

ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE

March 24, 2006

1:14 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 20(JUD)

"An Act relating to offenses against unborn children."

- TABLED

HOUSE BILL NO. 276

"An Act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products."

- HEARD AND HELD

HOUSE BILL NO. 442

"An Act relating to the validity of advance health care directives, individual health care instructions, and do not resuscitate orders; relating to the revocation of advance health care directives; relating to do not resuscitate orders; relating to resuscitative measures; relating to the liability of health care providers and institutions; relating to an individual's capacity for making health care decisions; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 439

"An Act relating to authorizing the state to join with other states entering into the Interstate Insurance Product Regulation Compact and authorizing the compact to supersede existing statutes by approving standards, rules, or other action under the terms of the compact."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 308

"An Act relating to false caller identification."

- BILL HEARING POSTPONED TO 03/29/06

HOUSE BILL NO. 325

"An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure."

- BILL HEARING POSTPONED TO 03/27/06

PREVIOUS COMMITTEE ACTION

BILL: SB 20

SHORT TITLE: OFFENSES AGAINST UNBORN CHILDREN

SPONSOR(S): SENATOR(S) DYSON

01/11/05	(S)	PREFILE RELEASED 12/30/04
01/11/05	(S)	READ THE FIRST TIME - REFERRALS
01/11/05	(S)	STA, JUD
03/01/05	(S)	STA AT 3:30 PM BELTZ 211
03/01/05	(S)	Heard & Held
03/01/05	(S)	MINUTE(STA)
03/15/05	(S)	STA AT 3:30 PM BELTZ 211
03/15/05	(S)	Moved CSSB 20(STA) Out of Committee
03/15/05	(S)	MINUTE(STA)
03/16/05	(S)	STA RPT CS 1NR 4AM SAME TITLE
03/16/05	(S)	AM: THERRIAULT, ELTON, WAGONER, HUGGINS
03/16/05	(S)	NR: DAVIS
03/16/05	(S)	FIN REFERRAL ADDED AFTER JUD
03/31/05	(S)	JUD AT 8:30 AM BUTROVICH 205
03/31/05	(S)	Scheduled But Not Heard
04/04/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/04/05	(S)	Heard & Held
04/04/05	(S)	MINUTE(JUD)
04/12/05	(H)	JUD AT 8:00 AM CAPITOL 120
04/12/05	(S)	Heard & Held
04/12/05	(S)	MINUTE(JUD)
04/19/05	(S)	JUD AT 8:30 AM BUTROVICH 205

04/19/05 (S) Moved CSSB 20(JUD) Out of Committee
 04/19/05 (S) MINUTE(JUD)
 04/19/05 (S) JUD RPT CS FORTHCOMING 3DP 1NR
 04/19/05 (S) DP: SEEKINS, THERRIault, HUGGINS
 04/19/05 (S) NR: GUESS
 04/20/05 (S) RETURNED TO JUD COMMITTEE
 04/21/05 (S) JUD CS RECEIVED SAME TITLE
 04/26/05 (S) JUD AT 8:30 AM BUTROVICH 205
 04/26/05 (S) Moved CSSB 20(2nd JUD) Out of Committee
 04/26/05 (S) MINUTE(JUD)
 04/27/05 (S) JUD RPT CS(2D JUD) 3DP 2AM SAME TITLE
 04/27/05 (S) DP: SEEKINS, THERRIault, HUGGINS
 04/27/05 (S) AM: FRENCH, GUESS
 04/27/05 (S) FIN REFERRAL ADDED AFTER JUD
 04/28/05 (S) FIN AT 9:00 AM SENATE FINANCE 532
 04/28/05 (S) Moved CSSB 20(JUD) Out of Committee
 04/28/05 (S) MINUTE(FIN)
 04/29/05 (S) FIN RPT CS(JUD) 2DP 3NR
 04/29/05 (S) DP: GREEN, DYSON
 04/29/05 (S) NR: WILKEN, HOFFMAN, OLSON
 05/01/05 (S) JUD CS ADOPTED Y11 N5 E3 A1
 05/03/05 (S) TRANSMITTED TO (H)
 05/03/05 (S) VERSION: CSSB 20(JUD)
 05/04/05 (H) READ THE FIRST TIME - REFERRALS
 05/04/05 (H) JUD, FIN
 05/05/05 (H) JUD AT 1:00 PM CAPITOL 120
 05/05/05 (H) Scheduled But Not Heard
 05/07/05 (H) JUD AT 3:30 PM CAPITOL 120
 05/07/05 (H) Meeting Postponed to 5/8/05
 05/08/05 (H) JUD AT 12:00 AM CAPITOL 120
 05/08/05 (H) Meeting Postponed
 05/09/05 (H) JUD AT 0:00 AM CAPITOL 120
 05/09/05 (H) <Bill Hearing Canceled>
 02/15/06 (H) JUD AT 1:00 PM CAPITOL 120
 02/15/06 (H) Heard & Held
 02/15/06 (H) MINUTE(JUD)
 02/22/06 (H) JUD AT 2:30 PM CAPITOL 120
 02/22/06 (H) <Bill Hearing Postponed to 2/23/06>
 02/23/06 (H) JUD AT 10:00 AM CAPITOL 120
 02/23/06 (H) Scheduled But Not Heard
 03/15/06 (H) JUD AT 1:00 PM CAPITOL 120
 03/15/06 (H) -- Meeting Canceled --
 03/20/06 (H) JUD AT 1:00 PM CAPITOL 120
 03/20/06 (H) -- Meeting Canceled --
 03/22/06 (H) JUD AT 1:00 PM CAPITOL 120
 03/22/06 (H) Heard & Held
 03/22/06 (H) MINUTE(JUD)

03/24/06 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 276

SHORT TITLE: BUSINESS LICENSE TOBACCO ENDORSEMENT

SPONSOR(S): REPRESENTATIVE(S) KOTT

04/19/05 (H) READ THE FIRST TIME - REFERRALS
04/19/05 (H) JUD, FIN
04/26/05 (H) JUD AT 1:00 PM CAPITOL 120
04/26/05 (H) Scheduled But Not Heard
04/27/05 (H) JUD AT 1:00 PM CAPITOL 120
04/27/05 (H) Heard & Held
04/27/05 (H) MINUTE(JUD)
02/15/06 (H) JUD AT 1:00 PM CAPITOL 120
02/15/06 (H) <Bill Hearing Canceled>
03/24/06 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR FRED DYSON

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Sponsor of SB 20.

MICHAEL O'HARE, Staff

to Representative Pete Kott

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented HB 414, Version L, on behalf of the sponsor, Representative Kott.

ED SASSER

Douglas, Alaska

POSITION STATEMENT: Expressed concerns during discussion of HB 276.

RONALD F. TAYLOR, Coordinator

Alcohol Safety Action Program (ASAP)

Prevention and Early Intervention Section

Division of Behavioral Health (DBH)

Department of Health and Social Services (DHSS)

Anchorage, Alaska

POSITION STATEMENT: Expressed concerns during discussion of HB 276 and responded to questions.

MICHAEL ELERDING, President

Northern Sales Company of Alaska, Inc.

Ketchikan, Alaska

POSITION STATEMENT: Testified in support of HB 276 and responded to questions.

SUZANNE MEUNIER, Director of Advocacy

American Stroke Association

American Heart Association

Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 276, expressed concerns and responded to questions.

KIP KNUDSON, Manager

Government Relations

Tesoro Alaska [Company]

Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 276 and responded to questions.

STEVEN RUSH, Director

Corporate Compliance

Holiday Stationstores, Inc.

Minneapolis, Minnesota

POSITION STATEMENT: Testified in support of HB 276 and responded to questions.

TAMMY GREEN, Section Chief

Chronic Disease Prevention and Health Promotion (CDPHP)

Division of Public Health

Department of Health and Social Services (DHSS)

POSITION STATEMENT: During discussion of HB 276, provided comments and expressed a preference that the current law remain unchanged.

ROGER HAMES, President

Hames Corporation

Sitka, Alaska

POSITION STATEMENT: During discussion of HB 276, provided comments and encouraged passage of the bill.

MARGE LARSON, Chief Executive Officer (CEO)

American Lung Association of Alaska

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 276.

ACTION NARRATIVE

REPRESENTATIVE TOM ANDERSON, acting as chair, called the House Judiciary Standing Committee meeting to order at [1:14:46 PM](#). Representatives Anderson, Coghill, Gara, Wilson, Kott, and Gruenberg were present at the call to order. Representative McGuire arrived as the meeting was in progress.

SB 20 - OFFENSES AGAINST UNBORN CHILDREN

[1:16:11 PM](#)

REPRESENTATIVE ANDERSON announced that the first order of business would be CS FOR SENATE BILL NO. 20(JUD), "An Act relating to offenses against unborn children." [Before the committee was CSHB 20(2d JUD), which had been adopted as the work draft on 2/15/06 and amended on 3/22/06; left pending from 3/22/06 was the motion to adopt Amendment 2, as amended; and included in member's packets was a proposed House committee substitute (HCS) for SB 20, Version 24-LS0197\B, Mischel, 3/24/06.]

REPRESENTATIVE ANDERSON noted that public testimony on SB 20 had been closed at a prior meeting, posited that the bill has been thoroughly debated and analyzed, and acknowledged that there are still differing philosophies regarding what the intent of the bill is and the direction it should take.

REPRESENTATIVE GARA remarked that the committee and sponsor have done their best to try to reach a compromise on the bill; however, it looks s though that is unlikely to occur. He said he agrees with the concept of increasing sentences for those who assault a pregnant woman and those who by doing so cause a miscarriage - characterizing such as a heinous crime - and is in favor of the sentence lengths proposed in the bill. He recounted that an amendment he'd proposed [Amendment 2, as amended] would have made the current penalties [for murder and assault] much stiffer if one's behavior is directed at a pregnant woman or causes a woman to have a miscarriage or causes an injury to a pregnant woman and her [unborn baby]. The part of the bill that people aren't going to agree on, he surmised, is the part that could have an impact on Roe v. Wade, that part being the "unborn child" terminology.

REPRESENTATIVE GARA added:

We could pass the same bill that would say it's illegal to terminate a pregnancy, it's illegal to assault a pregnant woman, it's illegal to attack a

pregnant woman, and I could impose the same sentences that everybody on this committee on both sides of the issue would want to impose. But the language that I think will be used by lawyers to reverse Roe v. Wade, I think that's an issue we should fight on some other day. ...

REPRESENTATIVE ANDERSON interjected to note that members' packets now contain a proposed House committee substitute (HCS) for SB 20, Version 24-LS0197\B, Mischel, 3/24/06.

[1:18:53 PM](#)

REPRESENTATIVE COGHILL noted that at the last hearing on the bill, Amendment 2, as amended, was left pending.

REPRESENTATIVE GARA withdrew Amendment 2, as amended.

[1:19:23 PM](#)

REPRESENTATIVE COGHILL moved to adopt the proposed HCS for SB 20, Version 24-LS0197\B, Mischel, 3/24/06, as the work draft.

REPRESENTATIVE GRUENBERG objected, and noted that at a prior meeting the committee had adopted an amendment to CSSB 20(2d JUD).

[1:20:21 PM](#)

SENATOR FRED DYSON, Alaska State Legislature, sponsor, said that although he'd not yet had a chance to review Version B, the intention was include the amendment adopted on 3/22/06 as well as language in the original bill that would ensure that a woman could not be prosecuted for any actions she takes that may result in a miscarriage. It was also intended that Version B would no longer include language that would have allowed a woman to be prosecuted for recklessly causing damage to her [unborn child].

The committee took an at-ease from 2:24 p.m. to 2:25 p.m.

REPRESENTATIVE GRUENBERG asked for a quick review of the specific changes incorporated in Version B.

SENATOR DYSON explained that proposed AS 11.41.150(a)(4) [and proposed AS 11.41.280(a)(3)] no longer contain the words, "; for purposes of this paragraph, a pregnant woman's decision to

remain in a relationship in which domestic violence as defined in AS 18.66.990 has occurred does not, by itself, constitute conduct manifesting an extreme indifference to the value of human life".

REPRESENTATIVE GRUENBERG expressed approval of that change.

SENATOR DYSON explained that proposed AS 11.41.160(a) now says:

A person commits the crime of manslaughter of an unborn child if, under circumstances not amounting to murder of an unborn child, the person intentionally, knowingly, or recklessly causes the death of an unborn child.

SENATOR DYSON, referring to a handout being distributed to members, explained that that was what was given to Legislative Legal and Research Services in order to direct the drafter regarding the changes that were intended to be incorporated into Version B.

REPRESENTATIVE GARA said he still has concerns about proposed AS 11.41.170 - criminally negligent homicide of an unborn child - because it could apply to situations wherein a husband, for example, with his pregnant wife in the car, gets in a car accident because he is driving too fast and thus causes his wife to miscarry; under the language proposed via Version B, the husband, in addition to losing his unborn child, would face a charge of criminally negligent homicide of an unborn child - a class B felony - whereas currently, he might only be charged with negligent driving.

[1:29:17 PM](#)

SENATOR DYSON said his goal when originally drafting this legislation was to establish penalties for damaging an unborn child that were reasonably equivalent to those that would be applied for damaging a born child; in the aforementioned example, the driver would be guilty of negligence and so should face the same penalties as if the child had been born and was sitting beside its mother in a car seat.

REPRESENTATIVE GARA reiterated his prior argument and said he can't support this provision.

REPRESENTATIVE GRUENBERG noted that Version B now exempts acts committed by a pregnant woman against herself and her own unborn

child, and said he appreciates that change, which involves the inclusion of language found on page 3, lines 1-2, and on page 4, lines 4-5.

REPRESENTATIVE GARA, after acknowledging that they may not ever reach a consensus on Amendment 2, as amended, which he characterized as a compromise, suggested that they adopt Version B for purposes of discussion.

SENATOR DYSON said that although he is offering Version B for the committee's consideration, he does not recommend adopting it; rather, he would be more comfortable with the committee adopting [CSSB 20(2d JUD)].

REPRESENTATIVE ANDERSON offered his understanding that Representative Gara has concerns regarding the bill's references to "unborn child".

REPRESENTATIVE GARA, in response to comments, offered his belief that situations such as occurred to Laci Peterson can be addressed by severely punishing people for assaulting a pregnant woman - that's what many states have done - and so using the term, "unborn child" is not necessary to effect that goal.

REPRESENTATIVE GRUENBERG, after reiterating some of his earlier comments regarding the changes incorporated into Version B, removed his objection to the motion to adopt Version B.

REPRESENTATIVE ANDERSON asked whether there were any further objections to adopting Version B as the work draft. There being none, Version B was before the committee.

[1:38:05 PM](#)

SENATOR DYSON said his intention is for Version B to no longer contain any language that would allow a pregnant woman to be prosecuted for her own actions.

REPRESENTATIVE GRUENBERG remarked that they are not waiving their right to cure typographical or punctuation errors.

SENATOR DYSON, in response to comments, assured the committee that he has no intention of using this bill as a vehicle to attack Roe v. Wade, and is willing to provide the committee with legal opinions from three different law professors who state that SB 20 will have no impact on Roe v. Wade. Furthermore, no one has successfully used this type of legislation - either

state legislation or federal legislation - to challenge Roe v. Wade. Senator Dyson offered his belief that there is nothing in SB 20 that assigns personhood to an unborn child, adding that he was very careful not to do so. As legislators, he remarked, they have the right to assign value to entities that are not persons, and he is merely attempting to establish - via SB 20 - that an unborn wanted child has value, in and of itself, that will be recognized and protected by law.

[1:43:06 PM](#)

REPRESENTATIVE GARA - after observing that they may never reach consensus on some of the issues raised such as use of the term, "unborn child" and whether to establish separate crimes or just increase penalties - made a motion to lay SB 20 [Version B] on the table.

REPRESENTATIVE COGHILL objected.

[1:44:25 PM](#)

A roll call vote was taken. Representatives Gara, Gruenberg, Kott, Anderson, and Wilson voted in favor of the motion to lay SB 20 [Version B] on the table. Representative Coghill voted against it. Therefore, the motion to lay SB 20 [Version B] on table passed by a vote of 5-1. [Members went on to note that the committee could take the bill up again at any time via a motion to take the bill from the table.]

HB 276 - BUSINESS LICENSE TOBACCO ENDORSEMENT

[1:45:28 PM](#)

REPRESENTATIVE ANDERSON announced that the final order of business would be HOUSE BILL NO. 276, "An Act relating to business license endorsements for tobacco products, to holders of business license endorsements for tobacco products, and to the employees and agents of holders of business license endorsements for tobacco products." [In members' packets was a proposed committee substitute (CS) for HB 276, Version 24-LS0855\L, Bannister, 3/23/06.]

REPRESENTATIVE ANDERSON offered his recollection that HB 276 was held over for the purpose of possibly addressing some of the concerns expressed during the bill's last hearing.

REPRESENTATIVE KOTT, speaking as the sponsor, indicated that he and the interested parties had been able to reach some level of consensus between then and now, and that his staff would be explaining what that entailed.

[1:47:14 PM](#)

MICHAEL O'HARE, Staff to Representative Pete Kott, Alaska State Legislature, sponsor, on behalf of Representative Kott, relayed that members' packets include the proposed committee substitute (CS) for HB 276, Version 24-LS0855\L, Bannister, 3/23/06. He characterized HB 276 as a "business fairness bill," which will increase the financial penalties for retailers who fall out of compliance with the prohibition against selling tobacco products to minors. He noted that testimony last year indicated that some felt that the current penalties weren't sufficient.

[1:49:20 PM](#)

REPRESENTATIVE WILSON moved to adopt the proposed CS for HB 276, Version 24-LS0855\L, Bannister, 3/23/06, as the work draft.

REPRESENTATIVE GRUENBERG objected for the purpose of discussion, asked for a description of the changes encompassed in Version L, and said he might also be objecting to some of the provisions in Version L.

MR. O'HARE noted that members' packets also contain a sectional analysis of Version L by Legislative Legal and Research Services.

The committee took an at-ease from 1:51 p.m. to 1:55 p.m.

MR. O'HARE, after briefly discussing some of the provisions contained in both Version L and the original bill, indicated that Version L proposes to insert two "penalty matrixes," one applying to those that don't comply with proposed AS 43.70.075(t) regarding employee/agent education, compliance, and disciplinary programs, and one applying to those that do comply with proposed AS 43.70.075(t).

MR. O'HARE referred to proposed AS 43.70.075(d) of Version L and relayed that it stipulates that at the time of a current violation, if a person who holds an endorsement is in compliance with proposed AS 43.70.075(t) and has no previous violations, he/she will no longer be subject to an endorsement suspension,

but may be subject to a civil penalty of at least \$300 but not more than \$750.

REPRESENTATIVE ANDERSON noted that imposition of that civil penalty is not mandatory.

REPRESENTATIVE KOTT concurred, and mentioned that the bill will also provide the hearing officer in a suspension hearing with more discretion. In response to a question, he offered his understanding that currently endorsement suspensions are invoked immediately.

2:02:04 PM

MR. O'HARE relayed that under Version L, for a second violation within 24 months, the endorsement holder may be subject to an endorsement suspension of up to 20 days and to a civil penalty of at least \$500 but not more than \$1,000; for a third violation within 24 months, the endorsement holder may be subject to an endorsement suspension of up to 45 days and to a civil penalty of at least \$1,000 but not more than \$2,500; for a fourth violation within 24 months, the endorsement holder may be subject to an endorsement suspension of up to 90 days and to a civil penalty of at least \$2,500 but not more than \$3,500; and for a fifth or more violation within 24 months, the endorsement holder may be subject to an endorsement suspension of up to 12 months and to a civil penalty of at least \$3,500 but not more than \$4,500. In response to a question, offered his understanding that when calculating the number of prior violations a holder might have, each [retail] location is viewed separately.

MR. O'HARE referred to proposed AS 43.70.075(u) of Version L and relayed that it stipulates that at the time of a current violation, if a person who holds an endorsement is not in compliance with proposed AS 43.70.075(t) and has no previous violations, he/she will no longer be subject to an endorsement suspension, but may be subject to a civil penalty of at least \$500 but not more than \$750. Furthermore, when not in compliance with proposed AS 43.70.075(t), an endorsement holder may be subject to an endorsement suspension of up to 20 days and to a civil penalty of at least \$1,000 but not more than \$2,500 for a second violation within 24 months; to an endorsement suspension of up to 90 days and to a civil penalty of at least \$2,500 but not more than \$3,500 for a third violation within 24 months; to an endorsement suspension of up to 12 months and to a civil penalty of at least \$3,500 but not more than \$4,500 for a

fourth violation within 24 months; and to a permanent endorsement suspension and to a civil penalty of at least \$5,000 for a fifth or more violation within 24 months.

MR. O'HARE referred to the language on page 6, lines 2-8, which says that when making a decision, the hearing officer shall consider whether the person is in compliance with proposed AS 43.70.075(t) on or before the date the department initiates a proceeding under proposed AS 43.70.075(m); mitigating factors presented by the person; and the scope and extent of the person's education, compliance, and disciplinary program under proposed AS 43.70.075(t)(2).

[Representative Anderson turned the gavel over to Chair McGuire.]

MR. O'HARE then spoke about proposed AS 43.70.075(p), which is unchanged from the original bill, and pertains to the civil penalty that may be imposed for a violation of the signage requirements of existing AS 43.70.075(f) or for a violation of the requirements of proposed AS 43.70.075(t) regarding employee/agent education, compliance, and disciplinary programs; that penalty, also unchanged from existing law, is not to exceed \$250 for each day of the violation and may not exceed \$5,000 for each violation. In conclusion, he remarked that Version L promotes employee/agent education regarding the selling of tobacco products to minors and removes the automatic 20-day suspension of an endorsement for a first offense, and mentioned that Alaska currently has a high compliance rate with the "Synar" requirements.

REPRESENTATIVE ANDERSON expressed favor with the removal of the automatic 20-day suspension of an endorsement for a first offense.

[2:13:29 PM](#)

ED SASSER relayed that although some of his concerns have been alleviated via Version L, he is still concerned that the language, "up to" regarding endorsement suspensions is cumbersome and could cause a fiscal note, and he also questions who besides the endorsement holder will certify that he/she has an education, compliance, and disciplinary program in effect for his/her employees/agents.

[2:15:49 PM](#)

RONALD F. TAYLOR, Coordinator, Alcohol Safety Action Program (ASAP), Prevention and Early Intervention Section, Division of Behavioral Health (DBH), Department of Health and Social Services (DHSS), said that [the DHSS] has the primary responsibility for [administering] the state's Tobacco Enforcement program. The overall goal of this program is to reduce youth access to tobacco products, and when the 2003 changes in the law took effect, Alaska dropped its noncompliance rates from 30 percent down to 10 percent in a one-year period of time, and currently the noncompliance rate is just over 9 percent; therefore, those changes in the law are working, and so from a departmental standpoint, the DHSS has a problem with this attempt to change something that is not only working but working very well.

MR. TAYLOR predicted that if nebulous language such as, "may" and "up to" is inserted into this statute, it will take away the effectiveness of the state's Tobacco Enforcement program, and water down the statute in terms of providing endorsement holders with the certainty that a penalty will be imposed for noncompliance; furthermore, from a statewide perspective, the overall consistency of enforcement efforts will deteriorate. He, too, spoke of the concerns expressed by Mr. Sassar regarding who will be responsible for enforcing, monitoring, and certifying the education, compliance, and disciplinary program requirements, and regarding a possible fiscal note. When the aforementioned 2003 changes were enacted, the legislature sent a very loud and clear message to the department that it must do a better job of enforcement so as to have Alaska be in compliance with the "Synar amendment."

MR. TAYLOR said that to accomplish that goal, the department looked at other states and received federal technical assistance in order to come into compliance with "Synar rates," and the department adopted all of the best practices that were recommended. Now the department is being told, via HB 276, that this "best practice" program needs to be watered down because it is working too well. However, he remarked, "I think we all want our system to operate on the basis of best practices." He suggested that when looking at state's Tobacco Enforcement program, one must compare it with "the alcohol program"; HB 276 is taking a step backward, similar to what was done with the alcohol program. For example, he offered, the Alcoholic Beverage Control Board ("ABC Board") has no enforceable penalties for business owners and, because of this, the industry in Alaska has a 29 percent [underage] sale rate in February

alone for the Kenai Peninsula, even though all clerks are required by law to receive training.

MR. TAYLOR, with regard to tobacco sales, said that even in Montana, when that state began to reduce penalties and take away the impact on endorsements, the [underage sales] rates crept back up: in 1999 the rate went up 33 percent, in 2000 it went up 37 percent, in 2001 it went up 46 percent, and in 2002 it went up 50 percent. He predicted that should the proposed changes be adopted, Alaska's rates will go back up and Alaska will not remain in compliance.

[2:21:09 PM](#)

REPRESENTATIVE GRUENBERG asked that those figures be presented to the committee in writing.

MR. TAYLOR agreed to do so.

REPRESENTATIVE WILSON commented on the good job that Mr. Taylor's agency did in her town regarding reducing underage tobacco sales.

REPRESENTATIVE ANDERSON asked Mr. Taylor to give consideration to the concept of at least eliminating the 20-day endorsement suspension for a first violation, and suggested that when an endorsement is suspended, it can cost a business much in terms of both lost revenue and lost customer base.

MR. TAYLOR concurred, though he remarked that it's easy to get off track on this issue if one thinks of the penalty as being imposed on the spot, but that's just not true; currently, when a citation [for noncompliance] is issued, the penalty is not automatically imposed immediately. Instead, an administrative hearing has to take place. And during such a hearing, for example, if the citation is against the store clerk and he/she is not found guilty, no penalties are imposed on the endorsement holder. Furthermore, an endorsement holder has the right to go through the entire administrative hearing process, which can take at least nine months, and has an opportunity to present any type of defense. He said, therefore, that if the purported problem is one of due process, then the committee should consider the issue similarly to driving under the influence (DUI) violations wherein the officer issues the citation and simply lets the court sort out issues of due process; "we have administrative and judicial [processes] in place that actually deal with due process issues."

REPRESENTATIVE ANDERSON reiterated his suggestion to Mr. Taylor that he give consideration to the concept of at least eliminating the 20-day endorsement suspension for a first violation.

REPRESENTATIVE KOTT asked Mr. Taylor whether he's attended any of the administrative hearings.

MR. TAYLOR said he hadn't, but relayed that one of his chief investigators who has attended such hearings is available for questions.

REPRESENTATIVE KOTT and REPRESENTATIVE GRUENBERG indicated that they'd heard that the endorsement suspensions happen automatically, without endorsement holders being given the opportunity to defend their endorsements against suspension.

REPRESENTATIVE KOTT offered his belief that in some other states, the compliance rates are higher than in Alaska and yet they don't suspend an endorsement on a first offense; in light of that, how will eliminating the 20-day endorsement suspension for a first offense have a dramatic effect on Alaska's compliance rates.

[2:27:32 PM](#)

REPRESENTATIVE ANDERSON surmised that Mr. Taylor's concern is that lessening the penalties will encourage endorsement holders to lessen their training and supervision as well.

MR. TAYLOR concurred. With regard to Representative Kott's comments, he asked Representative Kott whether he was looking at the overall prevention efforts put in place by the aforementioned states, at the overall culture of those states, and at the type of cooperation those states have with their vendors.

REPRESENTATIVE KOTT indicated that he'd not considered those aspects; instead, he'd merely seen the statistics those states sent to the federal government in order to qualify for grant money. He characterized the current statute as overreaching, and posited that cutting back on the penalties will not have as disastrous an outcome as Mr. Taylor fears, as evidenced by the statistics of other states.

REPRESENTATIVE GARA asked Mr. Taylor whether he has seen a reduction in the number of kids who use tobacco products.

MR. TAYLOR said he thinks a reduction has occurred but he doesn't have the exact figures.

REPRESENTATIVE GRUENBERG asked for information regarding the changes that occurred in Montana's law and enforcement methods, as well as Montana's statistics and the same type of information about other states.

MR. TAYLOR indicated that he would attempt to provide that information.

[2:32:08 PM](#)

MICHAEL ELERDING, President, Northern Sales Company of Alaska, Inc., after relaying that his company is in part a wholesale distributor of tobacco products, indicated that he'd provided testimony in support of HB 276 at the bill's last hearing. He offered his belief that HB 276 will improve Alaska's laws pertaining to enforcing the prohibition against selling tobacco products to minors. Tobacco [retailers] in the state have a special social responsibility to prohibit tobacco sales to underage persons, and are doing a good job, he opined, adding that since 2002, there has been an aggressive reduction in retail availability of tobacco products to minors. The Alaska legislature and the administration have done a good job prohibiting tobacco sales to underage persons with vigorous laws and regulations; in that regard, Alaska has some of the harshest laws and regulations, and has the 4th highest rate of taxation on tobacco products in the nation, behind only Rhode Island, New Jersey, and Washington.

MR. ELERDING pointed out, however, that Alaska is the only state in the union that has a mandatory 20-day endorsement suspension for a first offense. He characterized this as a denial of due process, and offered his understanding that a retailer who employs a clerk that has sold tobacco products to a minor can't offer up any defense. House Bill 276 will correct this deficiency, he remarked, and will increase the financial penalties for retailers found guilty of selling tobacco products to minors. The bill will provide an incentive to retailers to institute aggressive and rigorous staff training programs, by having reduced penalties for those retailers that do so; he posited that trained staff are more likely to refuse to sell

tobacco products to minors. In conclusion, he urged the committee to pass HB 276.

MR. ELERDING, in response to a question, opined that suspension of a retailer's endorsement can change customers' buying patterns and thereby reduce a retailer's customer base. In response to another question, he pointed out that the bill won't affect his company because Northern Sales Company of Alaska, Inc., is a wholesale distributor and does not sell directly to consumers.

REPRESENTATIVE GRUENBERG noted that some people are saying that there is a due process violation occurring under current law and some say there is not.

CHAIR MCGUIRE and REPRESENTATIVE ANDERSON suggested that remaining testifiers address the issue of due process.

[2:41:07 PM](#)

SUZANNE MEUNIER, Director of Advocacy, American Stroke Association, American Heart Association, indicated that she has grave concerns about HB 276, specifically regarding its threat to the lives of Alaskan children and thus to the future of Alaska. Alaska's current tobacco enforcement laws are reasonable, effective, and appropriate; they have effectively curbed illegal sales of tobacco to minors; and that translates into saved lives. She provided members with the DHSS's 2005 annual report entitled, "Tobacco Prevention and Control in Alaska, Preventing Addiction - Saving Lives", and noted that the graph on page 2 illustrates the reduction in smoking by Alaska high school students; this report further documents that a comprehensive and sustained tobacco prevention and control program, along with enforcement, is a critical piece of that reduction.

MS. MEUNIER relayed that compliance data for last year confirm that only a small minority of Alaska's 1,700 retail tobacco vendors are now selling to minors; specifically, better than 90 percent of Alaska's tobacco retailers are getting it right, and they're managing the very serious responsibility of selling a highly addictive, dangerous product - tobacco. She then referred to a graph produced by the U.S. Department of Health and Human Services (DHHS) that illustrated what she characterized as a dramatic drop in illegal sales to youth after 2002, when the current enforcement law began to have an effect. Other statistics speak to the fact that in 1995, 29 percent of

Alaska's teens reported the self-purchase of cigarettes, whereas in 2003 only 13 percent did so.

MS. MEUNIER said that now is not the time to roll back the state's tobacco enforcement efforts. In conclusion, she turned member's attention to four photographs located on page 16 of the aforementioned annual report. Those photos, from a counter-marketing youth prevention advertisement entitled "Still Can't Quit", are of a young man looking at x-rays of his diseased lungs, and are captioned: "I'm 15 years old. I started smoking when I was 11."; "I'm addicted to cigarettes. I found out I was hooked about 3 weeks after I started."; "Now I have spots on my lungs. If I don't quit smoking they can turn to cancer."; "It scares me - and I still can't quit smoking."

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MS. MEUNIER, in response to questions, indicated that her organization's main goal with the bill is to prevent minors from obtaining tobacco, and that it would be willing to look at an alternative proposal.

REPRESENTATIVE GRUENBERG suggested as an alternative to the 20-day suspension [for a first offense] that they simply require that a portion of a retailer's income go to health organizations such as the one Ms. Meunier represents.

MS. MEUNIER offered her belief that the bill, as currently written, is taking the law back to what was in place a few years ago when Alaska's noncompliance rates were so high; the law's current requirements regarding temporary suspensions have had an impact and are working, so her fear is that lowering the sanctions and penalties will create a risk - a risk too high to take - that the state will revert back to high noncompliance rates. In response to a question, she said she did not know how the boy presented in the aforementioned advertisement initially acquired his cigarettes.

REPRESENTATIVE KOTT said he doubts it was through a retailer, given that an 11-year-old probably could not have been mistaken for a 19-year old. He asked Ms. Meunier whether her organization received any of the grant money that the state receives through the federal "arrangement."

MS. MEUNIER explained that the American Heart Association does not receive any federal, state, or [other] government funding.

REPRESENTATIVE KOTT surmised, then, that any funds her organization might receive through a change such as just suggested by Representative Gruenberg would go a long ways towards helping it attain its overall goal of reducing smoking among Alaskans.

MS. MEUNIER concurred.

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REPRESENTATIVE GARA suggested that the question is whether the bill will affect the current lower noncompliance rates if all of the other efforts to curb smoking among youth are maintained to the same degree.

MS. MEUNIER said she is not sure whether that can be determined.

REPRESENTATIVE GARA surmised that it's possible that the lower noncompliance rates could be maintained even with passage of the bill.

MS. MEUNIER concurred, but added that one can only look at what is occurring under current law as compared to what occurred before passage of the current law. She remarked that having a comprehensive, sustained tobacco program is the best practice as recommended, and so her organization is seeking to ensure that such is implemented in Alaska, and an enforcement aspect is part of that and it's working.

CHAIR McGUIRE said she is supportive of all the efforts being made to curb the number of smokers, and doesn't want to see the lower noncompliance rates begin to rise again. The question, however, is whether the aforementioned reduction can be maintained without requiring a 20-day endorsement suspension for a first offense.

REPRESENTATIVE ANDERSON asked Ms. Meunier to consider the issue from businesses' perspective.

MS. MEUNIER, after thanking members for their comments, opined that it is important to remember that better than 90 percent of Alaska's more than 1,700 retail tobacco venders are complying with current law - are getting it right - and that in order to even be convicted of a violation, a retailer has to fail a compliance check, which involves the young person who is making the purchase on behalf of the state actually disclosing to the retailer that he/she is underage.

2:56:43 PM

KIP KNUDSON, Manager, Government Relations, Tesoro Alaska [Company], testified in favor of HB 276, adding that his company, which operates convenience stores in 16 western states, favors the language in Version L. He said that even with passage of HB 276, Alaska will still have the most stringent tobacco prevention laws of any of the states that his company operates in. Tesoro Alaska [Company], he remarked, has a very strong "no underage tobacco sales" policy; before employees are allowed to sell tobacco products, they must complete orientation, be tested, and have a passing score of 100 percent, and each quarter Tesoro Alaska [Company] conducts internal compliance checks.

MR. KNUDSON said that since the year 2000, Tesoro Alaska [Company] has had only 13 violations among its 31 Alaskan convenience stores, but there has been no difference in compliance rates since current law was put in place, and there have been no second time offenses. When an employee violates the company's "no underage tobacco sales" policy, he/she is terminated, Mr. Knudson explained, adding that the company's goals with regard to prohibiting the sale of tobacco products to minors are similar to those of the American Heart Association and the legislature, though the company would appreciate the law being changed to somewhat buffer it.

REPRESENTATIVE GRUENBERG asked whether his earlier suggestion would be preferable to the current 20-day endorsement suspension for a first offense.

MR. KNUDSON said that as long as the money went to the right organizations, that suggestion would be preferable to a 20-day suspension and would underpin the company's existing community relations program.

REPRESENTATIVE ANDERSON surmised that if Tesoro Alaska [Company] experiences a reduction in revenue, then it might not be able to continue contributing to the community to the same degree that it has been.

MR. KNUDSON acknowledged that such might be the case, but relayed that not having the company's endorsement suspended is still the preferred option.

3:03:35 PM

STEVEN RUSH, Director, Corporate Compliance, Holiday Stationstores, Inc. ("Holiday"), after mentioning that Holiday operates in 12 states, indicated that he'd provided testimony in support of HB 276 at the bill's last hearing. Holiday entered into Alaska's marketplace in 2004 when it acquired convenience stores previously owned and operated by Williams Express, Inc., and since that time, Holiday has been cited only three times for alleged underage sale of tobacco products to minors, and two of those violations occurred within just a couple of months of acquiring its Alaskan units, before Holiday had had a chance to fully incorporate its employee training program. Currently, Holiday has a very comprehensive and proprietary computer-based training program, among other methods, to train its employees regarding this critical issue, and since the implementation of this program, Holiday has only had one citation.

MR. RUSH said he would be testifying in support of HB 276. With regard to the question of how much revenue a retailer can lose during a 20-day endorsement suspension, he said that some of Holiday's units could lose in excess of \$100,000 in collateral sales for that 20-day period, thus it is critical that Holiday not be subject to an endorsement suspension for a first offense. On the issue of due process, he characterized [current law] as unconstitutional because during the administrative hearing process for a 20-day endorsement suspension, under AS 43.70075(m), the hearing officer is limited in the types of information he/she may consider before making a determination; for example, all the hearing officer has to consider, and all the state has to prove is "the underlying criminal conviction of the sales associate." So as soon as that information is introduced, Holiday's liability is automatic because the company can't offer any evidence that would prove it was not negligent and so shouldn't be found responsible under the statute.

MR. RUSH posited that that underlying conviction acts as collateral estoppel in any subsequent civil proceeding on the issue of culpability of the retailer, and this is what attaches liability and responsibility to the retailer; he opined that this is blatantly unconstitutional. He referred to a 1993 Alaska Supreme Court case, Spenard Action Committee v. Lot 3, Block 1, Evergreen Division, 902 P 2d 766, and offered his belief that the court held that a criminal conviction of a non-party may not be admitted at a subsequent civil trial as a evidence of the facts on which the judgment rests. With regard to cases involving tobacco sales to underage persons, the sales associate is cited for an alleged sale of tobacco and within a

matter of weeks or days, he/she usually pleads guilty to the crime of negligent sale of tobacco to an underage individual.

MR. RUSH pointed out that in such a case, Holiday is not a party to that action and is given no notice of it, but once the sales associate is convicted, that conviction is used as evidence in an administrative hearing regarding suspension of the endorsement to prove the company's guilt without also allowing the company to offer any evidence that it was not negligent in the handling of the tobacco product. House Bill 276 corrects the due process problem, he remarked, by specifying, on page 6, that the hearing officer shall consider any mitigating factors, and whether the [endorsement holder] was in compliance with proposed AS 43.70.075(t) regarding employee/agent education, compliance, and disciplinary programs. Holiday is only asking for a fair hearing and the ability to exercise its constitutional right to present evidence regarding guilt or innocence, evidence that it has made good faith efforts towards compliance with the law.

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MR. RUSH, in response to a question, offered his understanding that there have been legal challenges to the current statute, and that a ruling by the Alaska Supreme Court on the due process issue is pending.

REPRESENTATIVE GARA asked about the Alaska Superior Court's decision in that Alaska Supreme Court case.

MR. RUSH said that the Alaska Superior Court affirmed the hearing officer's decision that the statute was not unconstitutional.

REPRESENTATIVE GARA surmised, then, that it is not absolutely clear yet whether the current statute is unconstitutional.

MR. RUSH clarified that the hearing officer had stated that he did not have the authority to rule on constitutionality.

REPRESENTATIVE GARA offered his belief that although a hearing officer can't rule whether a statute is constitutional, the Alaska Superior Court can, and therefore his assumption is that the Alaska Superior Court, by affirming the hearing officer's decision, was saying that the statute is not unconstitutional. Therefore, it will be up to Alaska Supreme Court to offer the final judgment on this issue. His concern for now, he relayed,

is to ensure that the process is fair, and acknowledged that they could certainly come up with something that is more fair than the minimum the Alaska State Constitution requires.

REPRESENTATIVE GRUENBERG said he would like a copy of that Alaska Superior Court decision, and would like to know how long ago the case was submitted to the Alaska Supreme Court, what its status is, and whether oral argument has been presented yet.

MR. RUSH clarified that that case does not involve his company; offered his understanding that the name of one of the parties is Mendenhall Valley Tesoro, that the matter has been briefed, and that the last materials were submitted in December; and predicted that there won't be a decision by the Alaska Supreme Court for about 16 months.

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REPRESENTATIVE ANDERSON provided a synopsis of Mr. Rush's points.

MR. RUSH concurred with Representative Anderson's synopsis, and offered that Holiday simply wants acknowledgment that a 20-day endorsement suspension for a first offense is bad public policy because of its severity on retail businesses. He added, "We do want the ability to present evidence at the hearing rather than simply having an unrelated proceeding and conviction introduced as evidence of our guilt when we were not a party to that proceeding nor were we in privity with the employee." In response to a question, he explained that all three of the aforementioned citations against Holiday are under appeal; that the estimate of how much revenue would be lost was simply an estimate that a store could lose as much as 25 percent of its income during a 20-day suspension; and that if Holiday ends up being subject to an endorsement suspension for any of those cases, it will only apply to the store at which the violation occurred.

MR. RUSH, in response to another question, offered his understanding that with regard to a violation of the prohibition of selling alcohol to minors, the state has to prove that the license holder knowingly, or with criminal negligence, allowed the sale, and characterized that as a far higher standard than what is being applied with regard to tobacco because, for a tobacco sale, the state needn't show that the retailer was negligent - there is simply the introduction of the conviction of the sales associate as evidence of the endorsement holder's

guilt. He again offered that a solution to this problem would be to adopt HB 276.

REPRESENTATIVE GRUENBERG opined that the holding in Spenard Action Committee clearly indicates that Holiday would not be denied due process, and that nothing in AS 43.70.075(m) is contrary to that holding.

MR. RUSH pointed out, though, that the language in AS 43.70.075(m) references the criminal conviction of the employee, which the hearing officer then uses in the civil endorsement proceeding to determine whether to hold the endorsement holder vicariously liable.

REPRESENTATIVE GRUENBERG characterized that as a different question than what is presented in the Spenard Action Committee case; Mr. Rush appears to be raising a question regarding the elements [used] for suspension of the endorsement, rather than an evidentiary question.

MR. RUSH concurred, but explained that the Spenard Action Committee is the most analogous case that he'd been able to find. He added:

In the context of a hearing, ... all that happens is the State of Alaska shows the hearing officer the criminal conviction of the sales associate - it is a proceeding to which we are not a party nor are we given notice; that conviction, in and of itself, is sufficient for the adjudicator to determine that we as a license endorsement holder are guilty of violating our endorsement and therefore the resulting penalties will be placed on us.

REPRESENTATIVE GRUENBERG argued, though, that that is a different issue, one that isn't addressed in Spenard Action Committee, where the court simply cited a federal rule of evidence that if a judgment of guilty in a criminal case which follows proof beyond a reasonable doubt is to have impact, the impact should be by way of collateral estoppel, not by admitting the previous judgment.

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TAMMY GREEN, Section Chief, Chronic Disease Prevention and Health Promotion (CDPHP), Division of Public Health, Department of Health and Social Services (DHSS), relayed that the Division

of Public Health thinks that the current law is important and has been working, and so would like to see things continue as they have been. She noted that nearly all smoking starts in childhood, and that of the current Alaska smokers, 78 percent started before the age of 15, and 47 percent [of those] had started by the age of 12. It is relatively easy to keep kids from starting to use tobacco when one compares that to helping adults quit using tobacco, she opined, adding that another important statistic to keep in mind when looking at a comprehensive approach to the state's tobacco program is that after the implementation of the 2002 enforcement law, the self-purchase of cigarettes by Alaska youth dropped from 29 percent to 13 percent. This is important. Also, according to the Youth Risk Behavior Survey (YRBS), youth smoking dropped from a 36 percent prevalence rate in 1995, to a 19 percent prevalence rate in 2003. Again, the Division of Public Health believes the current law is working and is part of the state's comprehensive tobacco prevention and control program, and therefore would like to see this success continue and not be changed.

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ROGER HAMES, President, Hames Corporation, after mentioning that his family-owned company owns two retail grocery stores and two convenience stores, relayed that his company supports the law prohibiting the sale of tobacco products to minors, and takes this issue very seriously, having instituted an aggressive education program in all of his stores and for all of the sales associates. His company tries very hard to be a responsible business, following the laws and educating its employees and reeducating everyone constantly. Current law is bad law, he opined, and contains no incentive for retailers because regardless of what kind of a training program is instituted, retailers have their endorsement suspended with a first violation.

MR. HAMES noted that his company has experienced two suspensions at the same store and has another suspension pending. A suspension essentially brings a business to its knees in an instant and leaves it suffering tremendously, particularly when tobacco products account for up to 20 percent of its sales, as is the case with his convenience stores. What is extremely wrong with the picture current law presents is that his business is totally at the mercy one sales associate who made the wrong decision, for whatever reason, but not for a lack of effort on his part; it just isn't fair, he opined, and is just the opposite of a business-friendly law. House Bill 276 will

provide a powerful and effective alternative to current law without jeopardizing an endorsement holder's overall business. He concluded by encouraging passage of HB 276.

REPRESENTATIVE GARA asked Mr. Hames how much profit the suspensions cost him.

MR. HAMES said that the purchasing patterns of his customers changed, but he hasn't yet analyzed exactly how much revenue was lost.

[3:29:39 PM](#)

MARGE LARSON, Chief Executive Officer (CEO), American Lung Association of Alaska, opined that Version L will effectively prevent the state from imposing meaningful sanctions on those businesses that make illegal tobacco sales to children. With the ability to sell a deadly addictive drug necessarily comes the responsibility to ensure that tobacco products are not sold to children. A relevant point of current law, a point not changed by HB 276, is that the first violation has to occur within a 24-month period, and it is her understanding, she relayed, that very few endorsement holders receive more than one citation on a license for a given location. So essentially, she opined, [Version L] would completely revoke suspensions from current law.

MS. LARSON mentioned that in a meeting the American Lung Association of Alaska had with Mr. Rush, he'd made two specific points, one being that Holiday and other responsible retailers ought to be separated from those retailers who did not believe in enforcing the law regarding the sale of tobacco to underage individuals, and the other being that the current law is more stringent than it needs to be to achieve "Synar compliance". On the latter point, the American Lung Association of Alaska would argue that although that may be true, Synar compliance is not sufficient to achieve the outcome of reducing tobacco use among children, whereas the current law has made a difference. For example, between 1997 and 2003, tobacco use prevalence among youth has been reduced by 50 percent, and although that reduction can't be entirely attributed to the enforcement program - because the enforcement program works in concert with tobacco counter-marketing media, with the taxes on tobacco products, and with prevention efforts - it is not worth the risk to remove "one of the legs of that stool" when the health of Alaska's children are at stake. So regardless that current law is not business friendly, it is a children's health law.

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CHAIR McGUIRE indicated that public testimony would remain open and that HB 276 would be held over [with the motion to adopt Version L left pending].

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:33 p.m.