

By Senator Mitchell

4-1566-02

1 A bill to be entitled
2 An act relating to the sale of tobacco
3 products; creating part II of ch. 210, F.S.,
4 consisting of ss. 210.81-210.92, F.S.;
5 providing a short title; providing legislative
6 intent and purpose with respect to enforcing
7 certain settlement agreements between this
8 state and cigarette manufacturers and between
9 other states or territories and cigarette
10 manufacturers; providing definitions;
11 prohibiting a person who holds a permit under
12 ch. 210, F.S., from shipping or possessing for
13 sale out of this state cigarettes not included
14 on a list approved by the Division of Alcoholic
15 Beverages and Tobacco of the Department of
16 Business and Professional Regulation; requiring
17 the division to annually prepare a list of
18 certified cigarette brands; providing
19 requirements under which a manufacturer's
20 brands may be included on the list; providing
21 requirements for certification; requiring that
22 the division notify a manufacturer of its
23 determination of certification; authorizing the
24 division to impose penalties against a
25 permitholder who violates the prohibition
26 against the sale or shipment of certain
27 cigarettes or who violates certain reporting
28 requirements; requiring that the Attorney
29 General seek an injunction or bring an action
30 in circuit court to enforce the act;
31 authorizing a manufacturer to bring an action

1 challenging a determination made by the
2 division with respect to enforcing the act;
3 requiring that the division update the list of
4 approved cigarettes; providing for sharing
5 information and for audits; requiring that a
6 permitholder certify compliance with the act;
7 providing for application of the act; providing
8 an effective date.

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10 Be It Enacted by the Legislature of the State of Florida:

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12 Section 1. Part III of chapter 210, Florida Statutes,
13 consisting of sections 210.81, 210.82, 210.83, 210.84, 210.85,
14 210.86, 210.87, 210.88, 210.89, 210.90, 210.91, and 210.92,
15 Florida Statutes, is created to read:

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210.81 Short title.--This part may be cited as the
"Cigarette Anti-Conduit Act."

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210.82 Legislative findings and purpose.--
 (1) It is the policy of this state to reduce cigarette
smoking by minors and adults who are residents of this state.
According to public health authorities, higher cigarette
prices help reduce cigarette consumption.
 (2) In 1997 and 1998, leading cigarette manufacturers
in the United States entered into a settlement agreement with
this state and into settlement agreements with other states
and territories resolving various lawsuits brought by those
states and territories against those manufacturers.
 (3) Under the settlement agreement with this state
dated August 25, 1997, known as the Florida Settlement
Agreement or FSA, leading cigarette manufacturers agreed to
make annual payments to this state. These payments are tied to

1 each such manufacturer's share of cigarette sales for
2 consumption in the United States. If the national market share
3 of any of these manufacturers declines, its payments to
4 Florida under the FSA declines.

5 (4) Under the settlement agreement with these
6 cigarette manufacturers and others dated November 23, 1998,
7 known as the Master Settlement Agreement or MSA, 46 states and
8 six territories have enacted a statute, known as the MSA
9 Statute, which requires tobacco product manufacturers to:

10 (a) Sign the MSA and thereby become participating
11 manufacturers responsible for making settlement payments as
12 specified in the MSA; or

13 (b) Remain nonparticipating manufacturers and thereby
14 become responsible for making specified payments into escrow
15 accounts for sales of cigarettes to consumers in those states
16 and territories.

17 (5) The Master Settlement Agreement and the MSA
18 Statutes enacted by the MSA states directly benefit the people
19 of this state in two ways. First, by requiring each tobacco
20 product manufacturer to make either settlement payments or
21 escrow payments, as the case may be, the MSA and the MSA
22 Statutes ensure higher prices for cigarettes, which public
23 health authorities believe help reduce cigarette consumption.
24 Second, by requiring nonparticipating manufacturers to make
25 escrow payments, the MSA Statutes directly protect the
26 payments this state receives under the FSA by preventing
27 nonparticipating manufacturers from using their cost advantage
28 vis-a-vis the participating manufacturers as a result of the
29 MSA to siphon sales from such manufacturers.

30 (6) Some nonparticipating manufacturers, however, are
31 circumventing or may attempt to circumvent the escrow-payment

1 requirements of the MSA Statutes by using this state as a
2 conduit, selling their cigarettes to distributors in this
3 state for transshipment to states and territories covered by
4 the MSA, and then claiming that the MSA Statutes do not
5 require them to make escrow payments for sales of the
6 transshipped cigarettes in those states and territories. As a
7 result of such circumvention, the prices of cigarettes of such
8 nonparticipating manufacturers in this state do not reflect
9 the escrow payments required by the MSA Statutes.

10 (7) Such circumvention undermines the policy of this
11 state to reduce smoking by the residents of this state by
12 enabling such nonparticipating manufacturers to offer
13 significantly lower prices than the tobacco product
14 manufacturers that must make annual settlement payments under
15 the MSA and the nonparticipating manufacturers that make such
16 escrow payments. It also threatens the payments that this
17 state is due under the FSA by siphoning sales from the
18 manufacturers whose payments to the state are tied to their
19 national market share. Finally, the use of this state as a
20 conduit to circumvent the laws of other states is generally
21 contrary to the public policy of this state.

22 (8) Prohibiting the out-of-state shipment or
23 out-of-state sale of cigarettes of a nonparticipating
24 manufacturer that has not made all escrow payments required by
25 the MSA Statutes will help ensure that the nonparticipating
26 manufacturer will make such payments, thereby serving the
27 state's policies of reducing smoking by its residents,
28 protecting payments to this state under the FSA, and avoiding
29 the use of this state as a conduit to circumvent the laws of
30 other states and territories.

31 210.83 Definitions.--As used in this part, the term:

1 (1) "Brand family" means all styles of cigarettes sold
2 under the same trademark and differentiated from one another
3 by means of additional modifiers, including, but not limited
4 to, "menthol," "lights," "kings," and "100's."

5 (2) "Cigarette" means any product that contains
6 nicotine, is intended to be burned or heated under ordinary
7 conditions of use, and consists of or contains:

8 (a) Any roll of tobacco wrapped in paper or in any
9 substance not containing tobacco;

10 (b) Tobacco, in any form, that is functional in the
11 product, which, because of its appearance, the type of tobacco
12 used in the filler, or its packaging and labeling, is likely
13 to be offered to, or purchased by, consumers as a cigarette;
14 or

15 (c) Any roll of tobacco wrapped in any substance
16 containing tobacco, which, because of its appearance, the type
17 of tobacco used in the filler, or its packaging and labeling,
18 is likely to be offered to, or purchased by, consumers as a
19 cigarette described in paragraph (a).

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21 The term "cigarette" includes "roll-your-own," meaning any
22 tobacco that, because of its appearance, type, packaging, or
23 labeling is suitable for use and likely to be offered to, or
24 purchased by, consumers as tobacco for making cigarettes. For
25 purposes of this definition, 0.09 ounces of "roll-your-own"
26 tobacco constitutes one individual cigarette.

27 (3) "Division" means the Division of Alcoholic
28 Beverages and Tobacco of the Department of Business and
29 Professional Regulation.

30 (4) "Master Settlement Agreement" means the settlement
31 agreement and related documents entered into on November 23,

1 1998, by the MSA states and certain tobacco product
2 manufacturers, and subsequently entered into by certain other
3 tobacco product manufacturers.

4 (5) "MSA state" means a Settling state as defined in
5 section II(qq) of the Master Settlement Agreement.

6 (6) "MSA Statute" means the statute enacted by an MSA
7 state to implement Exhibit T to the Master Settlement
8 Agreement.

9 (7) "Nonparticipating manufacturer" means any tobacco
10 product manufacturer that is not a participating manufacturer,
11 as defined in subsection (8).

12 (8) "Participating manufacturer" means a participating
13 manufacturer as that term is defined in section II(jj) of the
14 Master Settlement Agreement and any amendments thereto.

15 (9) "Permitholder" means a person who holds a permit
16 as:

17 (a) A wholesale dealer or exporter under Part I; or

18 (b) A distributor under Part II.

19 (10) "State" means any state or territory of the
20 United States.

21 (11) "Tobacco product manufacturer" means a tobacco
22 product manufacturer as that term is defined in section II(uu)
23 of the Master Settlement Agreement.

24 210.84 Prohibition against shipment and sale of
25 certain cigarettes.--A permitholder may not:

26 (1) Ship to any person in another state cigarettes
27 belonging to a brand family not included on the list provided
28 by the division to the permitholder under s. 210.85; or

29 (2) Sell or possess for sale to any person in another
30 state or for resale to a consumer in another state cigarettes
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1 belonging to a brand family not included on the list provided
2 by the division to the permitholder under s. 210.85.

3 210.85 List of cigarettes approved for shipment and
4 sale.--The division shall annually prepare, and by July 15 of
5 each year transmit to all permitholders and post on the
6 website of the division, a list of all brand families
7 manufactured for sale to consumers within the United States by
8 each tobacco product manufacturer that by May 1 of such year
9 has provided the division the certification and information
10 specified in s. 210.86(1), and each tobacco product
11 manufacturer as to which the division has made the
12 determination described in s. 210.87(2).

13 210.86 Inclusion on list.--

14 (1) PARTICIPATING MANUFACTURERS.--The division shall
15 include on the list described in s. 210.85 all brand families
16 manufactured for sale to consumers within the United States by
17 each tobacco product manufacturer that has provided the
18 division, not later than May 1 of the year in question or
19 previously, a certification, under penalty of perjury, that it
20 is a participating manufacturer and the names of all such
21 brand families. Such a tobacco product manufacturer is
22 considered to be the manufacturer of all those cigarettes, but
23 only those cigarettes which are counted as its cigarettes for
24 purposes of calculating its payments under the Master
25 Settlement Agreement for the year in question.

26 (2) NONPARTICIPATING MANUFACTURERS.--The division
27 shall include on the list described in s. 210.85 all brand
28 families manufactured for sale to consumers within the United
29 States by each nonparticipating manufacturer that has provided
30 the division, not later than May 1 of the year in question,
31 the certification described in s. 210.87, but only if division

1 has determined that such certification is true and correct,
2 and the names of all such brand families. A nonparticipating
3 manufacturer is deemed to be the manufacturer of all
4 cigarettes as to which it is the first purchaser anywhere for
5 resale in the United States of cigarettes manufactured
6 anywhere which the manufacturer of such cigarettes did not
7 intend to be sold in the United States.

8 210.87 Determination by division.--

9 (1) CERTIFICATION BY NONPARTICIPATING

10 MANUFACTURER.--For the brand families of a nonparticipating
11 manufacturer that sells, whether directly or through a
12 distributor or similar intermediary or intermediaries,
13 cigarettes to any permitholder to be eligible for inclusion in
14 the list described in s. 210.85, the manufacturer, not later
15 than May 1 of the year in question, under penalty of perjury,
16 must provide to the division:

17 (a) A certification that the manufacturer:

18 1. Will make all escrow payments required by the MSA
19 Statute of each MSA state for all cigarettes of the
20 nonparticipating manufacturer which will be sold to consumers
21 within each such MSA state through April 30 of the year
22 following the year in which the certification is provided; and

23 2. Has made all escrow payments required by the MSA
24 Statute of each MSA state for cigarettes of the
25 nonparticipating manufacturer which were sold to consumers
26 within each such MSA state during the preceding calendar year;
27 and

28 (b) Any information required by the division to
29 determine whether such certification is true and correct.

30 Failure to request certification does not impact the ability
31 of a permitholder to sell the nonparticipating manufacturer's

1 brands within the state but, as stated in s. 210.84, will
2 result in a permitholder being unable to ship or sell such
3 brands to any person in another state.

4 (2) DETERMINATION OF COMPLIANCE.--A nonparticipating
5 manufacturer shall be determined to have made a true and
6 correct certification under subsection (1) if the division
7 determines that the total amount of the escrow payments made
8 by the nonparticipating manufacturer in all MSA states for
9 cigarettes of the nonparticipating manufacturer which were
10 sold to consumers within all such states during the preceding
11 year is equal to the product of:

12 (a) The applicable per-unit amount specified in the
13 MSA Statutes of such states, including all adjustments for
14 inflation; and

15 (b) The number of units of cigarettes manufactured by
16 the nonparticipating manufacturer which were sold to consumers
17 within all MSA states during the preceding year.

18 (3) NOTICE OF DETERMINATION.--The division shall
19 promptly notify the nonparticipating manufacturer and the
20 Attorney General of any determination made under this section.

21 (4) DEFINITION.--For purposes of this section,
22 references to cigarettes "sold to consumers within a state"
23 include any cigarettes sold to consumers within the state,
24 whether sold by the manufacturer directly or by a distributor,
25 retailer, or similar intermediary or intermediaries.

26 210.88 Reports by permitholders.--Not later than 30
27 days after the end of each quarter, and more frequently if so
28 directed by the division, each permitholder shall report to
29 the division all shipments of cigarettes to persons in this
30 state and other states during the preceding calendar quarter.
31 The report shall list, by nonparticipating manufacturer and

1 brand family, the quantity of cigarettes shipped to persons in
2 each such state.

3 210.89 Administrative penalties and injunctive
4 relief.--

5 (1) PENALTIES.--Upon a finding of a violation of s.
6 210.84 by a permitholder, the division may impose upon the
7 permitholder a civil penalty in an amount not to exceed the
8 greater of 500 percent of the retail value of the cigarettes
9 shipped in violation of s. 210.84 or \$5,000. Upon a finding of
10 a violation of s. 210.88 by a permitholder, the division may
11 impose upon the permitholder a penalty in an amount not to
12 exceed \$5,000. Upon a finding of a second or subsequent
13 violation by a permitholder of s. 210.84 or s. 210.88, the
14 division may suspend or revoke the license of the
15 permitholder.

16 (2) INJUNCTIONS.--The Attorney General, on behalf of
17 the division, shall seek an injunction to restrain a
18 permitholder from shipping cigarettes in violation of s.
19 210.84 or to compel a permitholder to submit the information
20 required by s. 210.88.

21 (3) ACTIONS AGAINST NONCOMPLIANT MANUFACTURERS.--Based
22 on credible information provided by authorities in an MSA
23 state or other credible information, the Attorney General
24 shall bring an action in circuit court against a
25 nonparticipating manufacturer for filing a false certification
26 in violation of s. 210.87. Upon a finding that the
27 nonparticipating manufacturer has filed a false certification
28 under s. 210.87(1)(a)2. or has fraudulently or intentionally
29 filed a false certification under s. 210.87(1)(a)1., the court
30 shall issue a permanent injunction prohibiting any
31 nonparticipating manufacturer from selling cigarettes,

1 directly or through a distributor or other intermediary or
2 intermediaries, to permitholders and consumers within the
3 state for a period not to exceed 2 years.

4 210.90 Review of division's determination.--If the
5 division determines to exclude or remove from the list
6 described in s. 210.85 the brand families of a
7 nonparticipating manufacturer that timely submitted to the
8 division the certification and information described in s.
9 210.87(1)(b), such nonparticipating manufacturer may challenge
10 the determination as erroneous and seek relief from such
11 determination by bringing an action in the appellate district
12 where the division maintains its headquarters or where a party
13 resides or as otherwise provided by law to challenge the
14 division's determination. Upon the filing of such an action,
15 the division's determination shall be stayed for 20 days. The
16 court may extend the stay upon a showing by the
17 nonparticipating manufacturer, after notice to the division,
18 that it has a substantial probability of success in the action
19 and would suffer irreparable injury in the absence of a stay.

20 210.91 Additional authority of division and Attorney
21 General.--

22 (1) REVISION OF LIST.--The division shall update
23 monthly the list described in s. 210.85 in order to correct
24 mistakes and to remove or add brand families, including brand
25 families of nonparticipating manufacturers that have failed to
26 make escrow payments required by the MSA Statute of an MSA
27 state or that have corrected such failures, and new brand
28 families of participating manufacturers.

29 (2) INFORMATION SHARING.--The division and Attorney
30 General may share with each other, with other authorities
31 within the state, and with authorities in other states the

1 information they receive under this part, including audits
2 under subsection (3), and may combine such information with
3 information received from authorities in other states for
4 purposes of analysis and enforcement.

5 (3) AUDITS.--The Attorney General and the division may
6 audit, or engage others to audit, information supplied by
7 nonparticipating manufacturers under s. 210.87(1), and the
8 division may audit the information supplied by permitholders
9 under s. 210.88.

10 210.92 Applicants for permits.--The division may not
11 issue a permit to a person to act as a permitholder unless
12 such person has certified, under penalty of perjury, that such
13 person will comply fully with this part.

14 Section 2. For the year 2002, if the effective date of
15 this act is later than March 16, 2002, the reports of
16 permitholders required by section 210.88, Florida Statutes,
17 shall be due 30 days after the effective date of this act; the
18 submissions of participating manufacturers and the
19 certifications of nonparticipating manufacturers described in
20 sections 210.86(1) and 210.87(1), Florida Statutes,
21 respectively, shall be due 45 days after the effective date of
22 this act; and the transmission by the division to
23 permitholders and the website posting under section 210.85,
24 Florida Statutes, shall be due 90 days after such effective
25 date.

26 Section 3. This act shall take effect upon becoming a
27 law.

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SENATE SUMMARY

Creates the Cigarette Anti-Conduit Act. Prohibits the out-of-state shipment or sale of cigarettes manufactured by cigarette manufacturers that are not in compliance with certain settlement agreements. Requires that the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation prepare and update a list of certified cigarette brands. Provides for penalties. Requires a person who holds a permit under ch. 210, F.S., to certify compliance with the act. (See bill for details.)