

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Tobacco Settlement

In February 1995, the State of Florida sued a number of tobacco manufacturers asserting various claims for monetary and injunctive relief on behalf of the state of Florida. In March 1997, the State settled¹ all of its claims against the Liggett Tobacco Company. In August 1997, the “Big Four” tobacco companies [Phillip Morris, R.J. Reynolds, Brown and Williamson, and Lorillard] entered into a landmark settlement with the State for all past, present, and future claims by the State including reimbursement of Medicaid expenses, fraud, RICO and punitive damages.² At the time of this settlement, these cigarette producers held 93% of the tobacco market share in the U. S. The remaining 7% market share was held by various smaller producers who were not named in the State’s suit as defendants and, therefore, were not part of the settlement agreement.

Under the terms of the settlement agreement, as subsequently amended by a Stipulation Amendment, there are non-monetary and monetary sanctions imposed on the tobacco manufacturers. The non-monetary provisions involve restrictions or limitations on billboard and transit advertisements, merchandise promotions, product placement, and lobbying, relating to all tobacco products.

The amount of the tobacco settlement payments is based on a consideration of volume of U. S. cigarette sales, share of market, net operating profits, consumer price indices, and other factors as to each year payment is made. Any adjustment to those payments is based on a formula set forth in an appendix to the settlement agreement and involves a ratio of volume of U. S. cigarette sales as existed in 1997 and volume of sales in the applicable year. If the market share of these manufacturers declines, their payments to Florida under the settlement agreement will, likewise, decline.

Subsequent to Florida’s settlement, the major tobacco companies, Phillip Morris, R. J. Reynolds, Brown and Williamson, and Lorillard and some other smaller tobacco producers³ settled with 46 states and five U. S. territories [November 1998]. This Master Settlement Agreement [MSA] provided over \$200

¹ See State v. American Tobacco Co., et al., Case 95-1466AH, Palm Beach County. [U.S. Tobacco Company is also a signatory to the agreement but is only subject to the non-economic provisions of the settlement agreement.]

² The states of Texas, Minnesota and Mississippi also entered into individual settlement agreements.

³ According to industry publications, 37 of the smaller manufacturers are now participating in the MSA.

billion to the participating states over a 25-year period and contained terms similar to those of the Florida agreement which tie their payments, in part, to the company's market share sales.

Terms of the MSA require each participating state to enact legislation that ensures the participating manufacturers are not placed at a competitive disadvantage due to their participation in the MSA with regard to the nonparticipating manufacturers.⁴ The model legislation, attached as Exhibit T of the MSA, reads, in part:

“(f) It would be contrary to the policy of the State if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the State to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment proof before liability may arise.”

To that end, the model legislation requires nonparticipating manufacturers [NPM] to pay funds into an escrow account in an amount equal to the NPM's allocable share of the payments that the manufacturer would have been required to pay in a specific year under the MSA, adjusted for inflation. The principal from these funds is held in escrow for a period of 25-years, after which it is released from escrow and returned to the manufacturer if no liability has been attributed to that manufacturer.

Because Florida is not an MSA state, an NPM can sell cigarettes here without making either MSA payments or escrow payments. In addition, the tobacco industry reports that there has been an increase in the trans-shipment of cigarettes from Florida [and the three other non-MSA states] into the MSA-states as a means of illegally avoiding the required payments.

According to industry statistics, prior to 1996 there were 28 smaller cigarette manufacturers in existence in the United States; there are presently over 100 smaller companies. In addition there are numerous foreign manufacturers that either routinely or occasionally ship cigarettes into the United States. Some industry statistics indicate that the smaller cigarette manufacturers have increased their market share of cigarette sales to over 21% of total sales. The increase in market share may be attributed, in part, to the increased cost of products sold by MSA participating manufacturers.

Florida's Regulatory and Tax Structure

Section 210.15, F.S., requires every person or business desiring to deal in cigarettes to obtain a cigarette permit. Cigarette and OTP importers are licensed as wholesaler dealers if they offer their product for sale in Florida.

Distributing agents receive cigarettes in interstate or intrastate commerce and typically warehouse the product while awaiting distribution instructions from the manufacturer. Exporters receive or transport tax-exempt cigarettes for delivery beyond the borders of the state and store the product in bonded warehouses prior to shipment into foreign commerce.

Cigarettes and OTP, with the exception of cigars, are subject to a state excise tax. Licensed Florida cigarette wholesalers within and without the state must affix a tax stamp to each pack of cigarettes,

⁴ Section IX (d)(E) of MSA reads in part: “A ‘qualifying Statute’ means a Settling State’s statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement.”

evidencing the payment of excise taxes, prior to placing the product in the stream of commerce in Florida. Excise taxes must be paid by the wholesale dealer at the time of first sale in Florida.⁵ Cigarette wholesalers may also place the excise tax stamp on cigarettes for other states prior to transportation into that state. These sales into other states are reported on the Florida wholesaler's monthly excise tax report to the division as a Florida tax exempt sale since the sale is not taxable in Florida. The reporting information from the wholesaler does not, however, include any information by quantity of brand style.

This bill requires the Florida wholesaler to pay the excise tax imposed by other states and affix any required tax stamp to any cigarettes transported from this state into other states. These shipments must be reported to the Division of Alcoholic Beverages and Tobacco within 10 days after the end of the month and must include information identifying the quantity of each brand style of cigarette and the name and address of each recipient.

The bill prohibits a person from affixing a tax stamp or paying the tax if the state into which the cigarettes are being shipped prohibits the payment of the tax or prohibits the sale of the cigarettes. This provision is apparently designed to require that the Florida wholesaler check the other state's web site to verify that the brand style of cigarette being shipped is allowed to be sold in that state, i.e., that the escrow account has been established and the manufacturer is otherwise in good standing in that state.

C. SECTION DIRECTORY:

Section 1. Creates new subsections (5), (6), (7) and (8) in s. 210.06, F.S., prohibiting the transportation of cigarettes from Florida into another state without paying the excise tax to the other state and placing that state's tax stamp on the cigarettes. The section prohibits shipment into another state if that state prohibits stamping of the cigarettes, payment of the excise tax on the cigarettes or prohibits the sale of the cigarettes. This section also requires a monthly report to the division of all cigarettes by brand styles that are transported into other states and authorizes the division to promulgate rules.

Section 2. Provides that the act will take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

According to the Division of Alcoholic Beverages and Tobacco, the provisions of this legislation will not add any substantial increased cost to operation. The division already receives monthly reports from cigarette wholesalers and will need to capture the additional information provided from out-of-state sales regarding brands. Similarly, auditors will verify the tax stamping and approval from other states during their semi-annual audits of wholesalers.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

⁵ State excise taxes on cigarettes generated over \$426 Million for FY 2001-02.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or cities to spend funds or take an action requiring the expenditure of funds; does not reduce the authority that cities or counties have to raise revenues in the aggregate; and does not reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill appears to grant sufficient rule-making authority to the Division of Alcoholic Beverages and Tobacco.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Reference is made throughout this legislation to a "person" transporting cigarettes, etc. Florida law prohibits the possession of untaxed cigarettes by persons other than those having a Florida license authorizing such possession. To avoid possible misinterpretation, this reference should be changed to "licensed wholesale dealer" or similar term to adequately reflect the intention of the law.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES