

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/CS/SB 2676

SPONSOR: Appropriations Committee, Commerce, Economic Opportunities, and Consumer Services Committee, Regulated Industries Committee, and Senator Haridopolos

SUBJECT: Transportation and Sale of Cigarettes

DATE: April 20, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	<u>Gillespie</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
3.	<u>                    </u>	<u>                    </u>	<u>FT</u>	<u>Withdrawn</u>
4.	<u>                    </u>	<u>                    </u>	<u>AGG</u>	<u>Withdrawn</u>
5.	<u>Deloach</u>	<u>Coburn</u>	<u>AP</u>	<u>Favorable/CS</u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

Committee Substitute for Committee Substitute for Committee Substitute for Senate Bill 2676 prohibits a person from transporting from Florida, or causing to be transported, cigarettes for sale in another state without complying with the other state's laws relating to the affixation of stamps to, the payment of excise taxes on, or the sale of the cigarettes. The committee substitute exempts from these requirements a person's transportation of the cigarette brands of participating manufacturers under the Master Settlement Agreement and of nonparticipating manufacturers and importers that comply with the qualifying statute.

The committee substitute requires manufacturers and importers of cigarettes to obtain a cigarette permit from the state's Division of Alcoholic Beverages and Tobacco, prohibits manufacturers and importers from selling or distributing cigarettes other than to a wholesale dealer, specifies that certain sales of cigarettes are exempt from the state excise tax, and clarifies that manufacturers and importers are not wholesale dealers responsible for affixing tax stamps to cigarette packages.

The committee substitute requires wholesale dealers in Florida to affix tax stamps to cigarette packages within 10 days after receipt of the cigarettes and requires out-of-state dealers to affix the stamps before shipment of the cigarettes into Florida. The committee substitute prohibits wholesale dealers from obtaining cigarettes, or affixing tax stamps to cigarettes obtained, from anyone other than a manufacturer or importer or from selling or distributing cigarettes to anyone other than a retail dealer or another wholesale dealer.

The committee substitute prohibits any person from possessing unstamped cigarettes, except under certain circumstances. The committee substitute allows a wholesale dealer to store

unstamped cigarettes, but requires the unstamped cigarettes to be stored separately from stamped cigarettes. The committee substitute also prohibits a retail dealer from obtaining cigarettes from anyone other than a manufacturer, importer, or wholesale dealer.

The committee substitute extends the Division of Alcoholic Beverage and Tobacco's authority to seize and forfeit cigarettes without tax stamps. The committee substitute also permits the division, under certain circumstances, to seize and forfeit the fixtures, equipment, and other personal property of a wholesale dealer or retail dealer violating the cigarette tax law (part I of ch. 210, F.S.), but requires the division to destroy confiscated cigarettes.

The committee substitute allows the division or any law enforcement officer to stop and search a vehicle for contraband cigarettes, if reasonable cause exists to believe that the vehicle is illegally transporting cigarettes. The committee substitute also enhances and broadens the application of criminal penalties for violations of the cigarette tax law and authorizes additional civil penalties.

This committee substitute substantially amends the following sections of the Florida Statutes: 210.01, 210.05, 210.06, 210.09, 210.12, 210.15, and 210.18.

The committee substitute creates sections 210.085 and 210.181, Florida Statutes.

## II. Present Situation:

### Tobacco Settlement Agreements

Beginning in the mid 1990s, more than 40 states and some local governments brought suit against tobacco companies, alleging the industry violated antitrust and consumer protection laws, withheld information about the adverse health effects of tobacco, manipulated nicotine levels to keep smokers addicted, and conspired to hold back less risky and less addictive tobacco products from the market.<sup>1</sup> In February 1995, the State of Florida brought its suit in Palm Beach County against a number of tobacco companies, seeking monetary damages and injunctive relief on behalf of the state.<sup>2</sup> In March 1996, Florida settled its claims with two of those tobacco companies (Brooke and Liggett) as part of a five-state settlement agreement.<sup>3</sup>

In 1997 and 1998, four states (Florida, Minnesota, Mississippi, and Texas) settled their lawsuits by negotiating independent agreements with the tobacco industry. In August 1997, the State of Florida entered into its settlement agreement with the four largest tobacco companies in the United States (Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard). As part of the settlement, the companies agreed to make annual payments to the state, based on each company's respective market share of sales of cigarettes for consumption in the United States,

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<sup>1</sup> See, e.g., U.S. General Accounting Office, *Tobacco Settlement: States' Use of Master Settlement Agreement Payment* 8 (GAO-01-851, June 2001).

<sup>2</sup> *Complaint, State of Florida v. American Tobacco Co. et al.*, No. 95-1466AO (Fla. 15th Cir. Ct. filed Feb. 21, 1995), available at University of California San Francisco, <http://www.library.ucsf.edu/tobacco/litigation/fl/1florida.pdf> (last visited Apr. 1, 2004).

<sup>3</sup> *Attorneys General Settlement Agreement with Brooke Group Ltd. and Liggett Group, Inc.* (Mar. 15, 1996), available at University of California San Francisco, <http://www.library.ucsf.edu/tobacco/litigation/fl/agsettlement.pdf> (last visited Apr. 1, 2004). (Florida, Louisiana, Massachusetts, Mississippi, and West Virginia were the states that entered into the settlement agreement with Liggett.)

among other non-monetary provisions, in exchange for release from past, present, and future claims brought by the state. According to the Council of State Governments, it is estimated that Florida would receive approximately \$13.4 billion in settlement payments through 2025.<sup>4</sup>

In November 1998, after Florida's settlement, the nation's four largest tobacco companies (cited as the "original participating manufacturers" or "OPMs") negotiated an agreement with the attorneys general of the remaining 46 states, thereby settling the lawsuits brought by these states against the tobacco companies. This multi-state agreement (cited as the "Master Settlement Agreement" or "MSA"), like the Florida agreement, released the tobacco companies participating in the settlement from past, present, and future claims brought by the settling states in exchange for annual payments to the states and reimbursement of attorneys fees.<sup>5</sup> Under the Master Settlement Agreement, the tobacco industry was projected to pay the settling states in excess of \$200 billion over a 25-year period.<sup>6</sup>

The MSA also imposed restrictions on the marketing and advertising practices of the settling tobacco companies. In addition, to receive its full share of the settlement payments, unlike the Florida agreement, each state was required by the MSA to enact a law that addressed the potential competitive advantage that tobacco companies that were not parties to the settlement might experience. Under the MSA, if the aggregate market share of the tobacco companies that were parties to the agreement fell more than 2 percent below their base level in 1997 and the loss was caused in significant part by the MSA, the MSA payments might be reduced based on a formula that corrects for this loss in market share.

The MSA specified that individual states can avoid this downward adjustment—known as the "non-participating manufacturers" adjustment—to their payments by enacting and enforcing a law intended to prevent a competitive disadvantage for the participating manufacturers.<sup>7</sup> The MSA included a model law that, if enacted and enforced by a state, would protect that state from any adjustment for market share loss, although states were permitted to enact and enforce any law that achieved the same result.<sup>8</sup> The model law includes legislative findings and purpose, which provide, in part:

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

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<sup>4</sup> James B. Carroll & David A. Moss, Council of State Governments, *Tobacco Settlement and Declining State Revenues*, *TrendsAlert* 4 (Mar. 2002).

<sup>5</sup> *Master Settlement Agreement* (Nov. 1998), available at National Association of Attorneys General, [http://www.naag.org/upload/1032468605\\_cigmsa.pdf](http://www.naag.org/upload/1032468605_cigmsa.pdf) (last visited Apr. 1, 2004).

<sup>6</sup> National Association of Attorneys General, *NAAG Projects: Tobacco*, at <http://www.naag.org/issues/issue-tobacco.php> (last visited Apr. 1, 2004).

<sup>7</sup> The Master Settlement Agreement provides that 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." *MSA*, *supra* note 5, at 60 (page number of the PDF file).

<sup>8</sup> *Exhibit T of the Master Settlement Agreement*, *supra* note 5, at 279 (page number of the PDF file).

of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.<sup>9</sup>

To achieve these legislative findings and purpose, the model law requires that every tobacco company in the state must either become a participating manufacturer, who pays its respective share of the settlement payments to the states based on the manufacturer's market share of cigarette sales in the United States, or remain a nonparticipating manufacturer ("NPM"). Under the model law, a NPM must pay funds into an escrow account equivalent to the amount the manufacturer would have paid to the state if it became a participating manufacturer under the MSA. As of December 2002, approximately 37 tobacco companies had joined the MSA.<sup>10</sup>

Because Florida is not a party to the MSA, a NPM may sell cigarettes in this state without making either MSA payments or escrow payments. The tobacco industry claims that, since the MSA was signed in 1998, there has been an increase in the interstate transportation of cigarettes by NPMs from the four states that are not parties to the MSA (Florida, Minnesota, Mississippi, and Texas) into states that are parties to the MSA, in order to avoid making payments in compliance with the laws in those states which implement the MSA's model law.

### **Florida's Excise Tax on Cigarettes and Reporting Requirements**

Under current law, each person, firm, or corporation dealing in cigarettes as a distributing agent, wholesale dealer, or exporter within this state must apply for and obtain a cigarette permit from the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation (s. 210.15(1), F.S.). A person, firm, corporation, or business entity dealing in, selling, storing, or operating as a wholesale dealer in cigarettes, or acting as a cigarette distributing agent or exporter, without a cigarette permit commits a misdemeanor of the first degree, punishable by no more than one year in jail and a \$1,000 fine (s. 210.15(8), F.S.). In addition, the division may suspend or revoke the permit of any wholesale dealer for violations relating to the tax on cigarettes (s. 210.16, F.S.).

The State of Florida imposes an excise tax on cigarettes and requires each wholesale dealer, regardless of whether the dealer is located in the state, to affix to each package or container, or cause to be affixed, a stamp evidencing the payment of the excise tax before the cigarettes may be offered for sale or use, consumed, or otherwise disposed of in this state (ss. 210.02 and 210.06(1), F.S.).<sup>11</sup> Current law does not include provisions concerning the affixation of another state's tax stamps on cigarettes for sale in the other state.

Wholesale dealers are required to submit to the Division of Alcoholic Beverages and Tobacco by the 10th day of each month a monthly report of its purchases and sales of cigarettes within or without the state for the preceding month (rule 61A-10.011, F.A.C; s. 210.09(2), F.S.). Sales of cigarettes out-of-state are reported on a wholesale dealer's monthly report as exempt from the

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<sup>9</sup> *Id.* at 279-80 (page numbers of the PDF file).

<sup>10</sup> David J. Adelman et al., Morgan Stanley & Co., Inc., *State of the US Cigarette Industry: Not a Pretty Picture 2* (Dec. 20, 2002). These tobacco companies are cited as "subsequent participating manufacturers" or "SPMs," which distinguishes these companies from OPMs (original participating manufacturers).

<sup>11</sup> According to the Division of Alcoholic Beverages and Tobacco, the division collected \$418.2 million in cigarette excise taxes from stamping wholesale distributors for the 2002-2003 fiscal year.

excise tax because the tax applies only to sales in Florida. The monthly report details the number of cigarette packages, but does not include any information about the quantity of each brand style.<sup>12</sup>

### **Decline of Tobacco Settlement Payments**

In 1997, according to industry estimates, the original participating manufacturers (Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard) controlled approximately 97.4 percent of the United States cigarette market, with the remaining smaller companies representing about 2.6 percent of the market.<sup>13</sup> By 2000, the market share of the OPMs had fallen to about 94.5 percent, according to industry estimates.<sup>14</sup>

One of the causes for the OPMs' declining market share, according to industry market analysts, is the interstate sale of cigarettes from one of the four states that are not parties to the Master Settlement Agreement (Florida, Minnesota, Mississippi, and Texas) into states that are parties of the MSA. Because Florida's settlement agreement does not require the state to enact legislation requiring nonparticipating manufacturers to become subsequent participating manufacturers (responsible for payments under the MSA) or make payments into a state escrow account, NPMs have a competitive advantage over the OPMs when transporting cigarettes from Florida for sale into other states that are parties to the MSA. Nonparticipating manufacturers may accordingly sell cigarettes for substantially reduced prices than the OPMs in these other states, thereby contributing to shifts in market share.

Because payments by the OPMs under both Florida's settlement agreement and the MSA are based on each company's respective market share, a reduction in the OPMs' market share vis-à-vis the NPMs may consequently cause a reduction in Florida's settlement payments. A reduction in settlement payments has been observed in the 46 states that are party to the MSA.<sup>15</sup>

### **III. Effect of Proposed Changes:**

#### **Transportation from Florida of Cigarettes for Sale in another State**

The committee substitute prohibits a "person"<sup>16</sup> from transporting from Florida, or causing to be transported, cigarettes for sale in another state without first affixing the tax stamp and paying any other excise tax required by that state to be affixed or paid. The committee substitute also prohibits a person from affixing a stamp, or paying any other excise tax, required on cigarettes by another state, if the other state prohibits the stamp from being affixed or the excise tax from being paid, or if the other state prohibits the sale of the cigarettes.

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<sup>12</sup> Florida Dept. of Bus. and Prof'l Regulation, *Cigarette Monthly Report Detail, Form AB&T 4000A-205-3* (Dec. 2003), available at [http://www.myflorida.com/dbpr/abt/forms/auditing/acrobat\\_auditing/4000a-205-3.pdf](http://www.myflorida.com/dbpr/abt/forms/auditing/acrobat_auditing/4000a-205-3.pdf) (last visited Apr. 1, 2004).

<sup>13</sup> See Carroll, *supra* note 4, at 5.

<sup>14</sup> *Id.*

<sup>15</sup> According to the U.S. General Accounting Office, adjustments of settlement payments based, in part, on market share led to a \$1.6 billion reduction in the payments from projections between 1999 and 2001. GAO, *supra* note 1, at 11.

<sup>16</sup> The committee substitute defines a "person" as an individual, partnership, committee, association, corporation, or any other organization or group of persons. The committee substitute excludes from this definition a common or contract carrier or public warehouse that is not owned, in whole or in part, directly or indirectly, by the person.

The laws of the 46 signatory states to the Master Settlement Agreement<sup>17</sup> currently require a cigarette manufacturer to become a participating manufacturer who makes settlement payments to the states, based upon the manufacturer's market share of cigarette sales in the United States, or to remain a nonparticipating manufacturer and make escrow payments equivalent to the amount of the settlement payments paid by the participating manufacturers. To enforce these requirements, signatory states currently may prohibit the sale of cigarettes other than cigarettes with tax stamps affixed by manufacturers that meet these requirements.

The committee substitute in effect prohibits a person from transporting from Florida, or causing to be transported, cigarettes for sale in another state without complying with the other state's laws relating to the affixation of stamps to, the payment of excise taxes on, or the sale of the cigarettes. For transportation to the 46 signatory states, the committee substitute would likely require the person to be a participating manufacturer or a nonparticipating manufacturer making escrow payments equivalent to a participating manufacturer's settlement payments.

The committee substitute exempts from these requirements a person's transportation of the cigarette brands<sup>18</sup> of the following manufacturers and importers:

- Participating manufacturers, as defined in the Master Settlement Agreement,<sup>19</sup> which are responsible under the agreement for making settlement payments to the 46 signatory states; and
- Other manufacturers and importers that fully comply with the "qualifying statute," as defined in Master Settlement Agreement,<sup>20</sup> of the state in which the cigarettes are to be sold. (The qualifying statutes require these nonparticipating manufacturers and importers to make escrow payments equivalent to the settlement payments made by participating manufacturers.)

The committee substitute requires a person transporting from Florida, or causing to be transported, cigarettes for sale in another state to submit a monthly report to the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation. The report must be submitted on or before the 10th day of each month and must identify, from the preceding calendar month, the quantity of each brand family<sup>21</sup> of the cigarettes and the name

<sup>17</sup> The committee substitute specifies that the Master Settlement Agreement is the settlement agreement (and related documents) entered into in 1998 by 46 states and leading United States tobacco manufacturers; see also *MSA, supra* note 5.

<sup>18</sup> The committee substitute specifies that the exemption applies, for cigarettes of a participating manufacturer, to cigarettes that are "deemed to be [the participating manufacturer's] cigarettes for purposes of calculating its [settlement] payments" and, for cigarettes of other manufacturers and importers, to cigarettes that are "deemed to be [the manufacturer's or importer's] cigarettes for purposes of the applicable qualifying statute" (i.e., for purposes of the escrow payments).

<sup>19</sup> The committee substitute specifies that the exemption applies to "participating manufacturers," as defined in section II(jj) of the Master Settlement Agreement (*MSA, supra* note 5, at 16-17 (page numbers of PDF file) and *supra* note 17).

<sup>20</sup> The committee substitute specifies that the exemption applies to a manufacturer or importer that is in full compliance with the "qualifying statute," as defined in section IX(d)(2)(E) of the Master Settlement Agreement (*MSA, supra* note 5, at 60 (page number of PDF file), *supra* note 7, and *supra* note 17).

<sup>21</sup> The committee substitute defines a "brand family" as all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, "menthol," "lights," "kings," and "100s." The committee substitute further specifies that this definition includes any brand name used alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

and address of each recipient of the cigarettes. In addition, the committee substitute requires the person to certify under oath, subject to penalties for perjury:<sup>22</sup>

- That tax stamps have been affixed to cigarettes being transported from Florida to another state, as required by that state, and that tax stamps have not been affixed to the cigarettes, if prohibited by that state; or
- That the cigarette brands, which the person is transporting from Florida to another state, are cigarettes of a participating manufacturer or of a nonparticipating manufacturer or importer in full compliance with the other state's qualifying statute.

The committee substitute also specifies that these transportation requirements and exemptions do not authorize a person to possess or transport cigarettes if the person is not otherwise authorized to possess or transport the cigarettes under any other provision of Florida's cigarette tax law (part I of ch. 210, F.S.).

## **Manufacturers and Importers**

### ***Permits***

Under current law, each distributing agent,<sup>23</sup> wholesale dealer, and exporter of cigarettes in this state is required to obtain a permit from the Division of Alcoholic Beverages and Tobacco for each place of business (s. 210.15, F.S.). The committee substitute adds cigarette manufacturers<sup>24</sup> and importers<sup>25</sup> to these entities that are required to obtain a permit to engage in business in Florida. The committee substitute clarifies that each of these entities must obtain a permit for each place of business located in Florida,<sup>26</sup> or if none are located in Florida, for wherever the entity's principal place of business is located.

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<sup>22</sup> Chapter 837, F.S., provides various criminal penalties for perjury. These penalties vary based upon the specific offense of perjury. For example, perjury that not in an official proceeding is a misdemeanor of the first degree, punishable by up to 1 year in jail or up to a \$1,000 fine (s. 837.012, F.S.). Comparatively, perjury in an official proceeding is a felony of the third degree, punishable by up to 5 years in prison or up to a \$5,000 fine, and is subject to the habitual felony offender statute (s. 837.02(1), F.S.). For purposes of perjury, an "official proceeding" includes a proceeding heard, or which may be or is required to be heard, before any administrative or other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, administrative law judge, hearing officer, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with the proceeding. The committee substitute is unclear whether these certifications under oath constitute "official proceedings" before the Division of Alcoholic Beverages and Tobacco for purposes of determining which penalty for perjury would apply.

<sup>23</sup> Under current law, a "distributing agent" is a person, firm, or corporation in Florida which acts as an agent for a person, firm, or corporation inside or outside of Florida by receiving and storing the cigarettes for distribution or delivery to wholesale dealers or other distributing agents inside or outside of Florida (s. 210.01(14), F.S.).

<sup>24</sup> The committee substitute defines a "manufacturer" as a person with a valid federal cigarette manufacturer's permit under 26 U.S.C. s. 5712 who manufactures, fabricates, assembles, processes, or labels a finished cigarette.

<sup>25</sup> The committee substitute defines an "importer" as a person with a valid federal cigarette importer's permit under 26 U.S.C. s. 5712 who imports into the United States, directly or indirectly, a finished cigarette for sale or distribution.

<sup>26</sup> Under current law, a "place of business" is defined as a place where cigarettes are sold or where cigarettes are stored or kept for the purpose of sale or consumption or, if cigarettes are sold from a vending machine, the place in which the vending machine is located (s. 210.01(15), F.S.).

The committee substitute prohibits each of these entities from obtaining, maintaining, or renewing a permit if the entity, its officers, or any person owning more than 10 percent of the entity:

- Owes \$500 or more in delinquent cigarette taxes;
- Had a cigarette importer's, retail dealer's, or wholesale dealer's permit revoked within the previous 2 years; or
- Has been convicted of selling stolen or counterfeit cigarettes, receiving stolen cigarettes, or being involved in the counterfeiting of cigarettes.

Under current law, a distributing agent, wholesale dealer, or exporter may not be issued a permit if the person (or an officer, if the entity is a corporation) has been convicted within the past 5 years of an offense under the state's cigarette tax law (part I of ch. 210, F.S.) or has been convicted of a felony in Florida, another state, or the United States during the past 5 years (s. 210.15(1)(c), F.S.). The committee substitute clarifies that these entities may not maintain or renew a permit if the person or officer has these convictions. The committee substitute also prohibits manufacturers and importers from obtaining, maintaining, or renewing a permit if the person or officer has these convictions.

#### ***Sell or Distribute Cigarettes Only to Wholesale Dealers***

The committee substitute prohibits a manufacturer, importer, or distributing agent from selling or distributing cigarettes to a person in Florida unless the person is a wholesale dealer that has a valid and current permit issued by the Division of Alcoholic Beverages and Tobacco.

#### ***Prohibition against Manufacturers Stamping Cigarettes***

Under current law, Florida's cigarette excise tax is required to be paid by the wholesale dealer "upon the first sale or transaction within the state, whether or not such sale or transfer be to the ultimate purchaser or consumer" (s. 210.02(6), F.S.). The current law is unclear whether cigarette manufactures would be considered "wholesale dealers."

The committee substitute prohibits a Florida cigarette tax stamp from being applied to a cigarette package that is exempt from the federal cigarette excise tax under 26 U.S.C. s. 5704, if the cigarette package is distributed by a manufacturer under federal regulations. According to 26 U.S.C. s. 5704, cigarettes are exempt from the federal tax:

- For consumption or use by a manufacturer's employees for experimental purposes;
- For transfer by a manufacturer or export warehouse proprietor<sup>27</sup> to the bonded premises of another manufacturer or export warehouse proprietor, or for shipment outside of the United States' 50 states;

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<sup>27</sup> The committee substitute does not define the term, "export warehouse proprietor"; however, the federal Internal Revenue Code specifies that an export warehouse proprietor is a person who operates an export warehouse (26 U.S.C. s. 5702(i)). The federal code further defines an "export warehouse" as a bonded internal revenue warehouse for the storage of tobacco products and cigarette papers and tubes, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States (26 U.S.C. s. 5702(h)).



- For delivery to an export warehouse or manufacturer upon importation into the United States and release from customs custody; or
- For return to the manufacturer upon release from customs custody, if the cigarettes were previously exported but returned to the United States.

By prohibiting cigarette tax stamps from being affixed to these cigarette packages exempt from the federal excise tax, the committee substitute would extend these federal exemptions for manufacturers to the Florida cigarette excise tax. The committee substitute does not change the requirement that wholesale dealers must affix cigarette tax stamps and pay the excise taxes. Because the committee substitute prohibits manufacturers from selling cigarettes to a person other than a wholesale dealer, the committee substitute is not anticipated to affect the collection of cigarette excise taxes.

### ***Distinguish Manufacturers and Importers from Wholesale Dealers***

Under current law, a “wholesale dealer” is a person who sells cigarettes to retail dealers or other persons for purposes of resale only, or a person who operates more than one cigarette vending machine located in more than one place of business (s. 210.01(6), F.S.). The committee substitute clarifies that a wholesale dealer may be located inside or outside of Florida. The committee substitute also specifies that cigarette manufacturers, export warehouse proprietors,<sup>28</sup> and importers are not considered wholesale dealers for purposes of the state’s cigarette tax law, if the manufacturer, export warehouse proprietor, or importer:

- Has a valid federal cigarette permit under 26 U.S.C. s. 5712; and
- Sells and distributes cigarettes in Florida only to wholesale dealers, who are agents<sup>29</sup> that hold valid and current permits issued by the Division of Alcoholic Beverages and Tobacco, to a cigarette manufacturer, an export warehouse proprietor, to an importer, or to another manufacturer.

### **Requirements for Wholesale Dealers**

The committee substitute requires wholesale dealers in Florida to affix tax stamps<sup>30</sup> to cigarette packages within 10 days after receipt of the cigarettes and requires out-of-state dealers to affix the stamps before shipment of the cigarettes into Florida. These provisions replace requirements in current law specifying that all wholesale dealers, whether inside or outside of Florida, must affix cigarette tax stamps before the cigarettes are offered for sale or use, consumed, or are otherwise disposed of in Florida (s. 210.06(1), F.S.).

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<sup>28</sup> See *Export Warehouse Proprietor*, *supra* note 27.

<sup>29</sup> Under current law, an “agent” is a person authorized by the Division of Alcoholic Beverages and Tobacco to purchase and affix cigarette tax stamps (s. 210.01(9), F.S.).

<sup>30</sup> The committee substitute specifies that “stamps” are the indicia required to be placed on cigarette packages as evidence of payment of the state’s excise tax on cigarettes.

The committee substitute prohibits a wholesale dealer from:

- Selling or distributing cigarettes to a person in Florida unless the person is a wholesale dealer or retail dealer with a valid and current retail permit issued by the Division of Alcoholic Beverages and Tobacco;
- Obtaining cigarettes from a manufacturer or importer that does not possess a valid and current federal cigarette manufacturer's or importer's permit under 26 U.S.C. s. 5712; or
- Applying tax stamps to cigarette packages received from anyone other than a manufacturer or importer of cigarettes which possesses a valid and current federal cigarette manufacturer's or importer's permit under 26 U.S.C. s. 5712.

### **Unstamped Cigarettes**

The committee substitute specifies that a tax stamp must be applied to all cigarette packages subject to the cigarette excise tax which are intended for sale to consumers, except as otherwise provided in the committee substitute. The committee substitute prohibits a person from holding or possessing unstamped cigarette packages, except if the person:

- Is a wholesale dealer that receives unstamped cigarette packages directly from a cigarette manufacturer or importer;
- Ships the cigarettes to a wholesale dealer that holds a valid and current permit issued by the Division of Alcoholic Beverages and Tobacco;
- Ships the cigarettes to a person other than a wholesale dealer with a valid and current permit, but first files a notice with the Division of Alcoholic Beverages and Tobacco; or
- Is a common or contract carrier that is transporting cigarettes through Florida to an out-of-state location under a proper bill of lading or freight bill that specifies the quantity, source, and destination of the cigarettes.

The committee substitute requires a person to first file a notice with the Division of Alcoholic Beverages and Tobacco, if the person ships unstamped cigarette packages to a person in Florida other than to a manufacturer, importer, or a wholesale dealer with a valid and current permit issued by the division. The committee substitute specifies that this requirement does not apply to a common or contract carrier that is transporting cigarettes through Florida to an out-of-state location under a proper bill of lading or freight bill that specifies the quantity, source, and destination of the cigarettes.

The committee substitute permits a wholesale dealer to set aside, without affixing tax stamps, that part of the dealer's stock which is identified for sale or distribution outside of Florida. The committee substitute requires a dealer maintaining stocks of unstamped cigarettes to store the unstamped packages separately from stamped packages. The committee substitute also prohibits a wholesale dealer from transferring unstamped cigarette packages to another person or to another facility of the dealer.

### **Requirements for Retail Dealers**

Under current law, a “retail dealer” is a person other than a wholesale dealer which is engaged in the business of selling cigarettes (s. 210.01(7), F.S.). The committee substitute clarifies that a retail dealer may be located inside or outside of Florida and that retail dealers include persons, firms, associations, or corporations that obtain retail tobacco products dealer permits under s. 569.003, F.S.

The committee substitute prohibits a retail dealer from obtaining cigarettes from a person other than a manufacturer, importer, or a wholesale dealer with a valid and current permit issued by the Division of Alcoholic Beverages and Tobacco.

### **Searches, Seizures, and Forfeitures**

Under current law, the Division of Alcoholic Beverages and Tobacco is authorized to seize, confiscate, and forfeit for the use and benefit of the state, any cigarettes for which the state’s cigarette excise taxes are unpaid (s. 210.12(1), F.S.). The committee substitute extends the division’s authority to seize, confiscate, and forfeit cigarettes to any cigarettes that are held in violation of the state’s cigarette tax law.<sup>31</sup>

The committee substitute requires that all fixtures, equipment, and other materials and personal property on the premises of a wholesale dealer or retail dealer be forfeited to the state, if the wholesale dealer or retail dealer:

- Fails to keep or make a required record, return, report, or inventory, with intent to defraud the state;
- Keeps or makes a false or fraudulent record, return, report, or inventory; or
- Attempts to evade or defeat the requirements of the state’s cigarette tax law.

The committee substitute prohibits the state from using or benefiting from the seizure, confiscation, and forfeiture of cigarettes and requires the state to destroy these cigarettes.

The committee substitute also permits the Division of Alcoholic Beverages and Tobacco or its authorized agent, or a law enforcement officer, to stop a vehicle and inspect the vehicle for contraband cigarettes, if the official has knowledge or reasonable grounds to believe that a vehicle is transporting cigarettes in violation of the state’s cigarette tax law.

### **Criminal Penalties**

Under current law, a wholesale dealer or retail dealer who violates the cigarette tax law commits a misdemeanor of the first degree, punishable by up to 1 year in prison or up to a \$1,000 fine (s. 210.18(2), F.S.). A subsequent conviction is a felony of the third degree, punishable by up to 5 years in prison or up to a \$5,000 fine, and is subject to the habitual felony offender statute. The committee substitute extends these criminal penalties to all persons.

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<sup>31</sup> See, e.g., the discussion on page 10 of this staff analysis about the committee substitute’s prohibitions against a person holding or possessing unstamped cigarette packages.

Under current law, a person, firm, or corporation, other than a licensee under the cigarette tax law, who possesses 50 or fewer cartons of unstamped cigarettes commits a misdemeanor of the second degree, punishable by up to 60 days in jail or up to a \$500 fine, but may pay the unpaid tax plus a penalty to avoid criminal penalties (s. 210.18(6), F.S.). The committee substitute deletes this offense; however, the committee substitute specifies that a person who fails to comply with any requirement of the cigarette tax law, with the intent to defraud the state, commits a felony of the third degree, punishable by up to 5 years in prison or up to a \$5,000 fine, and is subject to the habitual felony offender statute.

The committee substitute provides that, notwithstanding any other law, a person, manufacturer, importer, distributing agent, wholesale dealer, or retail dealer who sells or possesses “counterfeit cigarettes”<sup>32</sup> is subject to the following criminal penalties:

- For a first violation involving less than two cartons of cigarettes, punishable by up to 5 years in prison, up to a \$1,000 fine or five times the retail value of the cigarettes, whichever is greater, or both.
- For a subsequent violation involving less than two cartons of cigarettes, punishable by up to 5 years in prison, up to a \$5,000 fine or five times the retail value of the cigarettes, whichever is greater, or both (violation results in revocation by the Division of Alcoholic Beverages and Tobacco of the manufacturer’s, importer’s, distributing agent’s, wholesale dealer’s, or retail dealer’s permit).
- For a first violation involving two or more cartons of cigarettes, punishable by up to 5 years in prison, up to a \$2,000 fine or five times the retail value of the cigarettes, whichever is greater, or both.
- For a subsequent violation involving two or more cartons of cigarettes, punishable by up to 5 years in prison, a \$50,000 fine or five times the retail value of the cigarettes, whichever is greater, or both (violation results in revocation by the Division of Alcoholic Beverages and Tobacco of the manufacturer’s, importer’s, distributing agent’s, wholesale dealer’s, or retail dealer’s permit).

The committee substitute requires the Division of Alcoholic Beverages and Tobacco, or a law enforcement agency, to seize counterfeit cigarettes and related machinery. The committee substitute also requires the division to destroy the seized counterfeit cigarettes.

### **Civil Penalties**

The committee substitute imposes civil penalties, in addition to other penalties provided in the cigarette tax law, against a person who:

- Knowingly omits, neglects, or refuses:
  - To comply with any duty imposed by the cigarette tax law, or
  - To do or cause to be done anything required by the cigarette tax law; or
- Does anything prohibited by the cigarette tax law.

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<sup>32</sup> The committee substitute specifies that “counterfeit cigarettes” are cigarettes with false manufacturing labels, tobacco product packs with counterfeit tax stamps, or any combination thereof.

The committee substitute specifies that the person violating these provisions is liable for a \$1,000 fine or five times the retail value of the cigarettes, whichever is greater.

The committee substitute also imposes civil penalties, in addition to other penalties provided in the cigarette tax law, against a person who fails to pay any taxes imposed by the cigarette tax law at the time prescribed by law or rules. The bill specifies that the person is liable for a penalty of five times the unpaid taxes due.

### **Appropriation**

The committee substitute provides \$480,028 from the Alcoholic Beverage and Tobacco Trust Fund and four positions to the Department of Business and Professional Regulation. These additional resources are provided for the purpose of conducting regulatory activities related to the transportation and sale of cigarettes.

### **Effective Date**

The committee substitute provides that it takes effect upon becoming a law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

According to the Department of Business and Professional Regulation, the committee substitute may generate additional revenues from permit fees collected for the additional required permits. However, it is indeterminate how many additional in-state and out-of-state entities will become permitted and remit fees and excise taxes as a result of the committee substitute.

### **B. Private Sector Impact:**

In addition to current reporting requirements, the committee substitute requires a person to detail the quantity of each brand style of cigarettes sold out-of-state. The committee

substitute also requires nonparticipating manufacturers (tobacco companies that are not parties to the Master Settlement Agreement), which transport cigarettes from Florida for sale in another state, to comply with the laws of other state. Compliance with other state laws would most likely require the nonparticipating manufacturers to become subsequent participating manufacturers (and make payments under the Master Settlement Agreement) or make payments into escrow accounts in other states, thereby reducing the competitive advantage and market share of these companies. A reduction in the market share of nonparticipating manufacturers will most likely benefit the original participating manufacturers (Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard) and other subsequent participating manufacturers.

The extent of any private-sector costs associated with the reporting requirements of the committee substitute has not been determined.

**C. Government Sector Impact:**

**Department of Business and Professional Regulation**

The Department of Business and Professional Regulation estimates it will need one-time set-up costs of \$250,000 to contract for the development and establishment of the computer system to capture the data reported under the requirements of the committee substitute. The department also cites that it would need annual budget authority of \$30,000 to fund license agreements and maintenance, and one System Project Analyst position to provide technology support relating to the new database. According to the department, it would require one additional Regulatory Specialist II position in the Bureau of Licensing, one additional Revenue Specialist I position, and one Tax Auditor I position in the Bureau of Auditing, to administer the committee substitute, along with space and equipment applicable to the positions. The Division of Information Technology would require one Systems Project Analyst, \$250,000 in one-time programming costs, and \$30,000 in recurring expenses.

**Tobacco Settlement Trust Funds**

If the committee substitute causes an increase in the market share of the original participating manufacturers (Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard) by reducing the market share of nonparticipating manufacturers through requiring compliance with the laws of other states, the committee substitute would likely increase the amounts of settlement payments made by the original participating manufacturers to Florida under the state's settlement agreement.

**VI. Technical Deficiencies:**

None.

**V. Related Issues:**

None.

**VI. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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