

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Nonsettling Cigarette Manufacturer
SPONSOR(S): Farkas
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2112

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Trades, Professions & Reg. Business [Sub]</u>	<u>6 Y, 2 N</u>	<u>Morris</u>	<u>Liepshutz</u>
2) <u>Business Regulation</u>	<u></u>	<u>Morris</u>	<u>Liepshutz</u>
3) <u>Judiciary</u>	<u></u>	<u></u>	<u></u>
4) <u>Finance & Tax</u>	<u></u>	<u></u>	<u></u>
5) <u>Commerce & Local Affairs App. [Sub]</u>	<u></u>	<u></u>	<u></u>
6) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

This bill imposes a fee of 25 mills per cigarette [25 mills equals 2.5 cents per cigarette or \$0.50 on a standard pack of 20 cigarettes], on the sale, receipt, purchase, possession, consumption, handling, distribution and use of nonsettling-manufacturer cigarettes sold in Florida. Nonsettling-manufacturer cigarettes do not include the companies that entered into Florida's 1997 settlement [Philip Morris, R. J. Reynolds, Brown & Williamson and Lorillard] or the Attorney General's settlement with the Liggett Group. This fee is in addition to excise and sales taxes imposed on the sale of all cigarettes in Florida.

At present cigarette stamping wholesalers report monthly the total number of cigarettes packages that are stamped, but do not report the stamped packages by manufacturer, by brand family, or in any other definable grouping. The bill requires cigarette stamping wholesalers to expand their monthly report by including a breakdown of the cigarettes stamped by nonsettling-manufacturer and by brand family. The same information is required to be reported to the DABT on out-of-state cigarette sales.

Nonsettling-manufacturers would also be required to report to the Attorney General's office and to the DABT their initial intention to sell cigarettes in Florida, and then to certify their compliance on the first of each month to both agencies.

A recent Revenue Estimating Conference estimates the fee imposed by this legislation would generate between \$50 million and \$90 million annually. This disparity results, in part, from the inability to accurately determine the actual market share of nonsettling manufacturers in Florida. The conference is continuing to gather relevant information and will meet again to refine the estimate.

The bill takes effect upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0405a.br.doc
DATE: March 5, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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:

Reduce Government

The provisions of this legislation require new reporting and record-keeping responsibilities on the part of the Department of Business and Professional Regulation, Department of Legal Affairs and nonsettling cigarette manufacturers. The capturing and sharing of this information will require enhanced information technology, personnel, and communication capabilities.

Lower Taxes

The bill imposes a fee of 25 mills per cigarette [50 cents per pack of standard cigarettes] on the sale, receipt, purchase, possession, consumption, handling, distribution and use of nonsettling-manufacturer cigarettes sold in Florida.

B. EFFECT OF PROPOSED CHANGES:

Tobacco Settlements

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, Florida's Attorney General settled¹ all of its claims against the Liggett Tobacco Company. Thereafter, 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.

For clarity purposes it may be helpful to offer definitions for the several acronyms used throughout this analysis.

- MSA means the Master [or multistate] Settlement Agreement and does not include Florida
- NAAG means the National Association of Attorneys General
- NPM means a non-participating manufacturer [or *nonsettling-manufacturer* as they are referred to in this legislation]
- OPM means an original participating manufacturer
- SPM means a subsequent participating manufacturer

Under the terms of the Florida 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,

¹ See State v. American Tobacco Co., et al., Case 95-1466AH, Palm Beach County.

merchandise promotions, product placement, and lobbying, relating to all tobacco products. These provisions apply only to the five manufacturers that are a party to Florida's settlement agreements.

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 producers settled with the remaining 46 states and five U. S. territories [November 23, 1998]. This Master Settlement Agreement [MSA] provided over \$200 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. The MSA contains provisions allowing subsequent participating manufacturers [SPMs] that were not a party to the original agreement to join the MSA.² Because Florida is not an MSA state, manufacturers that were not a party to the Florida settlement agreement [NPMs and SPMs] can sell cigarettes here without making either MSA-type payments or escrow payments required by the MSA in Florida. These manufacturers are not subject to the sales, advertising and marketing restrictions of the MSA or Florida's settlement agreement.

Terms of the MSA require each participating state to enact model legislation³ 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 [NPMs]. According to the NAAG approximately fifteen states have enacted additional MSA complementary legislation.⁴ The complementary legislation which is similar to HB 405 contains requirements that the state maintain a directory of cigarette products by brand family that are permitted to be sold in that state and prohibit the placement of tax stamps on products that are not listed in a required directory. The State of Minnesota, in March of 2003, state passed complementary legislation which also imposed a \$0.35 per pack fee on cigarettes of manufacturers that were not a party to the settlement agreement with the state.

By some tobacco industry accounts there has also been an increase in the trans-shipment of cigarettes into Florida [and the other non-MSA states] and back out into an MSA state as a means of avoiding that state's required payments.⁵

The number of smaller cigarette manufacturers in existence in the United States has grown during the past few years and some industry statistics indicate that the smaller or deep-discount cigarette manufacturers have increased their market share of cigarette sales significantly.⁶ In addition there are numerous foreign manufacturers that either routinely or occasionally ship cigarettes into the United States⁷.

The actual market share of all manufacturers is difficult to ascertain. According to a Council of State Government publication,⁸ in 1997, NPMs accounted for less than one percent of the domestic market while OPMs controlled 97.35 percent of the domestic market; by the year 2000, OPMs reportedly controlled 94.5 percent of the market. One industry publication places the present market share of the

² According to one NAAG document dated January 21, 2004 there are 48 manufacturers participating in the MSA.

³ Model Statute, Exhibit T, Master Settlement Agreement

⁴ *Model Complementary Legislation Introduction and Analysis*, NAAG, January 2003

⁵ *State of the US Cigarette Industry: Not a Pretty Picture*, MorganStanley, December 13, 2002

⁶ *Moody's Special Comment*, Moody's Investor Service, July 2003

⁷ *Rise of the Rebels*, Tobacco Reporter, September 2003; see also Memorandum to All Attorneys General, from National Association of Attorneys General, September 12, 2003

⁸ Tobacco Settlement and Declining State Revenue; *Trends Alert*, March 2002

NPMs at between 13 and 16 percent.⁹ The recent Tobacco Settlement Payments Forecast by the Revenue Estimating Conference indicates that market share from the manufacturers that are a party to Florida's settlement agreement continues to decline in Florida from 98.18 percent in 1998 to an estimated 87.07 percent in FY 2003-04.

Florida's Regulatory and Tax Structure

Section 210.15, F.S., requires every person or business desiring to deal in cigarettes as a distributing agent, wholesale dealer, or importer to obtain a cigarette permit from the Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation. Cigarette and other tobacco products 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.

Section 210.02, F.S., imposes an excise or privilege tax on the sale, receipt, purchase, possession, consumption, handling, distribution, and use of cigarettes and other tobacco products. Licensed Florida cigarette wholesalers within and without the state must affix a tax stamp to each pack of cigarettes, 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.¹⁰ The existing tax rate in Florida is 33.9 cents per standard pack of cigarettes. Manufacturers report the total number of packages sold to each distributor by invoice total. Similarly, cigarette stamping wholesalers report the total number of cigarette packages that are stamped on a monthly basis but do not report the stamped packages by manufacturer, by brand family [e.g. Brand X, Brand X Menthols, Brand X 100s], or in any other similar grouping.

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. Whether stamped for in-state or out-of-state sales the reporting information from the wholesaler does not include any information by brand family.

This bill calls for a multi-faceted approach and cooperation between the Department of Business and Professional Regulation and the Attorney General in order to document the number and brands of cigarettes coming into and out of the state.

For FY 2002-2003 Division of Alcoholic Beverages and Tobacco data show stamped purchases of \$418,191,473, and taxes per known cigarettes shipped based on manufacturer shipping reports of \$361,015,431.

Summary

This bill imposes a fee in the amount of 25 mills per cigarette on each nonsettling-manufacturer cigarette sold in the state in addition to any fee already imposed by law. One mil equals 1/10 of a cent, making the fee imposed by this bill \$0.025 per cigarette or \$0.50 cents per standard pack of cigarettes. All cigarette manufacturers other than the four which entered into the Florida settlement agreement or into the Florida Attorney General's agreement with the Liggett Group are considered to be nonsettling-manufacturers under the terms of this legislation

⁹ *Rise of the Rebels*, Tobacco Reporter, , September 2003.

¹⁰ State excise taxes on cigarettes generated over \$400 Million for FY 2002-03.

The bill requires cigarette stamping wholesalers to expand their monthly report by including a breakdown of the cigarettes stamped by nonsettling-manufacturer, including a breakdown by brand family [e.g. Brand X, Brand X Menthol, Brand X 100s]. The same information is also required to be reported to the DABT on out-of-state cigarette sales.

Nonsettling-manufacturers will be required to report to the Attorney General's office and to the DABT their initial intention to sell cigarettes in Florida, and then to certify their compliance on the first of each month to both agencies and will be required to pay the applicable fee. The provisions of this legislation are similar to those proposed by the NAAG as Complementary Legislation to the states participating in the MSA.

The Division of Alcoholic Beverages and Tobacco would have the responsibility of capturing this information, collecting the fees, and projecting the fees due for prepayment at the beginning of the effective date. The Attorney General's office is required to generate and provide a list of complying nonsettling-manufacturers each month.

This bill lists several purposes for implementation of this fee:

- to recover health care costs incurred by the state;
- to prevent the undermining of the state's policy of reducing underage smoking;
- to protect funding for programs under the tobacco settlement agreement;
- to recoup settlement payment revenue lost to the state as a result of nonsettling-manufacturer cigarette sales;
- to fund enforcement and administration of nonsettling-manufacturer legislation, and
- to fund other legislatively determined programs.

C. SECTION DIRECTORY:

Section 1. Creates a new s. 210.0205, Florida Statutes which:

Subsection (1).

- expands the definition of a manufacturer to include an entity that is the first importer into the state;
- defines a nonsettling-manufacturer as one who has not entered into the tobacco settlement agreement; this provision excludes those companies that entered into the Florida settlement agreement and members of the Liggett Group.

Subsection (2).

- imposes a fee of 25 mills per cigarette on nonsettling-manufacturer cigarettes;
- provides that the fee shall be adjusted upward annually each January 1st by the greater of 3 percent or the Consumer Price Index;
- requires reports and a prepayment of the fee by the nonsettling-manufacturer to the Division of Alcoholic Beverages and Tobacco;
- requires monthly reports by the stamping wholesalers to include the number of individual nonsettling-manufacturer cigarette packages stamped, by manufacturer and brand family.

Subsection (3).

- requires the nonsettling-manufacturer to report to the Attorney General within 30 days of the effective date of this act specific information pertaining to their company, their brands, and their intention to comply with these obligations;
- provides for reimbursement of overpayments;
- requires the nonsettling-manufacturer to certify to the Attorney General each month that they are in compliance, and requires the Attorney General to make the information available on the Internet;

- designates cigarettes of non-complying manufacturers as non-taxed cigarettes which cannot be stamped.

Subsection (4). Enumerates the purposes of the act as:

- recovering health care costs incurred by the state as a result of sales of nonsettling-manufacturer cigarettes;
- preventing nonsettling cigarettes from undermining the state's policy of reducing underage smoking;
- protecting funding, which is reduced as a result of the growth of nonsettling-manufacturer cigarette sales, for programs funded in whole or in part by payments to the state under the tobacco settlement agreement;
- recouping settlement-payment revenue lost to the state as a result of nonsettling-manufacturer cigarette sales; and
- funding enforcement and administration of the legislation.

Subsection (5).

- requires monthly reports from each wholesaler by manufacturer and brand family and authorizes the division to adopt appropriate rules.

Subsection (6).

- requires a nonsettling-manufacturer to provide specific information to the Attorney General, including the names of the brand families the manufacturer is selling or plans to sell;
- requires the Attorney General to make this information available to the DABT.

Subsection (7).

- requires a certification from each nonsettling-manufacturer to the Attorney General that the manufacturer is in compliance and has paid the fee imposed in this statute. This subsection also requires the Attorney General to develop, maintain, and publish on its Internet website a listing of all nonsettling-manufacturers that have provided certifications. This information shall be made available to the public upon request.

Subsection (8).

- provides that cigarettes of nonsettling-manufacturers upon which the fee has not been paid or upon which the reporting requirements were not made, as unstamped cigarettes and prohibits the application of the Florida excise tax stamp.

Section 2. Creates a new s. 210.0207, Florida Statutes, which:

- requires all packages of cigarettes which are to be sold into other states to be stamped with the other state's tax stamp or the taxes paid to the other state;
- prohibits the stamping of cigarettes for, paying taxes to, or selling cigarettes in another state if the other state prohibits either activity;
- requires anyone who sells cigarettes into another state to report to the Division of Alcoholic Beverages and Tobacco each month the quantity, brand family and style of each brand family, and recipient information for any sales made out of Florida; and
- provides a definition for the term "person."

Section 3. Provides that the bill will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See FISCAL COMMENTS section.

2. Expenditures:

Neither the Division of Alcoholic Beverages and Tobacco [DABT] of the Department of Business and Professional Regulation nor the Office of the Attorney General currently obtains individual sales invoice information by cigarette brand detail. Manufacturers and distributors report the total packages of cigarettes sold by invoice total to the DABT. Information technology adaptations and employees to input and manipulate the information would be needed to capture the information required by the bill for both the DABT and the Office of the Attorney General. As written, the bill does not provide any direct funding to either office.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None anticipated.

2. Expenditures:

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Nonsettling cigarette manufacturers will be adversely impacted by the imposition of a 50 cents fee per package of cigarettes. Likewise, consumers who purchase these brands will be adversely impacted to the extent this fee is passed on to the consumer.

D. FISCAL COMMENTS:

A recent Revenue Estimating Conference estimates the fee imposed by this legislation would generate between \$50 million and \$90 million annually. These are preliminary numbers and the conference plans to discuss this item again after gathering additional data.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Not applicable.

B. RULE-MAKING AUTHORITY:

This bill grants rule-making authority to the DABT in the Department of Business and Professional Regulation regarding monthly reports and enforcement.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

The Division of Alcoholic Beverages and Tobacco has pointed out several drafting issues the most important of which is that the bill does not designate into what trust fund the fees collected by this

legislation are to be deposited, e.g. General Revenue, the Tobacco Settlement Trust Fund, etc. In addition:

- The bill requires the prepayment of the fee at the beginning of selling cigarettes into Florida, either on the effective date of the bill or at a time before beginning to sell into the state. The division is then required to reimburse the nonsettling-manufacturers if actual sales are less than projected sales and to bill the nonsettling-manufacturers if actual sales are greater than projected sales. It is unclear if this creates a prepayment situation each month, or if it creates a month when the fee will not be paid. In any situation, there could be an over/under payment by the nonsettling-manufacturer each month, based on the distributors' actual purchases.
- The bill requires the Attorney General's office to develop, maintain, and publish on its Internet web site a directory listing all nonsettling-manufacturers that have provided current, accurate, and complete certifications to them on the first of each month. The accuracy of the certifications will not be verifiable until the Division of Alcoholic Beverages and Tobacco receives the payments and reports from the nonsettling-manufacturers and reports from the distributors. It is therefore unclear if the certification due to the Attorney General's office on the first of the month is for the previous month's activity, or the previous month's payment.
- The bill requires the capturing of information pertaining to cigarettes sold into other states by packages per brand family and recipient. However, the bill does not require that the information be shared with the receiving states.
- On page 7, line 196, the bill references reporting cigarettes transported in the preceding "calendar quarter" and the bill should read "calendar month."

Additional Background Information

Terms of the MSA require each participating state¹¹ to enact model 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 [NPMs]. This proposed model legislation requires NPM's to pay funds into an escrow account in an amount equal to their 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. This MSA model legislation includes a provision that can substantially reduce escrow funding requirements for NPMs by setting a cap on the total amount to be escrowed in that state. This cap is set at the state's allocable share of total payments that the NPM would have made if it were considered a SPM. According to a 2003 investment advisor article, this provision may result in some NPMs concentrating their sales in a few states, taking advantage of the cap on payments on a state-by-state basis, and thereby eliminating some escrow payments.¹² The article further states that the absence of model statutes in the four initial states could mean that the price advantage for NPMs in Florida, Mississippi and Texas will remain higher than the rest of the country.¹³

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

The Trades, Professions and Regulated Business Subcommittee adopted an amendment by Representative Ryan at the February 17, 2004 meeting. This amendment directed up to \$40 million or 20 percent of the proceeds from the fee imposed by this legislation, whichever is greater, to provide funding for a youth-focused tobacco control program, commonly known as the TRUTH Campaign.

¹¹ Florida, Mississippi, Texas and Minnesota are not a party to the MSA

¹² *Moody's Special Comment*, Moody's Investor Service, July 2003

¹³ *ibid.*