

# 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.)

Prepared By: Commerce and Consumer Services Committee

BILL: SB 2012

SPONSOR: Senator Dockery

SUBJECT: Transportation and Sale of Cigarettes

DATE: April 13, 2005      REVISED: 4/11/05    4/14/05    \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gordon</u>	<u>Cooper</u>	<u>CM</u>	<b>Fav/4 amendments</b>
2.	_____	_____	<u>GE</u>	_____
3.	_____	_____	<u>WM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see last section for Summary of Amendments**

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

**I. Summary:**

This bill imposes a fee of 2 cents per cigarette on the sale of cigarettes of manufacturers who are not parties to any of the Tobacco Settlement agreements (nonsettling manufacturers, or NSMs)<sup>1</sup> in which Florida and other states have participated. This fee is increased annually, and indexes to inflation or 3 percent, whichever is greater. In addition, the bill:

- Outlines the purposes for imposing the fee including, but limited to:
  - Preventing underage smoking due to the availability of cigarettes at discounted prices; and
  - Protecting the state’s tobacco settlement from the growth of NSM sales of tobacco.
- Imposes new reporting requirements on NSMs as well as penalties for non-compliance;
- Requires the Division of Alcoholic Beverages and Tobacco to provide notice to NSMs when their payments are due and post via the Internet a list of complying manufacturers;
- Exempts subsequent participating manufacturers (SPMs) from the fee until the effective date of a credit amendment to the Master Settlement Agreement (MSA) and outlines requirements for such credit;
- Imposes additional requirements and restrictions on the affixing of stamps;

<sup>1</sup> Nonsettling manufacturers are also known as non-participating manufacturers or NPMs.

- Provides criminal and civil penalties for violating the new requirements of the bill;
- Appropriates \$16 million to the Department of Health (DOH) for anti-smoking programs;
- Appropriates \$2 million to DOH to address health care disparities in minority communities; and
- Permits the seizure, confiscation and forfeiture of cigarettes where their handler has violated specific parts of this legislation.

This bill creates the following sections of the Florida Statutes: 210.0205, 210.085, and 210.181.

This bill amends the following sections of the Florida Statutes: 17.41, 210.01, 210.05, 210.06, 210.09, 210.12, 210.15, and 210.18.

This bill reenacts the following sections of the Florida Statutes: 772.102(1)(a) and 895.02(1)(a).

## II. Present Situation:<sup>2</sup>

### Florida's Tobacco Settlements Background

In February 1995, Florida sued several tobacco companies to recover smoking-related health care costs. In March 1996, the state entered into a settlement agreement with Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. This settlement is known as the Attorneys General Settlement Agreement.

In August 1997, the "Big Four" tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company) entered into the landmark \$368.5 billion tobacco settlement agreement with Florida for all past, present and future claims by the state, including reimbursement of Medicaid expenses, fraud, RICO and punitive damages.<sup>3</sup> These cigarette producers held over 97 percent of the tobacco market share in the U.S.<sup>4</sup> The remaining market share was, and remains, held by various, smaller producers who were not named in the state's suit as defendants and therefore, are not a part of the settlement.

### Master Settlement Agreement

Two years after Florida entered into a \$368.5 billion settlement, to be paid over 25 years, with the Big Four Tobacco Companies, those companies, along with Commonwealth Tobacco and Liggett & Myers, settled with 46 states, the District of Columbia, and five U.S. territories in November 1998, by entering into the Master Settlement Agreement (MSA).<sup>5</sup> These settling manufacturers are known as the original participating manufacturers or OPMs (Original Participating Manufacturers).

---

<sup>2</sup> This portion of the analysis is based in significant part on Senate Interim Project Report No. 2005-157 by the Committee on Regulated Industries.

<sup>3</sup> See, s. 215.56005(1)(f), F.S., which defines the tobacco settlement agreement to mean *State v. American Tobacco Co. et al.*, Case no. 95-1466AH (Fla. 15th Cir. Ct. 1996).

<sup>4</sup> The Council of State Governments, *Tobacco Settlement and Declining State Revenues*, Trends Alert (March, 2002), page 5.

<sup>5</sup> Florida, Minnesota, Mississippi, and Texas were not parties to the Master Settlement Agreement, having previously settled with those companies.

The MSA,<sup>6</sup> provided states with funding to prevent smoking and control tobacco sales while imposing restrictions on OPMs such as, for example, requiring the removal of billboard advertising, prohibiting the use of cartoon characters to sell cigarettes, limiting product placement in movies and television, and limiting cigarette sampling. Under the MSA, each state receives payments based on a formula contained in the agreement that takes into account inflation, and volume of cigarette sales in the states. OPM payments under the MSA are also subject to a “previously settled states reduction” based on their payments to the four states, including Florida, which settled prior to 1998 under the Attorneys General Settlement Agreement.

According to a list of participating manufacturers on the National Association of Attorneys General website, over 40 subsequent participating manufacturers (SPMs) have signed the MSA since the 1998 settlement with the OPMs.<sup>7</sup> SPMs are subject to the same restrictions as OPMs, but make lower up-front payments than do OPMs.<sup>8</sup> However, SPMs, which have settled with the MSA states but not with Florida, are not subject to a comparable reduction in their payments under the MSA. OPMs and SPMs are required to make their annual payments into a national escrow account by April 15<sup>th</sup> of each year. The funds are later distributed to the states pursuant to an MSA allocation formula.<sup>9</sup>

Tobacco companies that did not enter into a settlement with any state are known as Non-settling Manufacturers (NSMs). NSMs make no direct payments to any state.

In order to receive its full share of the settlement payments, each state that is a party to the MSA is required by the MSA to enact a law addressing the potential competitive advantage of tobacco companies that were not parties to the settlement. The Florida agreements have no comparable provision. The MSA specified that individual states can avoid a downward adjustment—known as the “non-participating manufacturers” adjustment—to their payments by enacting and enforcing an escrow statute intended to prevent a competitive disadvantage for the participating manufacturers. 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>10</sup>

According to representatives for the National Association of Attorneys General (NAAG), which negotiates the MSA on behalf of the participating states, all MSA participating states have adopted some form of the model escrow statute. The model escrow statute requires that every tobacco company in the state must either participate in the settlement and pay 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 an NSM. Under the model escrow statute, an NSM must pay funds into an escrow account equivalent to the amount the manufacturer would have paid to the state if it had been sued by the state and became a participating manufacturer under the MSA.

---

<sup>6</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. 10, 2005).

<sup>7</sup> *Participating Manufacturers and Brand Name List Under MSA*, 9 March 2005. <http://www.naag.org>. Last visited April 10, 2005.

<sup>8</sup> See, *MSA: Five Years Later*, State Government News, November/December 2003, page 14.

<sup>9</sup> The Council of State Governments, *Tobacco Settlement and Declining State Revenues*, Trends Alert (March, 2002), p. 3.

<sup>10</sup> *Exhibit T of the Master Settlement Agreement*, *supra* note at 279 (page number of the PDF file).

Because Florida is not a party to the MSA, an NSM may sell cigarettes in this state without making either MSA payments or escrow payments.<sup>11</sup>

Escrow payments are collected from the manufacturers who then transfer the cost to the consumers. Escrow payments are intended to limit the cost advantage of the nonsettling manufacturers and thereby potentially discourage underage tobacco use. Escrow payments are held for 25 years, after which time, if the state has not sued to recover Medicaid or other costs associated with cigarette consumption, the state must return the moneys collected. Escrow statutes have the disadvantage that the funds placed in escrow cannot be used to address the health costs associated with tobacco consumption or to address other state revenue needs.

### **Task Force on Tobacco-Settlement Revenue Protection**

In 2000, Florida's Legislature established the Task Force on Tobacco-Settlement Revenue Protection (task force) to determine the need for and evaluate methods for protecting the state's settlement revenue from diminution or significant loss.<sup>12</sup> The task force submitted its findings and recommendations in March, 2001, and found that Florida had received annual payments totaling \$2.4 billion since September 1997. The task force expressed concern about the tobacco companies' willingness and ability to continue to make payment based on declining payments due to a decrease in the number of smokers and a shift in market share among cigarette manufacturers which had already necessitated revenue adjustments.

The Task Force identified two major categories of uncertainty underlying these payments:

1. No payments due to bankruptcy or some other catastrophic financial event as may be caused by a huge judgment; and
2. Reduced payments owing to adjustments allowed under the settlement agreement.

Florida's payments under the settlement agreement are based on domestic sales of cigarettes by the participating tobacco manufacturers. The task force recommended several options for protecting the tobacco settlement revenues including the imposition of a licensing fee or equitable assessment on non-participating tobacco product manufacturers or NSMs.

### **Non-Settling Manufacturers (also known as Non-Participating Manufacturers, or NPMs)**

Non-settling manufacturers (NSMs), are mostly small, domestic tobacco companies and foreign tobacco manufacturers that market their products state by state or regionally. Because they are not parties to the MSA or have not otherwise settled with any state, including Florida, they are not required to make the annual payments required of the settling-manufacturers. They are also

---

<sup>11</sup> New York and Virginia courts have heard challenges to their NPM statutes. In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), NPM's challenged an escrow statute on Commerce Clause, Equal Protection and Anti-Sherman Act grounds and a contraband statute based on affixing the stamp tax to cigarette packs. The New York court held that NPMs had a cause of action to challenge the statutes on the basis that the escrow and contraband statutes may, based on the facts alleged in the complaint, violate the Sherman Anti-Trust Act because they effectively relieved the settling manufacturers from price competition. The court did not find a commerce clause or equal protection basis for the NPMs claims. In *Star Scientific, Inc. v. Beals*, 278 F.3d 339 (4<sup>th</sup> Cir. 2002), a U.S. District Court of Appeals upheld Virginia's escrow statute against a constitutional challenge by an NPM on due process, commerce clause and equal protection grounds.

<sup>12</sup> See, ch. 2000-128, s.5, L.O.F

not subject to the advertising and marketing restrictions that the settling-manufacturers are subject to. Florida's Division of Alcoholic Beverages and Tobacco (the division) within the Department of Business and Professional Regulation (DBPR) estimates that there are approximately 40 NSMs selling cigarettes in Florida with estimated sales to various distributors in Florida in excess of 209,362,000 packs of cigarettes.

The states that entered into settlement agreements with the major tobacco companies are concerned about the effect on payments under the agreements of the sale of deep-discounted cigarettes from non-settling-manufacturers. Florida's settlement agreements and the MSA consider OPMs and SPMs market share in determining payments; lower prices of NSM products allow for a reduction in the total payments that states receive under the agreements. A reduction in market share has been observed in the 46 states that are a party to the MSA.<sup>13</sup> In response to these concerns, for instance, Minnesota, a non-MSA state like Florida, imposed a fee of \$.35 per pack of 20 cigarettes in 2003 on NSM cigarettes.<sup>14</sup> When the fee was challenged by NSMs, a Minnesota appellate court upheld the fee as constitutional finding the distinction between settling and non-settling manufacturers tied to the legitimate state interests of subsidizing costs of smoking to the state and raising cigarette prices to discourage youth smoking.

### **Senate Interim Project Report No. 2005-157: Florida Tobacco Settlement and Nonsettling Manufacturers**

The Florida Senate recently issued a report authored by the Committee on Regulated Industries that directly addresses the aforementioned settlement agreements and the parties affected. In addition to detailing the history of Florida's tobacco settlements, the report notes that the market share of the settling manufacturers has been decreasing relative to the market share of the cigarette manufacturers that have not settled with Florida or the MSA states. The report indicates this loss in market share may adversely affect Florida's revenue under the tobacco settlement agreements. The report made recommendations to the Legislature, including, but not limited to, the following:

- Impose a tax or fee on cigarettes sold in Florida that are manufactured by cigarette manufacturers that are not making tobacco settlement payments to Florida if the Legislature finds that the non-settling manufacturers are not paying their equitable share of the costs associated with tobacco use and are causing an erosion of the market share for Florida's settling manufacturers to the detriment of Florida's tobacco settlement payments. The fee or tax should reflect the settling manufacturers per cigarette cost under the Florida tobacco settlement in order to offset any cost advantage by cigarette manufacturers that are not making tobacco settlement payments to Florida.

---

<sup>13</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. See U.S. General Accounting Office, *Tobacco Settlement: States' Use of Master Settlement Agreement Payment* 8 (GAO-01-851, June 2001). See also *Issues Affecting MSA Payment, Issue Brief Summary* from the National Conference of State Legislatures, dated October 1, 2003, at 11 (page number of the PDF file).

<sup>14</sup> Section 297F.24, Minnesota Statutes (2003). A trial court decision in Minnesota held that this statute is not unconstitutional in an analysis that analogized the state's tax to Virginia's escrow statute. See, *Council of Independent Tobacco Manufacturers v. Minnesota*, Minn. 2<sup>nd</sup> Jud. Dist., File No. C1-03-7120, Nov. 18, 2001. (Unreported decision.)

- Provide for collection of any fee or tax imposed from wholesalers or stamping agents in a similar manner to the collection of excise taxes.
- Require that manufacturers and importers be required to identify the quantity of cigarettes shipped or sold, or cause to be shipped or sold, and to whom the cigarettes were shipped or sold, or cause to be shipped or sold.
- Require that all manufacturers and importers file a monthly report to the division if they ship or sell, or cause to be shipped or sold, cigarettes into Florida for sale to consumers in this state.

The report also discussed several equity issues that have arisen as a result of the tobacco settlements including escrow statutes as well as payments made under the MSA versus those of the four states not part of the MSA.

### **Equitable Assessment Fees**

Florida attempted to enact a fee on NSM cigarettes in 2001 with CS/CS/SB 2214. That bill would have imposed a 36 cent surcharge fee on all cigarettes and would have provided a credit to the cigarettes from settling manufacturers and from any manufacturer and importer who paid the fee and entered into an agreement with the state for direct mail sales. This fee would have provided a mechanism for encouraging NSMs to settle with the state to limit the advertising and marketing of cigarettes in a manner comparable to the restrictions imposed on the settling manufacturers under the tobacco settlements. In 2003, the Legislature introduced SB 2112 which would have imposed the fee directly on the NSM cigarettes without a credit. Other MSA states have attempted to enact “equitable assessment fees” on NSM cigarettes. In 2003, Michigan imposed a fee of 17.5 mills per cigarette on NSM cigarettes sold in the state. In 2004, Utah passed a law imposing the same fee.

NSMs argue such fees are inequitable for several reasons including, but not limited to, the following:

- Payments made by settling manufacturers are the consequence of their alleged denial and concealment of the deadly and addictive nature of cigarettes. Non-settling manufacturers were never sued for similar acts and, therefore, they should not be obligated to pay the same penalty as the settling manufacturers and settling manufacturers should not have to escape the associated penalty of higher prices for their products.
- NSMs should not be required to pay a fee or tax for their refusal to enter into a settlement with Florida.
- If a fee were imposed, it would not equalize the market because the settling manufacturers receive a credit in their MSA payments for their Florida settlement payments.
- NSMs that have entered the MSA assert that a Florida fee or tax would disproportionately increase their price-per-carton because the prices for their products already reflect either MSA payments or escrow payments to the other states.

One recent development may weigh against these arguments. Vibo Corporation, doing business as General Tobacco, a Miami based importer became an SPM in August 2004 under the MSA.

General Tobacco's settlement provides a \$.73 credit for each dollar it pays to the MSA. The Senate Interim project noted that, according to representatives for NAAG, the MSA states are prepared to give the same credit to any tobacco company that has settled under the MSA or wishes to enter into the agreement. There is no intent to provide a similar credit to NPMs for their escrow payments to the MSA-states.

Representatives for the settling manufacturers have indicated that, in order to be equitable, a fee imposed on NSM cigarettes would have to approximate the settling manufacturers' per-cigarette settlement costs. The settling manufacturers' projected adjusted tobacco settlement payment to Florida for 2004 was \$372.9 billion. This translates to a Florida settlement cost of approximately two cents (or 20 mills) per cigarette or 40 cents per cigarette package sold in this state.<sup>15</sup> Accordingly, if the Legislature opts to enact a fee or tax on NSM cigarettes, a similar per cigarette fee is suggested.

According to the Senate Interim Project, NAAG representatives have recommended that Florida collect the fee at the wholesale level as is done with excise taxes. However, representatives for wholesalers have indicated that requiring them to collect the fee would impose additional regulation and administrative costs for the wholesalers that would increase their work and expenses. For example, currently s. 210.05(3), F.S., authorizes stamping agents and wholesalers to collect 2 percent of the par value of the amount of stamps purchased during the fiscal year; but, the discount is calculated on 24 cents per pack of cigarettes, which is less than the 33.9 cent excise tax rate for a standard 20-cigarette pack. Wholesalers indicate that this compensation is insufficient for collecting the tax—an additional requirement for collection and administration of a fee on NSM cigarettes would impose an additional uncompensated expense on the industry.

### **Cigarette Excise Tax Revenue**

The Division of Alcoholic Beverages and Tobacco (division) in the Department of Business and Professional Regulation (department) oversees the collection of excise taxes from the sale of cigarettes and other tobacco products. Section 210.15, F.S., requires every person, firm or corporation desiring to deal in cigarettes in Florida as a distributing agent, wholesale dealer, or exporter to apply for a cigarette permit. The current excise tax in Florida ranges from 16.9 cents per package to 67.8 cents per package, depending on the number of cigarettes per package.<sup>16</sup> The current excise tax is 33.9 cents per standard 20-cigarette pack cigarettes.<sup>17</sup>

A "distributing agent" is any person, firm, or corporation who receives cigarettes and distributes them to wholesalers or other distributing agents inside or outside the state.<sup>18</sup> An "agent" is any person authorized by the division to purchase and affix adhesive or meter stamps under part I of ch. 510, F.S.<sup>19</sup> A "wholesale dealer" sells cigarettes to retail dealers for resale only, or operates

---

<sup>15</sup> According to the Senate Interim Project, these calculations are based on the estimates of the Revenue Estimating Conference, Tobacco Settlement Payments Forecast, February 12, 2004, and do not include shipment by Liggett since it made no settlement payments during that year.

<sup>16</sup> See, s. 210.02(3) and (4), F.S.

<sup>17</sup> Section 210.02(3)(b), F.S.

<sup>18</sup> Section 210.01(14), F.S.

<sup>19</sup> Section 210.01(9), F.S.

cigarette vending machines in more than one place of business.<sup>20</sup> An “exporter” is a person who transports tax-exempt cigarettes into Florida under bond for delivery beyond state borders.<sup>21</sup>

Section 210.06, F.S., requires that every dealer affix a tax stamp as evidence that the excise tax has been paid before the cigarettes can be offered for sale in this state. Sections 210.02 and 210.04, F.S., provide that excise taxes must be paid by the wholesale dealer upon the first sale or transaction within this state whether or not such sale or transfer is to the ultimate purchaser or consumer. Because wholesalers may purchase cigarettes from other wholesalers, only the first sale is taxed. Distributing agents, acting as agents to the manufacturers, are not required to pay taxes for the distribution of cigarettes to wholesalers. Collected excise taxes are paid to the division. Stamps representing various denominations of tax are purchased in bulk by wholesale dealers and are affixed to packages as proof of payment. Cigarettes that are not properly stamped may not be sold in Florida. The amount of the tax then becomes a part of the price of the cigarettes to be paid by the purchaser or consumer.

According to the division, it received \$417,585,728 in cigarette excise taxes from stamping distributors for FY 03-04.

## **Cigarette Reporting Requirements**

### ***A. Manufacturers***

Under current law, cigarette manufacturers report information pertaining to the tobacco settlement agreement to the Attorney General’s Office rather than to the division. Section 210.09(2), F.S., requires a monthly report by “any distributing agent, wholesale dealer, retail dealer, common carrier, or any other person handling, transporting or possessing cigarettes for sale or distribution within the state.” All manufacturers must report to the division the amount of cigarettes, by invoice total, shipped to Florida cigarette stamping wholesalers, i.e., distributors. However, according to the division, not all manufacturers submit these reports.

Although most out-of-state manufacturers report their deliveries in Florida voluntarily, Florida law does not require that manufacturers report their in-state sales to the division. According to the division, a requirement that manufacturers must report monthly to the division all cigarettes sold in Florida, would permit the division to know that unlicensed or non-reporting entities are selling cigarettes to the retailers in Florida and not reporting to the division. According to the division, this information would allow the division to cross-reference and identify distributors who are not licensed or who do not report and pay taxes to the state. The untaxed cigarettes sales, i.e., less expensive cigarettes, may adversely affect the market share of the settling manufacturers and, thereby, adversely affect Florida’s share of the tobacco settlement.

### ***B. Importers***

Florida law does not provide for the licensure of cigarette importers nor defines the term “importer” in the context of cigarettes or other tobacco products importers. The division relies

---

<sup>20</sup> Section 210.01(6), F.S.

<sup>21</sup> Section 210.01(17), F.S.



on the definition for importers in s. 561.14(4), F.S., which establishes a license classification for importers of alcoholic beverages. Section 210.185, F.S., regulates the importation of cigarettes into this state by prohibiting the acquiring, holding, owning, possessing, transporting or the importation, for sale or distribution in this state of cigarettes that the manufacturer did not intend to sell or distribute in the United States. This section prohibits the importation of “gray market” cigarettes or diverted tobacco products which are cigarettes that are domestically manufactured then obtained at reduced prices from international markets and imported for domestic sale.

Like cigarette manufacturers, the division relies on s. 201.09(2), F.S., to report the amount of cigarettes shipped to Florida cigarette stamping agents. The division indicates that all importers may not be reporting to the division.

### ***C. Wholesalers and Distributing Agents***

Cigarette distributing agents file a monthly report with the division detailing the number of cigarettes shipped through their warehouse for the preceding month, including all cigarettes received from manufacturers and delivered to each stamping agent. Stamping agents file a monthly report listing all stamp purchases and usage for the preceding month, including ending and beginning inventories. Wholesale distributors that are not stamping agents file a similar report of all purchases and sales inside and outside the state for the preceding month, including ending and beginning inventories. Sales of cigarettes out-of-state are reported on a wholesale dealer’s monthly report as exempt from the 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. There are no reporting requirements for retailers.

### **Contraband Cigarettes**

The sale of contraband cigarettes, which includes untaxed and counterfeit cigarettes, deprives the state of excise and sales tax revenues, and it may supplant legal sales, thereby reducing the state’s tobacco settlement payments. The scope of counterfeit or untaxed cigarette sales in Florida is also unknown. The Florida Department of Law Enforcement (FDLE) and the division do not maintain records of counterfeit cigarette seizures or related arrests. Section 219.18(8), F.S., requires law enforcement officers to report to the division the seizure of any unstamped cigarettes in order to keep the state informed about the size and magnitude of the illicit cigarette business.

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

**Section 1** amends s. 210.01, F.S., to among other things, specifically exclude a manufacturer, export warehouse proprietor or importer holding a valid permit under 26 U.S. C. s. 5712, from the definition of wholesale dealer if that person distributes cigarettes in Florida only to dealers who are agents and hold valid and current permits under s. 210.15, F.S.

This section amends the “wholesale dealer” and “retail dealer” definitions to include those located inside or outside of Florida.

This section adds definitions of the terms, “stamp(s),” “importer,” “counterfeit cigarettes” and “brand family” to the statute.

**Section 2** creates s. 210.0205, F.S., to impose a fee on cigarettes produced by nonsettling-manufacturers.

Subsection (1) defines a nonsettling manufacturer to mean:

...any tobacco product manufacturer that has not entered into the tobacco settlement agreement defined in s. 215.56005(1)(f) or the Attorneys General Settlement Agreement dated March 15, 1996, in the State of Florida, et al. v. American Tobacco Company, et al., Fifteenth Judicial Circuit, Case No. 95-1466.

Subsection (2) imposes an additional fee of 20 mills per cigarette on the sale, receipt, purchase, possession, consumption, handling, distribution, and use in this state of cigarettes from a nonsettling-manufacturer. One mill equals 1/10 of a cent; therefore, the fee imposed by this subsection is \$.020 per cigarette, \$.40 per package of 20 cigarettes, or \$4.00 a carton. This fee is in addition to any other fee or tax imposed on cigarettes. The fee amount must be adjusted upward annually by the division each January 1 by the greater of 3 percent or the Consumer Price Index.

Subsection (3) provides the procedure for collecting the fee. The amount of fee collected would be based on the information collected under the reporting requirements in subsection (6). This subsection requires that, no later than the 15th day of each month, the division must mail to each nonsettling-manufacturer a notice of the fee due based on sales in the preceding month. The nonsettling-manufacturer is required to ensure that the division has received the required fee no later than the last day of the month in which the notice is mailed. This subsection provides that, except as provided in this section, the fee shall be imposed, collected, paid, administered, and enforced in the same manner as the tax on cigarettes imposed by s. 210.02, F.S. Unless otherwise provided in this section, proceeds from the fee must be deposited into the Tobacco Settlement Clearing Trust Fund.

Subsection (4) of s. 210.0205, F.S., requires a nonsettling-manufacturer that is selling cigarettes in the state on July 1, 2005, to provide the information described in subsection (7) and (8) of this section, and to pay the fee imposed by August 1, 2005. If the nonsettling-manufacturer is not selling cigarettes in this state on the effective date of this bill, the nonsettling-manufacturer must prepay the required fee before commencing any sales in this state. This subsection provides that the prepayment amount shall be determined by 20 mills multiplied by the number of cigarettes the division reasonably projects that the nonsettling-manufacturer must sell in this state in the first calendar month or \$50,000, whichever is greater. This subsection authorizes the division to require a nonsettling-manufacturer to provide whatever information necessary to make this determination. It also requires that the division establish procedures for reimbursing a nonsettling-manufacturer if the actual sales are less than the sales projected. Moreover, this subsection provides that the term “cigarettes” as used in that section only refers to non-settling manufacturer cigarettes.

Subsection (5) of s. 210.0205, F.S., states the legislative purposes of the fee including:

- Preventing nonsettling-manufacturers from undermining the state policy of reducing underage smoking by offering substantially lower priced cigarettes;
- Protecting the tobacco settlement agreement as defined in s. 215.56005(1)(f), F.S., and funding for state programs supported by money derived from the settlement agreement;
- Recouping settlement revenue lost to the state as a result of nonsettling-manufacturers cigarette sales;
- Funding enforcement and administration of nonsettling –manufacturer legislation and the fee imposed by this section; and
- Funding such other purposes as the Legislature deems necessary.

This section requires that \$16 million of the fee proceeds must be provided annually in quarterly disbursements to the Department of Health (DOH) to allow that agency to implement statewide anti-smoking marketing, educational and advertising campaigns to reduce tobacco use. DOH must evaluate the performance of its program and may contract out for any of the activities specified in this legislation.

Subsection (6) requires each agent and wholesaler to make monthly reports to the division. The reports must state the number and denominations of tax stamps or insignia affixed to individual packages of nonsettling-manufacturer cigarettes sold or purchased in this state. The reports must also state the number of individual packages of nonsettling-manufacturer cigarettes handled or distributed in this state for sale in another state, commonwealth, or territory of the United States, and must state, by manufacturer and brand family, the number sold for each place of business in the month preceding the month in which the report is made.

This section authorizes the division to adopt rules to require any agent or wholesaler, wholesale dealer or nonsettling-manufacturer to provide any information necessary to determine the required fee in its monthly report.

Subsection (7) requires a nonsettling-manufacturer to provide the following information on a form prescribed by the division before selling cigarettes in this state, or if selling cigarettes in this state on the effective date of this bill, within 30 days of the effective date:

- Its name, address and telephone number;
- The date it began, or intends to begin, selling, cigarettes in this state;
- The name of cigarette brand families it is selling or will be selling in this state;
- A statement of intention to comply with this legislation; and
- The name, address, telephone number, and signature of an officer of the nonsettling-manufacturer attesting to the information provided pursuant to this subsection.

Subsection (8) requires each nonsettling-manufacturer to certify to the division on the first day of each month that it is in compliance with this section and has paid the required fee. This section requires the division to develop, maintain, and publish on its internet website a directory listing all nonsettling-manufacturers that have provided current, accurate, and complete certifications. A copy of this list must be provided to any person upon request.

Subsection (9) provides that cigarettes of a nonsettling-manufacturer that has not paid the required fee or not complied with the aforementioned reporting requirement section shall be treated as cigarettes for which the tax imposed by s. 210.02, F.S., has not been paid. If a person receives notice that the nonsettling-manufacturer of such cigarettes has not paid in full the fee required by this section or if the nonsettling-manufacturer is not listed in the division's internet directory described in subsection (8), a person may not affix stamps to the subject cigarettes or otherwise purchase or sell such cigarettes.

Subsection (10) excludes subsequent participating manufactures (SPM) from the imposition of the fee described in subsection (4) until the effective date of a credit amendment to the MSA. This section provides that an amendment to the MSA is considered a "credit amendment" if it makes available to each SPM, other than one that has an agreement as of July 1, 2005, each year a credit against its payment obligations under the MSA which is equal to or greater than the product of the total number of individual cigarettes sold by an SPM during the year in question multiplied by at least 73.2 percent of the per-cigarette fee provided in section (4). The credit described is not conditioned on that SPM forfeiting in whole or in part any other benefits or credits provided for in the MSA.

**Section 3** amends s. 210.05, F.S., by adding subsection (6). This subsection prohibits the transport of cigarette packages from this state for sale in another state without first affixing the tax stamp or paying the excise tax required by the state into which the cigarettes are to be sold. Moreover, the subsection prohibits the stamping of cigarettes for, paying taxes to, or selling cigarettes in another state if the other state prohibits such action. However, paragraph (c) of subsection (6) states these requirements do not apply to cigarettes emanating from manufacturers or importers either defined as participating manufacturers under section II(jj)<sup>22</sup> of the MSA or in full compliance with the qualifying statute as defined in section IX(d)(2)(E)<sup>23</sup> of the MSA. A person asserting an exemption under this paragraph must file reports as required in the subsection (6)(d) as described below.

Anyone who sells cigarettes in another state must, by the 10th day of each month, report to the division the quantity, brand information, and recipient name and address for any sales made out of this state. This section also requires that such person certify under oath and subject to penalties of perjury that:

- The required stamps have been affixed in accordance with the statute pertaining to cigarettes sold to another state that requires such a tax and were not affixed to cigarettes going to states where no such stamp or excise tax is required; or
- Such person satisfies the MSA exemption as above-described.

This section defines the term "person" and clarifies that the term does not include any common or contract carrier or public warehouse that is not owned, in whole or in part, directly or indirectly by such person.

---

<sup>22</sup> This portion of the MSA outlines the definition of a participating manufacturer.

<sup>23</sup> This portion of the MSA applies to the model NSM statute.

This section also states that it does not authorize the possession or transportation of cigarettes by any person not so authorized under this part.

**Section 4** amends s. 210.06, F.S., to specify the procedure for affixing stamps to cigarettes.

Subsection (1) is amended to clarify the time when stamps are to be affixed to a product. The bill provides that stamps must be affixed to a package or container of cigarettes within 10 days after receipt of the product. This section also provides that dealers outside the state will affix stamps before the shipment of cigarettes into the state. Under this subsection, a tax stamp must be applied to all cigarette packages intended for sale or distribution to consumers that are subject to taxation under s. 210.02, F.S.; a stamp may not be applied to cigarettes exempt under 26 U.S. C. s. 5704; and dealers may apply stamps only to cigarette packages received directly from manufacturers or importers possessing a valid and current 26 U.S.C. s. 5712 permit.

This section adds subsection (5) to provide guidance in the event a dealer receives unstamped cigarette packages from a manufacturer or importer. In such case, the dealer may not hold or possess the product. According to this provision, the dealer may set aside without application of stamps, only such part of its stock it identifies for sale or distribution outside of the state. Unstamped products must be stored separately and may not be transferred by a dealer to another facility of the dealer within this state or to another person within this state.

**Section 5** creates s. 210.085, F.S., to limit transactions. A manufacturer, importer, or distributing agent may only sell or distribute cigarettes to a person located or doing business in this state if such person is a dealer holding a valid and current permit pursuant to s. 210.15, F.S.

The section also imposes restrictions on dealers. Dealers may only sell or distribute cigarettes under this provision to a person located or doing business in this state only if such person holds a valid and current permit under s. 569.003, F.S. Moreover, dealers may obtain cigarettes only from manufacturers or importers who hold a valid and current permit under 26 U.S.C. 5712, or from a distributing agent or dealer holding a valid and current permit under s. 210.15, F.S. Retail dealers are further restricted to obtaining cigarettes from manufacturers, importers or dealers holding a valid, current permit under s. 210.15.

**Section 6** amends subsection (1) of s. 210.09, F.S., to add two additional paragraphs related to shipments of cigarettes.

Paragraph (b) requires any person who ships unstamped cigarette packages into the state, other than a manufacturer, importer, or dealer holding a valid and current permit under s. 210.15, F.S., to first file a notice of shipment with the division. This provision does not apply to a common or contract carrier transporting cigarettes through this state to another location outside this state under a proper bill of lading or freight bill stating quantity, source and destination of product.

Paragraph (c) authorizes a law enforcement officer, any division or other duly authorized agency that knows or has reason to believe that a vehicle is transporting cigarettes in violation of this part, to stop such vehicle and inspect it for contraband cigarettes.

**Section 7** amends s. 210.12, F.S., governing seizures and forfeiture proceedings.

This section authorizes the division to seize, confiscate, and forfeit any cigarettes that are held in violation of this bill. It deletes the restriction to seize, confiscate and forfeit cigarettes “for the use and benefit of the state.” Instead, all cigarettes must now be destroyed. It also specifies that vending machines or other cigarette receptacle “upon which taxes have not been paid” may also be subject to such seizure, confiscation, or forfeiture.

Subsection (2) is created to subject to forfeiture to the state the fixtures, equipment and other materials and personal property on the premises of a dealer or retail dealer who fails to keep proper records, makes false reports, refuses to pay taxes, or otherwise attempts to evade the requirements of this legislation.

**Section 8** amends s. 210.15, F.S., regarding permits.

This section expands the list of entities that must have permits from distributing agent, wholesale dealer or exporter to include manufacturer, importer, exporter, distributing agent, or wholesale dealer of cigarettes. The provision adds the requirement that each entity file an application with the division for each of its places of businesses located in the state or, where none exists in the state, wherever the principal place of business may be.

Currently a permit may not be issued if the applicant has been convicted within the past 5 years of any offense against the cigarette laws of Florida. This restriction is extended to the applicant, its officer or any person or persons owning directly or indirectly, in the aggregate, more than 10 percent of the ownership interests of the applicant. Three new conditions are added including:

- Owing \$500 or more in delinquent cigarette taxes;
- Having a cigarette importer, retail dealer or dealer permit revoked by the division within the preceding 2 years; and
- Having a conviction of selling stolen or counterfeit cigarettes, receiving stolen cigarettes, or being involved in the counterfeiting of cigarettes.

**Section 9** amends s. 210.18, F.S., regarding penalties for tax evasion.

This section deletes the second degree misdemeanor penalty for any person, firm or corporation that “possesses, removes, deposits, conceals or aids in the possessing, removing, depositing, or concealing” any unstamped cigarettes. Such possession is addressed in other sections of the bill. Section 4 of the bill permits the setting aside of such unstamped cigarettes and explicitly prohibits the intra-state transfer of such cigarettes. Section 5 of the bill permits shipping unstamped cigarettes into Florida and to someone other than a manufacturer, importer, or dealer holding a current and valid permit only after a notice has been filed with the division.

This section adds “or with the intent to defraud the state, fails to comply with any other requirement of this chapter commits” to the criteria for imposing the third degree felony penalty for fraudulently altering tax stamps or related meter machines in subsection (3).

This section also adds seizure of the product and related machinery to the penalties for sale or possession of counterfeit cigarettes and makes such violation punishable as follows:

- Quantity of less than 2 cartons of cigarettes or an equal amount of other cigarettes:
  - First violation: Punishable by a fine not to exceed \$1,000 or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed 5 years, or both;
  - Subsequent violation: A fine not to exceed \$5,000 or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed 5 years, or both, as well as the revocation of the perpetrator's permit.
  
- Quantity of more than 2 cartons of cigarettes or an equal amount of other cigarettes:
  - First violation: Punishable by a fine not to exceed \$2000 or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed 5 years, or both;
  - Subsequent violation: A fine not to exceed \$50,000 or five times the retail value of the cigarettes involved, whichever is greater, or imprisonment not to exceed 5 years, or both, as well as the revocation of the perpetrator's permit.

The section provides that cigarettes seized under this provision will be destroyed.

**Section 10** creates s. 210.181, F.S., which provides civil penalties.

Under this section, penalties for knowingly omitting, neglecting or refusing to comply with the duties of this legislation or otherwise violating the prohibitions in this act will be subject to an additional penalty of \$1,000 or five times the retail value of the cigarettes involved, whichever is greater. This section further provides that a person who fails to pay the tax imposed by this legislation will also be liable for a penalty of five times the unpaid tax due.

**Section 11** republishes s. 772.102, F.S., which outlines definitions of terms related to civil remedies for criminal practices to incorporate the amendment made to s. 210.18, F.S., which is also included under the definition of "criminal activity" in ch. 772, F.S.

**Section 12** republishes s. 895.02, F.S., providing definitions under Florida's RICO Act to incorporate the amendment made to s. 210.18, F.S., which is included under the definitions of racketeering activity.

**Section 13** appropriates \$480,028 from the Alcoholic Beverage and Tobacco Trust Fund and authorizes the creation of 4 full-time equivalent positions to be established by DBPR for the purpose of conducting regulatory activities relates to the transportation and sale of cigarettes.

**Section 14** appropriates \$2 million to DOH to address health care disparities in the minority community.

**Section 15** of the bill amends s. 17.41, F.S., entitled, "Department of Financial Services Tobacco Settlement Clearing Trust Fund," to add fees collected from nonsettling-manufacturers under this legislation to the trust fund.

**Section 16** provides this act will take effect July 1, 2005.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

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

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

Congress derives its power to regulate commerce among the states from the Commerce Clause.<sup>24</sup> The clause has a dormant aspect that denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.<sup>25</sup> The Dormant Commerce Clause prohibits economic protectionism, i.e., state regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.<sup>26</sup> The standard for evaluating whether a state action is an unconstitutional burden on interstate commerce is whether the effects of the regulation on interstate commerce are only incidental and the burden imposed does not exceed the public benefit.<sup>27</sup>

This constitutional provision may be violated if courts determine that the bill discriminates in purpose or in effect against cigarettes produced by non-settling manufacturers.

The bill also raises equal protection concerns.<sup>28</sup> The equal protection clause of the U.S. Constitution requires that all persons and entities be treated similarly under similar circumstances and conditions. Florida's Supreme Court has stated, in reviewing a taxing statute, "A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy."<sup>29</sup> Differential treatment of classes of persons or entities must be rationally related to furthering a legitimate state interest.<sup>30</sup> Therefore, the relevant inquiry is whether the classifications under the fee scheme, i.e., non-settling manufacturers and settling-manufacturers, are reasonably related to the state's interest in decreasing tobacco consumption.

<sup>24</sup> See, Art. I, s. 8, cl. 3, U.S. Constitution.

<sup>25</sup> See, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994).

<sup>26</sup> See, *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 946 U.S. 18 (Fla. 1990).

<sup>27</sup> See, *Pike v. Bruce, Inc.* 397 U.S. 137 (1970).

<sup>28</sup> U.S. Constitution, Amendment XIV: "No State...shall deny to any person within its jurisdiction the equal protection of any laws."

<sup>29</sup> See, *Eastern Air Lines v. Dept. of Revenue*, 455 So.2d 311 (Fla. 1984).

<sup>30</sup> See, *Smith v. Florida Dept. of Revenue*, 512 So.2d 1008 (Fla. 1st DCA 1987).



Recent federal court decisions relating to the constitutionality of state escrow statutes and the related regulations for MSA-states, which may be analogous to the fee and regulatory scheme in this bill, have held that such statutes are not unconstitutional on equal protection and commerce clause grounds.<sup>31</sup> According to Senate Interim Project No. 2005-157, a Minnesota court has upheld a statute seeking to impose taxes on NPM and SPM cigarettes. In an analysis that analogized the state's tax to Virginia's escrow statute, a state district court held that the tax imposed on SPMs and NPMs did not violate the equal protection and commerce clauses of the U.S. Constitution.<sup>32</sup>

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

The Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation (DBPR) projects revenues generated under this bill will be \$76,228,500, \$78,515,360, and \$80,870,820 in FY 2005-06, FY 2006-07, and FY 2007-08, respectively.

### B. Private Sector Impact:

This bill would cause the nonsettling-manufacturers to pay the additional fee imposed by this bill of \$.40 per package of twenty cigarettes.

### C. Government Sector Impact:

#### **Division of Alcoholic Beverages and Tobacco**

The division will be required to capture the manufacturers' sales to distributors each month, bill the manufacturers for the calculated fees, and then collect the fees from the manufacturers. The division states it will need one additional Revenue Specialist II and two Tax Auditor II positions to handle the workload associated with these new duties.

Information Technology will need one Systems Programming Administrator to provide maintenance and support of a new computer application, record package sales and administer the billing process. This position will also provide continuing support for the electronic reporting of sales invoices. In addition, technology will need \$200,000 in nonrecurring funds to develop, test and implement the new computer application.

The division states one Senior Attorney and one Administrative Assistant II will be needed in the Office of the General Counsel. In addition, the division states the Division of Service Operations will also need two Regulatory Specialist II positions to perform related services required in the bill.

---

<sup>31</sup> See, *Star Scientific, Inc. and Freedom Holdings, Inc.*, note 11, *supra*.

<sup>32</sup> See, *Council of Independent Tobacco Manufacturers v. Minnesota*, Minn. 2<sup>nd</sup> Jud. Dist., File No. C1-03-7120, Nov. 18, 2001. (Unreported decision.) Minnesota, like Florida, is a non-MSA state.

The Department of Business and Professional Regulations projects that, in order to provide the services required by this bill, it will have to create 12 new positions. Projected expenditures will be \$1,000,573 for FY 2005-2006, \$754,055 for FY 2006-2007 and \$768,096 for FY 2007-2008. This bill appropriates \$480,028 in funding for four new positions which will result in deficits of \$520,545, \$274,027 and \$288,068 for the next three fiscal years.

### **Department of Health**

DOH currently receives \$1 million in Tobacco Settlement Trust Funds for tobacco prevention activities. These funds are used to support the local activities of Students Working Against Tobacco (SWAT) in middle and high schools, and for DOH to administratively support these activities. SWAT youth are engaged in countering the marketing strategies of tobacco companies to discourage youth from using tobacco products. DOH has five regional tobacco coordinators who support SWAT activities at the local level. Currently, there are approximately 5,000 SWAT youth. The additional \$16 million in funding under Section 2 would allow DOH to create a comprehensive youth tobacco prevention program. However, according to DOH, a total of six full-time FTEs and two half-time FTEs are needed to implement activities funded by the \$16 million appropriation. Total staff expenses will be \$405,459 in the first year and \$456,273 each year thereafter.

Section 14 appropriates \$2 million to DOH to address health care disparities in the minority community. DOH currently administers the "Closing the Gap" program pursuant to ss. 381.7351-381.7356, F.S. This program provides grant funding for local projects designed to reduce racial and ethnic disparities in seven areas: maternal and infant mortality; cancer; HIV/AIDS; cardiovascular disease; diabetes; adult and child immunizations; and oral health. Current funding is approximately \$5.6 million. DOH states additional funding would allow DOH to further educate, screen and refer individuals under the Closing the Gap program. According to DOH, the funds would be allocated through the "Closing the Gap" grant process in ss. 381.7351-381.7356, F.S. The grant process involves soliciting requests for proposals and requires local matching funds in the amount of \$1 for each \$3 in grant funds.

### **VI. Technical Deficiencies:**

The bill uses the term "nonsettling" throughout. The MSA uses the term "non-settling." Technical amendments may be necessary to conform the use of the word in this bill to the MSA.

### **VII. Related Issues:**

None.

## VIII. Summary of Amendments:

**Barcode 985672 by Commerce and Consumer Services:**

This amendment corrects the spelling of the word “manufacturer.”

**Barcode 394792 by Commerce and Consumer Services:**

This amendment requires DOH to allocate up to \$25 million dollars of any fee proceeds remaining to the Florida Cancer Council for the purposes described in s. 381.921.

**Barcode 591442 by Commerce and Consumer Services:**

This amendment corrects the spelling of the word “determining.”

**Barcode 493452 by Commerce and Consumer Services:**

This amendment corrects the spelling of the word “nonsettling.”

---

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

---