

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 366

INTRODUCER: Regulated Industries Committee and Senator Wise

SUBJECT: Surtax/Smoking Pipes and Devices

DATE: March 3, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brink	Imhof	RI	Fav/CS
2.			CJ	
3.			FT	
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The committee substitute (CS) assesses a 25 percent surtax on the sales price of smoking pipes and devices, separate from and in addition to any applicable taxes imposed by ch. 212, F.S.

Surtax revenue collected by the retail dealers under this section would be deposited into the Department of Corrections' Grants and Donations Trust Fund and used by the department for its substance abuse treatment programs.

The CS creates section 212.05995, Florida Statutes.

The CS provides a January 1, 2011 effective date.

II. Present Situation:

Chapter 212, F.S., contains the state's statutory provisions for the levy and collection of Florida's sales and use taxes, and provides exemptions and credits applicable to certain items or uses under specified circumstances.

Currently, the state does not charge a surtax on the sale of smoking pipes and devices beyond any taxes already assessed under 212, F.S., such as Florida's state and local sales taxes. As a general matter, the unlawfulness of an activity does not prevent its taxation.¹

Smoking pipes and devices are commonly found at specialty stores that sell a variety of accessories associated with the use of illegal drugs. Although anti-paraphernalia laws in the 1980s ended much of these sales, these shops still exist in Florida and other states, and the sale of such paraphernalia has expanded with the advent of the internet.²

Federal law defines "drug paraphernalia" as any "equipment, product, or material of any kind which is primarily intended or designed for use in . . . injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful [Drug paraphernalia] includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, [etc.] into the body."³

The statute continues lists items that constitute drug paraphernalia, including items listed in the CS, and more.⁴ The same section makes it illegal for any person to sell or offer for sale drug paraphernalia.⁵ It does not apply to any person authorized by local, state, or federal law to manufacture, possess, or distribute such items.⁶ It also does not apply to any item that is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.⁷

Under s. 893.145, F.S., the definition of "drug paraphernalia" similarly includes an element of intent, and the section provides an example list of items that constitute drug paraphernalia. A court, jury, or other authority, when determining in a criminal case whether an object constitutes drug paraphernalia, must consider specified facts surrounding the connection between the item and the individual arrested for possessing drug paraphernalia. Such facts include proximity of the object in time and space to a controlled substance, the existence of residue of controlled substances on the object, and expert testimony concerning its use.⁸

Section 210.01, F.S., defines "tobacco products" to mean:

loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings and sweepings of tobacco; and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing.

¹ *United States v. Constantine*, 296 U.S. 287, 293 (1935); *James v. United States*, 366 U.S. 213 (1961).

² U.S. Drug Enforcement Administration, Drug Paraphernalia, Tools of the Illegal Drug Trade.

<http://www.usdoj.gov/dea/concern/paraphernaliafact.html> (last visited January 28, 2010). <http://www.grasscity.com> (last visited January 28, 2010) is an example of an online head shop. It is based in Amsterdam, The Netherlands. Another head shop site, <http://www.rollies.com> (last visited January 28, 2010), is based in Vancouver, British Columbia, Canada.

³ 21 U.S.C. § 863(d) (2002).

⁴ *See id.*

⁵ 21 U.S.C. § 863(a) (2002).

⁶ 21 U.S.C. § 863(f) (2002).

⁷ *See id.*

⁸ § 893.146, F.S.

Section 210.01, F.S., defines “retail dealer” to mean:

any person located inside or outside this state other than a wholesale dealer engaged in the business of selling cigarettes, cigars, or tobacco products, including persons issued a permit pursuant to s. 569.03.

Section 210.01, F.S., defines “cigarette” to mean:

any roll for smoking, except one of a roll for smoking in which the tobacco is fully naturally fermented, without regard to the kind of tobacco or other substances used in the inner roll or the nature or composition of the material in which the roll is wrapped, and which is made wholly or in part of tobacco, irrespective of size or shape and whether such tobacco is flavored, adulterated or mixed with any other ingredient.

Section 210.01, F.S., defines “sale” to mean:

any transfer, exchange, or barter for consideration. The term includes a gift by a person engaged in the business of selling tobacco products in exchange for advertising, a gift as a means of evading this section, or a gift for any other purpose.

In Florida, it is a first-degree misdemeanor to use or possess drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body⁹, or to advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of such objects for use as drug paraphernalia.¹⁰

It is a third-degree felony to deliver, manufacture with intent to deliver, or possess with intent to deliver drug paraphernalia when it is known or reasonable to know that it will be used to produce a controlled substance or introduce a controlled substance into the body.¹¹ It is also a third-degree felony to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia when it is known or reasonable to know that it will be used to transport a controlled substance or contraband as defined in s. 932.701(2)(a)1, F.S.¹²

It is a second-degree felony to deliver drug paraphernalia to a minor when it is known or reasonable to know that it will be used to produce or introduce into the body a controlled substance.¹³

The Florida Department of Corrections provides substance abuse treatment services to prison inmates and individuals subject to supervision and correctional programs state who struggle with drug addiction.¹⁴ These services are funded by recurring general appropriation funds and grant money through the Florida Department of Law Enforcement.

⁹ § 893.147(1), F.S.

¹⁰ § 893.147(5), F.S.

¹¹ § 893.147(2), F.S.

¹² § 893.147(4), F.S.

¹³ § 893.147 (3), F.S.

¹⁴ FLA. DEP'T OF CORR., SUBSTANCE ABUSE REPORT (2009) (as accessed at <http://www.dc.state.fl.us/pub/subabuse/inmates/07-08/index.html>).

III. Effect of Proposed Changes:

The CS creates s. 212.05995, F.S. to include a surtax provision on the sale of smoking pipes and devices. The CS may reduce marijuana and illicit drug use by making it less economically feasible to obtain common smoking implements. The CS subjects the following items to the 25 percent surtax, regardless of whether they are sold for legal purposes or in violation of the law:

- Metal, wooden, acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens, or punctured metal bowls;
- water pipes;
- carburetion tubes and devices;
- chamber pipes;
- carburetor pipes;
- electric pipes;
- air-driven pipes;
- chillums;
- bongs; and,
- ice pipes or chillers.

The CS defines the terms “retail dealer,” “tobacco products,” “cigarettes,” and “sale.” These definitions are identical to the definitions provided under s. 210.01, F.S.

Under the CS, the Department of Revenue must deposit surtax revenue into the Department of Corrections’ Grants and Donations Trust Fund to be used for substance abuse treatment programs.

Further, retail dealers must have a tobacco license under s. 569.003, F.S., to offer items listed under subsection (2) of the CS for sale. It also makes ch. 569, F.S. applicable to any retail dealer that offers items listed under subsection (2) for sale. A retail dealer is defined as any person located inside or outside this state other than a wholesale dealer engaged in the business of selling cigarettes, cigars, or tobacco products, including persons issued a permit pursuant to s. 569.003.

The CS grants the Department of Revenue rulemaking authority to administer the section.

The CS provides a January 1, 2011 effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet determined the impact of the CS.

The CS imposes a 25 percent surtax on the sale of items listed under subsection (2) of the CS, unless the exemption provisions of the CS apply to the retail dealer.

B. Private Sector Impact:

A representative from the Florida Retail Federation expressed concern that the CS’s language would assess the surtax on sales of traditional, non-illicit tobacco pipes. However, the CS exempts retail dealers that sell cigarettes, cigars, tobacco products, smoking pipes that are intended to be used with tobacco products, or other items that are intended to be used with tobacco which are not listed under subsection (2) of the CS from the surtax.

Purchasers and retailers of products listed in s. 212.05995, F.S., will be subject to increased taxes regardless of whether the items are purchased for legal or illegal purposes.

Because interstate sales of smoking devices and pipes are available over the internet, dealers located in Florida may lose business to internet dealers from another country, where this surtax would not be charged. This may compromise the efficacy of SB 366 in terms of reducing illicit drug use in Florida.

C. Government Sector Impact:

Expenditures:

The Department of Revenue would incur both nonrecurring and recurring costs in implementing the infrastructure necessary to accommodate the provisions of the CS. The Department estimates its implementation costs for the first four years as follows:

	FY 09-10	FY 10-11	FY 11-12	FY 12-13
Recurring	\$60,000	\$60,000	\$60,000	\$60,000
Non-Recurring	\$198,600	\$40,902	--	--
Total	\$258,600	\$100,902	\$60,000	\$60,000

Revenues:

The CS was scheduled for an impact conference on January 29, 2010. No estimate is available at this time.

The CS has an effective date of January 1, 2011 in order to provide the Department of Revenue the time needed to hire and train contract programmers and to make certain system modifications. The CS would exempt the surtax from the dealer tax collection credit under s. 212.12, F.S., to help assuage administration costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 3, 2010:

The CS creates s. 212.05995, F.S.

The CS differs from SB 366 as follows:

- It creates s. 212.05995(1), F.S., to define the terms “cigarette,” “tobacco products,” “retail dealer,” and “sale,” as defined in s. 210.01, F.S.
- It creates s. 212.05995(6), F.S., to specify that surtax revenue must be deposited into the Department of Corrections’ Grants and Donations Trust Fund and used for its substance abuse treatment programs;
- It creates s. 212.05995(7), F.S., to exempt from the surtax retail dealers that sell cigarettes, cigars, tobacco products, smoking pipes that are intended to be used with tobacco products, or other items that are intended to be used with tobacco which are not listed under subsection (2);
- It creates s. 212.05995(8), F.S., to require that retail dealers must have a retail tobacco products dealer permit under s. 569.003, F.S., to offer for sale items listed under subsection (2). It also makes ch. 569, F.S. applicable to any retail dealer that offers for sale items listed under subsection (2); and
- It creates s. 212.05995(9), F.S., to grant the Department of Revenue rulemaking authority to administer the section.

The CS changes the effective date to January 1, 2011.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
