

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2168

SPONSOR: Senator Burt

SUBJECT: Task Force on Tobacco-Settlement-Revenue Protection

DATE: April 20, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The bill creates the Task Force on Tobacco-Settlement-Revenue Protection to determine the need for, and to evaluate methods of, protecting the state's tobacco settlement revenue. The task force is also authorized to commit up to \$100 million from nonrecurring tobacco-settlement revenues if it determines that it is necessary to implement an asset-protection strategy so that the state has a high probability of receiving the estimated tobacco-settlement revenue over 30 years.

The bill creates an undesignated section of the Florida Statutes.

## II. Present Situation:

The State of Florida commenced legal action against a number of tobacco manufacturers and other defendants, asserting various claims for monetary and injunctive relief on behalf of the state in February of 1995. The state entered into a settlement agreement on August 25, 1997, with Phillip Morris, Reynolds Tobacco, B & W American Brands, and Lorillard. This settlement agreement was subsequently amended.<sup>1</sup> These four cigarette producers hold an estimated market share of 93 percent in the United States. The remaining percentage is shared by smaller producers who were not named in the state's suit as defendants and, as a result, were not parties to the settlement.

Under the agreement as amended, apart from other first year payments, Florida is to receive 5.5 percent of the following unadjusted amounts, in perpetuity:

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<sup>1</sup>Florida negotiated a "Most Favored Nations" clause in the settlement which provided the state with additional monies for a period of time after Minnesota settled with the defendants on terms more favorable than Florida's.

Year	1999	2000	2001	2002	2003	Thereafter
Dollar Amount	\$4.5 Billion	\$5 Billion	\$6.5 Billion	\$6.5 Billion	\$8 Billion	\$8 Billion

Currently, tobacco proceeds are placed in the Lawton Chiles Endowment Fund, which was created by the Legislature in 1999. The fund is administered by the State Board of Administration. Portions of the non-recurring moneys received pursuant to the settlement are required to be deposited into this fund, and monies are disbursed to tobacco funds in various departments depending on appropriations made by law. The State Board of Administration invests monies in the endowment in order to maximize the rate of return earned by the State.<sup>2</sup> Funds from the endowment are not available for disbursement to state agencies until after July 1, 2000.

After Florida's settlement, Phillip Morris, Reynolds Tobacco, B & W American Brands, and Lorillard, settled lawsuits with Texas, Mississippi, and Minnesota. These corporations, as well as the other smaller producers, have settled with the remaining states in what has been termed the "Master Settlement Agreement" (MSA). The unadjusted cost of the state settlements ranges between \$212 billion to \$246 billion over the next 25 years. The range is broad because these amounts are subject to numerous adjustments, from inflation to fluctuations in cigarette consumption and market share. As a result, the amount may increase due to inflation but may decrease if cigarette consumption decreases markedly. Other factors that may affect cigarette consumption includes general population growth, cigarette price increases, changes in disposable income, youth consumption, health warnings, smoking bans in public places, nicotine dependence, advertising restrictions, and smoking trends over time.<sup>3</sup>

What the tobacco companies and the settling state governments cannot factor at this time is the estimated cost of dozens of individual suits and one certified class action (*Engle v. R.J. Reynolds, et.al.*, in Dade County, Florida). While the tobacco settlement payments are to be made in perpetuity, it is possible that the tobacco companies may someday declare bankruptcy and default on their obligations.

In a story dated March 26, 2000, the Associated Press reported that the National Association of Attorneys General retained a Los Angeles bankruptcy law firm to insure states receive a combined \$246 billion in tobacco settlements. According to the story, the nation's five biggest cigarette makers owe about \$10 billion this year, and also face a potentially record-setting punitive damages award in *Engle*. The tobacco industry fears an estimated 500,000 sick Florida smokers may be awarded \$300 billion.

According to Salomon Smith Barney, tobacco industry credit fundamentals make bankruptcy of a major manufacturer unlikely due to the significant domestic demand, the profitability of the

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<sup>2</sup>Section 215.5601, F.S.

<sup>3</sup>According to a report prepared by WEFA, Inc., an international econometric and consulting firm, on behalf of the Westchester Tobacco Asset Securitization Corporation, dated December 15, 1999, adult consumption of cigarettes declined 0.65% annually for the period 1965 to 1981, 3.31% for the period 1981 to 1990, and 2.47% for the period 1991 to 1998. According to these trends, consumption could decline from the roughly 539 million cigarettes consumed in 1990 to under 200 million cigarettes for the year 2040.

industry, and the ability of the industry to pass additional costs to consumers in the form of high prices.<sup>4</sup> In a series of scenarios presented by WEFA included within the Salomon Smith Barney materials projected an industry settlement three times the size of the MSA (approximately \$700 billion) resulting in a cigarette price increase of more than 50 percent causing a consumption decline of more than 14 percent. WEFA concluded that even in those “extreme and unlikely conditions” consumption is still projected to generate sufficient tobacco settlement revenues to meet the planned principal amortization schedule. While it appears that the industry could survive payments that are amortized and made over time, it is unknown how the industry would react to a \$300 billion jury award that was upheld on appeal and immediately payable.

Section 20.03(8), F.S., defines a “committee or task force” to mean

an advisory body created without specific statutory enactment for a time not to exceed 1 year or created by specific statutory enactment for a time not to exceed 3 years and appointed to study a specific problem and recommend a solution or policy alternative with respect to that problem. Its existence terminates upon the completion of its assignment.

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

The bill creates the Task Force on Tobacco-Settlement-Revenue Protection to determine the need for and to evaluate methods for protecting the state’s tobacco settlement revenue from significant loss. The task force is required, at a minimum, to study and make a determination of:

- The degree of risk posed to the amount of tobacco-settlement revenue as a consequence of a decline in domestic tobacco sales.
- The degree of risk posed to the tobacco-settlement revenue by potential dissolution or restructure of the tobacco companies that were defendants in the state’s suits.
- The necessity and advisability of taking action to protect the asset value of the tobacco settlement.
- The options available for protecting the asset value of tobacco-settlement revenues, including securitization, insurance, self-insurance, or a combination of these options.

The bill provides that the task force is to be composed of:

- The Governor, who serves as chair;
- The Comptroller;
- The Insurance Commissioner and,
- The Attorney General.

The task force is to conduct research, hold public hearings, receive testimony, employ consultants, and undertake other activities determined by its members to be necessary.

Task force members are not permitted to delegate their attendance or voting powers.

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<sup>4</sup>Opinions in Tobacco Settlement Securitization, dated February 29, 2000, page 19.

The bill requires a vote of three of the four members to authorize any action.

Staff support for the task force is to be provided by the State Board of Administration.

The task force ceases to exist on October 1, 2000.

The sum of \$250,000 is appropriated from the tobacco-settlement revenues to the State Board of Administration to support operation of the task force.

The task force is authorized to commit up to \$100 million from nonrecurring tobacco-settlement revenues if it determines that it is necessary to implement an asset-protection strategy so that the state has a high probability of receiving the estimated tobacco-settlement revenue over 30 years.

#### 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:

The separation of powers into the legislative, executive, and judicial branches of government is expressly codified in Art. II, s. 3 of the State Constitution. In *Askew v. Cross Key Waterways*<sup>5</sup> the Florida Supreme Court construed this constitutional provision, and stated:

. . . Under the fundamental document adopted and several times ratified by the citizens of this State, the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. . . . Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.<sup>6</sup>

The court continued

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<sup>5</sup>372 So.2d 913(Fla. 1978).

<sup>6</sup>*Askew* at 924.

. . . When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.<sup>7</sup>

This doctrine was reaffirmed in *Chiles v. Children A, B, C, D, E, and F*,<sup>8</sup> in holding unconstitutional a statute authorizing the Administration Commission to reduce state agency budgets to meet budget deficits. In *Chiles*, the court stated

. . . The legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed in the event of a budget shortfall. Carefully crafted legislation establishing, among other things, the extent to which appropriations may be reduced, coupled with a recitation of reduction priorities and *provisions for legislative oversight*, might pass facial constitutional muster. What the legislature cannot do is delegate its policy-making responsibility [*emphasis added*].<sup>9</sup>

The bill authorizes the task force to “undertake other activities determined by its members to be necessary.” Further, it permits the task force to commit up to \$100 million from nonrecurring tobacco-settlement revenues if it determines that it is necessary to implement an asset-protection strategy so that the state has a high probability of receiving the estimated tobacco-settlement revenue over 30 years. The bill does not establish constitutionally required criteria for making such a determination or provide for constitutionally required legislative oversight of such activity.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

The public would benefit from the protection of the tobacco settlement revenue.

### C. Government Sector Impact:

The sum of \$250,000 is appropriated from the tobacco-settlement revenues to the State Board of Administration to support operation of the task force.

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<sup>7</sup>*Id* at 918-919.

<sup>8</sup>589 So.2d 260 (Fla. 1991).

<sup>9</sup>*Chiles* at 268.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Pursuant to s. 20.03(8), F.S., a task force is an advisory body intended to study a specific problem, and to recommend a solution or policy alternative with respect to that problem. A task force exists for no longer than 3 years and its existence terminates upon the completion of its assignment. The bill creates the body as a task force and requires it to study specific problems related to the tobacco settlement.

Nevertheless, the bill also assigns the body powers and duties that are not within the authority of an advisory body, such as a task force. Specifically, it permits the task force to “undertake other activities determined by its members to be necessary.” Further, it permits the task force to commit up to \$100 million from nonrecurring tobacco-settlement revenues if it determines that it is necessary to implement an asset-protection strategy so that the state has a high probability of receiving the estimated tobacco-settlement revenue over 30 years. These latter powers are not advisory in nature. If the Legislature wishes to delegate authority to a governmental entity composed of a collegial body to administer a program, the entity should be created as a “board” to comply with s. 20.03(12), F.S.

**VIII. Amendments:**

None.

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

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