

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2112

SPONSOR: Senator Dockery and others

SUBJECT: Nonsettling-manufacturer Cigarettes

DATE: March 9, 2004 REVISED: 3/11/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates s. 210.0205, F.S. The bill defines the following terms as used in this section: “brand family,” “Consumer Price Index,” “Manufacturer,” “nonsettling manufacturer,” “nonsettling manufacturer cigarettes,” and “person.”

Subsection (2) of s. 210.0205, F.S., imposes an additional fee of 25 mills per cigarette on the sale, receipt, purchase, possession, consumption, handling, distribution, and use in this state of cigarettes from a nonsettling-manufacturer. This equals a fee of \$.025 per cigarette, \$.50 a package of twenty cigarettes, or \$5.00 per carton.

The fee imposed by this bill applies to nonsettling-manufacturer cigarettes that are required to have a stamp or stamp insignia attached, or which are intended for resale, including retail sale, in other jurisdictions. The bill requires an upward annual adjustment of the fee by the division each January 1 by the greater of three percent or the Consumer Price Index.

The bill provides the procedure for the collection of the fee. The bill provides that, except as provided, 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. The bill provides a procedure for determining how to pay the prepayment amount. The bill authorizes the division to require a nonsettling-manufacturer to provide whatever information it may need to make this determination. It also requires that the division establish procedures for providing a reimbursement to a nonsettling-manufacturer if the actual sales are less than the sales projected.

The bill sets forth the legislative purposes in support of the fee, which includes the recouping of settlement revenue lost to cigarette sales by nonsettling-manufacturers, and the funding of the enforcement and administration of the fee.

The bill requires that 20 percent of the revenue received from the fee must be provided quarterly to the Department of Health, Division of Health Awareness and Tobacco to implement a state-wide anti-smoking marketing and advertising campaign to reduce youth tobacco use.

The bill establishes reporting requirements for agents and wholesalers. The bill authorizes the division to adopt rules to require any agent or wholesaler to provide any information necessary to determine the required fee.

The bill requires that the division 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.

The bill provides that the cigarettes of a nonsettling-manufacturer that has not paid the required fee, or complied with the provisions of the bill, shall be treated as cigarettes for which the tax imposed by s. 210.02, F.S., has not been paid. It prohibits the affixing of tax stamps and the selling of cigarettes by persons with notice from the Division of Alcoholic Beverages and tobacco that the nonsettling-manufacturer of the cigarettes has not paid in full the required fee or if the nonsettling-manufacturer is not listed in the division's internet directory.

The bill creates section 210.0207, F.S., to prohibit 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. The bill establishes reporting requirements relating to sales made out-of-state. The bill prohibits the stamping of cigarettes for, paying taxes to, or selling cigarettes in another state if the other state prohibits either action.

This bill would take effect upon becoming a law.

This bill creates sections 210.0205 and 210.0207, Florida Statutes.

II. Present Situation:

Florida's Tobacco Settlements Background

In February, 1995, the State of Florida sued a number of tobacco manufacturers and other defendants, asserting various claims for monetary and injunctive relief on behalf of the State of Florida. In March, 1996, the state entered into a settlement agreement to settle all of its claims against 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.¹ These cigarette producers held approximately 97.35 percent of the tobacco market share in the U.S.² The remaining market share is 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. Under the settlement agreement, as subsequently amended by a Stipulation of Amendment,³ 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, merchandise promotions, product placement, and lobbying relating to all tobacco products.

From the date of the settlement, Florida is to receive \$11.3 billion over the next 25 years and an additional \$1.7 billion over the next 5 years as a result of a most favored nation clause in the settlement agreement as amended. The amounts of these annual tobacco settlement payments are based on several factors, including the volume of U.S. cigarette sales, share of market, net operating profits (undefined in the agreement), and consumer price indices. Any adjustment to those payments would be based on a formula set forth in an appendix to the settlement agreement and involve a ratio of volume of U.S. cigarette sales as existed in 1997 and the volume of such sales in the applicable year. Statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.⁴

Master Settlement Agreement

Subsequent to Florida's settlement, the major tobacco companies settled with 46 states, the District of Columbia, and five U.S. territories in November, 1998, by entering into the Master Settlement Agreement.⁵ These settling manufacturers are known as the original participating manufacturers or OPM's.⁶

The Master Settlement Agreement⁷ (MSA), provided states with funding to prevent smoking and control tobacco sales. The agreement required tobacco companies to take down all billboard advertising and advertising in sports arenas, to stop using cartoon characters to sell cigarettes and to make available to the public specified documentation. The tobacco companies also agreed not to market or promote their products to young people. The unadjusted cost of the state settlements ranges between \$212 billion to \$246 billion over the next 25 years, subject to numerous adjustments ranging from inflation to fluctuations in cigarette consumption and market share.⁸

¹ 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).

² The Council of State Governments, *Tobacco Settlement and Declining State Revenues*, Trends Alert (March, 2002), page 5.

³ Florida also negotiated an 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.

⁴ See s. 569.21, F.S.

⁵ Florida, Minnesota, Mississippi, and Texas were not parties to the Master Settlement Agreement.

⁶ The OPM's are Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company, Commonwealth Tobacco, and Liggett & Myers. Thirty-three additional manufacturers have become parties to the MSA. (Noted in *Freedom Holdings, Inc. v. Spitzer*, 2004 W.L. 26498, C.A.2 (N.Y.), 2004, decided Jan. 6, 2004.) These manufacturers are known as subsequent participating manufacturers or SPM's.

⁷ *Master Settlement Agreement* (Nov. 1998), available at National Association of Attorneys General, http://www.naag.org/upload/1032468605_cigmsa.pdf (last visited Mar. 1, 2004).

⁸ 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, consumption of cigarettes by adults 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

The OPM's payments under the MSA are subject to a reduction based on their payments to the four states, including Florida, under the Attorneys General Settlement Agreement. This reduction is known as the "previously settled states reduction" and it reduces the payments of the OPM's under the MSA by 12.45 percent in the case of payments due before 2007, 12.2373756 percent in the case of payments due after 2007 but before 2018, and 11.0666667 percent in the case of payment due after 2018.⁹ The subsequent participating manufacturers (SPM's), which have settled with the MSA states but not with Florida, are not subject to a comparable reduction in their payments under the MSA. However, SPM's make lower up-front payments than those made by the OPM's¹⁰. The nonsettling-manufacturer (also known as non-participating manufacturers), which have not settled with the 46 MSA states and have not settled with Florida, 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 that addressed the potential competitive advantage of tobacco companies that were not parties to the settlement. The Florida agreements have no comparable provision. Under the MSA, if the aggregate market share of the tobacco companies that were parties to the agreement fell by more than 2 percent below their base level in 1997, and the loss was caused in significant part by the MSA, the MSA payments might be reduced based on a formula that corrects for losses in market share.

The MSA specified that individual states can avoid this downward adjustment—known as the "non-participating manufacturers" adjustment—to their payments by enacting and enforcing an escrow statute intended to prevent a competitive disadvantage for the participating manufacturers.¹¹ 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.¹²

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 a nonparticipating manufacturer ("NPM"). Under the model escrow statute, a NPM 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. Because Florida is not a party to the MSA, an NPM may sell cigarettes in this state without making either MSA payments or escrow payments.

1998. If these trends hold, cigarette consumption could decline from the roughly 539 million cigarettes consumed in 1990 to less than 200 million cigarettes for the year 2040.

⁹ See ss. II.(k)(k) and IX of the Master Settlement Agreement.

¹⁰ See *MSA: Five Years Later*, State Government News, November/December 2003, page 14.

¹¹ The Master Settlement Agreement provides that a "Qualifying Statute" means a settling state's statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement." *MSA, supra* note, at 60 (page number of the PDF file).

¹² *Exhibit T of the Master Settlement Agreement, supra* note at 279 (page number of the PDF file).

The State of New York's escrow statute was challenged by NPM's as a violation of the Commerce Clause of the U.S. Const., art. I, s. 8, cl. 3, the Equal Protection Clause of the 14th Amendment of the U.S. Const., and the Sherman Anti-Trust Act, 15 U.S.C. 1. On the same grounds the NPM's also challenged New York's contraband statute, which required cigarette manufacturers to certify annually to the state that they were either making payments under the MSA or were in compliance with the escrow requirements. The contraband statute was enacted in response to the difficulties in enforcing the escrow statute. New York's contraband statute prohibits cigarette stamp agents from affixing a tax stamp to cigarettes from an NPM if the NPM has not made the required certification or if the tax stamp agent has notice that the NPM is in violation of the escrow statute. The United States Court of Appeals for the Second Circuit recently held that the NPM's 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 cause of action.¹³ In *Star Scientific, Inc., v. Beals*, the U.S. District Court of Appeals for the Fourth Circuit also upheld Virginia's escrow statute against a constitutional challenge by an NPM on due process, commerce clause, and equal protection grounds.¹⁴

Task Force on Tobacco-Settlement Revenue Protection

In light of the uncertainty in the marketplace, the threat of bankruptcy and pending litigation which may affect the tobacco companies' obligations under the settlement agreements, some states have resorted to securitization of the tobacco settlement proceeds by issuing bonds through non-profit corporations.¹⁵ The 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. (See ch. 2000-128, s.5, L.O.F.) 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 which have 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.

¹³ *Freedom Holdings, Inc. v. Spitzer*, 2004 W.L. 26498, C.A.2 (N.Y.), 2004, decided Jan. 6, 2004.

¹⁴ *Star Scientific, Inc., v. Beals*, 278 F.S.3d 339 (4th Cir. 2002).

¹⁵ U.S. General Accounting Office, *Tobacco Settlement: States' Allocations of Fiscal Years 2002 and 2003 Master Settlement Agreement Payments* (GAO-03-407, February 2003).

Nonsettling-manufacturers

Nonsettling-manufacturers, or NPM's, are mostly small, domestic tobacco companies and foreign tobacco manufacturers. They mainly 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 not subject to the advertising and marketing restrictions that the settling-manufacturers are subject to. The division estimates that there are approximately 40 nonsettling-manufacturers selling cigarettes in Florida. It estimates that these nonsettling-manufacturers sell in excess of 209,362,000 packs of cigarettes into Florida each year to various distributors.

The states that entered into the 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 nonsettling-manufacturers. Because under both Florida's settlement agreements and the MSA the settling-manufacturer's payments under the agreements are based on market share, the amounts received under the tobacco settlements may be adversely affected by diversionary marketing practices that can supplant domestic tobacco product sales or divert market share to nonsettling tobacco product manufacturers. A reduction in market share has been observed in the 46 states that are a party to the MSA.¹⁶ In response to these concerns Minnesota, which, like Florida, is not an MSA state, imposed a fee of \$.35 per pack of 20 cigarettes on cigarettes produced from manufacturers that have not entered into a settlement agreement with the state.¹⁷

Section 210.185, F.S., regulates the importation of cigarettes into this state. This provision makes unlawful the importation of "gray market" or diverted tobacco products, in which sellers or other third parties obtain cigarettes for domestic sale at reduced prices via the international market, by prohibiting the acquiring, holding, owning, possessing, or transporting or importation, for sale or distribution in this state of cigarettes that the manufacturer did not intend to sell or distribute in the United States.

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

¹⁶ 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).

¹⁷ 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. 2nd Jud. Dist., File No. C1-03-7120, Nov. 18, 2001. (Unreported decision.)

per package to 67.8 cents per package, depending on the number of cigarettes per package.¹⁸ The current excise tax is 33.9 cents per standard 20-cigarette pack cigarettes.¹⁹

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.²⁰ 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.²¹ A “wholesale dealer” sells cigarettes to retail dealers for resale only, or operates cigarette vending machines in more than one place of business.²² An “exporter” is a person who transports tax-exempt cigarettes into Florida under bond for delivery beyond state borders.²³

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 \$418,191,500 in cigarette excise taxes from stamping distributors for the FY 02-03.

Cigarettes Reporting Requirements

Under current law, the cigarette manufacturers do not report to the division any information pertaining to the tobacco settlement agreement. All such information or regulation has been with the state’s Attorney General’s office. Pursuant to s. 201.09(2), F.S., the division requires all manufacturers to report to the division the amount of cigarettes, by invoice total, shipped to the Florida cigarette stamping wholesalers, i.e., distributors.

Wholesale dealers are required to submit to the division by the 10th day of each month a monthly report of its purchases and sales of cigarettes within or without the state for the preceding month.²⁴ 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

¹⁸ See ss. 210.02(3) and (4), F.S.

¹⁹ Section 210.02(3)(b), F.S.

²⁰ Section 210.01(14), F.S.

²¹ Section 210.01(9), F.S.

²² Section 210.01(6), F.S.

²³ Section 210.01(17), F.S.

²⁴ Section 210.09(2), F.S., and rule 61A-10.011, F.A.C.

monthly report details the number of cigarette packages, but does not include any information about the quantity of each brand style.²⁵

III. Effect of Proposed Changes:

Section 1. The bill creates s. 210.0205, F.S. Subsection (1) of s. 210.0205, F.S., defines the following terms as used in this section: “brand family,” “Consumer Price Index,” “Manufacturer,” “nonsettling manufacturer,” and non-settling manufacturer cigarettes.”

The bill 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 into the Attorneys General’s Settlement Agreement with Brooke Group, Ltd., Liggett & Myers, Inc., and Liggett Group, Inc., dated March 15, 1996.

Subsection (2) of s. 210.0205, F.S., imposes an additional fee of 25 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 \$.025 per cigarette, \$.50 per package of 20 cigarettes, or \$5.00 a carton. This fee is in addition to any other kind of fee or tax imposed on cigarettes.

The fee imposed by this subsection applies to nonsettling-manufacturer cigarettes that must have a stamp or stamp insignia attached, or which are sold in this state but are not required to bear a stamp or insignia of this state. The latter are cigarettes that are intended for resale, including retail sale, in other jurisdictions. The fee applies to cigarettes from all manufactures that are a party to the MSA, but are not also a party to the Florida settlement. The bill requires that the fee amount must be adjusted upward annually by the division each January 1 by the greater of three percent or the Consumer Price Index.

Subsection (3) of s. 210.0205, F.S., provides the procedure for the collection of the fee. The amount of fee collected would be based on the information collected under the reporting requirements in subsection (6). The bill 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 for 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 fee is mailed. The bill 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.

Subsection (4) of s. 210.0205, F.S., requires a nonsettling-manufacturer that is selling cigarettes in the state on the effective date of this bill to provide the information described in subsection (7) of s. 210.0205, F.S., and to pay the fee imposed by this bill within 30 days of its effective date. 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

²⁵ See Florida Dept. of Bus. and Prof’l Regulation, *Taxable Cigarette Wholesale Dealer’s Monthly Report, Form AB&T 4000A-205-1* (Dec. 2003), available at http://www.state.fl.us/dbpr/abt/forms/index_auditing.shtml (last visited Mar. 1, 2004).

state. The bill provides that the prepayment amount shall be determined by 25 mills multiplied by the number of cigarettes the division reasonably projects that the nonsettling-manufacturer will sell in this state in the first calendar month or \$50,000, whichever is more. The bill authorizes the division to require a nonsettling-manufacturer to provide whatever information it may need 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.

Subsection (5) of s. 210.0205, F.S., sets forth the legislative purposes in support of the fee, which are to:

- prevent nonsettling-manufacturers from undermining efforts to reduce underage smoking by offering substantially lower priced cigarettes;
- protect funding for state programs supported under the tobacco settlement agreement;
- recoup settlement revenue lost to cigarette sales by nonsettling-manufacturers; and
- fund enforcement and administration of the fee.

The bill requires that 20 percent of the revenue received from the fee must be provided quarterly to the Department of Health, Division of Health Awareness and Tobacco to implement a state-wide anti-smoking marketing and advertising campaign to reduce youth tobacco use.

Subsection (6) of s. 210.0205, F.S., 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 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.

The bill authorizes the division to adopt rules to require any agent or wholesaler to provide any information necessary to determine the required fee.

Subsection (7) of s. 210.0205, F.S., requires a nonsettling-manufacturer to provide certain 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. The nonsettling-manufacturer must state:

- its name, address and telephone number,
- the date it began, or intends to begin selling, cigarettes in this state, and
- the name of cigarette brand families it is selling or will be selling in this state.

The nonsettling-manufacturer must also make a statement that it intends to comply with the obligations imposed by this section. An officer of the nonsettling-manufacturer must attest to the information provided pursuant to this subsection.

Subsection (8) of s. 210.0205, F.S., 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. The bill requires that the division 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) of s. 210.0205, F.S., provides that the cigarettes of a nonsettling-manufacturer that has not paid the required fee or complied with this 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 to the cigarettes the stamps required by s. 210.06, F.S., or otherwise purchase or sell such cigarettes.

Section 2. The bill creates s. 210.0207, F.S., to prohibit 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.

The bill prohibits the stamping of cigarettes for, paying taxes to, or selling cigarettes in another state if the other state prohibits either action. Anyone who sells cigarettes into another state must, by the 10th day of each month, report to the division the quantity, brand information, and recipient information for any sales made out of this state.

The bill also 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.

Section 3. The bill would take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Commerce Clause of the U.S. Constitution may be implicated if the bill is found to discriminate in purpose or in effect against cigarettes produced by non-settling manufacturers. Discrimination in the context of commerce means differential treatment by a state whereby in-state interests are benefited at the expense of burdening out-of-state

interests.²⁶ Under the Commerce Clause, Congress has the power to regulate commerce among the states.²⁷ Though phrased as a grant of regulatory power to Congress, the clause has long been understood to have a negative or dormant aspect that denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce.²⁸ In its negative aspect, the Commerce Clause prohibits economic protectionism, i.e., state regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.²⁹ Assuming the provisions of the bill are nondiscriminatory, 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.³⁰

Equal protection issues under the 14th Amendment of the U.S. Constitution may also be implicated by the fee imposed by this bill. It is the state's inherent power to tax a specified class and to grant exemptions, if any.³¹ However, the differential treatment of classes of persons or entities must be rationally related to furthering a legitimate state interest.³² A taxing statute may have effect of favoring one class of interests over another, but the tax would not violate the Equal Protection Clause if it has a rational basis.³³ At issue is whether the classifications under the fee scheme, i.e., settling manufacturers and nonsettling-manufacturers, are reasonably related to the state's interest and the bill's purposes, as outlined in subsection (5) of the bill, in mitigating tobacco consumption and not arbitrarily or discriminatorily imposed.

However, 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.³⁴ In Minnesota, which, like Florida, is not an MSA-participant, a state district court held that that state's tax imposed on SPM's and NPM's did not violate the equal protect and commerce clauses of the U.S. Constitutions in a analysis that analogized the state's tax to Virginia's escrow statute.³⁵

²⁶ See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

²⁷ See art. I, s. 8, *U.S. Constitution*.

²⁸ *Id.*

²⁹ See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996); and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238, 946 U.S. 18 (Fla. 1990).

³⁰ See *Pike v. Bruce, Inc.* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed. 2d 174 (1970).

³¹ See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

³² See *Smith v. Florida Dept. of Revenue*, 512 So.2d 1008 (Fla. 1st DCA 1987).

³³ See *Fitzgerald v. Racing Association of Central Iowa*, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003)

³⁴ See *Star Scientific, Inc., v. Beals*, 278 F.S.3d 339 (4th Cir. 2002); and *Freedom Holdings, Inc. v. Spitzer*, 2004 W.L. 26498, C.A.2 (N.Y.), 2004, decided Jan. 6, 2004.

³⁵ See *Council of Independent Tobacco Manufacturers v. Minnesota*, Minn. 2nd Jud. Dist., File No. C1-03-7120, Nov. 18, 2001. (Unreported decision.)

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

According to the division, the approximate fee to be paid by the nonsettling-manufacturers would be \$104,681,000 in the first year. Using an adjusted inflation rate of 3 percent each year, the approximate fee for each of the following years would be \$107,821,000 and \$111,056,000.

The Revenue Estimating Conference met on March 5, 2004. The conference did not establish an estimate for SB 2112. However, it provided an unofficial preliminary estimate in the range \$50 million to \$86 million.

B. Private Sector Impact:

This bill would cause the nonsettling-manufacturers to pay the additional fee imposed by this bill of \$.50 per package of twenty cigarettes.

C. Government Sector Impact:

According to the department there would be a cost associated with the implementation of this bill. The division would need additional FTE's to record and audit the information being reported monthly. According to the department, there would be a one-time set-up cost of \$325,000 to develop and establish the computer system needed to capture the data. It would also need annual budget authority to fund license agreements, maintenance, and one System Project Analyst position to provide technology support for the new database. It would need an additional six Revenue Specialist I positions to input data received from nonsettling-manufacturers, and approximately two additional Tax Auditor I positions to audit the payments and reports. According to the department, total one-time expected trust fund expenditure for FY 2004-05 would be in the amount of \$366,049.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.