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: CS/SB 1526

SPONSOR: Regulated Industries Committee and Senator Dyer

SUBJECT: Cigarettes/Sale & Distribution

DATE: March 18, 2000 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Guthrie	RI	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

The bill prohibits the sale, and the importation or possession for the purpose of selling, of unlawfully imported cigarettes, prohibits the alteration of packages of such cigarettes, and prohibits placing a tax stamp on an unlawful or altered package of cigarettes. The bill establishes criminal, administrative, and civil remedies and penalties. The bill broadens the definition of "cigarette," for purposes of the new prohibitions only, to include "bidis" and similar products within these prohibitions. The bill requires the Division to design cigarette tax stamps and maintain records in a way that permits identification of the agent or wholesale dealer that affixed the stamp to a particular pack of cigarettes.

The bill amends sections 210.05 and 210.19 and creates section 210.185, Florida Statutes.

II. Present Situation:

According to information provided by the Department of Legal Affairs, there are two types of "gray market" or "diverted" tobacco products. The first is "export label" product, which is manufactured domestically for export and is marked "U.S. Tax Exempt For Sale Outside the U.S." The second type is "foreign source" product, which is manufactured outside the United States for sale abroad and may bear a variety of marks or legends that distinguish it from product made for the domestic market. Both of these types of products are being diverted into the United States by third parties for domestic sale.

According to information from the Governor's Washington office, in the last year, there has been a dramatic increase in diversion as an unintended consequence of the tobacco settlements entered into by the states. Sales of gray market cigarettes increased 229% in Florida in a one year period. These cigarettes are sold at prices ranging from $14-18 per carton, including federal and state taxes. Domestic cigarettes are sold for $23 per carton, including a $4.50 increase based on last year's nation wide tobacco suit settlement, a price component not included in gray market cigarettes. As gray market products supplant domestic products, states' settlement payments are reduced accordingly.

In addition to the reduction in tobacco settlement payments, gray market cigarettes have a public health impact. The significantly lower price makes them more affordable and increases consumption, especially among minors. Additionally, they do not carry health warning labels required for cigarettes produced or imported for sale in the United States.

The Balanced Budget Act of 1997 restricts importation of gray market cigarettes to manufacturers only, effective January 1, 2000. The Act does not limit the exception to *original* manufacturers, however, creating a loophole that allows almost anyone to register as a manufacturer and import gray market cigarettes. Additionally, the act does not address foreign source products. A broad coalition including the state attorneys general, governors, state legislators (through the National Conference of State Legislatures), duty free store operators, wholesalers, retailers, and manufacturers of tobacco products are working to enact legislation at the federal level that would:

- Address the foreign source diverted product issue.
- Limit importation of previously exported tobacco products to the original manufacturer only.
- Ban the sale of any tobacco product with the legend "U.S. Tax-exempt. For use outside U.S." or "Tax-exempt. For use outside U.S.", which would address diverted export products stockpiled before the end of 1999 for sale after January 1, 2000.
- Apply criminal penalties for diversion to the domestic market before export of tobacco products manufactured domestically for export.
- Provide exemptions for personal use quantities and duty free sales.
- Require the destruction of diverted products seized by government.
- Make technical amendments to the civil and criminal violation sections of current law to correct enforcement problems.

In Florida, the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation (the Division) oversees the collection of excise taxes from the sale of cigarettes and other tobacco products. Payment of the tax is evidenced by affixing to the package of cigarettes either a stamp or a stamp insignia. s. 210.05, F.S. The division is authorized to seize and forfeit any cigarettes upon which the taxes have not been paid. s. 210.12, F.S.

Section 210.05, F.S., requires the Division to prescribe and prepare cigarette tax stamps.

Section 210.19, F.S., requires the Division to keep records showing the total amount of taxes collected.

III. Effect of Proposed Changes:

The bill creates s. 210.185, F.S., to enact in Florida the provisions sought by the coalition at the federal level. The bill does not apply either to cigarettes allowed to be imported or brought into the United States for personal use or cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise. It does apply, however, to any cigarettes that are brought back into the customs territory for resale within the customs territory.

Subsection 210.185(1), F.S., establishes three prohibited or unlawful acts. The first prohibition, contained in paragraph 210.185(1)(a), F.S., bars selling certain cigarettes or importing or possessing those cigarettes with the intent to sell. The banned cigarettes would be: packages that bear a label indicating they were produced domestically for export; packages that do not comply with all federal requirements regarding warnings and other information on packages of cigarettes manufactured, packaged, or imported for sale, distribution, or use in the United States; cigarettes imported into the United States on or after January 1, 2000, in violation federal law or regulations; cigarettes for which there has not been submitted to the Secretary of the U.S. Department of Health and Human Services the list or lists of the ingredients added to tobacco; and any other cigarettes that a person knows or has reason to know the manufacturer did not intend to be sold, distributed, or used in the United States.

The second prohibition, contained In paragraph 210.185(1)(b), F.S., makes it unlawful to alter a package of cigarettes before sale or distribution to the ultimate consumer so as to remove, conceal, or obscure any statement, label, stamp, sticker, or notice stating, "For Export Only," "U.S. Tax-Exempt," "For Use Outside U.S.," or similar wording, or any health warning that is not specified in or does not conform with federal requirements.

The third prohibition, contained in paragraph 210.185(1)(c), F.S., makes it unlawful to affix a tax stamp or any other required stamp to the package of any cigarettes described in paragraph (a) or altered in violation of paragraph (b).

The bill also establishes documentation requirements, requiring that on the first business day of each month, each person permitted to affix the tax stamp to cigarettes must file with the Division, for all cigarettes imported into the United States to which the person has affixed the tax stamp in the preceding month, a copy of the importer's federal tax permit; a copy of the customs form containing the internal revenue tax information required by the U.S. Bureau of Alcohol, Tobacco and Firearms; and a statement, signed by an officer of the manufacturer or importer under penalty of perjury, certifying that the manufacturer or importer has complied with the federal package health warning and ingredient reporting requirements with respect to those cigarettes.

The bill establishes criminal, administrative, and civil remedies and penalties. As to the criminal penalties, any person who sells the prohibited cigarettes, or imports or possesses them with the intent to sell, either knowing or having reason to know he or she is doing so, or who fails to comply with the documentation requirements, commits a felony of the third degree.

As to administrative penalties, upon a violation of the statute or any implementing rule, the Division may revoke or suspend the permit of any distributing agent, wholesale dealer, or exporter, and impose on the permittee a civil penalty, in an amount not to exceed the greater of 500 percent of the retail value of the cigarettes involved or $5,000. Additionally, any cigarettes that are acquired, held, owned, possessed, transported in, imported into, sold, or distributed in this state in violation of the section are considered contraband and are subject to seizure and forfeiture. The cigarettes are considered contraband whether the violation is knowing or otherwise.

As to civil remedies and penalties, the bill makes a violation an unlawful trade practice under part II of chapter 501, F.S., the Florida Deceptive and Unfair Trade Practices Act. This allows a state attorney or the Attorney General, as appropriate, and any aggrieved person to bring an action under the deceptive and unfair trade practices act. Included in the remedies and penalties which a state attorney or the Attorney General may seek under this Act are an injunction against any person who has violated, is violating, or is otherwise likely to violate the Act; actual damages for one or more consumers caused by an act or practice in violation of the Act; and appropriate orders, including, but not limited to, an order: to sequester or freeze assets; to reimburse consumers; to order any defendant to divest herself or himself of any interest in any enterprise, including real estate; to impose reasonable restrictions upon the future activities of any defendant to impede her or him from engaging in or establishing the same type of endeavor; to order the dissolution or reorganization of any enterprise; or to grant other appropriate relief. The enforcing authority may also seek civil penalties of not more than $10,000 per violation.

The Act also provides that anyone aggrieved by a violation of the Act may bring an action to enjoin a person who has violated, is violating, or is otherwise likely to violate the Act and, in any individual action brought by a consumer who has suffered a loss as a result of a violation, the consumer may recover actual damages, plus attorney's fees and court costs.

Additionally, the bill provides that any person may bring an action for appropriate injunctive or other equitable relief for a violation of this section; for actual damages, if any, sustained by reason of the violation; and, as determined by the court, for interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the actual damages sustained by reason of the violation.

The final penalty provision states that the bill’s penalty provisions are in addition to any penalties imposed under any other law.

The Division is to enforce the bill, and if requested by the Division, any law enforcement agency must enforce it. For enforcement purposes, the Division and any agency to which the Division has delegated enforcement responsibility may request information from any state or local agency, and may share information with, and request information from, any federal agency or any agency of any other state or any local agency thereof.

The bill defines “cigarette” for purposes of the newly created gray market statute to include a “bidi” cigarette. Bidis are small, unfiltered cigarettes, wrapped in leaves, with flavors such as chocolate, strawberry, and vanilla. According to newspaper articles, the cost for a pack of bidis is $2 or less for a pack of 20, less than a pack of regular cigarettes. According to the Center for Disease Control and Prevention, bidis release considerably more tar and nicotine than regular cigarettes.

The bill requires the Division to design the cigarette tax stamps in a way that permits identification of the agent or wholesale dealer that affixed the stamp to the particular pack of cigarettes by means of a serial number or other mark on the stamp. It also requires that the Division maintain records that identify which agent or wholesale dealer affixed the tax stamp to each package of cigarettes.

Section 4 of the bill is a severability clause, providing that if any provision of the bill, or the application of the bill to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the bill which can be given effect without the invalid provision or application.

The bill takes effect August 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Sellers of cigarettes obtained from traditional domestic sources will no longer be at a competitive disadvantage relative to sellers who obtain cigarettes at a reduced price via the international market. Sellers who previously participated in the gray market will either face increased cost of products or cease operation.

C. Government Sector Impact:

There will be an undetermined increase in tobacco settlement payments as the supply of gray market cigarettes diminishes and the demand for cigarettes made for the domestic market increases.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.