

BILL ANALYSIS

Senate Research Center
83R9839 ADM-F

S.B. 1136
By: Hinojosa
Finance
4/23/2013
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In the early 1990s, Texas and several other states were involved in lawsuits against the tobacco industry to recover money spent to treat tobacco-related illnesses. This resulted in a settlement agreement involving most of the states and separate settlement agreements for certain states, including Texas. This settlement structure resulted in several classes of manufacturers, depending on whether a manufacturer joined one of the settlement agreements.

S.B. 1136 seeks to ensure evenhanded treatment of the different groups of tobacco companies, to prevent certain manufacturers from undermining the state's policy of preventing underage smoking by offering tobacco products at substantially lower prices than other manufacturers, and to protect the programs currently being funded by the tobacco settlement agreement.

S.B. 1136 amends the Health and Safety Code to impose a fee on the sale, use, consumption, or distribution in Texas of the following: cigarettes of a manufacturer that did not sign a tobacco settlement agreement if a tax stamp is required to be affixed to a package of those cigarettes; non-settling manufacturer cigarettes that are sold, purchased, or distributed in Texas but that are not required to have a tax stamp affixed to a package of those cigarettes; non-settling manufacturer cigarette tobacco products that are subject to the state tax on tobacco products other than cigars; and non-settling manufacturer cigarette tobacco products that are sold, purchased, or distributed in Texas but are not subject to such a tax.

The bill makes the fee inapplicable to cigarettes or cigarette tobacco products that a manufacturer that signed a tobacco settlement agreement claims as its own and that are included in computing payments to be made by such settling manufacturer under the agreement and to cigarettes and cigarette tobacco products that are sold into another state for resale to consumers outside of Texas, provided that the sale is reported to the state into which the cigarettes are sold. The bill establishes that the fee is in addition to any other privilege, license, fee, or tax required or imposed by Texas law and that the fee is imposed, collected, paid, administered, and enforced in the same manner as the cigarette tax and the cigars and tobacco products tax. The bill requires the fee to be collected only once as to each cigarette or cigarette tobacco product on which it is due.

As proposed, S.B. 1136 amends current law relating to imposing a fee on the sale of cigarettes and cigarette tobacco products manufactured by certain companies, and provides penalties.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the comptroller of public accounts of the State of Texas in SECTION 1 (Section 161.617, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the attorney general of the State of Texas in SECTION 1 (Section 161.617, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 161, Health and Safety Code, by adding Subchapter V, as follows:

SUBCHAPTER V. FEE ON CIGARETTES AND CIGARETTE TOBACCO PRODUCTS
MANUFACTURED BY CERTAIN COMPANIES

Sec. 161.601. PURPOSE. Provides that the purpose of this subchapter is to:

- (1) recover health care costs to the state imposed by non-settling manufacturers;
- (2) prevent non-settling manufacturers from undermining this state's policy of reducing underage smoking by offering cigarettes and cigarette tobacco products at prices that are substantially below the prices of cigarettes and cigarette tobacco products of other manufacturers;
- (3) protect the tobacco settlement agreement and funding, which has been reduced because of the growth of sales of non-settling manufacturer cigarettes and cigarette tobacco products, for programs that are funded wholly or partly by payments to this state under the tobacco settlement agreement and recoup for this state settlement payment revenue lost because of sales of non-settling manufacturer cigarettes and cigarette tobacco products;
- (4) ensure evenhanded treatment of manufacturers and further protect the tobacco settlement agreement and funding by imposing a partial payment obligation on non-settling manufacturers that already make payments on Texas sales under the master settlement agreement until a credit amendment to that agreement that will provide those manufacturers with a credit for payments to Texas is effective; and
- (5) provide funding for any purpose the legislature determines.

Sec. 161.602. DEFINITIONS. Defines "brand family," "cigarette," "cigarette tobacco product," "credit amendment," "distributor," "manufacturer," "master settlement agreement," "non-settling manufacturer," "non-settling manufacturer cigarettes," "non-settling manufacturer cigarette tobacco products," "settling manufacturer," "subsequent participating manufacturer," and "tobacco settlement agreement" in this subchapter.

Sec. 161.603. FEE IMPOSED. (a) Provides that a fee is imposed on the sale, use, consumption, or distribution in this state of:

- (1) non-settling manufacturer cigarettes if a stamp is required to be affixed to a package of those cigarettes under Section 154.041 (Stamp Required), Tax Code;
- (2) non-settling manufacturer cigarettes that are sold, purchased, or distributed in this state but that are not required to have a stamp affixed to a package of those cigarettes under Chapter 154 (Cigarette Tax), Tax Code;
- (3) non-settling manufacturer cigarette tobacco products that are subject to the tax imposed by Section 155.0211 (Tax Imposed on Tobacco Products Other Than Cigars), Tax Code; and
- (4) non-settling manufacturer cigarette tobacco products that are sold, purchased, or distributed in this state but that are not subject to the tax imposed by Section 155.0211, Tax Code.

(b) Provides that the fee imposed by this section does not apply to cigarettes or cigarette tobacco products that a settling manufacturer claims as its own, and that are included in computing payments to be made by that settling manufacturer, under the tobacco settlement agreement described by Section 161.602(13)(A) (relating to defining "tobacco settlement agreement" to mean the Comprehensive Settlement Agreement and Release filed on January 16, 1998, in the United States District Court, Eastern District of Texas, in the case styled *The State of Texas v.*

The American Tobacco Co., et al., No. 5-96CV-91, and all subsequent amendments).

(c) Provides that the fee imposed by this subchapter does not apply to cigarettes or cigarette tobacco products that are sold into another state for resale to consumers outside of this state, provided that the sale is reported to the state into which the cigarettes are sold under 15 U.S.C. Section 376.

(d) Provides that the fee imposed by this subchapter is in addition to any other privilege, license, fee, or tax required or imposed by state law.

(e) Provides that the fee imposed by this subchapter, except as otherwise provided by this subchapter, is imposed, collected, paid, administered, and enforced in the same manner as the taxes imposed by Chapter 154 or 155 (Cigars and Tobacco Products Tax), Tax Code, as appropriate, taking into account that the fee is imposed on non-settling manufacturers.

(f) Requires that the fee imposed by this subchapter be collected only once on each cigarette or cigarette tobacco product on which it is due.

Sec. 161.604. RATE OF FEE. (a) Imposes the fee, for cigarettes or cigarette tobacco products sold, used, consumed, or distributed in this state, as provided by Section 161.603, during the 2013 calendar year, at the rate of 2.75 cents for:

(1) each non-settling manufacturer cigarette; and

(2) each 0.09 ounces of non-settling manufacturer cigarette tobacco product.

(b) Requires the comptroller of public accounts of the State of Texas (comptroller), beginning in January 2014, and in January of each subsequent year, to compute the rate of the tax applicable during that calendar year by increasing the rate for the preceding calendar year, as recalculated under Section 161.607 for that year, by the greater of:

(1) three percent; or

(2) the actual total percentage change in the Consumer Price Index for All Urban Consumers (CPI), as published by the Bureau of Labor Statistics of the United States Department of Labor, during the preceding calendar year, calculated by comparing the CPI for December of the preceding calendar year with the CPI for December a year earlier.

(c) Requires that the rate of the fee on the cigarettes and cigarette tobacco products of a subsequent participating manufacturer, notwithstanding Subsection (a), for calendar months beginning before the effective date of a credit amendment, be calculated by substituting 0.75 cents for 2.75 cents in Subsection (a). Requires that the rate of the fee on the cigarettes and cigarette tobacco products of subsequent participating manufacturers, for calendar months beginning on or after the effective date of a credit amendment, be the same as the rate that applies for those months to the cigarettes of non-settling manufacturers who are not subsequent participating manufacturers.

Sec. 161.605. DISTRIBUTOR'S REPORT. (a) Requires a distributor required to file a report under Section 154.210 (Distributor's Report) or 155.111 (Distributor's Report), Tax Code, to, in addition to the information required by those sections, include in that required report, as appropriate:

(1) the number and denominations of stamps affixed to individual packages of non-settling manufacturer cigarettes during the preceding month;

(2) the amount of non-settling manufacturer cigarette tobacco products subject to the tax imposed by Section 155.0211, Tax Code, during the preceding month;

(3) the number of individual packages of non-settling manufacturer cigarettes and the amount of non-settling manufacturer cigarette tobacco products not subject to the tax imposed by Chapter 154, Tax Code, or Section 155.0211, Tax Code, sold or purchased in this state or otherwise distributed in this state for sale in the United States; and

(4) any other information the comptroller considers necessary or appropriate to determine the amount of the fee imposed by this subchapter or to enforce this subchapter.

(b) Requires that the information required by Subsections (a)(1), (2), and (3) be itemized for each place of business and by manufacturer and brand family.

(c) Requires that the requirement to report information under this section be enforced in the same manner as the requirement to deliver to or file with the comptroller a report required under Section 154.210 or 155.111, Tax Code, as appropriate.

(d) Authorizes information obtained from a report provided under Subsection (a) regarding cigarettes or cigarette tobacco products sold, purchased, or otherwise distributed by a non-settling manufacturer to be disclosed by the comptroller to the manufacturer or to the authorized representative of the manufacturer.

Sec. 161.606. NOTICE AND PAYMENT OF FEE. (a) Requires the comptroller, each month, not later than the 20th day after the date the comptroller receives the information required by Section 161.605, to:

(1) compute the amount of the fee imposed by this subchapter that each non-settling manufacturer owes for that reporting period based on that information and any other information available to the comptroller; and

(2) mail to each non-settling manufacturer a notice of the fee the manufacturer owes.

(b) Requires the non-settling manufacturer, not later than the 15th day of the month after the month in which the comptroller mails a non-settling manufacturer a notice under Subsection (a), to send to the comptroller the amount of the fee due according to the notice.

Sec. 161.607. ADDITIONAL FEE. (a) Requires the comptroller, in preparing the final notice under Section 161.606 for the 2014 calendar year and for each subsequent calendar year, to recalculate the fee rate for the calendar year to which that notice applies, using the methodology specified in Section 161.604, except that:

(1) the rate of tax for the year to which the increases are applied is required to be the greater of the rate for the preceding year calculated under this section and the rate for that year originally calculated under Section 161.604; and

(2) Section 161.604(b)(2) is required to be applied using the actual total percent change in the Consumer Price Index for All Urban Consumers (CPI), as published by the Bureau of Labor Statistics of the United States

Department of Labor, for the calendar year to which that final notice relates, calculated by comparing the CPI for December of the calendar year to which the notice relates with the CPI for December of the year preceding the year to which the notice relates.

(b) Requires that the amount shown as payable by each non-settling manufacturer in the final notice, if the rate as recalculated under Subsection (a) exceeds the rate originally calculated for the calendar year under Section 161.604, be equal to the amount of non-settling manufacturer cigarettes and non-settling manufacturer cigarette tobacco products of that manufacturer sold, used, consumed, or distributed in this state during the full year to which the notice relates multiplied by the recalculated fee rate computed under Subsection (a), reduced by the amount of fees paid by that manufacturer under the notices previously issued for that year under Section 161.606.

Sec. 161.608. DIRECTORY OF COMPLYING MANUFACTURERS. (a) Requires the comptroller to develop, maintain, and publish on the comptroller's Internet website a directory listing of all manufacturers that have complied with this subchapter and their brands.

(b) Requires the comptroller to provide the list described by Subsection (a) to any person on request.

Sec. 161.609. PREPAYMENT BEFORE OFFERING NON-SETTLING MANUFACTURER CIGARETTES OR CIGARETTE TOBACCO PRODUCTS FOR SALE OR DISTRIBUTION IN THIS STATE. (a) Prohibits the non-settling manufacturer, if cigarettes or cigarette tobacco products of a non-settling manufacturer were not offered for sale or distribution in this state on September 1, 2012, from offering those cigarettes or cigarette tobacco products for sale or distribution in this state after that date unless the manufacturer first prepays the fee imposed by this subchapter for sales of cigarettes and cigarette tobacco products that will occur in the first calendar month in which they are sold or distributed in this state.

(b) Provides that the amount a non-settling manufacturer is required to prepay under this section is equal to the greater of:

(1) the rate prescribed by Section 161.604 in effect on that date multiplied by:

(A) the number of cigarettes on which the fee would be due that the comptroller reasonably projects that the non-settling manufacturer will sell or distribute in this state during that calendar month; and

(B) each 0.09 ounces of non-settling manufacturer cigarette tobacco products on which the fee would be due that the comptroller reasonably projects that the non-settling manufacturer will sell or distribute in this state during that calendar month; or

(2) \$50,000.

(c) Authorizes the comptroller to require a non-settling manufacturer to provide any information reasonably necessary to determine the prepayment amount.

(d) Requires the comptroller to establish procedures to reimburse a non-settling manufacturer if the actual sales or distributions in the first calendar month are less than the projected sales or distributions, and require additional payments if the actual sales or distributions in the first calendar month are greater than the projected sales or distributions.

(e) Requires the non-settling manufacturer, beginning in the month following the month for which a non-settling manufacturer prepays its fees, to thereafter pay the fee imposed by this subchapter in the manner provided by Section 161.606.

Sec. 161.610. REPORT TO ATTORNEY GENERAL BEFORE OFFERING NON-SETTLING MANUFACTURER CIGARETTES OR CIGARETTE TOBACCO PRODUCTS FOR SALE OR DISTRIBUTION IN THIS STATE. (a) Requires a non-settling manufacturer described by Section 161.609(a), in addition to prepaying the fee required by Section 161.609, to, before the date the cigarettes or cigarette tobacco products are offered for sale or distribution in this state, provide to the attorney general on a form prescribed by the attorney general:

(1) the non-settling manufacturer's complete name, address, and telephone number;

(2) the date that the non-settling manufacturer will begin offering cigarettes or cigarette tobacco products for sale or distribution in this state;

(3) the names of the brand families of the cigarettes or cigarette tobacco products that the non-settling manufacturer will offer for sale or distribution in this state;

(4) a statement that the non-settling manufacturer intends to comply with this subchapter; and

(5) the name, address, telephone number, and signature of an officer of the non-settling manufacturer attesting to all of the included information.

(b) Requires the attorney general to make the information provided under this section available to the comptroller.

Sec. 161.611. PENALTIES FOR NONCOMPLIANCE. (a) Requires that cigarettes and cigarette tobacco products of a non-settling manufacturer that has not complied with this subchapter, including full payment of the fee imposed by this subchapter, be treated as cigarettes or cigarette tobacco products for which the tax assessed by Chapter 154 or 155, Tax Code, as appropriate, has not been paid, and provides that the non-settling manufacturer is subject to all penalties imposed by those chapters for violations of those chapters.

(b) Requires the comptroller to provide to a non-settling manufacturer, each distributor authorized to affix stamps under Chapter 154, Tax Code, and the attorney general a notice of the non-settling manufacturer's noncompliance with this subchapter if the non-settling manufacturer:

(1) does not pay in full the fee imposed by this subchapter; or

(2) is not included on the directory required by Section 161.608.

(c) Prohibits a distributor, if a non-settling manufacturer does not appear on the directory required by Section 161.608, or on receipt of the notice of a non-settling manufacturer's noncompliance, from:

(1) paying the tax imposed by Chapter 154 or 155, Tax Code, as appropriate;

(2) affixing to a package of cigarettes the stamp required by Section 154.041, Tax Code; or

(3) otherwise purchasing, selling, or distributing cigarettes or cigarette tobacco products manufactured by the non-settling manufacturer in this state.

(d) Requires the comptroller, if the comptroller determines that the non-settling manufacturer that is the subject of a notice provided under Subsection (b) later complies with this subchapter, to provide to the non-settling manufacturer, each distributor authorized to affix stamps under Chapter 154, Tax Code, and the attorney general notice that the non-settling manufacturer is in compliance with this subchapter.

Sec. 161.612. APPOINTMENT OF AGENT FOR SERVICE OF PROCESS. Requires a non-settling manufacturer to appoint and engage a resident agent for service of process.

Sec. 161.613. AUDIT OR INSPECTION. Entitles the comptroller or attorney general to conduct reasonable periodic audits or inspections of the financial records of a non-settling manufacturer and its distributors to ensure compliance with this subchapter.

Sec. 161.614. COMPTROLLER INFORMATION SHARING. Requires the comptroller, on request, to report annually to the independent auditor or other entities responsible for making calculations or other determinations under a tobacco settlement agreement or the master settlement agreement, as the master settlement agreement may be amended or supplemented by some or all of the parties thereto, the volume of cigarettes on which the fee required under Section 161.603 is paid, itemized by cigarette manufacturer and brand family.

Sec. 161.615. REVENUE DEPOSITED IN GENERAL REVENUE FUND. Requires that the revenue from the tax imposed by this subchapter be deposited in the state treasury to the credit of the general revenue fund.

Sec. 161.616. APPLICATION OF SUBCHAPTER. Provides that this subchapter applies without regard to Section 154.022 (Tax Imposed on First Sale of Cigarettes), Tax Code, or any other law that might be read to create an exemption for interstate sales.

Sec. 161.617. RULES. Authorizes the comptroller and attorney general to issue rules and regulations as necessary to carry out or enforce this subchapter.

SECTION 2. (a) Requires a non-settling manufacturer, not later than September 30, 2013, as that term is defined by Section 161.602, Health and Safety Code, as added by this Act, that is offering cigarettes or cigarette tobacco products for sale or distribution in this state on September 1, 2013, to provide to the attorney general on a form prescribed by the attorney general:

(1) the non-settling manufacturer's complete name, address, and telephone number;

(2) the date that the non-settling manufacturer began offering cigarettes or cigarette tobacco products for sale or distribution in this state;

(3) the names of the brand families of the cigarettes or cigarette tobacco products that the non-settling manufacturer offers for sale or distribution in this state;

(4) a statement that the non-settling manufacturer intends to comply with Subchapter V, Chapter 161 (Public Health Provisions), Health and Safety Code, as added by this Act; and

(5) the name, address, telephone number, and signature of an officer of the non-settling manufacturer attesting to all of the included information.

(b) Requires the attorney general to make the information provided under Subsection (a) of this section available to the comptroller.

SECTION 3. Effective date: September 1, 2013.