

**NONPARTICIPATING CIGARETTE  
MANUFACTURERS**

**House Bill 5221**

**Sponsor: Rep. Lorence Wenke**

**House Bill 5222**

**Sponsor: William J. O'Neil**

**Committee: Tax Policy**

**Complete to 11-5-03**

**A SUMMARY OF HOUSE BILLS 5221 AND 5222 AS INTRODUCED 11-4-03**

House Bill 5221 would amend the Tobacco Products Tax Act (MCL 205.426d) to:

- require a nonparticipating manufacturer to prepay an equity assessment (equal to 35 cents per pack of 20 cigarettes) to the Department of Treasury;
- prohibit a stamping agent from affixing a stamp to a package of cigarettes of a nonparticipating manufacturer unless that manufacturer was listed on the department's web site as having complied with the bill; and
- allow the Department of Treasury to seize the cigarettes of a nonparticipating manufacturer that were held illegally.

(A nonparticipating manufacturer is a tobacco manufacturer that did not participate in the master settlement agreement. The master settlement agreement was reached on November 23, 1998, between 46 states and the five major United States tobacco companies.)

House Bill 5222 would amend Public Act 244 of 1999 (MCL 445.2052), which implements provisions of the tobacco master settlement agreement, to revise the determination of the amounts that nonparticipating manufacturers must place in escrow.

A more detailed description of the two bills follows.

House Bill 5221

The bill would require a nonparticipating manufacturer selling cigarettes in Michigan on the bill's effective date to pay an equity assessment and provide certain information to the Department of Treasury, within 30 days after the bill's effective date. If a nonparticipating manufacturer were not selling cigarettes in Michigan on that date, the manufacturer would be required, before selling cigarettes in the state, to provide the information and pay the equity assessment for all cigarettes it anticipated to sell in the current calendar year. The bill says that the purpose of the equity assessment would be to fund enforcement and administration of Public Act 244 of 1999 (the master tobacco settlement agreement implementation law).

A nonparticipating manufacturer that did not provide the required information or pay the equity assessment could not sell cigarettes in the state to any person for sale, distribution, or consumption in the state; further, a person could not purchase, acquire, possess, or sell cigarettes acquired from or manufactured by a nonparticipating manufacturer that had not provided the required information or paid the equity assessment.

The bill would impose an equity assessment of 17.5 mills per cigarette (or 35 cents for a pack of 20 cigarettes) on all cigarettes sold in the state by a nonparticipating manufacturer. A nonparticipating manufacturer would have to prepay the equity assessment by March 1 each year for all cigarettes that were anticipated to be sold in the current calendar year. The prepayment amount would be either 1) an amount determined by multiplying 17.5 mills times the number of cigarettes that the department reasonably determined that the nonparticipating manufacturer would sell in the state in the current calendar year or 2) \$10,000, whichever was more. The department could require a nonparticipating manufacturer to provide any information reasonably necessary to determine the equity assessment prepayment amount.

By February 15 of each year, the department would have to notify the nonparticipating manufacturer of the amount of the prepayment due for the current year. The department could increase the equity assessment prepayment amount during the year if the increase were justified by the nonparticipating manufacturer's actual sales of cigarettes. The equity assessment would have to be collected and reconciled by April 15 of each year for cigarettes sold in the previous calendar year. The department would have to credit a nonparticipating manufacturer with any prepayment it made for that year. The equity assessment would be in addition to all other fees, assessments, and taxes levied by law.

The bill would require a nonparticipating manufacturer to provide to the department, on a form prescribed by the department, the name, address, and telephone number of the nonparticipating manufacturer and its resident agent; and the date that the manufacturer intended to begin or began selling cigarettes in the state and the brand names of the cigarettes. A nonparticipating manufacturer also would have to state its intention to comply with its escrow obligation, its obligations under the bill, and its obligations under Section 6c of the Tobacco Products Tax Act.

(Section 6c requires each nonparticipating manufacturer to certify to the department each year that it is not a participating manufacturer, that it has established the required escrow account, and that it has deposited funds into the account as required by Public Act 244 of 1999.)

The bill would require a nonparticipating manufacturer to provide to the department the name, address, telephone number, and signature of an officer of the manufacturer who attested to all of the information required under the bill.

The department would have to maintain and regularly update a list of nonparticipating manufacturers that complied with the bill, and publish the list on its web site, and provide a copy of the list to a person upon request.

Ninety days after the department posted on its web site and provided wholesalers and unclassified acquirers notice that a nonparticipating manufacturer was in violation of the bill, the department could seize or confiscate from any person any cigarettes in that person's possession that were acquired from or manufactured by that nonparticipating manufacturer. The seizure, confiscation, forfeiture, and sale of cigarettes would have to be done as provided in Section 9 of the Tobacco Products Tax Act for tobacco products that are acquired, possessed, sold, or transported in violation of the act.

The bill would prohibit a stamping agent from affixing to any package of cigarettes, or shipping container of roll-your-own tobacco, of a nonparticipating manufacturer, the stamp required under the act unless the nonparticipating manufacturer was listed on the department web site as being in compliance, or after receiving notice that the nonparticipating manufacturer had not prepaid or paid in full its equity assessment. A stamping agent that violated this provision would be subject to the penalties in Section 5 of the act (which provides for the suspension, revocation, or refusal to issue or renew a license issued under the act, including the license of a stamping agent). Further, if a stamping agent intentionally and knowingly violated this provision, the department could seize or confiscate any cigarettes in the agent's possession that were stamped in violation of the bill. Seizure, confiscation, forfeiture, and sale of cigarettes would have to be accomplished as provided under Section 9.

The bill specifies that a nonparticipating manufacturer that intended to sell or was selling a brand of cigarettes in or into the state would be presumed to be the same manufacturer that previously sold the same brand in or into the state, unless the nonparticipating manufacturer could prove that the two manufacturers were not affiliated. A nonparticipating manufacturer could not be authorized to sell in or into the state a cigarette brand that was previously sold in or into the state by another nonparticipating manufacturer that had not paid its entire escrow amount or paid its equity assessment.

The bill would require a nonparticipating manufacturer to appoint and continually engage a resident agent for service of process. The service would constitute a legal and valid service of process.

The department could impose on any person a civil fine of up to \$1,000 for each violation of the bill. The civil fine would be in addition to all other fines or penalties imposed under the act or the Revenue Act.

#### House Bill 5222

The bill would amend Public Act 244 of 1999 (MCL 445.2052), which implements provisions of the tobacco master settlement agreement, to revise the determination of the amounts that nonparticipating manufacturers must place in escrow.

Under Public Act 244, a nonparticipating manufacturer must place in an escrow fund, by April 15 each year, amounts specified in the act. The amount to be placed in escrow is determined pursuant to a formula prescribed by Sections IX(i)(2) and IX(i)(3) of the master settlement agreement. The nonparticipating manufacturer receives interest and other appreciation

on the funds, but the funds themselves may be released from escrow only under circumstances specified in the act. Under one condition, if it is established that the amount a nonparticipating manufacturer is required to place into escrow in a particular year is greater than “the state’s allocable share of the total payments that such a manufacturer would have been required to make under the master settlement agreement (as determined pursuant to Section IX(i)(2) . . . and before any of the adjustments or offsets described in Section IX(i)(3) . . . other than the inflation adjustment) had it been a participating manufacturer”, then the excess is returned.

House Bill 5222 would revise the escrow determination provision to read: “to the extent that a tobacco manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to Section IX(i) of that agreement including after final determination of all adjustments, that [the] manufacturer would have been required to make on account of such units sold had it been a participating manufacturer”, the excess would be returned. (This means apparently that, under the bill, all of Section IX(i), instead of only Sections IX(i)(2) and IX(i)(3), would be used to determine the escrow amount.)

Under the bill, if a court found the new language added by the bill and quoted above unconstitutional, then the subdivision being amended would return to its original condition. Further, the bill would specify that if the act or any portion of the bill’s provisions were held unconstitutional by a court of competent jurisdiction, the remaining portions of the act would continue in full force and effect.

Analyst: M. Wolf/C. Couch

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.