

By: Representative Moody

To: Public Health and
Welfare; Ways and Means

HOUSE BILL NO. 1338

1 AN ACT TO ENACT THE "CIGARETTE ANTI-CONDUIT ACT" TO MAKE IT
 2 UNLAWFUL TO SHIP TO ANY PERSON IN THIS STATE OR ANOTHER STATE
 3 CIGARETTES BELONGING TO A BRAND FAMILY OF A MANUFACTURER WHO IS
 4 NOT PARTICIPATING IN THE MASTER SETTLEMENT AGREEMENT BETWEEN
 5 CERTAIN STATE AND TOBACCO PRODUCT MANUFACTURERS OR WHO IS NOT
 6 MAKING ESCROW PAYMENTS AS REQUIRED UNDER THE MASTER SETTLEMENT
 7 AGREEMENT; TO REQUIRE THE CHAIRMAN OF THE STATE TAX COMMISSION TO
 8 ANNUALLY COMPILE A LIST OF ALL BRAND FAMILIES OF CIGARETTE
 9 MANUFACTURERS WHO ARE PARTICIPATING IN THE MASTER SETTLEMENT
 10 AGREEMENT OR WHO ARE MAKING ESCROW PAYMENTS UNDER THE MASTER
 11 SETTLEMENT AGREEMENT; TO REQUIRE CERTAIN REPORTS BY PARTICIPATING
 12 MANUFACTURERS; TO PROVIDE CERTAIN PENALTIES AND INJUNCTIVE RELIEF
 13 FOR VIOLATIONS OF THIS ACT; TO GIVE THE CHAIRMAN OF THE STATE TAX
 14 COMMISSION AND THE ATTORNEY GENERAL CERTAIN ADDITIONAL AUTHORITY
 15 IN RELATION TO THIS ACT; TO AUTHORIZE THE CHAIRMAN OF THE STATE
 16 TAX COMMISSION TO ESTABLISH FEES TO BE PAID BY MANUFACTURERS
 17 SEEKING INCLUSION OF THEIR BRAND FAMILIES IN THE LIST REQUIRED BY
 18 THIS ACT; AND FOR RELATED PURPOSES.

19 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

20 **SECTION 1.** This chapter may be cited as the "Cigarette
 21 Anti-Conduit Act."

22 **SECTION 2.** (1) It is the policy of the state to reduce
 23 cigarette smoking by minors and adults who are residents of this
 24 state.

25 (2) According to public health authorities, higher cigarette
 26 prices help reduce cigarette consumption.

27 (3) In 1997 and 1998 leading United States cigarette
 28 manufacturers entered into a settlement agreement with this state,
 29 and into settlement agreements with other states, resolving
 30 various lawsuits brought by those states against those
 31 manufacturers.

32 (4) Pursuant to the settlement agreement with leading United
 33 States cigarette manufacturers known as the Master Settlement
 34 Agreement, or MSA, entered into on November 23, 1998, forty-six
 35 (46) states and six (6) territories have enacted statutes, known



36 as the MSA Statute, requiring tobacco product manufacturers either
37 (a) to sign the MSA, and thereby become participating
38 manufacturers responsible for making settlement payments to those
39 states and territories as specified in the MSA, or (b) to remain
40 nonparticipating manufacturers, and thereby become responsible for
41 making specified payments into escrow accounts for sales of their
42 cigarettes to consumers within those states, in order to provide a
43 source of recovery in the event that the states and territories
44 assert claims against them in the future, and prevent such
45 manufacturers from deriving large, short-term profits and then
46 becoming judgment-proof before liability may arise.

47 (5) The MSA and the MSA Statutes enacted by the MSA States
48 directly benefit the people of this state by requiring each
49 tobacco product manufacturer that is a participating manufacturer
50 or a nonparticipating manufacturer under the MSA to make
51 settlement payments or escrow payments, as the case may be, that
52 are reflected in higher prices for the cigarettes of such
53 manufacturer in this state, which public health authorities
54 believe help reduce cigarette consumption.

55 (6) Some nonparticipating manufacturers, however, either are
56 circumventing or may attempt to circumvent the escrow payment
57 requirements of the MSA Statute enacted by MSA States by using
58 this state as a conduit, selling their cigarettes to distributors
59 in this state for transshipment to states and territories covered
60 by the MSA, and then claiming that the MSA Statute does not
61 require them to make escrow payments for sales of the transshipped
62 cigarettes in those states and territories.

63 (7) As a result of such circumvention of the escrow payment
64 requirements of the MSA Statute, the prices of cigarettes of such
65 nonparticipating manufacturers in this state do not reflect the
66 escrow payments required by the MSA Statutes enacted by the MSA
67 States, undermining the policy of this state to reduce smoking by
68 the residents of this state by enabling such nonparticipating



69 manufacturers to offer significantly lower prices than the tobacco
70 product manufacturers that must make annual settlement payments
71 under the MSA and the nonparticipating manufacturers that make
72 such escrow payments.

73 (8) This use of the state as a conduit to circumvent the
74 laws of other states and territories not only undermines the
75 policy of this state to reduce smoking by residents of this state
76 but also is generally contrary to the public policy of this state.

77 (9) Prohibiting the shipment or sale of cigarettes of a
78 nonparticipating manufacturer that has not made all escrow
79 payments required by the MSA Statutes enacted by the MSA States
80 will help ensure that the nonparticipating manufacturer will make
81 such payments, thereby serving the state's policy of reducing
82 smoking by its residents and avoiding its use as a conduit to
83 circumvent the laws of other states.

84 **SECTION 3.** As used in this chapter:

85 (a) "Brand family" means all styles of cigarettes sold
86 under the same trade mark and differentiated from one another by
87 means of additional modifiers including, but not limited to,
88 "menthol," "lights," "kings" and "100s."

89 (b) "Cigarette" means any product that contains
90 nicotine, is intended to be burned or heated under ordinary
91 conditions of use, and consists of or contains (i) any roll of
92 tobacco wrapped in paper or in any substance not containing
93 tobacco; or (ii) tobacco, in any form, that is functional in the
94 product, which, because of its appearance, the type of tobacco
95 used in the filler, or its packaging and labeling, is likely to be
96 offered to, or purchased by, consumers as a cigarette; or (iii)
97 any roll of tobacco wrapped in any substance containing tobacco
98 which, because of its appearance, the type of tobacco used in the
99 filler, or its packaging and labeling, is likely to be offered to,
100 or purchased by, consumers as a cigarette described in (i) of this
101 definition. The term "cigarette" includes "roll-your-own,"



102 meaning any tobacco which, because of its appearance, type,
103 packaging or labeling is suitable for use and likely to be offered
104 to, or purchased by, consumers as tobacco for making cigarettes.
105 For purposes of this definition of "cigarette," 0.09 ounces of
106 "roll-your-own" tobacco shall constitute one (1) individual
107 "cigarette."

108 (c) "Commissioner" means the Chairman of the State Tax
109 Commission of the State of Mississippi, and his authorized agents
110 and employees.

111 (d) "Master Settlement Agreement" means the settlement
112 agreement and related documents entered into on November 23, 1998,
113 by the MSA States and certain tobacco product manufacturers, and
114 subsequently entered into by certain other tobacco product
115 manufacturers.

116 (e) "MSA State" means a Settling State as defined in
117 Section II(qq) of the Master Settlement Agreement.

118 (f) "MSA Statute" means the statute enacted by an MSA
119 State to implement the Exhibit T to the Master Settlement
120 Agreement.

121 (g) "Nonparticipating manufacturer" means any tobacco
122 product manufacturer that is not a participating manufacturer, as
123 defined in paragraph (h).

124 (h) "Participating manufacturer" means a participating
125 manufacturer as that term is defined in Section II(jj) of the
126 Master Settlement Agreement and any amendments thereto.

127 (i) "Permit holder" means a person who (i) holds a
128 permit under Chapter 69 of Title 27 to operate as a wholesaler or
129 operator of a terminal or warehouse; or (ii) has received
130 permission to operate as an interstate dealer under Section
131 27-69-33.

132 (j) "State" means any state or territory of the United
133 States.



134 (k) "Tobacco product manufacturer" means a tobacco
135 product manufacturer as that term is defined in Section II(uu) of
136 the Master Settlement Agreement.

137 **SECTION 4.** It shall be unlawful for a permit holder (a) to
138 ship to any person in this state or another state cigarettes
139 belonging to a brand family not included on the list provided by
140 the commissioner to the permit holder under Section 27-70-5, or
141 (b) to sell or possess for sale, to any person in this state or
142 another state, for resale to a consumer in this state or another
143 state, such cigarettes.

144 **SECTION 5.** The commissioner shall annually prepare, and not
145 later than July 15 of each year shall transmit to all permit
146 holders and post on the website of the commissioner, a list of all
147 brand families manufactured for sale to consumers within the
148 United States by (a) each tobacco product manufacturer that by May
149 1 of such year has provided the commissioner the certification and
150 information specified in Section 6(1) of this act, and (b) each
151 tobacco product manufacturer as to which the commissioner has made
152 the determination described in Section 7(2) of this act.

153 **SECTION 6.** (1) The commissioner shall include on the list
154 described in Section 5 of this act all brand families manufactured
155 for sale to consumers within the United States by each tobacco
156 product manufacturer that has provided the commissioner, not later
157 than May 1 of the year in question or previously, (a) a
158 certification, under penalty of perjury, that it is a
159 participating manufacturer, and (b) the names of all such brand
160 families. Such a tobacco product manufacturer shall be deemed to
161 be the manufacturer of all those cigarettes, but only those
162 cigarettes, that are counted as its cigarettes for purposes of
163 calculating its payments under the Master Settlement Agreement for
164 the year in question.

165 (2) The commissioner shall include on the list described in
166 Section 5 of this act all brand families manufactured for sale to



167 consumers within the United States by each nonparticipating
168 manufacturer that has provided the commissioner, not later than
169 May 1 of the year in question, (a) the certification described in
170 Section 7 of this act, but only if the commissioner has determined
171 that such certification is true and correct; and (b) the names of
172 all such brand families. A nonparticipating manufacturer shall be
173 deemed to be the manufacturer of all cigarettes as to which it is
174 the first purchaser anywhere for resale in the United States of
175 cigarettes manufactured anywhere that the manufacturer of such
176 cigarettes did not intend to be sold in the United States.

177 **SECTION 7.** (1) For the brand families of a nonparticipating
178 manufacturer that sells (whether directly or through a distributor
179 or similar intermediary or intermediaries) cigarettes to any
180 permit holder to be eligible for inclusion in the list described
181 in Section 5 of this act, such manufacturer, not later than May 1
182 of the year in question, under penalty of perjury, must provide
183 the commissioner:

184 (a) A certification that such manufacturer:

185 (i) Will make all escrow payments required by the
186 MSA Statute of each MSA State for all cigarettes of such
187 nonparticipating manufacturer that shall be sold to consumers
188 within each such MSA State through April 30 of the year following
189 the year in which such certification is provided; and

190 (ii) Has made all escrow payments required by the
191 MSA Statute of each MSA State for cigarettes of such
192 nonparticipating manufacturer that were sold to consumers within
193 each such MSA State during the preceding calendar year; and

194 (b) Such information as the commissioner shall require
195 to determine whether such certification is true and correct.

196 (2) A nonparticipating manufacturer shall be determined to
197 have made a true and correct certification under subsection (1) of
198 this section if the commissioner determines that the total amount
199 of the escrow payments made by the nonparticipating manufacturer



200 in all MSA States for cigarettes of the nonparticipating
201 manufacturer that were sold to consumers within all such states
202 during the preceding year is equal to the product of (a) the
203 applicable per-unit amount specified in the MSA Statutes of such
204 states, including all adjustments for inflation, and (b) the
205 number of units of cigarettes manufactured by the nonparticipating
206 manufacturer that were sold to consumers within all MSA States
207 during the preceding year.

208 (3) The commissioner shall promptly notify the
209 nonparticipating manufacturer and the Attorney General of any
210 determination made under this section.

211 (4) For purposes of this section, references to cigarettes
212 "sold to consumers within" a state shall include any cigarettes
213 sold to consumers within the state, whether sold by the
214 manufacturer directly or by a distributor, retailer or similar
215 intermediary or intermediaries.

216 **SECTION 8.** Not later than thirty (30) days after the end of
217 each quarter, and more frequently if so directed by the
218 commissioner, each permit holder shall report to the commissioner
219 all shipments of cigarettes to persons in this state and other
220 states during the preceding calendar quarter. The report shall
221 state, by nonparticipating manufacturer and brand family, the
222 quantity of cigarettes shipped to persons in each such state.

223 **SECTION 9.** (1) Upon a finding of a violation of Section 4
224 of this act by a permit holder, the commissioner may impose upon
225 the permit holder a civil penalty in an amount not to exceed the
226 greater of five hundred percent (500%) of the retail value of the
227 cigarettes shipped in violation of Section 4 of this act or Five
228 Thousand Dollars (\$5,000.00). Upon a finding of a violation of
229 Section 8 of this act by a permit holder, the commissioner may
230 impose upon the permit holder a civil penalty in an amount not to
231 exceed Five Thousand Dollars (\$5,000.00). Upon a finding of a
232 second or subsequent violation by a permit holder of Sections 4 or



233 8 of this act, the commissioner may revoke the license of the
234 permit holder, in accordance with the procedures in Section
235 27-69-9.

236 (2) The Attorney General, on behalf of the commissioner,
237 shall seek an injunction to restrain a permit holder from shipping
238 cigarettes in violation of Section 4 of this act or to compel a
239 permit holder to submit the information required by Section 8 of
240 this act.

241 (3) Based on credible information provided by authorities in
242 an MSA State or other credible information, the Attorney General
243 shall bring an action in the Circuit Court of Hinds County,
244 Mississippi, against a nonparticipating manufacturer for filing a
245 false certification in violation of Section 7 of this act. Upon a
246 finding that the nonparticipating manufacturer has filed a false
247 certification under Section 7(1)(a)(ii) of this act or has
248 fraudulently or intentionally filed a false certification under
249 Section 7(1)(a)(i), the court shall issue a permanent injunction
250 prohibiting any nonparticipating manufacturer from selling
251 cigarettes (directly or through a distributor or other
252 intermediary or intermediaries) to permit holders and consumers
253 within the state for a period not to exceed two (2) years.

254 **SECTION 10.** If the commissioner determines to exclude or
255 remove from the list described in Section 5 of this act the brand
256 families of a nonparticipating manufacturer that timely submitted
257 to the commissioner the certification and information described in
258 Section 7(1)(b) of this act, such nonparticipating manufacturer
259 may challenge such determination as erroneous and seek relief from
260 such determination by bringing an action in the Circuit Court of
261 Hinds County, Mississippi, to challenge the commissioner's
262 determination. Upon the filing of such an action, the
263 commissioner's determination shall be stayed for twenty (20) days.
264 The Circuit Court of Hinds County, Mississippi, may extend the
265 stay upon a showing by the nonparticipating manufacturer, after



266 notice to the commissioner, that it has a substantial probability
267 of success in the action and would suffer irreparable injury in
268 the absence of a stay.

269 **SECTION 11.** (1) The commissioner shall update monthly the
270 list described in Section 5 of this act in order to correct
271 mistakes and to remove or add brand families, including brand
272 families of nonparticipating manufacturers that have failed to
273 make escrow payments required by the MSA Statute of an MSA State,
274 or that have corrected such failures, and new brand families of
275 participating manufacturers.

276 (2) The commissioner and Attorney General may share with
277 each other, with other authorities within the state, and with
278 authorities in other states the information they receive under
279 this chapter, including audits under subsection (3) of this act,
280 and may combine such information with information received from
281 authorities in other states for purposes of analysis and
282 enforcement.

283 (3) The Attorney General and the commissioner may audit, or
284 engage others to audit, information supplied by nonparticipating
285 manufacturers under Section 7(1), and the commissioner may audit
286 the information supplied by permit holders under Section 8.

287 (4) The commissioner shall establish a fee, to be paid by
288 nonparticipating manufacturers seeking inclusion of their brand
289 families in the list described in Section 5 of this act,
290 sufficient to cover the costs incurred by the commissioner in
291 carrying out the functions of the commissioner described in
292 Section 7 of this act.

293 **SECTION 12.** No person shall be issued a permit to act as a
294 permit holder unless such person has certified, under penalty of
295 perjury, that such person will comply fully with this act.

296 **SECTION 13.** For calendar year 2002, the reports of permit
297 holders required by Section 8 of this act shall be due thirty (30)
298 days after such effective date; the submissions of participating



299 manufacturers and the certifications of nonparticipating
300 manufacturers described in Section 6(1) and Section 7(1),
301 respectively, shall be due forty-five (45) days after such
302 effective date; and the transmission by the commissioner to permit
303 holders and the website posting under Section 5 of this act shall
304 be due ninety (90) days after such effective date.

305 **SECTION 14.** This act shall take effect and be in force from
306 and after its passage.

