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HOUSE BILL NO. 1072

Offered January 9, 2008

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A BILL to amend the Code of Virginia by adding in Title 59.1 a chapter numbered 23.1, consisting of sections numbered 59.1-293.1 through 59.1-293.9, relating to the sale of fire-safe cigarettes; civil penalties.

Patron—Caputo

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 59.1 a chapter numbered 23.1, consisting of sections numbered 59.1-293.1 through 59.1-293.9, as follows:

CHAPTER 23.1.

FIRE-SAFE CIGARETTES.

§ 59.1-293.1. Definitions.

As used in this chapter:

"Cigarette" has the same meaning ascribed thereto in § 58.1-1031.

"Commissioner" means the Commissioner of Agriculture and Consumer Services.

"Department" means the Department of Taxation.

"Importer" has the same meaning ascribed thereto in 26 U.S.C. § 5702 (k).

"Manufacturer" means (i) a person that manufactures or otherwise produces, or causes to be manufactured or produced, cigarettes intended for sale in the Commonwealth, including cigarettes intended for sale in the United States through an importer; (ii) the first purchaser anywhere that intends to resell in the United States cigarettes that the original manufacturer or maker does not intend for sale in the United States; or (iii) the successor to a person listed in clause (i) or (ii).

"Package" has the same meaning ascribed thereto in 15 U.S.C. § 1332 (4).

"Quality control and quality assurance program" means laboratory procedures implemented to ensure that operator bias, systematic and nonsystematic methodological errors, and equipment-related problems do not affect the results of the testing, and the testing repeatability remains within the required repeatability value for any test trial used to certify cigarettes under this chapter.

"Repeatability" means the range of values within which the repeat results of cigarette test trials from a single laboratory will fall 95 percent of the time.

"Retailer" means a person who (i) sells cigarettes to consumers through vending machines on fewer than 40 premises; (ii) otherwise sells cigarettes to consumers; or (iii) holds cigarettes for sale to consumers.

"Vending machine operator" means a person who (i) holds cigarettes for sale to consumers through vending machines on 40 or more premises or (ii) sells cigarettes to consumers through vending machines on 40 or more premises.

"Wholesaler" means a person who (i) holds cigarettes for sale to another person for resale or (ii) sells cigarettes to another person for resale.

§ 59.1-293.2. Testing and certification of cigarettes.

A. Cigarettes may not be manufactured in the Commonwealth or sold or offered for sale to any person in the Commonwealth unless:

1. The cigarettes have been tested in accordance with the test method and meet the performance standard specified in this section;

2. The manufacturer has filed a written certification in accordance with § 59.1-293.3; and

3. The cigarettes have been marked in accordance with § 59.1-293.4.

B. The performance standard for cigarettes sold or offered for sale in the Commonwealth is stated in subdivision E 1.

C. Testing of cigarettes shall be conducted in accordance with the American Society of Testing and Materials (ASTM) Standard E2187-04 "Standard Test Method for Measuring the Ignition Strength of Cigarettes." The Commissioner, in consultation with the State Fire Marshal, may adopt a subsequent ASTM Standard Test Method for Measuring the Ignition Strength of Cigarettes on a finding that the subsequent method does not result in a change in the percentage of full-length burns exhibited by any tested cigarette when compared to the percentage of full-length burns the same cigarette would exhibit when tested in accordance with ASTM standard E2187-04 and the performance standard of this section.

D. Testing of cigarettes shall be conducted on 10 layers of filter paper.

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59 E. 1. No more than 25% of the cigarettes tested in a test trial shall exhibit full-length burns.

60 2. Forty replicate tests shall comprise a complete test trial for each cigarette tested.

61 F. The performance standard required by this section shall only be applied to a complete test trial.

62 G. Written certifications shall be based upon testing conducted by a laboratory that has been  
63 accredited pursuant to Standard ISO/IEC 17025 of the International Organization for Standardization or  
64 other comparable accreditation standard required by the Commissioner.

65 H. Each laboratory that conducts tests in accordance with this section shall implement a quality  
66 control and quality assurance program that includes a procedure to determine the repeatability of the  
67 testing results. The repeatability value shall be no greater than 0.19.

68 I. Each cigarette listed in a certification that uses lowered permeability bands in the cigarette paper  
69 to achieve compliance with the performance standard of this section shall have at least two nominally  
70 identical bands on the paper surrounding the tobacco column. At least one complete band shall be  
71 located at least 15 millimeters from the lighting end of the cigarette. For a cigarette on which the bands  
72 are positioned by design, at least two bands shall be located at least 15 millimeters from the lighting  
73 end and 10 millimeters from the filter end of the tobacco column. For an unfiltered cigarette, the two  
74 complete bands shall be located at least 15 millimeters from the lighting end and 10 millimeters from  
75 the labeled end of the tobacco column.

76 J. If the Commissioner determines that a cigarette cannot be tested in accordance with the test  
77 method required by this section, the manufacturer of the cigarette shall propose to the Commissioner a  
78 test method and performance standard for that cigarette. The Commissioner, in consultation with the  
79 State Fire Marshal, may approve a test method and performance standard that the Commissioner  
80 determines is equivalent to the requirements of this section, and the manufacturer may use that test  
81 method and performance standard for certification in accordance with § 59.1-293.3. If the Commissioner  
82 determines that another state has enacted reduced cigarette ignition propensity standards that include a  
83 test method and performance standard that are the same as those contained in this chapter, and the  
84 Commissioner finds that the officials responsible for implementing those requirements have approved the  
85 proposed alternative test method and performance standard for a particular cigarette proposed by a  
86 manufacturer as meeting the reduced cigarette ignition propensity standards of that state's law or  
87 regulation under a legal provision comparable to this section, then the Commissioner shall authorize  
88 that manufacturer to employ the alternative test method and performance standard to certify that  
89 cigarette for sale in the Commonwealth, unless the Commissioner demonstrates a reasonable basis why  
90 the alternative test should not be accepted under this chapter. All other applicable requirements of this  
91 section shall apply to the manufacturer.

92 K. This section does not require additional testing for cigarettes that are tested in a manner  
93 consistent with the requirements of this section for any other purpose.

94 L. Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes  
95 offered for sale for a period of three years, and shall make copies of these reports available to the  
96 Commissioner, State Fire Marshal, and the Attorney General on written request. Any manufacturer who  
97 fails to make copies of these reports available within 60 days of receiving a written request shall be  
98 subject to a civil penalty not to exceed \$10,000 for each day after the 60th day that the manufacturer  
99 does not make such copies available.

100 M. Testing performed or sponsored by the Commissioner to determine a cigarette's compliance with  
101 the performance standard required by this section shall be conducted in accordance with this section.

102 N. The requirements of subsection A shall not prohibit:

103 1. Wholesalers or retailers from selling their existing inventory of cigarettes on or after the effective  
104 date of this chapter if the wholesaler or retailer can establish that state tax stamps were affixed to the  
105 cigarettes prior to the effective date and the wholesaler or retailer can establish that the inventory was  
106 purchased prior to the effective date in comparable quantity to the inventory purchased during the same  
107 period of the prior year; or

108 2. The sale of cigarettes solely for the purpose of consumer testing. For purposes of this paragraph,  
109 the term "consumer testing" shall mean an assessment of cigarettes that is conducted by a manufacturer,  
110 or under the control and direction of a manufacturer, for the purpose of evaluating consumer  
111 acceptance of such cigarettes, utilizing only the quantity of cigarettes that is reasonably necessary for  
112 such assessment, and in a controlled setting where the cigarettes are either consumed on-site or  
113 returned to the testing administrators at the conclusion of the testing.

114 § 59.1-293.3. Certification of cigarette testing.

115 A. Each manufacturer shall submit on request to the Commissioner written certification attesting that  
116 each cigarette has been tested in accordance with and has met the performance standard required under  
117 § 59.1-293.2.

118 B. The description of each cigarette listed in the certification shall include:

119 1. The brand;

120 2. The style;

121 3. The length in millimeters;  
122 4. The circumference in millimeters;  
123 5. The flavor, if applicable;  
124 6. Whether filter or nonfilter;  
125 7. A package description, such as soft pack or box;  
126 8. The mark approved in accordance with § 59.1-293.4;  
127 9. The name, address, and telephone number of the laboratory, if different than the manufacturer  
128 that conducted the test; and  
129 10. The date that the testing occurred.  
130 C. On request, the certification shall be made available to the Attorney General, the Commissioner,  
131 and the State Fire Marshal.  
132 D. Each cigarette certified under this section shall be recertified every three years.  
133 E. If a manufacturer has certified a cigarette pursuant to this section, and thereafter makes any  
134 change to such cigarette that is likely to alter its compliance with the reduced cigarette ignition  
135 propensity standards mandated by this chapter, then before such cigarette may be sold or offered for  
136 sale in the Commonwealth such manufacturer shall retest such cigarette in accordance with the testing  
137 standards prescribed in § 59.1-293.2 and maintain records of such retesting as required by § 59.1-293.2.  
138 Any such altered cigarette which does not meet the performance standard set forth in § 59.1-293.2 may  
139 not be sold in the Commonwealth.  
140 § 59.1-293.4. Marking of cigarettes.  
141 A. Cigarettes that have been certified in accordance with § 59.1-293.3 shall be marked in  
142 accordance with the requirements of this section.  
143 B. The marking shall:  
144 1. Be in a font of at least eight-point type; and  
145 2. Include one of the following:  
146 a. Modification of the product UPC code to include a visible mark that is printed at or around the  
147 area of the UPC code and consists of one or more alphanumeric or symbolic characters permanently  
148 stamped, engraved, embossed, or printed in conjunction with the UPC code;  
149 b. Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved,  
150 embossed, or printed on the cigarette package or the cellophane wrap; or  
151 c. Stamped, engraved, embossed, or printed text that indicates that the cigarettes meet the standards  
152 of this chapter.  
153 C. The manufacturer shall request approval of a proposed marking from the Commissioner.  
154 D. The Commissioner shall approve or disapprove the marking offered, except that the Commissioner  
155 shall approve:  
156 1. The letters "FSC," which signifies Fire Standards Compliant appearing in eight-point type or  
157 larger and permanently printed, stamped, engraved, or embossed on the package at or near the UPC  
158 code; and  
159 2. Any marking in use and approved for sale in New York pursuant to the New York fire safety  
160 standards for cigarettes.  
161 E. A marking is deemed approved if the Commissioner fails to act within 30 days after receiving a  
162 request for approval.  
163 F. A manufacturer may not use a modified marking unless the modification has been approved in  
164 accordance with this section.  
165 G. A manufacturer shall use only one marking on all brands that the manufacturer markets.  
166 H. A marking or modified marking approved by the Commissioner shall be applied uniformly on all  
167 brands marketed and on all packages, including packs, cartons, and cases marketed by that  
168 manufacturer.  
169 § 59.1-293.5. Provision of copies of certifications and illustration of the packaging markings;  
170 inspections.  
171 A. Each manufacturer shall:  
172 1. Provide a copy of each certification to each wholesaler to which the manufacturer sells cigarettes;  
173 and  
174 2. Provide sufficient copies of an illustration of the packaging marking approved and used by the  
175 manufacturer in accordance with § 59.1-293.4 for each retailer and vending machine operator that  
176 purchases cigarettes from the wholesaler.  
177 B. The wholesaler shall provide a copy of the illustration to each retailer and vending machine  
178 operator to which the wholesaler sells cigarettes.  
179 C. Each retailer, vending machine operator, and wholesaler shall allow the Commissioner or  
180 designee of the Commissioner to inspect the markings on cigarette packaging at any time.  
181 § 59.1-293.6. Nonconforming cigarettes contraband.

182 Cigarettes that are acquired, held, owned, possessed, transported in, imported into, or sold or  
183 distributed in the Commonwealth in violation of this chapter shall be deemed contraband and shall be  
184 subject to seizure, forfeiture, and destruction. Such cigarettes shall be deemed contraband whether or  
185 not the violation of this chapter is with knowledge.

186 § 59.1-293.7. Powers of Commissioner; regulation and implementation.

187 The Commissioner:

188 1. May adopt regulations necessary to carry out and administer this chapter;

189 2. In consultation with the State Fire Marshal, may adopt regulations for the conduct of random  
190 inspections of retailers, vending machine operators, and wholesalers to ensure compliance with this  
191 chapter; and

192 3. Shall ensure that the implementation and substance of this chapter is in accordance with the  
193 implementation and substance of the New York fire safety standards for cigarettes.

194 § 59.1-293.8. Enforcement; civil penalties.

195 A. A manufacturer or other person that knowingly sells or offers for sale cigarettes other than by  
196 retail sale in violation of § 59.1-293.2 is subject to a civil penalty not exceeding \$10,000 for each sale.

197 B. A retailer or wholesaler that knowingly sells cigarettes in violation of § 59.1-293.2 is subject to a  
198 civil penalty not exceeding:

199 1. \$500 for each sale in which less than 50 packages of cigarettes are sold; or

200 2. \$1,000 for each sale in which 50 or more packages of cigarettes are sold.

201 C. Except as otherwise provided in this section, a person that knowingly sells cigarettes in violation  
202 of § 59.1-293.2 is subject to a civil penalty not exceeding \$1,000 for each violation.

203 D. A manufacturer that knowingly makes a false certification under § 59.1-293.3 may be assessed a  
204 civil penalty by the Commissioner not exceeding \$10,000 for each false certification. A civil penalty may  
205 be assessed by the Commissioner only after the Commissioner has given the manufacturer charged with  
206 making such a false certification an opportunity for a public hearing. Where such a public hearing has  
207 been held, the Commissioner shall make findings of fact and issue a written decision as to the  
208 occurrence of the violation and the amount of the penalty which is warranted, incorporating, when  
209 appropriate, an order therein requiring that the penalty be paid. Any hearing under this section shall be  
210 a formal adjudicatory hearing in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).  
211 When the person charged with such a violation fails to avail himself of the opportunity for a public  
212 hearing, a civil penalty shall be assessed by the Commissioner after the Commissioner determines that a  
213 violation has occurred and the amount of the penalty warranted, and issues an order requiring that the  
214 penalty be paid.

215 E. The Commissioner may collect civil penalties which are owed in the same manner as provided by  
216 law in respect to judgment of a court of record. Such civil penalties shall be paid into a special fund in  
217 the state treasury to the credit of the Department of Agriculture and Consumer Services to be used in  
218 carrying out the purposes of this chapter.

219 § 59.1-293.9. Application of chapter to certain cigarettes; conflicting local ordinances prohibited.

220 A. Nothing in this chapter shall be construed to prohibit any person from manufacturing or selling  
221 cigarettes that do not meet the requirements of this chapter if the cigarettes are stamped for sale in  
222 another state or are to be sold outside the United States.

223 B. Notwithstanding any other provision of law, a locality may neither enact nor enforce any  
224 ordinance or other local law or regulation that conflicts with, or is inconsistent with, any provision of  
225 this chapter.

226 **2. That the provisions of this act shall become effective on January 1, 2010.**

227 **3. That the provisions of this act shall expire on the effective date of any federal law that**  
228 **implements a reduced cigarette ignition propensity standard, which law preempts the provisions of**  
229 **the first enactment of this act.**