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# HOUSE BILL NO. 228

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.*

Patrons—Cosgrove and 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 who 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.*

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

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

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

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

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

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

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

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

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

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

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

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

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

*§ 59.1-293.3. Certification of cigarette testing.*

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

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

*1. The brand;*

*2. The style;*

*3. The length in millimeters;*

*4. The circumference in millimeters;*

*5. The flavor, if applicable;*

*6. Whether filter or nonfilter;*

*7. A package description, such as soft pack or box;*

*8. The mark approved in accordance with § 59.1-293.4;*

*9. The name, address, and telephone number of the laboratory, if different than the manufacturer that conducted the test; and*

*10. The date that the testing occurred.*

*C. On request, the certification shall be made available to the Attorney General, the Commissioner, and the State Fire Marshal.*

*D. Each cigarette certified under this section shall be recertified every three years.*

*E. If a manufacturer has certified a cigarette pursuant to this section, and thereafter makes any change to such cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards mandated by this chapter, then before such cigarette may be sold or offered for sale in the Commonwealth such manufacturer shall retest such cigarette in accordance with the testing standards prescribed in § 59.1-293.2 and maintain records of such retesting as required by § 59.1-293.2. Any such altered cigarette that does not meet the performance standard set forth in § 59.1-293.2 may not be sold in the Commonwealth.*

*F. For each brand style of cigarette listed in a certification, a manufacturer shall pay a fee in the amount of $250; however, the Commissioner is authorized to adjust the amount of the fee annually to ensure that the amount collected therefrom defrays the actual costs of the processing, testing, enforcement and oversight activities required by this chapter. The fees assessed under the provisions of this chapter shall be paid into the state treasury and shall be deposited into a special fund designated "Department of Agriculture and Consumer Services Fire-Safe Cigarette Fund." One half of the moneys deposited into the special fund and one half of the unexpended balance thereof shall be appropriated for use by the Commissioner to conduct the processing, testing, enforcement, and oversight activities required by this chapter, and such expenditures from the special fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Commissioner. The other half of the moneys deposited into the special fund and the unexpended balance thereof shall be appropriated to the Department of Fire Programs for use by the State Fire Marshal pursuant to § 9.1-206 in carrying out the provisions of the Statewide Fire Prevention Code Act (§ 27-94 et seq.), and such expenditures from the special fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Executive Director of Fire Programs.*

*§ 59.1-293.4. Marking of cigarettes.*

*A. Cigarettes that have been certified in accordance with § 59.1-293.3 shall be marked in accordance with the requirements of this section.*

*B. The marking shall:*

*1. Be in a font of at least eight-point type; and*

*2. Include one of the following:*

*a. Modification of the product UPC code to include a visible mark that is printed at or around the area of the UPC code and consists of one or more alphanumeric or symbolic characters permanently stamped, engraved, embossed, or printed in conjunction with the UPC code;*

*b. Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, embossed, or printed on the cigarette package or the cellophane wrap; or*

*c. Stamped, engraved, embossed, or printed text that indicates that the cigarettes meet the standards of this chapter.*

*C. The manufacturer shall request approval of a proposed marking from the Commissioner.*

*D. The Commissioner shall approve or disapprove the marking offered, except that the Commissioner shall approve:*

*1. The letters "FSC," which signify Fire Standards Compliant, appearing in eight-point type or larger and permanently printed, stamped, engraved, or embossed on the package at or near the UPC code; and*

*2. Any marking in use and approved for sale in New York pursuant to the New York fire safety standards for cigarettes.*

*E. A marking is deemed approved if the Commissioner fails to act within 30 days after receiving a request for approval.*

*F. A manufacturer may not use a modified marking unless the modification has been approved in accordance with this section.*

*G. A manufacturer shall use only one marking on all brands that the manufacturer markets.*

*H. A marking or modified marking approved by the Commissioner shall be applied uniformly on all*

*brands marketed and on all packages, including packs, cartons, and cases marketed by that manufacturer.*

*§ 59.1-293.5. Provision of copies of certifications and illustration of the packaging markings; inspections.*

*A. Each manufacturer shall:*

*1. Provide a copy of each certification to each wholesaler to which the manufacturer sells cigarettes; and*

*2. Provide sufficient copies of an illustration of the packaging marking approved and used by the manufacturer in accordance with § 59.1-293.4 for each retailer and vending machine operator who purchases cigarettes from the wholesaler.*

*B. The wholesaler shall provide a copy of the illustration to each retailer and vending machine operator to whom the wholesaler sells cigarettes.*

*C. Each retailer, vending machine operator, and wholesaler shall allow the Commissioner or designee of the Commissioner to inspect the markings on cigarette packaging at any time.*

*§ 59.1-293.6. Nonconforming cigarettes.*

*A. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard required by § 59.1-293.2 shall be deemed contraband and subject to forfeiture and disposal by the Commonwealth; however, prior to the destruction of any cigarettes forfeited pursuant to this subsection, the true holder of the trademark rights in the cigarette brand shall be permitted to inspect such cigarettes.*

*B. The Department in the regular course of conducting inspections of retailers and wholesalers may inspect cigarettes to determine if the cigarettes are marked as required by § 59.1-293.4. If the cigarettes are not marked as required, the Department shall notify the Commissioner.*

*C. Whenever law-enforcement personnel or a duly authorized representative of the Commissioner shall discover any cigarettes that have not been marked in the manner required by § 59.1-293.4, such personnel are hereby authorized and empowered to seize and take possession of such cigarettes. Such cigarettes shall be turned over to the Department and shall be forfeited to the Commonwealth. Cigarettes seized pursuant to this section shall be destroyed; however, prior to the destruction of any cigarette seized pursuant to this subsection, the true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette.*

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

*The Commissioner:*

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

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

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

*§ 59.1-293.8. Enforcement; civil penalties.*

*A. A manufacturer or other person who knowingly sells or offers for sale cigarettes other than by retail sale in violation of § 59.1-293.2 shall be subject to a civil penalty not exceeding $100 for each such pack of cigarettes sold or offered for sale, provided that in no case shall the civil penalty assessed against any such person exceed $100,000 for sales or offers for sale during any 30-day period.*

*B. A retailer who knowingly sells cigarettes in violation of § 59.1-293.2 shall be subject to a civil penalty not exceeding $100 for each pack of such cigarettes sold or offered for sale, provided that in no case shall the civil penalty assessed against any retailer exceed $25,000 for sales or offers for sale during any 30-day period.*

*C. Any person who violates any other provision of this chapter shall be subject to a civil penalty of not more than $1,000 for the first violation. The civil penalty for each subsequent violation shall not exceed $5,000.*

*D. A manufacturer who knowingly makes a false certification under § 59.1-293.3 shall be subject to a civil penalty of at least $75,000 and not exceeding $250,000 for each false certification.*

*E. A civil penalty may be assessed by the Commissioner only after the Commissioner has given the manufacturer charged with making such a false certification an opportunity for a public hearing. Where such a public hearing has been held, the Commissioner shall make findings of fact and issue a written decision as to the occurrence of the violation and the amount of the penalty that is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. Any hearing under this section shall be a formal adjudicatory hearing in accordance with the Administrative Process Act (§ 2.2-4000 et seq.). When the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Commissioner after the Commissioner determines that a violation has occurred and the amount of the penalty warranted and issues an order requiring that the penalty be paid.*

*F. The Commissioner may collect civil penalties that are owed in the same manner as provided by law in respect to judgment of a court of record. Such civil penalties shall be paid into the Department of Agriculture and Consumer Services Fire-Safe Cigarette Fund referenced in subsection F of § 59.1-293.3 and distributed as provided therein.*

*§ 59.1-293.9. Application of chapter to certain cigarettes; conflicting local ordinances preempted.*

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

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

**2. That the provisions of this act shall become effective on the first day of the 13th month following its enactment.**

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