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SENATE BILL NO. 494

Offered January 8, 2014

Prefiled January 8, 2014

A BILL to amend and reenact § 58.1-1003.3 of the Code of Virginia, to amend the Code of Virginia by adding in Title 9.1 a chapter numbered 2.1, consisting of sections numbered 9.1-209 through 9.1-217, and to repeal Chapter 23.1 (§§ 59.1-293.1 through 59.1-293.9) of Title 59.1 of the Code of Virginia, relating to the sale of cigarettes with reduced ignition propensity; civil penalties.

Patron—Marsh

Referred to Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That § 58.1-1003.3 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 9.1 a chapter numbered 2.1, consisting of sections numbered 9.1-209 through 9.1-217, as follows:

CHAPTER 2.1.

REDUCED CIGARETTE IGNITION PROPENSITY.

§ 9.1-209. Definitions.

As used in this chapter, unless the context requires a different meaning:

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

"Department" means the Department of Taxation.

"Director" means the Executive Director of the Department of Fire Programs.

"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.

§ 9.1-210. Testing and certification of cigarettes.

A. Except as provided in subsection N, no cigarettes may be sold or offered for sale in the Commonwealth or offered for sale or sold to persons located 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 § 9.1-211; and

3. The cigarettes have been marked in accordance with § 9.1-212.

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 Director, 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

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59 tested in accordance with ASTM standard E2187-04 and the performance standard of this section.

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

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

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

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

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

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

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

78 J. If the Director determines that a cigarette cannot be tested in accordance with the test method
79 required by this section, the manufacturer of the cigarette shall propose to the Director a test method
80 and performance standard for that cigarette. The Director, in consultation with the State Fire Marshal,
81 may approve a test method and performance standard that the Director determines is equivalent to the
82 requirements of this section, and the manufacturer may use that test method and performance standard
83 for certification in accordance with § 9.1-211. If the Director determines that another state has enacted
84 reduced cigarette ignition propensity standards that include a test method and performance standard
85 that are the same as those contained in this chapter, and the Director finds that the officials responsible
86 for implementing those requirements have approved the proposed alternative test method and
87 performance standard for a particular cigarette proposed by a manufacturer as meeting the reduced
88 cigarette ignition propensity standards of that state's law or regulation under a legal provision
89 comparable to this section, then the Director shall authorize that manufacturer to employ the alternative
90 test method and performance standard to certify that cigarette for sale in the Commonwealth, unless the
91 Director demonstrates a reasonable basis why the alternative test should not be accepted under this
92 chapter. All other applicable requirements of this section shall apply to the manufacturer.

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

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

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

103 N. The requirements of subsection A shall not prohibit the sale of cigarettes solely for the purpose of
104 consumer testing. For purposes of this subdivision, the term "consumer testing" means an assessment of
105 cigarettes that is conducted by a manufacturer, or under the control and direction of a manufacturer,
106 for the purpose of evaluating consumer acceptance of such cigarettes, utilizing only the quantity of
107 cigarettes that is reasonably necessary for such assessment.

108 **§ 9.1-211. Certification of cigarette testing.**

109 A. Each manufacturer shall submit to the Director written certification attesting that each cigarette
110 has been tested in accordance with and has met the performance standard required under § 9.1-210.

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

112 1. The brand;

113 2. The style;

114 3. The length in millimeters;

115 4. The circumference in millimeters;

116 5. The flavor, if applicable;

117 6. Whether filter or nonfilter;

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

119 8. The mark approved in accordance with § 9.1-212;

120 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 Director, 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 § 9.1-210 and maintain records of such retesting as required by § 9.1-210. Any such altered cigarette that does not meet the performance standard set forth in § 9.1-210 shall 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 Director in consultation with the State Fire Marshal 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 "Cigarette Fire Safety Standard and Firefighter Protection Act Fund." Moneys deposited into the special fund and the unexpended balance thereof shall be appropriated to the Department of Fire Programs for use by the Director to conduct the processing, testing, enforcement, and oversight activities required by this chapter and performed 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 Director.

§ 9.1-212. Marking of cigarettes.

A. Cigarettes that have been certified in accordance with § 9.1-211 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 bar code to include a visible mark that is printed at or around the area of the UPC bar code and consists of one or more alphanumeric or symbolic characters permanently stamped, engraved, embossed, or printed in conjunction with the UPC bar 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 Director.

D. The Director shall approve or disapprove the marking offered, except that the Director 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 Director fails to act within 10 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 Director shall be applied uniformly on all brands marketed and on all packages, including packs, cartons, and cases marketed by that manufacturer.

§ 9.1-213. 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 § 9.1-212 for each retailer and vending machine operator who purchases cigarettes from the wholesaler.

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

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

186 **§ 9.1-214. Nonconforming cigarettes.**

187 A. Any cigarettes that have been sold or offered for sale that do not comply with the performance
188 standard required by § 9.1-210 shall be deemed contraband and subject to forfeiture and disposal by the
189 Commonwealth; however, prior to the destruction of any cigarettes forfeited pursuant to this subsection,
190 the true holder of the trademark rights in the cigarette brand shall be permitted to inspect such
191 cigarettes.

192 B. The Department and the State Fire Marshal, in the regular course of conducting inspections of
193 retailers and wholesalers, may inspect cigarettes to determine if the cigarettes are marked as required
194 by § 9.1-212. If the cigarettes are not marked as required, the Department shall notify the Director.

195 C. Whenever law-enforcement personnel, the State Fire Marshal or local fire marshal appointed
196 under § 27-30, or a duly authorized representative of the Director discovers any cigarettes that have
197 not been marked in the manner required by § 9.1-212, such personnel are hereby authorized and
198 empowered to seize and take possession of such cigarettes. Such cigarettes shall be turned over to the
199 Department and shall be forfeited to the Commonwealth. Cigarettes seized pursuant to this section shall
200 be destroyed; however, prior to the destruction of any cigarette seized pursuant to this subsection, the
201 true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette.

202 **§ 9.1-215. Powers of Director; regulation and implementation.**

203 The Director:

204 1. In consultation with the State Fire Marshal, may adopt regulations necessary to carry out and
205 administer this chapter;

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

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

211 **§ 9.1-216. Enforcement; civil penalties.**

212 A. A manufacturer or other person who knowingly sells or offers for sale cigarettes other than by
213 retail sale in violation of § 9.1-210 shall be subject to a civil penalty not exceeding \$100 for each such
214 pack of cigarettes sold or offered for sale, provided that in no case shall the civil penalty assessed
215 against any such person exceed \$100,000 for sales or offers for sale during any 30-day period.

216 B. A retailer who knowingly sells cigarettes in violation of § 9.1-210 shall be subject to a civil
217 penalty not exceeding \$100 for each pack of such cigarettes sold or offered for sale, provided that in no
218 case shall the civil penalty assessed against any retailer exceed \$25,000 for sales or offers for sale
219 during any 30-day period.

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

223 D. A manufacturer who knowingly makes a false certification under § 9.1-210 shall be subject to a
224 civil penalty of at least \$75,000 and not exceeding \$250,000 for each false certification.

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

235 F. The Director may collect civil penalties that are owed in the same manner as provided by law in
236 respect to judgment of a court of record. Such civil penalties shall be paid into the Cigarette Fire Safety
237 Standard and Firefighter Protection Act Fund referenced in subsection F of § 9.1-211 and used in
238 carrying out the purposes of this chapter.

239 **§ 9.1-217. Application of chapter to certain cigarettes; conflicting local ordinances preempted.**

240 A. Nothing in this chapter shall be construed to prohibit any person from manufacturing or selling
241 cigarettes that do not meet the requirements of this chapter if the cigarettes are or will be stamped for
242 sale in another state or sold in North Carolina or South Carolina, or are packaged for sale outside the
243 United States, and that person has taken reasonable steps to ensure that such cigarettes will not be sold

or offered for sale to persons located in the Commonwealth.

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.

§ 58.1-1003.3. Roll-your-own cigarette machines.

Any person who maintains, operates, or rents a machine at a retail establishment for use by a consumer that enables any person to process at the establishment a product that is made or derived from tobacco into a roll or tube shall be deemed to be a manufacturer of cigarettes, and the resulting product produced at such establishment shall be deemed to be manufactured cigarettes sold to a consumer for purposes of this title, Chapter 42 (§ 3.2-4200 et seq.) of Title 3.2, and Chapter 23.1 (§ 59.1-293.1 9.1-209 et seq.) of Title 59.1 9.1. A retail establishment may purchase tobacco that has not been subject to tax pursuant to this title or the requirements of Chapter 42 of Title 3.2, provided that (i) such tobacco may only be sold to consumers for the purpose of making cigarettes on the machines described herein in the establishment, (ii) the retail establishment pays the taxes due on such cigarettes pursuant to this title, and (iii) the retail establishment maintains compliance with the requirements of Chapter 42 of Title 3.2 with respect to such cigarettes. The provisions of this section shall not apply to the sale and use of cigarette rolling machines purchased for personal use by an individual consumer to make cigarettes for personal consumption and not for rental or use by other consumers.

2. That Chapter 23.1 (§§ 59.1-293.1 through 59.1-293.9) of Title 59.1 of the Code of Virginia is repealed.