



Sub. H.B. 500

127th General Assembly

(As Reported by H. State Government and Elections)

Reps. Hughes, Flowers, Yuko, Letson, Stebelton, D. Stewart, Carmichael, Domenick

BILL SUMMARY

- Establishes reduced ignition propensity standards for cigarettes.
- Authorizes the State Fire Marshal to monitor and the State Fire Marshal and Attorney General to enforce these standards.
- Establishes penalties for violations.

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CONTENT AND OPERATION

Required testing of cigarettes and required certification of testing

Except as described below, the bill prohibits any person from selling or offering to sell cigarettes in Ohio, or from selling or offering to sell cigarettes to persons located in Ohio, unless all of the following requirements are met:

- The manufacturer of the cigarettes has the cigarettes tested in accordance with the testing method specified in the bill or the testing method approved by the State Fire Marshal under the bill;
- The cigarettes met the performance standards specified in the bill or the performance standard approved by the State Fire Marshal under the bill;
- The manufacturer has marked the packaging of the cigarettes as required by the bill; and
- The manufacturer files a written certification with the State Fire Marshal as required by the bill. (R.C. 3739.02.)

A manufacturer, wholesale dealer, agent, or any other person (other than a retail dealer) who knowingly sells or offers to sell cigarettes in violation of the requirements listed above is liable for a civil penalty not to exceed \$100 per pack of cigarettes sold or offered for sale, provided that in no case can the penalty against any such person or entity exceed \$100,000 during any 30-day period (R.C. 3739.99(B)). A retail dealer who knowingly sells or offers to sell cigarettes in violation of the requirements listed above is liable for a civil penalty not to exceed \$100 per pack of cigarettes sold or offered for sale, provided that in no case can the penalty against any such retail dealer exceed \$25,000 for sales or offers to sell during any 30-day period (R.C. 3739.99(C)).

Definition of basic terms

The bill defines "manufacturer" to mean either of the following: (1) an entity or the entity's successor that, in any location, manufactures or otherwise produces cigarettes, or causes cigarettes to be manufactured or produced, that the entity intends to be sold in Ohio, including, but not limited to, cigarettes intended to be sold in the United States through an importer or (2) any entity or the entity's successor that meets both of the following criteria: (a) purchases cigarettes, in any location, from a second entity that manufactures or otherwise produces cigarettes in any location when the second entity does not intend that the cigarettes it

manufactures be sold in the United States and (b) intends to sell the cigarettes described in (a) in the United States (R.C. 3739.01(D)).

"Wholesale dealer" means either of the following: (1) a person, other than a manufacturer, who sells cigarettes to retail dealers or other person for purposes of resale or (2) a person who owns, operates, or maintains one or more vending machines upon premises owned or occupied by any other person (R.C. 3739.01(H)).

"Agent" means any person licensed by a county auditor or the Tax Commissioner to purchase and affix adhesive or meter stamps on packages of cigarettes under the Cigarette Tax Law. "Cigarettes," "sale," and "retail dealer" all have the same meanings as in the Cigarette Tax Law (R.C. 3739.01(A), (C), and (F)).

Required testing of cigarettes

A cigarette manufacturer must have a laboratory conduct the required testing of the manufacturer's cigarettes. The laboratory must be accredited pursuant to the International Organization for the Standardization and International Electrotechnical Commission Standard 17025 of the International Organization for Standardization, or another comparable accreditation standard required by the State Fire Marshal. The laboratory must implement a quality control and quality assurance program and must use that program when conducting the required testing. (R.C. 3739.03(A).) "Quality control and assurance program" means the procedures a laboratory implements to ensure both of the following: (1) that operator bias, systematic and nonsystematic methodological errors, and equipment-related problems do not affect cigarette test results and (2) testing repeatability remains within the required repeatability values for all test trials used by the laboratory to certify cigarettes in accordance with the bill and is not greater than 0.19 (R.C. 3739.01(G)). "Repeatability" means the range of values within which 95% of the results of cigarette test trials from a single laboratory will fall (R.C. 3739.01(E)).

A cigarette manufacturer must have the accredited laboratory test the manufacturer's cigarettes in accordance with all the following requirements:

- The laboratory must test the cigarettes in accordance with the American Society of Testing and Materials Standard E2187-04, which is titled "Standard Test Method for Measuring Ignition Strength of Cigarettes," or any subsequent standard adopted by the State Fire Marshal (see below);
- The laboratory must test the cigarettes on ten layers of filter paper; and

- Not more than 25% of the cigarettes tested in a test trial can exhibit full-length burns. This performance standard must apply only to a complete test trial, which means 40 replicate tests for each type of cigarette tested. (R.C. 3739.03(B) and (C).)

These requirements are not to be construed to require additional cigarette testing if a manufacturer tests cigarettes in accordance with these requirements for any other purposes other than the purposes specified in the requirements (R.C. 3739.03(D)).

The bill authorizes the State Fire Marshal to adopt any American Society of Testing and Materials standard used to measure the ignition strength of cigarettes that takes effect after the bill's effective date if the State Fire Marshal determines that the subsequent standard does not result in a change in the percentage of full-length burns the same cigarette would exhibit when tested using the American Society of Testing and Materials Standard E2187-04 and the performance standard described above. (R.C. 3739.03(E).)

If a manufacturer manufactures a cigarette the State Fire Marshal determines cannot be tested in the manner described above, the State Fire Marshal must require the manufacturer to propose and submit a test method and performance standard for the cigarette to the State Fire Marshal for approval. If the State Fire Marshal determines that the test method and performance standard proposed by the manufacturer are equivalent to the test method and performance standard described above, the State Fire Marshal must approve the proposed test method and performance standard, and the manufacturer may use that test method and performance standard to certify the cigarettes as required by the bill (see below). (R.C. 3793.04(A).)

If the State Fire Marshal 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 specified in the bill and that the officials responsible for implementing those standards have determined that the alternative test method and performance standard for a particular cigarette proposed by the manufacturer satisfies the standards under that other state's law or regulation under a statute or regulation that is comparable to the bill, the State Fire Marshal must authorize the manufacturer to use that alternative test method and performance standard to certify the manufacturer's cigarettes for sale in Ohio. The State Fire Marshal is not required to approve such an alternative test method and performance standard if the State Fire Marshal demonstrates a reasonable basis why that alternative test method and performance standard should not be approved. All other applicable requirements of the bill apply to a manufacturer that is authorized to use such an alternative test method and performance standard. (R.C. 3739.04(B).)

The bill requires that each manufacturer maintain copies of the reports of all tests conducted on all cigarettes offered for sale in Ohio for a period of three years after a test is concluded and make copies of the reports available to the State Fire Marshal and to the Attorney General upon receipt of a written request from either of these officials (R.C. 3739.05(A)). The bill prohibits a manufacturer from failing to make these copies available within 60 days after receiving such a request (R.C. 3739.05(B)). A manufacturer that violates this prohibition is subject to a civil penalty not to exceed \$10,000 for each day after the 60th day that the manufacturer fails to comply (R.C. 3739.99(A)).

Required certification of cigarette testing

The bill requires each manufacturer to submit to the State Fire Marshal a written certification that each type of cigarette listed in the certification has been tested in accordance with the bill's requirements and meets the performance standard set forth in the bill or approved by the State Fire Marshal (R.C. 3739.07(A)). A manufacturer must include in the certification all of the following information for each type of cigarette listed in the certification:

- The brand or trade name on the cigarette package;
- The style of cigarette;
- The length and circumference of the cigarette in millimeters;
- The flavor of the cigarette, if applicable;
- Whether the cigarette is filter or nonfilter;
- A description of the package;
- The marking the manufacturer uses that the State Fire Marshal has approved in accordance with the bill (see below);
- The name, address, and telephone number of the laboratory, if different than the manufacturer, that conducted the cigarette test;
- The date the cigarette test occurred. (R.C. 3739.07(B).)

A manufacturer must make the certification available to the Attorney General and to the Tax Commissioner to ensure compliance with the bill (R.C. 3739.07(C)). The bill prohibits a manufacturer from submitting a false certification to the State Fire Marshal (R.C. 3739.07(D)). A manufacturer that is a corporation, partnership, sole proprietorship, limited partnership, or association who knowingly violates this prohibition is liable for a civil penalty of at least

\$75,000, not to exceed \$250,000 for each such violation, in addition to any other penalty prescribed by law (R.C. 3739.99(D)).

The bill requires a manufacturer, before submitting the certification, to submit a marking that the manufacturer must place on each package of cigarettes that the manufacturer intends to certify. The marking must be in eight-point type or larger and include at least one the following:

- Modification of the product Universal Product Code to include a visible mark printed at or around the area of the code that consists of an alphanumeric or symbolic character permanently stamped, engraved, embossed, or printed in conjunction with the product's code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette package or cellophane wrap.
- Printed, stamped, engraved, or embossed text that indicates that the cigarettes meets the standards specified in the bill or approved by the State Fire Marshal. (R.C. 3739.06(A).)

The manufacturer must notify the State Fire Marshal of the marking that the manufacturer selects and request approval of that marking from the State Fire Marshal. Upon the receipt of the request, the State Fire Marshal must approve or disapprove the marking offered by the manufacturer. If the manufacturer elects to submit either of the following markings, the State Fire Marshal must automatically approve that marking:

- Any marking used for cigarettes approved for sale in New York pursuant to the New York Fire Safety Standards for Cigarettes.
- A marking consisting of only the letters "FSC," which signify "fire standards compliant."

If the State Fire Marshal fails to act within ten business days after receiving a request for approval, the proposed marking is considered approved. A manufacturer may not modify the marking approved by the State Fire Marshal unless the modification has been approved in the manner described above. (R.C. 3739.06(B).)

A manufacturer must include the approved mark on each package of cigarettes certified under the bill to indicate compliance with the bill's requirements. A manufacturer must use only one marking for all of the cigarettes the manufacturer sells and must apply this marking uniformly to all packages,

including, without limitation, packs, cartons, cases, and brands sold by that manufacturer. (R.C. 3739.06(C).)

Each cigarette a manufacturer lists in a certification submitted to the State Fire Marshal for which the manufacturer uses lower permeability bands in the cigarette paper to comply with the testing requirements specified in the bill must have either of the following bands surrounding the tobacco column:

- For cigarettes on which bands are not positioned by design, at least two nominally identical bands, one of which must be located at least 15 millimeters from the lighting end of the cigarette.
- For cigarettes on which bands are positioned by design, at least two bands, one of which is located at least 15 millimeters from the lighting end of the cigarette and the other of which is located in either of the following places: (1) for filtered cigarettes, ten millimeters from the filter end of the tobacco column or (2) for nonfiltered cigarettes, ten millimeters from the labeled end of the tobacco column. (R.C. 3739.08.)

The bill requires a manufacturer to recertify every three years each cigarette the manufacturer certifies under the bill. A manufacturer that certifies a cigarette in accordance with the bill and subsequently makes any change to the cigarette that alters the cigarette in such a way that the manufacturer knows that the cigarette is likely to no longer meet the standard specified in the bill or the standard approved by the State Fire Marshal may not sell or offer to sell that cigarette in Ohio until the manufacturer retests the cigarette in accordance with those testing standards. The manufacturer must maintain records of the retesting in the same manner as the manufacturer maintains records of the previous tests. The bill prohibits a manufacturer from selling in Ohio any altered cigarette that fails to meet the appropriate performance standard. (R.C. 3739.09.)

A manufacturer that certifies its cigarettes in accordance with the bill must provide a copy of the certifications to each wholesale dealer and agent to which the manufacturer sells cigarettes and must provide sufficient copies of an illustration of the package marking used by the manufacturer for each retail dealer to which the wholesale dealer or agent sells cigarettes.

Each wholesale dealer and agent who receives these copies must provide to each retail dealer to which the wholesale dealer or agent sells the manufacturer's cigarettes a copy of the illustration provided to the wholesale dealer or agent by the manufacturer. A wholesale dealer, agent, or retail dealer must allow the State Fire Marshal, the Tax Commissioner, and the Attorney General to inspect the markings of cigarette packaging. (R.C. 3739.10.)

Enforcement of bill by State Fire Marshal, Tax Commissioner, and Attorney General

The bill authorizes the State Fire Marshal to conduct testing on cigarettes certified by a manufacturer under the bill to determine whether the manufacturer complied with the bill's requirements. The State Fire Marshal must conduct the testing in the manner the bill requires as described above.

Whenever the State Fire Marshal or the State Fire Marshal's designee discovers any cigarettes that do not include a mark required by the bill, the State Fire Marshal or designee may seize and take possession of the cigarettes, must give the seized cigarettes to the Tax Commissioner, and the cigarettes are thereupon forfeited to the state. The Tax Commissioner must order the destruction of any forfeited cigarettes, but before their destruction, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarettes.

Any cigarettes sold or offered for sale that do not comply with the performance standard required by the bill or approved by the State Fire Marshal are subject to forfeiture under the Cigarette Tax Law and must be destroyed in accordance with that Law, but before their destruction, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarettes.

In addition to any other remedy provided by law, if the State Fire Marshal or Attorney General determines that reasonable evidence exists that a violation of the bill has occurred, the State Fire Marshal or Attorney General may file an action in the common pleas court of the county where the alleged violation occurred. The action may include a petition for injunctive relief or to recover any costs or damages suffered by the state because such a violation occurred, including enforcement costs in relation to the specific violation and attorney's fees. Each violation of the bill or the rules adopted under it constitutes a separate civil violation for which the State Fire Marshal or Attorney General may obtain relief.

To enforce the bill, the Attorney General and State Fire Marshal may examine the books, papers, invoices, and other business records of any person in possession or control of, or occupying any premises where cigarettes are placed, stored, sold, or offered for sale, including the stock of cigarettes on the premises, if the Attorney General or State Fire Marshal reasonably suspects that a violation of the bill has occurred. Every person in possession or control of, or occupying any premises where cigarettes are placed, sold, or offered for sale, must give to the Attorney General and State Fire Marshal the means, facilities, and opportunity for these examinations

The Tax Commissioner, in the regular course of conducting inspections of wholesale dealers, agents, and retail dealers, as authorized under the Cigarette Tax Law, may inspect any cigarette packaging to determine if the package is marked as

required by the bill. If a package of cigarettes is not marked, the Tax Commissioner must notify the State Fire Marshal of the fact. (R.C. 3739.11.) The bill authorizes an agent of the Department of Taxation to share information with the Fire Marshal that the agent finds during the course of an investigation (R.C. 5703.21(B)(4)).

Exemptions from the bill's provisions

The bill is not to be construed to prohibit any person or entity from manufacturing or selling cigarettes that do not meet the bill's requirements if the cigarettes' packaging is or will be stamped for sale in another state, or is packaged for sale outside the United States, and that person or entity has taken reasonable steps to ensure that those cigarettes will not be sold or offered for sale to persons located in Ohio (R.C. 3739.12(A)).

The bill does not prohibit a wholesale or retail dealer of cigarettes from selling the dealer's inventory of cigarettes in existence on the bill's effective date if the dealer establishes both of the following:

- That state tax stamps were affixed to the cigarettes before that effective date; and
- That the inventory that was purchased before that effective date is comparable in quantity to the inventory purchased during the same period of the prior year. (R.C. 3739.12(B).)

Nothing in the bill may be construed to prohibit the sale of cigarettes solely for the purpose of consumer testing, which it defines to 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 the cigarettes, utilizing only the quantity of cigarettes that is reasonably necessary for the assessment (R.C. 3739.12(C)).

New York fire safety standards for cigarettes as persuasive authority; State Fire Marshal rules and evaluations

The implementation and substance of the New York fire safety standards for cigarettes is to be persuasive authority in implementing the bill. The State Fire Marshal may adopt rules under the Administrative Procedure Act as are necessary to administer the bill. (R.C. 3739.13.)

The bill requires the State Fire Marshal periodically to evaluate the bill's effectiveness. The State Fire Marshal must submit a report that consists of the State Fire Marshal's findings to the General Assembly on the first day of the 49th

month after the bill's effective date, and every three years after that date. (R.C. 3739.14.)

State preemption of political subdivision authority and federal preemption of state authority

A political subdivision may not enact or enforce any ordinance or other local law or regulation that conflicts with or preempts the bill or any state policy expressed in the bill (R.C. 3793.15). No person is required to comply with the bill or rules adopted under it if a federal reduced cigarette ignition propensity standard that preempts the bill or those rules is adopted and becomes effective (R.C. 3739.16).

Immunity from liability in enforcing the bill

In addition to any other immunities, defenses, and exclusions provided under the Revised Code, the state, the Department of Commerce or Taxation, and the Division of State Fire Marshal, and any employees of the state, either Department, or the Division, are immune from liability in any civil action or proceeding arising from the performance or nonperformance of any duties specified in the bill. In no event are these agencies or employees liable to any person for any claims for injury or damages including, without limitation, claims for indirect, consequential, incidental, special, or punitive damages or claims for lost profits, arising from the performance or nonperformance of the duties specified in the bill. (R.C. 3739.17.)

Payment of certification fee

The bill requires a manufacturer to pay the State Fire Marshal a \$1,000 fee, or an adjusted fee, for each type of brand family included in a certification required by the bill. The fee for each type of brand family includes any new cigarette certified under the bill within that brand family during the three-year certification period specified by the bill. The State Fire Marshal may adjust this fee annually to ensure the fee is sufficient to defray the actual costs of processing, testing, enforcing, and overseeing the activities required under the bill. (R.C. 3739.18(A) and (B).)

"Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors including, but not limited to, "menthol," "lights," "kings," and "100s." "Brand family" includes cigarettes sold under a brand name, whether that name is used alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or other indicia of product identification identical or similar to, or identifiable with, a previous brand of cigarettes (R.C. 3739.01(B)).

Creation of the Reduced Cigarette Ignition Propensity and Firefighter Protection Act Enforcement Fund and the Fire Prevention and Public Safety Fund

The bill creates in the state treasury the Reduced Cigarette Ignition Propensity and Firefighter Protection Act Enforcement Fund. The Fund consists of all certification fees submitted by manufacturers and any other moneys made available to the State Fire Marshal specifically to support certification processing, testing, enforcing, and overseeing activities conducted under the bill. The State Fire Marshal must use the fund only for these activities. (R.C. 3739.18(C).)

The bill also creates in the state treasury the Fire Prevention and Public Safety Fund. Moneys collected from the civil penalties collected under the bill, except for civil penalties assessed against manufacturers for failing to make copies of test reports available to the State Fire Marshal and Attorney General, must be deposited in the Fund. The State Fire Marshal must use the Fund to support fire safety and prevention programs. (R.C. 3739.18(D).)

Civil penalties for remaining violations

The civil penalty for all violations of the bill, except for the civil penalties for those specific violations already discussed in this analysis, is not to exceed \$1,000 on a first offense and not to exceed \$5,000 on each subsequent offense (R.C. 3739.99(E)).

Delayed effective dates for civil penalties

The bill's provisions that establish violations and assess civil penalties will not take effect until the first day of the 13th month after the bill's effective date (Section 2).

HISTORY

ACTION	DATE
Introduced	03-11-08
Reported, H. State Gov't & Elections	05-12-08

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