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 BILL ANALYSIS

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Senate Bill 264 (as enacted)
Sponsor: Senator Tupac A. Hunter
Senate Committee: Commerce and Tourism
House Committee: Regulatory Reform

PUBLIC ACT 56 of 2009

Date Completed: 5-19-10

CONTENT

The bill created the "Fire Safety Standard and Firefighter Protection Act" to do the following:

- Prescribe testing requirements and a performance standard for cigarettes sold in Michigan.
- Require cigarettes sold in Michigan to be certified and marked by the manufacturer.
- Prescribe a three-year, \$1,250 certification fee.
- Allow a manufacturer to use an alternative test method and performance standard, under certain circumstances.
- Require the Department of Energy, Labor, and Economic Growth (DELEG) to review the effectiveness of the testing and performance standard requirements every three years and report its findings to the Legislature.
- Require the Department of Treasury to establish and administer the "Fire Safety Standard and Firefighter Protection Act Enforcement Fund"; and credit to it all certification fees.
- Prescribe civil fines for violations of the Act.
- Require the Department of Treasury to establish and administer the "Fire Safety Standard and Firefighter Protection Act Fund" to support fire safety and prevention programs; and require civil fines to be credited to this Fund.
- Authorize DELEG to promulgate rules to implement and enforce the Act.
- Authorize specified officials to conduct examinations to enforce the Act.

- Repeal the Act if a Federal performance standard is adopted.
- Prohibit local regulation that conflicts with the Act.

The bill took effect on January 1, 2010.

Sale of Cigarettes

Except as otherwise provided, a person may not sell cigarettes in Michigan or to a person located in Michigan unless the cigarettes are tested in accordance with the test method described in the bill and meet the Act's performance standards, the manufacturer has filed a written certification with DELEG, and the cigarettes are marked in compliance with the Act.

Cigarette Testing & Performance Standard

The testing of cigarettes must be conducted in accordance with ASTM standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes". The testing must be conducted on 10 layers of filter paper. Forty replicate tests comprise a complete test trail for each cigarette tested. The performance standard described below may be applied only to a test trial. Testing must be conducted by a laboratory that is accredited pursuant to standard ISO/IEC 17025:2005 of the International Organization for Standardization (ISO) or other comparable accreditation standard required by DELEG. A laboratory conducting testing must have implemented a quality control and quality assurance program that includes a procedure that determines repeatability of the testing results. The

repeatability value of the testing results must be 0.19 or less.

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

When a cigarette is tested, not more than 25% of the cigarettes tested in a test trial may exhibit full-length burns. The testing and performance standard provisions do not require additional testing if cigarettes are tested consistently with the Act for any other purpose.

Any testing performed or sponsored by DELEG to determine a cigarette's compliance with the performance standard must comply with the testing provisions.

A cigarette listed in a certification submitted under the Act that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard must have at least two nominally identical bands on the paper surrounding the tobacco column, with at least one complete band located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, the cigarette must have at least two bands fully located at least 15 millimeters from the lighting end and 10 millimeters from the filter end of the tobacco column or, for nonfiltered cigarettes, 10 millimeters from the labeled end of the tobacco column.

A manufacturer of a cigarette that DELEG determines cannot be tested in compliance with the ASTM standard must propose to the Department a test method and performance standard for the cigarette. If DELEG approves the proposed method and determines that the proposed performance standard is equivalent to the prescribed standard, the manufacturer may employ the test method and performance standard to certify the cigarette. If DELEG 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 the Act, and DELEG 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 fire safety standards of that state's law or regulation under a legal

provision comparable to the Act's provisions, DELEG must authorize that manufacturer to employ the alternative test method and performance standard to certify that cigarette for sale in Michigan, unless the Department demonstrates a reasonable basis as to why the alternative test should not be accepted. All other applicable requirements apply to the manufacturer.

A manufacturer must maintain copies of the reports of all tests conducted under the Act on all cigarettes offered for sale in Michigan for three years and make copies of them available to DELEG or the Attorney General upon written request. A manufacturer that fails to make the copies available within 60 days of receiving a written request from DELEG or the Attorney General is subject to a civil fine of up to \$10,000 for each day after the 60th day that the manufacturer does not make them available.

The Department may adopt a subsequent ASTM standard test method for measuring the ignition strength of cigarettes if it finds 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 exhibits when tested in accordance with the ASTM and performance standards specified in the Act.

The Department must implement the testing and performance provisions in accordance with the implementation and substance of the New York Fire Safety Standards for Cigarettes.

The Department must review the effectiveness of the testing and performance provisions and report its findings to the Legislature every three years. If appropriate, DELEG also must report recommendations for legislation to improve the effectiveness of the Act. The Department must submit the report and legislative recommendations by the first June 30 following the conclusion of each three-year period.

The testing and performance provisions do not prohibit a wholesale or retail dealer from selling its existing inventory of cigarettes, if the dealer can establish that State tax stamps were affixed to the cigarettes before the Act's effective date and that the inventory was purchased before that date in comparable quantity to the inventory

purchased during the same period of the preceding year.

The testing and performance provisions also do not prohibit the sale of cigarettes solely for the purpose of consumer testing. For purposes of this provision, "consumer testing" means an assessment of cigarettes that is conducted by a manufacturer, or under the manufacturer's control and direction, for the purpose of evaluating consumer acceptance of those cigarettes, using only the quantity that is reasonably necessary for the assessment.

Cigarette Certification

A manufacturer must certify cigarettes for the purposes of the Act by submitting to DELEG a written certification attesting that each listed cigarette has been tested in compliance with the Act and meets the performance standard.

A manufacturer must include in the certification all of the following information for each listed cigarette:

- Its brand or the trade name on the package.
- Its style, such as light or ultra light.
- Its length in millimeters.
- Its circumference in millimeters.
- Its flavor, such as menthol or chocolate, if applicable.
- Whether it is a filter or nonfilter cigarette.
- A package description, such as a soft pack or box.
- The package markings as required by the Act.
- The name, address, and telephone number of the laboratory that conducted the cigarette test, if it is a person other than the manufacturer.
- The date that the testing occurred.

The Department must make the certifications available to the Attorney General and the Department of Treasury for the purpose of ensuring compliance with the Act or any other purpose consistent with it.

A manufacturer must recertify a cigarette every three years.

If a manufacturer makes a change to a certified cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards required by the Act, a person may not sell that cigarette in Michigan until the manufacturer retests

the cigarette in accordance with the Act and maintains records of that retesting. A person may not sell in Michigan an altered cigarette that does not meet the Act's performance standard.

Certification Fee & Enforcement Fund

At the time it submits a written certification, a manufacturer must pay to DELEG a fee of \$1,250 for each brand family listed in the certification. A fee applies to all cigarettes within the listed brand family and to any new cigarette in that brand family certified during the three-year period for which the fee is paid.

The bill created the Fire Safety Standard and Firefighter Protection Act Enforcement Fund within the State Treasury. The Department of Energy, Labor, and Economic Growth must deposit fees paid under the Act into the Fund. The State Treasurer may receive money or other assets from any other source for deposit into the Fund, and must credit to it interest and earnings from Fund investments. Money in the Fund at the close of the fiscal year must remain in the Fund and may not lapse to the General Fund. The Department is the administrator of the Fund for auditing purposes, and may spend money from the Fund, upon appropriation, only for processing, testing, enforcement, and oversight activities under the Act.

Manufacturer Markings

A manufacturer must mark any cigarettes it certifies to indicate compliance with the testing and performance standard requirements. The marking must be in eight-point type or larger and consist of one of the following:

- Modification of the product UPC to include a visible mark printed at or around the area of the UPC.
- A visible combination of alphanumeric or symbolic characters stamped, engraved, or embossed permanently upon the cigarette package or cellophane wrap.
- Printed, stamped, engraved, or embossed text that indicates that the cigarettes meet the Act's standards.

A manufacturer must use the same marking on all the brands it markets and apply that marking uniformly on all packs, cartons, cases, and other packages of its cigarettes.

A manufacturer must notify DELEG of which marking it has selected for its cigarettes.

Before certification of any cigarette, a manufacturer must submit a request to DELEG for approval of its proposed marking. Subject to certain criteria, when it receives a request, DELEG must approve or disapprove the submitted marking. A proposed marking will be considered approved if DELEG fails to approve or disapprove of it within 10 business days after receiving a request.

The Department must approve of any marking submitted to it if the marking includes the acronym "FSC", signifying that the cigarettes are fire standards-compliant under the New York Fire Safety Standards for Cigarettes, or if the marking is in use and approved for sale in New York pursuant to those standards.

A manufacturer may not modify a marking approved by DELEG unless it submits a request for approval of the modification. When it receives a request, DELEG must approve or disapprove the proposed modification. A modification is considered approved if DELEG fails to approve or disapprove it within 10 business days after receiving the request.

A manufacturer certifying cigarettes must provide a copy of the certification to each wholesale dealer, unclassified acquirer, and stamping agent to which it sells cigarettes and must provide sufficient copies of an illustration of the package marking it used by the manufacturer for each secondary wholesaler and retail dealer to which the wholesale dealer, unclassified acquirer, or agent sells cigarettes. A wholesale dealer or agent must provide a copy of package markings received from a manufacturer to each secondary wholesaler and retail dealer to which it sells cigarettes. A wholesale dealer, unclassified acquirer, agent, secondary wholesaler, or retail dealer must permit DELEG, the Department of Treasury, the Attorney General, and their employees to inspect markings of cigarette packaging marked under the Act.

Penalties; Fund

A manufacturer, wholesale dealer, agent, or any other person other than a retail dealer who knowingly sells or offers to sell cigarettes, other than through retail sale, in violation of the testing and performance standard requirements is subject to a civil

fine of up to \$100 for each pack of those cigarettes sold or offered for sale. A person's aggregate liability for civil fines for multiple violations that arise during any 30-day period may not exceed \$100,000.

A retail dealer that knowingly sells or offers to sell cigarettes in violation of the testing and performance standard requirements is subject to a civil fine of up to \$100 per pack. A retail dealer's aggregate liability for civil fines for multiple violations that arise during any 30-day period may not exceed \$25,000.

In addition to any penalty prescribed by law, a person engaged in the manufacture of cigarettes who knowingly makes a false certification is subject to a civil fine of not less than \$75,000 and not more than \$100,000.

A person who commits any other violation of the Act is subject to a civil fine of not more than \$1,000 for the first violation and not more than \$5,000 for each subsequent violation.

In addition to any other remedy provided by law, DELEG or the Attorney General may commence an action against a person who violates the Act or rules promulgated under it. In an action brought under the Act, the court may order one or more of the following forms of equitable relief for each violation:

- Injunctive or other equitable relief, as appropriate.
- Enforcement costs relating to the violation or any other actual damages sustained by the State that are caused by the violation.
- Reasonable attorney fees and costs.

The bill created the Cigarette Fire Safety Standard and Firefighter Protection Act Fund. All civil fines recovered under the Act must be deposited in the Fund. The State Treasurer may receive money or other assets from any other source for deposit into the Fund, and must credit to it interest and earnings from Fund investments. Money in the Fund at the close of the fiscal year must remain in the Fund and may not lapse to the General Fund. The Department of Energy, Labor, and Economic Growth is the administrator of the Fund for auditing purposes, and may spend money from the Fund, upon appropriation, only for fire safety and prevention programs.

Enforcement

To enforce the Act, the Attorney General, the Department of Treasury, DELEG, or their duly authorized representatives, the State Fire Marshal, the commanding officer, or a uniformed firefighter acting under the orders and direction of the commanding officer, of the fire department of a city, village, township, or county, or any law enforcement personnel, may examine the books, papers, invoices, and other records of any person in possession, control, or occupancy of any premises where cigarettes are placed, stored, sold, or offered for sale and the stock of cigarettes on the premises. Every person in the possession, control, or occupancy of the premises must give any of the specified officials the means, facilities, and opportunity to conduct the authorized examinations.

Cigarettes Sold outside Michigan

The Act does not prohibit any person from manufacturing or selling cigarettes that do not meet the Act's requirements if they are or would be stamped for sale in another state or are packaged for sale outside the United States, and the person has taken reasonable steps to ensure that the cigarettes will not be sold or offered for sale to people located in Michigan.

Local Regulation

A city, county, township, or village may not adopt or enforce a local law, ordinance, resolution, or rule that duplicates, extends, revises, or conflicts with any provision of the Act or purports to regulate its subject matter.

Repeal

The Act will be repealed on the date that the DELEG Director notifies the Secretary of State in writing that a Federal reduced cigarette ignition propensity standard that preempts the Act has been adopted and is in effect.

MCL 29.491-29.513

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill increases the responsibilities of DELEG by creating a new certification program for cigarette manufacturers that

will be administered by the Bureau of Fire Safety. The bill requires that the manufacturers obtain a three-year certification from the Department, and pay a \$1,250 fee for each brand family. Revenue from the fee will be deposited into the new Fire Safety Standard and Firefighter Protection Act Enforcement Fund. This Fund will be used to support the costs of testing, enforcement, and oversight. Money in the Fund will not lapse to the General Fund, but will carry forward into the next fiscal year. According to the Department, there are 100 brand families registered in the State of New York. The revenue that will be generated by this fee each year will equal approximately \$42,000, while the average cost of supporting one FTE is approximately \$80,000. Therefore, the revenue will support only a part-time staff person for the administration of this new program or the Bureau will have to redirect some of its existing resources to support this program. The FY 2009-10 year-to-date appropriations for the Bureau of Fire Safety programs (including the Fire Marshal Program, Fire Fighters Training Council, and Fire Safety Program) total \$6,052,700, of which \$1,854,900 is generated from fee revenue and \$2,600,000 comes from the General Fund, with remaining resources from Federal revenue and interdepartmental grants.

In addition, the bill created the Cigarette Fire Safety Standard and Firefighter Protection Act Fund. Revenue to this Fund will come from any civil fines levied for noncompliance with the Act. This Fund will have carry-forward authority. Money from this Fund may be used to support DELEG's fire safety and prevention programs. The civil fines might increase revenue to these programs if manufacturers or sellers of cigarettes are found to be out of compliance; however, it is difficult to estimate the amount of civil fine revenue that will be collected.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.