




Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536


 BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bills 264 and 265 (as introduced 2-19-09)
Sponsor: Senator Tupac A. Hunter
Committee: Commerce and Tourism

Date Completed: 4-28-09

CONTENT

Senate Bill 264 would create 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 proposed 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 were adopted.
- Prohibit local regulation that conflicted with the Act.

Senate Bill 265 would amend the Tobacco Products Tax Act to designate cigarettes contraband subject to seizure and forfeiture if they were not marked as required by Senate Bill 264; and refer to violations of the proposed Fire Safety Standard and Firefighter Protection Act.

The bills are tie-barred and would take effect on January 2, 2010.

Senate Bill 264

Sale of Cigarettes

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

Cigarette Testing & Performance Standard

The testing of cigarettes would have to be conducted in accordance with ASTM standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes". The testing would have to be conducted on 10 layers of filter paper. Forty replicate tests would comprise a complete test trail for each cigarette tested. The

performance standard described below could be applied only to a test trial. Testing would have to be conducted by a laboratory that was 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 would have to have implemented a quality control and quality assurance program that included a procedure that would determine repeatability of the testing results. The repeatability value of the testing results would have to be 0.19 or less.

("Repeatability" would mean 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 was tested, not more than 25% of the cigarettes tested in a test trial could exhibit full-length burns. The testing and performance standard provisions would not require additional testing if cigarettes were tested consistently with the proposed Act for any other purpose.

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

A cigarette listed in a certification submitted under the proposed Act that used lowered permeability bands in the cigarette paper to achieve compliance with the performance standard would have to 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 were positioned by design, the cigarette would have to 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 determined could not be tested in compliance with the ASTM standard would have to propose to the Department a test method and performance standard for the cigarette. If DELEG approved of the proposed method and determined that the proposed performance standard was

equivalent to the prescribed standard, the manufacturer could employ the test method and performance standard to certify the cigarette. If DELEG determined that another state had enacted reduced cigarette ignition propensity standards that included a test method and performance standard that were the same as those contained in the proposed Act, and DELEG found that the officials responsible for implementing those requirements had 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 would have to authorize that manufacturer to employ the alternative test method and performance standard to certify that cigarette for sale in Michigan, unless the Department demonstrated a reasonable basis as to why the alternative test should not be accepted. All other applicable requirements would apply to the manufacturer.

A manufacturer would have to maintain copies of the reports of all tests conducted under the proposed 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 failed to make the copies available within 60 days of receiving a written request from DELEG or the Attorney General would be subject to a civil fine of up to \$10,000 for each day after the 60th day that the manufacturer did not make them available.

The Department could adopt a subsequent ASTM standard test method for measuring the ignition strength of cigarettes if it found that the subsequent method did 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 the ASTM and performance standards specified in the bill.

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

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

The testing and performance provisions would not prohibit a wholesale or retail dealer from selling its existing inventory of cigarettes, if the dealer could establish that State tax stamps were affixed to the cigarettes before the proposed Act's effective date and that the inventory was purchased before that date in comparable quality to the inventory purchased during the same period of the preceding year.

The testing and performance provisions also would not prohibit the sale of cigarettes solely for the purpose of consumer testing. For purposes of this provision, "consumer testing" would mean 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 would have to certify cigarettes for the purposes of the proposed Act by submitting to DELEG a written certification attesting that each listed cigarette had been tested in compliance with the Act and met the performance standard.

A manufacturer would have to 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 was 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 were a person other than the manufacturer.
- The date that the testing occurred.

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

A manufacturer would have to recertify a cigarette every three years.

If a manufacturer made a change to a certified cigarette that was likely to alter its compliance with the reduced cigarette ignition propensity standards required by the proposed Act, a person could not sell that cigarette in Michigan until the manufacturer retested the cigarette in accordance with the Act and maintained records of that retesting. A person could not sell in Michigan an altered cigarette that did not meet the Act's performance standard.

Certification Fee & Enforcement Fund

At the time it submitted a written certification, a manufacturer would have to pay to DELEG a fee of \$1,250 for each brand family listed in the certification. A fee would apply 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 was paid.

The Department of Treasury would have to establish and administer the Fire Safety Standard and Firefighter Protection Act Enforcement Fund as a restricted account in the General Fund for the administration and enforcement of the proposed Act. The Department would have to credit to the account all certification fees submitted by manufacturers under the Act, money received from any other source, and earnings on the account. The Department could use the money in the account only to provide money to DELEG to support processing, testing, enforcement, and oversight activities under the Act. Money in the account at the end of a fiscal year would not revert to the General Fund, but would be carried over in the account to the next fiscal year.

Manufacturer Markings

A manufacturer would have to mark any cigarettes it certified to indicate compliance with the testing and performance standard requirements. The marking would have to 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 indicated that the cigarettes met the proposed Act's standards.

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

A manufacturer would have to notify DELEG of which marking it had selected for its cigarettes.

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

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

A manufacturer could not modify a marking approved by DELEG unless it submitted a request for approval of the modification. When it received a request, DELEG would have to approve or disapprove the proposed modification. A modification would be considered approved if DELEG failed to approve or disapprove it within 10 business days after receiving the request.

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

Penalties; Fund

A manufacturer, wholesale dealer, agent, or any other person other than a retail dealer who knowingly sold or offered to sell cigarettes, other than through retail sale, in violation of the testing and performance standard requirements would be 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 arose during any 30-day period could not exceed \$100,000.

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

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

A person who committed other violations of the proposed Act would be 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 could commence an action against a person who violated the proposed Act or rules promulgated under it. In an action brought under the Act, the court could 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 were caused by the violation.
- Reasonable attorney fees and costs.

The Department of Treasury would have to establish and administer the Cigarette Fire Safety Standard and Firefighter Protection Fund as a restricted account in the General Fund. The Department would have to credit to the account all money recovered from civil fines under these provisions, money received from any other source, and earnings on the account. The Department could use money in the account only to provide funds to DELEG to support fire safety and prevention programs. Money in the account at the end of a fiscal year would not revert to the General Fund but would be carried over in the account to the next fiscal year.

Enforcement

To enforce the proposed 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, could examine the books, papers, invoices, and other records of any person in possession, control, or occupancy of any premises where cigarettes were 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 would have to give any of the specified officials the means, facilities, and opportunity to conduct the authorized examinations.

Cigarettes Sold outside Michigan

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

Local Regulation

A city, county, township, or village could not adopt or enforce a local law, ordinance, resolution, or rule that duplicated, extended, revised, or conflicted with any provision of the proposed Act or purported to regulate its subject matter.

Repeal

The proposed Act would be repealed on the date that the DELEG Director notified the Secretary of State in writing that a Federal reduced cigarette ignition propensity standard that preempted the Act had been adopted and was in effect.

Senate Bill 265

Under the Tobacco Products Tax Act, a tobacco product that is held, owned, possessed, transported, or in control of a person in violation of the Act, and a vending machine, vehicle, and other tangible personal property containing a tobacco product in violation of the Act and any related books and records, are contraband and may be seized and confiscated by the Department of Treasury as provided in the Act. Under the bill, this provision also would apply to a tobacco product that was not marked as required under Senate Bill 264.

The Act requires a person making the seizure of any alleged contraband to deliver personally or by registered mail to the person from whom the seizure was made, within five business days, an inventory statement of the seized property. Under the bill, if the contraband were cigarettes seized because of an allegation that they were not marked as required, the person making the seizure also would have to give notice of it and an inventory of the seized cigarettes to

the manufacturer that certified that brand under Senate Bill 264, if any.

The Act prescribes procedures for the forfeiture of seized contraband, and requires the Department of Treasury to destroy all cigarettes forfeited to the State. The bill would require the Department to give a manufacturer that certified the brand of any unmarked cigarettes an opportunity to inspect them before the Department destroyed them.

The Act provides that the seizure and destruction or sale of a tobacco product or other property does not relieve a person from a fine, imprisonment, or other penalty for a violation of the Act. A person who is not an employee or officer of the State or a political subdivision of the State who furnishes to the Department of Treasury or any law enforcement agency original information concerning a violation of the Act that results in the collection and recovery of any tax or penalty or leads to the forfeiture of any cigarettes, or other property, may be awarded and paid by the State Treasurer, compensation of up to 10% of the net amount received from the sale of any forfeited cigarettes or other property. The amount may not exceed \$5,000, and must be paid out of the receipts from the sale of the property. The bill would extend these provisions to a violation of the proposed Fire Safety Standard and Firefighter Protection Act.

(The Department of Treasury may sell all tobacco products, except cigarettes, and other property forfeited pursuant to the Tobacco Products Tax Act at public sale. The Department may pay up to 25% of the proceeds to the local governmental unit whose law enforcement agency performed the procedures. The balance must be credited to the General Fund.)

MCL 205.429 (S.B. 265)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Senate Bill 264

This bill would increase the responsibilities of DELEG by creating a new certification program for cigarette manufacturers that would be administered by the Bureau of Fire Safety. The bill would require that the manufacturers obtain a three-year

certification from the Department, and pay a \$1,250 fee for each brand family. Revenue from the proposed fee would be deposited into the Fire Safety Standard and Firefighter Protection Act Enforcement Fund, which would be created by the bill. This Fund would be used to support the costs of testing, enforcement, and oversight. Money in the Fund would not lapse to the General Fund, but would 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 would be generated by this fee each year would equal approximately \$42,000, while the average cost of supporting one FTE is approximately \$80,000. Therefore, the revenue would support only a part-time staff person for the administration of this new program or would require the Bureau to redirect some of its existing resources to support this program. The FY 2008-09 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 \$6,474,700, of which \$1,816,700 is generated from fee revenue and \$3,060,200 comes from the General Fund, with remaining resources from Federal revenue and interdepartmental grants.

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

Senate Bill 265

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz
Stephanie Yu

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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.