



SPONSOR: Rep. Lee & Sen. Bunting
Reps. Carey, Ewing, Hocker, Maier, D. Short, Valihura,
Keeley, Ennis; Sens. Adams, Cook

HOUSE OF REPRESENTATIVES

144th GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO. 1 FOR
HOUSE BILL NO. 149
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO REDUCED IGNITION PROPENSITY CIGARETTES AND FIRE SAFETY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 16 of the Delaware Code by adding thereto the following new Chapter:

“CHAPTER 71A. REDUCED IGNITION PROPENSITY CIGARETTES.

§ 7116. Definitions.

As used in this subchapter:

- (1) ‘Agent’ shall mean any person authorized by the State to purchase and affix tax stamps on packages of cigarettes.
- (2) ‘Cigarette’ means
 - a. any roll for smoking whether made wholly or in part of tobacco or any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material other than leaf tobacco; or
 - b. any roll for smoking wrapped in any substance containing tobacco which , because of its appearance the type of tobacco used in the filler or its packaging and labeling, is likely to be offered, or purchased by, consumers as a cigarette as described in subparagraph a above.

- (3) 'State Fire Marshal' shall mean the Delaware State Fire Marshal or his Deputies.
- (4) 'Manufacturer' shall mean:
- a. any entity which manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that such manufacturer intends to be sold in this State, including cigarettes intended to be sold in the United States through an importer; or
 - b. the first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States; or
 - c. any entity that becomes a successor of an entity described in paragraph (1) or (2) of this subdivision.
- (5) 'Repeatability' shall mean the range of values within which the repeat results of cigarette test trials from a single laboratory will fall 95 percent of the time.
- (6) 'Retail dealer' shall mean any person other than a manufacturer or wholesale dealer engaged in selling cigarettes or tobacco products.
- (7) 'Sale' means in addition to its usual meaning, any sale, transfer, exchange, theft, barter, gift or offer for sale and distribution, in any manner or by any means whatsoever.
- (8) 'Sell' shall mean to sell or to offer or agree to do the same.
- (9) 'Quality control and quality assurance program' shall mean the 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. This program ensures that the testing repeatability remains within the required repeatability values stated in § 7117(5) of this Chapter for all test trials used to certify cigarettes in accordance with this law.
- (10) 'Wholesale dealer' shall mean any person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, and any person who owns, operates or maintains one or more cigarette or tobacco product vending machines in, at or upon premises owned or occupied by any other person.

§ 7117 Test Method and Performance Standard.

- (a) Except as provided in subsection (g), no cigarettes may be sold or offered for sale in this State or offered for sale or sold to persons located in this State unless such cigarettes have been tested in accordance with the test method and meet the performance standard specified in this subsection; and a written certification has been filed by the manufacturer with the State Fire Marshal in accordance with § 7118 of this Chapter, and the cigarettes have been marked in accordance with § 7119 of this Chapter.
- (1) 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’.
 - (2) Testing shall be conducted on ten (10) layers of filter paper.
 - (3) No more than 25 percent of the cigarettes tested in a test trial in accordance with this subsection shall exhibit full-length burns. Forty (40) replicate tests shall comprise a complete test trial for each cigarette tested.
 - (4) The performance standard required by this subsection shall only be applied to a complete test trial.
 - (5) Written certification 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 (ISO), or other comparable accreditation standard required by the State Fire Marshal.
 - (6) Laboratories conducting testing in accordance with this Section shall implement a quality control and quality assurance program that includes a procedure that will determine the repeatability of testing results. The repeatability value shall be no greater than 0.19
 - (7) This Section does not require additional testing if cigarettes are tested consistent with this Act for any other purpose.
 - (8) Testing performed or sponsored by the State Fire Marshal to determine a cigarette’s compliance with the performance standard required shall be conducted in accordance with this Section.

- (b) Each cigarette list in a certification submitted pursuant to § 7118 of this Chapter that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard set forth in this Section shall have at least two (2) nominally identical bands on the paper surrounding the tobacco column. At least one (1) complete band shall be located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design there shall be at least two (2) bands fully located at last 15 millimeter from the lighting end and 10 millimeters from the filter end of the tobacco column, or 10 millimeters from the labeled end of the tobacco column for a non-filtered cigarette.
- (c) The manufacturer or manufacturers of a cigarette that the State Fire Marshal determines cannot be tested in accordance with the test method prescribed in § 7117(a) of this Chapter shall propose a test method and performance standard for such cigarette to the State Fire Marshal. Upon approval of the proposed test method and a determination by the State Fire Marshal that the performance standard proposed by the manufacturer or manufacturers is equivalent to the performance standard prescribed in § 7117(a)(3) of this Chapter, the manufacturer or manufacturers may employ such test method and performance standard to certify such cigarette pursuant to § 7118 of this Chapter. 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 contained in this Chapter, and the State Fire Marshal 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 this Section, then the State Fire Marshal shall authorize that manufacturer to employ the alternative test method and performance standard to certify that cigarette for sale in this State, unless the State Fire Marshal 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 such manufacturer or manufacturers.

- (d) In order to ensure compliance with the performance standard specified in § 7117(a) or (c) of this Chapter, data from testing conducted by manufacturers to comply with this performance standard shall be kept on file by such manufacturers for a period of three (3) years and shall be sent to the State Fire Marshal upon its request, and to the Office of the Attorney General upon its request. Any manufacturer who fails to make copies of these reports available within sixty (60) days of receiving a written request shall be subject to a civil penalty not to exceed \$10,000 for each day after the sixtieth (60th) day that the manufacturer does not make such copies available.
- (e) The State Fire Marshal may adopt a subsequent ASTM Standard Test Method for Measuring Ignition Strength of Cigarettes upon a finding that such 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.
- (f) As of January 1, 2010, and at least every three (3) years thereafter, the State Fire Marshal shall undertake a review of the effectiveness of this Chapter and report its findings to the legislature. Based upon such review, the State Fire Marshal may recommend legislation to improve the effectiveness of this Chapter. The report and legislative recommendations shall be submitted no later than June 30th following the conclusion of each three-year period.
- (g) The requirements of subsection (a) shall not prohibit:
 - (1) wholesale or retail dealers from selling their existing inventory of cigarettes on or after the effective date of this Chapter if the wholesale or retailer dealer can establish that state tax stamps were affixed to the cigarettes prior to the effective date and if the wholesale or retail dealer 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.
 - (2) the sale of cigarettes solely for the purpose of consumer testing. For purposes of this subsection, 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 testing.

- (h) This Chapter shall be implemented in accordance with the implementation and substance of the New York Fire Safety Standards for Cigarettes.

§ 7118. Certification of Compliance by Manufacturers.

- (a) Each manufacturer shall submit to the State Fire Marshal a written certification attesting that:
 - (1) each cigarette listed in the certification has been tested in accordance with § 7117 of this Chapter;
 - (2) each cigarette listed in the certification meets the performance standard set forth under § 7117(a)(3) of this Chapter;
 - (3) each cigarette listed in the certification shall be described with the following information:
 - a. brand (i.e., the trade name on the package);
 - b. style (i.e., light, ultra light);
 - c. length in millimeters;
 - d. circumference in millimeters;
 - e. flavor (e.g., menthol, chocolate), if applicable;
 - f. filter or non-filter;
 - g. package description (e.g., soft pack, box);
 - h. marking approved in accordance with § 7119 of this Chapter.
 - i. the name, address and telephone number of the laboratory, if different than the manufacturer that conducted the test; and
 - j. the date that the testing occurred.

- (b) Such certifications shall be made available to the Attorney General and the Division of Revenue for the purposes of ensuring compliance with this Section. Each cigarette certified under this Section shall be re-certified every three (3) years.
- (c) For each cigarette listed in a certification a manufacturer shall pay to the State Fire Marshal a \$250.00 fee. The State Fire Marshal shall have the power to adjust this fee to an amount sufficient only to provide for processing, testing, enforcement and oversight activities related to this Chapter.
- (d) There is hereby established in the custody of the State Comptroller a special nonlapsing fund to be known as the 'Cigarette Fire Safety and Firefighter Protection Act Enforcement Fund'. Such fund shall consist of all certification fees submitted by manufacturers, and shall, in addition to any other monies made available for such purpose, be available to the State Fire Marshal's Office and shall be used solely to support State processing testing, enforcement and oversight activities related to this Chapter. All payments from the Cigarette Fire Safety and Firefighter Protection Act Enforcement Fund shall be made on the audit and warrant of the State Treasurer on vouchers certified and submitted by the State Fire Marshal.
- (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 required by this Chapter, that cigarette shall not be sold or offered for sale in this State until the manufacturer retests the cigarette in accordance with the testing standards set forth in § 7117 of this Chapter and maintains records of that retesting as required by § 7117 of this Chapter. Any altered cigarette which does not meet the performance standard set forth in § 7117 of this Chapter may not be sold in this State.

§ 7119. Package Markings.

- (a) Cigarettes that are certified by a manufacturer in accordance with § 7118 of this Chapter shall be marked to indicate compliance with the requirements of § 7117 of this Chapter. Such marking shall be in eight (8) point font type or larger and consist of:
 - (1) modification of the product UPC Code to indicate a visible mark printed at or around the area of the UPC Code. Such mark may consist of alphanumeric or

- symbolic character(s) permanently stamped, engraved, embossed or printed in conjunction with the UPC; or
- (2) any visible combination of alphanumeric or symbolic character(s) permanently stamped, engraved, or embossed upon the cigarette package or cellophane wrap; or
 - (3) printed, stamped, engraved or embossed test that indicates that the cigarettes meet the standards of this Section; or
 - (4) The letters “FSC”, which signifies Fire Standards Compliant appearing in eight (8) point type or larger and permanently printed, stamped, engraved or embossed on the package at or near the UPC code.
- (b) A manufacturer must use only one (1) marking and must apply this marking uniformly for all packages (including, but not limited to, packs, cartons and cases) and brands marketed by that manufacturer.
- (c) The State Fire Marshal must be notified as to the marking that is selected.
- (d) Prior to the certification of any cigarette, a manufacturer shall present its proposed marking to the State Fire Marshal for approval. Upon receipt of the request, the State Fire Marshal shall approve or disapprove the marking offered, except that the State Fire Marshal shall approve:
- (1) any marking in use and approved for sale in New York State pursuant to New York Fire Safety Standard for Cigarettes, or
 - (2) the letters ‘FSC’, which signifies Fire Standards Compliant appearing in eight (8) point type or larger and permanently printed, stamped, engraved or embossed on the package at or near the UPC code.
- (e) Proposed markings shall be deemed approved if the State Fire Marshal fails to act within ten (10) business days of receiving a request for approved.
- (f) No manufacturer shall modify its approved marking unless the modification has been approved by the State Fire Marshal in accordance with § 7119 of this Chapter.
- (g) Manufacturers certifying cigarettes in accordance with § 7118 of this Chapter shall provide a copy of such certifications to all wholesale dealers and agents to which they sell

cigarettes, and shall also provide sufficient copies of an illustration of the package markings utilized by the manufacturer pursuant to § 7119 of this Chapter for each retailer to which the wholesale dealers or agents sell cigarettes. Wholesale dealers and agents shall provide a copy of these package markings received from manufacturers to all retail dealers to which they sell cigarettes. Wholesale dealers, agents and retail dealers shall permit the State Fire Marshal, the Director of the Division of Revenue, the Office of the Attorney General, or employees thereof, to inspect markings of cigarette packaging marked in accordance with this Section.

§ 7120. Enforcement and Penalties.

- (a) A manufacturer, wholesale dealer, agent or any other person or entity who knowingly sells or offers to sell cigarettes, other than through retail sale, in violation of § 7117 of this Chapter shall be subject to a civil penalty not to exceed \$100 for each pack of such cigarettes sold or offered for sale provided that in no case shall the penalty against any such person or entity exceed \$100,000 during any thirty-day period.
- (b) A retail dealer who knowingly sells or offers to sell cigarettes in violation of Section 2 of this Act shall be subject to a civil penalty not to exceed \$100 for each pack of such cigarettes sold or offered for sale provided that in no case shall the penalty against any retail dealer exceed \$25,000 during any thirty-day period.
- (c) In addition to any penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership or association engaged in the manufacture of cigarettes that knowingly makes a false certification pursuant to § 7118 of this Act shall be subject to a civil penalty of at least \$75,000, and not to exceed \$250,000 for each such false certification.
- (d) Any person violating any other provision in this Act shall be subject to a civil penalty for a first offense not to exceed \$1,000, and for a subsequent offense subject to a civil penalty not to exceed \$5,000, for each such violation.
- (e) Any cigarettes that have been sold or offered for sale that do not comply with the performance standard required by § 7117 of this Act shall be subject to forfeiture. Cigarettes forfeited pursuant to this Section shall be destroyed; provided, however, that prior to the destruction of any cigarette forfeited pursuant to these provisions, the true

holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette.

- (f) The State Fire Marshal is authorized to enforce this legislation and to promulgate regulations as necessary to implement and administer this law.
- (g) The State Fire Marshal may, in consultation with the Director of the Division of Revenue and/or the Attorney General, promulgate regulations to conduct random inspections of wholesale dealers, agents, and retail dealers to ensure that only cigarettes complying with this Chapter are sold in the State.
- (h) In addition to any other remedy provided by the law, the Attorney General may file an action in State Court for a violation of this Chapter, including petitioning for injunctive relief or to recover any costs or damages suffered by the State government because of a violation of this Section, including enforcement costs relating to the specific isolation and attorney's fees. In any such action, the Attorney General shall have the same authority to investigate and to obtain remedies if the action were brought (under authorizing statutes and authorities). Each violation of this Chapter or of the rules adopted under this Section constitutes a separate civil violation for which the Attorney General may obtain relief.
- (i) Whenever any law enforcement personnel or duly authorized representative of the State Fire Marshal shall discover any cigarettes that have not been marked in the manner required by § 7119 of this Chapter, such personnel is hereby authorized and empowered to seize and take possession of such cigarettes. Such cigarettes shall be turned over to the Department of Finance, and shall be forfeited to the State. Cigarettes seized pursuant to this Section shall be destroyed; provided, however, that prior to the destruction of any cigarette seized pursuant to these provisions, the true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette.

§ 7121. Fire Prevention and Public Safety Fund.

- (a) The State Fire Marshal shall assess all civil penalties as outlined in this Chapter.
- (b) All civil penalties will be paid within thirty (30) days of assessment.

- (c) The monies derived from the civil penalties will be split equally between the State Fire Marshal for enforcement of this Section, and the Fire Detection Fund pursuant to § 6637 of this Title.

§ 7122. Exemptions.

This Chapter shall not be construed to affect the making or manufacturing of cigarillos. A cigarillo shall mean a small cigar or cigarette wrapped in tobacco instead of paper.

§ 7123. Sale Outside of Delaware.

Nothing in this Chapter shall be construed to prohibit any person or entity from manufacturing or selling cigarettes that do not meet the requirements of § 7117 of this Chapter if the cigarettes are or will be stamped for sale in another state or are packaged for sale outside the United States, and that person or entity has taken reasonable steps to ensure that such cigarettes will not be sold or offered for sale to persons located in this State.

§ 7124. Effective Date.

This Act shall take effect on January 1, 2009, and the requirement that only cigarettes certified as compliant with the performance standard herein may be sold shall not prohibit wholesale dealers or retail dealers from selling their existing inventory of cigarettes on or after January 1, 2009, if the wholesale dealer or retailer can establish that State tax stamps were affixed to the cigarettes prior to January 1, 2009, and if such wholesale dealer or retailer can establish that such inventory was purchased prior to January 1, 2009, in comparable quantity to the inventory purchased during the same period of the prior year. Nothing in this Act shall be construed to prohibit any person or entity from manufacturing or selling cigarettes that do not meet the requirements of § 7117 of this Chapter if such cigarettes are or will be stamped for sale in another state or are packaged for sale outside the United States and has taken reasonable steps to ensure that such cigarettes will not be sold or offered for sale to persons located in this State.

§ 7125. Effect of Federal Regulation.:

- (a) This Chapter shall be repealed if a federal reduced cigarette ignition propensity standard that preempts this Chapter is adopted and becomes effective.

- (b) Notwithstanding any other provision of law, the local government units of this State may neither enact nor enforce any ordinance or other local law or regulations conflicting or preempted by, any provision of this Chapter or with any policy of this State expressed by this Chapter, whether that policy be expressed by inclusion in this Chapter or with any policy of this State expressed by this Chapter or by exclusion of that subject from this Chapter.”