

SB 456

FILED

2009 MAY -8 PM 4: 21

WEST VIRGINIA LEGISLATURE
SEVENTY-NINTH LEGISLATURE
REGULAR SESSION, 2009

OFFICE OF THE WEST VIRGINIA
CLERK OF STATE

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ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 456

(SENATORS FOSTER, KESSLER
AND UNGER, *original sponsors*)

[Passed April 11, 2009; in effect ninety days from passage.]

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 456

(SENATORS FOSTER, KESSLER AND UNGER, *original sponsors*)

[Passed April 11, 2009; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §47-25-1, §47-25-2, §47-25-3, §47-25-4, §47-25-5, §47-25-6, §47-25-7, §47-25-8, §47-25-9, §47-25-10, §47-25-11, §47-25-12 and §47-25-13, all relating to establishing a cigarette fire safety standard for cigarettes sold in the state; defining terms; setting a reduced cigarette ignition propensity performance test and standard; requiring compliance certification by manufacturers; setting certification fees; requiring manufacturers to maintain records; requiring certain packaging markings; establishing civil penalties; establishing a special penalty fund; requiring the State Fire Marshal to review effectiveness of the law and report to the Legislature; providing the State Fire Marshal with rule-making authority; authorizing inspections by State Tax Commissioner; authorizing the sale of existing

inventory; permitting manufacturers to sell noncompliant cigarettes to other states and foreign countries; preemption if federal law or regulations establish a national standard; preemption of local regulations; and establishing effective dates.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §47-25-1, §47-25-2, §47-25-3, §47-25-4, §47-25-5, §47-25-6, §47-25-7, §47-25-8, §47-25-9, §47-25-10, §47-25-11, §47-25-12 and §47-25-13, all to read as follows:

ARTICLE 25. REDUCED CIGARETTE IGNITION PROPENSITY.

§47-25-1. Short title.

1 This article shall be known and may be cited as the
2 Reduced Cigarette Ignition Propensity Standard and Fire
3 Prevention Act.

§47-25-2. Definitions.

1 (a) "Agent" means any person authorized by the State
2 Tax Commissioner to purchase and affix stamps on
3 packages of cigarettes.

4 (b) "Cigarette" means:

5 (1) Any roll of tobacco wrapped in paper or in any
6 substance not containing tobacco; and

7 (2) Any roll of tobacco wrapped in any substance
8 containing tobacco which, because of its appearance, the
9 type of tobacco used in the filler, or its packaging and
10 labeling, is likely to be offered to, or purchased by,
11 consumers as a cigarette as described in this subsection.

12 (c) "Manufacturer" means:

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STATE

13 (1) Any entity which manufactures or otherwise pro-
14 duces cigarettes or causes cigarettes to be manufactured or
15 produced anywhere that the manufacturer intends to be
16 sold in this state, including cigarettes intended to be sold
17 in the United States through an importer;

18 (2) The first purchaser anywhere that intends to resell
19 in the United States cigarettes manufactured anywhere
20 that the original manufacturer or maker does not intend to
21 be sold in the United States; or

22 (3) Any entity that becomes a successor of an entity
23 described in subdivision (1) or (2) of this subsection.

24 (d) "Quality control and quality assurance program"
25 means the laboratory procedures implemented to ensure
26 that operator bias, systematic and nonsystematic method-
27 ological errors and equipment-related problems do not
28 affect the results of the testing. The program shall ensure
29 that the testing repeatability remains within the required
30 repeatability values stated in subdivision (6), subsection
31 (a), section three of this article for all test trials used to
32 certify cigarettes in accordance with this article.

33 (e) "Repeatability" means the range of values within
34 which the repeat results of cigarette test trials from a
35 single laboratory will fall ninety-five percent of the time.

36 (f) "Retail dealer" has the same meaning as in section
37 two, article seventeen, chapter eleven of this code.

38 (g) "Sale" has the same meaning as in section two,
39 article seventeen, chapter eleven of this code.

40 (h) "Wholesale dealer" means any person other than a
41 manufacturer who sells cigarettes or tobacco products to
42 retail dealers or other persons for purposes of resale and
43 any person who owns, operates or maintains one or more
44 cigarette or tobacco product vending machines in, at or
45 upon premises owned or occupied by any other person.

§47-25-3. Test method and performance standard.

1 (a) Except as provided in subsection (g) of this section
2 and in section ten of this article, no cigarettes may be sold
3 or offered for sale in this state or offered for sale or sold to
4 persons located in this state, unless: (i) The cigarettes have
5 been tested in accordance with the test method and meet
6 the performance standard specified in this section; (ii) a
7 written certification has been filed by the manufacturer
8 with the State Fire Marshal in accordance with section
9 four of this article; and (iii) the cigarettes have been
10 marked in accordance with section five of this article.

11 (1) Testing of cigarettes shall be conducted in accor-
12 dance with the American Society of Testing and Materials
13 (ASTM) standard E2187-04, standard test method for
14 measuring the ignition strength of cigarettes.

15 (2) Testing shall be conducted on ten layers of filter
16 paper.

17 (3) No more than twenty-five percent of the cigarettes
18 tested in a test trial in accordance with this section may
19 exhibit full-length burns. Forty replicate tests shall
20 comprise a complete test trial for each cigarette tested.

21 (4) The performance standard required by this section
22 shall only be applied to a complete test trial.

23 (5) Written certifications shall be based upon testing
24 conducted by a laboratory that has been accredited
25 pursuant to standard ISO/IEC 17025 of the International
26 Organization for Standardization (ISO) or other compara-
27 ble accreditation standard.

28 (6) Laboratories conducting testing in accordance with
29 this section shall implement a quality control and quality
30 assurance program that includes a procedure that will
31 determine the repeatability of the testing results. The
32 repeatability value shall be no greater than 0.19.

33 (7) This section does not require additional testing if
34 cigarettes are tested consistent with this article for any
35 other purpose.

36 (8) Testing performed to determine a cigarette's compli-
37 ance with the performance standard required by this
38 section shall be conducted in accordance with this section.

39 (b) Each cigarette listed in a certification submitted
40 pursuant to section four of this article that uses lowered
41 permeability bands in the cigarette paper to achieve
42 compliance with the performance standard set forth in this
43 section shall have at least two nominally identical bands
44 on the paper surrounding the tobacco column. At least
45 one complete band shall be located at least fifteen milli-
46 meters from the lighting end of the cigarette. For ciga-
47 rettes on which the bands are positioned by design, there
48 shall be at least two bands fully located at least fifteen
49 millimeters from the lighting end and ten millimeters from
50 the filter end of the tobacco column, or ten millimeters
51 from the labeled end of the tobacco column for nonfiltered
52 cigarettes.

53 (c) A manufacturer of a cigarette that cannot be tested
54 in accordance with the test method prescribed in subdivi-
55 sion (1), subsection (a) of this section shall propose a test
56 method and performance standard for the cigarette to the
57 State Fire Marshal. If the performance standard proposed
58 by the manufacturer is equivalent to the performance
59 standard prescribed in subdivision (3) of said subsection,
60 the manufacturer may employ that test method and
61 performance standard to certify the cigarette pursuant to
62 section four of this article. If another state has enacted
63 reduced cigarette ignition propensity standards that
64 include a test method and performance standard that are
65 the same as those contained in this article and the officials
66 responsible for implementing those requirements have
67 approved the proposed alternative test method and

68 performance standard for a particular cigarette proposed
69 by a manufacturer as meeting the fire safety standards of
70 that state's law or regulation under a legal provision
71 comparable to this section, then the manufacturer may
72 employ the alternative test method and performance
73 standard to certify cigarettes for sale in this state, unless
74 the State Fire Marshal demonstrates a reasonable basis
75 why the alternative test should not be accepted under this
76 article. All other applicable requirements of this section
77 apply to the manufacturer.

78 (d) Each manufacturer shall maintain copies of the
79 reports of all tests conducted on all cigarettes offered for
80 sale for a period of three years and shall make copies of
81 these reports available to the State Fire Marshal upon
82 written request. Any manufacturer who fails to make
83 copies of these reports available within sixty days of
84 receiving a written request is subject to a civil penalty not
85 to exceed \$10,000 for each day after the sixtieth day that
86 the manufacturer does not make the copies available.

87 (e) A subsequent ASTM standard test method for
88 measuring the ignition propensity of cigarettes may be
89 used, if the subsequent method does not result in a change
90 in the percentage of full-length burns exhibited by any
91 tested cigarette when compared to the percentage of
92 full-length burns the same cigarette would exhibit when
93 tested in accordance with ASTM Standard E2187-04 and
94 the performance standard in subdivision (3), subsection (a)
95 of this section.

96 (f) The State Fire Marshal shall review the effectiveness
97 of this section and report every three years to the Legisla-
98 ture, if appropriate, recommendations for legislation to
99 improve the effectiveness of this article. The report and
100 legislative recommendations shall be submitted no later
101 than June 30 following the conclusion of each three-year
102 period.

103 (g) The requirements of subsection (a) of this section
104 shall not prohibit:

105 (1) Wholesale or retail dealers from selling their exist-
106 ing inventory of cigarettes on or after the effective date of
107 this article if the wholesale or retail dealer can establish
108 that state tax stamps were affixed to the cigarettes prior
109 to the effective date and the wholesale or retail dealer can
110 establish that the inventory was purchased prior to the
111 effective date in comparable quantity to the inventory
112 purchased during the same period of the prior year; or

113 (2) The sale of cigarettes solely for the purpose of
114 consumer testing. For purposes of this subsection, the term
115 "consumer testing" means an assessment of cigarettes that
116 is conducted by a manufacturer (or under the control and
117 direction of a manufacturer), for the purpose of evaluating
118 consumer acceptance of those cigarettes, using only the
119 quantity of cigarettes that is reasonably necessary for the
120 assessment.

121 (h) This article shall be implemented and construed as
122 to effectuate its general purpose to make uniform the law
123 of those states that have enacted reduced cigarette ignition
124 propensity laws.

§47-25-4. Certification and product change.

1 (a) Each manufacturer shall submit to the State Fire
2 Marshal a written certification attesting that:

3 (1) Each cigarette listed in the certification has been
4 tested in accordance with section three of this article; and

5 (2) Each cigarette listed in the certification meets the
6 performance standard set forth in section three of this
7 article.

8 (b) Each cigarette listed in the certification shall be
9 described with the following information:

- 10 (1) Brand or trade name on the package;
 - 11 (2) Style, such as light or ultra light;
 - 12 (3) Length in millimeters;
 - 13 (4) Circumference in millimeters;
 - 14 (5) Flavor, if applicable;
 - 15 (6) Filter or nonfilter;
 - 16 (7) Package description, such as soft pack or box;
 - 17 (8) Marking pursuant to section five of this article;
 - 18 (9) The name, address and telephone number of the
19 laboratory, if different from the manufacturer that
20 conducted the test; and
 - 21 (10) The date that the testing occurred.
- 22 (c) The certifications shall be made available to the
23 State Fire Marshal for the purposes of ensuring compli-
24 ance with this section.
- 25 (d) Each cigarette certified under this section shall be
26 recertified every three years.
- 27 (e) At the time it submits a written certification under
28 this section, a manufacturer shall pay a fee of \$1,000 to the
29 State Fire Marshal for each brand family of cigarettes
30 listed in the certification. The fee shall apply to all
31 cigarettes within the brand family certified and shall
32 include any new cigarette certified within the brand
33 family during the three-year certification period.
- 34 (f) All moneys collected as certification fees submitted
35 by manufacturers shall be deposited in a special account
36 in the State Treasury to be known as the Reduced Ciga-
37 rette Ignition Propensity Standard and Fire Prevention
38 Act Fund. The fund shall be administered by the Tax

39 Commissioner. Expenditures from the fund are not
40 authorized from collections, but are to be made only in
41 accordance with appropriation by the Legislature and in
42 accordance with the provisions of article three, chapter
43 twelve of this code and upon the fulfillment of the provi-
44 sions set forth in article two, chapter eleven-b of this code:
45 *Provided*, That for the fiscal year ending June 30, 2010,
46 expenditures are authorized from collections rather than
47 pursuant to an appropriation by the Legislature. The fund
48 shall, in addition to any other moneys made available for
49 those purposes, be equally divided and distributed without
50 appropriation between the State Fire Marshal and the
51 State Tax Commissioner to support fire prevention
52 activities and processing, testing, enforcement and over-
53 sight activities under this article.

54 (g) If a manufacturer has certified a cigarette pursuant
55 to this section and thereafter makes any change to the
56 cigarette that is likely to alter the cigarette's compliance
57 with the reduced cigarette ignition propensity standards
58 required by this article, that cigarette shall not be sold or
59 offered for sale in this state until the manufacturer retests
60 the cigarette in accordance with the testing standards set
61 forth in section three of this article and maintains records
62 of that retesting as required by section three of this article.
63 Any altered cigarette which does not meet the perfor-
64 mance standard set forth in section three of this article
65 may not be sold in this state.

§47-25-5. Marking of cigarette packaging.

1 (a) Cigarettes that are certified by a manufacturer in
2 accordance with section four of this article shall be
3 marked to indicate compliance with the requirements of
4 section three of this article. The marking shall be in
5 eight-point type or larger and consist of:

6 (1) Modification of the product UPC code to include a
7 visible mark printed at or around the area of the UPC

8 code. The mark may consist of alphanumeric or symbolic
9 characters permanently stamped, engraved, embossed or
10 printed in conjunction with the UPC;

11 (2) Any visible combination of alphanumeric or sym-
12 bolic characters permanently stamped, engraved or
13 embossed upon the cigarette package or cellophane wrap;
14 or

15 (3) Printed, stamped, engraved or embossed text that
16 indicates that the cigarettes meet the standards of this
17 article.

18 (b) A manufacturer shall use only one marking and
19 shall apply this marking uniformly for all packages,
20 including, but not limited to, packs, cartons and cases, and
21 brands marketed by that manufacturer.

22 (c) The State Tax Commissioner shall be notified as to
23 the marking that is selected.

24 (d) Prior to the certification of any cigarette, a manu-
25 facturer shall submit its proposed marking to the State
26 Tax Commissioner for approval. Upon receipt of the
27 request, the State Tax Commissioner shall approve or
28 disapprove the marking offered, except that the State Tax
29 Commissioner shall approve:

30 (1) Any marking in use and approved for sale in another
31 state; or

32 (2) The letters "FSC", which signifies fire standards
33 compliant, appearing in eight-point type or larger and
34 permanently printed, stamped, engraved or embossed on
35 the package at or near the UPC code.

36 (e) A manufacturer shall not modify its approved
37 marking unless the modification has been approved by the
38 State Tax Commissioner in accordance with this section.

39 (f) Manufacturers certifying cigarettes in accordance
40 with section four of this article shall provide a copy of the
41 certifications to all wholesale dealers and agents to which
42 they sell cigarettes and shall also provide sufficient copies
43 of an illustration of the package marking used by the
44 manufacturer pursuant to this section for each retail
45 dealer to which the wholesale dealers or agents sell
46 cigarettes. Wholesale dealers and agents shall provide a
47 copy of these package markings received from manufac-
48 turers to all retail dealers to which they sell cigarettes.
49 Wholesale dealers, agents and retail dealers shall permit
50 the State Tax Commissioner and its agents to inspect
51 markings of cigarette packaging marked in accordance
52 with this section.

§47-25-6. Penalties.

1 (a) A manufacturer, wholesale dealer, agent or any
2 other person or entity who knowingly sells or offers to sell
3 cigarettes, other than through retail sale, in violation of
4 section three of this article, is subject to a civil penalty not
5 to exceed \$100 for each pack of the cigarettes sold or
6 offered for sale: *Provided*, That in no case shall the
7 penalty against that person or entity exceed \$100,000
8 during any thirty-day period.

9 (b) A retail dealer who knowingly sells or offers to sell
10 cigarettes in violation of section three of this article is
11 subject to a civil penalty not to exceed \$100 for each pack
12 of the cigarettes sold or offered for sale: *Provided*, That in
13 no case shall the penalty against that retail dealer exceed
14 \$25,000 for sales or offers to sell during any thirty-day
15 period.

16 (c) In addition to any penalty prescribed by law, any
17 manufacturer of cigarettes that knowingly makes a false
18 certification pursuant to section four of this article is
19 subject to a civil penalty of at least \$75,000 and not to
20 exceed \$250,000 for each false certification.

21 (d) Any person violating any other provision in this
22 article is subject to a civil penalty for a first offense not to
23 exceed \$1,000 and for a subsequent offense, subject to a
24 civil penalty not to exceed \$5,000 for each violation.

25 (e) In addition to any other remedy provided by law, the
26 State Fire Marshal or the State Tax Commissioner may
27 file an action in circuit court for a violation of this article,
28 including petitioning for injunctive relief against any
29 manufacturer, importer, wholesale dealer, retail dealer,
30 agent or any other person or entity to enjoin that entity
31 from selling, offering to sell, or affixing tax stamps to any
32 cigarette that does not comply with the requirements of
33 this article, or to recover any costs or damages suffered by
34 the state because of a violation of this article, including
35 enforcement costs relating to the specific violation and
36 attorney's fees. Each violation of this article or of rules
37 promulgated under this article constitutes a separate civil
38 violation for which the State Fire Marshal or the State
39 Tax Commissioner may obtain relief. Upon obtaining
40 injunctive relief under this section, the State Fire Marshal
41 or the State Tax Commissioner shall provide a copy of the
42 judgment to all wholesale dealers and agents to which the
43 cigarette has been sold.

44 (f) Whenever any law-enforcement personnel or duly
45 authorized representative of the State Tax Commissioner
46 discovers any cigarettes for which no certification has
47 been filed as required by section four of this article or that
48 have not been marked in the manner required by section
49 five of this article, they may seize and take possession of
50 the cigarettes. The cigarettes shall be forfeited to the
51 state. The State Tax Commissioner shall destroy any
52 cigarettes seized pursuant to this section: *Provided*, That
53 prior to the destruction of any cigarette seized pursuant to
54 these provisions, the true holder of the trademark rights in
55 the cigarette brand may inspect the cigarette.

§47-25-7. Implementation.

1 (a) The State Fire Marshal or the State Tax Commis-
2 sioner may promulgate rules, pursuant to the Administra-
3 tive Procedures Act, chapter twenty-nine-a of this code,
4 necessary to effectuate the purposes of this article.

5 (b) The State Tax Commissioner in the regular course of
6 conducting inspections of wholesale dealers, agents and
7 retail dealers, as authorized under article seventeen,
8 chapter eleven of this code, may inspect the cigarettes to
9 determine if the cigarettes are marked as required by
10 section five of this article.

§47-25-8. Inspection.

1 To enforce the provisions of this article, the State Tax
2 Commissioner and its duly authorized representatives may
3 examine the books, papers, invoices and other records of
4 any person in possession, control or occupancy of any
5 premises where cigarettes are placed, stored, sold or
6 offered for sale, as well as the stock of cigarettes on the
7 premises. Every person in the possession, control or
8 occupancy of any premises where cigarettes are placed,
9 sold or offered for sale, shall give the State Tax Commis-
10 sioner and its duly authorized representatives the means,
11 facilities and opportunity for the examinations authorized
12 by this section.

**§47-25-9. Reduced Cigarette Ignition Propensity Standard and
Fire Prevention Act Fund.**

1 All moneys collected as civil penalties under section six
2 of this article shall be deposited in a special account in the
3 State Treasury to be known as the Reduced Cigarette
4 Ignition Propensity Standard and Fire Prevention Act
5 Fund. The moneys shall be deposited to the credit of the
6 fund and shall, in addition to any other moneys made
7 available for that purpose, be equally divided between the

8 State Fire Marshal and the State Tax Commissioner to
9 support fire safety and prevention programs and tax
10 department enforcement activities.

§47-25-10. Sales outside of West Virginia.

1 Nothing in this article shall be construed to prohibit
2 any person or entity from manufacturing or selling
3 cigarettes that do not meet the requirements of section
4 three of this article, if the cigarettes are or will be stamped
5 for sale in another state or are packaged for sale outside
6 the United States and that person or entity has taken
7 reasonable steps to ensure that the cigarettes will not be
8 sold or offered for sale to persons located in this state.

§47-25-11. Preemption.

1 This article shall have no force and effect if a federal
2 law or regulation establishing a national reduced cigarette
3 ignition propensity standard is adopted and becomes
4 effective.

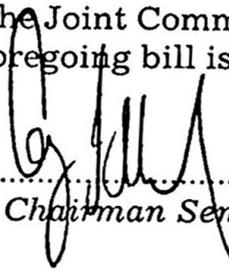
§47-25-12. Local regulation.

1 Notwithstanding any other provision of law, the local
2 governmental units of this state may neither enact nor
3 enforce any ordinance or other local law or regulation
4 relating to cigarette fire safety standards conflicting with
5 any provision of this article.

§47-25-13. Effective date.

1 Except as otherwise specifically provided in this
2 section, the provisions of this article take effect on Janu-
3 ary 1, 2010. The provisions of section twelve of this article
4 take effect on the effective date of this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

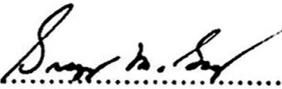

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Chairman Senate Committee


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Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


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President of the Senate


.....
Speaker House of Delegates

The within *is appended* this the *30*
Day of *March*, 2009.


.....
Governor

PRESENTED TO THE
GOVERNOR

MAY 7 2009

Time 11:20am