

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill creates substantial new duties and rule-making authority for the division and the DOR.

Ensure lower taxes: The bill creates new fees for cigarette manufacturers and penalties for violations.

B. EFFECT OF PROPOSED CHANGES:

Current situation

Smoking-related fires

Fires caused by smoking often occur when a smoker drops or improperly disposes of a lit cigarette.¹ 'Cigarette ignition propensity' refers to the likelihood a cigarette will ignite a fire.

Some victims of smoking-related fires have sued tobacco companies, relying on arguments based on strict liability, negligent design and unreasonable or unexpected danger beyond what would be contemplated by an ordinary consumer.² Tobacco companies generally defend these lawsuits, arguing consumers accept responsibility for smoking-related fires when they decide to smoke; smokers are negligent when they leave burning cigarettes unattended; and that the lawsuits lack proof of causation.³

In 1990, the Federal Fire Safe Cigarette Act directed the National Institute of Standards and Technology (NIST) to develop a standard method to determine cigarette ignition propensity. Of the two tests developed, the cigarette extinction method has become standard. A lighted cigarette is laid on layers of filter paper to determine whether the cigarette generates enough heat to continue to burn.

Cigarette regulation in Florida

The division within the DBPR is responsible for enforcing chapter 210, F.S., relating to taxes on tobacco, and seizing cigarettes for which no tax has been paid.

The division and DBPR, along with the Department of Health, are involved in the enforcement of the Florida Clean Indoor Air Act. The State Fire Marshal consults with the DBPR and the Department of Health on rulemaking for the Florida Clean Indoor Air Act.

The Department of Health is also involved in prevention measures under the Comprehensive Statewide Tobacco Education and Use Prevention Program.

Reduced cigarette ignition propensity legislation

Florida does not have a law governing the ignition propensity of cigarettes. Section 590.10, F.S., makes discarding a lighted cigarette that may or does cause a wildfire a first-degree misdemeanor.

The state of New York passed the first reduced cigarette ignition propensity law in 2000; it became effective in 2004. The law requires cigarettes sold in the state to meet certain requirements based on the cigarette extinction method of testing. Cigarettes that meet these requirements are commonly referred to as fire-safe cigarettes (FSC) or reduced ignition propensity (RIP) cigarettes.

Since 2004, 22 states, along with Canada, have adopted laws similar to New York's Fire Safety Standards for Cigarettes. Some major cigarette companies are voluntarily converting their cigarette

¹ Legal Consortium, Tobacco Control, "Regulating Cigarettes for Fire Safety" (August 2007). William Mitchell Legal Studies Research Paper No. 79 Available at SSRN: <http://ssrn.com/abstract=1004132>.

² Id.

³ Id.

brands to meet the RIP standard.⁴ They have also advocated for federal legislation that would preempt state laws to create one consistent standard.⁵

Effect of proposed changes

The bill creates the Reduced Cigarette Ignition Propensity Standard and Firefighter Protection Act, requiring cigarettes sold in the state to be certified as meeting certain minimum performance standards. The bill creates a new section in chapter 633, F.S. This chapter relates to the State Fire Marshal and fire prevention and control.

Applicability

The bill includes definitions of “cigarette,” “manufacturer,” “quality control and quality assurance program,” “repeatability,” “retail dealer,” “sale,” “sell,” and “wholesale dealer.”

Cigarette vending machines are considered wholesale dealers by the bill, but are considered retail dealers by s. 569.003, F.S., relating to tobacco products generally, and 210.01, F.S. Cigarettes are defined to exclude those rolled in leaf tobacco, i.e. cigars. See comments below relating to the definition of cigarette.

Implementation

The division is charged with most of the implementation of the provisions of the bill, although the DOR is also given inspection duties.

Test Standard

The bill requires cigarettes be tested using the American Society for Testing and Materials (ASTM) standard E2187-04, which is the cigarette extinction method, discussed above. The bill specifies:

- Test must be conducted by lab accredited by the International Organization for Standardization;
 - The division may adopt a comparable accreditation standard.
- 10 layers of filter paper are to be used;
- Test is to be replicated 40 times;
- Repeatability no greater than 0.19.
 - Repeatability is the range of values that the results of repeated tests will fall 95% of the time.

If the division tests or sponsors testing to determine a cigarette’s compliance with the standard, the tests must meet the approved test standard.

Manufacturers must keep copies of the test reports for every cigarette offered for sale in the state for 3 years and must make copies available to the division and the Attorney General within 60 days of written request. This is enforceable by a civil penalty of up to \$10,000 for each day after the 60th day.

Performance Standard

The bill requires that the cigarette may not exhibit a full-length burn more than 25% of the time; i.e., it must burn out 75% of the time when not in active use.

Once the cigarettes are tested, they do not have to be retested. So, for example, if a cigarette has passed a similar test in another state, it would not have to be retested for Florida.

Lowered permeability bands

Many manufacturers accomplish reduced ignition propensity through the use of special bands within the paper that act as speed bumps to the burn. If a cigarette uses such bands, the bill requires that:

- At least two identical bands be used: one at least 15 millimeters from the lighting end.
- For bands positioned by design, the two bands must be at least 15 millimeters from the lighting end and 10 millimeters from the filter end or labeled end if there is no filter.

Certification

⁴ R.J. Reynolds Tobacco Company. *Position on Fire-Safe Cigarettes*. Retrieved from <http://www.rjrt.com/legal/stateFireSafety.asp> on March 16, 2008.

⁵ Philip Morris USA. *Reduced Cigarette Ignition Propensity*. Retrieved from http://www.philipmorrisusa.com/en/legislation_regulation/reduced_ignition_propensity.asp on March 16, 2008.

The bill requires manufacturers to submit a list of cigarettes that are certified by the manufacturer as meeting the performance standard to the division. This certification must include:

- Descriptions of each cigarette, with the brand, style, length, circumference, flavor, filter, package description, markings (discussed below), and the contact information of the testing laboratory, if different from that of the manufacturer.

The certification must be made available to the Attorney General and to the DOR, but it is unclear whether the division or the manufacturer would have this duty.

Manufacturers must provide copies of the certification and illustrations of the marking to wholesale dealers and agents to be distributed to retail dealers. Each party is required to allow the division, the DOR and the Attorney General to inspect the records.

If a manufacturer changes a certified cigarette in a way that will likely alter its performance, the cigarette must be recertified.

All cigarettes must be recertified every 3 years.

Marking

A manufacturer must place one consistent marking on all certified cigarettes. This marking must be approved by the division, which must approve any marking that:

1. Has been approved for sale under New York law, or
2. Is the letters, FSC, in 8-point type.

If the division does not act within 10 business days, the marking is automatically considered approved. Approved markings cannot be changed without division approval.

Fees

Manufacturers must pay the division \$250 per cigarette listed in the certification. The division may adjust this fee, as needed, to defray the costs of processing, testing, enforcement and oversight.

These fees are deposited into the Reduced Cigarette Ignition Propensity Standard and Firefighter Protection Act Enforcement Fund, a trust fund created by tied bill HB 1171, to support processing, testing, enforcement and oversight activities required by this bill.

Penalties

Wholesale sale of uncertified cigarettes: civil penalty of \$100 per pack of cigarettes, up to \$100,000 during a 30-day period.

Retailer sale of known uncertified cigarettes: civil penalty of \$100 per pack of cigarettes, up to \$25,000 during a 30-day period.

Knowingly making false certification: civil penalty of at least \$75,000 and not more than \$250,000 per false certification.

Any other violation: civil penalty up to \$1,000 for first offense; up to \$5,000 for subsequent offenses.

The Attorney General may file an action for violation of the provisions of the bill, including petitioning for injunctive relief, to recover costs or damages to the state, including enforcement costs of the violation and attorney's fees.

These penalties are deposited into the Reduced Cigarette Ignition Propensity Standard and Firefighter Protection Act Fund, a trust fund created by tied bill HB 1169, to support fire safety and fire prevention programs.

Forfeiture

Uncertified cigarettes are subject to forfeiture and must be destroyed.

- Before destruction, the holder of the trademark rights to the cigarette brand must be allowed to inspect the cigarettes. The bill does not reference how much time the trademark holder is to be given to inspect or what inspection would entail.

Law enforcement officers or division representatives who discover unmarked cigarettes may seize them, and are required to turn them over to the DOR for destruction. If the DOR discovers unmarked cigarettes, it must notify the division and the Attorney General.

Exceptions

The bill does not apply to:

- Current inventory of cigarettes as of the effective date of the bill;
- Cigarettes provided for consumer testing, so long as the testing is done in a controlled setting where the cigarettes are consumed onsite or returned at the conclusion of the testing; and
- Cigarettes intended for sale outside of the state, so long as reasonable steps are taken to ensure that such cigarettes will not be sold or offered for sale in the state.

Reporting requirement

The bill requires the division to review the law's effectiveness and report findings and recommendations to the Speaker of the House and the President of the Senate every 3 years by June 13.

Implementation

The division is given rule-making authority to implement the law.

The DOR is responsible for:

- Conducting inspections of wholesale dealers, agents and retail dealers to determine whether cigarettes are marked correctly.
 - The bill specifies this is to be done during its usual course of business pursuant to chapter 210, F.S. Currently, the division is the agency charged with conducting chapter 210 inspections.

The division, DOR and the Attorney General may examine any cigarette stored or for sale at a premises and the records of any person in possession or occupancy of the premises.

Preemption

The provisions of the bill will be automatically repealed if a federal standard that preempts state law is adopted and becomes effective.

On the effective date, no other laws or rules, whether state or local, may be enacted or enforced if they conflict with, or are preempted by, the bill.

Requirement to implement in accordance with New York law

The bill includes a requirement that the ignition propensity standards be implemented in accordance with the implementation and substance of the New York Fire Safety Standards for Cigarettes.

C. SECTION DIRECTORY:

Section 1. Creates s. 633.042, the Reduced Cigarette Ignition Propensity Standard and Firefighter Protection Act.

Section 2. Provides preemption clause effective upon the bill becoming law.

Section 3. Provides effective date: January 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The department anticipates collecting approximately \$556,500 in tri-annual certification fees in FY 2009-10.

REVENUE			
	<u>FY 2008-09</u>	<u>FY 2009-10</u>	<u>FY 2010-11</u>
License Fees:	0	0	0

Taxes:	0	0	0
Other (identify): Tri-annual Certification Fees 1/1/2010 (250 x 2,226 cigarettes)	0	556,500	0
TOTAL:	0	556,500	0

2. Expenditures:

The department anticipates a need for 33 FTE positions and approximately \$1.5 million in FY 2009-10, of which \$884,803 will be recurring, and \$2.5 million in FY 2010-11, of which approximately \$1.8 million will be recurring.

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Recurring Budget	FY 2008-09	FY 2009-10	FY 2010-11
Salaries/Benefits # of FTE's 33 beginning 1/1/2010	0	767,686	1,535,371
Salary Rate 1,137,312			
Other Personal Services	0	0	0
Expenses	0	110,550	221,100
Contract Services	0	0	0
Transfer to DMS – HR Services	0	6,567	13,134
Subtotal	0	884,803	1,769,605

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Non-Recurring Budget	FY 2008-09	FY 2009-10	FY 2010-11
Other Personal Services	0	0	0
Expense	0	111,804	0
Operating Capital Outlay	0	33,000	0
Acquisition of Motor Vehicles	0	465,000	
Contracted Services – Lab Work for Tri-annual certification	0	Indeterminate	0
Subtotal	0	609,804	0

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Cigarette manufacturers will have to pay a certification fee of \$250 every three years.

D. FISCAL COMMENTS:

Revenues will be generated every third year per the tri-annual certification requirement; however, the deposition of the fees is not clearly addressed. The department assumes the fees will be deposited into the Alcoholic Beverages and Tobacco Trust Fund. The department anticipates a need for 33 FTE positions and approximately \$1.5 million in FY 2009-10. The estimated need for resources will increase to \$2.5 million in FY 2010-11. These estimates include the acquisition and operation of 31 vehicles.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

The bill includes a requirement that the ignition propensity standards be implemented in accordance with the implementation and substance of the New York Fire Safety Standards for Cigarettes.

While the legislature is free to adopt laws passed by other governing bodies, constitutional questions may arise if the legislature attempts to adopt prospective changes in a law. See s. 1, Art. III, Fla. Const. For federal laws specifically, the Florida Supreme Court has ruled that:

[I]t is within the province of the legislature to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body, that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future.⁶

B. RULE-MAKING AUTHORITY:

The bill gives authority to the division to adopt rules in order to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Cigarette is defined in the bill as a single cigarette, but it is used throughout the bill in a way implying it was intended to mean a product line of cigarettes.

The DBPR points out:

1. The DOR does not [currently] conduct inspections under chapter 210, F.S., the division has this authority. The DBPR states: the DOR cannot inspect cigarettes in the regular course of conducting inspections under that chapter.
2. The bill classifies vending machine operators as wholesale dealers, while current law classifies them as retail dealers.

The DBPR also states:

The duties placed on the [division] for testing and certifying that all cigarettes sold or offered for sale in this state meet the performance standard specified in the bill are quite beyond the current functions of the division. The knowledge, skills, and ability and the lab equipment necessary for such testing do not exist in the division, and the placement of the testing and certification might be better suited with the State Fire Marshal's office.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

⁶ Florida Indus. Com'n v. State ex rel. Orange State Oil Co. 155 Fla. 772, 780 (1945).