

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 2640

INTRODUCER: Regulated Industries Committee and Senator Constantine

SUBJECT: Reduced Cigarette Ignition/Firefighter Protection

DATE: April 20, 2008                      REVISED: 04/21/08 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Sumner</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/2 amendments</u>
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/>            | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input checked="" type="checkbox"/> | Significant amendments were recommended |

**I. Summary:**

Fire-safe cigarettes, also known as reduced ignition propensity cigarettes, are designed to stop burning when left unattended. The bill creates the “Reduced Cigarette Ignition Propensity and Firefighter Protection Act.” It provides a standard for testing cigarette ignition propensity and prohibits cigarettes from being sold in Florida unless the cigarettes are tested, certified, and marked as required and meet the performance standards prescribed by the bill.

The bill provides civil penalties for violations of the requirements and preempts political subdivisions from adopting their own standards. It provides a civil penalty of \$100 per pack of cigarettes, not to exceed \$100,000 during a 30-day period, for a wholesale sale of uncertified cigarettes. It provides a civil penalty of \$100 per pack of cigarettes, not to exceed \$25,000 during a 30-day period, for the retail sale of known uncertified cigarettes. It provides a civil penalty of at least \$75,000 and not more than \$250,000 per false certification, for knowingly making a false certification. Any other violation would result in a civil penalty not to exceed \$1,000 for a first offense and may not exceed \$5,000 for subsequent offenses.

The bill provides for its repeal if a federal reduced cigarette ignition propensity standard that preempts state law is adopted and becomes effective. It also preempts any municipal or county ordinance on the subject.

The bill provides an effective date of January 1, 2010, if SB 2584 and SB 2586, which create the Reduced Cigarette Ignition Propensity and Firefighter Protection Enforcement Trust Fund and the Fire Prevention and Public Safety Trust Fund, or similar legislation, are adopted in the same legislative session or an extension thereof and become law.

This bill creates section 633.042, Florida Statutes. This bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### Smoking-related fires

Fires caused by smoking often occur when a smoker drops or improperly disposes of a lit cigarette.<sup>1</sup> Cigarette-ignited fires are the leading cause of residential fire deaths in the United States with 700 to 900 deaths per year. Approximately a quarter of those deaths are not the smoker. Many of the deaths are of children and the elderly. "Fire-safe" cigarettes are designed to self-extinguish if dropped or left unattended and are less likely to ignite clothing, bedding, or other material.<sup>2</sup> Cigarette ignition propensity' refers to the likelihood that a cigarette would 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.<sup>3</sup> Tobacco companies generally defend these lawsuits, arguing that consumers accept responsibility for smoking-related fires when they decide to smoke; that smokers are negligent when they leave burning cigarettes unattended; and that the lawsuits lack proof of causation.<sup>4</sup>

In 1990, the U.S. Congress enacted the Fire Safe Cigarette Act of 1990,<sup>5</sup> which directed the National Institute of Standards and Technology (NIST) to develop a standard method to determine cigarette ignition propensity. Twenty-two states have enacted cigarette ignition propensity standards.<sup>6</sup>

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.

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<sup>1</sup> 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>.

<sup>2</sup> See News Release from the National Fire Protection Association, available at <http://www.nfpa.org/newsReleaseDetails.asp?categoryID=488&itemID=36577&rss=NFPAnewsreleases&rss=Coalition> (Last visited March 28, 2008).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Fire Safe Cigarette Act of 1990, Pub. L. No. 101-352, 104 Stat. 405 (1990).

<sup>6</sup> Based on information from the Coalition for Fire-Safe Cigarettes, [www.firesafecigarettes.org](http://www.firesafecigarettes.org) (last visited March 28, 2008).

The State of New York passed the first reduced cigarette ignition propensity law in 2000; it became effective in 2004.<sup>7</sup> The New York law requires cigarettes sold in the state to meet specified requirements based on what is known as 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. Some major cigarette companies are voluntarily converting their cigarette brands to meet the RIP standard.<sup>8</sup> They have also advocated for federal legislation that would preempt state laws to create one consistent standard.<sup>9</sup>

### **Cigarette Regulation in Florida**

The Division of Alcoholic Beverages and Tobacco (division) within the Department of Business and Professional Regulation (department) oversees the collection of excise taxes from the sale of cigarettes and other tobacco products. Part I, ch. 210, F.S., consisting of ss. 210.01-210.22, F.S., provides for the taxation of cigarettes. Part II, ch. 210, F.S., consisting of ss. 210.25-210.75, F.S., provides for the taxation of tobacco products other than cigarettes and cigars.

The sale and delivery of tobacco is governed by the division under the provisions of ch. 569, F.S. The division and the department, along with the Department of Health, are involved in the enforcement of the Florida Clean Indoor Air Act.<sup>10</sup> The division consults with the DBPR and the Department of Health on rulemaking for the Florida Clean Indoor Air Act.<sup>11</sup> The Department of Health is also involved in prevention measures under the Comprehensive Statewide Tobacco Education and Use Prevention Program.

### **State Fire Marshal**

The State Fire Marshal implements the provisions of ch. 633, F.S., relating to fire prevention and control, including the Florida Fire Prevention Code in s. 633.0215, F.S.

## **III. Effect of Proposed Changes:**

The bill creates s. 633.042, F.S., to require that cigarettes sold or offered for sale in the state must be certified as meeting minimum performance standards for reduced cigarette ignition.

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<sup>7</sup> N.Y. Fire Safety Standards for Cigarettes, Exec. Law, s. 156-c (2008); and N.Y. Comp. Codes R. & Regs. tit. 19, s. 429 (2008).

<sup>8</sup> R.J. Reynolds Tobacco Company. *Position on Fire-Safe Cigarettes*. Retrieved from <http://www.rjrt.com/legal/stateFireSafety.asp> (last visited on March 28, 2008).

<sup>9</sup> Philip Morris USA. *Reduced Cigarette Ignition Propensity*. Retrieved from [http://www.philipmorrisusa.com/en/legislation\\_regulation/reduced\\_ignition\\_propensity.asp](http://www.philipmorrisusa.com/en/legislation_regulation/reduced_ignition_propensity.asp) (last visited on March 16, 2008).

<sup>10</sup> Part II, ch. 386, F.S.

<sup>11</sup> See s. 386.207, F.S.

**Short Title**

Section 633.042(1), F.S., provides that this section may be cited as the “Reduced Cigarette Ignition Propensity Standard and Firefighter Protection Act.”

**Legislative Findings and Intent**

Section 633.042(2), F.S., provides a statement of legislative findings and intent. The bill states that cigarettes are the leading cause of fire deaths in this state and the nation. It provides that each year between 700 and 900 persons are killed and around 3,000 persons are injured in fires ignited by cigarettes. The bill provides that, in 2004, the State of New York implemented a cigarette firesafety regulation requiring cigarettes sold in that state to meet a firesafety performance standard, and other states have directly incorporated New York's regulation into statute. It provides that New York State's cigarette firesafety standard is based upon decades of research by the National Institute of Standards and Technology, Congressional research groups, and private industry, and this cigarette firesafety standard minimizes costs to the state; minimally burdens cigarette manufacturers, distributors, and retail sellers; and, therefore, should become the law in this state.

**Definitions**

Section 633.042(3), F.S., provides definitions for terms used in the bill. Some of the provided definitions are defined elsewhere in the Florida Statutes, including ch. 210, F.S. The bill defines the following terms: “agent,” “cigarette,”<sup>12</sup> “division,” “manufacturer,” “quality control and quality assurance program,” “repeatability,” “retail dealer,” “sale,” “sell,” and “wholesale dealer.”

The bill defines the term “division” to mean the Division of Alcoholic Beverages and Tobacco within the Department of Business and Professional Regulation.

The bill defines the term “quality control and quality assurance program” to 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. According to the bill, this program ensures that the testing repeatability remains within the required repeatability values provided in the bill for all test trials used to certify cigarettes.

The bill defines the term “repeatability” to 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.

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 s. 210.01, F.S. Cigarettes are defined to exclude those rolled in leaf tobacco, i.e. cigars.

The bill defines the term “wholesale dealer” to include any person “who owns, operates, or maintains one or more cigarette or tobacco product vending machines in, at, or upon premises

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<sup>12</sup> The term “cigarette” is also defined in s. 210.01(1), F.S., relating to the cigarette tax.

owned or occupied by any other person.” This is a broader definition than provided in ch. 569, F.S., which classifies cigarette vending machines as retail dealers.<sup>13</sup>

### **Test Method and Performance Standard**

Section 633.042(4)(a), F.S., prohibits the sale of cigarettes in this state unless they have been tested according to the performance standards established by this bill, a written certification has been filed by the manufacturer with the division, and the cigarettes have been marked as required by the bill.

Section 633.042(4)(a), F.S., prescribes the test method for cigarettes. It requires cigarettes be tested using the American Society for Testing and Materials (ASTM) standard E2187-04,<sup>14</sup> which is the cigarette extinction method, discussed above. The bill specifies:

- Ten layers of filter paper must be used;
- No more than 25 percent of the cigarettes tested can exhibit full-length burns;
- A complete test trial consists of 40 replicate tests for each cigarette tested;
- The performance standard provided in the bill must be applied to a complete test trial;
- The written certification must be conducted by lab accredited by the International Organization for Standardization pursuant to standard ISO/IEC 17025, or other comparable accreditation standard required by the division; and
- The laboratories that conduct the testing must implement a quality control and quality assurance program with a repeatability of no greater than 0.19.

The bill does not require additional testing if the cigarettes are tested consistent with the standards provided in the bill. In its discretion, the division may perform or sponsor testing to determine a cigarette’s compliance with the standard.

According to a representative for a cigarette manufacturer, many manufacturers accomplish reduced ignition propensity through the use of special bands within the paper that act as speed bumps to the burn. These bands are known as “permeability bands.” Section 633.042(4)(b), F.S., requires that, if a cigarette uses such bands:

- At least two nominally identical bands must be used, with 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.

Section 633.042(4)(c), F.S., provides for cigarettes that the division determines cannot be tested pursuant to the test method prescribed in s. 633.042(4)(a), F.S. It permits the manufacturer to use a testing method that has been approved in another state that the division has determined includes an alternative test method and performance standard that are the same as that provided

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<sup>13</sup> Section 569.003, F.S.

<sup>14</sup> A description of the American Society for Testing and Materials (ASTM) standard E2187-04 is available at: [http://www.astm.org/cgi-bin/SoftCart.exe/STORE/filtrexx40.cgi?U+googleorgstore+ioha9702+-L+E2187:04+/usr6/htdocs/astm.org/DATABASE.CART/REDLINE\\_PAGES/E2187.htm](http://www.astm.org/cgi-bin/SoftCart.exe/STORE/filtrexx40.cgi?U+googleorgstore+ioha9702+-L+E2187:04+/usr6/htdocs/astm.org/DATABASE.CART/REDLINE_PAGES/E2187.htm) (last visited April 18, 2008).

in s. 633.042(4)(a), F.S. The bill provides the standards that the division must follow to determine whether an alternative testing method may be used. The standard includes a determination by the division that the officials in the other state who are responsible for implementing the other state's cigarette ignition propensity standards requirements have approved the proposed alternative test method and performance standard for the cigarette.

Section 633.042(4)(d), F.S., requires that manufacturers keep copies of the test reports for every cigarette offered for sale in the state for three years and must make copies available to the division and the Attorney General within 60 days of a written request. This is enforceable by a civil penalty of up to \$10,000 for each day after the 60<sup>th</sup> day.

Section 633.042(4)(e), F.S., provides that the division may adopt a subsequent ASTM standard test method for measuring the ignition strength of cigarettes. To adopt a subsequent standard, the division must make a finding that the subsequent method does not result in a change in the percentage of full-length burns from what results when a cigarette is tested with the ASTM Standard E2187-04 and the performance standard in s. 633.042(2)(a), F.S.

Section 633.042(4)(f), F.S., requires that the division review the effectiveness of s. 633.042, F.S., and report its findings every three years to the President of the Senate and the Speaker of the House of Representatives. If appropriate, the division must provide recommendations to improve its effectiveness. The report and legislative recommendations must be submitted by June 13 of each three-year period.

Section 633.042(4)(g), F.S., specifies the following actions that are not prohibited by this bill:

- Dealers can sell their current inventory of cigarettes as of the effective date of the bill; and
- Cigarettes may be sold for consumer testing that uses only the quantity of cigarettes that is reasonably necessary for such assessment.

Section 633.042(4)(h), F.S., provides that it is the intent of the Legislature to promote uniformity among the states in the regulation of cigarettes per this section. It provides that the resolution of issues regarding the interpretation or implementation of this section must be made in a manner consistent with the New York Fire Safety Standards for Cigarettes, New York Executive Law, Section 156-c, as amended and Part 429 of Title 19 New York Codes, Rules, and Regulations, as amended, that are in effect on March 1, 2008.

### **Certification and Product Change**

Section 633.042(5)(a), F.S., requires that each manufacturer submit to the division a written certification attesting that each cigarette listed in the certification has been tested in accordance with the methods specified in s. 633.042(2), F.S., and that the listed cigarettes meet the performance standard set forth s. 633.042(2)(a)3., F.S., which requires that no more than 25 percent of the cigarettes tested can exhibit full-length burns.

Section 633.042(5)(b), F.S., specifies how each cigarette listed on the certification must be described.

Section 633.042(5)(c), F.S., requires that the certifications must be made available to the Attorney General for purposes consistent with the provisions in s. 633.042, F.S., and to the Department of Revenue for the purpose of ensuring compliance. This provision is unclear because s. 633.042(3)(a), F.S., requires that the manufacturer submit written certifications to the division. Therefore, it is not clear whether s. 633.042(3)(c), F.S., requires that the division or the manufacturer make the certifications available to the Attorney General and the division.

Section 633.042(5)(d), F.S., requires that all certified cigarettes must be recertified every three years.

Section 633.042(5)(e), F.S., provides that manufacturers must pay the division a fee of \$250 for each brand family listed in the certification. The fee is applicable to all cigarettes within the brand family certified, including any new cigarette certified within the brand family during the three-year certification period. The bill does not define the term “brand family.” A representative for a cigarette manufacturer has represented that the term is commonly understood in the industry, but the representative did furnish a definition.

The bill requires that the fees must be deposited into the Reduced Cigarette Ignition Propensity and Firefighter Protection Enforcement Trust Fund. Senate bill 2584 proposes the creation of this trust fund.

Section 633.042(5)(f), F.S., requires that a manufacturer recertify any cigarettes that the manufacturer changes in a way that will likely alter its compliance with the reduced cigarette ignition propensity standards established by this bill.

### **Marking of Cigarette Packaging**

Section 633.042(6), F.S., requires manufacturers to mark certified cigarettes to indicate compliance with the testing and certification requirement. Manufacturers must place one consistent marking on all certified cigarettes. This marking must be approved by the division. The bill specifies the size and location of the mark:

1. Eight-point type; and
2. Modification of the Universal Product Code (UPC) bar code to include the visible mark in the area of the UPC bar code.

The manufacturer may only use one package marking and it must be used uniformly to all brands and all packages, including but not limited to, packs, cartons, cases, and brands marketed by that manufacturer.

Section 633.042(6)(c), F.S., requires that the division must be notified of the marking selected by the manufacturer. Section 633.042(6)(d), F.S., requires that the division must approve the package marking before the cigarette is certified. The bill requires that the division approve:

- Any marking that is in use and approved for sale in the State of New York pursuant to the New York Fire Safety Standards for Cigarettes; and

- Any marking that with the letters “FSC,” which signifies “Fire Standard Compliant.”

It provides that, if the division does not act on a manufacturer’s proposed marking within 10 business days, the package marking is automatically considered approved. Approved markings cannot be changed without division approval.

Section 633.042(6)(e), F.S., requires that the manufacturer provide a copy of each approved package marking to the wholesale dealer, and each wholesale dealer must provide a copy of the package marking to each retail dealer. The bill requires that all wholesale dealers, agents, and retail dealers must allow the division, the division, the Attorney General, and each agency's respective employees to inspect the markings of cigarette packaging marked.

### **Penalties**

Section 633.042(7), F.S., provides the following penalties for violations of the testing and certification requirements in this bill.

- The wholesale sale of known uncertified cigarettes would result in a civil penalty of \$100 per pack of cigarettes, not to exceed \$100,000 during a 30-day period.
- The retail sale of known uncertified cigarettes would result in a civil penalty of \$100 per pack of cigarettes, not to exceed \$25,000 during a 30-day period.
- Knowingly making a false certification would result in a civil penalty of at least \$75,000 and not more than \$250,000 per false certification.
- Any other violation would result in a civil penalty not to exceed \$1,000 for a first offense and may not exceed \$5,000 for subsequent offenses.

Section 633.042(7)(e), F.S., provides that uncertified cigarettes are subject to forfeiture following a hearing under ch. 120, F.S.,<sup>15</sup> at which the true holder of the trademark rights in the cigarettes brand may appear and present evidence. It is not clear how the division would determine the identity of the true holder of the trademark for seized cigarettes.

The procedural requirements of this provision under the Administrative Procedures Act (APA) are unclear. The hearing provisions of ch. 120, F.S., apply to persons whose substantial interests are affected by agency action.<sup>16</sup> It is not clear whether the bill, by permitting the trade mark holder to present evidence, intends to make the trademark holder a “substantially interested party” within the meaning of ch. 120, F.S., or whether the trademark holder must be permitted to appear as a witness on behalf of the owner of the cigarettes. If this provision is limited to requiring that the trademark holder must be permitted to appear as witness at a hearing, ch. 120, F.S., does not specify pre-hearing notice requirements for witnesses to an underlying agency action. Therefore, it is not clear whether the bill would require the agency to afford the trademark holder with a 14-day notice of hearing, as required by s. 120.569(2)(b), F.S., and whether the trademark holder would have standing as a party in the proceeding to, for example, participate in a pre-hearing conference, request a continuance of the hearing, or subpoena witnesses.<sup>17</sup> If the

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<sup>15</sup> Section 210.12, F.S., provides for the seizure and forfeiture of cigarette for which the tax has not been paid.

<sup>16</sup> See s. 120.569, F.S.

<sup>17</sup> See rules 28-106.209, 28-106.210, 28-106.212, F.A.C.



trademark holder is not a “substantially interested” party under ch. 120, F.S., it is also not clear what procedure applies if the person who owns the cigarettes does not request a hearing under ch. 120, F.S., as required by s. 120.569(2)(a), F.S. If the party does not request a hearing under s. 120.569(2)(a), F.S., agency could proceed with its proposed agency action and forfeit the cigarettes.<sup>18</sup>

Section 633.042(7)(e), F.S., also provides that forfeited cigarettes 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 provide the trademark holder with a right to inspect the cigarettes before the forfeiture proceeding. It is not clear whether the right to inspect the cigarettes is limited to after the proceeding but before the destruction of the cigarettes. The bill does not specify how much notice of the agency’s intent to destroy the cigarettes must be given to the trademark holder before their destruction.

Section 633.042(7)(f), F.S., provides that 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.

Section 633.042(7)(g), F.S., provides that law enforcement officers or division representatives who discover unmarked cigarettes may seize them, and are required to turn them over to the division for destruction. The seized cigarettes must be turned over to the Department of Revenue (DOR) and shall be forfeited. This section also requires that, before destruction, the holder of the trademark rights to the cigarette brand must be allowed to inspect the cigarettes. It also does not reference how much notice the trademark holder is to be given before the destruction, or what inspection would entail. This provision also conflicts with the forfeiture hearing provision in s. 633.042(6)(f), F.S., and whether the ch. 120, F.S., procedures in that paragraph apply before or after the cigarettes are turned over to the DOR.

Section 633.042(7)(h), F.S., provides that penalties collected are to be deposited into the Fire Prevention and Public Safety Trust Fund within the Department of Financial Services, a trust fund proposed for creation by SB 2586.

### **Implementation**

Section 633.042(8)(a), F.S., authorizes the division to adopt rules pursuant to ss. 120.536(1) and 120.54 to administer this section. Section 633.042(6)(b), F.S., provides that the division, in the regular course of conducting inspections of wholesale dealers, agents, and retail dealers, may inspect cigarettes to determine if the cigarettes have the required package marking. The division is required to notify the division if the cigarettes are not marked as required.

### **Inspection**

Section 633.042(9), F.S., authorizes the Attorney General, the DOR, and the division, their duly authorized representatives, and other law enforcement personnel to examine the books, papers,

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<sup>18</sup> Section 120.69, F.S., provides that an agency action may be enforced through a petition for enforcement filed in the circuit court. The petition may include forfeiture as a remedy.

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, as well as the stock of cigarettes on the premises. The person in possession, control, or occupancy of any premises where cigarettes are placed, sold, or offered for sale must give these agencies and their authorized the means, facilities, and opportunity for the examinations.

### **Sale Outside the State**

Section 633.042(10), F.S., provides that cigarettes intended for sale outside of the state are exempt from the testing requirement if reasonable steps are taken to ensure that such cigarettes will not be sold or offered for sale in Florida.

### **Preemption**

Section 633.042(11), F.S., provides that this section shall be repealed if a federal reduced cigarette ignition propensity standard that preempts state law is adopted and becomes effective. It also preempts any municipal or county ordinance on the subject.

Section 2 of the bill preempts local government ordinances or regulations conflicting with, or preempted by, the provisions in this act or any policy of this state expressed by this act.

### **Effective Date**

The bill provides an effective date of July 1, 2008, if SB 2584 and SB 2586 (which create the Reduced Cigarette Ignition Propensity and Firefighter Protection Enforcement Trust Fund and the Fire Prevention and Public Safety Trust Fund) or similar measures, are adopted in the same legislative session or an extension thereof and become law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. Other Constitutional Issues:**

Sections 633.042(4) and (5), F.S., may constitute an unconstitutional delegation of legislative authority. An invalid delegation of authority violates the principal of

separation of powers in Art. II, s. 3, Florida Constitution.<sup>19</sup> When assigning to an agency a regulatory responsibility, the legislature must provide the agency with adequate standards and guidelines when delegating the duties.<sup>20</sup> The executive branch must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed.<sup>21</sup>

The bill has set the standard the Legislature is going to adopt, the American Society for Testing and Materials, as the authority to set the appropriate minimum standards for the certification and testing of cigarettes. Section 633.042(4)(h), F.S., also provides the statement of Legislative intent regarding the interpretation or implementation of this section must be resolved in a manner consistent with the New York Fire Safety Standards for Cigarettes, New York Executive Law, Section 156-c, as amended and Part 429 of Title 19 New York Codes, Rules, and Regulations, as amended, that are in effect on March 1, 2008. Section 633.042(6)(d), F.S., requires that the division approve any marking that is in use and approved for sale in the State of New York pursuant to the New York Fire Safety Standards for Cigarettes.

Legislation can adopt provisions of legislation or administrative rules from jurisdictions outside of Florida such as federal and state laws and rules that exist at the time the Legislation is enacted. These laws and rules may not be adopted to incorporate subsequent changes in the legislation and rules from outside this state.<sup>22</sup> Legislation may also adopt codes or standards from non-governmental entities but the legislative adoption must be limited to the codes and standards that were in effect at the time the law was enacted. It cannot adopt subsequent changes to the codes and standards made by the non-governmental entities after the Florida legislation is enacted.<sup>23</sup>

Section 633.042(11), F.S., requires the repeal of this section if a federal reduced cigarette ignition propensity standard that preempts state law is adopted and becomes effective. This provision may violate the principal that a present Legislature cannot bind future Legislatures. The Legislature has an absolute right to repeal or modify any statute, as long as its actions do not transgress constitutional requirements. Therefore, the power of a future legislature cannot be limited by the acts of a present or prior legislature.<sup>24</sup>

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

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<sup>19</sup> *Gallagher v. Motors Insurance Corp.*, 605 So.2d 62 (Fla. 1992).

<sup>20</sup> *Florida East Coast Industries, Inc. v. Dept. of Community Affairs*, 677 So.2d 357 (Fla. 1st DCA 1996).

<sup>21</sup> *Florida Home Builders Association v. Division of Labor*, 367 So. 219 (Fla. 1979).

<sup>22</sup> *Adoue v. State*, 408 So. 2d 567, 569 (Fla. 1982); *Friemuth v. State*, 272 So. 2d 473, 476 (Fla. 1976).

<sup>23</sup> *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 167 (Fla. 5<sup>th</sup> DCA 2003); *State, Dept. of Children and Family Services v. L.G.*, 801 So. 2d 1047, 1052 (Fla. 1<sup>st</sup> DCA 2001).

<sup>24</sup> *See Nue v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1985); *Internal Improvement Fund v. St. Johns River Co.*, 16 Fla. 531 (Fla. 1878); *Gonzales v. Sullivan*, 16 Fla. 791 (Fla. 1878).

**B. Private Sector Impact:**

Cigarette manufacturers whose cigarettes are sold or offered for sale in Florida would incur the indeterminate cost of testing and certifying those cigarettes.

**C. Government Sector Impact:**

The division and the Department of Revenue would incur indeterminate costs related to the administration of the requirements in this bill, including costs related to reviewing and approving the manufacturers testing standards, reviewing and approving package markings, and rulemaking. The Department of Business and Professional Regulation's analysis provides that the division would need 33 FTE's by January 2010 to address the inspections needs of the bill.<sup>25</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill provides that the Department of Revenue (in addition to the division and the Attorney General) is responsible for the enforcement of the cigarette inspection requirements under the provisions in the bill under. The Department of Business and Professional Regulation states in its analysis, of similar House Bill 1167, that it is already performing cigarette inspections under ch. 210, F.S. It states that the division has tax auditors that inventory the warehouses of the cigarette wholesale dealers and agents and perform audits semi-annually.<sup>26</sup>

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Regulated Industries on April 1, 2008:**

The committee substitute:

- Provides that the bill may be cited as the “Reduced Cigarette Ignition Propensity and Firefighter Protection Act.”
- Provides a statement of Legislative findings and intent.
- Amends the definition of the term “manufacturer” in s. 633.042(3)(d), F.S., to clarify that a manufacturer is an entity that produces, or causes to be produced, *regardless of location*, cigarettes. It also clarifies that a manufacturer is any entity, regardless of location, that first manufactures cigarettes manufactured anywhere.
- Removes the State Fire Marshal's duties under the bill and assigns those duties to the Division of Alcoholic Beverage and Tobacco (division). It replaces all of the references to the State Fire Marshal and with the division.

<sup>25</sup> Department of Business and Professional Regulation Analysis of HB 1167, March 14, 2008.

<sup>26</sup> *Id.*

- Clarifies that the division, in its discretion, may perform or sponsor testing to determine a cigarette's compliance with the standard, and that such discretionary testing must meet the approved test standard.
- Clarifies that the ASTM standard is the American Society for Testing and Materials standard.
- Changes from July 1 to June 13 the date by which the division must submit, every three years, its report of findings and recommendations to the President of the Senate and the Speaker of the House of Representatives.
- Changes the effective date to the "effective date of this section" instead of July 1, 2008.
- Removes the requirement that the consumer testing must be done in a controlled setting where the cigarettes are consumed onsite or returned at the conclusion of the testing.
- Creates s. 633.042(4)(h), F.S., to provide a statement of Legislative intent.
- Requires that the certifications must be made available to the Attorney General and to the Department of Revenue, instead of to the division, for the purpose of ensuring compliance.
- Provides that manufacturers must pay the division a fee of \$250 per each brand family listed in the certification. It provides that the fee is applicable to all cigarettes within the brand family certified, including any new cigarette certified within the brand family during the three-year certification period. It removes the division's authority to adjust this fee, as needed, to defray the costs of processing, testing, enforcement, and oversight. It also changes the name of the trust fund to the *Reduced Cigarette Ignition Propensity and Firefighter Protection Enforcement Trust Fund*.
- Changes the reference to the "Universal Product Code bar code" instead of the "UPC bar code." It also requires that only one marking must be applied to all brands and all packages.
- Requires that the division approve any marking that is in use and approved for sale in the State of New York pursuant to the New York Fire Safety Standards for Cigarettes.
- Provides that uncertified cigarettes are subject to forfeiture following a hearing under ch. 120, F.S., instead of under ch. 210, F.S. It also provides that the true holder of the trademark rights in the cigarettes brand may appear and present evidence at the hearing.
- Provides that seized cigarettes must be turned over to the Department of Revenue (DOR) instead of to the division.
- Provides to authorize the DOR to examine the books, papers, invoices, and other records of specified persons.
- Creates section 2 of the bill to preempt local government ordinances or regulations that conflicting with, or preempted by, the provisions in this act or any policy of this state expressed by this act.
- Amends the effective date to cross-references SB 2584 and SB 2586. It also extends the effective date from July 1, 2008 to January 1, 2010.

**B. Amendments:****Barcode 350768 by Judiciary on April 21, 2008:**

- Revises the definitions of “retail dealer” to include tobacco-product vending machines.
  - Revises the definition of “wholesale dealer” to not include persons who, own, operate, or maintain cigarette or tobacco-product vending machines.
  - Provides for certification and testing by the State Fire Marshal instead of the Division of Alcoholic beverages and Tobacco.
  - Deletes the provisions that required that manufacturers pay a \$250 fee for certification of each brand family listed in the certification and that provided for the fee be deposited into the Reduced Cigarette Ignition Propensity and Firefighter Protection Enforcement Trust Fund.
  - Deletes the provision that allowed for a hearing under ch. 120, F.S. when cigarettes are subject to forfeiture.
  - Provides for the deposit of all collected penalties into the Insurance Regulatory Trust Fund of the Department of Financial Services.
  - Deletes the requirement that all collected penalties be deposited into the Fire Prevention and Public Safety Trust within the Department of Financial Services.
  - Authorizes the State Fire Marshal to file an action in circuit court for injunctive relief or to recover any costs or damages suffered because of a violation.
  - Deletes the provision that seized cigarettes be turned over to the Department of Revenue and shall be forfeited to the state.
  - Provides the State Fire Marshal with rulemaking authority.
- Provides for enforcement, including inspections, by the State Fire Marshal, and it does not provide for inspections by the Department of Revenue. (WITH TITLE AMENDMENT)

**Barcode 259194 by Judiciary on April 21, 2008:**

Amends the conditions of the effective date to provide that except as otherwise expressly provided in this act and except for the effective date section, which shall take effect upon becoming a law, the act shall take effect January 1, 2010. (WITH TITLE AMENDMENT)