

LEGISLATIVE BILL 198

Approved by the Governor May 19, 2009

Introduced by Stuthman, 22; Cornett, 45.

FOR AN ACT relating to cigarettes; to adopt the Reduced Cigarette Ignition Propensity Act; and to provide operative dates.
Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 11 of this act shall be known and may be cited as the Reduced Cigarette Ignition Propensity Act.

Sec. 2. For purposes of the Reduced Cigarette Ignition Propensity Act:

(1) Agent means any person authorized by the Tax Commissioner to purchase and affix stamps or cigarette tax meter impressions on packages of cigarettes under sections 77-2601 to 77-2615;

(2) Cigarette has the same meaning as in section 77-2601;

(3) Consumer testing means an assessment of cigarettes that is conducted by a manufacturer, or under the control or direction of a manufacturer, for the purpose of evaluating consumer acceptance of the cigarettes;

(4) Manufacturer means:

(a) Any entity which manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that such manufacturer intends to sell in this state, including cigarettes intended to be sold in the United States through an importer;

(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 subdivision (4) (a) or (b) of this section;

(5) Quality control and quality assurance program means 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. Such a program ensures that the testing repeatability remains within the required repeatability values stated in section 3 of this act for all test trials used to certify cigarettes in accordance with the act;

(6) Repeatability means the range of values within which the repeat results of cigarette test trials from a single laboratory will fall ninety-five percent of the time;

(7) Retail dealer means any person, other than a manufacturer or wholesale dealer, engaged in selling cigarettes or tobacco products;

(8) Sale means any transfer for consideration, exchange, barter, gift, offer for sale, or distribution in any manner or by any means whatsoever;

(9) Sell means to sell or to offer or agree to do the same; and

(10) Wholesale dealer means any person, other than a manufacturer, 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.

Sec. 3. (1) Except as provided in subsection (7) of this section, 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 the cigarettes have been tested in accordance with the following test method and meet the performance standard specified in this section, a written certification has been filed by the manufacturer with the State Fire Marshal in accordance with section 4 of this act, and the cigarettes have been marked in accordance with section 5 of this act. Testing shall be as follows:

(a) Testing of cigarettes shall be conducted in accordance with the American Society of Testing and Materials Standard E2187-04, Standard Test Method for Measuring the Ignition Strength of Cigarettes;

(b) Testing shall be conducted on ten layers of filter paper;

(c) No more than twenty-five percent of the cigarettes tested in a test trial in accordance with this subsection shall exhibit full-length burns. Forty replicate tests shall comprise a complete test trial for each cigarette tested;

(d) The performance standard required by this subsection shall only be applied to a complete test trial;

(e) Written certifications 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 or other comparable accreditation standard required by the State Fire Marshal;

(f) Laboratories conducting testing in accordance with this subsection shall implement a quality control and quality assurance program that includes a procedure that will determine the repeatability of the testing results. The repeatability value shall be no greater than 0.19;

(g) This subsection does not require additional testing if cigarettes are tested consistent with the Reduced Cigarette Ignition Propensity Act for any other purpose; and

(h) Testing performed or sponsored by the State Fire Marshal to determine a cigarette's compliance with the performance standard required by this section shall be conducted in accordance with this subsection.

(2) Each cigarette listed in a certification submitted pursuant to section 4 of this act 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 nominally identical bands on the paper surrounding the tobacco column. At least one complete band shall be located at least fifteen millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there shall be at least two bands fully located at least fifteen millimeters from the lighting end and ten millimeters from the filter end of the tobacco column, or ten millimeters from the labeled end of the tobacco column for nonfiltered cigarettes.

(3) A manufacturer of a cigarette that the State Fire Marshal determines cannot be tested in accordance with the test method prescribed in subdivision (1)(a) of this section shall propose a test method and performance standard for the cigarette to the State Fire Marshal. 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 the Reduced Cigarette Ignition Propensity Act 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 the act. All other applicable requirements of this section shall apply to the manufacturer.

(4) Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes offered for sale for a period of three years and shall make copies of these reports available to the State Fire Marshal and the Attorney General upon written request. Any manufacturer who fails to make copies of these reports available within sixty days after receiving a written request shall be subject to a civil penalty not to exceed ten thousand dollars for each day after the sixtieth day that the manufacturer does not make such copies available.

(5) The State Fire Marshal may adopt a subsequent American Society of Testing and Materials Standard Test Method for Measuring the 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 the American Society of Testing and Materials Standard E2187-04 and the performance standard in subdivision (1)(c) of this section.

(6) The State Fire Marshal shall review the effectiveness of this section and report every three years to the Legislature the State Fire Marshal's findings and, if appropriate, recommendations for legislation to improve the effectiveness of this section. The report and legislative recommendations shall be submitted no later than November 15 each three-year period.

(7) The requirements of subsection (1) of this section shall not prohibit wholesale or retail dealers from selling their existing inventory of cigarettes on or after the operative date of this section if the wholesale or retail dealer can establish that state tax stamps were affixed to the cigarettes prior to such date and if the wholesale or retail dealer can establish that the inventory was purchased prior to such date in comparable quantity to the inventory purchased during the same period of the prior year.

(8) The Reduced Cigarette Ignition Propensity Act shall be implemented in accordance with the implementation and substance of the New

York Fire Safety Standards for Cigarettes as such standards existed on January 1, 2009.

Sec. 4. (1) Each manufacturer shall submit to the State Fire Marshal a written certification attesting that:

(a) Each cigarette listed in the certification has been tested in accordance with section 3 of this act; and

(b) Each cigarette listed in the certification meets the performance standard set forth in section 3 of this act.

(2) Each cigarette listed in the certification shall be described with the following information:

(a) Brand or trade name on the package;

(b) Style, such as light or ultra light;

(c) Length in millimeters;

(d) Circumference in millimeters;

(e) Flavor, such as menthol or chocolate, if applicable;

(f) Filter or nonfilter;

(g) Package description, such as soft pack or box;

(h) Marking pursuant to section 5 of this act;

(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.

(3) The State Fire Marshal shall make the certifications available to the Attorney General for purposes consistent with the Reduced Cigarette Ignition Propensity Act and the Department of Revenue for the purposes of ensuring compliance with this section.

(4) Each cigarette certified under this section shall be recertified every four years.

(5) At the time a manufacturer submits a written certification under this section, the manufacturer shall pay to the State Fire Marshal a fee of one thousand dollars for each brand family of cigarettes identified in the certification. The fee paid shall apply to all cigarettes listed in the brand family identified in the certification and shall include any new cigarette certified within the brand family during the four-year certification period.

(6) The Reduced Cigarette Ignition Propensity Fund is created. The fund shall consist of all certification fees submitted by manufacturers in addition to any other funds made available for such purpose. The State Fire Marshal shall use the fund to carry out the act. Fees collected pursuant to this section shall be remitted to the State Treasurer for credit to the fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

(7) 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 the Reduced Cigarette Ignition Propensity Act, such 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 section 3 of this act and maintains records of that retesting as required by section 3 of this act. Any altered cigarette which does not meet the performance standard set forth in section 3 of this act shall not be sold in this state.

Sec. 5. (1) Cigarettes that are certified by a manufacturer in accordance with section 4 of this act shall be marked to indicate compliance with the requirements of section 3 of this act. The marking shall be either:

(a) Any marking in use and approved for sale in New York pursuant to the New York Fire Safety Standards for Cigarettes as such standards existed on January 1, 2009; or

(b) The letters "FSC" which signifies Fire Standards Compliant.

(2) The marking shall appear in eight-point type or larger and be permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code.

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

(4) Manufacturers certifying cigarettes in accordance with section 4 of this act shall provide a copy of the certifications to all wholesale dealers and agents to which they sell cigarettes and shall also provide sufficient copies of an illustration of the package marking utilized by the manufacturer pursuant to this section for each retail dealer 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 Department of Revenue, and their employees or peace officers of this state to inspect markings of cigarette packaging marked in accordance with this section.

Sec. 6. (1) 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 section 3 of this act, shall be liable to a civil penalty not to exceed ten thousand dollars per each sale of such cigarettes for a first offense and shall be liable to a civil penalty not to exceed twenty-five thousand dollars for any subsequent offense per each sale of such cigarettes, except that this penalty against any such person or entity shall not exceed one hundred thousand dollars during any thirty-day period.

(2) A retail dealer who knowingly sells or offers to sell fewer than one thousand cigarettes in violation of section 3 of this act shall be liable to a civil penalty not to exceed five hundred dollars for a first offense and shall be liable to a civil penalty not to exceed two thousand dollars for any subsequent offense for each such sale or offer for sale of such cigarettes. A retail dealer who knowingly sells or offers to sell one thousand or more cigarettes in violation of section 3 of this act shall be liable to a civil penalty not to exceed one thousand dollars for a first offense and shall be liable to a civil penalty not to exceed five thousand dollars for any subsequent offense per each such sale or offer of sale of such cigarettes. The penalty against any retail dealer under this subsection shall not exceed twenty-five thousand dollars during any thirty-day period.

(3) In addition to any civil penalty, any corporation, partnership, sole proprietor, limited partnership, limited liability company, limited liability partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification pursuant to section 4 of this act shall be liable to a civil penalty of seventy-five thousand dollars for the first false certification and shall be liable to a civil penalty not to exceed one hundred fifty thousand dollars for each subsequent false certification.

(4) Any person violating any other provision of the Reduced Cigarette Ignition Propensity Act shall be liable to a civil penalty not to exceed one thousand dollars for a first offense and shall be liable to a civil penalty not to exceed five thousand dollars for any subsequent offense.

(5) Whenever any peace officer of this state or duly authorized representative of the State Fire Marshal or Tax Commissioner discovers any cigarettes (a) for which no certification has been filed as required by section 4 of this act or (b) that have not been marked as required by section 5 of this act, such peace officer or representative may seize and take possession of such cigarettes. Cigarettes seized pursuant to this subsection shall be destroyed, except that prior to the destruction of any cigarette seized pursuant to this subsection the true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette.

(6) In addition to any other remedy provided by law, the Attorney General may file an action in a court of competent jurisdiction for a violation of the Reduced Cigarette Ignition Propensity Act, including petitioning (a) for preliminary or permanent injunctive relief against any manufacturer, importer, wholesale dealer, retail dealer, agent, or other person or entity to enjoin such entity from selling, offering to sell, or affixing tax stamps or cigarette tax meter impressions to any cigarette that does not comply with the requirements of the Reduced Cigarette Ignition Propensity Act or (b) to recover any costs or damages suffered by the state because of a violation of the act, including enforcement costs relating to the specific violation and attorney's fees. Each violation of the act or of rules or regulations adopted and promulgated under the act constitutes a separate civil violation for which the Attorney General may obtain relief. Upon obtaining judgment for injunctive relief under this subsection, the Attorney General shall provide a copy of the judgment to all wholesale dealers and agents to which the cigarette has been sold.

Sec. 7. The Tax Commissioner, in the regular course of conducting inspections of wholesale dealers, agents, and retail dealers, as authorized under section 77-2605, may inspect cigarettes to determine if the cigarettes are marked as required by section 5 of this act. If the cigarettes are not marked as required, the Tax Commissioner shall notify the State Fire Marshal.

Sec. 8. To enforce the provisions of the Reduced Cigarette Ignition Propensity Act, the Attorney General may examine the books, papers, 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. Every person in the possession, control, or occupancy of any premises where cigarettes are placed, sold, or offered for sale shall give the Attorney General the means, facilities, and opportunity for the examinations authorized by the act.

Sec. 9. Nothing in the Reduced Cigarette Ignition Propensity Act shall be construed to prohibit:

(1) Any person or entity from manufacturing or selling cigarettes that do not meet the requirements of section 3 of this act 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; or

(2) The use of cigarettes solely for the purpose of consumer testing utilizing only the quantity of cigarettes that is reasonably necessary for the assessment.

Sec. 10. (1) The Reduced Cigarette Ignition Propensity Act shall terminate if a federal reduced cigarette ignition propensity standard that preempts the act is adopted and becomes effective.

(2) The Reduced Cigarette Ignition Propensity Act preempts any local law on the subject and no political subdivision shall enact or enforce any ordinance or other local law or regulation conflicting with any provision of the act or with any policy of this state expressed by the act, whether the policy is expressed by inclusion of a provision in the act or by exclusion of that subject from the act.

Sec. 11. The State Fire Marshal may adopt and promulgate rules and regulations necessary to carry out the Reduced Cigarette Ignition Propensity Act in accordance with the Administrative Procedure Act.

Sec. 12. Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of this act become operative on January 1, 2010. The other sections of this act become operative on their effective date.