

HOUSE BILL NO. 461
INTRODUCED BY B. EBINGER

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING REQUIREMENTS FOR CIGARETTES SOLD IN THE STATE; ESTABLISHING REDUCED IGNITION PROPENSITY STANDARDS AND TESTING AND CERTIFICATION REQUIREMENTS; PROVIDING DEFINITIONS; REQUIRING THAT RECORDS OF TESTING BE MAINTAINED AND MADE AVAILABLE UPON REQUEST; REQUIRING THE STATE FIRE MARSHAL TO REPORT TO THE LEGISLATURE EVERY 4 YEARS; REQUIRING CERTAIN INFORMATION FOR CERTIFICATION OF CIGARETTES; REQUIRING A CIGARETTE MANUFACTURER TO PAY A FEE FOR CERTIFICATION AND REQUIRING REVENUE FROM THE FEE TO BE USED FOR CERTAIN PURPOSES; REQUIRING SPECIFIC MARKING ON CIGARETTE PACKAGING; PROVIDING PENALTIES FOR NONCOMPLIANCE; ALLOWING RULEMAKING BY THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF REVENUE; ALLOWING INSPECTION OF CIGARETTES AND OF RECORDS KEPT BY SELLERS OF CIGARETTES; CREATING A FIRE PREVENTION AND PUBLIC SAFETY FUND; AND PROVIDING A DELAYED EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 10], the following definitions apply:

(1) "Agent" means a person authorized by the department of revenue to purchase and affix stamps on packages of cigarettes.

(2) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not the tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of nontobacco paper or any other substance or material except tobacco.

(3) "Manufacturer" means:

(a) an entity that manufactures or otherwise produces cigarettes or causes cigarettes that the manufacturer intends to be sold in this state to be manufactured or produced anywhere, 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) an entity that becomes a successor of an entity described in subsections (3)(a) and (3)(b).

(4) "Quality control and quality assurance program" means the laboratory procedures implemented to ensure that operator bias, systemic and nonsystemic methodological errors, and equipment-related problems do not affect the results of testing. The program ensures that the testing repeatability remains within the required repeatability values provided in [section 2(2)(f)] for all test trials used to certify cigarettes in accordance with [sections 1 through 10].

(5) "Repeatability" means the range of values within which the repeat results of cigarette test trials from a single laboratory will fall 95% of the time.

(6) "Retail dealer" means a person, other than a manufacturer or wholesale dealer, engaged in selling cigarettes or tobacco products.

(7) "Sale" means any transfer of title of cigarettes for consideration, exchange, barter, gift, offer for sale, or distribution, in any manner or by any means.

(8) "Wholesale dealer" means a person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, and a 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.

NEW SECTION. Section 2. Cigarette test method and performance standard -- conditions on sale -- alternative test method and performance standard. (1) Except as provided in subsection (8), cigarettes may not be sold or offered for sale in this state or sold or offered for sale to persons located in this state unless:

(a) the cigarettes have been tested in accordance with the test method provided in this section;

(b) the cigarettes meet the performance standard specified in this section;

(c) the manufacturer has filed a written certification with the state fire marshal in accordance with [section 3]; and

(d) the cigarettes have been marked in accordance with [section 4].

(2) (a) Testing of cigarettes must be conducted in accordance with the American society for testing and materials standard E2187-04, the standard test method for measuring the ignition strength of cigarettes.

(b) Testing must be conducted on 10 layers of filter paper.

(c) No more than 25% of the cigarettes tested in a test trial in accordance with this section may exhibit full-length burns. Forty replicate tests compose a complete test trial for each cigarette used.

(d) The performance standards required in subsection (2)(c) may be applied only to a complete test trial.

(e) Written certifications must 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 another comparable accreditation standard required by the state fire marshal.

(f) Laboratories conducting testing in accordance with this section shall implement a quality control and quality assurance program that includes a procedure for determining the repeatability of the testing results. The repeatability value may not be greater than 0.19.

(g) This section does not require additional testing if cigarettes are tested for any other purpose in a manner that is consistent with [sections 1 through 10].

(h) Testing performed or sponsored by the state fire marshal to determine a cigarette's compliance with the required performance standard must be conducted in accordance with this section.

(3) Each cigarette listed in a certification submitted pursuant to [section 3] that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard provided in this section must have at least two nominally identical bands on the paper surrounding the tobacco column. At least one complete band must be located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there must be at least two bands fully located at least 15 millimeters from the lighting end and 10 millimeters from the filter end of the tobacco column or, for nonfiltered cigarettes, 10 millimeters from the labeled end of the tobacco column.

(4) (a) A manufacturer of a cigarette that the state fire marshal determines cannot be tested in accordance with the test method prescribed in subsection (2)(a) shall propose a test method and performance standard for the cigarette to the state fire marshal.

(b) Upon approval of the proposed test method and a determination by the state fire marshal that the performance standard proposed by the manufacturer is equivalent to the performance standard prescribed in subsection (2)(c), the manufacturer may employ that test method and performance standard to certify a cigarette pursuant to [section 3].

(c) 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 [section 2] and the state fire marshal determines 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 provisions comparable to this section, the state fire marshal shall authorize the manufacturer to employ the alternative test method and performance standard to certify the cigarette for sale in this state, unless the state fire marshal demonstrates a reasonable basis why the alternative test is unacceptable. All other applicable

provisions of this section apply to the manufacturer even if the alternative test method and performance standard are authorized.

(5) Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes offered for sale for a period of 3 years and shall make copies of these reports available to the state fire marshal and the attorney general upon written request. A manufacturer who fails to make copies of the reports available within 60 days of receipt of a written request is subject to a civil penalty not to exceed \$10,000 for each day after the 60th day that the manufacturer does not make the copies available.

(6) The state fire marshal may adopt a subsequent American society for testing and materials standard test method for measuring the ignition strength of cigarettes upon a finding that the 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 standard provided in subsection (2)(a) and the performance standard in subsection (2)(c).

(7) The state fire marshal shall review the effectiveness of this section and report every 4 years to the legislature the state fire marshal's findings and, if appropriate, submit recommendations for legislation to improve the effectiveness of this section. The report and legislative recommendations may be submitted no later than January 1 of each 4-year period.

(8) The requirements of subsection (1) do not prohibit a wholesale dealer or retail dealer from selling the wholesale dealer's or retail dealer's existing inventory of cigarettes on or after [the effective date of this act] if the wholesale dealer or retail dealer can establish that state tax stamps were affixed to the cigarettes prior to [the effective date of this act] and if the wholesale dealer or retail dealer establishes that the inventory was purchased prior to [the effective date of this act] in comparable quantity to the inventory purchased during the same period of the prior year.

(9) Because [sections 1 through 10] are based on New York law, it is the intent of the legislature that [sections 1 through 10] be implemented in accordance with the implementation and substance of the New York executive law section 156-c, fire safety standards for cigarettes.

NEW SECTION. Section 3. Certification -- fee for certification -- product change. (1) Each manufacturer shall submit to the state fire marshal a written certification attesting that each cigarette listed in the certification:

- (a) has been tested in accordance with [section 2]; and
- (b) meets the performance standard provided in [section 2(2)(c)].

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

(a) brand or trade name on the package;

(b) style, such as light or ultralight;

(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 approved in accordance with [section 4];

(i) the name, address, and telephone number of the laboratory, if different from the manufacturer, that conducted the test; and

(j) the date that the testing occurred.

(3) Certifications must be made available to the attorney general for purposes consistent with [sections 1 through 10] and to the department of revenue for the purposes of ensuring compliance with this section.

(4) Each cigarette certified under this section must be recertified every 3 years.

(5) (a) For each cigarette listed in a certification, a manufacturer shall pay to the department of justice a \$250 fee or other fee as determined by the state fire marshal. The state fire marshal may annually adjust the fee to ensure that it offsets the actual costs of the processing, testing, enforcement, and oversight activities required in [sections 1 through 10].

(b) There is an account in the state special revenue fund in which fees collected under this subsection (5) must be deposited. Money collected may be used only by the department of justice for the purposes provided in subsection (5)(a).

(6) If a manufacturer has certified a cigarette pursuant to this section and later makes any change to the cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards required by [sections 1 through 10], the cigarette may not be sold or offered for sale in this state until the manufacturer retests the cigarette in accordance with the testing standards provided in [section 2] and maintains records of the retesting as required by [section 2]. Any altered cigarette that does not meet the performance standard provided in [section 2] may not be sold in this state.

NEW SECTION. Section 4. Marking on cigarette packaging. (1) Cigarettes that are certified by a manufacturer in accordance with [section 3] must be marked to indicate compliance with the requirements of

[section 2]. The marking must be in 8-point type or larger and consist of:

(a) modification of the universal product code to include a visible mark printed at or around the area of the code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed, or printed in conjunction with the code;

(b) any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette package or cellophane wrap; or

(c) stamped, engraved, embossed, or printed text that indicates that the cigarettes meet the standards required in [sections 1 through 10].

(2) A manufacturer may use only one marking and shall uniformly apply the marking to all packages, including but not limited to packs, cartons, and cases, and brands marketed by the manufacturer.

(3) The department of revenue must be notified of the marking that is selected.

(4) Prior to the certification of any cigarette, a manufacturer shall present its proposed marking to the department of revenue for approval. Upon receipt of the request, the department of revenue shall approve or disapprove the marking offered, except that the department of revenue shall approve any marking in use and approved for sale in New York pursuant to New York executive law section 156-c, the New York fire safety standards for cigarettes. Proposed markings must be considered to be approved if the department of revenue fails to act within 10 business days of receiving a request for approval.

(5) A manufacturer may not modify its approved marking unless the modification has been approved by the department of revenue in accordance with this section.

(6) Manufacturers certifying cigarettes in accordance with [section 3] shall provide a copy of the certification to all wholesale dealers and agents to whom they sell cigarettes and shall also provide sufficient copies of an illustration of the package marking used by the manufacturer pursuant to this section for each retail dealer to whom 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 whom they sell cigarettes. Wholesale dealers, agents, and retail dealers shall permit the state fire marshal, the department of revenue, the attorney general, and their employees to inspect markings of cigarette packaging marked in accordance with this section.

NEW SECTION. Section 5. Penalties. (1) A manufacturer, wholesale dealer, agent, or any other person or entity that knowingly sells or offers to sell cigarettes, other than through retail sale, in violation of [section 2], for a first offense, is subject to a civil penalty not to exceed \$10,000 for each sale of the cigarettes and, for a

subsequent offense, is subject to a civil penalty not to exceed \$25,000 for each sale of the cigarettes. However, the penalty may not exceed \$100,000 during any 30-day period.

(2) (a) A retail dealer who knowingly sells cigarettes in violation of [section 2]:

(i) for a first offense, is subject to a civil penalty not to exceed \$500 and, for a subsequent offense, is subject to a civil penalty not to exceed \$2,000 for each sale or offer for sale of the cigarettes, if the total number of cigarettes sold or offered for sale does not exceed 1,000 cigarettes; or

(ii) for a first offense, is subject to a civil penalty not to exceed \$1,000 and, for a subsequent offense, is subject to a civil penalty not to exceed \$5,000 for each sale or offer for sale of the cigarettes, if the total number of cigarettes sold or offered for sale exceeds 1,000 cigarettes.

(b) The total penalty against a retail dealer provided in this subsection (2) may not exceed \$25,000 during a 30-day period.

(3) In addition to any penalty prescribed by law, any corporation, partnership, sole proprietor, limited liability company, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification pursuant to [section 3] is, for a first offense, subject to a civil penalty of at least \$75,000 and, for a subsequent offense, a civil penalty not to exceed \$250,000 for each false certification.

(4) A person violating any other provision in [sections 1 through 10] is subject to a civil penalty for a first offense not to exceed \$1,000 and, for a subsequent offense, a civil penalty not to exceed \$5,000 for each violation.

(5) Any cigarettes that have been sold or offered for sale that do not comply with the performance standard required by [section 2] are subject to forfeiture under 16-11-159 if prior to the destruction of any cigarette seized pursuant to these provisions, the true holder of the trademark rights in the cigarette brand is permitted to inspect the cigarette.

(6) In addition to any other remedy provided by law, the state fire marshal or attorney general may file an action in the appropriate district court for a violation of [sections 1 through 10], including petitioning for injunctive relief or to recover any costs or damages suffered by the state because of a violation of [sections 1 through 10], including enforcement costs related to the specific violation and attorney fees. Each violation of [sections 1 through 10] or of rules adopted under [sections 1 through 10] constitutes a separate civil violation for which the state fire marshal or attorney general may obtain relief.

NEW SECTION. Section 6. Implementation -- rulemaking authority -- inspection for proper markings. (1) The department of justice and the department of revenue may adopt rules, pursuant to Title 2,

chapter 4, necessary to effectuate the purposes of [sections 1 through 10].

(2) The department of justice and the department of revenue in the regular course of conducting inspections of wholesale dealers, agents, and retail dealers, as authorized under Title 16, chapter 11, may inspect cigarettes to determine if the cigarettes are marked as required by [section 4]. If the department of revenue has conducted the inspection and the cigarettes are not marked as required, the department of revenue shall notify the department of justice.

NEW SECTION. **Section 7. Inspection.** To enforce the provisions of [sections 1 through 10], the department of justice and the department of revenue 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. Each person in the possession, control, or occupancy of any premises where cigarettes are placed, stored, sold, or offered for sale shall give the department of justice and the department of revenue the means, facilities, and opportunity for the examinations authorized by this section.

NEW SECTION. **Section 8. Sale outside Montana.** [Sections 1 through 10] may not be construed to prohibit a person or entity from manufacturing or selling cigarettes that do not meet the requirements of [section 2] if the cigarettes are or will be stamped for sale in another state or are packaged for sale outside the United States and if the person or entity has taken reasonable steps to ensure that the cigarettes will not be sold or offered for sale to a person located in this state.

NEW SECTION. **Section 9. Preemption.** [Sections 1 through 10] no longer apply if a federal reduced cigarette ignition propensity standard that preempts [sections 1 through 10] is adopted and becomes effective.

NEW SECTION. **Section 10. Local consistency required.** The provisions of 7-1-113 apply in the administration and application of [sections 1 through 10].

NEW SECTION. **Section 11. Effective date.** [This act] is effective May 1, 2008.

NEW SECTION. **Section 12. Codification instruction.** [Sections 1 through 10] are intended to be codified as an integral part of Title 50, and the provisions of Title 50 apply to [sections 1 through 10].

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