



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

H.B. 2438, H.D. 2, RELATING TO CIGARETTES.

L A T E

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES AND PUBLIC HOUSING

DATE: Monday, March 10, 2008 **TIME:** 2:45 PM

LOCATION: State Capitol, Room

Deliver to: Committee Clerk, Room 215, 1 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Earl R. Hoke, Jr., Deputy Attorney General

Chair Ige and Chair Kokubun and Members of the Committees:

The Department of the Attorney General supports the intent of this measure and provides the following comments and recommendations.

The impetus for this bill rests in the area of fire safety and protection, which by statute is the province and jurisdiction of the State Fire Council and fire departments of each county as articulated in chapter 132, Hawaii Revised Statutes. This measure places the primary responsibility to administer and enforce fire safe cigarettes with the State Fire Council, which is consistent with other jurisdictions that have fire safe cigarettes statutes.

Any fire safe cigarette legislation that proposes creating a program with the stated legislative purpose of improving fire safety standards to reduce fires that may result in deaths, injuries, and property damage should not be undertaken lightly. Careful thought must be given to the legislation to ensure that the agency entrusted with administering the fire safe cigarette program has the proper expertise in fire safety not only to properly monitor compliance with fire safety standards, but also to determine acceptable alternative standards if necessary. In Hawaii, pursuant to chapter 132, Hawaii Revised Statutes, issues

of fire safety and fire protection are delegated to the State Fire Council and county fire chiefs.

Chapter 132, Hawaii Revised Statutes, deals with fire protection. Section 132-1(b), Hawaii Revised Statutes, provides that the fire chief of each county shall:

- (1) Investigate the cause, origin, and circumstances of fires;
- (2) Supervise and make or cause to be made periodically a thorough inspection of all property which might constitute a fire hazard within the county.

Section 132-2, Hawaii Revised Statutes, provides the authority to the fire chiefs to make rules related to:

- (1) Prevention of fires, and the inspection of property, periodically or otherwise, or for the prevention of or reduction of loss by fire, or to promote the safety of persons in case of fire;
- (2) Manufacture, storage, sale, and use of combustibles and explosives.

Section 132-3, Hawaii Revised Statutes, calls for the establishment of a state fire code by the State Fire Council that sets forth minimum requirements relative to the protection of persons and property from fire loss, including the storage, handling and use of hazardous substances, materials, and devices. Section 132-5, Hawaii Revised Statutes, provides for right of entry to the fire chiefs of each county to make any inspection, investigation, or examination authorized under chapter 132.

In other jurisdictions, agencies tasked with fire protection or public safety are the lead agencies tasked with the administration, and enforcement of the "fire safe cigarette laws." The research indicates that, in those states where reduced ignition propensity cigarette statutes have passed, the agencies tasked with fire protection or public safety are the agencies tasked with taking the lead in administering and making broad rules regarding reduced ignition propensity cigarette laws. For example, the State Fire Marshall in California; the Office of

Fire Prevention and Control in New York; the Commissioner of Public Safety who is the ex officio fire marshal in Vermont; the Director of the Division of Consumer Affairs in the Department of Public Safety in consultation with the Division of Fire Safety in the Department of Community Affairs in New Jersey; the Commissioner of Safety in New Hampshire (the Division of Fire Safety, whose head is the State Fire Marshall, is a division within the Department of Safety in New Hampshire); the Office of the State Fire Marshall in Illinois; the Secretary of the Office of Public Safety in Massachusetts (the Department of Fire Services, whose head is the State Fire Marshall, is a department within the Executive Office of Public Safety and Security in the State of Massachusetts); the State Fire Marshall in the State of Kentucky; the State Fire Marshall in Alaska, Department of Public Safety in Iowa (the State Fire Marshall Division is a division within the Department of Public Safety in Iowa); the Comptroller, State Fire Safety Commission, and Attorney General in Maryland; Commissioner of Revenue and State Fire Marshall in Minnesota; Department of Justice and State Fire Marshall in Montana; State Fire Marshall in Oregon; State Fire Marshall in Delaware; State Fire Marshall in Texas; State Fire Marshall in Maine; State Fire Marshall in Louisiana; State Fire Marshall in Connecticut; State Fire Marshall in Utah; Director of the Department of Health in Rhode Island; and the Commissioner of Insurance who is the State Fire Marshall in North Carolina all have the primary administrative responsibility over fire safe cigarettes in those jurisdictions.

We recommend that the effective date of this proposed program coincide with the tax stamp increases. As a practical matter this would afford ease of transition and allow for only the stamping of fire safe cigarettes with the new tax stamps that come into play with a new cigarette tax rate. In accord with section 245-3, Hawaii Revised Statutes, an increase in cigarette

taxes will occur on or after September 30, 2008, September 20, 2009, September 30, 2010, and September 30, 2011.

We offer the following amendments to the language contained in H.B. No. 2438, H.D. 1, as a means of clarifying provisions related to application, certification, seizure of contraband cigarettes, and disposition of seized contraband cigarettes.

(1) An amendment to page 3, lines 20 thru 22 and page 4, lines 1 thru 5, to read:

section -8, 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 comply with all applicable federal, state, county, and local laws, ordinances, rules, and regulations pertaining to cigarettes, have been tested in accordance with the test method, and meet the performance standard specified in this section and the manufacturer has filed a written certification with the state fire council in accordance with section -4(a), and the cigarettes have been marked in accordance with section -4(b). . . .

The purpose of this amendment is to put the manufacturers, dealers, distributors, and retailers on notice that the cigarettes must satisfy all other state, federal, and county regulatory requirements in order to be sold in the State.

(2) An amendment to page 14, lines 20-22 and page 15, lines 1-5, which would designate the last part of paragraph (4) as a new paragraph (5) to deal with seizure and forfeiture of non-compliant cigarettes, to read:

(5) Any cigarettes sold or offered for sale that do not comply with the performance standards required by section -3 shall be considered contraband and may be seized with or without a warrant and turned over to the attorney general [and ordered forfeited]. The contraband cigarettes are subject to summary forfeiture without regard to the procedures set forth in chapter 712A. Cigarettes forfeited pursuant to this subsection shall be destroyed[; ~~however, prior to the destruction of any cigarette~~

~~forfeited pursuant to these provisions, the true holder of the trade mark rights in the cigarette brand shall be permitted to inspect the cigarette].~~

We are proposing that wording requiring the State to provide access to the trademark holder be struck for the simple reason that logistically it may be impossible to have every trade mark holder review the seized product prior to destruction. Similar provisions appear on page 15, lines 10-16 and we recommend similar amending wording and deletions:

. . . Such cigarettes shall be considered contraband and may be seized with or without a warrant and turned over to the attorney general~~[and ordered forfeited].~~
The contraband cigarettes are subject to summary forfeiture without regard to the procedures set forth in chapter 712A. Cigarettes seized pursuant to this subsection shall be destroyed~~;~~ ~~provided, however, that prior to the destruction of any cigarette seized pursuant to these provisions, the true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarette].~~

With regard to the three-year certification period and fee of \$250, we would defer to the State Fire Council as to the necessary personnel and costs to administer, implement, and enforce the fire safe cigarette program. We also defer to the State Fire Council whether a special fund should be set up to receive the fees from the certifications, the necessary appropriations, and whether the certification period should be shorter than the proposed three-year period. Reason dictates that effective enforcement of this law requires periodic laboratory testing of cigarettes to ensure compliance with the articulated standards. This measure currently calls for a \$250 fee per cigarette. An appropriate fee amount is necessary to provide a funding and allocation mechanism of moneys for testing and other compliance and enforcement measures.

Given that cigarettes are imported from all over the world and given the cigarette industries record for candor, it is not recommended that the State rely solely on an individual manufacturer or industry representations that the cigarettes are compliant without having a means to independently verify the cigarettes' compliance. This testing may reasonably require laboratory testing or some other forensic testing to determine compliance with the articulated standards. Should the State of Hawaii enact a reduced ignition propensity cigarette statute, it is not recommended that Hawaii simply rely on New York State's certification of compliance with the reduced ignition propensity cigarette standards. Instead, the State of Hawaii should test cigarettes for compliance with any reduced ignition propensity cigarette program enacted by the Legislature. Three laboratories have been identified as potential candidates to provide testing for the State of Hawaii. Those laboratories are:

- VGO Testing and Inspection Engineers of Portland, Oregon.;
- Kidde-Fenwal, Inc., Combustion Research Center, located in Massachusetts; and
- Arista Laboratories, Inc., of Richmond, Virginia.

The cost to test each cigarette brand style is not insignificant and ranges from approximately \$760 per brand style to \$2,000 per brand style. Currently Hawaii has 2,156 brand styles listed in the Hawaii Tobacco Directory. The State of New York's reduced ignition propensity cigarette directory lists approximately 1,216 brand styles of which 1,152 brand styles are also listed on Hawaii's Tobacco Directory. Assuming 1,152 of the brand styles of cigarettes listed on Hawaii's Tobacco Directory certifies as reduced ignition propensity cigarettes, testing costs for one test per year would be in the range of \$875,520 to \$2,304,000. Assuming the same number as reduced ignition propensity cigarettes certified in New York, the laboratory costs could range between \$924,160 and \$2,432,000. The laboratory

testing costs do not include the cost of purchasing the cigarettes at retail at an estimated \$5.00 to \$6.00 per pack which ranges from \$23,040 to \$27,648 for four packs of the 1,152 brand styles currently listed on both New York's reduced ignition propensity cigarette directory and Hawaii's Tobacco Directory. The cost of purchasing cigarettes at retail increases to \$43,120 to \$51,744 for four packs needed to conduct one test of all 2,156 brand styles listed in the Hawaii's Tobacco Directory.

Because fire safe cigarette legislation is relatively new, the complexities of the issues and the practical realities of running an effective program have not been realized, even in states that have already passed fire safe cigarette legislation. Accordingly, the true impact of fire safe cigarette legislation in other states will not be evident for several years, and extrapolating anything learned from those states to Hawaii is premature. As such, the Legislature may elect to await further developments in the industry, other states, and possibly federal reduced ignition propensity cigarette regulation.