

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

March 21, 2007

1:34 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 84

"An Act relating to the burning capability of cigarettes being sold or offered for sale, or possessed for sale; relating to compliance certifications by tobacco product manufacturers, a directory of tobacco product manufacturers, the affixing of stamps to cigarette packages, and cigarette tax stamps; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 84

SHORT TITLE: TESTING & PACKAGING OF CIGARETTES

SPONSOR(S): SENATOR(S) OLSON

02/14/07	(S)	READ THE FIRST TIME - REFERRALS
02/14/07	(S)	L&C, JUD, FIN
02/27/07	(S)	L&C AT 1:30 PM BELTZ 211
02/27/07	(S)	Heard & Held
02/27/07	(S)	MINUTE(L&C)
03/06/07	(S)	L&C AT 1:30 PM BELTZ 211
03/06/07	(S)	Moved CSSB 84(L&C) Out of Committee
03/06/07	(S)	MINUTE(L&C)
03/07/07	(S)	L&C RPT CS 3DP 1NR 1AM NEW TITLE
03/07/07	(S)	DP: ELLIS, DAVIS, STEVENS
03/07/07	(S)	NR: HOFFMAN
03/07/07	(S)	AM: BUNDE
03/21/07	(S)	JUD AT 1:30 PM BELTZ 211

WITNESS REGISTER

Senator Donald Olson
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Sponsor of SB 84

Denise Liccioli, Staff
Senator Donny Olson
Alaska State Capitol
Juneau, AK

POSITION STATEMENT: Provided information on SB 84

Ray Bazal, Western Regional Manager
National Fire Protection Association

POSITION STATEMENT: Spoke in support of SB 84

Warren Cummings, President
Alaska Fire Chiefs Association and
Fairbanks Fire Chief
Fairbanks, AK

POSITION STATEMENT: Spoke in support of SB 84

Rusty Belanger
State Fire Marshal

POSITION STATEMENT: Spoke in support of SB 84

Pat Eggers
Alaska State Firefighters Association
Juneau, AK

POSITION STATEMENT: Spoke in support of SB 84

Bob Evans, Lobbyist
for Altria Corporation
Anchorage, AK

POSITION STATEMENT: Spoke in support of SB 84

Emily Neenan, Director,
Alaska Government Relations
American Cancer Society

POSITION STATEMENT: Said the ACS has no objection to SB 84

Theresa Bannister, Legislative Counsel
Division of Legal and Research Services
Legislative Affairs Agency
Juneau, AK

POSITION STATEMENT: Highlighted issues related to SB 84

Johanna Bales, Excise Audit Manager
Tax Division
Department of Revenue (DOR)
Juneau, AK

POSITION STATEMENT: Highlighted DOR obligations related to SB 84

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at [1:34:05 PM](#). Present at the call to order were Senator Huggins, Senator Wielechowski, Senator McGuire, Senator Therriault, and Chair French.

SB 84-TESTING & PACKAGING OF CIGARETTES

CHAIR FRENCH announced the consideration of CSSB 84(L&C).

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SENATOR OLSON, Sponsor of SB 84, introduced his staff member, Denise Licctoli and then he read the sponsor statement into the record as follows:

SB 84 mandates that only self-extinguishing cigarettes can be sold in Alaska, and establishes the testing and certification requirements to assure that only self-extinguishing cigarettes are sold in Alaska. Although no cigarette could ever be called safe, so called self-extinguishing or "fire safe" cigarettes are reduced ignition propensity cigarettes. These are cigarettes that are designed to be less likely than a conventional cigarette to ignite soft furnishings such as a couch or mattress. The bill also provides for the marking of cigarette packaging in an approved and easily identifiable manner to indicate they are fire safe.

Cigarettes are the leading cause of home fire fatalities in Alaska and the United States. The most common material first ignited in home fires are mattresses and bedding, upholstered furniture, and floor coverings. A typical scenario for fires is when a lit cigarette is forgotten or dropped by a smoker. The cigarette fire can smolder for hours before it flares up into a full blaze.

One fourth of victims of smoking-material fire fatalities are not the smoker whose cigarette started the fire; over one third of these are children. The risk of dying in a residential structure fire caused by smoking rises with age: 38 percent of fatal smoking-material-fire victims are age 65 or older.

The most common technology used by cigarette manufacturers for reduced cigarette ignition propensity (RCIP) is to make the paper thicker in places to slow down a burning cigarette. If such a cigarette is left unattended, when the burn reaches one of the thicker places or "speed bumps", the burning will self-extinguish. Self-extinguishing cigarettes meet established fire safety performance standards.

Legislation similar to SB 84 has been enacted in New York, Massachusetts, Vermont, New Hampshire, California, and Illinois. A fire safe cigarette mandate has also been approved for all of Canada. This legislation is supported by the Alaska Fire Chiefs Association, the Alaska Firefighters Association, and Department of Public Safety, Division of Fire Prevention.

SB 84 will save lives, as well as reduce injuries and damage to property in Alaska.

SENATOR OLSON explained that part of his interest in the bill stems from having treated children who were fire victims.

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CHAIR FRENCH opened public testimony.

RAY BAZAL, Western Regional Manager for the National Fire Protection Association, spoke in support of SB 84. He relayed that 6 states have passed similar legislation and 22 others are in the process of doing so meaning that one quarter of the US population is now protected by this law. Statistics from New York indicate that in the six months after the law was passed there was no reduction in cigarette tax revenue, but there was a one third reduction in fire fatalities and an even higher reduction in the number of fires. "Passing this bill will absolutely save lives in Alaska and reduce injuries to people, to firefighters, and reduce property damage."

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WARREN CUMMINGS, President, Alaska Fire Chiefs Association and Fairbanks Fire Chief, spoke in support of SB 84. He reported that in the last 10 years there have been 37 cigarette caused fire fatalities in Alaska. Smokers aren't the only ones to die in these fires: 34 percent are children of the smokers, 25 percent are neighbors or friends of the smokers, 14 percent are spouses or partners, and 13 percent are the parents of the smokers. In the 1980s it was predicted that self extinguishing cigarettes would eliminate 3 out of 4 cigarette fire deaths. If cigarette manufacturers had been producing only those cigarettes since that time, approximately 15,000 lives would have been saved throughout the US. This is good legislation he said.

[1:43:50 PM](#)

RUSTY BELANGER, Acting Director, Division of Fire Prevention, Department of Public Safety (DPS), spoke in support of SB 84. The bill embodies the division's mission statement to prevent the loss of life and property from fire and explosion. As previously mentioned, 27 lives and \$8 million in property has been lost in the last 10 years as a result of fires that started with a cigarette as the ignition source. The division believes that the number of fire related deaths in Alaska will be reduced if cigarette manufacturers are required to meet the new safety standards set forth in SB 84. He urged the committee to support the issue.

SENATOR HUGGINS asked how many cigarette related fires are attributable to roll your own type smoking material.

MR. BELANGER said he could try and get that information, but it might not be broken down that way. The division looks at those fires as having been caused by unattended smoking materials.

SENATOR HUGGINS said he wants to make sure that the bill really would fix something.

CHAIR FRENCH asked Mr. Belanger to send the information via email if he finds it broken down that way.

MR. BELANGER agreed.

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PAT EGGERS, First Vice-President, Alaska State Firefighters Association, described SB 84 as huge legislation that will save

lives. He informed members that a great deal of relevant information is available on the firesafe.org website.

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BOB EVANS, Lobbyist for Altria Corporation, said that for several years the parent company, Philip Morris USA, has worked with the national firefighters to develop legislation that would address the safety issue and also provide business consistency for Altria Corporation. In an ideal world Congress would provide a single uniform standard, but because that's unlikely to happen any time soon PMUSA has been working with firefighters and legislatures in different states to make this bill happen. My client supports this bill as drafted, he stated.

SENATOR WIELECHOWSKI noted the memorandum in the packet from Michael White and asked if he is a corporate attorney for Altria.

MR. EVANS explained that he and Mr. White are partners at Patton Boggs, LLP. Mr. White has been retained by Arnold & Porter, LLP to address the delegation issue. That legal entity is outside counsel to Legislative Council.

SENATOR WIELECHOWSKI noted his finding that the legislature has the authority to pass this law.

MR. EVANS said yes.

SENATOR WIELECHOWSKI asked if there is any sort of preemption issue.

MR. EVANS said he isn't aware of any, but he would defer to Mr. White.

SENATOR HUGGINS asked if there might be an issue of underground market cigarettes if this legislation were to pass.

MR. EVANS said he didn't know for sure, but he understands there is no difference in taste so that wouldn't be a contributing factor. To the extent that there is already an underground market, he suspects it would be the same. This wouldn't necessarily increase it.

CHAIR FRENCH asked for clarification that there is no economic incentive to select one type over another.

MR. EVANS said that's correct; there is no economic advantage whatsoever.

CHAIR FRENCH added that there could be cigarettes that don't have a tax stamp, but tax is an entirely different issue.

MR. EVANS agreed completely.

SENATOR WIELECHOWSKI asked if self extinguishing cigarettes would require the user to inhale more deeply.

MR. EVANS said he doesn't know, but he's been told there are no increased health issues.

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EMILY NEENAN, Alaska Government Relations Director for the American Cancer Society, said SB 84 doesn't affect the mission to prevent cancer one way or the other. Responding to a previous question she said that a colleague from New York told her that smokers do not have to inhale more deeply to keep a cigarette lit. Although she doesn't have any documentation, that is what folks in the health field are saying.

As an aside she said she prefers to call these cigarettes self extinguishing rather than fire safe because she doesn't like to use safe and cigarette in the same sentence.

CHAIR FRENCH said the nomenclature is noted.

SENATOR WIELECHOWSKI said he would like to find out if these cigarettes require deeper inhalation because that would endanger thousands of users in the state. "... that's a judgment call or certainly a fact that I want to be aware of," he said.

MS. NEENAN said she doesn't believe that's an issue, but she would provide more information.

SENATOR HUGGINS asked if she knows the percentage of the roll your own fraternity.

MS. NEENAN said she would try to provide that information, but her general sense is it's a pretty small percentage.

SENATOR HUGGINS said as much as he dislikes tobacco smoking, he'd hate for the next step to be a prohibition on roll your own because they aren't self extinguishing.

CHAIR FRENCH asked what makes a cigarette self extinguishing compared to one that continues to burn when it's left unattended.

MS. NEENAN said she understands that self extinguishing cigarettes have bands in the paper that don't burn if the cigarette isn't actively smoked.

JOANNA BAILS, Department of Revenue (DOR), advised that DOR will have some enforcement obligations.

CHAIR FRENCH asked her to describe DOR's role should the bill become law.

MS. BAILS said the DOR fiscal note addresses the committee substitute that Senator Olson was going to offer.

2:00:19 PM

CHAIR FRENCH thanked her for bringing that to his attention and asked for a motion to adopt Version \0 committee substitute (CS).

SENATOR HUGGINS motioned to adopt Version \0, CS for SB 84, labeled 25-LS0596\0, as the working document. There was no objection.

MS. BAILS said she understands that the CS removes bill sections dealing with a DOR maintained directory. DOR believes that with that change it will have to maintain an additional directory listing cigarettes that are approved for sale in the state and the fiscal note reflects that cost. DOR expects it will need at least a part-time person to maintain the separate directory and educate taxpayers on the difference between the two directories.

She elaborated that as part of the Tobacco Master Settlement Agreement the state passed legislation requiring DOR to maintain a directory that identifies cigarettes that are either compliant with the master settlement agreement or compliant with an escrow statute that was adopted under Title 45. Because the master settlement is so complex, it is best not to change the existing directory and instead maintain a separate directory for the self extinguishing cigarettes. DOR would need to educate retailers about which brands meet both the self extinguishing and the MSA standards. That is where the additional costs come from.

MS. BAILS added that based on the language in the bill, every three years manufacturers would be required to pay a \$250 fee

for each cigarette brand that is certified in the state. Up to 1,000 different brands could be certified, which would more than cover the expected annual cost of about \$40,000.

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SENATOR THERRIAULT said he could understand some one-time costs, but he doesn't believe that the year after year expenses justify a half-time position.

MS. BALES explained that the ongoing expenses include: maintaining the new directory; cross referencing the master settlement and the self extinguishing cigarette directories; investigation activity to ensure that only the self extinguishing cigarettes are stamped; seizing and destroying cigarettes; and addressing potential legal costs.

SENATOR THERRIAULT said he would leave it to the finance committee, but he believes that a lot of those expenses are included in the ordinary business of the state.

2:06:11 PM

CHAIR FRENCH said he would like to discuss the 3/19/07 memorandum that Ms. Bannister issued. He asked her to describe how the bill intersects with the interstate commerce clause.

THERESA BANNISTER, Legislative Counsel, explained that bringing cigarettes to Alaska from another state places a burden on interstate commerce and the US Constitution prohibits that if it goes too far. Thus, the question will be whether the burden is clearly excessive on the commerce that is going back and forth versus the benefit that will be reaped. "I don't have enough information to be able to evaluate that, but I wanted to bring it up as an issue," she stated.

CHAIR FRENCH asked if she did any research into whether a tobacco company had ever challenged a similar bill in another state on those grounds.

MS. BANNISTER replied she had not.

CHAIR FRENCH asked her to address her observations in the bill with respect to civil penalties.

MS. BANNISTER explained that the legislature can impose civil rather than criminal penalties to regulate activity that is addressed in statute. However, if the penalty is too high, then it might be interpreted that the legislature actually thought

the activity was criminal. In that case all the protections that accrue to a criminal penalty would accrue to the civil penalty. To a large degree the court will defer to the legislature finding that it is a civil penalty, but you must keep that in mind. Also keep in mind that the court will evaluate the size of the penalty for the particular situation. She really didn't have any idea what penalty is appropriate in this particular situation, she said.

CHAIR FRENCH asked her to articulate any observations and concerns in the bill with respect to delegation.

MS. BANNISTER explained that the legislature can delegate its authority to make regulations to members of the executive branch as long as it provides guidelines, otherwise it is an improper delegation of authority. In this case the effect is that in three sections of the bill the delegation of legislative authority is to follow what New York law does. The question that arises is whether or not in that particular situation the legislature is exceeding its authority. A reason underlying the issue is the concern that the people won't have an opportunity to comment or get notice of any changes in New York law. The court has stated that concern in the past, she said.

MS. BANNISTER said the federal government doesn't pay attention to the delegation issue, but Alaska seems to allow some delegation by reference to amended federal laws and it also mentions some private organizations regarding a building code. Because the language is there and the concept of delegating or allowing another state's activities to affect what this state does is unusual, and because it isn't clear what the court will do it is an issue that the legislature ought to be aware of, she stated.

[2:14:49 PM](#)

SENATOR THERRIAULT asked why language similar to the New York law isn't written in to the statute now.

MS. BANNISTER said she doesn't know why that hasn't been done, but she feels that the idea is to capture decisions that are made in the future. In particular Section 18.74.220 says that the New York standards shall be persuasive authority. "I see it as embodying future decisions," she said.

SENATOR THERRIAULT said he understands that cigarette manufacturers are looking for consistency, which is not

forthcoming from Congress so the suggestion to refer to just one state's law is reasonable.

CHAIR FRENCH said he too senses the tension; it seems odd to make explicit reference to New York laws and delegate the decision making to that body.

SENATOR McGUIRE suggested the committee replace the word "shall" with "may" on page 9, line 12. That way the record reflects that this legislature is looking for consistency for the manufactures.

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SENATOR WIELECHOWSKI stated the opinion that section 220 is probably unconstitutional. "If we want to use the New York statute then we should probably just put that in here," he stated.

SENATOR McGUIRE asked the sponsor why adopting the New York model isn't preferable to specifically referencing it in an implementation clause.

[2:18:43 PM](#)

CHAIR FRENCH advised that Mr. White would be the next witness.

SENATOR OLSON said he'd like to hear from the next witness before explaining why the bill is crafted a specific way.

MICHAEL D. WHITE ESQ., Partner, Patton Boggs, LLP, said their client is Altria Corporate Services, Inc, parent company of Phillip Morris USA (PMUSA). His firm was asked to look at this legislation focusing in particular on the issues that Legislative Counsel raised regarding the potential issue of unconstitutional delegation. Review of the statutes and authorities unequivocally indicates that there is no delegation problem, thus no constitutional problem, he stated.

He referenced the March 20, 2007 memorandum and said he would touch on two major points. First, the delegation issue may have been a concern 60 years ago, but since that time the courts have routinely upheld this type of legislation. Although it is true that there is the concept in the law regarding delegation, what it means now is there can't be complete abdication of authority. Clearly government wouldn't work if legislators couldn't delegate work to other branches of government to do regulations and other daily business matters as part of state, local and federal government.

MR. WHITE said case law that interprets the statutes makes it clear that since the '60s, other than the extremely large delegation of authority giving the governor the discretion to rewrite the budget, every challenge based on a delegation has been rejected by Alaska courts.

The specific examples in Sections 18.74.040 (b), 18.74.120 (b), and 18.74.220 show that legislative authority is delegated to the fire marshal to implement decisions to do his or her job by making the authority from New York a deciding or persuasive factor. Those standards are the ones that are necessary for the fire marshal to do the job. "There is no unlawful delegation because the court has said there is a sliding scale analysis. The broader the delegation - i.e. the closer you get to abdication - the more scrutiny the court will give that delegation." Furthermore, he said, if this is unlawful delegation then a good portion of the laws the legislature has passed would be unlawful delegations. That includes the Alaska Wage and Hour Act, federal tax laws, antitrust laws, and various probate laws. In those the legislature has implicitly adopted laws from other jurisdictions as binding upon the state.

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SENATOR WIELECHOWSKI said he doesn't have a big problem delegating authority to the fire marshal, but he does have a problem delegating to what is done in another state. Noting that all the references for delegations listed in the memo are to federal code, he asked if any Alaska legislation directs use of another state's law as a persuasive authority.

MR. WHITE clarified that it doesn't matter that the delegation references are to federal code rather than another state's code, because both are foreign governments with respect to the legislative authority that exists under State of Alaska sovereignty. He further explained that there are a number of uniform acts that are not federal legislation such as the Uniform Child Custody Jurisdiction Act and the Uniform Probate Code. Promulgated by an association, those laws seek a nationwide uniform standard in an area that lacks uniformity. Responding to the specific question, he said he is not familiar with any specific reference to a state law other than the fact that all Alaska law is based on Oregon law and his understanding is that it would not be inappropriate for the Alaska Legislature to adopt by reference something in Oregon statute.

[2:26:20 PM](#)

CHAIR FRENCH asked if he is aware of any challenge of self extinguishing cigarette legislation by Altria, PMUSA, or any tobacco company with respect to the issue of interstate commerce.

MR. WHITE said no; Altria supports the legislation and would not challenge any such legislation on those grounds.

SENATOR WIELECHOWSKI asked if he would challenge this legislation on any grounds and if he foresees any federal preemption issues here.

MR. WHITE said he couldn't say because he doesn't know what his client is thinking, but in his mind he can't see a challenge of this type of law. With regard to preemption his understanding is there is no federal law, thus there can be no preemption issue. Congress could but has not regulated in this area so states are free to do so.

CHAIR FRENCH asked about his client's perspective on civil penalties and whether it would be challenged as amounting to a criminal fine because of size and severity.

MR. WHITE reiterated he couldn't speak for Altria, but he does not believe this would amount to an unlawful criminal sanction - particularly in light of the strong legislative intent that these be civil penalties.

[2:29:16 PM](#)

CHAIR FRENCH stated his intention to hold the bill to finish reviewing Mr. White's legal memorandum. He asked the sponsor if he had any further observations on the bill.

SENATOR OLSON said Ms. Licctoli had additional information.

[2:30:01 PM](#)

DENISE LICCIOLI, Staff to Senator Olson, said she has no legal background so deferring the delegation issue to this committee's expertise was intentional. Nonetheless, she can attest that the manufacturers believe that lacking federal regulation, it is very important to establish nationwide uniformity.

CHAIR FRENCH asked if states with a similar law reference New York law or embed New York law in statute as Senator Wielechowski suggested.

MS. LICCIOLI said the website referenced previously has model legislation as well as the laws from the states that have passed this legislation. Essentially all have adopted and made reference to New York law. The model legislation is stronger than what is suggested in SB 84.

SENATOR OLSON said he feels strongly about this issue and he introduced the bill to affect the lives of those who have been negatively affected in the past. As far as the concern about having to inhale more deeply, he said smokers have made a conscious choice. Children who are fire victims weren't there by choice and were in fact expecting to be protected.

SENATOR THERRIAULT noted the Department of Public Safety fiscal note for \$83,000 per year and commented that for years the fire associations have been looking for a funding source similar to the Police Standards Council. It's an annual appropriation, but this could be an answer to a long-standing problem.

CHAIR FRENCH held SB 84 in committee.

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There being no further business to come before the committee, Chair French adjourned the meeting at [2:35:49 PM](#).