

SUBCHAPTER L. FIRE STANDARD COMPLIANT CIGARETTES
28 TAC §§34.1201 – 34.1214

1. INTRODUCTION. The Commissioner of Insurance adopts new Subchapter L, §§34.1201 - 34.1214, relating to fire standard compliant cigarettes. Sections 34.1201 – 34.12112 and 34.1214 are adopted with changes to the proposed text published in the October 24, 2008 issue of the *Texas Register* (33 TexReg 8714). Section 34.1213 is adopted without changes.

2. REASONED JUSTIFICATION. The new subchapter is necessary to implement the provisions of HB 2935, 80th Legislature, Regular Session, effective January 1, 2009. HB 2935 prescribes standards relating to fire standard compliant (FSC) cigarettes. FSC cigarettes are cigarettes which have a reduced propensity to continue burning when left unattended. In enacting HB 2935, the Legislature found that cigarettes are the leading cause of home fire fatalities in the United States, killing 700 to 900 people, smokers and nonsmokers alike, per year. According to the HB 2935 Senate bill analysis, many victims of smoking-material fire fatalities are not the smokers whose cigarettes started the fire: 34 percent are children of the smokers; 25 percent are neighbors or friends; 14 percent are spouses or partners; and 13 percent are parents. The Legislature found that there is technology available to produce a cigarette that has a reduced propensity to burn when left unattended. (Texas House Health & Human Services Committee, Bill Analysis (Senate Committee Report), HB 2935, 80th Legislature, Regular Session (June 15, 2007)). The purpose of HB 2935 is to reduce the number of fatalities resulting from fires caused by unattended cigarettes. All individuals and entities that sell or offer

to sell a cigarette in Texas after January 1, 2009, will be subject to Chapter 796 of the Health and Safety Code and the rules adopted to implement Chapter 796. Section 796.008 of the Health and Safety Code authorizes the State Fire Marshal to adopt rules to administer Chapter 796. The new subchapter is adopted to administer the provisions of HB 2935. The subchapter addresses (i) the purpose, applicability, and proper citation to the subchapter; (ii) definitions of terms used in the subchapter; (iii) cigarette manufacturers' general submission requirements of required and voluntary forms; (iv) existing cigarette inventories; (v) requirements relating to cigarette testing and alternative testing methods and performance standards; (vi) certification and changes to a certified cigarette; (vii) records maintenance; (viii) package marking; (ix) fees and forms; (x) penalties; and (xi) forfeiture of cigarettes.

On October 24, 2008, the proposed new subchapter was published in the *Texas Register*, and a public hearing on the rule was held on November 18, 2008. In response to comments received on the published proposal, the Department has revised some of the proposed text in the published rule. Additionally, this adoption includes minor clarification changes to several proposed provisions and to proposed Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette). None of the changes made to the proposed text, either as a result of comments or as a result of necessary clarification, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text as a result of comments. Section 34.1201 as adopted is changed to provide that the subchapter does not prohibit the sale of cigarettes solely for the purpose of cigarette assessment conducted by a

manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette by using only the quantity that is reasonably necessary for the assessment. This change was requested by commenters who pointed out that this exception is specified in the Health and Safety Code §796.014.

The definition of "marking" in proposed §34.1202(7) has been changed in the adoption to delete the phrase "that has been approved by the State Fire Marshal's Office (SFMO)." Commenters requested the deletion of the phrase stating that the qualifying language is unnecessary and potentially confusing. According to the commenters, other portions of the subchapter discuss and distinguish "proposed markings" and "approved markings."

Section 34.1204(a) as adopted is revised to change the reference to the year "2008" in the proposal to "the previous year." Therefore, adopted §34.1204(a) reads in pertinent part: "Pursuant to Section 2(a) of HB 2935 enacted by the 80th Legislature and subject to subsection (b) of this section, this subchapter does not prohibit a wholesaler from selling existing inventory of cigarettes on or after January 1, 2009, provided . . . and the quantity is comparable to the quantity of cigarettes purchased during the previous year." A commenter requested that proposed §34.1204(a) be revised to conform to Section 2(a) of HB 2935, 80th Legislature. Section 2(a) uses the phrase "the previous year" in lieu of the year "2008."

Section 34.1205(c) as adopted has been changed to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). Adopted 34.1205(c) reads: "This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code

Chapter 796 and this subchapter and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796." Proposed §34.1205(c) provided that the section did not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and the subchapter and have been subsequently altered only by changes to the brand or trade name or package description. This change resulted from commenters who recommended changing §34.1205(c) to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). Section 796.005(f) requires that a cigarette be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards. While the Department disagrees that proposed §34.1205(c) is inconsistent with the Health and Safety Code §796.005(f), there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8).

Section 34.1206(a)(1) as adopted provides that pursuant to §796.004 of the Health and Safety Code, a cigarette manufacturer may not certify a cigarette variety under the Health and Safety Code Chapter 796 and the adopted rules using a cigarette testing method and performance standard other than the method specified in the Health

and Safety Code §796.003 without the prior written authorization of the SFMO. The request to add the word “variety” to the certification requirement in proposed §34.1206(a)(1) was made by a commenter who noted that the testing and certification requirements in the Health and Safety Code apply to cigarette varieties, rather than cigarettes.

Section 34.1206(b) is changed to delete the phrase “or complaints concerning the cigarette variety.” According to a commenter, the Health and Safety Code Chapter 796 does not have a provision specifying that a review of an alternative test method may be initiated based on complaints concerning the cigarette variety.

Section 34.1206(d)(1) as adopted does not require that a cigarette manufacturer demonstrate to the satisfaction of the SFMO that the alternative test method is equivalent to the performance standard specified in the Health and Safety Code §796.003. A commenter pointed out that the Health and Safety Code §796.004 requires only that the manufacturer demonstrate that the performance standard is equivalent to the statutory standard, but does not require that the alternative test method itself be equivalent to the statutory performance standard.

Section 34.1207 as adopted exempts retailers from the restrictions on selling a cigarette variety after the certification period for the cigarette has expired. This change is consistent with the statutory requirement in the Health and Safety Code §796.005(d), which applies only to manufacturers and not to wholesale dealers or retailers. Therefore, the following provision is added to adopted §34.1207(d): “(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for

the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.”

Proposed subsection (b) is deleted from §34.1208 as adopted because of the concern that there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). One commenter suggested revising proposed §34.1208(b), relating to cigarette alterations requiring retesting, to conform to the Health and Safety Code §796.005(f). Another commenter recommended deleting proposed §34.1208(b). Both commenters voiced concern that the proposed requirement in §34.1208(b) for cigarette retesting for alterations of any of the cigarette's physical characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) goes beyond the requirement in the Health and Safety Code §796.005(f) that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards. While the Department disagrees that the requirement in §34.1208(b) is inconsistent with the Health and Safety Code §796.005(f), there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8).

Section 34.1209(a) as adopted does not contain the record maintenance requirement specified in proposed §34.1209(a) that records be kept for three years after the expiration of the certification period. Instead, adopted §34.1209(a) requires manufacturers to retain testing records for all cigarettes offered for sale within the previous three years. According to one commenter, proposed §34.1209(a) is not consistent with the Health and Safety Code §796.007, which requires that manufacturers retain testing records for all cigarettes offered for sale within the previous three years.

Section 34.1209 as adopted does not contain the requirements to retain documents that are in addition to the documents required to be maintained by the Health and Safety Code §796.007. Proposed §34.1209(a) and (b) required manufacturer retention of copies of all cigarette tests, information demonstrating testing laboratory compliance with the requirements of the Health and Safety Code §796.003 or §796.004, and information relating to changes made to altered cigarettes. A commenter objected to the record maintenance requirements specified in proposed §34.1209(a) and (b) because the subsections require retention of documents in addition to the documents required to be maintained by the Health and Safety Code §796.007.

Section 34.1210(c) as adopted is revised to add a paragraph (2) to specify that the SFMO must approve (i) a marking that is in use and approved for sale in another state or (ii) a marking that has the letters "FSC" for Fire Standard Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code. This addition was requested by

a commenter who pointed out that this requirement is specified in the Health and Safety Code §796.006(b).

Section 34.1214 as adopted provides that pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette. A commenter suggested adding “under Chapter 154, Texas Tax Code” to proposed §34.1214 to be consistent with the Health and Safety Code §796.010(c).

Sections throughout the subchapter are revised to allow for manufacturers' use of alternate certification forms and marking applications. Section 34.1203(b)(2) as adopted specifies the applicable procedure for a manufacturer requesting to use an alternate certification form or marking application. Section 34.1212(c)(1) as adopted specifies that manufacturers may submit an alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit an alternate certification form and alternate marking application. Section 34.1212(c)(2) as adopted specifies that the alternate forms must be approved by the SFMO. Section 34.1203(c)(3) as adopted specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with §34.1203 as adopted. Section 34.1203(c)(4) as adopted specifies that a manufacturer may submit a request to use an alternate form in accordance with adopted §34.1203. Section 34.1212(c)(4) as adopted specifies that submission of an alternate form is not required and is at the option of the

manufacturer. Additionally, §§34.1202(2), 34.1203(a)(1) and (2), 34.1203(b)(1) and (3)(A) and (3)(B), 34.1203(b)(4)(C)(i), 34.1207(a)(1)(B), 34.1207(d)(1), 34.1209(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (3), 34.1210(d), 34.1211(a), and the titles to §§34.1203 and 34.1212 as adopted address the filing of the alternate submission forms. The changes were made in response to comments recommending deletion of references throughout the proposed subchapter to a specific adopted form and amendment of language in numerous sections to allow for the submission of required information in alternate forms. Commenters stated that not adopting a specific form by rule allows the SFMO the flexibility to update and change the form without going through the rulemaking process. Commenters also asserted that it would be burdensome on manufacturers to submit the information required by the certification forms and marking applications in the exact format specified by the proposal. Commenters stated that they issue a single uniform certification form and marking application form of their own creation to all states with fire standard compliant cigarette programs when certifying a new cigarette. According to commenters, requiring manufacturers to submit the same information to Texas in an alternate form would impose administrative difficulties for manufacturers. Commenters proposed revisions to §§34.1202(2), 34.1207(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (2), 34.1210(d), 34.1211(a), 34.1212(a) and 34.1212(b) to implement this recommendation.

Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette) as adopted is revised to narrow the scope of the signature statement on page one of the form. The language above the signature line on page one of Form SF250 now reads: "I certify that the cigarette varieties listed on this form and attached to this

certification have been tested in accordance with and meet the performance standard in the Health and Safety Code §796.003 or 796.004 [~~comply with the Texas Health and Safety Code, Chapter 796 and the Texas Fire Standard Compliant Cigarette Rules~~]. By my signature, I verify that the information provided on this form and its attachments are true.” The change was made in response to a commenter who stated that the proposed signature statement went beyond the certification requirement specified in the Health and Safety Code §796.005(a).

Form SF250 as adopted is revised to specify that the signature statement relating to cigarette testing entities, testing methods, and testing and quality assurance programs on page two of the form is optional. The signature heading on page two of Form SF250 now reads: “SIGNATURE (This signature is optional and is not required.)” The change was made in response to a commenter who stated that the proposed signature statement went beyond the certification requirement specified in the Health and Safety Code §796.005(a).

The heading on page two of Form SF250 as adopted is entitled “FSCC Testing Information.” The change was made in response to a commenter who suggested that the title was more accurate than the proposed title of “FSCC Testing Form.”

The necessary clarification changes to the proposed text include the following. The reference to §34.1212 in the proposal regarding the adoption by reference of Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette) in the definition of “Certification” in §34.1202(2) is changed to read §34.1212(a). A minor clarification to §34.1203(b)(4)(C) has been made to add the word “notice” which was inadvertently omitted in the published proposal. Adopted 34.1203(b)(4)(C) reads in

pertinent part: "The SFMO will provide written notice as specified in subsection (c) of this section" The word "Section" is spelled out in §§34.1204(a) and (b) as adopted to conform to the language of HB 2935. In accordance with the definition of "SFMO" in adopted §34.1202(13), the acronym "SFMO" has been substituted for the phrase "State Fire Marshal's Office" or "State Fire Marshal" in adopted §§34.1206(a)(1), 34.1207(a)(1), 34.1210(b)(1) and (c)(1), and 34.1211(a). Two clarifications have been made to the adopted Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC)). The purpose of the form is to capture necessary information relating to certified cigarette varieties so that the SFMO may verify compliance with the Health and Safety Code Chapter 796. The third page of the form in item nine requests the Universal Product Code (UPC) for certified cigarette varieties. So that the SFMO may efficiently enforce the Health and Safety Code Chapter 796, item nine in the adopted form is revised to read "Package Universal Product Code (UPC)." In addition, item number ten, "Carton Universal Product Code (UPC)" is added in the adopted form. These revisions will also assist manufacturers by providing additional clarity in the certification process.

3. HOW THE SECTIONS WILL FUNCTION. Adopted §34.1201 sets forth the purpose, applicability, and proper citation for the adopted rules. The purpose is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes. Adopted §34.1201 specifies that the rules apply to all persons subject to the Health and Safety Code Chapter 796. The adopted section specifies that pursuant to the Health and Safety Code §796.001, entities that

sell or offer to sell cigarettes in Texas are subject to the Health and Safety Code Chapter 796 and the rules in Subchapter L, Chapter 34, 28 Texas Administrative Code. The section specifies that the subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment to evaluate consumer acceptance of the cigarette. The rules may be cited as "The Texas Fire Standard Compliant Cigarette Rules."

Adopted §34.1202 provides definitions for terms used in the new rules, including *agent, certification, cigarette, department, fire standard compliant cigarette, manufacturer; marking, packaging, person, retailer, sale, sell, SFMO, testing laboratory; variety, and wholesale dealer.*

Adopted §34.1203 specifies general procedural provisions regarding required and voluntary submissions. Adopted §34.1203(a) specifies that unless as provided otherwise in the subchapter, the section applies to each certification form and marking application, including those submitted in an alternate form, request for an alternate certification form or marking application, request for an alternative test method and performance standard, and applicable fees. New §34.1203(b)(1) specifies the address and website location at which manufacturers may obtain the forms promulgated in adopted §34.1212. Adopted §34.1203(b)(2) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in lieu of a promulgated form. Adopted §34.1203(b)(3)(A) provides the address for manufacturer submissions and specifies that to the extent the SFMO and the Department agree upon an acceptable means of electronic submission, submissions may be transmitted electronically. Adopted §34.1203(b)(3)(B) requires that submissions be complete before they will be accepted

by the SFMO and specifies that a complete form or application is one that provides all required information and is accompanied by all required fees. New §34.1203(b)(4) specifies SFMO initial actions upon receipt of initial submissions by entities regulated under the new subchapter. Under the adopted subsection, if the SFMO determines that a submitted marking application is incomplete, the SFMO must provide the manufacturer with written notice stating the reasons why the submitted marking application is incomplete. Adopted §34.1203(b)(4)(A) requires the SFMO to provide written notice to the manufacturer submitting the certification form, marking application, or request for an alternative testing method that the certification form or marking application has been accepted as complete or that the request for an alternative testing method has been approved or the submission has been disapproved. Disapproved submissions will be followed by a written explanation stating the reason for disapproval and what subsequent actions the submitter may take. New §34.1203(b)(4)(B) provides that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Adopted §34.1203(b)(5) specifies the procedures for manufacturer resubmissions. Adopted §34.1203(b)(5) provides that a manufacturer has 180 days in which to correct any submission insufficiencies before a new submission with new fees is required. Adopted §34.1203(c) specifies that notice from the SFMO will be given by personal service or mailed to the manufacturer's address on record with the SFMO.

Adopted §34.1204 specifies that a wholesale dealer or retailer is not prohibited from selling in Texas the person's existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1,

2009, and the quantity is comparable to the quantity of cigarettes purchased during the previous year. However, cigarettes that do not comply with the new subchapter may not be sold in Texas after January 1, 2010.

Adopted §34.1205 specifies testing requirements for each cigarette variety. New §34.1205(a) specifies that except as provided in adopted §34.1206, relating to alternative testing methods, each cigarette variety must be tested in compliance with the Health and Safety Code §796.003. Adopted §34.1205(b) provides that the manufacturer is solely responsible for ensuring that all cigarette varieties not approved for alternative testing methods under §34.1206 are tested in compliance with the Health and Safety Code §796.003. Adopted §34.1205(c) specifies that the section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and the new rules and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards.

Adopted §34.1206 specifies alternative testing methods. The Health and Safety Code §796.004 authorizes a cigarette manufacturer to propose an alternative test method and performance standard upon a determination by the State Fire Marshal that a cigarette cannot be tested in accordance with the Health and Safety Code §796.003. Adopted §34.1206(a) specifies the general requirements for manufacturer requests for an alternative test method and performance standard. Adopted §34.1206(b) specifies that the SFMO may initiate review of an alternative test method to make a determination based on the application of the cigarette manufacturer or the SFMO's own action. New §34.1206(c) specifies that if the SFMO determines that a variety of cigarette cannot be

tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard. New §34.1206(d) specifies the necessary showings that a manufacturer must provide in order for the SFMO to determine that the proposed alternative test method is sufficient. Adopted §34.1206(e) identifies the actions the manufacturer may take upon rejection of a proposal for an alternative test method. Adopted §34.1206(f) specifies the method for SFMO notification of manufacturers of determinations under the new section.

Adopted §34.1207 specifies information concerning the certification process, including submission of the required certification form, payment of certification fees, and the scope of certification. Adopted §34.1207(a) specifies that before a cigarette variety may be sold or offered for sale in this state, the manufacturer must complete and submit to the SFMO the promulgated certification form or an approved-for-use certification form and the required certification fee for each cigarette variety. Adopted §34.1207(b) specifies the circumstances allowing certification of numerous cigarette varieties in a single filing. Adopted §34.1207(c) specifies that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Under adopted §34.1207(d), the period for which the certification is valid is three years. New §34.1207(d) requires that in order for a manufacturer to continue selling a certified cigarette after the expiration of the certification period, the manufacturer must submit a new certification form accompanied by all required fees. New §34.1207(d)(3) specifies that a wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes

sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.

Adopted §34.1208 specifies what changes to a certified cigarette variety necessitate a separate certification. Adopted §34.1208 provides that if a certified cigarette variety is changed with respect to any one or more of the characteristics listed in the Health and Safety Code §796.005(b)(1) – (8), it is considered a different cigarette variety and must be certified as a new cigarette variety before it may be sold in this state. The cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) – (8) include (i) brand or trade name on the package; (ii) style, such as light or ultra light; (iii) length in millimeters; (iv) circumference in millimeters; (v) the flavor, such as menthol or chocolate, if applicable; (vi) filter or nonfilter; (vii) package description, such as soft pack or box; and (viii) marking approved in accordance with the Health and Safety Code §796.006.

Adopted §34.1209 specifies the record and document retention requirements for each cigarette variety of manufacturers subject to the Health and Safety Code Chapter 796. New §34.1209(a) requires maintaining for a period of not less than three years after the sale of a cigarette variety copies of reports of all tests conducted on the cigarette variety and a copy of the submitted certification form. Adopted §34.1209(b) requires that the manufacturer, not later than 60 calendar days following the date the manufacturer receives a written request from the SFMO for records and documentation, deliver the requested records and documents to the SFMO.

Adopted §34.1210 specifies requirements relating to the package marking, including general requirements in §34.1210(a); submission of the proposed marking in

§34.1210(b); and in §34.1210(c), SFMO procedure concerning approval or disapproval of the proposed marking. Adopted §34.1210(c)(1) specifies that the SFMO shall approve or disapprove a proposed marking within 10 business days after the date the complete marking application is received by the SFMO. Adopted §34.1210(c)(2) specifies that the SFMO shall approve a marking that is in use and approved for sale in another state or is a marking with the letters “FSC” appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code. Adopted §34.1210(c)(3) provides that if the marking is not disapproved within 10 business days after the completed application is received by the SFMO, the proposed marking is deemed approved. Adopted §34.1210(c)(4) and (5) specify that the SFMO will provide the manufacturer with notice of the SFMO’s approval or disapproval of the proposed marking. Adopted §34.1210(c)(5) Adopted §34.1210(d) prohibits a manufacturer from altering an approved marking before submitting a marking application submission form to the SFMO.

Adopted §34.1211 addresses certification filing fees. New §34.1211(a) requires that payment of the certification fee accompany completed certification submissions. Under adopted §34.1211(b), fees must be paid on a cumulative total basis for each certification filing. Adopted §34.1211(c) provides that fees are not refundable and are not transferable. Under adopted §34.1211(d) the fee for the initial certification filing is \$250 per cigarette variety and the renewal fee (required every three years) is \$250 per cigarette variety.

Section 34.1212 addresses promulgated and alternate certification forms and marking applications. Adopted §34.1212(a) adopts by reference Form Number SF250,

Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC). Adopted §34.1212(b) adopts by reference Form Number SF251, the Application for Fire Standard Compliant Cigarette Marking Approval. Adopted §§34.1212(a) and (b) describe the contents of the forms and indicate that both forms are available at the Department's website at www.tdi.state.tx.us/forms/form18.html. Adopted §34.1212(c) specifies that the information required by the promulgated certification form or marking application may be submitted in an alternate form in lieu of the promulgated certification form or marking application. Adopted §34.1212(c)(1) specifies that manufacturers may submit an alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit both an alternate certification form and an alternate marking application. Adopted §34.1212(c)(2) specifies that the alternate forms must be approved by the SFMO. Adopted §34.1203(c)(3) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with adopted §34.1203. Adopted §34.1212(c)(4) specifies that submission of an alternate submission form is not required and is at the option of the manufacturer.

Adopted §34.1213 specifies that a violation of the Health and Safety Code Chapter 796 or the adopted subchapter may subject a person to civil penalties as set forth in the Health and Safety Code §796.010.

Adopted §34.1214 specifies that pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that

before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§34.1201. Purpose, Applicability, and Title.

Comment: A commenter recommends adding language to proposed §34.1201 to specify that the subchapter does not prohibit the sale of cigarettes solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette by using only the quantity that is reasonably necessary for the assessment. This commenter states that this exception is specified in the Health and Safety Code §796.014.

Agency Response: The Department agrees with the comment and §34.1201 as adopted is revised to add subsection (c) to read: "This subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette. Only the quantity of cigarettes that is reasonably necessary for the assessment may be used."

§34.1202. Definitions.

Comment: A commenter recommends striking from the definition of "marking" in proposed §34.1202(7) the phrase "that has been approved by the State Fire Marshal's Office (SFMO)." The commenter explains that the qualifying language is unnecessary

and potentially confusing because other portions of the subchapter discuss and distinguish “proposed markings” and “approved markings.”

Agency Response: The Department agrees with the comment and §34.1202(7) as adopted is revised accordingly.

§34.1203. General Provisions Regarding Required and Voluntary Submissions.

Comment: A commenter requests the deletion of the language requiring “approval” or “disapproval” of certification forms in proposed §34.1203(b)(3) and (4). The commenter asserts that the Health and Safety Code does not specify that certification filings may be approved or disapproved by the SFMO.

Agency Response: The Department declines to make this change. The Health and Safety Code §796.005 requires that certifications be filed with the SFMO and that certifications include certain specified information and fees. The intent of the statute is to require manufacturers to file the information with the SFMO so that the SFMO may effectively and efficiently determine compliance with the Health and Safety Code Chapter 796. In order to effect this intent, it is necessary for the filed certifications to provide all of the statutorily required information. Those filed certifications that do not provide the statutorily required information do not meet the statutory standards, and therefore, the cigarettes that are the subject of the requested certification cannot be sold or offered for sale in this state. The means for determining the compliance with the statutory requirements for filed certifications consist of the “approval” and “disapproval” process. “Approval” and “disapproval” constitute the standard regulatory process for acceptance or rejection of forms filed with the Department.

§34.1204. Existing Inventory.

Comment: A commenter requests that proposed §34.1204(a) be revised to conform to Section 2(a) of HB 2935, 80th Legislature. Section 2(a) uses the phrase “the previous year” in lieu of the year “2008.”

Agency Response: The Department agrees with the comment and §34.1204(a) as adopted is revised accordingly.

§34.1205. Testing.

Comment: A commenter suggests revising proposed §34.1205(c) to specify that the section does not apply to cigarette varieties that have been subsequently altered only by changes that are not likely to alter their compliance with the reduced cigarette ignition propensity standards. The commenter recommends changing §34.1205(c) to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). The commenter voices concern that the proposed requirement to except previously certified cigarettes from retesting only for changes to the brand name or to the package type varies from the requirement in the Health and Safety Code §796.005(f). Section 796.005(f) states that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards.

Agency Response: The Department disagrees that proposed §34.1205(c) is inconsistent with the Health and Safety Code §796.005(f). However, there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition

propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8). Therefore, in response to the commenter's concern, §34.1205(c) as adopted is revised to read: "This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and this subchapter and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796 [~~to the brand or trade name or package description~~]."

§34.1206. Alternative Testing Methods.

Comment: A commenter requests that the word "variety" be added to the certification requirement in proposed §34.1206(a)(1). The commenter states that the testing and certification requirements in the Health and Safety Code apply to cigarette varieties, rather than cigarettes.

Agency Response: The Department agrees with the comment and §34.1206(a)(1) as adopted is revised accordingly.

Comment: A commenter suggests that the phrase "or complaints concerning the cigarette variety" be deleted from §34.1206(b). The commenter states that the Health

and Safety Code Chapter 796 has no provision specifying that a review of an alternative test method may be initiated based on complaints concerning the cigarette variety.

Agency Response: The Department agrees with the comment and §34.1206(b) as adopted is revised accordingly.

Comment: A commenter requests deletion of the requirement in §34.1206(d)(1) that a cigarette manufacturer demonstrate to the satisfaction of the SFMO that the alternative test method is equivalent to the performance standard specified in the Health and Safety Code §796.003. The commenter states that the Health and Safety Code §796.004 requires only that the manufacturer demonstrate that the performance standard is equivalent to the statutory standard, but does not require that the alternative test method itself be equivalent to the statutory performance standard.

Agency Response: The Department agrees with the comment and §34.1206(d)(1) as adopted is revised accordingly.

Comment: A commenter suggests deletion of the requirement in proposed §34.1206(d)(2)(B) that a manufacturer proposing an alternative test method approved in another state demonstrate that the state that has approved the alternative test method has a statute or regulation that includes a provision requiring the alternative performance method be equivalent to the statutory performance method. The commenter states that a statute or regulation comparable to the Health and Safety Code §796.004 would necessarily contain such a requirement and that the language in §34.1206(d) is therefore unnecessary.

Agency Response: The Department disagrees that the language is unnecessary and declines to make this change. The requirement adds clarity and necessary specificity

for manufacturers proposing an alternative test method and performance standard based on approval in another state. In addition, the requirement is necessary to implement §796.004(b) of the Health and Safety Code. Section §796.004(b) provides that an approving state used as the basis for approval in this state must have enacted reduced cigarette ignition propensity standards that include a test method and performance standard that are the same as those contained in the Health and Safety Code Chapter 796. Section 796.004(b) also requires that the approving state's officials approved the proposed alternative test method and performance standard as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to the Health and Safety Code §796.004.

§34.1207. Certification.

Comment: A commenter requests that proposed §34.1207(b) be amended to include a requirement that only cigarettes that comply with the performance standard specified in the Health and Safety Code §796.003(b) may be certified.

Agency Response: The Department disagrees that this change is consistent with the Health and Safety Code Chapter 796. The Health and Safety Code §796.005(a) allows for certification of a cigarette tested under either the performance standard specified in §796.003 or §796.004.

Comment: A commenter requests the addition of a subsection to proposed §34.1207 to except retailers from the restrictions on selling a cigarette variety resulting from an expired certification filing.

Agency Response: The Department agrees that the statutory requirement in the Health and Safety Code §796.005(d) applies only to manufacturers and not to wholesale dealers or retailers. Therefore, the following provision is added to adopted §34.1207(d): “(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.”

§34.1208. Changes to Cigarette Variety.

Comment: One commenter objects to the proposed requirement in §34.1208(a) that a change made by a manufacturer to a characteristic listed in the Health and Safety Code §796.005(b)(1) - (8) necessitates a separate certification for the altered cigarette. The commenter suggests that the Department revise §34.1208 to allow for an amendment of an existing certification without requiring an additional recertification fee.

Agency Response: The Department disagrees that the Health and Safety Code Chapter 796 allows for any amendment of an existing certification. The Health and Safety Code §796.002(3) prohibits the sale of a cigarette in this state unless it has been certified in accordance with the Health and Safety Code §796.005. The Health and Safety Code §796.005 specifies that a certification must include information on the characteristics of the cigarette as listed in §796.005(b)(1) – (8). Therefore, a change in one of the listed characteristics of the certified cigarette necessarily requires a new and separate certification.

Comment: A commenter suggests amending proposed §34.1208(a) to only require recertification for the characteristics listed in the Health and Safety Code §796.005(b)(1) – (7), rather than (1) – (8). The commenter explains that the element listed in the Health and Safety Code §796.005(b)(8), the approved cigarette marking, applies to all cigarette varieties and is not indicative of a specific cigarette variety.

Agency Response: The Department declines to make this change. Adopted §34.1202(15) specifies that a cigarette variety consists of all eight of the elements listed in the Health and Safety Code §796.005(b)(1) – (8). These eight characteristics will be used by the Department to identify and differentiate cigarette varieties. Because the Department's ability to enforce the Health and Safety Code Chapter 796 and the adopted rules is based on accurate identification of cigarette varieties, a change in the cigarette's marking would require a new certification. If there is no change in marking or other listed characteristic, no new certification is required.

Comment: One commenter suggests revising proposed §34.1208(b) relating to cigarette alterations requiring retesting to conform to the Health and Safety Code §796.005(f). Another commenter recommends deletion of proposed §34.1208(b). Both commenters voice concern that the proposed requirement in §34.1208(b) for cigarette retesting for alterations of any of the cigarette's physical characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) goes beyond the requirement in the Health and Safety Code §796.005(f). Section 796.005(f) requires that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards.

Agency Response: The Department disagrees that the requirement in §34.1208(b) is inconsistent with the Health and Safety Code §796.005(f). However, there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8). Therefore, subsection (b) is deleted from §34.1208 as adopted and the section title is revised to reflect this change.

§34.1209. Records Maintenance.

Comment: One commenter objects to the record maintenance requirements specified in proposed §34.1209(a) because the requirements are not consistent with the statutory requirement. According to the commenter, these requirements go beyond the recordkeeping requirements specified in the Health and Safety Code §796.007. The commenter states that the Health and Safety Code §796.007 requires that manufacturers retain testing records for all cigarettes offered for sale within the previous three years. However, proposed §34.1209 requires that records be kept for three years after the expiration of the certification period.

Agency Response: The Department agrees with the comment and §34.1209(a) as adopted is revised accordingly.

Comment: A commenter objects to the record maintenance requirements specified in proposed §34.1209(a) and (b) because the subsections require retention of documents in addition to the documents required to be maintained by the Health and Safety Code §796.007.

Agency Response: The Department agrees with the comment and §34.1209 as adopted is revised accordingly.

§34.1210. Marking of Package.

Comment: A commenter requests revising proposed §34.1210 to specify that the SFMO must approve a marking that is (i) in use and approved for sale in another state or (ii) that has the letters "FSC" for Fire Standard Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code. According to the commenter, this requirement is also specified in the Health and Safety Code §796.006(b).

Agency Response: The Department agrees with the comment. Section 34.1210(c) as adopted is revised to add a paragraph (2) to specify the requested provisions.

§34.1212. Promulgated and Alternate Certification Forms and Marking Applications.

Comment: A commenter requests that information regarding a manufacturer's testing and quality assurance program be deleted from the proposed form in §34.1212, the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC) Form, Form SF250. The commenter states that the Texas Health and Safety Code does not require

information regarding a manufacturer's testing and quality assurance program to be submitted with a certification.

Agency Response: The Department declines to make this change. The Health and Safety Code charges the SFMO with administration and enforcement of the Health and Safety Code Chapter 796. The information regarding testing and quality assurance is necessary to verify manufacturer compliance with the testing and quality assurance requirements of the Health and Safety Code Chapter 796.003.

§34.1214. Forfeiture Authority.

Comment: A commenter suggests adding "under Chapter 154, Texas Tax Code" to proposed §34.1214 to be consistent with the Health and Safety Code §796.010(c).

Agency Response: The Department agrees with the comment and §34.1214 as adopted is revised accordingly.

Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette).

Comment: A commenter requests that the signature statement on page one of Form SF250 be narrowed in its scope to conform to the certification requirement in the Health and Safety Code §796.005(a).

Agency Response: The Department agrees with the comment and the signature statement on page one of Form SF250 as adopted is revised accordingly.

Comment: A commenter suggests deletion of the signature statement and signature line on page two of Form SF250 relating to the cigarette testing entity, test method, and testing and quality assurance program. The commenter asserts that the Health and

Safety Code Chapter 796 does not require such an attestation to these items on the certification form.

Agency Response: The Department agrees that the Health and Safety Code does not require a signed certification relating to the cigarette testing entity, test method, and testing and quality assurance program, but disagrees that the signature statement and signature line should be deleted. The Health and Safety Code requires that cigarette testing entities, test methods, and testing and quality assurance programs meet certain minimum qualifications. The SFMO is charged with the administration and enforcement of the Health and Safety Code Chapter 796 and has a statutorily based interest in verifying compliance with the requirements of the Health and Safety Code Chapter 796. However, as a result of the comment, the Department has changed the signature heading on page two of Form SF250 to specify that the signature is optional and is not required.

Comment: A commenter suggests that the heading on page two of Form SF250 be revised to read "FSCC Testing Information." The commenter states that this title more accurately describes the content of the page.

Agency Response: The Department agrees with the comment and the heading on page two of Form SF250 as adopted is revised accordingly.

Adoption of Specific Forms in Rule and Use of Alternate Certification Form and Marking Application

Comment: A commenter suggests deleting references throughout the proposed subchapter to a specific adopted form and amending language in numerous sections to

allow for the submission of required information in alternate forms. The commenter states that not adopting a specific form by rule allows the SFMO the flexibility to update and change the form without going through the rulemaking process. The commenter also asserts that it would be burdensome on manufacturers to submit the information required by the certification forms and marking applications in the exact format specified by the proposal. The commenter states that they issue a single uniform certification form and marking application form of their own creation to all states with fire standard compliant cigarette programs when certifying a new cigarette, and that requiring manufacturers to submit the same information to Texas in an alternate form would impose administrative difficulties for manufacturers. The commenter proposes revisions to §§34.1202(2), 34.1207(a)(1), 34.1210(b)(1) and (b)(2), 34.1210(c)(1), 34.1210(c)(2), 34.1210(d), 34.1211(a), 34.1212(a) and 34.1212(b) to implement this suggestion.

Agency Response: The Department's position is that it has a statutorily based interest in requiring that all manufacturers submit required information in a manageable and uniform format. The Health and Safety Code charges the SFMO with administration and enforcement of the Health and Safety Code Chapter 796. This requirement is necessary for the SFMO to efficiently and effectively fulfill these administrative and enforcement responsibilities. However, in response to the commenter's concern, the Department has revised several sections throughout the subchapter as adopted to allow manufacturers to submit the information required by the certification form and marking application in alternate forms. Adopted §34.1203(b)(2) specifies the applicable procedure for a manufacturer request to use an alternate certification form or marking application. Adopted §34.1212(c)(1) specifies that manufacturers may submit an

alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit an alternate certification form and alternate marking application. Adopted §34.1212(c)(2) specifies that the alternate forms must be approved by the SFMO. Adopted §34.1203(c)(3) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with adopted §34.1203. Adopted §34.1203(c)(4) specifies that a manufacturer may submit a request to use an alternate form in accordance with adopted §34.1203. Adopted §34.1212(c)(4) specifies that submission of an alternate form is not required and is at the option of the manufacturer. Additionally, §§34.1202(2), 34.1203(a)(1) and (2), 34.1203(b)(1) and (3)(A) and (3)(B), 34.1203(b)(4)(C)(i), 34.1207(a)(1)(B), 34.1207(d)(1) and (3), 34.1209(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (3), 34.1210(d), 34.1211(a), and the titles to §§34.1203 and 34.1212 as adopted address the filing of the alternate submission forms.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None.

Against: None.

Neither for nor against, with recommended changes: R.J. Reynolds Tobacco Company and Altria Client Services, Incorporated, on behalf of Philip Morris USA Incorporated.

6. STATUTORY AUTHORITY. The new sections are adopted under the Health and Safety Code §796.008, the Government Code §§417.005 and 417.004, and the Insurance Code §36.001. The Health and Safety Code §796.008 specifies that the State Fire Marshal may adopt rules to administer the Health and Safety Code Chapter 796. The Government Code §417.005 specifies that the Commissioner of Insurance may, after consulting with the State Fire Marshal, adopt necessary rules to guide the State Fire Marshal in the investigation of arson, fire, and suspected arson and in the performance of other duties for the Commissioner of Insurance. The Government Code §417.004 specifies that the Commissioner of Insurance shall perform the rulemaking functions previously performed by the Texas Commission on Fire Protection. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

7. TEXT.

§34.1201. Purpose, Applicability, and Title.

(a) The purpose of this subchapter is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes in the State of Texas.

(b) This subchapter applies to all persons subject to the Health and Safety Code Chapter 796. Pursuant to the Health and Safety Code §796.001, entities located outside of Texas, including those located in other countries, are subject to Chapter 796 if they sell or offer to sell a cigarette in Texas.

(c) This subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette. Only the quantity of cigarettes that is reasonably necessary for the assessment may be used.

(d) This subchapter shall be known and may be cited as "The Texas Fire Standard Compliant Cigarette Rules."

§34.1202. Definitions. The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Agent--A person licensed by the Texas Comptroller of Public Accounts' Office to purchase and affix adhesive or meter stamps on packages of cigarettes.

(2) Certification--Completion and submission by a cigarette manufacturer of Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, adopted by reference in §34.1212(a) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications), or completion of an alternate certification form as specified in §34.1212(c) of this subchapter.

(3) Cigarette--A roll for smoking:

(A) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; or

(B) that is wrapped in any substance containing tobacco that, because of the roll's appearance, the type of tobacco used in the filler or the roll's

packaging and labeling, is likely to be offered to or purchased by a consumer as a cigarette.

(4) Department--Texas Department of Insurance.

(5) Fire Standard Compliant Cigarette--A cigarette variety that meets the requirements of the Health and Safety Code Chapter 796 regulating the testing, certification, marking, and sale of fire standard compliant cigarettes.

(6) Manufacturer--A person that manufactures or otherwise produces cigarettes for sale in this state, including cigarettes intended to be sold through an importer; or the first purchaser that intends to resell in this state cigarettes manufactured anywhere that the original manufacturer does not intend to be sold in this state.

(7) Marking--A manufacturer's designation on the package that is permanently stamped, engraved, embossed, or printed and that identifies the package as containing fire standard compliant cigarettes that meet the requirements of the Health and Safety Code §796.006 and §34.1210 of this subchapter (relating to Marking of Package).

(8) Packaging--Cigarette soft packs, hard packs, boxes, cartons, and cases.

(9) Person--An individual or entity, including a cigarette manufacturer, wholesale dealer, or retailer.

(10) Retailer--A person, other than a wholesale dealer, engaged in selling cigarettes or tobacco products.

(11) Sale--Any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means or any agreement. The term

includes, in addition to sales using cash or credit, the giving of a cigarette as a sample, prize, or gift and the exchange of a cigarette for any consideration other than money.

(12) Sell--To sell or to offer or agree to sell.

(13) SFMO--State Fire Marshal's Office.

(14) Testing laboratory--Laboratory meeting the accreditation standards specified in the Health and Safety Code §796.003 that performs the fire standard cigarette compliance test. The testing laboratory may be owned or controlled by the cigarette manufacturer.

(15) Variety--A type of cigarette marketed by the manufacturer as being distinct from other types of cigarettes on the basis of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8).

(16) Wholesale dealer--A person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, including a person who owns, operates, or maintains one or more cigarette or tobacco product vending machines in premises owned or occupied by another person.

§34.1203. General Provisions Regarding Required and Voluntary Submissions.

(a) Applicability. Except as otherwise provided in this subchapter, this section applies to each:

(1) certification form and marking application, including those submitted in an alternate form in accordance with §34.1212(c) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications);

(2) request for an alternate certification or marking application form;

(3) request for an alternative test method and performance standard; and

(4) applicable fee required to be submitted to the SFMO under the Health and Safety Code §796.005(e) and §34.1211 of this subchapter (relating to Certification Filing Fees).

(b) Submissions.

(1) Promulgated certification forms and marking applications. The certification form and marking application form specified in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications) may be obtained from the State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221 or the department's website at www.tdi.state.tx.us/forms/form18.html.

(2) Alternate certification form or marking application. A manufacturer may submit a request to the SFMO to use an alternate form as specified in §34.1212(c) of this subchapter in lieu of the promulgated certification form or marking application specified in §34.1212(a) and (b) of this subchapter. A manufacturer may request to use an alternate certification form or an alternate marking application, or both an alternate certification form and an alternate marking application. The request to use an alternate form should be submitted to the address specified in paragraph (1) of this subsection.

(3) Manner of submission.

(A) All certification forms, marking applications, including those submitted in an alternate form, requests for an alternative test method and performance standard, and applicable fees required to be submitted pursuant to the Health and Safety Code Chapter 796 and this subchapter must be submitted to the Fire Standard

Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221, or to the extent that the SFMO and department determine an acceptable means of electronic submission, a certification form, marking application, request for an alternate certification or marking application form, request for an alternative test method and performance standard, or applicable fee may be submitted electronically.

(B) Each certification form and marking application or approved-for-use alternate certification or marking application form submitted to the SFMO must be fully completed before it will be accepted and the filing will be considered for the purpose it was submitted. A completed certification form or marking application or completed alternate certification or marking application form is one that provides all required information and is accompanied by all required fees.

(4) SFMO initial actions on initial submissions.

(A) If the SFMO determines the submitted marking application is incomplete, the SFMO shall provide the manufacturer with written notice stating the reasons why the submitted marking application is incomplete. If this notification is not postmarked within 10 business days following the receipt of the marking application, the marking application is deemed approved as provided in §34.1210(c)(2) (relating to Marking of Package).

(B) A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing.

(C) The SFMO will provide written notice as specified in subsection (c) of this section that:

(i) the certification form or marking application has been accepted as complete or that the request for an alternative testing method or request for an alternate certification or marking application form has been approved; or

(ii) the submission has been disapproved. Disapprovals shall state in writing the reason the submission was not approved and that the person may take action as provided under paragraph (5) of this subsection.

(5) Resubmissions. If the submission is disapproved, the person making the submission may complete or correct the submission and resubmit it.

(A) If the corrected or completed submission is resubmitted to the SFMO within 180 days of receipt by the SFMO of the initial submission, the corrected or completed submission may be submitted without payment of additional fees.

(B) If the corrected or completed submission is not submitted within the 180-day time period, the corrected or completed submission constitutes a new submission and must be submitted with an additional payment to the SFMO of all required fees as specified in §34.1211 of this subchapter (relating to Certification Filing Fees).

(C) If the person chooses not to correct and resubmit the submission, the person shall have 30 days from the date of the last disapproval notice to make a written request for hearing to the SFMO. If a hearing is requested, the hearing will be granted, and the procedures for a contested case under the Administrative Procedure Act, Government Code Chapter 2001, shall apply.

(c) Written Notice from the SFMO. Notice by the SFMO, as required by provisions of this subchapter, shall be given by personal service or mailed, postage prepaid, to the mailing address of record for the submitting entity.

§34.1204. Existing Inventory.

(a) Pursuant to Section 2(a) of HB 2935 enacted by the 80th Legislature and subject to subsection (b) of this section, this subchapter does not prohibit a wholesale dealer or retailer from selling existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1, 2009, and the quantity is comparable to the quantity of cigarettes purchased during the previous year.

(b) Pursuant to Section 2(b) of HB 2935, a person may not sell or offer for sale a cigarette in this state that does not comply with this subchapter after January 1, 2010.

§34.1205. Testing.

(a) Except as provided in §34.1206 of this subchapter (relating to Alternative Testing Methods), each cigarette variety must be tested in compliance with the Health and Safety Code §796.003.

(b) The manufacturer is solely responsible for ensuring that all cigarette varieties not otherwise approved for alternative testing under §34.1206 of this subchapter are tested in compliance with the Health and Safety Code §796.003.

(c) This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and

this subchapter and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796.

§34.1206. Alternative Testing Methods.

(a) General Requirements.

(1) Pursuant to §796.004 of the Health and Safety Code, a cigarette manufacturer may not certify a cigarette variety under the Health and Safety Code Chapter 796 and this subchapter using a cigarette testing method and performance standard other than the method specified in the Health and Safety Code §796.003 without the prior written authorization of the SFMO.

(2) The manufacturer is solely responsible for ensuring that all cigarettes accepted for alternative testing under this section are tested in compliance with the alternative testing method and performance standard accepted by the SFMO for that cigarette variety.

(3) SFMO authorization to use an alternative testing method and performance standard must be granted for each specific cigarette variety that will be subject to the alternative testing method and performance standard.

(4) Accepted requests for an alternative testing method and performance standard are not transferable to other cigarette varieties and may not be used to test other cigarette varieties without the prior written authorization of the SFMO.

(b) Initiation of Review of Alternative Test Method. The SFMO may initiate a review of an alternative test method to make a determination under this subsection based on the application of the cigarette manufacturer or the SFMO's own action.

(c) Request for an Alternative Test Method.

(1) If the SFMO determines that a variety of cigarette cannot be tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard.

(2) A cigarette manufacturer may also seek authorization to use an alternative test method and performance standard approved in another state.

(3) Requests for authorization to use an alternative test method and performance standard must be submitted in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(d) SFMO Authorization.

(1) If a request is submitted under subsection (c)(1) of this section, the SFMO shall authorize the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that the performance standard proposed by the manufacturer is equivalent to the performance standard under the Health and Safety Code §796.003.

(2) If a request is submitted under subsection (c)(2) of this section, unless the SFMO can demonstrate a reasonable basis why the alternative test method should not be accepted under Health and Safety Code Chapter 796, the SFMO shall authorize

the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that:

(A) 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 Health and Safety Code Chapter 796; and

(B) the officials responsible for implementing those requirements have approved the proposed alternative test method and performance standard for the particular cigarette variety proposed by a manufacturer as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to the Health and Safety Code §796.004, including a provision that the performance standard proposed by the manufacturer is equivalent to, or greater than, the performance standard established under the Health and Safety Code §796.003.

(e) SFMO Rejection. If the requested alternative method is rejected by the SFMO, the cigarette manufacturer may proceed under §34.1203(b)(4) of this subchapter.

(f) SFMO Notice of Determination. Notice regarding the SFMO's determination concerning an alternative test method and performance standard requested pursuant to this section shall be made as described in §34.1203 of this subchapter.

§34.1207. Certification.

(a) Submission of Form and Payment of Fees. Before a cigarette variety may be sold or offered for sale in this state, the manufacturer of the cigarette variety must:

(1) complete and submit to the SFMO:

(A) the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, that is adopted by reference in §34.1212 of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications); or

(B) an approved-for-use alternate certification form as specified in §34.1212(c) of this subchapter; and

(2) pay the required certification fee for each variety of cigarette being certified as specified in the Health and Safety Code §796.005(e) and §34.1211 of this subchapter (relating to Certification Filing Fees).

(b) Scope of Certification. A manufacturer may certify any number of cigarette varieties in a single filing to the extent that the cigarette varieties:

(1) were all tested at the same testing laboratory;

(2) were tested using the same testing method and performance standard; and

(3) have the same manufacturer contact information.

(c) Validity Period for Certification. A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(d) Expiration of Certification.

(1) To continue to sell a cigarette variety that has been certified under this section the manufacturer of that cigarette variety must, within three years of the

certification date, submit a new complete Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, or an approved-for-use alternate certification form as specified in §34.1212(c) of this subchapter to the SFMO that is accompanied by all required certification renewal fees specified in §32.1211(d) of this subchapter.

(2) Each certification period shall expire at 11:59 p.m. on the third anniversary of the date the certification is filed with the SFMO.

(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.

§34.1208. Changes to Cigarette Variety. If a certified cigarette variety is changed with respect to any one or more of the items listed in the Health and Safety Code §796.005(b)(1) - (8), it is considered a different cigarette variety and must be certified as a new variety in conformance with §34.1207 of this subchapter (relating to Certification) before the cigarette variety may be sold in this state. Certification must meet all requirements specified in §34.1207 of this subchapter.

§34.1209. Records Maintenance.

(a) For each cigarette variety offered for sale, the manufacturer shall document and maintain for a period of not less than three years after the cigarette variety was offered for sale the following information:

(1) a copy of the submitted Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, for the cigarette variety, or the submitted alternate certification form as specified in §34.1212(c) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications); and

(2) copies of the reports of all tests conducted on that cigarette variety.

(b) The manufacturer shall, not later than 60 calendar days after the date the manufacturer receives a written request from the SFMO, make available to the SFMO copies of the records and documentation specified in the Health and Safety Code §796.007 and subsections (a) and (b) of this section. Except as agreed by the SFMO and the cigarette manufacturer, all copies requested to be made available under this section shall be delivered to the Fire Standard Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221.

§34.1210. Marking of Package.

(a) General Requirements.

(1) The packaging of all cigarettes varieties certified by the manufacturer to comply with the Health and Safety Code Chapter 796 shall be marked in accordance with the provisions of the Health and Safety Code §796.006.

(2) A manufacturer shall use only one marking method applied uniformly to all cigarette packaging of all varieties marketed by the manufacturer for compliance with the Health and Safety Code Chapter 796.

(b) Submission of Proposed Marking.

(1) Manufacturers must submit their proposed marking to the SFMO along with a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, that is adopted by reference in §34.1212 of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications), or with a completed approved-for-use alternate marking application form as specified in §34.1212(c) of this subchapter.

(2) The SFMO shall not be deemed to receive an Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or an approved-for-use alternate marking application on a Saturday, Sunday, or legal holiday. The day the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the approved-for-use alternate marking application is received by the SFMO shall not be included in computing the 10-day period.

(c) SFMO Approval or Disapproval.

(1) The SFMO shall approve or disapprove the proposed marking within 10 business days after the date the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the completed approved-for-use alternate marking application is received by the SFMO.

(2) The SFMO shall approve a marking that:

(A) is in use and approved for sale in another state; or

(B) has the letters "FSC" for Fire Standards Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code.

(3) Pursuant to the Health and Safety Code §796.006(b) if the marking is not disapproved within the 10 business days after the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the completed approved-for-use alternate marking application form is received, the proposed marking method shall be deemed approved.

(4) If the SFMO approves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written acknowledgement that the proposed marking method has been approved. Notice of approval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(5) If the SFMO disapproves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written notice that the marking method may not be used by the manufacturer. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter. The manufacturer may correct the application or appeal the disapproval as described in §34.1203 of this subchapter.

(d) Modification of Approved Marking. A manufacturer shall not modify an approved marking without first submitting a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, or a completed alternate marking application as specified in §34.1203(b)(2) of this subchapter as set forth in this section and obtaining prior approval of the proposed marking method by the SFMO.

§34.1211. Certification Filing Fees.

(a) Payment of the certification filing fee must accompany completed submissions of the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, or the approved-for-use alternate certification form. Fees must be paid by money order, check or other method accepted by the SFMO. Money orders and checks must be made payable to the Texas Department of Insurance.

(b) Fees must be paid on a cumulative total basis for each certification filing.

(c) Fees are non-refundable and non-transferable.

(d) Fees for the Fire Standard Compliant Cigarette Certification filing are as follows:

(1) initial fee--\$250 per cigarette variety; and

(2) renewal fee (every three years)--\$250 per cigarette variety.

§34.1212. Promulgated and Alternate Certification Forms and Marking Applications.

(a) Promulgated Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250. The commissioner adopts by reference the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, which contains instructions for completion of the form; information regarding certification fees; requires information to be provided regarding the certification type, cigarette manufacturer, testing entity, test method, testing and quality assurance program and cigarette variety information required by the Health and Safety

Code §796.005. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

(b) Promulgated Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251. The commissioner adopts by reference the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, which contains instructions for completion of the form and requires information to be provided regarding the cigarette manufacturer, marking approval, and a certification that the manufacturer will or has provided required information to cigarette wholesale dealers and agents. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

(c) Alternate Certification Form or Marking Application. The information required by the promulgated certification form or marking application may be submitted in an alternate form in lieu of the promulgated certification form or marking application.

(1) Manufacturers may submit either an alternate form in lieu of the promulgated certification form or an alternate form in lieu of the promulgated marking application or both an alternate certification form and alternate marking application. Manufacturers may submit an alternate certification form in conjunction with the promulgated Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251. Manufacturers may submit an alternate marking application in conjunction with the promulgated Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250.

(2) The alternate form must be approved by the SFMO before the form may be used to file the information required in the promulgated certification form or marking application.

(3) A manufacturer may submit a request to the SFMO to use an alternate form in accordance with §34.1203 (relating to General Provisions Regarding Required and Voluntary Submissions).

(4) Submission of an alternate form in lieu of the promulgated certification or marking application is not required and is at the option of the manufacturer.

§34.1213. Penalties. Violation of the Health and Safety Code Chapter 796 or this subchapter may subject a person to civil penalties as set forth in the Health and Safety Code §796.010.

§34.1214. Forfeiture Authority. Pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

CERTIFICATION. This agency hereby certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

08-1011

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 34. State Fire Marshal

Adopted Sections
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Issued at Austin, Texas, on Dec. 11th, 2008.

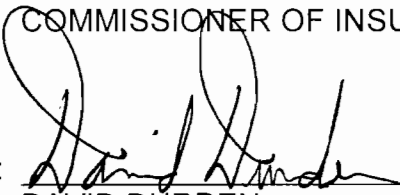


Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that new §§34.1201 – 34.1214 specified herein, concerning fire standard compliant cigarettes, are adopted.

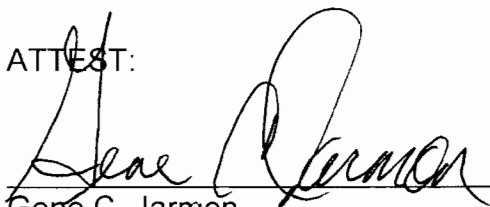
AND IT IS SO ORDERED.

MIKE GEESLIN
COMMISSIONER OF INSURANCE

By: 

DAVID DURDEN
Temporary Acting Commissioner
Via Commissioner's Order No. 08-0999

ATTEST:



Gene C. Jarmon
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. **08-1011**
DEC 11 2008