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Paul R. LePage
Governor

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
AND FINANCIAL REGULATION
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AUGUSTA, MAINE
04333-0035

Anne L. Head
Commissioner

To: Senator Christopher Rector, Chair
Representative Kerri Prescott, Chair
Joint Standing Committee on Labor, Commerce, Research and Economic
Development

From: Commissioner Anne L. Head
Department of Professional and Financial Regulation

Re: Report of Working Group as Required by Resolve Chapter 79
An Act to Protect Heating Oil Consumers

Date: November 30, 2011

The Labor, Commerce, Research and Economic Development Committee (LCRED) voted unanimously on May 17, 2011 to convert LD 1536, *An Act To Protect Heating Oil Consumers*, to a Resolve directing the Department of Professional and Financial Regulation to convene a working group to gather information on pre-paid home heating oil contracts and generate ideas about how to protect consumers in those arrangements. Resolve Chapter 79 was passed by the Legislature on June 8, 2011 and signed by Governor Paul R. LePage on June 14, 2011.

‘Resolve, Directing the Commissioner of Professional and Financial Regulation To Conduct Meetings To Review the Issue of Compliance with the Laws Governing Guaranteed Price Home Heating Oil, Kerosene and Liquefied Petroleum Gas Contracts’

‘Sec. 1 Commissioner of Professional and Financial Regulation to review options for reporting compliance with the laws governing guaranteed price home heating oil, kerosene and liquefied petroleum gas contracts. Resolved: That the Commissioner of Professional and Financial Regulation shall convene a working group with interested parties to determine what information could be included in a report from dealers of home heating oil, kerosene and liquefied petroleum gas to the State that would demonstrate their compliance with the current law that requires dealers to secure their prepaid guaranteed price home heating oil, kerosene and liquefied petroleum gas contracts, pursuant to the Maine Revised Statutes, Title 10, section 1110, and to develop recommendations to improve the State’s ability to ensure compliance with that law and with new reporting requirements that do not place any undue burden on the businesses involved; and be it further

Sec. 2 Reporting date established. Resolved: That, no later than January 15, 2012, the Commissioner of Professional and Financial Regulation shall submit a report of the findings and recommendations of the working group convened under section 1 to the Joint Standing Committee on Labor, Commerce, Research and Economic Development. That committee is authorized to introduce a bill on the subject matter of the report to the Second Regular Session of the 125th Legislature.’

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Resolve Chapter 79 required the Department to report back to the LCRED Committee on or before January 15, 2012 with recommendations about how to protect consumers. The resolve stipulated that the report may include draft legislation for the Committee's consideration.

Background

This legislative action resulted from several recent cases in which home heating oil retailers abruptly closed--leaving numerous consumers without fuel or the money they had paid to those oil retailers. It is estimated that at least 10 home heating oil retailers in Maine have gone out of business during the past 12 months. In several of those cases, the retailers owed heating oil to pre-paid customers.

The incidents of oil retailers closing continue. Since this Resolve was enacted, at least two more companies closed, either temporarily or permanently. Most recently, J & W Oil in West Paris discontinued service for a time, and Boothbay Energy in Boothbay is believed to have closed. It is unclear how many consumers are owed oil or a refund.

First Working Group Meeting

Commissioner Anne Head convened a working group meeting on May 26, 2011 at 1:00 p.m. in Room 302 of the Cross State Office Building. Representative Alexander Cornell Du Houx, sponsor of LD 1536, attended the meeting. Representative Kerri Prescott, who cosponsored the measure, also attended.

Participants: In addition to Commissioner Anne Head and the Legislators, participants in the May 26th meeting included Assistant Attorney General Linda Conti, Superintendent Will Lund and Julie Franchetti from the Bureau of Consumer Credit Protection, Jamie Py of the Maine Energy Marketers Association, and representatives from several home heating oil retailers: John Peters of Downeast Energy, David Martin of Webber Energy Fuels, Mike Estes of Estes Oil, Tom Myette of Midnight Oil Company, and Mark Gagnon of P. Gagnon and Son.

The meeting began with introductions and an overview about the Resolve's intent and the history that led to the legislation. During this initial part of the discussion, it was estimated that between 100-150 home heating oil retailers offer pre-paid contracts to consumers. Representatives from retailers participating in the working group meeting noted that these contracts are largely driven by consumers, who appreciate and expect them to be offered.

Holding People Accountable: Representatives Du Houx and Prescott made it clear that constituents believe the owners of Thibeault Energy of Brunswick, which closed in January, should be held legally accountable. Linda Conti provided significant detail about that case and others, and indicated that current Maine law makes it difficult to prove criminal violations in situations of this kind. She also explained that obtaining money for consumers through civil action can take a number of years and prove of little value. Conti said consumers may wish to pursue action through their local police department, indicating that the fuel company essentially "stole" from them.

Representatives Du Houx and Prescott emphasized that Maine people are looking to lawmakers to make sure Maine law provides better protections than those currently in place.

The working group discussed the possibility of a law change that would require home heating oil

retailers to maintain a bond or line of credit---to ensure that consumers have a financial safety net if a retailer suddenly closes or is otherwise unable to honor its end of the pre-paid contract. Regulators in the working group explained that businesses in other industries are required to meet a requirement of this kind. Representatives from all heating oil companies participating in the meeting opposed this idea, and suggested that banks and issuers of bonds may be unwilling to extend credit or issue bonds to cover pre-paid contracts.

Reporting Requirements Proposed: Representative Du Houx re-directed the focus of the discussion to 'reporting' requirements on the part of heating oil retailers. He said such requirements seem to be the priority of the LCRED Committee and he believes the working group should focus on developing reporting procedures, as well as penalties for failing to report or knowingly reporting erroneous information.

With regard to reporting, it was suggested that all companies planning to offer pre-paid contracts should be required to register/file a notice with a state regulatory agency, presumably the Department of Professional and Financial Regulation, well before the start of the next home heating season---perhaps in late winter or early spring.

The working group discussed a process in which registered companies would then file at least one report as the heating season begins---perhaps in October. This report, signed by the CEO or other responsible individual, would indicate (at a minimum) the amount of fuel pre-paid by consumers and the amount of wholesale heating oil the retailer has locked in place or "covered" with a wholesale distributor.

Penalty for Providing False Information: The heating oil retailer representatives in the working group meeting emphasized that the penalty for reporting false information, which might be perjury, would be enough to dissuade some of the 'bad apples' in the industry from entering into pre-paid contracts that they couldn't honor. The retailers conceded, however, that no registration and reporting requirements will completely prevent future problems associated with pre-paid contracts not being honored.

It was noted that having companies register with an 'intent to sell' letter, and then file a report prior to the heating season would serve as an "early warning" system to state regulators that something may be amiss with a particular company, and that this overall reporting system would be preventative in nature.

Need for Greater Education: There was a brief discussion about the need for an "educational campaign" to accompany the registration/reporting process, in order to encourage consumers to be aware of the risks associated with entering into a pre-paid contract and to encourage consumers to contact the State to make sure their home heating oil company is registered and in compliance.

It was pointed out that any eventual legislation may need to provide authority to the responsible State agency to receive complaints from the public, conduct investigations, etc. Another brief point made during the discussion was the fact that some New Hampshire heating oil retailers serve Maine homes, so they should be required to comply with any new regulatory requirements.

Follow-up and Additional Outreach

Notes from the first meeting were distributed to attendees. Feedback was requested. At this point, Commissioner Head and staff contacted the Maine State Housing Authority (MaineHousing), after it was realized that federal Low Income Home Energy Assistance Program (LIHEAP) funds are distributed by MaineHousing to oil retailers on behalf of LIHEAP recipients. Adam Krea of MaineHousing was asked for input. He indicated that his agency has been trying to determine how to enhance its protection of federal LIHEAP funds, in terms of losses incurred when oil dealers take those dollars and then go out of business.

Krea provided a list of 10 oil dealers who accepted LIHEAP since the beginning of 2010, but went out of business before delivering what was owed. In Krea's view, one of the fundamental problems is that requirements currently found in Title 10, §1110, aren't very effective. He expressed the opinion that bonding of oil retailers should be considered. Krea also noted that it's very difficult to obtain records from oil retailers after they close, in order to determine which customers are still owed oil. He suggested that some mechanism should be considered to give the Attorney General's Office more authority to obtain and review company records.

Draft Legislation and Second Meeting

Draft legislation, based on the first meeting, was distributed to participants. A second meeting of the working group was held by conference call on August 23, 2011 to discuss the draft bill.

Participants: Representatives Cornell Du Houx and Prescott took part in the call. Also participating were Commissioner Head, Assistant Attorney General Conti, Superintendent Lund from the Bureau of Consumer Credit Protection, Jamie Py of the Maine Energy Marketers Association, David Martin of Webber Energy Fuels, and Doug Dunbar from the Commissioner's Office. Adam Krea from MaineHousing was unavailable for the call, but his suggestion to require bonding (which was raised during the first meeting) was raised. As they did during the first working group meeting, representatives of oil retailers said bonding may prove difficult or impossible for smaller retailers.

The draft bill's focus on registering and reporting requirements for retail home heating fuel companies was generally acceptable to the working group. The discussion's focus turned to holding violators accountable---and using the threat of legal action as a deterrent to the few bad actors in the industry. It was agreed that the draft bill should be revised to establish a criminal code violation for knowingly providing false registration or reporting information. A copy of the draft bill accompanies this memo.

Proposed Replacement Amendment to LD 1536

An Act To Protect Heating Oil Consumers

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA §1110, sub-§§6 to 11 are enacted to read:

6. Registration. A dealer, wherever located, who offers prepaid contracts for home heating oil, kerosene or liquefied petroleum gas to residents of this state must register the dealer’s intent to offer such contracts using a form acceptable to the Department of Professional and Financial Regulation, on or before June 30 of each year. Each registration must be accompanied by an application fee of \$50 All fees received by the Department must be appropriated for use of the Department in administering this section, and shall not lapse and must be carried forward to the following fiscal year for the same purpose.

7. Report. A dealer who offers prepaid contracts for home heating oil, kerosene or liquefied petroleum gas shall file an annual report with the Department of Professional and Financial Regulation on or before October 31 of each year demonstrating how the dealer has satisfied the requirements of this section. The report shall be made on a form prescribed by the Department of Professional and Financial Regulation. The form shall conspicuously bear notification that states: “False statements made on this form are punishable as a Class D Crime pursuant to 10 M.R.S.A. § 1110(7) and 17-A M.R.S.A. § 453.” The report must be signed by the owner of the dealership. If the owner is a corporation, the report must be signed by a majority of the members of the board of directors. No fee shall be assessed for the annual report.

8. Confidential information. All information not otherwise available to the general public filed pursuant to subsections 6 and 7 is designated as confidential for purposes of Title 1, section 402, subsection 3, paragraph A.

9. Enforcement. The Department shall refer any violations to the Attorney General. The Attorney General may prosecute violations of subsection 7 as unsworn falsification under 17-A M.R.S.A. § 453. In addition a violation of any of the requirements of this section is a per se violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A through 214.

10. Complaint resolution and costs of ensuring compliance. The Department of Professional and Financial Regulation, may accept and act on complaints alleging violations of this section, and may make an investigation of any dealer whom it reasonably believes has engaged in violations of this section. For these purposes, the Department shall have free and reasonable access to the offices, places of business and records of the dealer, and may administer oaths, issue subpoenas and take such other steps as are reasonably necessary to adduce admissible evidence of noncompliance. If violations are found, the reasonable expenses of the Department for investigation and administration of this section are chargeable to the dealer.

11. Rules. The Attorney General and the Department of Professional and Financial Regulation may adopt joint rules to carry out the purposes of this section. Rules adopted pursuant to this subsection are routine technical rules as defined by Title 5, chapter 375, subchapter 2A.