

MAINE STATE LEGISLATURE

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121st MAINE LEGISLATURE

FIRST REGULAR SESSION-2003

Legislative Document

No. 1587

H.P. 1160

House of Representatives, April 28, 2003

An Act Regarding Distribution of Tobacco Products

Submitted by the Department of the Attorney General pursuant to Joint Rule 204.
Reference to the Committee on Taxation suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative LEMOINE of Old Orchard Beach.
Cosponsored by Senator STANLEY of Penobscot.

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

4 Sec. 1. 22 MRSA c. 263, sub-c. 4 is enacted to read:

6 SUBCHAPTER 4

8 TOBACCO PRODUCT MANUFACTURERS

10 §1580-L. Tobacco product manufacturer

12 1. Definitions. As used in this section, unless the
context otherwise indicates, the following terms have the
following meanings.

14 A. "Brand family" means all styles of cigarettes sold under
the same trademark and differentiated from one another by
means of additional modifiers, including, but not limited
to, menthol, lights, kings and 100s. "Brand family"
includes any brand name alone or in conjunction with any
other word, trademark, logo, symbol, motto, selling message,
recognizable pattern of colors or any other indicia of
product identification identical or similar to or
identifiable with a previously known brand of cigarettes.

24 B. "Cigarette" has the same meaning as in section 1580-H,
subsection 4.

28 C. "Distributor" means a person that is authorized to affix
tax stamps to packages or other containers of cigarettes
under Title 36, section 4366-A or any person that is
required to pay the excise tax imposed on cigarettes,
including roll-your-own tobacco, pursuant to Title 36,
chapter 703 or chapter 704.

34 D. "Nonparticipating manufacturer" means any tobacco
product manufacturer that is not a participating
manufacturer.

38 E. "Participating manufacturer" means a manufacturer as
defined in the Master Settlement Agreement, as that
agreement is defined in section 1580-H, subsection 5.

42 F. "Qualified escrow fund" has the same meaning as in
section 1580-H, subsection 6.

46 G. "Tobacco product manufacturer" has the same meaning as
in section 1580-H, subsection 9. "Tobacco product
manufacturer" also means a participating manufacturer or a
nonparticipating manufacturer.

50

2 H. "Units sold" has the same meaning as in section 1580-H,
 subsection 10.

4 2. Certification; participating manufacturer. Every
 participating manufacturer whose cigarettes are sold in this
6 State, whether directly or through a distributor, retailer or
 similar intermediary, shall execute and deliver in the manner
8 prescribed by the Attorney General a certification to the
 Attorney General no earlier than April 15th of each year and no
10 later than April 30th of each year under penalty of perjury that
 as of the date of certification the tobacco product manufacturer
12 is a participating manufacturer.

14 A. A participating manufacturer shall include in its
 certification a list of its brand families. The
16 participating manufacturer shall provide an updated list 30
 calendar days prior to any addition to or modification of
18 its brand families and deliver a supplemental certification
 to the Attorney General.

20 3. Certification; nonparticipating manufacturer. Every
 nonparticipating manufacturer whose cigarettes are sold in this
22 State, whether directly or through a distributor, retailer or
 similar intermediary, shall execute and deliver in the manner
24 prescribed by the Attorney General a certification to the
 Attorney General no earlier than April 15th of each year and no
26 later than April 30th of each year under penalty of perjury that
 as of the date of certification the tobacco product manufacturer
28 is in full compliance with subchapter 3.

30 A. A nonparticipating manufacturer shall include in its
 certification a complete list of all of its brand families
32 that:

34 (1) Separately lists for each brand family the number
 of units sold in the State during the preceding
36 calendar year;

38 (2) Indicates all of the nonparticipating
 manufacturer's brand families that have been sold in
40 the State at any time during the current calendar year;

42 (3) Indicates by an asterisk any brand family sold in
 the State during the preceding calendar year that is no
44 longer being sold in the State as of the date of
 certification; and
46

48 (4) Identifies by name and address any other
 manufacturer of the brand families in the preceding or
50 current calendar year.

2 The nonparticipating manufacturer shall provide an updated
3 list to the Attorney General 30 days prior to any addition
4 to or modification of its brand families and deliver a
5 supplemental certification to the Attorney General.

6 B. In addition to submitting the lists required in
7 paragraph A, a nonparticipating manufacturer shall also
8 state in its certification that:

10 (1) The nonparticipating manufacturer is registered to
11 do business in the State or has appointed a resident
12 agent for service of process and provided notice of the
13 registration as required under subsection 8;

14 (2) The nonparticipating manufacturer has:

16 (a) Established and continues to maintain a
17 qualified escrow fund pursuant to section 1580-I;
18 and

20 (b) Executed an escrow agreement, reviewed and
21 approved by the Attorney General, that governs the
22 qualified escrow fund;

24 (3) The nonparticipating manufacturer is in full
25 compliance with subchapter 3 and any rules adopted
26 pursuant to this section and subchapter 3;

28 (4) The name, address and telephone number of the
29 financial institution where the nonparticipating
30 manufacturer has established the qualified escrow fund
31 required under section 1580-I;

34 (5) The account number of the qualified escrow fund
35 and the subaccount number for the State;

36 (6) The amount the nonparticipating manufacturer
37 placed in the qualified escrow fund for cigarettes sold
38 in the State during the preceding calendar year, the
39 date and amount of each deposit and evidence or
40 verification as may be determined necessary by the
41 Attorney General to confirm the amount; and

44 (7) The amount and date of any withdrawal or transfer
45 of funds the nonparticipating manufacturer made at any
46 time from the qualified escrow fund or from any other
47 qualified escrow fund into which the nonparticipating
48 manufacturer has made escrow payments.

2 4. Tobacco product manufacturer; brand family. A tobacco
3 product manufacturer may not include a brand family in its
4 certification unless:

5 A. In the case of a participating manufacturer, the
6 participating manufacturer affirms that the brand family is
7 deemed to be the participating manufacturer's cigarettes for
8 purposes of calculating its payments under the Master
9 Settlement Agreement for the relevant year, in the volume
10 and shares determined pursuant to the Master Settlement
11 Agreement; and

12 B. In the case of a nonparticipating manufacturer, the
13 nonparticipating manufacturer affirms that the brand family
14 is deemed to be the nonparticipating manufacturer's
15 cigarettes for purposes of subchapter 3.

16 Nothing in this subsection may be construed as limiting or
17 otherwise affecting the State's right to maintain that a
18 brand family constitutes cigarettes of a different tobacco
19 product manufacturer for purposes of calculating payments
20 under the Master Settlement Agreement or for purposes of
21 subchapter 3.

22 5. Maintain invoices. A tobacco product manufacturer of
23 any cigarettes sold in this State shall maintain all invoices and
24 documentation of sales and other information relied upon for
25 certification for a period of 5 years unless otherwise required
26 by law to maintain those invoices and documentation of sales and
27 other information for a greater period of time.

28 6. Directory of cigarettes. The Attorney General shall
29 develop and make available for public inspection a directory
30 listing all tobacco product manufacturers that have provided
31 accurate certifications conforming to the requirements of this
32 section and all brand families that are listed in the
33 certifications.

34 A. The Attorney General may not include or retain in the
35 directory the name or brand families of any nonparticipating
36 manufacturer that fails to provide the required
37 certification or whose certification the Attorney General
38 determines is not in compliance with subsection 3,
39 paragraphs A and B, unless the Attorney General has
40 determined that the nonparticipating manufacturer is no
41 longer in violation of subsection 3, paragraphs A and B.

42 B. Neither a tobacco product manufacturer nor brand family
43 may be included or retained in the directory if the Attorney
44 General concludes that:

2 (1) In the case of a nonparticipating manufacturer,
4 all escrow payments required pursuant to subchapter 3
6 for any period for any brand family, whether or not
8 listed by the nonparticipating manufacturer, have not
 been fully deposited into a qualified escrow fund
 governed by an escrow agreement that has been approved
 by the Attorney General; or

10 (2) All outstanding final judgments, including
12 interest on the judgment, for violations of subchapter
14 3 have not been fully satisfied for the brand family or
 the tobacco product manufacturer.

16 C. The Attorney General shall update the directory as
18 necessary in order to correct mistakes and to add or remove
20 a tobacco product manufacturer or brand family to keep the
22 directory in conformity with the requirements of this
 section. A determination by the Attorney General not to
 list or to remove from the directory a brand family or
 tobacco product manufacturer is a final agency action as
 defined in Title 5, section 8002.

24 7. Prohibition against stamping or sale of cigarettes. It
26 is unlawful for any person to affix a tax stamp to a package or
28 other container of cigarettes of a tobacco product manufacturer
30 or brand family not included in the directory or to distribute,
 sell or offer or possess for sale in this State cigarettes of a
 tobacco product manufacturer or brand family not included in the
 directory.

32 A person who violates this subsection engages in an unfair and
34 deceptive act in violation of the Maine Unfair Trade Practices
 Act.

36 8. Agent for service of process. Any nonresident or
38 foreign nonparticipating manufacturer that has not registered to
40 do business in the State as a foreign corporation or business
42 entity shall, as a condition precedent to having its brand
44 families listed or retained in the directory, appoint and
46 continually engage without interruption the services of an agent
48 in this State for the service of process concerning or arising
 out of the enforcement of this section and subchapter 3. Such
 service constitutes legal and valid service of process on the
 nonparticipating manufacturer. The nonparticipating manufacturer
 shall provide the name, address, phone number and proof of the
 appointment and availability of the agent to the Attorney General.

50 The nonparticipating manufacturer shall provide notice to the
 Attorney General 30 days prior to termination of the authority of

2 an agent and shall further provide proof to the satisfaction of
3 the Attorney General of the appointment of a new agent no less
4 than 5 days prior to the termination of an existing agent
5 appointment. In the event an agent terminates that agent's
6 appointment by the nonparticipating manufacturer, the
7 nonparticipating manufacturer shall notify the Attorney General
8 of the termination within 5 days and shall include proof to the
9 satisfaction of the Attorney General of the appointment of a new
10 agent.

11 **9. Reporting by distributors.** No later than 20 days after
12 the end of each calendar quarter and more frequently if so
13 directed by the Attorney General, each distributor shall submit
14 information as the Attorney General requires to facilitate
15 compliance with this section, including, but not limited to, a
16 list by brand family of the total number of cigarettes upon which
17 the distributor affixed tax stamps during the previous calendar
18 quarter or, in the case of roll-your-own tobacco, the equivalent
19 stick count for which the distributor paid the tax due. The
20 distributor shall maintain all invoices and documentation of
21 sales of all nonparticipating manufacturer cigarettes and any
22 other information relied upon in reporting to the Attorney
23 General for a period of 5 years.

24 **10. Disclosure of information.** Notwithstanding any other
25 provision of law, the Department of Administrative and Financial
26 Services, Bureau of Revenue Services is authorized to disclose to
27 the Attorney General any tax information received by the Bureau
28 of Revenue Services and requested by the Attorney General for
29 purposes of determining compliance with and enforcing the
30 provisions of this section. The Attorney General may share any
31 information received under this section, other than information
32 received from the Bureau of Revenue Services, with other federal,
33 State or local agencies but only for purposes of enforcement of
34 this section, subchapter 3 or corresponding laws of other states.

35 **11. Verification of qualified escrow fund.** The Attorney
36 General may require at any time that the nonparticipating
37 manufacturer provide from the financial institution in which the
38 nonparticipating manufacturer has established a qualified escrow
39 fund for the purpose of compliance with subchapter 3 proof of the
40 amount of money in the qualified escrow fund being held on behalf
41 of the State, the dates of deposits and a listing of the amounts
42 of all withdrawals from the fund and the dates of the withdrawals.

43 **12. Requests for additional information.** The Attorney
44 General may require a distributor or tobacco product manufacturer
45 to submit any additional information, including, but not limited
46 to, samples of the packaging or labeling of each brand family
47 to, samples of the packaging or labeling of each brand family
48 to, samples of the packaging or labeling of each brand family

2 necessary to enable the Attorney General to determine whether a
3 tobacco product manufacturer is in compliance with this section.

4 13. Escrow installments. To promote compliance with the
5 provisions of this section, the Attorney General may adopt rules
6 requiring a tobacco product manufacturer subject to the
7 requirements of subsection 3, paragraph A to make the required
8 deposits in the qualified escrow fund in installments during the
9 year in which the sales covered by the deposits are made. The
10 Attorney General may require sufficient information to enable the
11 Attorney General to determine the adequacy of the amount of the
12 installment deposit.

13 14. Rules. The Attorney General may adopt rules necessary
14 to carry out the purposes of this section. Rules adopted
15 pursuant to this section are routine technical rules as defined
16 in Title 5, chapter 375, subchapter 2-A.

17 15. Unlawful acts. It is unlawful for a person to:

18 A. Sell or distribute cigarettes in violation of subsection
19 7; or

20 B. Acquire, hold, own, possess, transport, import or cause
21 to be imported cigarettes that the person knows or should
22 have known are intended for distribution or sale in the
23 State in violation of subsection 7.

24 16. Criminal penalty. A violation of this section is a
25 Class E crime except that violation of this section is a Class D
26 crime when the person has one or more prior convictions for
27 violation of this section. For purposes of this subsection, the
28 date of the prior conviction must precede the commission of the
29 offense being enhanced by no more than 10 years. The date of
30 conviction is deemed the date that sentence is imposed.

31 Each stamp affixed and each offer to sell cigarettes in violation
32 of subsection 7 constitutes a separate violation.

33 17. Contraband; seizure. Cigarettes that have been sold,
34 offered for sale or possessed for sale in this State in violation
35 of subsection 7 are deemed contraband under Title 36, section
36 4372-A and the cigarettes are subject to seizure and forfeiture
37 as provided in section 4372-A. All cigarettes so seized and
38 forfeited must be destroyed and may not be resold.

39 18. Injunction. The Attorney General may seek an
40 injunction to restrain a threatened or actual violation of
41 subsection 7, 9 or 12 and to compel compliance with these
42 subsections.

2 **19. Recovery of costs.** In any action brought by the State
4 to enforce this section, the State is entitled to recover the
 costs of investigation, expert witness fees, costs of the action
 and reasonable attorney's fees.

6
8 **20. Profits.** If a court determines that a person has
 violated this section, the court shall order any profits, gain,
10 gross receipts or other benefit from the violation to be paid to
 the Fund for a Healthy Maine. Unless otherwise expressly
12 provided, the remedies or penalties provided by this section are
 cumulative to each other and to the remedies or penalties
 available under all other laws of this State.

14
16 **21. Construction; severability.** If a court of competent
 jurisdiction finds that the provisions of this section and of
18 subchapter 3 conflict, then the provisions of subchapter 3
 control. If any portion of this section causes subchapter 3 to
20 no longer constitute a qualifying or model statute, as those
 terms are defined in the Master Settlement Agreement, then that
 portion of this section is not valid.

22
24 **Sec. 2. 36 MRSA §4362-A, sub-§3,** as amended by PL 2001, c.
 526, §3, is further amended to read:

26 **3. Expiration and reissuance.** A distributor's license
28 expires one year from the 30th day of June next succeeding the
 date of issuance unless sooner revoked by the assessor pursuant
30 to subsection 5 or unless the business with respect to which the
 license was issued is sold, in either of which cases the holder
 of the license shall immediately surrender it to the assessor.

32 A person may not be issued a distributor's license or granted a
34 renewal of a license unless the person certifies in writing to
36 the Attorney General that the person is in compliance with Title
 22, section 1580-L.

38 **Sec. 3. 36 MRSA §4383,** as enacted by PL 2001, c. 322, §1, is
40 repealed.

42 **Sec. 4. 36 MRSA §4402,** as amended by PL 2001, c. 526, §4, is
 further amended by adding at the end a new paragraph to read:

44 A person may not be issued a license or granted a renewal of
46 a license unless the person certifies in writing to the Attorney
 General that the person is in compliance with Title 22, section
 1580-L.

