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February 1, 2008

Senator Joseph C. Brannigan, Senate Chair
Representative Anne C. Perry, House Chair
Joint Standing Committee on Health and Human Services
123rd Maine Legislature
State House
Augusta, Maine 04333

RE: Report on the preliminary implementation of Public Law 2007, Chapter 467, An Act
Concerning Certain Flavored Cigarettes and Flavored Cigars and Hard Snuff

Dear Senator Brannigan and Representative Perry:

Attached please find the Attorney General's report on the preliminary implementation of Public Law 2007, Chapter 467. The Office of the Attorney General is directed to submit this report pursuant to Section 4 of the above mentioned law.

Very truly yours,

A handwritten signature in black ink that reads 'G. Steven Rowe'.

G. STEVEN ROWE
Attorney General

Enc.

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Report on Preliminary Implementation of Public Law 2007 Chapter 467

TO: Senator Joseph C. Brannigan, Senate Chair
Representative Anne C. Perry, House Chair
Joint Standing Committee on Health and Human Services

FROM: G. Steven Rowe, Attorney General

DATE: February 1, 2008

I. Rulemaking Background

The Office of the Attorney General filed provisionally adopted rule Chapter 10: RULES FOR EXEMPTIONS TO THE BAN ON FLAVORED CIGARETTES AND CIGARS on January 15, 2008 as required by PL 2007 Ch. 467. The Office of the Attorney General held a public hearing on December 6, 2007 regarding the proposed rule and both oral and written comments were received. In response to these comments, the proposed rules were amended. The Office of the Attorney General closely followed the language of the statute and the intent of the Legislature and provisionally adopted rules that (1) establish a means to verify¹ that tobacco products asserted to be first on the market prior to January 1, 1985 were in fact first on the market prior to that date and are sufficiently alike to be considered the same product, and (2) establish a process to exempt certain tobacco products introduced to the market after January 1, 1985 consistent with the standards set forth in the statute. The rules require manufacturers seeking exemption from the statutory prohibition on the sale of flavored cigarettes and cigars to submit specific product information sufficient to allow the Office of the Attorney General to verify the manufacturer's statement for the first category of exemptions and to determine compliance with the statutory standard for the second category of exemptions. The information required by these rules allows evaluation of each criterion set forth in the statute in determining whether a product qualifies for an exemption.

¹ In developing the criteria under this section the Office of the Attorney General relied on the plain meaning of the statutory term 'verify'. "Verify" 1: to confirm or substantiate in law by oath 2: to establish the truth, accuracy or reality of, *Merriam Webster's Collegiate® Dictionary, Tenth Edition principal copyright 1993.*

II. Recommended Amendments

In promulgating the Exemptions to the Ban on Flavored Cigarette and Cigar Exemption Rules, several issues came to our attention which we believe warrant the Committee's attention at this juncture. These issues are identified below along with specific recommendations for the Committee's review.

A. "Encourage the Initiation of Smoking"

One issue the Office of the Attorney General would like to bring to the attention of the Committee is the language in §1560-D(5) requiring that the flavored cigarette or cigar first on the market after January 1, 1985 demonstrate that the various product evaluation criteria "...do not directly or indirectly target youth or encourage the initiation of smoking" (emphasis added). This underlined language in the statute might be interpreted as restricting the issuance of exemptions for flavored cigarettes/cigars to those products that do not "encourage the initiation of smoking" by any age group. However, as you know, smoking by adults is legal and adults may lawfully begin smoking or be encouraged to initiate smoking at any time once they reach legal age. This issue with § 1560-D(5) could readily be addressed by either deleting the phrase "or encourage the initiation of smoking" from the statute or amending the subsection to read "or encourage the initiation of smoking by youth".

B. Exemption Duration & Withdrawal of Exemptions

A second issue to consider is that, although the statute establishes a mechanism to exempt from the statutory prohibition on the sales of flavored cigarettes or cigars certain products, the statutory exemption, once granted, is open ended. The statute does not provide a time limit to these exemptions and no mechanism is provided for renewing exemption applications by demonstrating continued compliance with the statutory standard. The provisionally adopted rules do not address this situation since the enabling statute seems to authorize only one-time open ended exemption. The Office of the Attorney General recommends that 22 M.R.S.A. § 1560-D be amended to limit an exemption to three to five years. We strongly recommend that in no event should the exemption duration be longer than five years. An exemption duration of three to five years reasonably balances the need to ensure compliance with the exemption standards against concerns about any potential administrative burdens on manufacturers in filing new applications upon expiration of the granted exemption.

In addition, while we firmly believe that the Attorney General has the inherent power to withdraw exemptions granted under Section 1560-D(2)(A) and (5) if a material change in any evaluation criteria of the product occurs such that an exemption would not have been granted, we also recommend that the statute be amended to include a provision that clarifies this authority for the regulated community. We recommend the following language:

The Attorney General may withdraw exemptions when a material change occurs in any of the evaluation criteria of the product that served as the basis for the grant of that exemption.

This provision makes clear to the regulated community that compliance with the exemption criteria is a continuing, rather than a one-time obligation.

C. Definition of “Brand Style” in both Statute and Rule

The Office of the Attorney General also recommends that the Committee consider adding a definition for the term “brand style”, specifically that 22 M.R.S.A. §1560-D(1) be amended to define the term “brand style” similarly to the way that term is defined in the Federal Cigarette Labeling and Advertising Act, with the addition of ‘cigars’, as follows:

“[B]rand style" means a variety of cigarettes or cigars distinguished by the tobacco used, tar and nicotine content flavoring used, size of the cigarette or cigar, filtration on the cigarette, or packaging.

This specific definition was not included in the proposed or provisionally adopted rule, and we believe it is for the Committee to choose to adopt the above Federal-law-based definition. We recommend that this definition be added to the statutory scheme because this is one of the criteria the Office of the Attorney General must review in determining whether to grant an exemption pursuant to Section 1560-D(5). We recommend this particular definition because it is specific and clear, conforms with existing Federal law and is one with which the regulated community is already familiar. In addition, we recommend that the provisionally adopted rules be amended by the Legislature to track the above definition.

III. Implementation

After the Legislative approval of the rules and action on any proposed legislation, the Office of the Attorney General anticipates sufficient time, prior to the July 1, 2009 effective date of the ban on flavored cigarettes and flavored cigars, to finalize implementation of the rules and to review manufacturers’ filings for exemptions subject to the guidelines and deadlines set out in the rules.