

940 CMR 22.00: SALES AND DISTRIBUTION OF CIGARS IN MASSACHUSETTS

Section

- 22.01: Purpose
- 22.02: Scope
- 22.03: Definitions
- 22.04: Labeling Requirements
- 22.05: Advertising Requirements
- 22.06: Point of Sale Restrictions
- 22.07: Relation to Other Laws
- 22.08: Severability
- 22.09: Effective Date

22.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 22.00 relating to cigar manufacturers and retailers pursuant to his authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 22.00 is to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts whereby:

- (1) Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts; and
- (2) the incidence of cigar use by children under legal age is addressed by imposing requirements and restrictions on the sale and distribution of cigars in Massachusetts in order to prevent access to such products by underage consumers.

22.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 22.00. 940 CMR 22.00 is designed to supplement existing regulations. All references in 940 CMR 22.00 to statutes and other regulations shall include amendments made to such statutes and regulations after the effective date of 940 CMR 22.00.

940 CMR 22.00 shall apply to any person who manufactures, packages, imports for sale, sells or distributes within Massachusetts cigars and little cigars as defined in these regulations.

940 CMR 22.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of any tobacco product other than cigars and little cigars as defined in 940 CMR 22.00.

22.03: Definitions

Adult-Only Retail Facility means a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time.

Advertisement (including the terms "advertise" and "advertising") means any oral, written, graphic, or pictorial statement, made by, or on behalf of, any person who manufactures, packages, imports for sale or distributes or sells within Massachusetts cigars or little cigars, the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigar or little cigars. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less. The terms "advertisement," "advertise," and "advertising" shall be interpreted in a manner which is consistent with the definition of the same terms in the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

22.03: continued

Brand Name means a 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, those used for any brand of cigars or little cigars.

Cigar means any roll of tobacco wrapped in either leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*), and as to which 1,000 units weigh more than three pounds.

Clear and Conspicuous shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Distributor means any person who furthers the distribution of cigars or little cigars, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Hand rolled cigar means any cigar which is not a manufactured cigar.

Little cigar means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*) and as to which one thousand units weigh not more than three pounds.

Manufactured cigar means any roll of tobacco wrapped by machine in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.*).

Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigar or little cigar.

Package means a pack, box, carton, container or individual wrapping of any kind in which cigars or little cigars are offered for sale, sold, or otherwise distributed to consumers.

Playground means any outdoor premises or grounds owned or lawfully operated by or on behalf of, the State, any State agency, or any political subdivision of the State, or any public, private or parochial school, any child day care center or any youth center, which contains any device, structure or implement, fixed or portable, used or intended to be used by persons under the age of 18 for recreational or athletic purposes including, but not limited to, play equipment such as a sliding board, swing, jungle gym, sandbox, climbing bar, wading pool, obstacle course, swimming pool, see-saw, baseball diamond, athletic field, or basketball court.

Point of sale means any location at which a consumer can purchase or otherwise obtain cigars or little cigars for personal consumption.

Retailer means any person who sells cigars or little cigars to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Sale or distribution shall be defined to include sampling or any other distribution not for sale.

Secret shopper program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure compliance by the outlet's employees with laws prohibiting the sale of tobacco to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

22.04: Labeling Requirements

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or manufactured little cigar the package of which does not bear, in accordance with the requirements of 940 CMR 22.00, one of the following labels:

WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug.

WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products.

(2) Label Format. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or little cigar the package of which fails to contain the warning statement required by 940 CMR 22.04(1) in the following format:

(a) On the front or top of the package, whichever surface area is larger, in a clear and conspicuous format, comprising at least 25% of the front or top panel of the package, with the warning statement capitalized as indicated in 940 CMR 22.04(1), with letters that are either white against a black background or black against a white background, and are in contrast with all other printed material on the package;

(b) The labels may either be printed directly on the package or preprinted, provided that any preprinted label is firmly attached to the package in such a way that the surface of the label is destroyed before the label can be removed from the package;

(c) If other warnings are required by any other Federal, State, or local governmental entity, the total area of all required warnings need not exceed 25% of the front or top of the package, provided that the warnings required by 940 CMR 22.00 remain clear and conspicuous.

(d) Label Rotation. It shall be an unfair or deceptive act or practice for any person to manufacture or import for sale or distribution within Massachusetts any brand of manufactured cigar or little cigar unless the label statements required in 940 CMR 22.04(1) are rotated by each manufacturer or importer regularly in alternating sequence on the packages of each brand of manufactured cigars or little cigars manufactured by the manufacturer or importer and in any advertisements for each such brand of manufactured cigars or little cigars.

22.05: Advertising Requirements

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of the warning statements specified in 940 CMR 22.04, rotated in accordance with the requirements of 940 CMR 22.04.

(2) Advertising Format. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the warning statement required by 940 CMR 22.04 comprises 20% of the area of the advertisement and is in the format required by 940 CMR 22.04(2).

22.06: Point of Sale Restrictions

(1) Retail Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars;

(b) breaking or otherwise opening any little cigar package to sell or distribute individual little cigars or a number of unpackaged or repackaged little cigars;

(c) distribution of cigars or little cigars through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 22.00;

(d) sale or distribution of cigars or little cigars if any apparel or other merchandise (other than cigars or little cigars) which bears a brand name is offered in consideration of the purchase.

22.06: continued

(2) Retail Outlet Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

- (a) Selling cigars or little cigars in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 22.00;
- (b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigars or little cigars is 18 years of age or older. No such verification is required for any person who appears 27 years of age or older.
- (c) Using self-service displays of cigars or little cigars;
- (d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel;
- (e) As to any retailer who sells hand rolled cigars, or who displays for purchase manufactured cigars outside of their original package, failing to display a sign containing one of the warning statements required by 940 CMR 22.04 in a clear and conspicuous format, a minimum of 50 square inches in size, and in a location readily visible to the consumer.

(3) Retail Outlet Prevention Measures. It shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to sell cigars or little cigars to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigars or little cigars to consumers younger than 18 years old. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

- (a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR 22.06(3)(b). A retailer who receives during any calendar year official written notification from a state or local governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check;
- (b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigars or little cigars regarding compliance with laws prohibiting the sale of tobacco products to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General.

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices: The following retail sales and retail sales outlet practices are not unfair or deceptive:

- (a) Mail-order sales, excluding mail-order redemption of coupons and distribution of free samples through the mail, that are subject to verification that the purchaser is not younger than 18 years old. Verification of age through the mail shall consist of, at a minimum, ensuring that the person to whom the product is being sent supplies a legible photocopy of a valid government-issued identification;
- (b) Vending machines that are located in facilities licensed under M.G.L. c. 138, § 12, to serve alcoholic beverages for consumption on the premises, if the vending machine:
 - 1. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine and must be out of the reach of all consumers and in a location accessible only to outlet personnel; and
 - 2. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are observable by the outlet employee(s) controlling the lock-out device; and
 - 3. is posted with a sign stating that minors are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.
- (c) Self-service displays that are located within adult-only retail facilities.
- (d) Within an adult-only retail facility, distribution of no more than one free sample per day to an individual adult. With respect to little cigars, "sample" means one pack of little cigars in the smallest size package distributed by the manufacturer for individual consumer use. With respect to cigars, "sample" means one pack of cigars in the smallest size package distributed by the manufacturer for individual consumer use or, if such cigars are not distributed in packs, no more than five individual cigars.

22.06: continued

(5) Advertising Restrictions. Except as provided in 940 CMR 22.06(6), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

- (a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
- (b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

(6) Exception to Prohibited Advertising Practices. The following advertising practice is not unfair or deceptive: A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale.

22.07: Relation To Other Laws

Nothing in 940 CMR 22.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 22.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Nothing in 940 CMR 22.00 shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Without limiting the generality of the foregoing, nothing in 940 CMR 22.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 22.00, it shall control to the extent of any inconsistency with 940 CMR 22.00.

22.08: Severability

If any provisions of 940 CMR 22.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 22.00 and the applicability of such provision to other persons or circumstances shall not be affected.

22.09: Effective Date

940 CMR 22.00 shall be effective on February 1, 2000.

REGULATORY AUTHORITY

940 CMR 22.00: M.G.L. c. 93A, § 2(c).