



**MODEL STATE LEGISLATION TO PROHIBIT ALL INTERNET
OR MAIL-ORDER SALES OF TOBACCO PRODUCTS**
[To Eliminate Internet Sales to Youths and Evasion of State & Local Tobacco Taxes]

Section XXXXX. Unlawful Internet and Mail Order Tobacco Product Sales to State Consumers.¹

1. Definitions.

A. "Cigarette" means any roll of tobacco wrapped in paper or in any substance not containing tobacco which is intended or likely to be heated or burned; any roll of tobacco wrapped in any substance that because of its appearance, the type of tobacco used in the filler, or its packaging or labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or any loose rolling tobacco that, because of its appearance, type, packaging, or labeling, is offered to, sold to, or purchased by, consumers as tobacco for making cigarettes, including but not limited to any roll of tobacco weighing not more than three pounds per thousand.

B. "Smokeless tobacco" means any finely cut, ground, powdered, or leaf tobacco or other product containing tobacco that is intended or expected to be placed in the oral or nasal cavity or otherwise consumed without being combusted; but does not include any product containing tobacco that has been approved by the United States Food and Drug Administration as a cessation-assistance product and is distributed and sold exclusively for that purpose.

C. "Tobacco product" means tobacco or any consumable product that contains tobacco, including but not limited to cigarettes (including bidis), smokeless tobacco, and cigars.

2. Prohibitions.

A. It shall be unlawful for any person in the business of manufacturing, distributing, or selling tobacco products, including those selling tobacco products over the Internet or through mail-order sales, to sell, offer for sale, deliver, or cause to be delivered any tobacco products to any person in this state except in a face-to-face transaction at the time of purchase, unless the tobacco products being delivered are in a container or wrapping plainly and visibly marked on the exterior with the word "tobacco products" and the delivery is made to one of the following persons for purposes other than personal consumption by the recipient:

(1) a person licensed by the state as a tobacco product tax agent, wholesale dealer, or distributor under [CITE RELEVANT STATE STATUTES] or licensed/registered by the state as a retail dealer under [CITE RELEVANT STATE STATUTES];²

(2) a manufacturer or importer of tobacco products or an export warehouse proprietor with a federal permit pursuant to Title 26, United States Code, Section 5712 or an operator of a federally designated customs bonded warehouse pursuant to Title 19, United States Code, Section 1311 or 1555; or

¹ This model legislation is based on existing New York State law – Public Health Article 13F, Section 1399-LL – with modifications to make it less vulnerable to legal challenge, more effective, and easier to enforce. For the NY law, see <http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS>. The U.S. Court of Appeals for the Second Circuit has ruled that the New York law is constitutional and otherwise valid: *Brown & Williamson v. Pataki*, February 13, 2003, <http://www.tobacco.neu.edu/litigation/resources/internet/CCA2ruling.pdf>.

² For states that do not register or license retail dealers, the legislation could refer to "legally operating in the state as a commercial retail seller of tobacco products" or, better yet, the legislation could be supplemented to initiate a new state system for licensing or registering all retail sellers of tobacco products.

(3) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state, when such person is acting in accordance with his or her official duties.

B. It shall be unlawful for any person in the business of manufacturing, distributing, or selling tobacco products, including those selling tobacco products over the Internet or through mail-order sales, to deliver or cause to be delivered any tobacco products to any person in this state under the age of 21 or to any home or residence in this state.

C. It shall be unlawful for any person within the jurisdiction of this State's laws, including all common carriers or commercial delivery services, to knowingly transport tobacco products on behalf of another person for commercial or business purposes to:

- (1) any person in this state under the age of 21;
- (2) any home or residence in this state; or
- (3) any person in this state other than a person described in paragraphs A. (1), 2) or (3).

3. Government Publications and Related Prohibitions.

A. The State Department of _____ shall make public, by posting on the internet and by other means, a list of all persons currently licensed or registered by the state as agents, dealers, or distributors, as described in paragraph 2.A.(1).

B. The Department shall provide to the U.S. postal service, common carriers, commercial delivery services operating in the state, and any other persons that deliver tobacco products into or in the state a copy of this Act and a list of persons making or offering tobacco product sales or deliveries in or into the state in violation of this Act. Ten days prior to putting any person on this list, the Department shall send notice to that person, by letter or email, that the interstate seller is being placed on the Department's list, with that notice including the text of this Act. This list shall be kept confidential by all parties that receive it and shall be used only for the purpose of complying with this act.

C. It shall be unlawful for any person within the jurisdiction of this State's laws that receives a list provided by the Department, pursuant to subsection 3.B., to make any deliveries in the State on behalf of any person who is identified by that list unless:

- (1) The delivery service or other person making the delivery knows or affirmatively believes in good faith that the package does not contain any tobacco products; or
- (2) The delivery is made to a person lawfully engaging in the business of distributing or selling tobacco products.

D. A delivery service or other person that delivers tobacco products that receives a list from the Department pursuant to subsection 3.A:

- (1) Shall have no obligation to:
 - (a) inspect any package being delivered to determine whether or not they contain tobacco products;
 - (b) determine whether any list provided by a state pursuant to that subsection is complete, accurate, or up to date; or
 - (c) determine whether any person ordering or requesting a delivery is in compliance with this Act.
- (2) Shall not be subject to any penalty for:
 - (a) not making any specific delivery on behalf of any person on the list provided pursuant to subsection 3.B.;
 - (b) establishing and following a policy of:
 - (i) not making any deliveries in the state on behalf of any person on the list provided pursuant to subsection 3.B.;
 - (ii) not making any deliveries of tobacco products in the state; or

(iii) not making any deliveries of tobacco products in the state for any person or for any person not in the business of manufacturing, distributing, or selling tobacco products.

(3) May collect an additional fee from its customers that order deliveries of tobacco products in order to cover any costs incurred by the delivery service or other person related to complying with this Act.

(4) Shall not be subject to criminal penalties for any violation of this Act unless that violation is done knowingly and for the specific purpose of:

- (a) assisting a person engaged in the business of manufacturing, distributing, or selling tobacco products to violate this Act; or
- (b) profiting from the violation of this Act by another person.

E. No employee of a delivery service or of any other person making deliveries on behalf of a delivery seller shall be subject to criminal penalties or civil fines for violating this Act unless that violation is done knowingly and for the specific purpose of assisting a person engaged in the business of manufacturing, distributing, or selling tobacco products to violate this Act.

F. No common carrier or other delivery service shall be subject to subsections 2.A or 2.B. when operating within the scope of its business as a common carrier or delivery service.

4. Indian Tribes.

This Act shall not apply to tobacco product sales by an Indian Tribe, as defined by 25 United States Code §450b(e), or by members of any such Indian Tribe, to a consumer in this State if the consumer is a verified adult member of the same Indian Tribe, and the buyer and seller are each located in Indian Country, as defined by 18 United States Code §1151, that is owned or occupied by the same Indian Tribe.

5. Penalties.

A. Except as provided in subdivision 3.E., any person who violates the provisions of this Act shall be subject to a civil fine of not less than five hundred dollars and not more than five thousand dollars or five times the value of the tobacco products at issue, whichever is highest, for each such violation.

B. Any person engaged in the business of manufacturing or selling tobacco products who violates the provisions of subdivision 2.A. or 2.B. shall also be required to reimburse the State and its political subdivisions for all unpaid taxes of the State or its political subdivisions relating to the tobacco products at issue, plus interest, and for any other damages.

C. Any person who violates the provisions of this Act shall pay, in addition to any other damages or penalties, an amount equal to any profits, gain, gross receipts, or other benefit from the violation.

D. Except as provided in subdivision 3.D(4) and 3.E., any person who knowingly violates the provisions of subdivision 2.A., B, or C. of this Act shall also be fined up to \$5,000 or ten times the value of the tobacco products at issue, whichever is highest, or imprisoned for up to one year, or both for a first violation, and fined not less than \$10,000, or imprisoned for up to five years, or both for a second or subsequent violation.

E. Notwithstanding any other provision of law, an amount equal to fifty percent of all criminal and civil penalties recovered by the State under the previous subsections shall be provided to the State offices or agencies responsible for enforcing this Act or making related investigations, in rough proportion to their participation in the enforcement of this Act and related investigations, solely to increase and supplement, but not to replace, existing resources supporting State efforts to enforce this Act and to enforce other State laws relating to contraband tobacco products, the collection of taxes on tobacco products, and the prohibition of tobacco product sales to persons under the legal minimum purchase age.

F. In any action brought to enforce this Act, the State shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney's fees, plus interest; and all such recovered

costs and fees, plus interest, shall be directed to and retained by the State agencies and offices that incurred the costs and fees.

G. Any tobacco products sold or delivered or attempted to be sold or delivered in this State in manner that does not meet the requirements of this Act shall be forfeited to the State.

H. Unless otherwise expressly provided, the remedies or penalties provided by this section are cumulative to each other, and to any other damages, remedies, penalties, or relief available under this Act or any other laws of this State.

6. Enforcement.

A. The Attorney General or his or her designee may bring an action in the appropriate court in the State to enforce this Act, seek fines, penalties and related damages and equitable relief, or to prevent or restrain actions by any person, or any person controlling such person that violate this Act or assist or encourage a violation of this Act.

B. Upon providing at least 15 days prior notice to the Attorney General, enforcement officials of any State political subdivision may bring an action in the appropriate court in the State, or join an action being brought by the Attorney General or his or her designee, to seek damages and equitable relief or to prevent or restrain actions by any person, or any person controlling such person that violate this Act or assist or encourage a violation of this Act.

C. Upon providing at least 15 days prior notice to the Attorney General, any person who holds a valid permit under 26 United States Code § 5712,³ may bring an action in the appropriate court in the State, or join an action being brought by the Attorney General or his or her designee, to prevent or restrain actions by any person, or any person controlling such person that violate this Act or assist or encourage a violation of this Act.

D. Upon receiving notice from another person of their intent to bring an action pursuant to this Act in the appropriate court in the State, the Attorney General or his or her designee may choose to join in the other person's action or bring an action by the State in its stead, and shall inform the person providing notice of how the Attorney General or the designee will proceed within 15 days of receiving the notice.

E. The Attorney General shall make public, by posting on the internet and other means, a list of all actions taken to enforce this Act and a list of all persons found to have violated this Act, including those persons' names, addresses, and any other information the Attorney General believes may be useful to other jurisdictions enforcing laws prohibiting or restricting tobacco product sales for personal consumption in which the seller and buyer do not initiate and complete the entire transaction when in each other's physical presence.

This Act shall go into effect 90 days after it is passed into law.

Campaign for Tobacco-Free Kids, February 20, 2008 / Eric Lindblom

For more on internet tobacco sales and how to address them:

- <http://tobaccofreekids.org/reports/internet>
- <http://tobaccofreekids.org/research/factsheets/index.php?CategoryID=29>.

³ Certain tobacco product manufacturers, tobacco product importers, and tobacco product export warehouse proprietors hold valid permits under 26 US Code § 5712.