

CAMPAIGN For TOBACCO-FREE Kids®

PROBLEMS WITH PHILIP MORRIS MODEL STATE INTERNET LEGISLATION ("Proposed Cigarette Delivery Sales Bill" of 2-3-03)

Definitions and Scope

1. Applies only to cigarettes, should apply to all tobacco products.¹
2. "Delivery Sale" should be defined as any sale or delivery of tobacco products where the sale, payment and delivery do not occur in the same place, at the same time, in a face-to-face transaction. There is no reason to use a narrower definition, and the broader definition may block currently unforeseen loopholes.
3. "Delivery Service" should be defined also to include internet or mail-order sellers of tobacco products that deliver the products they sell themselves.
4. Legislation should acknowledge sovereignty of Indian Tribes to set their own minimum age laws in excess of state minimum age laws, to set their own tribal tobacco taxes, and to sell tobacco products free of state cigarette taxes if those sales are made on the same tribe's lands to members of the same tribe and are delivered to the tribal members on the tribe's lands. [But the legislation should not provide any basis for supporting any more expansive conception of Tribal sovereignty.]
5. Law should also encompass payment of local taxes that apply to tobacco products (at least local tobacco excise taxes), and provide for enforcement of the law by local enforcement officials.

Identity and Age Verification

6. The identity and age verification provisions should apply to every delivery sale, not just to the first one. Otherwise, a kid who beats the system the first time will have no further obstacles. In addition, it is critically important to ensure that the subsequent purchases will actually be made by the adult whose identity and age were verified during the first sale and not by kids taking advantage of the pre-certification from the first sale.
7. The provision requiring that the seller "make a good faith effort to verify" the identity and age information provided by the prospective customer against "a commercially available database" should be strengthened by:
 - a) eliminating the "good faith" loophole [there is no reason not to require simply that the verification take place – i.e., that the seller "shall verify . . ."]; and
 - b) requiring verification against "a commercially available database based on government records." [Such databases ensure more accurate verification of adult status

¹ Reportedly, cigar manufacturers and dealers sometimes vigorously oppose restrictions on internet and mail-order sales of cigars because of their much heavier reliance on such sales, especially to premium customers nationwide. Nevertheless, there is no logical reason for excluding cigars from the same new youth access restrictions and tax-collection measures as cigarettes and other tobacco products. Should political realities block including cigars, other non-cigarette tobacco products should still be included, especially smokeless tobacco, bidis, and other tobacco products with strong youth markets.

and are already commercially available. There is no reason to provide for a weaker standard that allows the use of suspect age-verification databases.]

8. "Providing a photocopy or other image of the valid government-issued identification stating the date of birth or age of the individual placing the order" should not be an alternative to the verification requirement. While it is fine for the legislation to allow for the use of such a photocopy or image to establish the prospective customers identity and age, it should also require that any information provided by any such photocopy or image also be verified against a commercially available database based on government records – thereby guarding against false ID's.
9. Payment by check should not be allowed because it eliminates the additional safeguards inherent in requiring payment by credit card or debit card (and the name and address of the person the credit card was issued to much match the prospective customers). At the very least, payment should be allowed by check only if those checks exhibit the exact same name and address as the other identity and age information provided by the prospective buyer. Money orders (which are even easier for kids to get) should never be allowed under any circumstances.

Disclosure Requirements

10. The Federal Cigarette Labeling and Advertising Act explicitly preempts the states from making any additional requirements regarding the use of the FCLA warning labels [15 USC 1334]. Including a provision regarding the FCLA warning labels in a state internet bill will provide a solid basis for legal challenges that could interfere with the entire bill's implementation.

Registration and Reporting Requirements

11. The requirements that delivery sellers and delivery services provide certain information to the "Department" (a state agency) should include providing phone numbers and email addresses of all delivery sellers, delivery services, etc. and of all delivery sale customers. [Adding this information will make it easier for the state agency to contact the delivery sellers, deliverers, or customers, as needed for the enforcement of relevant laws – and the legislation could explicitly state that the Department can use this information only for administering and enforcing state laws relating to tobacco product sales.]
12. To provide a simple, efficient way for the state to block sales and deliveries by non-complying delivery sellers – including those located outside the United States or in protected jurisdictions -- legislation should require relevant state agency to maintain a current, publicly available list (available via the state's website and by other means) of delivery sellers that are eligible to sell tobacco products into the state (e.g., that have satisfied the initial registration requirements, including any additional registration or licensing the state may require, are current with all reporting and other requirements, etc.) – and expressly prohibit delivery services from knowingly delivering tobacco products into or within the state for any delivery seller not on that state list.
13. There is no reason to excuse those delivery sellers that comply with the Federal Jenkins Act re reporting delivery-sale cigarette sales into a state to that state's tax collection agency from also satisfying the more stringent registration and reporting requirements of the new state law. Doing that just lets internet sellers choose to comply only with the weaker and

easier federal system, which has yet to be enforced to any significant degree by federal officials.

Shipping Requirements

14. The legislation should provide that any adult other than the customer who signs for the tobacco products at delivery must show valid, government issued ID to establish identity and age, and also sign a statement that he or she knows that the actual customer is of legal age.
15. Delivery sellers should be required to provide delivery services with evidence of the seller's full compliance with all state registration (and any other) requirements – and delivery services should be expressly prohibited from delivering tobacco products for any delivery seller that does not supply this evidence. [Although much like 12, above, this provision is needed both to complement provision 12 or should be inserted by itself if it is not possible to get the stronger requirements of 12 added.]

Collection of Taxes

16. Legislation permits delivery sellers to sell cigarettes (or other tobacco products) into states that have no tax stamp from the state (i.e., they can sell cigarettes with no tax stamp at all (e.g., purchased from Indian tribes, offshore, or illegally) or with other states' tax stamps on them). That likely contradicts other state law that requires tax stamps on any cigarettes sold or delivered to end-user customers in the state. More importantly, perhaps, allowing the legal sale of packs with either no tax stamp or other states' tax stamps on them will make it much more difficult for the state to enforce its laws against cigarette smuggling, counterfeit cigarette brands, and sales by MSA non-participating manufacturers that are not in good standing. A better alternative is to require that all cigarettes sold into the state by delivery sellers have the state's own tax stamp on it – and allowing (or requiring) delivery sellers to become state-licensed distributors that can apply tax stamps, etc. [And the few states that have no tobacco tax stamps should initiate them.]

Penalties

17. For repeated or especially egregious violations, penalties should include a prohibition against doing business in the state – e.g., prohibited from selling or delivering tobacco products in the state for zero to ten years (at the judge's discretion) after the first or second separate conviction for an intentional violation, and a mandatory ten-year to permanent prohibition after the third or subsequent intentional violation. The judge should also be given discretion to order higher penalty amounts for the third and subsequent convictions. Providing for the possibility of imprisonment for repeated intentional violations would also be appropriate. The goal is both to create significant disincentives so that internet sellers will not violate the law and to provide for large enough fines to provide incentives for the state to enforce these provisions diligently. At the same time, the penalties in the model bill for violations by customers or potential customers are disproportionately severe.

Enforcement

18. AG and other state officials should not only have right to bring action to prevent or restrain violations but also to seek fines and penalties against violators.

19. Local government enforcement officials (including tribal enforcement officials where relevant) should have full authority to bring enforcement actions to prevent and restrain violations and to seek other equitable relief regarding violations of local or tribal tobacco taxation or minimum age laws. But these local and tribal officials should be required to notify the state AG of the intention to bring an action prior to doing so – with the AG having full authority to join their action or bring the state’s own action in its stead (which the local officials could join).
20. The Philip Morris model legislation allows tobacco product manufacturers, importers, and export warehouse proprietors (“persons who hold a valid permit under 26 USC 5712”) to bring an action in the appropriate court to prevent or restrain violations. That is fine because it will improve enforcement – but these non-government plaintiffs that enforce the act should also be required to notify the state AG of the intention to bring an action prior to doing so, – with the AG having full authority to join their action or bring the state’s own action in its stead, which the 26 USC 5712 permit holder(s) could join.

Missing Key Provisions that Should be Included

21. To make it more difficult the use of internet or other delivery-sale purchases to obtain large amounts of lower-cost cigarettes and other tobacco products for illegal resale to youths or others (e.g., to undercut the single-pack prices of in-state retailers), the legislation should: a) establish a maximum sale to any customer in a one-week period of 2,000 cigarettes (10 cartons) or its equivalent for other tobacco products; and b) expressly forbid the resale of any tobacco products purchased through delivery sales. Legislation should also require customers to sign statement saying the purchase is only for personal use and acknowledging that re-selling tobacco products to youths or others violates state law.
22. To better block sales to youths, legislation should also require that prior to the first delivery, delivery sellers must send prospective purchaser a letter at the verified address (by regular mail or more rapid delivery) that describes the placed order and provides the recipient with adequate time to contact the seller by telephone, mail or email if he or she did not actually place the order or otherwise wishes to cancel it.
23. Legislation should expressly give delivery services the right to refuse to deliver tobacco products without any risk of any liability or penalty under state or local law.
24. To protect consumers’ privacy and block the possible misuse of provided identity and age information, the legislation should prohibit the use of any consumer information obtained by the delivery sellers or delivery services for any purpose other than carrying out the requirements of this legislation and completing the transaction unless they receive the express consent from the consumer to use the information for certain clearly specified other purposes (opt-in not opt-out) and regularly provide the consumer with clear and obvious opportunities to rescind that authorization.
25. Legislation should direct state AG to promptly make public, on the AG’s website and through other means, information on all delivery sellers found to have violated any of these provisions or any other provision of state or local law pertaining to the sale of tobacco products or their taxation.