



ELEMENTS OF MODEL STATE INTERNET LEGISLATION

To Prevent Evasion of State Tobacco-Product Excise Taxes and to Block Youth Access

In November, 2002, Representatives Marty Meehan (D-MA) and James Hansen (R-UT) introduced *The Tobacco Free Internet for Kids Act of 2002* (H.R. 5724), comprehensive federal legislation that would block youth access to internet tobacco products and minimize tobacco tax evasion through internet purchases. Although state laws cannot reach quite as far as federal laws to restrict internet tobacco sales, the Meehan-Hanson bill can still be used as a model for possible state legislation. The following are provisions based on the Meehan-Hanson bill that could be included in state legislation to address the public health and tax-collection problems caused by internet sales of tobacco products.

Applicability of Provisions

Provisions apply to all retail tobacco-product sales in which the products are mailed, delivered by Carriers (i.e., common carriers like UPS and Fed Ex, or any other person or entity that delivers tobacco products as, on behalf of, or in return for payment from a Delivery Seller), or otherwise delivered to end users in the state other than through face-to-face exchanges between sellers and end-user buyers.

Provisions do not apply to tobacco products not sold and delivered to end users but legally sold and delivered to wholesalers/distributors or to other retailers for resale or other legitimate business purposes.

I. Age & Identify Verification

- A. Minimum age for legal sales of tobacco products will be the higher of 18 or the minimum legal age set for tobacco product sales by applicable state, tribal, local, or federal laws. Prohibitions against youths providing false information to obtain cigarettes, etc. also left to existing state, tribal, local, or federal laws.
- B. A. No sales allowed without prior verification of the age of the buyer through one of the following:
 - 1) Submitting a government-issued photo ID or a copy of it;
 - 2) Supplying the following information from a government-issued photo ID electronically (e.g., by telephone or via the internet): a) full name; b) address; c) date of birth; d) type of government-issued ID; e) government ID number.
- C. All of the submitted identity, address, and age information must be verified by the Delivery Seller by checking against a database or aggregated databases of identity and age information from government-issued identification that may also include additional, supplemental age and identity information from other government or verified public sources that is regularly used by government or business for identity verification and authentication. Attorney General allowed to establish alternative identity and age verification procedures using government ID databases, but only if they employ new technologies that provide even more stringent and accurate identity and age-verification.
- D. Delivery Seller may not complete the age and identity verification process or accept any orders from any potential customer until the customer first signs the following statement: "I understand that forging another person's signature, using false identification, or providing false information to obtain tobacco products by mail – especially when done by a minor or done to provide tobacco products to minors or to avoid applicable taxes – may violate both federal and state laws and subject the violator to monetary fines and/or imprisonment." Electronic signatures allowed (see, e.g., 15 U.S.C. Sec. 7001-7006).

* For a copy of H.R. 5724, see <http://www.house.gov/meehan/legislation.htm> or http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5724ih.txt.pdf.

II. Other Youth Access Provisions

- A. Payment to Delivery Sellers required by the buyer's own credit card or debit card, with Delivery Sellers confirming that the credit or debit card is issued to the same person identified through the identity and age-verification process.
- B. Delivery Sellers must register with the credit card and debit card companies so that their names on the credit or debit card invoices clearly identify them as tobacco-product sellers or take other steps to ensure that all of their Delivery Sales of tobacco products will be clearly and immediately identifiable as tobacco-product sales by anyone receiving or reviewing the related credit or debit card invoices.
- C. Prior to sending any tobacco products to a specific customer for the first time, the Delivery Seller must send a separate notice of the sale, by regular mail or more rapid delivery to the name and address provided through the identity and age-verification process, that notifies the recipient of the order (including products ordered, price, and date), requests an immediate reply if recipient did not place the order, and provides a mailing address, phone number, and email address for such recipient replies.

III. Provision to Block Illegal Resales By Customers

Delivery Sellers prohibited from selling or sending tobacco products to any specific end-user customer in any amounts of more than 2,000 cigarettes (or the equivalent amounts for other tobacco products), and prohibited from making more than one sale to any specific end-user customer in any 7-day period. [Maximum Delivery Sale amounts do not apply to Delivery Seller sales to licensed tobacco product manufacturers, distributors, or wholesalers, or to tobacco-product retailers for subsequent resale.]

IV. Delivery Provisions

- A. All Delivery Seller deliveries of tobacco products allowed only to the home address provided through the identity and age-verification process or to the customer's business address in the same state or within 100 miles of the home address. Delivery Sellers must verify that customers' business addresses are business addresses (e.g., not residential and not post office boxes).
- B. All Delivery Seller tobacco-product deliveries only to persons of minimum age or over, with verification at delivery of recipients' identity and age through government-issued photo ID. The Secretary must issue regulations requiring that any government issued photo ID used for identity and age verification at delivery must be verified against a government-issued database in those states where such instant verification upon delivery is available as soon as such instant verification upon delivery is available to Delivery Sellers in those states at a cost of no more than \$2.50 per delivery (in 2003 dollars).
- C. Recipients must sign for any tobacco products delivered by Carriers; and recipients that are not the buyer/addressee must also separately and exclusively sign the following statement: "I know the named addressee for this package, for whom I am signing, and I hereby confirm that the addressee is an adult over [minimum age in jurisdiction for legal tobacco sales or 18, whichever is higher]." No waiver of signature requirement allowed at any time.
- D. Delivery Sellers and others delivering tobacco products to end users in other than face-to-face transaction must notify Carriers whenever a package they provide to the Carriers for transport contains tobacco products; and Delivery Sellers must provide the Carriers with a copy of their state license or registration certificates or other documentation showing they are licensed or registered as Tobacco Product Distributors with the states to which they are sending tobacco products.
- E. Carriers must receive a copy of the documentation showing that a Delivery Seller is registered with the destination state(s) before accepting any tobacco products from the Delivery Seller for delivery, and Carriers may not knowingly accept any tobacco products for shipment into or within a state from a Delivery Seller that does not have a valid Tobacco Product Distributor license or registration with that state.

- F. Carriers are free to refuse to deliver tobacco products for Delivery Sellers or others without any risk of liability or other penalty through the application of state or local laws.

V. Key Provision for Tax Collection and for Enforcement of All Provisions

- A. A Delivery Seller (one who sells and delivers tobacco products within or into the state directly to end-user consumers other than through face-to-face transactions with the consumers) cannot sell, offer for sale, or deliver tobacco products within or into the State unless the Delivery Seller is licensed by the State as a Tobacco Product Distributor -- i.e., as a person or entity who is licensed or otherwise authorized by the State to account for and pay tobacco-product taxes imposed by the State (e.g., authorized to buy and apply tobacco-tax stamps); and who has complied with the accounting and payment requirements relating to such license or authorization with respect to the tobacco products involved. And all such licensed Delivery Sellers must comply with the State's tax collection requirements to ensure that State tobacco-product taxes are paid on all tobacco products sold within or into the State by the Delivery Seller to end users.[†]

[This licensing requirement (in conjunction with the delivery requirements listed above) enables a state to block sales into the state by non-complying Delivery Sellers by notifying Carriers operating in the state that they may not make any tobacco-product deliveries within the State for any Delivery Sellers other than those licensed by the state -- and the state could provide carriers with access to updated lists of validly licensed Delivery Sellers. The state could also revoke the state tobacco-product wholesaler/distributor license of any Delivery Seller that violates any of the requirements set forth herein, and notify all Carriers in the state that the Delivery Seller's license has been revoked.]

VI. Customer Privacy & Confidentiality Provisions

Any information obtained about a customer by the Delivery Sellers through the identity and age-verification procedures or the customer's product purchases (including, but not limited to, the customer's name, mailing address, email address, and age) may be used only by the Delivery Seller for processing the customers current and future orders -- with no use of this customer information for tobacco-product advertising or marketing purposes and no transfer of any of this customer information to any other parties for tobacco-product advertising or marketing purposes -- unless the customer specifically provides permission (opt in not opt out). And any customer that provides such permission must be provided with clear opportunities to retract it during every subsequent order and in every communication to the customer by the Delivery Seller. All other privacy protections existing in federal or state law fully apply, and these new provisions cannot be used to block or weaken any stronger privacy protections that exist in federal or state law or may be established in the future.

VII. Additional Provisions

- A. These provisions do not create any new requirements or liability of any kind for entities providing communication technologies (e.g., phone companies or internet service providers), computer software or related services, or credit or debit card services, except to the extent that those entities are Delivery Sellers, Carriers, or tobacco-product manufacturers, wholesalers/distributors, or retailers.

[†] Currently a more-or-less closed system exists for transfers of tobacco products across state lines or prior to export out of the country consisting of licensed manufacturers, distributors (i.e., wholesalers), exporters, bonded warehouses, and the like that buy and sell and otherwise transfer tobacco products among themselves and from one or more states to many others. Tobacco products legally depart from this closed system only when they are exported out of the country or are delivered to retailers for sale to end-user customers. Since regular bricks-and-mortar retail outlets are physically located in a state and only make sales in that same state, there has been little need to make them part of this closed system of specially licensed entities that sell from and to multiple states. Delivery-Seller retailers, on the other hand, do make sales from one state to many others, much like distributors. For that reason (among others), this provision simply adds Delivery Sellers into the existing closed system in order to facilitate cigarette tax collection and other necessary oversight. All states currently have laws on the books which license certain entities to buy and affix tobacco-tax stamps to tobacco products or to otherwise collect and/or pay applicable tobacco taxes to the state, and this provision simply calls for the application of these laws to Delivery Sellers.

- B. These provisions do not preempt or weaken any other state, or local laws applying to Delivery Sales of tobacco products unless the other laws interfere with the consistent application of the provisions herein in all applicable jurisdictions (e.g., supplementary or stronger legal requirements or restrictions placed by subdivisions of the State on Delivery Sellers or other entities that supplement but do not contradict the requirements and restrictions established here are permitted).

VIII. Enforcement & Penalties

- A. Penalties for violations of these provisions by Delivery Sellers. Fines: \$1,000 per each specific violation in first enforcement action brought against the violating entity; \$1,000 to \$5,000 per each specific violation in subsequent enforcement actions. Other penalties: upon finding or one or more violations in first or second enforcement action against a specific Delivery Seller, prohibition from selling tobacco products within or into the State for zero to ten years (applies both to the violating corporation or business and the principal people operating the violating business and/or willfully participating in the violations), depending on severity and willfulness of violation; for finding or one or more violations in any subsequent enforcement actions, mandatory permanent prohibition from selling tobacco products within or into the State. First knowing violation by Delivery Sellers also subject to fines, and/or imprisonment for up to 3 years. Subsequent offenses subject to fines and/or up to 5 years imprisonment.
- B. Penalties for violations of these provisions by Carriers: Fines: \$1,000 per each specific violation in first enforcement action brought against the violating entity; \$1,000 to \$5,000 per each specific violation in subsequent enforcement actions. Other penalties: upon finding or one or more violations in first or second or subsequent enforcement action against a specific Carrier, prohibition from delivering tobacco products within or into the State for zero to ten years, depending on the severity and willfulness of violations (applies both to the violating corporation or business and the principal people operating the violating business and /or willfully participating in the violations); for one or more violations in subsequent enforcement actions, prohibition from delivering tobacco products within or into the State for one year to permanently, depending on severity and willfulness of violations.
- C. The state attorney general and state and local tax collection officials may also obtain injunctive and other equitable relief against Delivery Sellers or Carriers that violate any of these provisions – including but not limited to temporary restraining orders and final injunctive relief that prohibit tobacco product sales by the defendant Delivery Sellers, that prohibit all tobacco product manufacturers, distributors/wholesalers, and retailers from selling tobacco products to the defendant Delivery Sellers, or that prohibit Carriers from delivering any tobacco products for the defendant Delivery Sellers; and including court ordered payments by the defendant Delivery Sellers of tobacco-product taxes owed to the state. The state attorney general must make information concerning these enforcement actions, and their results, publicly available at no cost through the state attorney general's publicly available website and other means.

Related State and Federal Laws & Legislation

- New York law (Public Health Article 13F, Section 1399-II) prohibiting all delivery sales of cigarettes (other than small amounts delivered by in-state retailers to nearby customers). <http://assembly.state.ny.us/leg/?cl=91&a=71>. After cigarette company legal challenges, this law was initially suspended as an unconstitutional violation of the commerce clause by a lower court. But on appeal, the U.S. Court of Appeals for the Second Circuit reversed the lower court, ruling that the law is constitutional and entirely valid. <http://tobacco.neu.edu/internet/CCA2ruling.pdf> Accordingly, the law is currently in full force and effect.
- Alaska tax stamp legislation, passed into law, which, among other things, prohibits deliveries of cigarettes into the state except to licensed entities (thereby forbidding any internet or mail-order deliveries to end-user customers), establishes new licensing rules for all entities selling cigarettes into the state, forbids common carriers from delivering cigarettes for non-licensed entities, and requires that all cigarettes sold to consumers in the state have state tax stamps on them. http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=SB0168E&session=23.
- Maine legislation (LD 1236), which has passed into law, that presents a comprehensive system for restricting internet tobacco product sales in order to block sales to kids and to collect state tobacco

excise taxes, including provisions making it illegal for delivery services to knowingly deliver tobacco products to persons in the state for internet or mail-order sellers not licensed by the state or that are on state non-compliance lists. <http://www.mainelegislature.org/legis/bills/ld.asp?id=1236>.

- California legislation, now law, restricting internet and mail order to kids, with age verification online and signature requirements (AB 1830, Assemblyman Frommer):
http://www.leginfo.ca.gov/pub/bill/asm/ab_1801-1850/ab_1830_bill_20020918_chaptered.pdf.
- California legislation, now law, requiring internet sellers to pay CA taxes on cigarettes delivered into state or mark packages notifying recipients that taxes are owed (SB 1766, Senator Ortiz):
http://www.leginfo.ca.gov/pub/bill/sen/sb_1751-1800/sb_1766_bill_20020918_chaptered.pdf.
- California legislation, now law, changing the tax stamp requirements in the state to require laser stamping with encrypted information (SB1701, Senator Peace):
http://www.leginfo.ca.gov/pub/bill/sen/sb_1701-1750/sb_1701_bill_20020926_chaptered.pdf.
- Idaho legislation (HB 357), passed into law, that forbids internet or mail-order sales of tobacco products to youth, has various youth access provisions, and creates state parallel to federal Jenkins Act re internet sellers reports of tobacco product sales into the state that identify state buyers for tax collection purposes. <http://www3.state.id.us/oasis/H0357.html#daily>.
- Nevada law forbidding internet sales to youths under age 18 in the state and requiring adult signature at delivery of all tobacco products to customers in state (NRS 202 Sec. 24935).
<http://www.leg.state.nv.us/NRS/NRS-202.html#NRS202Sec24935>.
- Rhode Island law restricting internet and mail order sales to kids, with signature at delivery requirements, <http://www.rilin.state.ri.us/PublicLaws/law00/law00210.htm>.
- Rhode Island law calling for unannounced state compliance checks re illegal internet and mail-order tobacco product sales to kids in the state (General Laws 11-9-13.6).
<http://www.rilin.state.ri.us/Statutes/TITLE11/11-9/11-9-13.6.HTM>.
- U.S. General Accounting Office, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement*, GAO-02-743, August 9, 2002, which provides critical analysis of internet sellers' compliance with Jenkins Act re state cigarette tax collection.
<http://www.gao.gov/new.items/d02743.pdf>.
- Federal Jenkins Act re internet cigarette sales, <http://www4.law.cornell.edu/uscode/15/ch10A.html>, 15 USC 375 et seq. District Court ruling in Washington State finding that states may assert a claim for violation of the federal Jenkins Act in U.S. District Court: Order Denying Motion to Dismiss, *State of Washington v. www.dirtcheapcig.com, Inc.*, Case No. CO2-2438L, U.S. District Court, Western District of Washington at Seattle, May 2, 2003. [Order not available via internet; but copies available from the Court: 206-553-5598.]
- Federal Laws prohibiting trafficking in contraband cigarettes, 18 USC 2342 et seq.
<http://www4.law.cornell.edu/uscode/18/plch114.html>.
- IRS Code re tobacco products. <http://www4.law.cornell.edu/uscode/26/stEch52.html>.
- H.R. 5724, *The Tobacco Free Internet for Kids Act of 2002*, introduced by Representatives Marty Meehan (D-MA) and James Hansen (R-UT) in November 2002 to block youth access to internet tobacco products and minimize tax evasion through internet sales of tobacco products.
<http://www.house.gov/meehan/legislation.htm> or http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5724ih.txt.pdf.

For more information, see the Campaign for Tobacco-Free Kids special website report on internet sales of tobacco products at <http://tobaccofreekids.org/reports/internet>.