WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2003

ENROLLED

House Bill No. 2748

(By Delegates Perdue and Hatfield)

Passed March 8, 2003

In Effect Ninety Days from Passage
AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto two new articles, designated articles nine-d and nine-e, all relating to restricting delivery sales of tobacco products and prohibiting possession of counterfeit cigarettes; defining terms; specifying requirements for verification of age and identity of purchasers; requiring notices to consumers; establishing requirements for shipping and shippers; establishing requirements for registration and reporting to the department of tax and revenue; requiring payment of taxes; providing for forfeiture of tobacco products and personal property; prohibiting the possession or sale of counterfeit cigarettes; and providing for civil and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto two new articles, designated articles nine-d and nine-e, all to read as follows:
ARTICLE 9D. DELIVERY SALES OF TOBACCO.

§16-9D-1. Definitions.

For purposes of this article:

(a) “Adult” means a person who is at least the legal minimum purchase age, as defined by article nine-A, section two of this chapter.

(b) “Consumer” means an individual who does not hold a business registration certificate in this state for the business of selling tobacco products as a wholesale or retail dealer.

(c) “Delivery sale” means any sale of cigarettes to a consumer in this state where either: (1) The purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the internet or other online service; or (2) the cigarettes are delivered by use of the mails or a delivery service. A sale of cigarettes shall be a delivery sale regardless of whether or not the seller is located within this state. A sale of cigarettes not for personal consumption to a person who holds a business registration certificate as a wholesale dealer or a retail dealer shall not be a delivery sale.

(d) “Delivery service” means any person who is engaged in the commercial delivery of letters, packages, or other containers.

(e) “Department” means the state tax department.

(f) “Legal minimum purchase age” is at least eighteen years of age as defined by article nine-A, section two of this chapter for the purchase of cigarettes in this state.

(g) “Mails” or “mailing” means the shipment of cigarettes through the United States postal service.
§16-9D-2. Requirements for delivery sales.

(a) No person shall make a delivery sale of cigarettes to any individual who is under the legal minimum purchase age in this state.

(b) Each person accepting a purchase order for a delivery sale shall comply with:

(1) The age verification requirements set forth in section three of this article;

(2) The disclosure requirements set forth in subdivision (3) of subsection (a) of section three of this article;

(3) The shipping requirements set forth in section four of this article;

(4) The registration and reporting requirements set forth in section five of this article;

(5) The tax collection requirements set forth in section six of this article; and

(6) All other laws of this state generally applicable to sales of cigarettes that occur entirely within this state, including, but not limited to, those laws imposing: (i) Excise taxes; (ii) sales taxes; (iii) license and revenue-stamping requirements; and (iv) escrow or other payment obligations.

§16-9D-3. Age verification requirements.
(a) No person shall mail, ship, or otherwise deliver cigarettes in connection with a delivery sale unless prior to the first delivery sale to a consumer, the person:

(1) Obtains from the prospective consumer a certification that includes a reliable confirmation that the consumer is at least the legal minimum purchase age and a statement signed by the prospective consumer in writing that certifies the prospective consumer's address and that the consumer is at least eighteen years of age. The statement shall also confirm (i) that the prospective consumer understands that it is illegal to sign another person's name to the certification, (ii) that the sale of cigarettes to individuals under the legal minimum purchase age is illegal, and (ii) that the purchase of cigarettes by individuals under the legal minimum purchase age is illegal under the laws of this state;

(2) Verifies the information contained in the certification provided by the prospective consumer against an appropriate database of government records available to the distributor or seller, or obtains simultaneous with the certificate as provided for in subdivision (1), a photocopy or other image of the valid, government-issued identification stating the date of birth or age of the individual placing the order;

(3) Sends to the prospective consumer, via e-mail or other means, a notice that contains: (A) A prominent and clearly legible statement that cigarette sales to a consumer below the legal minimum purchase age is illegal, (B) A prominent and clearly legible statement that consists of one of the warnings set forth in section 4(a)(1) of the federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333(a)(1), rotated on a quarterly basis, (C) A prominent and clearly legible statement that sales of cigarettes are restricted to those consumers who provide verifiable proof of age in accordance with section three of this article, and (D) A prominent and clearly legible statement that cigarette sales are subject to excise and sales taxes in this state,
and an explanation of how such taxes have been, or are to be, paid with respect to the delivery sale.

(4) In the case of an order for cigarettes pursuant to an advertisement on the internet, receives payment for the delivery sale from the prospective consumer by a credit or debit card or check that has been issued in the consumer's name.

(b) Persons accepting purchase orders for delivery sales may request that prospective consumers provide their e-mail addresses.

§16-9D-4. Shipping requirements.

(a) Each person who mails, ships, or otherwise delivers cigarettes in connection with a delivery sale:

(1) Shall include as part of the bill of lading or other shipping documents a clear and conspicuous statement providing as follows: "Cigarettes: West Virginia Law Prohibits Shipping to Individuals Under 18, and Requires the Payment of all Applicable Taxes";

(2) Shall use a method of mailing, shipping, or delivery that obligates the delivery service to require (i) the consumer placing the purchase order for the delivery sale, or another adult of legal minimum purchase age, to sign to accept delivery of the shipping container, and (ii) proof, in the form of a valid, government-issued identification bearing a photograph of the individual who signs to accept delivery of the shipping container, demonstrating that he is either the addressee or another adult of legal minimum purchase age; and

(3) Shall provide to the delivery service retained for such delivery sale evidence of full compliance with section seven of this article.
(b) A delivery service shall be in violation of this article if it (1) ships or otherwise delivers cigarettes in connection with a delivery sale without first receiving evidence of compliance with section seven of this article; or (2) fails to comply with the requirements described in subsection (a) or described in section six of this article:

(1) When obligated to do so under a method of shipping or delivery;

(2) When delivering any container pursuant to shipping documents containing the statement described in subdivision one of subsection (a) of this section; or

(3) When delivering any container that the delivery service otherwise has reason to know contains cigarettes.

(c) If the person accepting a purchase order for a delivery sale delivers the cigarettes without using a delivery service, that person shall comply with all requirements of this article applicable to a delivery service and shall be in violation of the provisions of this article upon failure to comply with the requirements.

§16-9D-5. Registration and reporting requirements.

(a) Prior to making delivery sales or mailing, shipping, or otherwise delivering cigarettes in connection with any such sales, every person shall file with the department a statement setting forth the seller’s name, trade name, and the address of the seller’s principal place of business and any other place of business.

(b) Not later than the tenth day of each calendar month, each person that has made a delivery sale or mailed, shipped, or otherwise delivered cigarettes in connection with any such sale during the previous calendar month shall file with the depart-
ment a memorandum or a copy of the invoice that provides for each and every delivery sale:

(1) The name and address of the consumer to whom the delivery sale was made;

(2) The brand or brands of the cigarettes that were sold in the delivery sale; and

(3) The quantity of cigarettes that were sold in the delivery sale.

(c) Any person that satisfies the requirements of 15 U.S.C. §376 shall be deemed to satisfy the requirements of this section.

§16-9D-6. Collection of taxes.

Each person accepting a purchase order for a delivery sale shall collect and remit to the department all cigarette taxes imposed by this state with respect to such delivery sale, except that the collection and remission shall not be required to the extent the person has obtained proof, in the form of the presence of applicable tax stamps or otherwise, that the taxes already have been paid to this state.

§16-9D-7. Penalties.

(a) Except as otherwise provided in this section, a first violation of any provision of this article shall be a misdemeanor and punishable by a fine of five hundred dollars or five times the retail value of the cigarettes involved, whichever is greater.

(b) Any person who knowingly violates any provision of this article, or who knowingly and falsely submits a certification under section three of this article in another person’s name, shall be guilty of a misdemeanor be fined one thousand dollars
or ten times the retail value of the cigarettes involved, whichever is greater, or confined not more than six months, or both.

(c) Any person failing to collect or remit to the department any tax required in connection with a delivery sale shall be assessed, in addition to any other penalty, a penalty of five times the retail value of the cigarettes involved.

(d) Any cigarettes sold or attempted to be sold in a delivery sale that does not meet the requirements of this article shall be forfeited to this state and destroyed. All fixtures, equipment, and all other materials and personal property on the premises of any person who, with the intent to defraud this state, violates any of the requirements of this article, shall be forfeited to this state.

§ 16-9D-8. Enforcement.

For violations of this article resulting in a delivery of tobacco products in this state, the prosecuting attorney of the county where the delivery is made shall have the power to prosecute the violation and to bring any action necessary to prevent further violations. The attorney general or any person who holds a valid permit under 26 U.S.C. § 5712 may bring any actions required to enforce all other requirements of this article and to prevent all other violations of its provisions.

ARTICLE 9E. COUNTERFEIT CIGARETTES.

§16-9E-1. Definition.

As used in this article, “counterfeit cigarettes” means cigarettes that (a) have false manufacturing labels, (b) are not manufactured by the manufacturer indicated on the container, or (c) have a false tax stamp affixed to the container.

§16-9E-2. Prohibition of counterfeit cigarettes.
It shall be unlawful for any person to knowingly possess or
sell counterfeit cigarettes, and all counterfeit cigarettes and the
equipment, materials and personal property used in substantial
connection with a knowing violation of this article may be
seized and destroyed by any law enforcement agency of this
state.

§16-9E-3. Penalties.

(a) Any person who knowingly violates the provisions of
this article with a total quantity of less than two cartons of
cigarettes shall, for the first offense, be punished by a civil
penalty of no more than one thousand dollars, and for a second
or subsequent offense involving a total quantity of less than two
cartons of cigarettes shall be punished by a civil penalty of no
more than five thousand dollars and the revocation for a period
of six months of any business held by the person.

(b) Any person who knowingly violates the provisions of
this article with a total quantity of two or more cartons of
cigarettes shall, for the first offense, be punished by a civil
penalty of no more than two thousand dollars, and for a second
or subsequent offense involving a total quantity of two or more
cartons of cigarettes shall be punished by a civil penalty of no
more than fifty thousand dollars and the revocation for a period
of one year of any business registration certificate held by the
person.

§16-9E-4. Enforcement.

The attorney general, the prosecuting attorney for the
county in which counterfeit cigarettes are found or any person
who holds a valid permit under 26 U.S.C. § 5712 may bring an
action in the circuit court of that county to prevent or restrain
violations of this article by any person, or any person control-
ling that person.
Enr. H. B. 2748]

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 1st day of April, 2003.

Governor
PRESENTED TO THE
GOVERNOR

Date  3/26/65
Time  3:50 pm