

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BROWN & WILLIAMSON TOBACCO  
CORPORATION and BWTDIRECT, LLC,

Plaintiffs,

00 Civ. 7750 (LAP)

-v-

GEORGE E. PATAKI, in his official capacity as Governor  
of the State of New York, ELIOT SPITZER, in his official  
capacity as Attorney General of the State of New York, and  
ANTONIA C. NOVELLO, M.D., in her official capacity as  
Commissioner of Health of the State of New York,

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

Defendants.  
----- X

Nature of Action

1. Plaintiffs Brown & Williamson Tobacco Corporation and BWTDirect, LLC, seek to enjoin Section 1399-ll of the New York Public Health Law, signed by Defendant George E. Pataki, Governor of New York, on August 16, 2000. The purpose and effect of this law is to prohibit the sale of cigarettes to New York consumers via the Internet, mail-order, or telephone. The new law takes effect as to sellers of cigarettes on November 14, 2000, and as to common and contract carriers that transport cigarettes on January 1, 2001. A true copy of Chapter 262 of the 2000 N.Y. Session Laws, which added Section 1399-ll to the New York Public Health Law, is attached hereto as Exhibit A.

2. Section 1399-ll violates the Commerce Clause of the United States Constitution and 42 U.S.C. § 1983. It is an unconstitutional attempt by New York State to regulate and control the use of three major instruments of interstate commerce—the mails, the telephone, and one of the very foundations of the new economy, the Internet—and an unconstitutional interference with interstate commerce. The new law will cause substantial and immeasurable

present and future damage to Plaintiffs and set a dangerous precedent of state control over the Internet and other avenues of the nation's commerce.

3. Section 1399-ll responds to concerns, among others, that the Internet is drawing cigarette sales away from in-state brick-and-mortar retailers and undermining New York's ability to realize tax revenues from cigarette sales—considerations that apply equally to Internet sales of other products and services as well. Allowing Section 1399-ll to stand would set a precedent for states to ban not only online cigarette sales, but online pharmacies, online alcohol sales, and online sales of any other products or services a particular state considers threatening to local interests or otherwise undesirable. The proliferation of such varied and inconsistent state regulations would choke the growth of e-commerce.

#### The Parties

4. Plaintiff Brown & Williamson Tobacco Corporation ("B&W") is a Delaware corporation with its principal place of business in Kentucky. B&W manufactures cigarettes that are advertised, promoted, marketed, and sold throughout the United States, including New York. B&W desires to include New York consumers in its nationwide direct marketing program, which B&W launched on October 10, 2000. Under this program, Plaintiff BWTDirect, LLC, sells certain B&W brands to consumers by mail-order and telephone and causes such cigarettes to be shipped to consumers using common or contract carriers. B&W plans to extend this direct marketing program to include Internet sales in the first half of 2001.

5. Plaintiff BWTDirect, LLC ("BWT"), a Kentucky corporation, is a subsidiary of B&W that sells cigarettes manufactured by B&W to consumers. B&W sells its cigarettes to a wholesaler that affixes the applicable excise tax stamps to the cigarettes (which would include the New York excise tax stamp, in the case of cigarettes sold to New York consumers), and the

wholesaler in turn sells the cigarettes to BWT for sale to consumers. BWT pays all applicable sales taxes.

6. Defendant George E. Pataki is sued in his official capacity as the Governor of the State of New York. He is responsible, under art. IV, § 7 of the New York Constitution, for final approval of state legislation, and he duly approved the legislation containing Section 1399-II of the Public Health Law. He is also responsible, under art. IV, § 3 of the New York Constitution, for ensuring that the laws of the State, including the new law, are faithfully executed. Upon information and belief, Defendant Pataki resides in this judicial district by maintaining an office here.

7. Defendant Eliot Spitzer is sued in his official capacity as the Attorney General of the State of New York. The Attorney General is responsible, under Section 12 of the Public Health Law and Section 63 of the New York Executive Law, for enforcing Section 1399-II of the Public Health Law by seeking injunctive relief and investigating and prosecuting criminal violations of the statute upon request of the Commissioner of Health. Upon information and belief, Defendant Spitzer resides in this judicial district by maintaining an office here.

8. Defendant Antonia C. Novello is sued in her official capacity as Commissioner of Health of the State of New York. Section 1399-II(5) of the Public Health Law authorizes the Commissioner to impose civil fines for violations of Section 1399-II. Under Section 12 of the Public Health Law and Section 63 of the Executive Law, the Commissioner is also charged with referring criminal violations of Section 1399-II to the Attorney General for investigation and prosecution and with requesting that the Attorney General seek injunctive relief against violators of the statute. Upon information and belief, Defendant Novello resides in this judicial district by maintaining an office here.

### Jurisdiction

9. This action arises under the Constitution of the United States and under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

### Venue

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

### The Challenged Statute

11. Section 1399-ll(1) of the New York Public Health Law will, upon its effective date, prohibit any person engaged in the business of selling cigarettes from shipping or causing to be shipped any cigarettes to any person in New York who is not a licensed cigarette tax agent or wholesale dealer, a registered retail dealer, a proprietor of an export warehouse, an operator of a customs bonded warehouse, or an officer, employee or agent of a governmental entity.

12. Section 1399-ll(2) of the New York Public Health Law will, upon its effective date, prohibit any common or contract carrier from knowingly transporting cigarettes to any person in New York reasonably believed by the carrier to be a person other than a licensed cigarette tax agent or wholesale dealer, a registered retail dealer, a proprietor of an export warehouse, an operator of a customs bonded warehouse, or an officer, employee or agent of a governmental entity.

13. Section 1399-ll(5) of the New York Public Health Law provides that a person who violates either of the foregoing prohibitions is guilty of a Class A misdemeanor for a first violation and a Class E felony for a second or subsequent violation, and authorizes the Commissioner of Health of the State of New York to impose a civil fine of up to \$5,000 for each such violation.

14. By effectively prohibiting Internet, mail-order, and telephone sales of cigarettes to New York consumers, Section 1399-ll restricts cigarette sales in New York to brick-and-mortar establishments, thereby granting in-state retailers a monopoly in the retail cigarette trade at the expense of out-of-state sellers of cigarettes.

15. Enacted without any legislative fact-finding, Chapter 262 sets forth in wholly conclusory terms four purported rationales for banning Internet, mail order, and telephone sales of cigarettes, alleging that (1) such sales jeopardize health care funding under the Health Care Reform Act of 2000, presumably by undermining collection of the cigarette excise tax that the act sharply increased; (2) such sales threaten "the economy of the state," presumably by depriving New York wholesalers and retailers of business; (3) such sales enable minors to evade proof-of-age requirements; and (4) banning such sales would help the state better measure and monitor cigarette smoking and determine its "public health and fiscal consequences." Section 1 also states that such sales threaten "public health, safety, and welfare." Chapter 262, § 1.

16. As to each of the rationales purportedly served by Section 1399-ll, either the rationale is impermissible as a matter of law, or alternative means are available for serving the state's asserted interests that do not entail such an extreme burden on interstate commerce. A blunderbuss law that blocks all sales to legitimate consumers over three of the nation's major avenues of commerce is not needed.

17. The contention that Internet, mail-order, and telephone sales of cigarettes may be banned because they threaten "the economy of the state" is impermissible economic protectionism at its most flagrant.

18. The contention that such sales may be banned to help the state maximize its tax revenues likewise cannot justify discriminating against interstate commerce. In any event,

both federal and New York State laws provide ample means for ensuring that applicable New York taxes on such sales are paid.

19. The contention that such sales may be banned to prevent minors from evading proof-of-age requirements is similarly wanting. As far as Plaintiffs can determine, the legislative record is devoid of evidence that minors are using the Internet, mail-order, or telephones to obtain cigarettes to any substantial degree. Indeed, when the U.S. Food and Drug Administration ("FDA") developed regulations to prevent minors from gaining access to cigarettes and smokeless tobacco, it initially proposed—then rejected—a ban on mail-order cigarette sales. After reviewing "thousands of comments," FDA found that there was "inadequate evidence demonstrating that young people use mail-order sales to any significant degree." 61 Fed. Reg. 44396, 44458-59 (1996). FDA stated that "[t]his lack of evidence may indicate that it is not relatively easy for young people to purchase cigarettes and smokeless tobacco through the mail." *Id.* at 44459. FDA highlighted comments indicating that minors are not patient enough to wait to receive cigarettes sold by mail-order and are not willing to purchase the minimum quantities required for mail-order purchases. *Id.* at 44458-59. FDA concluded that a problem had not been demonstrated that would justify such an interference with "an adult's ability to obtain legally his or her preferred tobacco products." *Id.* at 44459. Even if there were evidence that minors are using the Internet, the mails, or telephones to obtain cigarettes to any substantial degree, less drastic means than the sales ban imposed by Section 1399-11 are available to New York to prevent cigarettes sold via those channels from reaching minors. These include enforcement of existing state laws prohibiting cigarette sales to minors and imposition of appropriate age-verification requirements tailored to Internet, mail-order, and telephone sales.

20. The contention that such sales may be banned to help the state monitor and measure cigarette consumption is also wanting. Less drastic and more effective means are available to New York to serve those purposes. These include collection of information through survey research and the reporting requirements imposed on out-of-state sellers by the federal Jenkins Act, 15 U.S.C. § 376. That federal law requires any person who "sells or transfers for profit cigarettes in interstate commerce" to any person or entity in a state that taxes tobacco (other than a distributor licensed by the state) to register with the state's tobacco tax administrator and file a monthly memorandum or invoice covering "each and every shipment of cigarettes [into the state] during the previous calendar month" and containing "the name and address of the person to whom the shipment was made, the brand [of cigarettes shipped], and the quantity thereof." 15 U.S.C. § 376(a).

#### Impact on Plaintiffs

21. Section 1399-II will, upon its effective date, have a major adverse impact on the ability of Plaintiffs to market smaller brands and to introduce new brands where brick-and-mortar distribution channels are inadequate. As a result of legislative restrictions and for other reasons, the space available for display of cigarettes in brick-and-mortar retail establishments is shrinking. Cost considerations also are making it increasingly difficult for wholesalers and retailers to purchase and stock smaller brands, which include new and less popular brands, and it is becoming increasingly difficult to communicate information about new brands at the retail level. As a result, manufacturers such as Plaintiff B&W will increasingly need alternative avenues, such as the Internet, mail-order, and telephone, for marketing such products to lawful adult consumers.

22. Plaintiff B&W has received inquiries from lawful adult consumers of its products,

including many from New York consumers, concerning the availability of its cigarette brands that they are unable to locate in brick-and-mortar retail stores. In response, it developed, at a cost of millions of dollars, a direct marketing program to ensure, through sales to consumers by its subsidiary Plaintiff BWT, that its products are available to customers who seek to purchase them. This program, which was launched on October 10, 2000, is initially utilizing mail-order, fax, and telephone sales, and will begin utilizing Internet sales in the first half of 2001. Enactment of Section 1399-ll has precluded Plaintiff B&W from implementing this program in New York.

23. B&W's direct marketing program includes stringent procedures to prevent the sale of such cigarettes to minors. It also provides for the payment of all applicable New York excise and sales taxes on all cigarettes shipped to consumers in New York. Under the program, the sale of cigarettes to consumers by BWT, including New York consumers, takes place in the State of Georgia.

24. Section 1399-ll's prohibition against direct shipment of cigarettes to lawful New York consumers is causing and will in the future continue to cause direct and irreparable injury to Plaintiffs in the form of lost revenues and sales, loss of good will among longstanding customers of its products located in the State of New York, and ultimately loss of customers to manufacturers of competing products.

#### Loophole for Sales by Indian Retailers

25. Indian retailers on reservations within the State of New York sell cigarettes and operate numerous websites on which cigarettes are offered for sale.

26. Representatives of Defendant Governor Pataki have indicated that Section 1399-ll will not be enforced directly against Indian retailers and wholesalers who sell cigarettes to New

York consumers via the Internet, mail-order, or telephone under Section 1399-ll(1), but instead will be enforced against common and contract carriers who transport such cigarettes to New York consumers under Section 1399-ll(2).

27. Although Section 1399-ll(2) prohibits common and contract carriers from transporting cigarettes to New York consumers, Section 1399-ll(2) does not and cannot be enforced against the United States Postal Service.

28. Indian retailers and wholesalers in New York will therefore be able to continue, and will continue, to sell cigarettes via the Internet, mail-order, and telephone to New York consumers, notwithstanding Section 1399-ll, by transferring the business of shipping such cigarettes to New York consumers from private carriers to the Postal Service.

29. Such continuing shipments of cigarettes to consumers will render any putative benefits of Section 1399-ll illusory.

#### **COUNT I**

##### **(Impermissible Regulation of Instruments of Interstate Commerce)**

30. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-29 as though fully set forth herein.

31. The Commerce Clause precludes the states from regulating instruments of interstate commerce that demand uniform national regulation.

32. The Internet is a medium of interstate commerce that this Court has recognized is "susceptible to regulation only on a national level."

33. Section 1399-ll violates the Commerce Clause because it regulates instruments of commerce, including the Internet, that are "susceptible to regulation only on a national level."

34. Enforcement of Section 1399-ll causes Plaintiffs irreparable harm for which there is no adequate remedy at law.

**COUNT II**  
**(Impermissible Extraterritorial Regulation)**

35. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-29 as though fully set forth herein.

36. The Commerce Clause precludes the states from regulating transactions occurring in other states.

37. Section 1399-II violates the Commerce Clause because it attempts to prohibit sales that take place outside of the state of New York.

38. Enforcement of Section 1399-II causes Plaintiffs irreparable harm for which there is no adequate remedy at law.

**COUNT III**  
**(Impermissible Economic Protectionism)**

39. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-29 as though fully set forth herein.

40. The Commerce Clause precludes the state from discriminating against interstate commerce to protect in-state economic interests.

41. The purpose and effect of Section 1399-II is to protect in-state retailers against competition by permitting cigarettes sales in New York only in brick-and-mortar establishments.

42. Section 1399-II violates the Commerce Clause by thus discriminating against and disproportionately burdening out-of-state retailers.

43. Enforcement of Section 1399-II causes Plaintiffs irreparable harm for which there is no adequate remedy at law.

**COUNT IV**  
**(Unjustified Interference with Interstate Commerce:**  
**Sales to Consumers)**

44. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-29 as though fully set forth herein.

45. A state law that discriminates against interstate commerce violates the Commerce Clause unless there is "no other means" to serve the state's legitimate local interests. Even if the state law does not discriminate against but only "incidentally" burdens interstate commerce, the law violates the Commerce Clause if its burden on interstate commerce exceeds the local benefits.

46. Section 1399-II violates the Commerce Clause because less drastic alternatives are available to serve the state's legitimate interests without banning the use of entire modes of commerce. Banning Internet, mail order, and telephone cigarette sales is not necessary to prevent cigarettes from reaching minors, to collect state taxes on cigarette sales, or to measure and monitor cigarette consumption, and the burden imposed on interstate commerce by banning such sales exceeds the law's putative local benefits, which in any event are illusory because of the loopholes in the legislation described above.

47. Enforcement of Section 1399-II causes Plaintiffs irreparable harm for which there is no adequate remedy at law.

**COUNT V**  
**(42 U.S.C. § 1983)**

48. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-29 as though fully set forth herein.

49. By enacting and threatening to enforce Section 1399-II, Defendants have unlawfully and substantially deprived Plaintiffs of rights secured by the Commerce Clause of the

United States Constitution.

50. Defendants are "persons" under 42 U.S.C. § 1983 who have acted under color of state law to deprive Plaintiffs of rights secured by the United States Constitution.

51. Plaintiffs have no adequate remedy at law.


**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Court:

- (a) enter a judgment declaring that Section 1399-II violates the Commerce Clause of the United States Constitution, and 42 U.S.C. § 1983, and is null and void;
- (b) enter a permanent injunction enjoining Defendants and their agents from taking any action under or to enforce or implement Section 1399-II;
- (c) award Plaintiffs reasonable attorneys' fees and costs; and
- (d) grant Plaintiffs such additional or different relief as it deems just and proper.

Dated: New York, New York.  
October 12, 2000

COVINGTON & BURLING

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## New York State 2000 Chapter 262

The result of your chapter query is shown below. To try another query, enter the desired chapter number (2-489) here:  and press

### LAWS OF NEW YORK, 2000 CHAPTER 262

AN ACT to amend the public health law, in relation to the shipment of cigarettes; and to amend the tax law and the administrative code of the city of New York, in relation to penalties for violations of the cigarette tax

Became a law August 16, 2000, with the approval of the Governor. Passed on message of necessity pursuant to Article III, section 14 of the Constitution by a majority vote, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. The legislature finds and declares that the shipment of cigarettes sold via the internet or by telephone or by mail order to residents of this state poses a serious threat to public health, safety, and welfare, to the funding of health care pursuant to the health care reform act of 2000, and to the economy of the state. The legislature also finds that when cigarettes are shipped directly to a consumer, adequate proof that the purchaser is of legal age cannot be obtained by the vendor, which enables minors to avoid the provisions of article 13-F of the public health law. It is also the legislature's finding that by preventing shipment of cigarettes directly to consumers, the State will be better able to measure and monitor cigarette consumption and to better determine the public health and fiscal consequences of smoking. The legislature further finds that existing penalties for cigarette bootlegging are inadequate. Therefore, the bill enhances existing penalties for possession of unstamped or unlawfully stamped cigarettes.

S 2. The public health law is amended by adding a new section 1399-11 to read as follows:

S 1399-11. UNLAWFUL SHIPMENT OR TRANSPORT OF CIGARETTES. 1. IT SHALL BE UNLAWFUL FOR ANY PERSON ENGAGED IN THE BUSINESS OF SELLING CIGARETTES TO SHIP OR CAUSE TO BE SHIPPED ANY CIGARETTES TO ANY PERSON IN THIS STATE WHO IS NOT: (A) A PERSON LICENSED AS A CIGARETTE TAX AGENT OR WHOLESALE DEALER UNDER ARTICLE TWENTY OF THE TAX LAW OR REGISTERED RETAIL DEALER UNDER SECTION FOUR HUNDRED EIGHTY-A OF THE TAX LAW; (B) AN EXPORT WAREHOUSE PROPRIETOR PURSUANT TO CHAPTER 52 OF THE INTERNAL REVENUE CODE OR AN OPERATOR OF A CUSTOMS BONDED WAREHOUSE PURSUANT TO SECTION 1311 OR 1555 OF TITLE 19 OF THE UNITED STATES CODE; OR (C) 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. FOR PURPOSES OF THIS SUBDIVISION, A PERSON IS A LICENSED OR REGISTERED AGENT OR DEALER DESCRIBED IN PARAGRAPH (A) OF THIS SUBDIVISION IF HIS OR HER NAME APPEARS ON A LIST OF LICENSED OR REGISTERED AGENTS OR DEALERS PUBLISHED BY THE DEPARTMENT OF TAXATION AND FINANCE, OR IF SUCH PERSON IS LICENSED OR REGISTERED AS AN AGENT OR DEALER UNDER ARTICLE TWENTY OF THE TAX LAW.

2. IT SHALL BE UNLAWFUL FOR ANY COMMON OR CONTRACT CARRIER TO KNOWINGLY TRANSPORT CIGARETTES TO ANY PERSON IN THIS STATE REASONABLY BELIEVED BY SUCH CARRIER TO BE OTHER THAN A PERSON DESCRIBED IN PARAGRAPH (A), (B) OR (C) OF SUBDIVISION ONE OF THIS SECTION. FOR PURPOSES OF THE PRECEDING SENTENCE, IF CIGARETTES ARE TRANSPORTED TO A HOME OR RESIDENCE, IT SHALL BE PRESUMED THAT THE COMMON OR CONTRACT CARRIER KNEW THAT SUCH PERSON WAS NOT A PERSON DESCRIBED IN PARAGRAPH (A), (B) OR (C) OF SUBDIVISION ONE OF THIS SECTION. IT SHALL BE UNLAWFUL FOR ANY OTHER

PERSON TO KNOWINGLY TRANSPORT CIGARETTES TO ANY PERSON IN THIS STATE, OTHER THAN TO A PERSON DESCRIBED IN PARAGRAPH (A), (B) OR (C) OF SUBDIVISION ONE OF THIS SECTION. NOTHING IN THIS SUBDIVISION SHALL BE CONSTRUED TO PROHIBIT A PERSON OTHER THAN A COMMON OR CONTRACT CARRIER FROM TRANSPORTING NOT MORE THAN EIGHT HUNDRED CIGARETTES AT ANY ONE TIME TO ANY PERSON IN THIS STATE.

3. WHEN A PERSON ENGAGED IN THE BUSINESS OF SELLING CIGARETTES SHIPS OR CAUSES TO BE SHIPPED ANY CIGARETTES TO ANY PERSON IN THIS STATE, OTHER THAN IN THE CIGARETTE MANUFACTURER'S ORIGINAL CONTAINER OR WRAPPING, THE CONTAINER OR WRAPPING MUST BE PLAINLY AND VISIBLY MARKED WITH THE WORD "CIGARETTES".

4. WHENEVER A POLICE OFFICER DESIGNATED IN SECTION 1.20 OF THE CRIMINAL PROCEDURE LAW OR A PEACE OFFICER DESIGNATED IN SUBDIVISION FOUR OF SECTION 2.10 OF SUCH LAW, ACTING PURSUANT TO HIS OR HER SPECIAL DUTIES, SHALL DISCOVER ANY CIGARETTES WHICH HAVE BEEN OR WHICH ARE BEING SHIPPED OR TRANSPORTED IN VIOLATION OF THIS SECTION, SUCH PERSON IS HEREBY EMPOWERED AND AUTHORIZED TO SEIZE AND TAKE POSSESSION OF SUCH CIGARETTES, AND SUCH CIGARETTES SHALL BE SUBJECT TO A FORFEITURE ACTION PURSUANT TO THE PROCEDURES PROVIDED FOR IN ARTICLE THIRTEEN-A OF THE CIVIL PRACTICE LAW AND RULES, AS IF SUCH ARTICLE SPECIFICALLY PROVIDED FOR FORFEITURE OF CIGARETTES SEIZED PURSUANT TO THIS SECTION AS A PRE-CONVICTION FORFEITURE CRIME.

5. ANY PERSON WHO VIOLATES THE PROVISIONS OF SUBDIVISION ONE OR TWO OF THIS SECTION SHALL BE GUILTY OF A CLASS A MISDEMEANOR AND FOR A SECOND OR SUBSEQUENT VIOLATION SHALL BE GUILTY OF A CLASS E FELONY. IN ADDITION TO THE CRIMINAL PENALTY, THE COMMISSIONER MAY IMPOSE A CIVIL FINE NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH SUCH VIOLATION ON ANY PERSON WHO VIOLATES SUBDIVISION ONE OR TWO OF THIS SECTION. THE COMMISSIONER MAY IMPOSE A CIVIL FINE NOT TO EXCEED FIVE THOUSAND DOLLARS FOR EACH VIOLATION OF SUBDIVISION THREE OF THIS SECTION ON ANY PERSON ENGAGED IN THE BUSINESS OF SELLING CIGARETTES WHO SHIPS OR CAUSES TO BE SHIPPED ANY SUCH CIGARETTES TO ANY PERSON IN THIS STATE.

S 3. Paragraph (k) of subdivision 1 of section 480 of the tax law, as amended by chapter 629 of the laws of 1996, is amended to read as follows:

(k) No agent shall sell cigarettes and no distributor shall sell tobacco products to an unlicensed wholesale dealer, or to a wholesale dealer whose license has been suspended or revoked, or to a retail dealer who (has been forbidden to continue selling cigarettes or tobacco products, as the case may be) IS NOT REGISTERED UNDER SECTION FOUR HUNDRED EIGHTY-A OF THIS ARTICLE, OR WHOSE REGISTRATION HAS BEEN SUSPENDED OR REVOKED, and no wholesale dealer shall sell cigarettes or tobacco products to a retail dealer (so forbidden after notice of the prohibition) WHO IS NOT REGISTERED UNDER SECTION FOUR HUNDRED EIGHTY-A OF THIS ARTICLE, OR WHOSE REGISTRATION HAS BEEN SUSPENDED OR REVOKED, and no retail dealer (so forbidden) shall (continue selling) SELL cigarettes or tobacco products UNLESS SUCH DEALER IS REGISTERED UNDER SECTION FOUR HUNDRED EIGHTY-A OF THIS ARTICLE.

S 4. Subdivision 1 of section 480-a of the tax law is amended by adding a new paragraph (e) to read as follows:

(E) THE COMMISSIONER MAY REFUSE TO REGISTER AS A RETAIL DEALER OR MAY REVOKE THE REGISTRATION OF A RETAIL DEALER WHERE THE APPLICANT'S OR RETAIL DEALER'S PLACE OF BUSINESS IS AT THE SAME PREMISES AS THAT OF A RETAIL DEALER WHOSE RETAIL DEALER REGISTRATION HAS BEEN REVOKED AND WHERE SUCH REVOCATION IS STILL IN EFFECT, UNLESS THE APPLICANT OR RETAIL DEALER PROVIDES THE COMMISSIONER WITH ADEQUATE DOCUMENTATION DEMONSTRATING THAT SUCH APPLICANT OR RETAIL DEALER ACQUIRED THE PREMISES OR BUSINESS THROUGH AN ARM'S LENGTH TRANSACTION AS DEFINED IN THIS PARAGRAPH AND THAT THE SALE OR LEASE WAS NOT CONDUCTED, IN WHOLE OR IN PART, FOR THE PURPOSE OF PERMITTING THE ORIGINAL REGISTRANT TO AVOID THE EFFECT OF THE PREVIOUS REVOCATION FOR THE SAME PREMISES. FOR PURPOSES OF THIS PARAGRAPH, "ARM'S LENGTH TRANSACTION" MEANS A SALE OF A FEE OR ALL UNDIVIDED INTERESTS IN REAL PROPERTY, OR LEASE OF ANY PART THEREOF, OR A SALE OF A BUSINESS, IN GOOD FAITH AND FOR VALUABLE CONSIDERATION, THAT

REFLECTS THE FAIR MARKET VALUE OF SUCH REAL PROPERTY OR LEASE, OR BUSINESS, IN THE OPEN MARKET, BETWEEN TWO INFORMED AND WILLING PARTIES, WHERE NEITHER IS UNDER ANY COMPULSION TO PARTICIPATE IN THE TRANSACTION, UNAFFECTED BY ANY UNUSUAL CONDITIONS INDICATING A REASONABLE POSSIBILITY THAT THE SALE OR LEASE WAS MADE FOR THE PURPOSE OF PERMITTING THE ORIGINAL REGISTRANT TO AVOID THE EFFECT OF THE PREVIOUS REVOCATION FOR THE SAME PREMISES. THE FOLLOWING SALES OR LEASES SHALL BE PRESUMED NOT TO BE ARM'S LENGTH TRANSACTIONS UNLESS ADEQUATE DOCUMENTATION IS PROVIDED DEMONSTRATING THAT THE SALE OR LEASE WAS NOT CONDUCTED, IN WHOLE OR IN PART, FOR THE PURPOSE OF PERMITTING THE ORIGINAL REGISTRANT TO AVOID THE EFFECT OF THE PREVIOUS REVOCATION FOR THE SAME PREMISES:

- (I) A SALE BETWEEN RELATIVES; OR
- (II) A SALE BETWEEN RELATED COMPANIES OR PARTNERS IN A BUSINESS; OR
- (III) A SALE OR LEASE AFFECTED BY OTHER FACTS OR CIRCUMSTANCES THAT WOULD INDICATE THAT THE SALE OR LEASE IS ENTERED INTO FOR THE PRIMARY PURPOSE OF PERMITTING THE ORIGINAL REGISTRANT TO AVOID THE EFFECT OF THE PREVIOUS REVOCATION FOR THE SAME PREMISES.

§ 5. Subdivision 3 of section 480-a of the tax law, as added by chapter 190 of the laws of 1990, paragraph (a) as amended by chapter 629 of the laws of 1996, is amended to read as follows:

3. In addition to any other penalty imposed by this chapter: (a) Any retail dealer who violates the provisions of this section shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not LESS THAN FIVE HUNDRED DOLLARS BUT NOT to exceed (one) TWO thousand dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not LESS THAN ONE THOUSAND DOLLARS BUT NOT to exceed (two) THREE thousand five hundred dollars; or

(b) Any person who owns or, if the owner is not the operator, then any person who operates one or more vending machines through which cigarettes or tobacco products are sold in this state and who violates the provisions of this section shall, after due notice and an opportunity for a hearing, for a first violation be liable for a civil fine not LESS THAN SEVENTY-FIVE DOLLARS BUT NOT to exceed (one) TWO hundred dollars and for a second or subsequent violation within three years following a prior finding of violation be liable for a civil fine not LESS THAN TWO HUNDRED DOLLARS BUT NOT to exceed (three) SIX hundred dollars.

§ 6. Paragraph (d) of subdivision 4 of section 480-a of the tax law, as added by chapter 629 of the laws of 1996, is amended to read as follows:

(d) After review of the suspension or revocation of registration by the commissioner or his designee is complete, or the time within which a retail dealer may request such review has expired without such a request having been made, notice of the suspension or revocation of a retail dealer registration pursuant to this subdivision shall be given by the commissioner to the head of the division of the lottery for the purpose of enforcement of section sixteen hundred seven of this chapter AND SUCH DIVISION MAY SUSPEND OR REVOKE ANY LICENSE ISSUED WITH RESPECT TO A LOTTERY AGENT'S SPECIFIC LOCATION PURSUANT TO ARTICLE THIRTY-FOUR OF THIS CHAPTER IF SUCH LOTTERY AGENT IS A RETAIL DEALER OF CIGARETTES WHOSE REGISTRATION FOR SUCH LOCATION IS SUSPENDED OR REVOKED PURSUANT TO THIS SECTION. In addition, notice of such suspension or revocation shall also be given to the division of alcoholic beverage control and such suspension or revocation shall constitute cause, for purposes of section one hundred eighteen of the alcoholic beverage control law, for revocation, cancellation or suspension of any license or permit issued pursuant to such law.

§ 7. Paragraph (b) of subdivision 1 of section 481 of the tax law, as amended by chapter 61 of the laws of 1989, is amended to read as follows:

(b) (I) In addition to any other penalty imposed by this article, the commissioner (of taxation and finance) may impose a penalty of not more than one hundred FIFTY dollars for each two hundred cigarettes, or fraction thereof, in excess of (two) ONE thousand cigarettes in unstamped or

unlawfully stamped packages in the possession or under the control of any person. In addition, the commissioner may impose a penalty of not more than (fifty) SEVENTY-FIVE dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any person and a penalty of not more than one hundred FIFTY dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of five hundred cigars or ten pounds of tobacco in the possession or under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed shall not exceed (five) SEVEN thousand FIVE HUNDRED dollars in the aggregate. The commissioner may impose a penalty of not more than (fifty) SEVENTY-FIVE dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred FIFTY dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed shall not exceed (ten) FIFTEEN thousand dollars in the aggregate.

(II) THE PENALTIES IMPOSED BY THIS SUBPARAGRAPH MAY BE IMPOSED BY THE COMMISSIONER IN ADDITION TO ANY OTHER PENALTY IMPOSED BY THIS ARTICLE, BUT IN LIEU OF THE PENALTIES IMPOSED BY SUBPARAGRAPH (I) OF THIS PARAGRAPH:

(A) (I) NOT LESS THAN THIRTY DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF ONE THOUSAND CIGARETTES BUT LESS THAN OR EQUAL TO FIVE THOUSAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON;

(II) NOT LESS THAN SEVENTY-FIVE DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF FIVE THOUSAND CIGARETTES BUT LESS THAN OR EQUAL TO TWENTY THOUSAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON; AND

(III) NOT LESS THAN ONE HUNDRED DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF TWENTY THOUSAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES, KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON.

(B) (I) NOT LESS THAN TWENTY-FIVE DOLLARS BUT NOT MORE THAN ONE HUNDRED DOLLARS FOR EACH FIFTY CIGARS OR ONE POUND OF TOBACCO, OR FRACTION THEREOF, IN EXCESS OF TWO HUNDRED FIFTY CIGARS OR FIVE POUNDS OF TOBACCO KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON, WITH RESPECT TO WHICH THE TOBACCO PRODUCTS TAX HAS NOT BEEN PAID OR ASSUMED BY A DISTRIBUTOR OR TOBACCO PRODUCTS DEALER; AND

(II) NOT LESS THAN FIFTY DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH FIFTY CIGARS OR POUND OF TOBACCO, OR FRACTION THEREOF, IN EXCESS OF FIVE HUNDRED CIGARS OR TEN POUNDS OF TOBACCO KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON, WITH RESPECT TO WHICH THE TOBACCO PRODUCTS TAX HAS NOT BEEN PAID OR ASSUMED BY A DISTRIBUTOR OR TOBACCO PRODUCTS DEALER; PROVIDED, HOWEVER, THAT ANY SUCH PENALTY IMPOSED UNDER THIS CLAUSE SHALL NOT EXCEED TEN THOUSAND DOLLARS IN THE AGGREGATE.

(C) (I) NOT LESS THAN TWENTY-FIVE DOLLARS BUT NOT MORE THAN ONE HUNDRED DOLLARS FOR EACH FIFTY CIGARS OR ONE POUND OF TOBACCO, OR FRACTION THEREOF, IN EXCESS OF FIFTY CIGARS OR ONE POUND OF TOBACCO KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON, WITH RESPECT TO WHICH THE TOBACCO PRODUCTS TAX HAS NOT BEEN PAID OR ASSUMED BY A DISTRIBUTOR OR TOBACCO PRODUCTS DEALER; AND

(II) NOT LESS THAN FIFTY DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS

FOR EACH FIFTY CIGARS OR POUND OF TOBACCO, OR FRACTION THEREOF, IN EXCESS OF TWO HUNDRED FIFTY CIGARS OR FIVE POUNDS OF TOBACCO KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON, WITH RESPECT TO WHICH THE TOBACCO PRODUCTS TAX HAS NOT BEEN PAID OR ASSUMED BY A DISTRIBUTOR OR A TOBACCO PRODUCTS DEALER; PROVIDED, HOWEVER, THAT ANY SUCH PENALTY IMPOSED UNDER THIS CLAUSE SHALL NOT EXCEED TWENTY THOUSAND DOLLARS IN THE AGGREGATE.

(III) Any penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The commissioner (of taxation and finance,) in (his) THE COMMISSIONER'S discretion, may remit all or part of such penalty. Such penalty shall be paid to the department (of taxation and finance) and disposed of as hereinafter provided with respect to moneys derived from the tax.

S 8. Subdivision (d) of section 1814 of the tax law, as added by chapter 65 of the laws of 1985, is amended to read as follows:

(d) Any person, other than an agent (so authorized) LICENSED by the (tax commission) COMMISSIONER, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor. ANY PERSON WHO VIOLATES THE PROVISIONS OF THIS SUBDIVISION AFTER HAVING PREVIOUSLY BEEN CONVICTED OF A VIOLATION OF THIS SUBDIVISION WITHIN THE PRECEDING FIVE YEARS SHALL BE GUILTY OF A CLASS E FELONY.

S 9. Subdivision (e) of section 1814 of the tax law, as added by chapter 65 of the laws of 1985, is amended to read as follows:

(e) (1) Any person, other than an agent (so authorized) LICENSED by the (tax commission) COMMISSIONER, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class E felony.

(2) ANY PERSON, OTHER THAN AN AGENT LICENSED BY THE COMMISSIONER, WHO WILLFULLY POSSESSES OR TRANSPORTS FOR THE PURPOSE OF SALE THIRTY THOUSAND OR MORE CIGARETTES SUBJECT TO THE TAX IMPOSED BY SECTION FOUR HUNDRED SEVENTY-ONE OF THIS CHAPTER IN ANY UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES OR WHO WILLFULLY SELLS OR OFFERS FOR SALE THIRTY THOUSAND OR MORE CIGARETTES IN ANY UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES IN VIOLATION OF ARTICLE TWENTY OF THIS CHAPTER SHALL BE GUILTY OF A CLASS D FELONY.

S 10. Subdivision b of section 11-1317 of the administrative code of the city of New York is amended to read as follows:

b. (1) In addition to any other penalty imposed by this section, the commissioner of finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of (two) ONE thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. Such penalty shall be determined as provided in section 11-1310 of this chapter, and may be reviewed only pursuant to such section. Such penalty may be enforced in the same manner as the tax imposed by this chapter. The commissioner of finance, in his or her discretion, may remit all or part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues under this chapter.

(2) THE PENALTIES IMPOSED BY THIS PARAGRAPH MAY BE IMPOSED BY THE COMMISSIONER OF FINANCE IN ADDITION TO ANY OTHER PENALTY IMPOSED BY THIS SECTION, BUT IN LIEU OF THE PENALTIES IMPOSED BY PARAGRAPH ONE OF THIS SUBDIVISION: (A) NOT LESS THAN THIRTY DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF ONE THOUSAND CIGARETTES BUT LESS THAN OR EQUAL TO FIVE THOU-

SAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON; (B) NOT LESS THAN SEVENTY-FIVE DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF FIVE THOUSAND CIGARETTES BUT LESS THAN OR EQUAL TO TWENTY THOUSAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON; AND (C) NOT LESS THAN ONE HUNDRED DOLLARS BUT NOT MORE THAN TWO HUNDRED DOLLARS FOR EACH TWO HUNDRED CIGARETTES, OR FRACTION THEREOF, IN EXCESS OF TWENTY THOUSAND CIGARETTES IN UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES, KNOWINGLY IN THE POSSESSION OR KNOWINGLY UNDER THE CONTROL OF ANY PERSON. SUCH PENALTY SHALL BE DETERMINED AS PROVIDED IN SECTION 11-1310 OF THIS CHAPTER, AND MAY BE REVIEWED ONLY PURSUANT TO SUCH SECTION. SUCH PENALTY MAY BE ENFORCED IN THE SAME MANNER AS THE TAX IMPOSED BY THIS CHAPTER. THE COMMISSIONER OF FINANCE, IN HIS OR HER DISCRETION, MAY REMIT ALL OR PART OF SUCH PENALTY. SUCH PENALTY SHALL BE PAID AND DISPOSED OF IN THE SAME MANNER AS OTHER REVENUES UNDER THIS CHAPTER.

§ 11. Subdivisions (b) and (c) of section 11-4012 of the administrative code of the city of New York, as added by chapter 765 of the laws of 1985, are amended to read as follows:

(b) Any person, other than an agent so authorized by the commissioner of finance, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax under chapter thirteen of this title, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of such chapter shall be guilty of a misdemeanor. ANY PERSON WHO VIOLATES THE PROVISIONS OF THIS SUBDIVISION AFTER HAVING PREVIOUSLY BEEN CONVICTED OF A VIOLATION OF THIS SUBDIVISION WITHIN THE PRECEDING FIVE YEARS SHALL BE GUILTY OF A CLASS E FELONY.

(c) (1) Any person, other than an agent so authorized by the commissioner of finance, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by chapter thirteen of this title in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of such chapter shall be guilty of a class E felony.

(2) ANY PERSON, OTHER THAN AN AGENT APPOINTED BY THE COMMISSIONER OF FINANCE, WHO WILLFULLY POSSESSES OR TRANSPORTS FOR THE PURPOSE OF SALE THIRTY THOUSAND OR MORE CIGARETTES SUBJECT TO THE TAX IMPOSED BY CHAPTER THIRTEEN OF THIS TITLE IN ANY UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES OR WHO WILLFULLY SELLS OR OFFERS FOR SALE THIRTY THOUSAND OR MORE CIGARETTES IN ANY UNSTAMPED OR UNLAWFULLY STAMPED PACKAGES IN VIOLATION OF SUCH CHAPTER SHALL BE GUILTY OF A CLASS D FELONY.

§ 12. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 13. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that subdivision two of section 1399-11 of the public health law as added by section two of this act shall take effect January 1, 2001.

The Legislature of the STATE OF NEW YORK SS:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO SHELDON SILVER  
TEMPORARY PRESIDENT OF THE SENATE SPEAKER OF THE ASSEMBLY