

Smoke on the Web:

Can Children Buy Cigarettes Online?



Enforcement Options, Challenges and Recommendations

**A Report Prepared By
The Tobacco Law Project
For The Minnesota Department Of Health**

March 2002

ACKNOWLEDGEMENTS

The Tobacco Law Project gratefully acknowledges the financial support of the City of Plymouth and the Minnesota Department of Health's Youth Tobacco Prevention Initiative for the preparation of this report, and the valuable assistance of the many individuals who contributed to its completion. The City of Plymouth's investigation was conducted under the supervision of Police Chief Craig Gerdes, and was directed by Project Coordinator Lieutenant Joel Franz, with the assistance of Detective Mark Bevins and teen test shoppers Landon Labahn and Erin Neal. Student Research Assistant Lisa Needham, William Mitchell College of Law Class of 2001, conducted research and initial drafting, under the ongoing supervision of Barbara Colombo, former Director of the Center for Health Law and Policy, who prepared additional drafts. The final report was written by Tobacco Law Project Director D. Douglas Blanke. Administrative Assistant Rebekah Wendland compiled the information database. We were assisted in project design and implementation by Kristin Beckmann and Paul Martinez of the Minnesota Department of Health. Dean Harry Haynsworth of William Mitchell College of Law and the members of the Tobacco Law Project Advisory Committee reviewed the report and offered valuable suggestions for improvement, although any errors remain those of the Project alone.

For further information or to order additional copies of the report, please contact:

D. Douglas Blanke
Director
Tobacco Law Project
William Mitchell College of Law
875 Summit Avenue
Saint Paul, MN 55105-3076
(Phone) 651-290-7520
(Fax) 651-290-7515
dblank@wmitchell.edu

Smoke on the Web:
Can Children Buy Cigarettes Online?
Enforcement Options, Challenges and Recommendations

CONTENTS

| | |
|--|------------|
| EXECUTIVE SUMMARY | iii |
| I. INTRODUCTION | 1 |
| A Pediatric Epidemic | |
| Controlling Youth Access | |
| A New Challenge: The Internet | |
| II. THE INVESTIGATION: A SURVEY OF ONLINE CIGARETTE SALES | 4 |
| Findings: Age Verification Procedures | |
| Findings: Packaging | |
| Findings: Delivery Practices | |
| Findings: Cigarette Taxes | |
| III. YOUTH ACCESS TO TOBACCO: MINNESOTA LAWS | 7 |
| IV. THE INTERNET: | |
| A UNIQUE CHALLENGE TO EFFECTIVE REGULATION | 9 |
| Practical and Conceptual Issues | |
| Legal Issues: Jurisdiction | |
| Legal Issues: Interstate Commerce | |
| V. ENFORCEMENT OPTIONS | 14 |
| Possible Actions By Cities or Counties | |
| Possible Actions by the State | |
| Possible Federal Actions | |
| VI. DISCUSSION | 20 |
| Local Enforcement Actions | |
| State Enforcement Actions | |
| Coordinated Multi-State Actions | |
| Federal Actions | |
| State Legislation | |
| Federal Legislation | |
| Uniform State Legislation | |
| International Solutions | |
| Education and Voluntary Compliance | |
| VII. RECOMMENDATIONS | 26 |

| | |
|--|-----------|
| VIII. AREAS FOR FURTHER INVESTIGATION | 27 |
| IX. CONCLUSION | 27 |
| ENDNOTES | 28 |
| APPENDICES | 33 |

EXECUTIVE SUMMARY

Introduction

In the last decade, years, youth tobacco use rose at an alarming rate: twelfth-graders now smoke at nearly twice the rate their parents do. Minnesota's new tobacco prevention efforts show dramatic evidence of reversing this trend, but for those efforts to succeed, Minnesota must reduce the illegal sale of tobacco to minors, not only in stores, but also on the Internet. The emergence of online tobacco sales threatens to undo much of what is achieved by controlling traditional retail sales. This report examines that threat and the options for confronting it.

Investigation

The Police Department of Plymouth, Minnesota, and the Tobacco Law Project at William Mitchell College of Law examined a sample of 96 Web sites selling tobacco online. Age verification safeguards on most of the sites examined were meaningless or nonexistent. Two underage teens, acting under the supervision of a Plymouth police officer, placed 10 orders for cigarettes from 5 of the Web sites examined. **The Web sites accepted all 10 orders without checking the buyers' ages; 8 of the 10 packages of cigarettes were then delivered without checking the age of the person accepting the delivery. In one instance, cigarettes were delivered to an 8-year-old. In another instance, a delivery driver ignored a requirement that the package be delivered only to an adult, and later acknowledged that "most drivers fudge on the adult signature."**

Minnesota Laws

Minnesota imposes criminal penalties on anyone who sells or furnishes tobacco products to minors. The purchase, use or possession of tobacco by a minor is a petty misdemeanor. Local ordinances, required by state law, create civil administrative penalties for retailers and sales clerks who sell to minors.

Unique Challenges

The Internet poses practical and conceptual challenges to effective regulation. Online transactions defy the assumptions and paradigms on which Minnesota's youth access laws are based, because no individual occupies a position comparable to a sales clerk and because the transaction is not clearly linked to one geographic location. These differences raise novel jurisdictional issues. The law in this area is still developing, but the leading Minnesota case strongly suggests that Minnesota courts will have jurisdiction over typical online tobacco retailers, because they purposely avail themselves of the Minnesota market. Any effort by Minnesota to control online sales must not impermissibly burden interstate commerce. A recent New York statute, prohibiting the sale of tobacco through any method other than face-to-face transactions, was overturned on this ground, because it discriminated against out-of-state sellers.

Enforcement Options

Civil and criminal laws available to city and county prosecutors do not offer workable enforcement options. The Attorney General has authority to bring flexible civil actions to enforce the youth access and consumer protection laws, either independently or in coordination with other states. This is a stopgap solution, and the potential costs and benefits need to be weighed carefully, but these actions may offer the only enforcement option worth serious consideration under current state law.

New state legislation, similar to a law recently adopted in Rhode Island, could improve the state's ability to respond. This possible legislation would require online retailers to verify the buyer's age and to ensure that packages are delivered only to adult recipients.

Even with new legislation, the power of a single state to address this problem is limited. Nationwide solutions are needed. Several broad legal theories are currently available to the Federal Trade Commission, and new federal legislation has been proposed. Federal action should be encouraged. For a variety of reasons, however, it does not appear likely in the near future. One feasible alternative to federal legislation may be the development and promotion of a uniform act for consideration by all state legislatures. In the longer term, international responses, perhaps through the World Health Organization's proposed Framework Convention on Tobacco Control, will be required.

Recommendations

- Enforcement at the local level is not a realistic option.
- The Attorney General should weigh the costs and benefits of acting under the consumer protection and youth access laws, perhaps as part of a coordinated effort with other states.
- The Minnesota legislature should consider legislation to require that tobacco retailers who do not make face-to-face sales verify the buyer's age and label packages for delivery only to adults.
- Although federal enforcement actions and federal legislation do not appear likely in the near future, they are needed and should be encouraged.
- In the absence of federal action, consideration should be given to developing uniform state legislation to regulate Internet tobacco sales, for consideration by all state legislatures.
- Ultimately, Internet sales of tobacco must be addressed at the international level. The proposed Framework Convention on Tobacco Control offers the best vehicle for advancing effective restrictions on these sales.

Future Investigation

Efforts to fashion a comprehensive, longer-term response to this problem will need to explore issues related to Minnesota's taxing authority and tax enforcement mechanisms, as well as issues related to American Indian sovereignty.

Conclusion

The availability of tobacco online poses a clear and present danger to Minnesota's efforts to control youth access to tobacco. Current state laws offer only stopgap solutions. New legislation can strengthen the state's ability to respond, but in the longer term, the problem demands a nationwide, and even global, solution.

I. INTRODUCTION

A Pediatric Epidemic

Over the last decade, health authorities have come to recognize tobacco use as the single greatest threat to the long-term health of Americans, and have focused increasing attention on that threat.¹ Because most smokers become addicted to nicotine before they leave high school — indeed, nearly half of young smokers start smoking before they even become teenagers² — public health efforts have given high priority to discouraging young people from using tobacco products.

Despite these efforts, and despite the increasing public attention given to tobacco and health in the 1990s, the nationwide prevalence of youth smoking did not decline. This comes as a surprise to many adults. Adult smoking rates have been falling slowly for nearly forty years.³ Understandably, many adults assume there has been a parallel decline in teen smoking.

Other adults have a very different, but equally plausible, theory. They assume that the level of teen smoking is fixed and unchangeable. “Kids will be kids,” they say, reasoning that adolescence is a time of experimentation, rebellion and risk taking, and that this leads to an inevitable, natural rate of youth smoking, year in and year out.

Both assumptions are wrong.

The distressing fact is that, in the 1990s, the rate at which American adolescents take up smoking did not decline, despite the best efforts of health authorities and law enforcers.⁴ Nor did the rate of youth smoking hold steady, at some unchanging level ordained by the innate nature of the “teen personality.”

On the contrary, during the decade of the ‘90s, youth smoking rates soared.⁵ As America entered the Millennium, its youth were taking up smoking at a rate fifty percent higher than their older brothers and sisters had done only a decade earlier.⁶ This was as true in Minnesota as it was in the nation as a whole. By 2000, for the first time in history, Minnesota high school seniors were smoking at twice the rate their parents were.⁷ Only one out of five adults uses tobacco, yet close to half of our twelfth-graders now do.⁸ Doctor David Kessler, former Administrator of the Food and Drug Administration and a pediatrician by training, labels it a “pediatric epidemic.”⁹

The causes of this alarming trend are hotly debated. Some experts point to dramatically increased spending on cigarette advertising, along with the development of hip, sophisticated campaigns with special appeal to the young, from R.J. Reynolds’ Joe Camel cartoon character to the use of giveaway merchandise, music and sports sponsorships and coupon redemption programs.¹⁰ The seductive power of advertising is confirmed by evidence that new teen

smokers smoke whichever cigarette brands are advertised most heavily — a correlation that does not hold true for adults, but that is strong and consistent for teens. Other observers point to the increasing frequency and prominence of smoking in popular culture, especially films, where, for reasons not yet established, rates of smoking by actors in leading roles have skyrocketed in recent years.

Whatever the explanation, efforts to discourage youth smoking in Minnesota appear to have had little impact — until now, that is. Today, only one year after the introduction of a bold and innovative campaign to reverse the statistics of the preceding decade, Minnesota has reason for hope. Last year, drawing on successful pioneering programs in Florida and elsewhere, and in consultation with the Centers for Disease Control and other leading experts, Minnesota sponsored the creation of “Target Market,” a youth movement to reduce youth tobacco use by exposing the tobacco industry’s manipulation and exploitation of teens and, indirectly, “de-normalizing” smoking within teen culture.

Initially, this unorthodox approach raised eyebrows, especially among skeptics of tobacco prevention programs, some of whom found Target Market, with its teen-centered language and themes, difficult to comprehend. Now, after only twelve months of a planned five-year campaign, research suggests that Target Market and its companion media campaign have achieved near-universal levels of teen awareness and have already begun to alter attitudes.¹¹ Even more dramatically, early indicators show that Target Market has already begun reversing the increase in teen smoking rates, with two studies showing dramatic drops in adolescent smoking in the first year of tobacco prevention activities funded by the State tobacco endowment¹² — an achievement that would not only exceed the State’s expectations for the program’s early stages, but would be virtually without precedent in the history of public efforts to change addictive behaviors.

Controlling Youth Access

Whatever the underlying causes of increased youth smoking, and whatever the effectiveness of the Target Market movement, experts agree that the problem of youth tobacco use is exacerbated by the easy and illegal availability of cigarettes. Like every other state, Minnesota has long prohibited the sale of cigarettes to minors. Sadly, this prohibition remained widely ignored in practice — by salesclerks, retailers and law enforcers alike — until recent years. In 1990, the Administration of President George Bush estimated, based on test purchases across the country, that three-fourths of the tobacco outlets in the United States were selling tobacco to minors.¹³ This came to be known as the “youth access” problem.

During the 1980s and 1990s, many Minnesota communities worked to address this problem by adopting local ordinances to license and regulate the retailers who sell tobacco. To encourage better results, the federal government required states

to test the compliance of their retailers, and threatened to withhold federal block grants from states that failed to show progress in reducing illegal sales.¹⁴ In 1997, the Minnesota legislature required every county, and authorized every city, to adopt a local retailer licensing system, specifying minimum penalties for violations, prohibiting certain sales practices, and requiring licensing authorities to conduct annual tests, or “compliance checks,” of each store, using teen buyers acting under the direction of local officials.¹⁵

Today, such measures are in place in every county and in many cities. While violations continue at unacceptably high rates, the evidence shows steady, substantial progress toward reducing illegal retail sales at Minnesota stores and other businesses. Recent grants from the Department of Health to community groups accelerated this progress by supporting concentrated efforts to improve compliance in more than thirty Minnesota communities. In addition, the Tobacco Law Project is completing an analysis of opportunities for improving the local law enforcement process to reduce violation rates; and some communities with vigorous and sustained programs are now able to report very high compliance by their community’s retailers.

A New Challenge: The Internet

As these coordinated efforts offer hope for controlling illegal over-the-counter sales, a new and unanticipated challenge has emerged. Although recent years have seen youth access initiatives at the federal, state and local levels, these initiatives have focused, almost without exception, on “bricks-and-mortar” retail settings. Long-distance tobacco sales, by mail order or telephone, have always been possible in theory, but in practice, neither of these marketing channels has emerged as a significant source of illegal purchases, and public officials have considered it sufficient to focus on in-store settings.

The sudden emergence of the Internet as a sales medium now calls that assumption into question. Indeed, one Congressional spokesperson calls the Internet “the wild, wild west of commerce” and warns that “all the work the states have done to reduce smoking can be undermined by this online experience.”¹⁶ Some tobacco industry experts predict that, within a decade, one-fifth of all U.S. cigarette sales will be made over the Internet.¹⁷ Already, there appear to be several hundred Web sites offering online sale of cigarettes and other tobacco products.¹⁸ For most adolescents, the Internet is not yet a major source of tobacco. The only published study on the subject found that only two percent of California teen smokers had tried to buy cigarettes online, but also found evidence that, as regular retail sales become more difficult, teens are more likely to turn to the Internet.¹⁹ Whatever the current level of sales, online sellers make tobacco products potentially available to every Minnesota youth, regardless of the best efforts of law enforcers to curtail illegal sales in stores, and regardless of the efforts of parents to control their children’s online shopping.²⁰

In fact, online sales may be uniquely attractive to underage buyers. The online medium offers a degree of anonymity not present in traditional sales. At a minimum, the absence of face-to-face interaction in online sales, as they are currently conducted, prevents verification of the buyer's age by simple observation. Further, some online sellers offer prices significantly below those offered by traditional retailers, often because they do not collect cigarette excise taxes imposed by the buyer's jurisdiction. For these reasons, online retailers represent a new and unique challenge for law enforcement and public health officials.

This challenge prompted the Police Department of the City of Plymouth, Minnesota, in partnership with the Tobacco Law Project at William Mitchell College of Law, to examine the potential for online tobacco retailers to sell cigarettes and other tobacco products to Minnesota youth. With financial support from the Minnesota Youth Tobacco Prevention Initiative administered by the Minnesota Department of Health,²¹ the City of Plymouth and the Tobacco Law Project set out to explore this issue by: (1) surveying existing Web sites for examples of retailers who may already be selling to youth; (2) reviewing the age verification procedures used by typical sites and their delivery services; (3) identifying legal causes of action, both civil and criminal, that could potentially be asserted against online retailers; (4) examining the key legal, constitutional and practical obstacles to the effective use of these legal theories; and (5) offering recommendations as to the most effective courses of action.

This report presents our findings, conclusions and recommendations in each of these areas. While the report also identifies several related legal issues that may come into play in any concerted campaign to regulate Internet sales — most notably, issues related to state taxation and thorny legal issues related to the unique legal status of American Indian communities — these complex topics are beyond the scope of this report and are not examined here.

II. INVESTIGATION: A SURVEY OF ONLINE CIGARETTE SALES

To assess the potential for the Internet to become an important source of illegal sales, the Plymouth Police Department and the Tobacco Law Project set out to survey Web sites selling tobacco, examine any existing safeguards against illegal sales, test the willingness of typical sites to sell to underage buyers and explore the legal issues and options raised by this new medium.

To better understand typical online sales practices, a series of Internet searches were conducted over a period of several weeks in January and February 2001, using common Internet search engines, to identify a representative sample of these sites. A list of 96 sites was compiled, and each site was examined to collect the following information:

- What types of tobacco products were offered for sale?
- Did the site display any statement about the retailer's willingness to sell to minors?
- Did the site require buyers to state that they were adults?
- Did the site verify the buyer's age in any way?
- Were Surgeon General's warnings or other health warnings displayed?
- Were tobacco advertisements or brand logos present?
- Did the site accept credit cards, debit cards, checks, or money orders?
- How were purchases shipped?
- Did the site require a minimum total purchase?

A tabulation of some of the information collected in this survey appears in Appendix A to this report.

Of the sites examined, particular attention was paid to those that failed even to make a statement that buyers must be of legal age. Twelve such sites were identified, and test purchases were made from five of these sites. The test purchases were conducted by two teens, ages 15 and 16, acting under the supervision of the Plymouth Police, using a detailed written protocol. The protocol, developed specifically for this purpose by the Plymouth Police Department and reviewed by the Tobacco Law Project, was tailored to the online setting, but conformed to Minnesota statutory requirements for controlled compliance checks with underage buyers. Participating teens received written parental consent and were supervised by a police officer as they conducted the test purchases on April 7 and 9, 2001. To the extent possible, the police officer was also present for the delivery of the tobacco products.

Ten orders were placed on five Web sites²². As each test purchase was made, a "screen shot," or printout of the material on the computer screen, was generated and retained. In each case, the teen ordered the same item — a carton (or, where a larger minimum order was required, five cartons) of Marlboro cigarettes. **Of ten attempted transactions, ten orders were accepted. In not one instance did the seller verify the customer's age when the order was placed. In two of the ten resulting shipments, an adult signature was required for delivery. In the other eight cases, the cigarettes were delivered without regard to the recipient's age.** Specific practices of the sites examined are summarized below.

Findings: Age Verification Procedures

As is proven by the ability of the teen testers to obtain tobacco in eight of the ten test purchases, the Web sites reviewed showed little commitment to verifying the age of purchasers in any meaningful fashion. This is perhaps consistent with the attitude expressed by the operator of one site, who dismisses efforts to check

compliance with age restrictions as “silly,” because “any kid who wants cigarettes can hand money to an 18-year-old friend and get them.”²³

Many Web sites displayed statements that buyers must be 18 years old. Some sites affirmatively required customers to click on a statement affirming that they are 18 years old,²⁴ a requirement accompanied in some instances by a warning that the customer will be subject to state or federal prosecution for false statements. These “safeguards” do not check or verify the buyer’s true age, but do purport to shift responsibility for illegal sales away from the seller.

Other online retailers appear to base their practices on the assumption that, if a buyer has access to a credit card, he or she is of legal age. This is not true. Minors may be authorized signers on their parents’ cards; a card may be issued in a child’s name with payment guaranteed by the parent;²⁵ or a child may hold a debit card, which, to the online retailer, is indistinguishable from a credit card. And, of course, a child may use a parent’s card without permission.

None of the Web sites tested for this project required the participating teens to prove their ages. One of these sites, www.cycocigs.com, contained no age warnings as part of the transaction, but did bury an age restriction statement within the detailed “terms of sale.” Buyers were not required to read the terms of sale. This site claimed that its sales had increased 1000 percent in the first quarter of 2001. Another Web site tested, www.tobacco-online.net, called itself a “tax free tobacco store.” The home page of this site did not include any age warnings (or health warnings), but did assure customers that their identities would be kept private.

Findings: Packaging

The test purchases resulted in ten shipments of cigarettes. Each of the shipments was packaged in a standard U.S. Postal Service Priority Mail package or in unmarked brown paper wrapping. None of packages bore a return address or other marking to indicate the package came from a cigarette retailer. The names of the retailers’ companies did not suggest the nature of their business.

Findings: Delivery Practices

There were ten deliveries. Seven were made without regard to the age of the recipient, either by leaving the package on a doorstep, handing it to the teen tester, or in one instance, handing it to an eight-year-old.

The three remaining packages were marked for “adult only” delivery. Two of these three restrictions were honored. In the third instance the delivery service driver simply ignored the sticker. He later explained to a Plymouth police officer that “most drivers fudge on the adult signature” to avoid having to return to the home a second time, and the delivery service confirmed that this occurs.

Findings: Cigarette Taxes

Of the ten packages of cigarettes delivered, only one bore a tax stamp of any jurisdiction. It indicated that cigarette tax had been paid in Louisiana. Another package came shipped from overseas, and contained unidentified markings in Cyrillic letters.

The test purchases and the review of nearly one hundred online tobacco retailers persuaded the Plymouth Police Department and the Tobacco Law Project that it is already extremely easy for youth to purchase cigarettes online. No effective age verification procedures were encountered. While the sites reviewed do not obviously target teens,²⁶ they take no meaningful steps to avoid selling to them.

After reviewing the test purchases, the out-of-state location of the retailers, the possible legal remedies, the expense of prosecution and the likely results, the City of Plymouth exercised its discretion in deciding not to initiate enforcement actions, and the Tobacco Law Project supported this decision. Instead, the decision was made to use the information gathered in the investigation to inform the consideration of legal and policy options for addressing this new problem.

III. YOUTH ACCESS TO TOBACCO: MINNESOTA LAWS

Minnesota's laws treat youth access to tobacco as both a criminal and a civil issue. Whether these laws can control online sales will be considered in the remainder of this report. By their terms, however, none of these laws is limited to traditional retail settings, and each of them is worth considering as a possible tool for use in the online setting.

Selling or furnishing tobacco to a minor, and buying, using or possessing tobacco by a minor, are all addressed by long-standing provisions of Minnesota's Criminal Code, typically enforceable by city or county attorneys, prosecuting in the exercise of their discretion and at the instance of a peace officer. Under these provisions:

- An individual who sells cigarettes or other tobacco products to a person under 18 is guilty of a misdemeanor, punishable by incarceration for up to 90 days and a fine of up to \$1000. Minn. Stat. §609.685, Subd 1(a) (2000). A subsequent violation within five years is a gross misdemeanor, punishable by up to one year in jail and a fine of up to \$3,000. Id.
- One who "furnishes" (i.e., gives or makes available, but not as a sale) tobacco products to a person under 18 is similarly guilty of a misdemeanor and, on any subsequent violation within five

years, a gross misdemeanor. Minn. Stat. §609.685, Subd. 2(a) (2000).

- A person under the age of 18 who purchases or attempts to purchase tobacco products commits a petty misdemeanor, as does any young person who uses or possesses tobacco products. Minn. Stat. §609.685, Subd. 3 (2000). A petty misdemeanor is non-criminal offense (such as a parking ticket) punishable by a fine of up to \$300. Violators are ordinarily referred to the juvenile justice system, and in some communities, may be directed by the court to a tobacco use “diversion program.”
- A minor who attempts to buy tobacco with false identification, such as an altered driver’s license or Minnesota identification card, or with another person’s identification, commits a misdemeanor, punishable by up to 90 days in jail, a fine of up to \$1,000 and confiscation of the identification. Minn. Stat. §609.685, Subd. 2(b) and Subd. 6 (2000).

In addition to these criminal penalties, the sale of tobacco products to minors is a civil offense punishable by the imposition of administrative penalties under local ordinances. Minnesota Statutes, §461.12 (2000), as amended in 1997, required every county to adopt an ordinance creating a licensing system for tobacco retailers, and such laws are now in place in all Minnesota counties. In addition, the state law allows a city to adopt such an ordinance, if the city chooses to do so. Many have. To sell tobacco in Minnesota, a retailer must obtain a license from his or her city, if the city has adopted a licensing ordinance, or from the county, if no city ordinance exists or if the retailer is located in an unincorporated area.

By state law, these local ordinances contain certain minimum features, including increasing penalties for repeat offenders, annual compliance checks, and restrictions on sales practices. A retail business caught selling tobacco to a minor is subject to an administrative penalty of at least \$75, with the penalty increasing to at least \$200 for a second offense, and, on a third offense, to a seven-day suspension of the retailer’s tobacco license and a \$250 penalty. The sales clerk is also subject to a penalty of at least \$50. Minn. Stat. §461.12, Subd. 3 (2000).

Cities and counties are free to add to these minimum requirements, or toughen them, and many do. Some impose greater penalties; others enforce additional restrictions on sales practices — for example, eliminating all self-service sales or prohibiting the sale of tobacco by sales clerks under the age of 18. Each year, the licensing authority must conduct at least one unannounced test purchase, or “compliance check,” at each retail location. These checks are performed by 16- or-17-year old teens, acting under the direct supervision of a law enforcement officer or employee of the city or county. Minn. Stat. §461.12, Subd. 5 (2000).

IV. THE INTERNET: A UNIQUE CHALLENGE TO EFFECTIVE REGULATION

The Internet is creating entirely new ways to live, shop and do business. In the past five years, online commerce has exploded. In 1996, the Internet served a few million users. Today, well over 200 million computers are connected. Almost everything that can be purchased in the “real world” can now be purchased online, and opening a new business to further expand the choices available to consumers is easy and inexpensive.²⁷ Many “bricks and mortar” retailers now offer online sales, while other online retailers operate much like catalog companies, with no “real-world” retail outlets.²⁸ This dynamic and rapidly evolving medium poses a daunting set of practical and legal challenges to effective regulation in almost every area, including the regulation of underage tobacco sales.

Practical and Conceptual Issues

Some of the practical challenges of regulating online sales are a function of the remoteness and anonymity of Web sites; others arise from the fact that a Web site is at once everywhere and nowhere; still others flow from the involvement of multiple parties with specialized roles. But all of these challenges reflect the fact that this new medium defies fundamental paradigms about how business is conducted and regulated, and indeed, about how society maintains rules to order its affairs.

Some of the greatest practical challenges to regulating online sales involve age verification. In a face-to-face transaction, the seller looks the buyer in the eye and estimates his or her age. If there is any possibility the buyer may be underage, the seller can, and should, check a photo identification, comparing the photo to the buyer’s appearance, to be sure the identification is the buyer’s, and checking the identification itself for any indications of forgery or alteration.

While this process is not foolproof, it is straightforward. If, despite the steps outlined above, a salesclerk sells tobacco to a minor, the retailer is likely to be liable for an administrative penalty under the local licensing ordinance, unless the sales clerk relied in good faith on false identification. The clerk himself or herself is likely to be responsible both civilly, under the ordinance, and, at least in theory, criminally, under Minn. Stat. §609.685 — again, unless the clerk relied in good faith on false identification.

In an online setting, the same sale becomes complicated very quickly. The process does not lend itself to easy age verification, even if the seller is well intentioned. The buyer’s age cannot be estimated by visual inspection. The seller cannot see, much less manually inspect, a photo ID or non-photo identification such as credit cards. The buyer’s voice cannot be used to guess at the buyer’s age

or gender, to help the seller decide whether the name and age supplied are valid. Because Web sites are accessible from anywhere in the world, and because age-of-sale requirements are not uniform in all countries, or even in all states of this country, the seller may not even be certain of the legal age of sale in the buyer's home jurisdiction.

More fundamentally, in an online transaction, no single person is equivalent to the traditional salesclerk. In fact, an online order may be processed without any direct interaction whatsoever between the seller's employees and the buyer. If a Web site requires buyers to "click through" questions in an online "dialogue box" asking whether they are adults, or to answer questions about their identity and age, those questions may have been formulated originally by an independent Web site designer, perhaps in consultation with representatives of the seller, and those questions will ordinarily be answered by buyers without any contemporaneous involvement of the seller. To ensure the security of credit card data, the order may well be collected and transmitted by a secure server operated by a service independent of the retailer.²⁹ Alternately, the order submission process may be entirely automated; the order may be batched with many others, for later fulfillment by various employees of the seller; or the order may be handled entirely by an independent fulfillment service.³⁰ In none of these cases is there a clear counterpart to the cashier in a traditional face-to-face purchase.

Nor does the delivery phase of the online transaction parallel an over-the-counter sale. Typically, online orders are shipped by the U.S. Postal Service or by a private delivery service, which may have been chosen by the buyer as part of the ordering process. In some cases, the delivery service, as a corporation, may have actual or constructive notice of the nature of a seller's business or the contents of a particular package. The individual delivery person, however, is usually unaware of the contents of a shipment. Further, packages pass through a series of hands before arriving at the buyer's residence. Unless the retailer has marked a package to indicate that it contains tobacco products or that it is to be delivered only to an adult, the delivery service cannot reasonably be considered responsible for verifying the buyer's age.

Similar conceptual challenges make it equally difficult to hold online retailers accountable to other legal obligations, for example, the obligation to obtain a license, pay taxes and submit to the jurisdiction of a court.

Local licensing requirements in Minnesota counties and cities require a retailer to obtain a license before making a sale in that community. But does an online sale occur "in" the community where the buyer places the order or "in" the location where the retailer is located? What if the product is shipped to a third location and the retailer's Web site resides on a server in a fourth location? Conceptually, licensing authorities are likely to have legal authority to oversee a retailer who accepts orders placed from within the licensing jurisdiction and delivered to buyers there, but this authority is new and unsettled, and this issue holds the

potential for extended litigation. That litigation would be complicated by practical considerations: how can any retailer be expected to know of, and comply with, hundreds or even thousands of licensing requirements of different legal authorities in every corner of the globe? How are the licensing authorities, and their courts, to compel compliance by a seller who may be physically located in Belarus or Malaysia?

Similar challenges, practical and conceptual, complicate issues of taxation. Is an online sale of cigarettes subject to the tobacco excise taxes of the state or country from which the cigarettes are shipped, or that of the location to which they are delivered? Again, does this change if elements of the transaction occur in a third or fourth location? In practical terms, who will know about the transaction, and what can they do to compel compliance? Although there are parallels to mail order and telephone sales, these are complex questions implicating issues of federalism and interstate commerce beyond the scope of this report. It should be noted, however, that tax authorities in several states have recently made initial efforts to assert taxing authority over cigarette sales made to their residents, and to collect tax obligations directly from buyers. The assertion of this authority may open potential avenues for interstate cooperation to control sales to minors, and merits examination in future efforts to fashion solutions.³¹

Finally, practical and conceptual issues complicate the ability of courts in the buyer's home jurisdiction to assert their authority over an online transaction. As discussed more fully subsequently, an online sale may involve multiple participants in different physical locations, from the site of the Web server to that of the seller's office or warehouse, to that of the delivery service, the location of the computer from which the order was placed and the location where the tobacco product is delivered. Even if a court has theoretical legal authority over a sale, the court may hesitate to act out of practical concern about the difficulty of vindicating that authority, given these complexities.

As these examples demonstrate, the Internet confounds basic conceptual paradigms on which our rules of law and commerce are built. Even where these paradigms can be adapted to fit the new medium, practical issues make it difficult to fashion workable mechanisms for enforcing those rules.

Legal Issues: Jurisdiction

The global and intangible nature of electronic transactions also raises unique legal challenges. One of these involves the issue of personal jurisdiction.

“Jurisdiction” refers to a court's lawful authority to order parties to appear before it and to determine their rights and duties. Without jurisdiction, a state or city is powerless to pursue civil or criminal action against non-Minnesota corporations that sell tobacco to minors in its territory.

Evaluating whether Minnesota courts have jurisdiction over nonresident tobacco retailers involves two related issues. First, do the retailers' activities satisfy Minnesota's "long-arm statute," Minn. Stat §543.19 (2000), the statute that empowers courts to exercise jurisdiction over out-of-state parties in connection with causes of action affecting the state or its residents? And second, would the assertion of jurisdiction offend constitutional standards of due process of law?

In the most basic sense, jurisdiction is predicated on geographical location: Minnesota courts have jurisdiction to hear only cases involving disputes that are somehow related to Minnesota. Under the long-arm statute, a Minnesota court may exercise jurisdiction over a foreign corporation if the corporation transacts business in the state and has sufficient "minimum contacts" with it that the burden to the corporation of being brought before the courts of the state does not offend notions of fairness and substantial justice. Minn. Stat §543.19, Subd. 1(2) (2000). The exercise of state jurisdiction is constitutional if the out-of-state business has constructively availed itself of the state's market and may fairly be held to the state's laws and jurisdiction. In making these decisions, courts consider the quantity and quality of the business's contacts with Minnesota, the connection between those contacts and the legal claim at issue, the public's interest in providing a legal forum, and the relative convenience and interest of the parties.

Applying these tests in a retail setting, Minnesota courts ordinarily find that they have jurisdiction over a distant retailer if the retailer has purposefully availed itself of the privilege of conducting business in the state by affirmatively soliciting the state's residents. This standard is well suited to the traditional retail context, where soliciting customers requires a specific, identifiable physical effort to contact that state's residents, if not by operating a retail facility in the state or sending salespeople there, then by affirmatively directing mail or telephone solicitations to them. In contrast, Web sites are, by their very nature, both passive and available everywhere.³²

For this reason, the Internet tests traditional notions of jurisdiction, and courts are still developing criteria for deciding when an Internet seller's activities will trigger personal jurisdiction.³³ Cases to date suggest that a Web page that merely makes information available, without offering products for sale or interacting directly with any geographical market, may not, by itself, support jurisdiction, but that direct interaction with individual customers in the state may. In *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356 (W. D. Ark. 1997), for example, a federal district court held that a Hong Kong manufacturer's advertisement of a product in a trade journal posted on the Internet was insufficient to give Arkansas personal jurisdiction, where an Arkansas resident attempted to sue the manufacturer for the wrongful death of his daughter from a product manufactured by the defendant.

In contrast, the leading Minnesota case, *State by Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W. 2d 715 (Minn. Ct. App. 1997), affirmed without

published opinion, 576 N.W. 2d 747 (Minn. 1998), strongly indicates that the activities of typical online tobacco retailers do give Minnesota courts jurisdiction. In *Granite Gate*, Minnesota's Attorney General brought suit against a Nevada Web site advertising illegal online gambling. There, the Minnesota Court of Appeals held that, by its Internet advertising, the Web site had "demonstrated a clear intention to solicit business from markets that include Minnesota." The Web site had offered a toll-free telephone number accessible from Minnesota; Minnesotans had accessed the site; and at least one Minnesotan appeared on the corporation's mailing list. On these facts, the Court of Appeals held that the site's operators had "purposefully availed themselves of the privilege of doing business in Minnesota to the extent that the maintenance of an action based on consumer protection statutes does not offend traditional notions of fair play and substantial justice." *Id.* at 721. Minnesota courts therefore had jurisdiction.

It should be pointed out that the *Granite Gate* decision was affirmed by an evenly divided Minnesota Supreme Court, and the law is still developing in this area. Nevertheless, as the controlling legal authority in Minnesota, *Granite Gate* clearly suggests that Minnesota courts have jurisdiction over out-of-state Web sites that sell cigarettes to Minnesota youth, if the sites reach out to the national marketplace, accept orders knowing they originate in Minnesota, operate toll free numbers accessible from Minnesota, and ship orders to Minnesota addresses.

Legal Issues: Interstate Commerce

Another legal challenge arises from the Commerce Clause, the constitutional provision giving the federal government authority to "regulate Commerce...among the several states."³⁴ Under what is referred to as the "dormant" Commerce Clause, states and their municipalities are barred from adopting measures that unreasonably burden the free flow of goods and services across state borders. Courts apply a number of criteria for identifying state laws that unreasonably impede interstate commerce; most significant, for purposes of Internet tobacco sales, is the requirement that states not impose measures calculated to protect in-state businesses from out-of-state competitors, or to give in-state businesses unfair advantages. Such measures are subject to strict scrutiny and are likely to be stricken as unconstitutional if they are found to be pretexts for protecting local businesses, or if they arbitrarily disadvantage outsiders.

This standard recently proved fatal to efforts by the State of New York to prevent the Internet sale of tobacco to minors. *Brown & Williamson v. Pataki*, 2001 WL 63441 (S.D.N.Y., June 8, 2001) *appeal pending*, No. 01-7806 (2d Cir.), involved a New York statute adopted in August 2000, prohibiting cigarette sellers from shipping cigarettes to New York consumers, and thereby restricting sales to face-to-face transactions in in-state retail locations.³⁵

Tobacco manufacturers promptly challenged the law, alleging that it violated the Commerce Clause. After a five-day trial and the presentation of extensive

evidence about the law, its purposes effects and implications, the federal district court for the Southern District of New York agreed. In a lengthy decision, the court concluded that the law was enacted largely to protect in-state retailers from the “unfair competition” of Internet, mail order and other long-distance retailers outside the state, who saw orders from New York residents increase after New York adopted the nation’s highest cigarette taxes. While acknowledging the importance of the state’s interest in prohibiting sales to minors, the court rejected the state’s argument that the law was simply a health protection measure. Although the state argued that the law would also increase “revenue for health care funding” by favoring in-state sales, on which the state is best able to collect state cigarette taxes, the court ruled that “revenue generation is not a local interest that can justify discrimination.”³⁶

The court was most troubled that the law was tantamount to “an outright ban on interstate sales” and that “the only way an out-of-state seller could legally sell retail cigarettes to New York consumers under [this law] is to establish a bricks-and-mortar outlet in New York.”³⁷ The state had failed to consider other, less restrictive approaches, the court concluded, even though the court clearly felt that several less problematic alternatives existed. This ruling holds important implications for any Minnesota legislation to control on-line tobacco sales, as discussed later in this report.

V. ENFORCEMENT OPTIONS

Existing laws offer a wide array of potential legal theories for action against online retailers who sell tobacco to minors. The strengths and weaknesses of the options vary, but none offers an ideal solution to this new problem.

Possible Actions by Cities or Counties

Several options are available, at least in theory, to cities or counties. These include:

- **Criminal prosecution of a seller, under Minn. Stat. §609.685, for the misdemeanor offense of selling to a minor.** While misdemeanor penalties are modest, successful prosecution under this law would expose the defendant to possible gross misdemeanor prosecution for subsequent violations. However, the cost of prosecution would be very great in relation to the offense, the penalties and the retailer’s impact on any one Minnesota community. The burden of extradition alone would argue against this approach. Moreover, a strong argument can be made that criminal action would only be viable against an individual employee of the retailer who could be shown to have “made” the sale in

question, and not against the corporation itself. As discussed previously, it is exceedingly difficult to identify any individual in the online setting who plays a role analogous to a traditional salesclerk.

- **A misdemeanor prosecution, under Minn. Stat. §609.685, against a delivery person who “furnishes” tobacco to minors in fulfillment of an online sale.** This would offer the advantage of focusing on an easily identifiable in-state defendant. This approach might also help to enlist delivery services in creating safeguards against these illegal sales. However, as discussed previously, it appears that most online purchases are shipped in unmarked packages. Absent knowledge on the part of the delivery person or the delivery service about the contents of the package, prosecution is not viable.
- **Civil or administrative action under a local licensing ordinance.** Every Minnesota county, and many cities, including Plymouth, have adopted ordinances for the licensure of retailers who sell tobacco in the community. Theoretically, these ordinances might be used to pursue Internet retailers. The specific cause of action might vary, depending on the structure and contents of the local ordinance. In some cases, the potential action available would be an action against the retailer for failure to obtain a license to sell in the community. Such an action would seek a penalty for selling without a license, if such a penalty is provided in the ordinance, or would be a civil action to enjoin further sales into the community by the unlicensed seller. Alternatively, if the ordinance provides a penalty for selling to a minor, beyond the sanctions against licensees, then the action could be brought directly under that provision. None of these options is very workable. While, as a matter of abstract legal analysis, a city or county should have jurisdiction to bar outsiders from selling cigarettes into their community, no matter where the seller is located, in practice, courts will be skeptical of such an assertion of authority over a faraway seller with little connection to the community. Moreover, the cost of the action, and the difficulty of enforcing it would far outweigh the remedies that could be achieved or the impact of one Web site on one community.

Relying on municipalities to combat illegal online sales, under any of the theories above, would raise additional problems. First, minors could easily circumvent even the most successful campaigns by a city or county, simply by placing an order from a friend’s home in a nearby community. Second, reliance on a city-

by-city approach could result in wild variation in the level of protection for Minnesota's youth. A municipal action against a single Web site would be cost prohibitive: in most cases, the expense of prosecution would far outweigh the benefits to the community. To protect all of Minnesota's teens against the online availability of cigarettes, every city in the state would need to bring such an action against each online seller -- an unworkable solution.

Possible Actions by the State

Several possible legal theories are available to state enforcement authorities:

- **Civil actions to enforce the sale-to-minors laws.** The Minnesota Attorney General has broad statutory authority to enforce state laws regulating “unfair, discriminatory, and other unlawful practices in business, commerce or trade.” Minn. Stat. §8.31, Subd. 1 (2000). A strong argument can be made that Minnesota's prohibitions against selling tobacco to minors, Minn. Stat. §§461.12 and 609.685, Subd.1a, fall within this authority. This issue has not been litigated, but the strong interest in controlling tobacco sales to minors provides support for this view, because the Attorney General's power is conferred to ensure broad, flexible protection of the public's interest in a fair and honest marketplace. If this interpretation is correct, the Attorney General would have broad authority to act against Web sites found to sell to minors, to obtain both injunctive relief and substantial civil penalties. Minn. Stat. §8.31, Subd.3 (2000).
- **Consumer protection actions.** The Attorney General has broad authority to enforce Minnesota's consumer protection statutes. Minn. Stat. §8.31(2000). These laws could be invoked to seek injunctive remedies, changes in business practices and monetary penalties from online Web sites. The state Deceptive Trade Practices Act, Minn. Stat. §325D.44; the false advertising statute, Minn. Stat. §325F.67; and the consumer fraud statute, Minn. Stat. §325F.69, Subd. 1; all prohibit deceptive and misleading business practices. Further, the Deceptive Trade Practices Act specifically prohibits business conduct that “creates a likelihood of confusion or misunderstanding” about the seller or the products. Minn. Stat. §325D.44, Subd. 1(13) (2000). These laws could be invoked on the theory that tobacco Web sites are misleading because they represent, explicitly or by implication: (1) that they are in compliance with state sale- to-minors laws when they are not; (2) that

sales made on the sites are immune from state cigarette taxes, when they are not, (3) that the sites can lawfully sell tobacco to minors; or (4) that their products are safe for use. Attorneys General in several other states have used similar consumer protection laws successfully against online sellers of tobacco.

ACTIONS IN OTHER STATES

MICHIGAN. In mid-2000, the Michigan Attorney General conducted a sweep in which teens made 20 purchases from online retailers, none of whom required proof of the buyers' age. Criminal charges were filed against eight retailers for selling tobacco to minors, using a computer to commit a crime and failure to report the transfer of cigarettes into Michigan. In companion civil actions, Michigan alleged violation of its consumer protection laws, because the Web sites created the false impression they were operating lawfully. Michigan's actions are pending, but have reportedly caused some online retailers to cease all sales to Michigan residents.

OREGON. As part of a coordinated sweep with other states, the Oregon Attorney General conducted a series of compliance checks in 1999 to test the online sale of "bidi" cigarettes.¹ After the home delivery of cigarettes to an eight-year old and other violations, Oregon negotiated civil settlements with online retailers in Colorado, Maine, Massachusetts and New York, prohibiting any future sales to minors and prescribing penalties of up to \$25,000 for violations.

UTAH. Utah teens were able to buy cigarettes online in eight of fifteen test purchases. As part of a federally funded effort to combat Internet crimes against children, Utah has created a task force on online sale of tobacco and alcohol, and state legislation has been proposed to control online tobacco sales.

MASSACHUSETTS. In 1999, teens in a Massachusetts survey of online tobacco sales identified 26 Web tobacco sites. In test purchases, none of the buyers were required to prove their age, and their orders were shipped in unmarked packages with plain brown wrapping.

WASHINGTON. The Washington State Liquor Control Board issued cease and desist orders to five online tobacco retailers in December 1999, following test purchases of bidis by two children acting under supervision of the state Attorney General's Office, as part of a multi-state sweep.

- **Actions to collect excise taxes.** Although issues of taxation are beyond the scope of this report, it is worth noting that tax authorities in California and several other states have undertaken at least limited efforts to address online tobacco sales as a tax problem. Although California has sought recovery of tax obligations directly from California residents who have purchased cigarettes online,³⁸ the failure to obtain tax stamps on products shipped into a state may open additional avenues for action against the sellers themselves. This possibility should be considered in any future effort to regulate online sales in a systematic fashion.

Possible Federal Actions

There is no federal prohibition against selling tobacco products to minors. However, several legal theories may still be available to the Federal Trade Commission.

- Under its consumer protection authority, the Federal Trade Commission enforces consumer protection provisions of the Federal Trade Commission Act analogous to the state consumer protection laws discussed above. 15 U.S.C. Sec. 45(a)(1). The Commission has used this authority in the past to obtain injunctive relief against online businesses that engage in unfair or deceptive practices. In theory, the Commission could bring consumer protection actions similar to those suggested above with regard to state laws, and, in doing so, could seek nationwide remedies.
- Second, the Federal Trade Commission could act against online retailers for their failure to display health warnings. Indeed, the Commission recently took action to compel cigar manufacturers to provide health warnings on Web sites.³⁹ Although the specific statutory requirement that cigarette advertisements contain health warning labels does not apply to retailers, the Commission could proceed against retailers on the underlying theory that first gave rise to health warnings in cigarette advertising decades ago: the theory that it is inherently misleading to advertise tobacco products while omitting any warning about their health effects.
- Most boldly, the Commission might also consider a broad, but untested, legal theory that, if correct, would ban online tobacco sites altogether. The federal law prohibiting

tobacco advertising on radio and television, 15 U.S.C. Sec 1336, makes it unlawful to advertise cigarettes “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.” While the FCC has to date declined to assert jurisdiction over the Internet, a solid argument can be made that such authority exists, and that Internet marketing of cigarettes is therefore prohibited.⁴⁰ Further, the FCC has well-settled jurisdiction over practices of the telephone companies and cable television systems that provide modem access to the Internet, supporting an independent argument that advertising cigarettes online is tantamount to advertising through telephone or cable system lines, and is therefore prohibited by the language quoted above. Under the law, an enforcement action based on either of these theories would be brought by the Federal Trade Commission. In such an enforcement action, it would also be necessary to consider issues of commercial speech under the First Amendment. Recent decisions of the Supreme Court invite the question whether tobacco advertising can be barred entirely from the Internet without infringing the First Amendment rights of sellers. That issue is outside the scope of this report.

VI. DISCUSSION

Local Enforcement Actions

As an abstract legal matter, cities and counties have legal jurisdiction to pursue criminal, and possibly civil, actions under several theories, but these actions would present great practical challenges, and the cost and effort involved would be out of proportion to the benefits. It is not inconceivable that a prosecutor in a large city or county might elect to bring such an action for its symbolic or deterrent value, or as a test case. As an ongoing proposition, however, local enforcement actions do not represent a practical response to this problem.

State Enforcement Actions

State courts have jurisdiction over online sales, and state officials have statutory authority to pursue flexible causes of action offering creative remedies. The Attorney General has broad authority to protect consumers and enforce trade regulation laws. Revenue officials’ authority to collect unpaid excise taxes on online cigarettes sales may offer additional options. The potential benefits of state actions are substantially greater than those available to local prosecutors, because a single state action can achieve statewide relief. Authorities in several

other states have successfully pursued a handful of such cases. Nevertheless, the cost and effort required for this approach remains very high, in light of the practical challenge of enforcing court-ordered remedies against distant Web sites and the large number of sites in operation. Whether such an approach would be cost effective is an open question and would depend on many factors. State actions are worth consideration, however, to evaluate whether the potential benefits outweigh the likely costs.

Coordinated Multi-State Actions

Using their broad consumer protection powers, state Attorneys General sometimes join forces in coordinated enforcement campaigns against an abusive business practice affecting the entire nation. This strategy is especially attractive where a large number of violators are located far from consumers, and where the illegal practices affect every state. This approach has been used successfully against telemarketing schemes and deceptive direct mail sweepstakes promotions, for example. In addition, seventeen states have pursued coordinated investigation of the illegal sale of “bidis” — hand-rolled, unfiltered cigarettes often containing flavoring such as chocolate or cherry — to children.⁴¹

A coordinated, multi-state campaign to compel online tobacco retailers to adopt effective age verification measures would offer advantages over action by a single state. If each participating state targeted different retailers, and succeeded in changing their respective practices, every state would benefit from the others’ actions, and each state’s enforcement effort would be leveraged greatly. Further, if each state acted first against retailers physically located within its borders, the cost of enforcement would be reduced and the enforceability of remedies would be increased. Despite these advantages, it must be acknowledged that even multi-state actions are, at best, a stopgap solution, because current laws do not specifically address on-line sales, and because, on a long-term basis, the large number of retailers would test even the combined resources of the states. The decision whether or not to pursue such an approach is entirely within the prosecutorial discretion of state Attorneys General, and would involve many competing considerations of resource allocation, competing priorities and so on. That said, multi-state enforcement actions may offer the most attractive choice among the imperfect options currently available, and they merit thoughtful consideration.

State Legislation

Existing state laws offer only stopgap solutions. They can be invoked only on a case-by-case basis, and only after the fact, using evidence of specific illegal sales to individual Minnesota teens. At best, any enforcement under these laws will be piecemeal and resource-intensive. Legislation specifically designed to address online sales could provide a more systematic and enforceable solution.

Specifically, such a law could require the use of effective age verification measures.

As the recent decision in *Brown & Williamson v. Pataki*, 2001 WL 636441 (S.D.N.Y., June 8, 2001), *appeal pending*, No. 01-7806 (2d Cir.), demonstrates, such a law must be carefully crafted to avoid imposing an impermissible burden on interstate commerce.⁴² The court in *Brown & Williamson* concluded that New York's statute failed this test, because its practical effect was to prohibit out-of-state retailers from selling tobacco products to New Yorkers. Whether a Minnesota court would reach the same conclusion in a similar case is unclear.

In any event, a more carefully drafted law could be expected to avoid this problem, by addressing the age verification problem without disadvantaging out-of-state sellers. Rhode Island has recently enacted legislation that attempts to do just this.⁴³ The new Rhode Island law (set out in Appendix B to this report) applies to every business selling tobacco products to Rhode Island consumers through the mail or delivery services, and thus covers online retailers along with retailers who receive orders by telephone, fax or mail. The law imposes duties at both the front-end of a transaction — the ordering process — and the back end — the delivery process.

To verify the buyer's age at the front end, Rhode Island uses a three-part approach: (1) the retailer must receive a copy of the buyer's identification, showing the buyer's date of birth; (2) the retailer must also receive the buyer's "attestation" that the identification is genuine and correctly identifies him or her; and (3) the order must be shipped to the address shown on the identification. To make an illegal purchase under this system, a young buyer must use an adult's identification or falsified identification; must falsely attest to his or her identity; and must be able to receive the cigarettes at the address shown on the false or borrowed identification. These obstacles are likely to reduce illegal sales. Together with the delivery restrictions described below, they represent a significant improvement over current Minnesota law.

Rhode Island's approach remains incomplete, however. Obviously, without face-to-face interaction, the retailer cannot see whether the photo in the identification matches the buyer, and has no way to know whether the buyer's "attestation" is truthful. One possible way to address this would be to include in state legislation a requirement that every retailer, traditional or electronic, verify the buyer's age using "face-to-face interaction or other equally reliable means," and to specifically identify in the legislation one or more pre-approved or "safe harbor" methods of age verification, without mandating that any particular approach be used. Age verification approaches that might be pre-approved could include, for example, remote visual interaction with the buyer online, through inexpensive "Web cameras," or the use of a third party, such as a notary public, to certify the buyer's age and identity. Under this approach, a seller would not be compelled to adopt one of the approved age verification methods, as long as the seller's

practices were “equally reliable.” This would leave the door open for new technological solutions (for example, new online identification techniques using fingerprints or voice recognition) or for other unforeseen, innovative approaches.

Rhode Island’s law also addresses the delivery phase of the transaction. In theory, delivery services could offer the most effective point for state intervention, because they are physically present in the state and because they are well-established, legitimate businesses. Unfortunately, several factors prevent the state from controlling tobacco sales by regulating the delivery agents. Most importantly, states’ hands are tied by the fact that the most important delivery service, U.S. Postal Service, as a federal entity, is exempt from state jurisdiction.

Illegal sales might be controlled to some extent by regulating private delivery companies, but here, too, there are major limitations. Packages are usually shipped without markings, and, therefore cannot be identified by delivery services as containing tobacco. Nor is it possible simply to impose strict liability on delivery services for underage deliveries, in the expectation that the delivery services will then require their customers, the online retailers, to identify packages containing tobacco. Because the state cannot regulate the Postal Service, any attempt to force private services to label their packages would simply prompt dishonest sellers to ship their tobacco products through the mail.⁴⁴

Despite these limitations, Minnesota can adopt delivery restrictions such as those included in the Rhode Island law. Rhode Island requires retailers to ship tobacco products with delivery restrictions, requiring the package to be signed for either by the purchaser or by another adult. Delivery services, in turn, are prohibited from delivering tobacco products to persons under the age of 18, if they know or have reason to know a package contains tobacco, (although this prohibition does not, and cannot, apply to the Postal Service.)

Unlike the statute struck down in the *Brown & Williamson* case, Rhode Island’s approach, — with or without the possible addition discussed above — does not force out-of-state retailers to open bricks-and-mortar outlets in the state. Nor does it unduly burden the flow of products into the state, or put out-of-state businesses at an unfair disadvantage. Indeed, in overturning New York’s statute, the court in *Brown & Williamson* specifically mentioned Rhode Island’s legislation, and its requirement for adult signature at the point of delivery, as a constitutionally preferable alternative to the flat prohibition of New York’s statute.⁴⁵ It appears likely therefore, that legislation of the type described here would satisfy the requirements of the Commerce Clause.

State legislation of the type outlined here would not be self-enforcing, and cannot magically make distant Web sellers honest. Nevertheless, it would eliminate the need to prove actual illegal sales to youth, and would allow streamlined enforcement actions based on a simple review of the age verification safeguards in use on a retailer’s Web site. Such legislation may offer the best option

realistically available to Minnesota. In the longer term, however, this is still an imperfect solution. Enforcing statutory requirements against hundreds of retailers in distant locations, most of them small and many of them with limited interest in compliance, will be difficult for state authorities even under the best of circumstances.

Federal Actions

For the reasons already discussed, action at the national level offers the only long-term solution. The advantages of proceeding at the federal level, where the nationwide remedies are possible, are clear. Several considerations cast doubt on the likelihood of such actions in the near future, however. No federal law prohibits the sale of tobacco to minors. Thus, any federal action would have to proceed on indirect legal theories. Several such theories are available to the Federal Trade Commission under current law. Still, the sale of tobacco to minors has been viewed historically as a local or state problem, and has not been a focus of FTC activity. In addition, some tobacco prevention advocates question whether the present federal administration will be receptive to aggressive new initiatives against tobacco sellers, in light of its philosophical orientation and its positions on other tobacco-related issues. Whatever the merits of this view, it does appear likely, in the wake of the events of September 11, 2001, that other unrelated issues will occupy higher places on the federal agenda for the foreseeable future. All of these considerations make it doubtful the Federal Trade Commission will assume primary responsibility for controlling online tobacco sales in the foreseeable future.

Federal Legislation

Given the global nature of the Internet, and the difficulty of enforcing state laws against faraway businesses, a federal solution is clearly desirable. Because no federal law specifically addresses the sale of tobacco to minors in stores, much less on the Internet, new federal legislation is needed. It could take any of several forms. A proposal introduced in the Congress in December 2001 by Representative Martin Meehan of Massachusetts, The Tobacco Free Internet for Kids Act, H.R. 3456, 107th Cong., 1st Sess., for example, would criminalize the Internet sale of tobacco to minors, allow civil actions by the Federal Trade Commission, and authorize states to obtain nationwide injunctions against violators in the federal courts.⁴⁶ Sellers would be required to follow specific age verification procedures and to mark and ship the packages for delivery to adults. However, there has been no significant movement toward adoption of this bill or similar bi-partisan legislation introduced in earlier sessions. Historically, very few of the many proposals for regulation of tobacco products introduced in the Congress have received favorable consideration. Skeptics attribute this to the influence of the tobacco industry, as one of the largest sources of congressional campaign contributions, and argue that any effort to control Internet sales will be stalled indefinitely. In any event, following the recent acts of terrorism, Congress

is likely to be preoccupied with other issues, further reducing the possibility of new legislation in this area. While federal legislation represents the only real opportunity for a long-term solution, and should be strongly encouraged, it may not be likely in the foreseeable future.

Uniform State Legislation

In the absence of congressional action, perhaps the most feasible alternative for fashioning a nationwide response to this issue might be the development of uniform legislation for consideration by state legislatures. The National Conference of Commissioners on Uniform State Laws, which developed the Uniform Commercial Code and similar acts, organizes the development of model or uniform legislation in areas where uniformity is practical and desirable, and promotes their adoption by state legislatures. The nature of the Internet and the difficulty of controlling illegal sales on a state-by-state basis commend this approach as an alternative if federal legislation is not forthcoming.

International Solutions

In the final analysis, the Internet is a global phenomenon and illegal Internet sales of tobacco will probably require a global response. Even effective national legislation would leave open the possibility that Internet sellers would simply relocate their operations and ship into the United States. In the absence of methods for identifying the contents of packages arriving from outside the country, these sales would be difficult to control even at the federal level. In the long run, therefore, it appears likely that this problem can only be control at the global level. Plainly, this raises enormous complications and difficulties. Even if most countries were to act, the continued operation of even a handful of countries in which illegal sales were allowed to continue would undermine the ability of the rest of the world to end illegal sales. Clearly, a global solution will lie far in the future. A mechanism for progress toward that goal is at hand, however. The World Health Organization's proposed Framework Convention on Tobacco Control, the world's first global health treaty, is currently under negotiation and is expected to be presented to countries for possible ratification beginning in 2003. This treaty will set a framework of expectations and global norms for tobacco regulation, and is expected to address basic issues related to tobacco sales. Among provisions now under discussion is a proposal that countries adopting the treaty ban the Internet sale of tobacco to minors, as well as a more sweeping proposal that countries signing the treaty ban Internet tobacco sales altogether. These proposals represent the best opportunity for rapid movement toward an effective global response, and should be supported.

Education and Voluntary Compliance

Independent of legal action or legislation, public authorities may want to consider the value of efforts to educate retailers and associated businesses about legal age

restrictions. Based on this review of online tobacco retailing, it appears doubtful that retailers are likely to introduce effective age verification mechanisms voluntarily. However, there may be opportunities to improve sales practices by winning the cooperation and participation of delivery services, Web hosting services, or Internet service providers. Such an approach would be most effective, and most cost effective, if undertaken in partnership with other jurisdictions or with business and nonprofit partners.

VII. RECOMMENDATIONS

Based on the considerations and conclusions above, we offer the following recommendations:

- 1) Minnesota should not look to cities and counties for enforcement actions against online tobacco retailers.**
- 2) The Minnesota Attorney General should weigh the costs and benefits of possible civil actions under state consumer protection or sales-to-minors laws, using the Attorney General's trade regulation authority, perhaps as part of a multi-state enforcement campaign. At best, however, this is a stopgap solution.**
- 3) The Minnesota legislature should consider legislation to require tobacco retailers to verify the buyer's age and to require "adult only" deliveries. This legislation would significantly improve the state's enforcement ability, but it is only a partial solution.**
- 4) Federal solutions are needed. Minnesota should encourage federal enforcement actions and federal legislation, even if federal solutions are not likely in the near future.**
- 5) In the absence of federal legislation, the development of a possible uniform state act for regulating Internet sales should be pursued.**
- 6) Support should be given to proposals that the global Framework Convention on Tobacco Control, now being negotiated, prohibit or tightly restrict Internet tobacco sales.**

VIII. AREAS FOR FURTHER INVESTIGATION

This review identified two important sets of issues outside the scope of this report that should be examined carefully in any effort to fashion a long-term response to online tobacco sales:

- **State Taxing Authority.** The principal allure of online tobacco sales appears to be their failure to collect the state cigarette excise taxes applicable in the buyer's state of residence. Any effort to fully control online tobacco sales will require careful examination of the limits of the state's taxing authority and the mechanisms for best enforcing that authority, and will require the active participation of state revenue officials.
- **Tribal Sovereignty.** American Indian tribes have a unique and complex legal status as sovereign entities. In Minnesota, compacts between the state and tribal governments have addressed potential issues involving taxation of cigarettes, and this investigation did not identify any online tobacco retailers operating from within Minnesota reservations. Many, and perhaps most, Internet tobacco sites are located on Indian reservations, however.⁴⁷ Any effort to fully address online sales originating outside of Minnesota will need to consider the implications of tribal sovereignty, not only for the collection of taxes, but also for the enforceability of state civil and criminal laws.

IX. CONCLUSION

The emergence of online tobacco sales poses a clear and present danger to Minnesota's ability to control youth access to tobacco. This review did not find that online retailers are actively targeting youth, but it did find overwhelming evidence that these sales fail to verify the age of buyers. Existing laws offer only stopgap solutions to this problem. New state legislation can strengthen Minnesota's ability to control this problem, but, in the longer term, the problem cries for a nationwide solution.

ENDNOTES

¹ See, e.g., U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (August 1999) (CDC Best Practices Report), at 8, 9.

² Among Minnesota high school students who smoked cigarettes in 2000, 47.2 percent began smoking when they were twelve or younger. Minnesota Department of Health, *Teens and Tobacco in Minnesota, Results from the Minnesota Youth Tobacco Survey* (December 2000) (Minnesota Youth Tobacco Survey) at 14.

³ See, e.g., U.S. Department of Health and Human Services, Centers for Disease Prevention and Control, *Reducing Tobacco Use, A Report of the Surgeon General* (2000) (Surgeon General's Report), at 33.

⁴ As discussed in the text, youth smoking rates nationally, and in Minnesota, increased sharply through most of the last decade. See, e.g., Minnesota Health Improvement Partnership, *Tobacco Use Prevention and Reduction in Minnesota: Elements, Roles and Costs of a Comprehensive Approach* (January 1999) at 9: "Smoking among youth is increasing and now exceeds the national average.... The increase in smoking among Minnesota teens is alarming, particularly for middle school students. Between 1992 and 1995 weekly smoking increased from 12 to 18 percent among 9th graders." There were notable exceptions to this trend in California, Massachusetts, Florida and other jurisdictions that succeeded in mounting sustained, comprehensive prevention programs, combining aggressive, large-scale counter-marketing media campaigns; smoke-free workplaces and public places; excise tax increases; proven school-based educational programs and other components. In a number of cases, these comprehensive programs were able to avoid the increases in youth smoking experienced in the remainder of the United States, or were able to demonstrate actual reductions in smoking prevalence, reductions in cigarette consumption or increased cessation. See, e.g., CDC Best Practices Report, at 85-87.

⁵ In the period from 1990 to 1997, the annual rate of initiation of smoking among youth ages 12 to 17 increased by fifty-eight percent, from 100.9 per 1,000 potential new users to 159.2 per 1,000 potential new users, according to the 1999 National Household Survey on Drug Use.

⁶ *Id.*

⁷ Twenty percent of Minnesota adults smoke, according to a 1999 statewide survey. Minnesota Partnership for Action Against Tobacco, Minnesota Department of Health *Quitting Smoking: Nicotine Addiction in Minnesota* (July 2001) (Quitting Smoking) at 3. In early 2000, 44.9 percent of Minnesota twelfth-graders were using tobacco products, a rate which probably understates the actual rate of use among all seventeen and eighteen year-olds, because it does not include those who had dropped out of school, who are more likely to be smokers. Minnesota Youth Tobacco Survey, at 11.

⁸ *Id.*

⁹ Kessler, D.A., “Nicotine Addiction in Young People,” *New England Journal of Medicine* 1995; 333(3).

¹⁰ In 1999, the first year after the tobacco industry reached legal settlements with the fifty states, its spending on advertising, marketing and promotion actually increased by 22.3 percent over the year before. Total reported spending in 1999 was \$8.24 billion. Based on Minnesota’s pro-rata share of the national population, this represents annual spending of \$144 million to advertise and promote cigarettes in Minnesota. Federal Trade Commission, *Cigarette Report for 1999* (2001), available online at <http://www.ftc.gov/reports/cigarettes/1999cigarettereport.pdf>. This does not include spending to advertise and promote smokeless tobacco.

¹¹ Target Market, “Research Shows TM Campaign is Effective,” News Release, August 20, 2001, available online at <http://www.tmvoice.com>.

¹² The first-year assessment of the Target Market campaign, based on a scientifically-controlled telephone survey of a representative statewide sample of 1,014 teens in June 2001, found a 25 percent reduction in 12 to 17 year olds who say they have used tobacco in the last 21 days. Minnesota Department of Health, *Tobacco Use Prevention and Local Public Health Endowment, Annual Report to the Minnesota Legislature: 2001 Activities* (2002) at 6. The Minnesota Student Survey of 130,000 Minnesota youth, conducted by the Minnesota Department of Children, Families and Learning in 2001 found a 24 percent reduction in tobacco use among ninth graders in the first year of endowment-funded tobacco prevention activities. *Id.*, at 7.

¹³ U.S. Department of Health and Human Services, *A Model Sale of Tobacco Products to Minors Control Act: A Model Law Recommended for Adoption by States or Localities to Prevent the Sale of Tobacco Products to Minors*, May 24, 1990.

¹⁴ 42 U.S.C. §300x-2b, commonly known as the “Synar Amendment.”

¹⁵ Minn. Stat. §461.12 (2000).

¹⁶ Bridger McGaw, spokesperson for Massachusetts Representative Martin Meehan, quoted in “UNC Research Prompts Bill on Online Cigarette Sales,” *Raleigh News & Observer*, December 11, 2001, accessed at <http://www.newsobserver.com/ncwire/news/Story/844246p-830297c.html>.

¹⁷ See Commentary, “Tobacco Commerce on the Internet: A Threat to Comprehensive Tobacco Control,” *Tobacco Control* 2001; 10: 364.

¹⁸ In the course of this study, we identified approximately 200 sites appearing to offer tobacco products for sale; for example, a single search on the search engine “Google” on September 7, 2001 found 115 sites listed in Google’s “Shopping--Tobacco-Cigarettes” category. As part of this investigation, we analyzed the content of 96 such sites, as discussed in the text. The only peer-reviewed study designed to count Internet tobacco sellers identified 88 sites located in 23 states (none in Minnesota), as well as 22 sites located outside the U.S. and 239 sites selling

cigars, smokeless tobacco or other tobacco related products. Kurt Ribisl, Annice Kim and Rebecca Williams, “Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?” *Tobacco Control* 2001; 10:352-359.

¹⁹ Jennifer Ungera, Louise Rohrbach, Kurt Ribisl “Are Adolescents Attempting to Buy Cigarettes on the Internet?” *Tobacco Control* 2001; 10:360-363.

²⁰ Any child able to navigate the Internet can access online tobacco retailers. A number of widely-available software programs are available for the purpose of enabling parents to block their children’s access to objectionable Web sites, including those selling tobacco, alcohol and illegal drugs. The effectiveness and value of these “filters” has been questioned, however. A 1999 study by the Center for Media Education (CME) examined six filtering programs and found that only one successfully blocked access to more than half of sites promoting alcohol and tobacco. One of the filtering programs tested failed to block any tobacco sites, and another blocked only one. In addition, because filtering software blocks access to all sites containing specific target words, it can cause unintended consequences. Configuring a filter to block access to sites containing the word “tobacco,” for example, would prevent a child from accessing the Target Market site, as well as educational sites containing information about the health consequences of smoking and other health-related resources.

²¹ The competitive grant supporting this report was awarded under “Part V” of the Minnesota Youth Tobacco Prevention Initiative, which supported the development and implementation of enforcement strategies to reduce youth commercial access to tobacco products. See the Department of Health’s Web site at <http://www.health.state.mn.us/divs/opa/part5rfp.pdf>.

²² The sites tested were: www.cycocigs.com; www.tobacco-online.net; www.joesmoke.com; www.paylesscigarettes.com; www.cigaretteshop.com.

²³ Gary Kirschner, CEO of cigarettesbymail.com, quoted in “Utah Recruits Kids,” posted online at www.apbnews.com/newscenter/internetcrime/2000/02/01/cigs0201_01.html.

²⁴ None of the test purchases made as part of this review were conducted on sites that would have required the participating teens to affirmatively declare themselves to be 18.

²⁵ For example, VISA currently offers a promotion called “VISABUXX,” a prepaid card designed to be used by children and funded by deposits made by their parents. To a retailer, these cards are indistinguishable from a traditional credit card or a debit card.

²⁶ Many sites appear to be directed primarily at potential buyers whose interest is in avoiding their home state’s cigarette tax. Most of these sites emphasize that they do not collect taxes, and some promise not to identify buyers to officials.

²⁷ An online business can be set up in a matter of days. Arrangements must be made for a Web site host, the computer where the Web site will reside. This can be done for as little as \$20 per month. A Web site must be designed and built. Many programs now exist to automate this task,

and specialized programs allow a would-be retailer to construct an online business from easy-to-use templates. Finally, the retailer will need to arrange a merchant account to allow it to accept payment by credit card, a service readily available from many companies today.

²⁸ For example, Barnes and Noble Booksellers, www.bn.com, operates book “superstores” across the country, but also has a thriving online presence. In contrast, www.amazon.com, a leading national retailer of books, music and electronics, does business only online.

²⁹ A secure server is a specialized type of computer used in the transmission of credit card data. Credit card numbers are encrypted as protection against online theft. Secure servers are a necessity for many online businesses, because many online consumers, concerned about fraud, insist on them.

³⁰ An order fulfillment service is a clearinghouse that provides order fulfillment for many small retailers. Thus, the business that “takes” a cigarette order from an underage buyer may not be the same organization that actually fills and ships the order.

³¹ Tax issues are not within the focus of this report. It should be noted, however, that federal law requires businesses shipping tobacco products to residents of a state (whether in response to orders placed through mail order, telephone sales, online sales, or other methods) to file monthly reports with the state’s tax authorities, identifying residents of that state to whom the business has sent tobacco products. 15 U.S.C. §375. In March 2001, after a year of using this information to collect unpaid taxes from California residents, the State of California had collected \$1.4 million in excise taxes on online cigarette purchases. See *Brown & Williamson v. Pataki*, 2001 WL 636441 (S.D.N.Y., June 8, 2001) at *27.

³² Of course, like all marketers, Web site operators have many ways to seek out customers, some of which are more active and apparent than others. Sites can advertise on other sites that feature similar products or articles of interest. Sites can also “link” to one another, often pursuant to an informal agreement, or arrange for search engines to feature their names prominently when consumers conduct a generic search.

³³ See Schmitt and Nikolai, “Application of Personal Jurisdiction Principles to Electronic Commerce: A User’s Guide,” 27 *Wm. Mitchell L. Rev.* 1571 (2001).

³⁴ U.S. Const. Art. I, § 8, cl. 3.

³⁵ N.Y. Public Health Law, §1399-11.

³⁶ *Id.* at *15.

³⁷ *Id.* at *16 and *22.

³⁸ See note 28 above.

³⁹ An index linking to the Federal Trade Commission's proposed Consent Orders with Swisher International, Inc.; Consolidated Cigar Corp.; Havatampa, Inc.; General Cigar Holdings, Inc.; John Middleton, Inc.; Lane, Ltd.; and Swedish Match of North America, Inc.; can be found at www.ftc.gov/os/2000/06/index.htm. See also Davidson, "Untangling the Web: Legal and Policy Tools to Restrict Online Cigar Advertising," 35 *U.S.F.L. Rev.* 1 (2000), at 16-20.

⁴⁰ See Davidson, *supra*, at 21-26.

⁴¹ See http://www.wa.gov/ago/releases/rel_bidis_122199.html. Bidis, widely consumed in India, are not well known to American adults, but have achieved a surprising degree of popularity among American teens in the last several years. Sweet flavorings make them especially palatable to new smokers. They contain as much as three times the nicotine and twice the tar of commercially manufactured cigarettes.

⁴² See discussion at pages 14 and 15, above.

⁴³ Gen. Laws of Rhode Island, 1956, §11-9-13.11.

⁴⁴ At least one federal legislative proposal for comprehensive regulation of tobacco products would authorize the Secretary of Health and Human Services to take steps to restrict or eliminate the sale of tobacco products through the mail. S. 940, "The Leave No Child Behind Act of 2001," available online of the Library of Congress' "Thomas" Web site at <http://thomas.loc.gov/>.

⁴⁵ *Brown & Williamson v. Pataki*, 2001 WL 636441 (S.D.N.Y., June 8, 2001) at *23, *24.

⁴⁶ H.R.2914, "The Tobacco Free Internet for Kids Act", introduced September 22, 1999. See <http://www.techlawjournal.com/internet/1999090927.htm>.

⁴⁷ Of 88 tobacco-selling Web sites identified in the only published study of the subject, 49 were thought to be located on Indian reservations. Kurt Ribisl, Annice Kim and Rebecca Williams, "Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?" *Tobacco Control* 2001; 10:352-359. Internet searches conducted for this study identified 26 Web tobacco retailers who appear to be located on reservations in the State of New York.

APPENDIX A

| URL/Web Address | STATE | IS THERE A STATEMENT THAT BUYER MUST BE 18? | IS BUYER REQUIRED TO SAY THAT HE OR SHE IS 18? | IS THERE ANY METHOD TO VERIFY BUYER'S AGE? | SURGEON GENERAL'S WARNING | PKG MARKED | AGE VERIFICATION |
|--|---------------------|--|---|---|----------------------------------|---|-------------------------|
| amer11.safeshopper.com | VA | yes | | | no | info not given | info not given |
| http://cigarettes4less.safeshopper.com | none given | yes | | | no | info not given | info not given |
| http://home.sprynet.com/~wolfpacktobacco/index.html | none given | yes | | | no | info not given | info not given |
| http://members.tripod.com/~bood/home.html | NY | yes | yes (on mail order form) | | no | info not given | info not given |
| http://w2r.com/quakertradingco/ | NY | | yes (by entering site) | | no | info not given | info not given |
| http://www.members.tripod.com/~kennedy.bryan/home.html | NY | yes | yes (on mail order form) | | no | info not given | info not given |
| www.2guysmokeshop.com | NH & MA | | yes (by clicking certification) | | yes | info not given | info not given |
| www.a1discountcigarettes.com | 100% Internet Based | | yes (billing info used as shipping info to verify age of recipient) | | no | info not given | info not given |
| www.aaasmokes.com | VA | | yes (by ordering user is certifying legal age) | | no | info not given | info not given |
| www.aabakismokes.com | NV | yes | | | no | info not given | info not given |
| www.aardvarkstore.com | UK | yes | | | no | info not given | info not given |
| www.abccigar.com | MA | yes | | | no | info not given | info not given |
| www.abnersworld.com | PA | no | | | no | info not given | info not given |
| www.absolutecigars.com | QC | no | | | no | info not given | info not given |
| www.aelloyd.com | UK | no | | | no | info not given | info not given |
| www.affordablecigs.com | none given | yes | | | yes | info not given | info not given |
| www.alexanderscigars.com.au | Australia | yes | | | no | info not given | info not given |
| www.allstarcigar.com | MA | no | | | no | info not given | info not given |
| www.ambassadorcigar.com | FL | no | | | no | info not given | info not given |
| www.amdcigars.com | MA | no | | | no | info not given | info not given |
| www.andaluzacigars.com | NY | no | | | no | info not given | info not given |
| www.arabicigar.com | LA | no | | | no | info not given | info not given |
| www.area51cigars.com | TN | no | | | no | info not given | info not given |
| www.arotobacco.com | QC | no | | | no | info not given | info not given |
| www.avilacigars.com | none given | | yes (must be 21 & click certification) | | no | info not given | info not given |
| www.bestcigarprices.com | NY | yes (must be 21) | | | no | info not given | info not given |
| www.bggear.com | FL | no | | | no | info not given | info not given |
| www.bigbd.com | NY | | yes (D.O.B. on online form) | | no | info not given | info not given |
| www.bigmikescigar.com | NJ | | yes (by entering site) | | no | info not given | info not given |
| www.bogartcigars.com | FL | no | | | no | info not given | info not given |
| www.bonitasmokeshop.com | FL | yes | yes (signature on mail order form) | | no | info not given | info not given |
| www.brillcigars.com | Israel | no | | | no | info not given | info not given |
| www.cafehavana.com | LA | | | | | | |
| www.calgarycigar.com | AB | no | | | no | no ("boxed in plain paper cardboard boxes") | info not given |
| www.canadacigar.com | AB | no | | | no | info not given | info not given |
| www.capitalcigarsource.com | MD | yes | | | yes | info not given | info not given |
| www.cgarsltd.co.uk | UK | no | | | no | info not given | info not given |
| www.cigar.com | OH | no | | | no | info not given | info not given |
| www.cigar1.com.au | Australia | | yes (by completing order form) | | no | info not given | info not given |
| www.cigarettecarton.com | VA | | yes (by entering site) | | yes | info not given | info not given |
| www.cigaretteclub.com | NY | yes | | | yes | info not given | info not given |
| www.cigarettesexpress.com | NY | | | Driver's License required | yes | info not given | info not given |
| www.cigarettetobacco.com | NC | yes | | | no | info not given | info not given |

| URL/Web Address | STATE | IS THERE A STATEMENT THAT BUYER MUST BE 18? | IS BUYER REQUIRED TO SAY THAT HE OR SHE IS 18? | IS THERE ANY METHOD TO VERIFY BUYER'S AGE? | SURGEON GENERAL'S WARNING | PKG MARKED | AGE VERIFICATION |
|------------------------------|------------|---|---|--|---------------------------|----------------|--------------------------|
| www.cigarking.com | IL | yes | | | no | info not given | info not given |
| www.cigars4u.com | none given | no | | | no | info not given | info not given |
| www.cigarsatcost.com | MD | no | | | no | info not given | info not given |
| www.cigarweb.com | MO/KS | yes | | | no | info not given | info not given |
| www.cigoutlet.com | VA | yes | | Driver's License for mail order form | yes | info not given | info not given |
| www.cigs2000.com | VA | yes | | | no | info not given | info not given |
| www.cigsmoke1.com | FL | yes | | | no | info not given | info not given |
| www.cigs-n-gars.com | KY | yes | | | yes | info not given | info not given |
| www.cigsonline.com | VA | | yes (must click certification & adult signature required) | | yes | info not given | adult signature required |
| www.cigworld.com | VA | yes | | | yes | info not given | adult signature required |
| www.cmtcigars.com | NC | no | | | no | info not given | info not given |
| www.comcigar.com | MA | yes | | | yes | info not given | info not given |
| www.coronacigar.com | FL | | yes (must enter birthdate) | | no | info not given | info not given |
| www.cutratecigars.com | CT | | yes (must click certification) | | no | info not given | info not given |
| www.cycocigs.com | NV | | yes (billing info used as shipping info to verify age of recipient) | | no | info not given | info not given |
| www.dirtcheapcig.com | KY | | yes (by entering site & must click certification) | | yes | info not given | info not given |
| www.discountcigarette.com | GA | | yes (on mail order form & must click certification) | | yes | info not given | info not given |
| www.educatedcigar.com | WA | yes | | | yes | info not given | info not given |
| www.faderstobac.com | MD | | | | no | info not given | info not given |
| www.finckcigarcompany.com | TX | | yes (must be 21 & enter D.O.B.) | | no | info not given | info not given |
| www.firehousetobacco.com | PA | | yes (must click certification) | | no | info not given | info not given |
| www.highlandercigarettes.com | NY | yes | yes (on mail order form) | | no | info not given | info not given |
| www.hot-ent.com | NY | yes | | | no | info not given | info not given |
| www.iroquoisdirect.com | NY | | yes (by entering site & D.O.B. on order form) | | yes | info not given | info not given |
| www.killbucktradingpost.com | NY | | yes (must click if NOT of legal age) | Driver's License for mail order form | no | info not given | info not given |
| www.loneoak.net | NY | | yes (must click certification) | | yes | info not given | info not given |
| www.lowcostcigarettes.com | NY | | yes (must click certification) | | no | info not given | info not given |
| www.mybutts.com | NY | yes | | | yes | | |
| www.natsherman.com | none given | | | yes (must be 21, adult signature required upon delivery) | no | info not given | info not given |
| www.nauticom.net/www/blooms/ | PA | no | | | no | info not given | info not given |
| www.nickscigarworld.com | SC | | yes (must click certification) | | no | info not given | info not given |
| www.ojibwas.com | NY | | yes (by entering site & must click certification) | | yes | info not given | info not given |
| www.paylesscigarettes.com | none given | | yes (must click certification) | | yes | info not given | info not given |
| www.peacepipetobacco.com | NY | yes | | | no | info not given | info not given |
| www.ranchresortsmokeshop.org | OK | yes | | | no | info not given | info not given |
| www.redjacketobacco.com | NY | | yes (by entering site) | | no | info not given | info not given |
| www.rednationobacco.com | NY | yes | | | no | info not given | info not given |
| www.rezonline.com | NY | | yes (must click TRUE to order) | | no | info not given | info not given |

| URL/Web Address | STATE | IS THERE A STATEMENT THAT BUYER MUST BE 18? | IS BUYER REQUIRED TO SAY THAT HE OR SHE IS 18? | IS THERE ANY METHOD TO VERIFY BUYER'S AGE? | SURGEON GENERAL'S WARNING | PKG MARKED | AGE VERIFICATION |
|------------------------------|------------|---|---|--|---------------------------|----------------|------------------|
| www.riverbendusa.com | NY | | yes (on mail order & online forms) | | no | info not given | info not given |
| www.rjrj.com | NY | | yes (by entering site & on mail order form) | | yes | info not given | info not given |
| www.rockyscigars.com | NY | | yes (must click certification to order) | | no | info not given | info not given |
| www.ronssmokeshop.com | NY | | yes (by entering site) | | yes | info not given | info not given |
| www.saraval.com | Spain | no | | | no | info not given | info not given |
| www.saveoncigarettes.com | VA | | yes (must click certification) | yes (copy of Driver's License or legal I.D. w/D.O.B.) | yes | info not given | info not given |
| www.senecasmokes.com | NY | | yes (by entering site, must click certification & on mail order form) | | yes | info not given | info not given |
| www.sjitobacco.com | none given | no | | | no | info not given | info not given |
| www.smokemcheap.com | NY | yes | | | no | info not given | info not given |
| www.smokesgalore.com | NY | | yes (adult signature required) | | yes | info not given | info not given |
| www.smokes-spirits.com | KY | | yes (on mail order form & by clicking to enter site) | | yes | info not given | info not given |
| www.smokeysigars.com | NY | | yes (by ordering user is certifying legal age) | | no | info not given | info not given |
| www.smokin4less.com | VA | | yes (adult signature required) | | yes | info not given | info not given |
| www.smokintobacco.com | NY | yes | yes (on mail order form) | | no | info not given | info not given |
| www.smokinturtle.com | NY | yes | | | yes | info not given | info not given |
| www.smolderforless.com | NY | yes | | Driver's License & signature (on mail order form) | no | info not given | info not given |
| www.supercheapcigarettes.com | VA | | | yes (adult signature required upon delivery and proof of age required for mail orders) | yes | info not given | yes |
| www.taxfreetobacco.com | NY | | yes (by entering site & must click certification) | | yes | info not given | info not given |
| www.thompsoncigar.com | FL | | yes (must be 21 & enter D.O.B.) | | no | info not given | info not given |
| www.tobaccobymail.com | NY | | yes (by entering site - link provided if you are under 18 and want to buy cigs - takes user to page listing reasons why not to smoke) | yes (copy of Driver's License or legal I.D. w/D.O.B.) | no | info not given | info not given |
| www.tobaccomart.com | IL | | | | no | info not given | info not given |
| www.tobaccosource.com | NY | yes (must be 21) | | | no | info not given | info not given |
| www.tobaccoxpress.net | NY | yes | | | no | info not given | info not given |
| www.travelingsmoke.com | NY | yes | | | no | info not given | info not given |
| www.twowaysmokes.com | NY | yes | | | no | info not given | info not given |
| www.warholcigars.com | NY | no | | | no | info not given | info not given |
| www.westerndoorsmokes.com | NY | yes (must be 21) | | | no | info not given | info not given |

APPENDIX B

General Laws of Rhode Island, 1956

TITLE 11, Criminal Offenses

CHAPTER 11-9, Children

SECTION 11-9-13.11

§ 11-9-13.11 Prohibition on the sale or distribution of tobacco products through the mail to children under eighteen (18) – Proof of age of purchaser required – General rule. – (a) The distribution or sale of tobacco products to children under the age of eighteen (18) via the United States postal service, or by any other public or private postal or package delivery service, is prohibited.

(b) Any person selling or distributing tobacco products in the form of cigarettes, cigars, pipe tobacco, chewing tobacco, or snuff directly to a consumer via the United States postal service, or by any other public or private postal or package delivery service, including orders placed by mail, telephone, facsimile, or internet, shall:

(1) Before distributing or selling the tobacco product through any of these means, receive both a copy of a valid form of government identification showing date of birth to verify the purchaser is age eighteen (18) years or over and an attestation from the purchaser certifying that the information on the government identification truly and correctly identifies the purchaser and the purchaser's current address; and

(2) Deliver the tobacco product to the address of the purchaser given on the valid form of government identification and by a postal or package delivery service method that either limits delivery to that purchaser and requires the purchaser to sign personally to receive the delivery or requires a signature of an adult at the purchaser's address to deliver the package.

(c) The attorney general shall bring an action for any violation of this chapter. Any distribution or sale of a tobacco product to a child under eighteen (18) years of age via the United States postal service, or by any other public or private postal or package delivery service, is subject to an action against the distributor or seller by the attorney general of the state of Rhode Island. A minimum fine of one thousand dollars (\$1,000) shall be assessed against any distributor or seller convicted of distributing or selling tobacco products via the United States postal service, or by any other public or private postal or package delivery service, for each delivery or sale of a tobacco product to a child under eighteen (18) years of age.

(d) For the purpose of this section, "distribution", "distributing", "selling", and "sale" do not include the acts of the United States postal service or other common carrier when engaged in the business of transporting and delivering packages for others, nor the acts of a person, whether compensated or not, who transports or delivers a package for another person without any reason to know of the package's contents.