



COMMONWEALTH of VIRGINIA

Office of the Attorney General

William C. Mims
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

MEMORANDUM

TO: All Persons that make Cigarette "Delivery Sales" as defined at Va. Code § 18.2-246.6.

FROM: Gary L. Conover, Senior Assistant Attorney General
Chief, Tobacco Enforcement Section
Commonwealth of Virginia
Office of the Attorney General 

SUBJECT: New Requirements for persons that make "Delivery Sales" of cigarettes; Chapter 847, Acts of the 2009 Virginia General Assembly, related laws and penalties.

DATE: June 18, 2009

This important Notice is provided as a courtesy to advise you of recently enacted and existing laws in Virginia related to "delivery sales" of cigarettes. Please carefully review this Notice, along with the referenced provisions of law and internet web pages and, if necessary, consult a private attorney for advice concerning the meaning and implications of this recent enactment and related provisions of law to assure that you thoroughly understand their content.

The 2009 Virginia General Assembly enacted Chapter 847, Acts of Assembly, which takes effect on July 1, 2009 and provides in part:

§ 18.2-246.11. Registration and reporting requirements.

A. Prior to making delivery sales or mailing, shipping, or otherwise delivering cigarettes in connection with any such delivery sales, every person shall file with the Board and with the Attorney General a statement setting forth such person's name, trade name, and the address of such person's principal place of business and any other place of business.

B. Not later than the tenth day of each calendar month, each person that has made a delivery sale or mailed, shipped, or otherwise delivered cigarettes in connection with any such delivery sale during the previous calendar month shall file with the Board and with the Attorney General a report in the format prescribed by the Board, which may include an electronic format, that provides for each and every such delivery sale:

1. The name and address of the consumer to whom such delivery sale was made;
2. The brand or brands of the cigarettes that were sold in such delivery sale; and
3. The quantity of cigarettes that were sold in such delivery sale.

C. Any person who satisfies the requirements of § 376 of Title 15 of the United States Code shall be deemed to satisfy the requirements of this section.

D. For purposes of any penalty that may be imposed for a violation of this section, a failure to file a particular statement or report with both the Board and the Attorney General shall constitute a single violation.

§ 18.2-246.13. Penalties.

A. Except as specifically provided in § 18.2-246.14, a first violation of any provision of this article shall be punishable by a civil penalty of no more than \$1,000. A second or subsequent violation of any provision of this article shall be punishable by a civil penalty of no more than \$10,000.

B. Any prospective consumer who knowingly submits a false certification under subdivision A 1 of § 18.2-246.8 shall be subject to a civil penalty of no more than \$5,000 for each such offense.

C. Any person failing to collect or remit to the Board or the Department of Taxation any tax required in connection with a delivery sale shall be assessed, in addition to any other applicable penalty, a civil penalty of no more than five times the retail value of the cigarettes involved.

D. Any civil penalty collected under this article shall be paid to the general fund.

E. Any person who fails to file the statement required by subsection A of § 18.2-246.11 and thereafter makes a delivery sale is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

F. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a statement filed as required by subsection A of § 18.2-246.11 which is false is guilty of a violation of § 18.2-498.3. Each such filed statement containing one or more false statements shall constitute a separate offense.

G. Any person who fails to make the report required by subsection B of § 18.2-246.11 is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

H. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a materially false statement in any report required by subsection B of § 18.2-246.11 is guilty of a violation of § 18.2-498.3. Each such report containing one or more false statements constitutes a separate offense.

§ 18.2-246.15. Enforcement.

The Attorney General is authorized to enforce the provisions of this article. The Attorney General may assess the civil penalties authorized by this article, with the concurrence of the attorney for the Commonwealth pursuant to § 2.2-511, may prosecute criminal violations under § 18.2-246.13, and may bring an action in the appropriate court to collect assessed penalties or prevent or restrain violations of this article by any person, or any person controlling such person. The Board and the State Department of Taxation shall cooperate with the Attorney General in his enforcement efforts and provide to the Attorney General all information and documentation in their possession necessary for the Attorney General to accomplish such enforcement.

For purposes of the above quoted provisions of Virginia law, the term "delivery sale" is defined at Va. Code §18.2-246.6 as follows:

"Delivery sale" means any sale of cigarettes to a consumer in the Commonwealth regardless of whether the seller is located in the Commonwealth where either (i) the purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the Internet or other online service; or (ii) the cigarettes are delivered by use of the mails or a delivery service. A sale of cigarettes not for personal consumption to a person who is a wholesale dealer or retail dealer, as such terms are defined in § 58.1-1000, shall not be a delivery sale. A delivery of cigarettes, not through the mail or by a common carrier, to a consumer performed by the owner, employee or other individual acting on behalf of a retailer authorized to sell such cigarettes shall not be a delivery sale.

The term "person" is defined at Va. Code § 1-230 as follows:

"Person" includes any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

Civil penalties for violation of any provision of Va. Code §§ 18.2-246.6 through 18.2-246.13 will be assessed as follows:

1. First violation: \$50 per pack, not to exceed \$1,000.
2. Second violation: \$250 per pack, not to exceed \$10,000.
3. Third and any subsequent violation: \$500 per pack, not to exceed \$10,000.

The above quoted Va. Code § 18.2-246.13 states that certain violations of Virginia law governing cigarette delivery sales constitute a violation of Va. Code § 18.2-298.3. Please note that violation of Va. Code § 18.2-498.3 constitutes a Class 6 felony, punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” See Va. Code § 18.2-10.

Besides the civil and criminal penalties set forth at Va. Code §§18.2-246.13 and 18.2-498.3, please be advised that a felony violation of Va. Code §18.2-246.13 constitutes “racketeering activity” under the Virginia Racketeer Influenced and Corrupt Organization (RICO) Act, Va. Code § 18.2-512 and subsequent sections, violation of which is punishable as follows:

§ 18.2-515. Criminal penalties; forfeiture

A. Any person or enterprise convicted of engaging in activity in violation of the provisions of § 18.2-514 is guilty of a felony punishable by imprisonment for not less than five years nor more than 40 years and a fine of not more than \$ 1 million. A second or subsequent offense shall be punishable as a Class 2 felony and a fine of not more than \$ 2 million.

The court may order any such person or enterprise to be divested of any interest in any enterprise or real property identified in § 18.2-514; order the dissolution or reorganization of such enterprise; and order the suspension or revocation of any license, permit, or prior approval granted to such enterprise or person by any agency of the Commonwealth or political subdivision thereof.

B. All property, real or personal, including money, used in substantial connection with, intended for use in the course of, or traceable to, conduct in violation of any provision of § 18.2-514 is subject to civil forfeiture to the Commonwealth. The forfeiture proceeding shall be conducted pursuant to the provisions of Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2.

The paragraphs above include excerpts from and summaries of portions of Chapter 847 and related Virginia laws. In all instances and in any proceeding, the official text of

such laws is controlling. For your assistance and convenience, the full text of Chapter 847, 2009 Acts of Assembly, is attached to this Notice and I encourage you and your counsel to fully and carefully review this attachment along with the full text of all referenced and otherwise related provisions of Virginia law.

Finally, for your additional convenience, registration and reporting forms are attached to this Notice and are separately posted at this Office's web page:

http://www.vaag.com/LEGAL_LEGIS/Tobacco/index.html.

In addition, you may call this Office at 804-225-3195 and request that copies of the forms be mailed to you. If you select this option, please be prepared to provide the name of the "Delivery Seller" (person or company, as applicable), mailing address and the telephone number where such person or company can be contacted.

Thank you in advance for your cooperation and compliance with the above described provisions of Virginia law.

VIRGINIA ACTS OF ASSEMBLY -- 2009 RECONVENED SESSION

CHAPTER 847

An Act to amend and reenact §§ 2.2-511, 3.2-4212, 18.2-246.11, 18.2-246.13, 18.2-246.15, 18.2-513, and 18.2-514 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3 of Chapter 42 of Title 3.2 a section numbered 3.2-4219 and by adding sections numbered 19.2-245.01 and 58.1-1008.2, relating to the Master Settlement Agreement; criminal enforcement activities; penalty.

[S 1302]

Approved April 8, 2009

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-511, 3.2-4212, 18.2-246.11, 18.2-246.13, 18.2-246.15, 18.2-513, and 18.2-514 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 3 of Chapter 42 of Title 3.2 a section numbered 3.2-4219 and by adding sections numbered 19.2-245.01 and 58.1-1008.2 as follows:

§ 2.2-511. Criminal cases.

A. Unless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth except in cases involving (i) violations of the Alcoholic Beverage Control Act (§ 4.1-100 et seq.), (ii) violation of laws relating to elections and the electoral process as provided in § 24.2-104, (iii) violation of laws relating to motor vehicles and their operation, (iv) the handling of funds by a state bureau, institution, commission or department, (v) the theft of state property, (vi) violation of the criminal laws involving child pornography and sexually explicit visual material involving children, (vii) the practice of law without being duly authorized or licensed or the illegal practice of law, (viii) *violations of § 3.2-4212 or 58.1-1008.2*, (ix) with the concurrence of the local attorney for the Commonwealth, violations of the Virginia Computer Crimes Act (§ 18.2-152.1 et seq.), ~~(ix)~~ (x) with the concurrence of the local attorney for the Commonwealth, violations of the Air Pollution Control Law (§ 10.1-1300 et seq.), the Virginia Waste Management Act (§ 10.1-1400 et seq.), and the State Water Control Law (§ 62.1-44.2 et seq.), ~~(x)~~ (xi) with the concurrence of the local attorney for the Commonwealth, violations of Chapters 2 (§ 18.2-18 et seq.), 3 (§ 18.2-22 et seq.), and 10 (§ 18.2-434 et seq.) of Title 18.2, if such crimes relate to violations of law listed in clause ~~(ix)~~ (x) of this subsection, ~~(xi)~~ (xii) with the concurrence of the local attorney for the Commonwealth, criminal violations by Medicaid providers or their employees in the course of doing business, or violations of Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, in which cases the Attorney General may leave the prosecution to the local attorney for the Commonwealth, or he may institute proceedings by information, presentment or indictment, as appropriate, and conduct the same, ~~(xii)~~ (xiii) with the concurrence of the local attorney for the Commonwealth, violations of Article 9 (§ 18.2-246.1 et seq.) of Chapter 6 of Title 18.2, ~~(xiii)~~ (xiv) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of §§ 18.2-186.3 and 18.2-186.4, ~~and~~ ~~(xiv)~~ (xv) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of § 18.2-46.2, 18.2-46.3, or 18.2-46.5 when such violations are committed on the grounds of a state correctional facility, *and (xvi) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 of Title 18.2.*

In all other criminal cases in the circuit courts, except where the law provides otherwise, the authority of the Attorney General to appear or participate in the proceedings shall not attach unless and until a petition for appeal has been granted by the Court of Appeals or a writ of error has been granted by the Supreme Court. In all criminal cases before the Court of Appeals or the Supreme Court in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth. In any criminal case in which a petition for appeal has been granted by the Court of Appeals, the Attorney General shall continue to represent the Commonwealth in any further appeal of a case from the Court of Appeals to the Supreme Court.

B. The Attorney General shall, upon request of a person who was the victim of a crime and subject to such reasonable procedures as the Attorney General may require, ensure that such person is given notice of the filing, of the date, time and place and of the disposition of any appeal or habeas corpus proceeding involving the cases in which such person was a victim. For the purposes of this section, a victim is an individual who has suffered physical, psychological or economic harm as a direct result of the commission of a crime; a spouse, child, parent or legal guardian of a minor or incapacitated victim; or a spouse, child, parent or legal guardian of a victim of a homicide. Nothing in this subsection shall confer upon any person a right to appeal or modify any decision in a criminal, appellate or habeas corpus proceeding; abridge any right guaranteed by law; or create any cause of action for damages

against the Commonwealth or any of its political subdivisions, the Attorney General or any of his employees or agents, any other officer, employee or agent of the Commonwealth or any of its political subdivisions, or any officer of the court.

§ 3.2-4212. Penalties and other remedies.

A. In addition to any other civil or criminal penalty or remedy provided by law, upon a determination that any person has violated § 3.2-4207 or any regulation adopted pursuant thereto, the Commissioner may revoke or suspend such person's privilege to purchase tax stamps at a discounted rate. Each stamp affixed and each offer to sell cigarettes in violation of § 3.2-4207 shall constitute a separate violation. Upon a determination of a violation of § 3.2-4207 or any regulations adopted pursuant thereto, the Commissioner may also impose a civil penalty in an amount not to exceed the greater of (i) 500 percent of the retail value of the cigarettes sold or (ii) \$5,000.

B. Any cigarettes that have been sold, offered for sale or possessed for sale in the Commonwealth, or imported for personal consumption in the Commonwealth, in violation of § 3.2-4207, shall be deemed contraband and may not be sold or offered for sale unless such cigarettes are listed in the Directory. Any such cigarettes that are sold or offered for sale when not included in the Directory shall be subject to confiscation and forfeiture. Any such confiscation and forfeiture shall be governed by the procedures contained in § 4.1-338, which shall apply *mutatis mutandis*; except that all such cigarettes so confiscated and forfeited shall be destroyed and not resold.

C. The Attorney General may seek an injunction to restrain a threatened or actual violation of § 3.2-4207, subsection A of § 3.2-4209, subsection B of § 3.2-4209, or subsection C of § 3.2-4209 by a stamping agent and to compel the stamping agent to comply with such provisions. In any action brought pursuant to this subsection in which the Commonwealth prevails, the Commonwealth shall be entitled to recover the reasonable costs of investigation, costs of the action and reasonable attorneys' fees.

D. It shall be unlawful for a person to (i) sell or distribute cigarettes or (ii) acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the Commonwealth in violation of § 3.2-4207. A violation of this section is a ~~Class 2 misdemeanor~~ *involving less than 3,000 packages of cigarettes is a Class 1 misdemeanor. A violation of this section involving 3,000 or more packages of cigarettes is a Class 1 misdemeanor, and, upon conviction, the sentence of such person shall include a mandatory minimum term of confinement of 90 days.*

§ 3.2-4219. *Materially false statements.*

Any tobacco product manufacturer, stamping agent, or importer of cigarettes, or any officer, employee, or agent of any such entity, who knowingly and with the intent to defraud, mislead, or deceive makes any materially false statement in any record required by this chapter to be kept, or in any document required by this chapter to be filed with the Attorney General is guilty of a violation of § 18.2-498.3. Each document filed containing one or more false statements shall constitute a separate offense.

§ 18.2-246.11. Registration and reporting requirements.

A. Prior to making delivery sales or mailing, shipping, or otherwise delivering cigarettes in connection with any such delivery sales, every person shall file with the Board *and with the Attorney General* a statement setting forth such person's name, trade name, and the address of such person's principal place of business and any other place of business.

B. Not later than the tenth day of each calendar month, each person that has made a delivery sale or mailed, shipped, or otherwise delivered cigarettes in connection with any such delivery sale during the previous calendar month shall file with the Board *and with the Attorney General* a report in the format prescribed by the Board, which may include an electronic format, that provides for each and every such delivery sale:

1. The name and address of the consumer to whom such delivery sale was made;
2. The brand or brands of the cigarettes that were sold in such delivery sale; and
3. The quantity of cigarettes that were sold in such delivery sale.

C. Any person who satisfies the requirements of § 376 of Title 15 of the United States Code shall be deemed to satisfy the requirements of this section.

D. *For purposes of any penalty that may be imposed for a violation of this section, a failure to file a particular statement or report with both the Board and the Attorney General shall constitute a single violation.*

§ 18.2-246.13. Penalties.

A. Except as specifically provided in § 18.2-246.14, a first violation of any provision of this article shall be punishable by a civil penalty of no more than \$1,000. A second or subsequent violation of any provision of this article shall be punishable by a civil penalty of no more than \$10,000.

B. Any prospective consumer who knowingly submits a false certification under subdivision A 1 of § 18.2-246.8 shall be subject to a civil penalty of no more than \$5,000 for each such offense.

C. Any person failing to collect or remit to the Board or the Department of Taxation any tax required in connection with a delivery sale shall be assessed, in addition to any other applicable penalty, a civil penalty of no more than five times the retail value of the cigarettes involved.

D. Any civil penalty collected under this article shall be paid to the general fund.

E. Any person who fails to file the statement required by subsection A of § 18.2-246.11 and thereafter makes a delivery sale is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

F. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a statement filed as required by subsection A of § 18.2-246.11 which is false is guilty of a violation of § 18.2-498.3. Each such filed statement containing one or more false statements shall constitute a separate offense.

G. Any person who fails to make the report required by subsection B of § 18.2-246.11 is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

H. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a materially false statement in any report required by subsection B of § 18.2-246.11 is guilty of a violation of § 18.2-498.3. Each such report containing one or more false statements constitutes a separate offense.

§ 18.2-246.15. Enforcement.

The Attorney General is authorized to enforce the provisions of this article. The Attorney General may assess the civil penalties authorized by this article, with the concurrence of the attorney for the Commonwealth pursuant to § 2.2-511, may prosecute criminal violations under § 18.2-246.13, and may bring an action in the appropriate court in the Commonwealth to collect assessed penalties or prevent or restrain violations of this article by any person, or any person controlling such person. The Board and the State Department of Taxation shall cooperate with the Attorney General in his enforcement efforts and provide to the Attorney General all information and documentation in their possession necessary for the Attorney General to accomplish such enforcement.

§ 18.2-513. Definitions.

As used in this chapter, the term:

"Criminal street gang" shall be as defined in § 18.2-46.1.

"Enterprise" includes any of the following: sole proprietorship, partnership, corporation, business trust, criminal street gang; or other group of three or more individuals associated for the purpose of criminal activity.

"Proceeds" shall be as defined in § 18.2-246.2.

"Racketeering activity" means to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit two or more of the following offenses: Article 2.1 (§ 18.2-46.1 et seq.) of Chapter 4 of this title, § 18.2-460; a felony offense of §§ 3.2-4212, 3.2-4219, 10.1-1455, 18.2-31, 18.2-32, 18.2-32.1, 18.2-33, 18.2-35, Article 2.2 (§ 18.2-46.4 et seq.) of Chapter 4 of this title, §§ 18.2-47, 18.2-48, 18.2-48.1, 18.2-49, 18.2-51, 18.2-51.2, 18.2-52, 18.2-53, 18.2-55, 18.2-58, 18.2-77, 18.2-79, 18.2-80, 18.2-89, 18.2-90, 18.2-91, 18.2-92, 18.2-93, 18.2-95, Article 4 (§ 18.2-111 et seq.) of Chapter 5 of this title, Article 1 (§ 18.2-168 et seq.) of Chapter 6 of this title, §§ 18.2-178, 18.2-186, Article 6 (§ 18.2-191 et seq.) of Chapter 6 of this title, Article 9 (§ 18.2-246.1 et seq.) of Chapter 6 of this title, § 18.2-246.13, Article 1 (§ 18.2-247 et seq.) of Chapter 7 of this title, §§ 18.2-279, 18.2-286.1, 18.2-289, 18.2-300, 18.2-308.2, 18.2-308.2:1, 18.2-328, 18.2-355, 18.2-357, 18.2-369, 18.2-374.1, Article 8 (§ 18.2-433.1 et seq.) of Chapter 9 of this title, Article 1 (§ 18.2-434 et seq.) of Chapter 10 of this title, Article 2 (§ 18.2-438 et seq.) of Chapter 10 of this title, Article 3 (§ 18.2-446 et seq.) of Chapter 10 of this title, Article 1.1 (§ 18.2-498.1 et seq.) of Chapter 12 of this title, § 3.2-6571, 18.2-516, 32.1-314, 58.1-1008.2, or 58.1-1017; or any substantially similar offenses under the laws of any other state, the District of Columbia, the United States or its territories.

§ 18.2-514. Racketeering offenses.

A. It shall be unlawful for an enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to receive any proceeds known to have been derived directly from racketeering activity and to use or invest an aggregate of \$10,000 or more of such proceeds in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.

B. It shall be unlawful for any enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to directly acquire or maintain any interest in or control of any enterprise or real property through racketeering activity.

C. It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through racketeering activity.

D. It shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C.

E. Each violation of this section is a separate and distinct felony punishable in accordance with § 18.2-515.

§ 19.2-245.01. Offenses involving reports or statements concerning cigarette sales or stamping.

Any criminal violation of Chapter 42 (§ 3.2-4200 et seq.) of Title 3.2 or of § 18.2-246.13 or 18.2-514 involving reports or statements concerning cigarette sales or stamping may be prosecuted in the City of Richmond.

§ 58.1-1008.2. Materially false statements in reports.

Any tobacco product manufacturer, stamping agent, or importer of cigarettes, or any officer,

employee, or agent of any such entity, who knowingly and with the intent to defraud, mislead, or deceive makes any materially false statement in any record required by this article or Article 2.1 (§ 58.1-1021.01 et seq.) of this chapter to be kept, or in any report or return required by this article or Article 2.1 of this chapter to be filed with the Department is guilty of a violation of § 18.2-498.3. Each record kept and each report or return filed containing one or more false statements shall constitute a separate offense.