

State of South Dakota

EIGHTY-FOURTH SESSION LEGISLATIVE ASSEMBLY, 2009

400Q0367

HOUSE BILL NO. 1080

Introduced by: The Committee on Judiciary at the request of the Office of the Attorney General

1 FOR AN ACT ENTITLED, An Act to revise certain provisions relating to internet and mail
2 order sales of cigarettes and tobacco products.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 10-50-1 be amended to read as follows:

5 10-50-1. Terms used in this chapter mean:

6 (1) ~~"Adult," any person who is at least the legal minimum purchase age;~~

7 ~~—(2)—~~ "Consumer," any individual who is not a retailer or a licensed distributor or
8 wholesaler pursuant to § 10-50-9;

9 ~~(3)~~(2) "Dealer," or "retailer," any person other than a distributor or wholesaler, as defined
10 herein, who is engaged in this state in the business of selling cigarettes or tobacco
11 products at retail;

12 ~~—(4)—~~ "Delivery sale," any sale of cigarettes to a consumer in the state where:

13 ~~—(a)—~~ The purchaser submits the order for the sale by means of a telephonic or other
14 method of voice transmission, the mail or any other delivery service, or the
15 internet or other online service; or



1 ~~(b) The cigarettes are delivered by use of the mail or delivery service. A sale of~~
2 ~~cigarettes shall be a delivery sale regardless of whether the seller is located~~
3 ~~within or without the state;~~

4 ~~(5) "Delivery service," any person engaged in the commercial delivery of letters,~~
5 ~~packages, or other containers;~~

6 ~~(6)~~(3) "Distributor," any person engaged in this state in the business of producing or
7 manufacturing cigarettes, or importing into the state cigarettes, at least seventy-five
8 percent of which are purchased directly from the manufacturers thereof;

9 ~~(7) "Legal minimum purchase age," the minimum age at which an individual may legally~~
10 ~~purchase cigarettes in this state pursuant to § 34-46-2;~~

11 ~~(8)~~(4) "Licensed distributor," or "licensed wholesaler," a distributor or wholesaler licensed
12 under the provisions of this chapter;

13 ~~(9) "Mail," or "mailing," the shipment of cigarettes through the United States Postal~~
14 ~~Office;~~

15 ~~(10)~~(5) "Person," any individual, firm, fiduciary, partnership, limited liability
16 company, corporation, trust, or association, however formed;

17 ~~(11)~~(6) "Sale" or "sell," shall include or apply to gifts, exchanges, and barter;

18 ~~(12)~~(7) "Secretary," the secretary of revenue and regulation;

19 ~~(13) "Shipping container," any container in which cigarettes are shipped in connection~~
20 ~~with a delivery sale;~~

21 ~~(14) "Shipping document," any bill of lading, airbill, or any other document used to~~
22 ~~provide evidence of the undertaking by a delivery service to deliver a letter, package,~~
23 ~~or other container;~~

24 ~~(15)~~(8) "Tobacco products," cigars, snuff, chewing tobacco, and any other products

1 made up or composed of tobacco in whole or in part, except cigarettes.

2 Section 2. That § 10-50-93 be repealed.

3 ~~10-50-93. No person may make a delivery sale of cigarettes to any person who is under the~~
4 ~~legal minimum purchase age in the state.~~

5 ~~Any person accepting a purchase order for a delivery sale shall comply with:~~

6 ~~(1) The age verification requirements provided in § 10-50-94;~~

7 ~~(2) The disclosure requirements provided in § 10-50-95;~~

8 ~~(3) The shipping requirements provided in § 10-50-96;~~

9 ~~(4) The registration and reporting requirements provided in § 10-50-97;~~

10 ~~(5) All other statutes of the state generally applicable to sales of cigarettes that occur~~
11 ~~entirely within the state, and any law imposing an excise tax, sales tax, license,~~
12 ~~revenue-stamping requirement, and escrow payment obligation as provided in chapter~~
13 ~~10-50B; and~~

14 ~~(6) The registration requirements in § 10-50-9.~~

15 Section 3. That § 10-50-94 be repealed.

16 ~~10-50-94. No person may mail, ship, or otherwise deliver cigarettes in connection with a~~
17 ~~delivery sale unless prior to the first delivery sale to the consumer:~~

18 ~~(1) The person obtains from the consumer a statement signed by the consumer in writing~~
19 ~~that certifies the consumer's address and that the consumer is at least eighteen years~~
20 ~~of age. The statement shall also confirm that the consumer understands that signing~~
21 ~~another person's name to the certification is illegal, the sale of cigarettes to any~~
22 ~~individual under the legal minimum purchase age is illegal, the purchase of cigarettes~~
23 ~~by any individual under the legal minimum purchase age is illegal, and that the~~
24 ~~consumer wants to receive a mailing from a tobacco company;~~

1 ~~—(2)— The person makes a good faith effort to verify the information contained in the~~
2 ~~certification provided by the consumer pursuant to subdivision (1) against a~~
3 ~~commercially available database, or obtains a photocopy or other image of the valid,~~
4 ~~government-issued identification stating the date of birth or age of the individual~~
5 ~~placing the order;~~

6 ~~—(3)— The person provides to the consumer, via e-mail or other means, a notice that meets~~
7 ~~the requirements of § 10-50-95; and~~

8 ~~—(4)— If an order for cigarettes is made pursuant to an advertisement on the internet or other~~
9 ~~advertising medium, the person receives payment for the delivery sale from the~~
10 ~~prospective consumer by a credit or debit card that has been issued in the consumer's~~
11 ~~name, or by check.~~

12 ~~— Any person accepting a purchase order for a delivery sale may request that the prospective~~
13 ~~consumer provide an e-mail address.~~

14 Section 4. That § 10-50-95 be repealed.

15 ~~— 10-50-95. The notice required under § 10-50-94 shall include a prominent and clearly legible~~
16 ~~statement that:~~

17 ~~—(1)— Cigarette sales to consumers below the legal minimum purchase age are illegal;~~

18 ~~—(2)— Consists of one of the warnings set forth in section 4(a)(1) of the Federal Cigarette~~
19 ~~Labeling and Advertising Act (15 U.S.C. § 1333(a)(1)) as of January 1, 2005, rotated~~
20 ~~on a quarterly basis;~~

21 ~~—(3)— Sales of cigarettes are restricted to those consumers who provide verifiable proof of~~
22 ~~age in accordance with § 10-50-94; and~~

23 ~~—(4)— Cigarette sales are subject to tax under § 10-50-3, and an explanation of how the tax~~
24 ~~has been or will be paid with respect to the delivery sale.~~

Section 5. That § 10-50-96 be repealed.

~~10-50-96. Any person who mails, ships, or otherwise delivers cigarettes in connection with a delivery sale shall:~~

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

~~(2) Use a method of mailing, shipping, or delivery that obligates the delivery service to require the consumer placing the purchase order for the delivery sale, or another adult of legal minimum purchase age residing at the consumer's address, to sign to accept delivery of the shipping container, and provide proof in the form of a valid government-issued identification bearing a photograph of the individual who signs to accept delivery of the shipping container. The person accepting delivery shall be the addressee or another adult of legal minimum purchase age residing at the consumer's address.~~

~~If the person accepting a purchase order for a delivery sale delivers the cigarettes without using a delivery service, the person shall comply with each requirement of §§ 10-50-93 to 10-50-98, inclusive, applicable to a delivery service. The person is in violation of the provisions of §§ 10-50-93 to 10-50-98, inclusive, if the person fails to comply with any such requirement.~~

Section 6. That § 10-50-97 be repealed.

~~10-50-97. Prior to making a delivery sale or mailing, shipping, or otherwise delivering cigarettes in connection with any delivery sale, each person shall file with the department a statement providing the person's name, trade name, and the address of the person's principal place of business and any other place of business.~~

~~Not later than the tenth day of each calendar month, each person that has made a delivery~~

1 ~~sale or mailed, shipped, or otherwise delivered cigarettes in connection with any delivery sale~~
2 ~~during the previous calendar month shall file with the department a memorandum or a copy of~~
3 ~~the invoice that provides for each delivery sale:~~

4 ~~— (1) — The name and address of the consumer;~~

5 ~~— (2) — The brand or brands of the cigarettes that were sold; and~~

6 ~~— (3) — The quantity of cigarettes that were sold.~~

7 Section 7. That § 10-50-98 be repealed.

8 ~~— 10-50-98. In addition to any other provision of law, the secretary may assess, for a first~~
9 ~~violation of any provision of §§ 10-50-93 to 10-50-98, inclusive, a civil penalty of one thousand~~
10 ~~dollars or five times the retail value of the cigarettes involved, whichever is greater. A~~
11 ~~subsequent violation is punishable by a civil penalty of five thousand dollars or five times the~~
12 ~~retail value of the cigarettes involved, whichever is greater.~~

13 ~~— Any person who knowingly violates any provision pursuant to §§ 10-50-93 to 10-50-98,~~
14 ~~inclusive, or who knowingly and falsely submits a certification in another person's name, shall~~
15 ~~for each offense be fined ten thousand dollars or five times the retail value of the cigarettes~~
16 ~~involved, whichever is greater.~~

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

20 ~~— Any cigarettes sold or attempted to be sold in a delivery sale that do not meet the~~
21 ~~requirements of §§ 10-50-93 to 10-50-98, inclusive, shall be forfeited to the state and destroyed.~~

22 ~~All fixtures, equipment, and all other materials and personal property on the premises of any~~
23 ~~person who, with the intent to defraud the state, violates any of the requirements of §§ 10-50-93~~
24 ~~to 10-50-98, inclusive, shall be forfeited to the state.~~

1 Section 8. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as
2 follows:

3 No person who is engaged in the business of selling or distributing cigarettes or tobacco
4 products may ship or transport, or cause to be shipped or transported, cigarettes or tobacco
5 products to any consumer in the state. This section applies regardless of whether the person
6 engaged in the business of selling or distributing cigarettes or tobacco products is located within
7 or without the state.

8 Section 9. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as
9 follows:

10 The attorney general may seek an injunction to restrain a threatened or actual violation of
11 section 8 of this Act.

12 Section 10. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 The attorney general may bring a civil action in circuit court for any violation of section 8
15 of this Act. In a civil action, in addition to injunctive or any other relief, the court may impose
16 a civil penalty, for a first violation of section 8 of this Act, in the amount of one thousand dollars
17 or five times the retail value of the cigarettes or tobacco products involved, whichever is greater.
18 A subsequent violation of section 8 of this Act is punishable by a civil penalty of five thousand
19 dollars or five times the retail value of the cigarettes or tobacco products involved, whichever
20 is greater.

21 Section 11. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 Each shipment, transport, or attempted shipment or transport, of cigarettes or tobacco
24 products in violation of section 8 of this Act constitutes a separate violation.

Section 12. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as follows:

Any cigarettes or tobacco products shipped, transported, or attempted to be shipped or transported, in violation of section 8 of this Act shall be forfeited to the state and destroyed. In addition, any profit, gain, gross receipt, or other benefit from the violation of section 8 of this Act shall be disgorged and paid to the state treasurer for deposit in the state's general fund.

Section 13. That chapter 10-50 be amended by adding thereto a NEW SECTION to read as follows:

Unless otherwise expressly provided, the penalties or remedies, or both, under sections 9 to 12, inclusive, of this Act are in addition to any other penalties and remedies available under any other law of the state.

Section 14. That § 10-50-6 be amended to read as follows:

10-50-6. Any cigarette on which ~~a tax~~ the tax imposed by this chapter has been paid, the payment being evidenced by the affixing of the stamp, is not subject to a further tax under this chapter. ~~However, any person,~~ Any person, including a person receiving cigarettes in violation of this chapter, who possesses or receives cigarettes that do not bear a tax stamp indicating the South Dakota cigarette tax has been paid, shall pay the tax imposed pursuant to § 10-50-3. Any person, including a person receiving cigarettes in violation of this chapter, who possesses two thousand or more cigarettes that do not bear a tax stamp indicating that the South Dakota cigarette tax has been paid, shall pay the tax imposed pursuant to § 10-50-3, plus a penalty equal to ten percent of the total tax due.

Except as otherwise provided in this chapter, the provisions of chapter 10-59 apply to the assessment and collection of any tax, penalty, and interest.

Section 15. That § 10-50-61 be amended to read as follows:

1 10-50-61. In addition to the tax imposed by § 10-50-3, there is imposed, whether or not a
2 sale occurs, a tax upon all tobacco products in this state~~and~~, upon any person engaged in
3 business as a licensed distributor or licensed wholesaler thereof, and upon any person possessing
4 tobacco products not taxed under this chapter, at the rate of thirty-five percent of the wholesale
5 purchase price of such tobacco products. ~~Such~~ The tax shall be imposed at the time the
6 distributor or wholesaler brings or causes to be brought into this state tobacco products for sale;
7 makes, manufactures, or fabricates tobacco products in this state for sale in this state; ~~or~~ ships
8 or transports tobacco products to dealers in this state to be sold by those dealers; or at the time
9 a person possesses or receives tobacco products not taxed under this chapter. For the purposes
10 of this chapter, wholesale purchase price is the price for which a manufacturer sells tobacco
11 products to a licensed distributor or licensed wholesaler exclusive of any discount or other
12 reduction.

13 Except as otherwise provided in this chapter, the provisions of chapter 10-59 apply to the
14 assessment and collection of any tax, penalty, and interest.