

ATTORNEY GENERAL OF THE STATE OF NEW YORK
HEALTH CARE BUREAU

In the Matter of

Federal Express Corporation, and FedEx Ground Package
Systems, Inc.

ASSURANCE OF COMPLIANCE

Pursuant to New York Executive Law (“EL”) § 63(12), ELIOT SPITZER, Attorney General of the State of New York (“Attorney General”), has caused an inquiry to be made into certain business practices of Federal Express Corporation (“FedEx Express”) and FedEx Ground Package Systems, Inc. (“FedEx Ground”)(collectively, “FedEx”) related to N.Y. Public Health Law (“PHL”) § 1399- *ll*. As a result of such inquiry, the Attorney General has made the following findings:

1. FedEx Express is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 3610 Hacks Cross Road, Memphis, Tennessee 38125. FedEx Ground is a corporation, organized and existing under the laws of the State of Delaware with its principal place of business at 1000 FedEx Drive, Coraopolis, Pennsylvania 15018.
2. FedEx Express and FedEx Ground are package delivery companies and provide transportation and logistics services, and in the regular course of their businesses deliver packages to persons located in the State of New York.
3. PHL §1399-*ll*, entitled “Unlawful Shipment of Cigarettes,” states that it shall be unlawful for a common carrier like FedEx to knowingly transport cigarettes to any person in New

York whom it reasonably believes to be other than a person who is authorized to receive such shipment. The statute provides in pertinent part:

1. It shall be unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped any cigarettes to any person in this state who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred eighty-a of the tax law; (b) an export warehouse proprietor pursuant to chapter 52 of the internal revenue code or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or (c) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state, when such person is acting in accordance with his or her official duties.

2. It shall be unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by such carrier to be other than a person described in paragraph (a), (b) or (c) of subdivision one of this section. For purposes of the preceding sentence, if cigarettes are transported to a home or residence, it shall be presumed that the common or contract carrier knew that such person was not a person described in paragraph (a), (b) or (c) of subdivision one of this section. It shall be unlawful for any other person to knowingly transport cigarettes to any person in this state, other than to a person described in paragraph (a), (b) or (c) of subdivision one of this section.

4. PHL § 1399-ll became effective on or about April 10, 2003 (the “Implementation Date”).

5. EL § 63(12) prohibits repeated illegal acts and persistent illegality in carrying on, conducting or transacting business.

6. In 2004, the Attorney General commenced an investigation into: (a) whether certain tobacco businesses were engaging in violations of PHL § 1399-ll, PHL § 1399-cc, Tax Law § 1814, Penal Law § 260.21, 15 U.S.C. § 376, 18 U.S.C. § 1341, 18 U.S.C. § 1343 and/or other federal or state laws or regulations; and (b) whether certain other persons were engaged in violations of PHL § 1399-ll and/or other federal or state laws or regulations.

7. On or about August 13, 2004, the Attorney General caused subpoenas to be served on FedEx pursuant to EL § 63(12). Schedule C attached to the subpoenas identified the names of shippers that sell and ship cigarettes in the course of their business, and sought information about whether FedEx may have transported cigarettes from such shippers in violation of PHL § 1399-ll(2) and EL § 63(12).

8. FedEx produced documents and other information in response to the subpoenas.

WHEREAS, FedEx had adopted, prior to the commencement of the Attorney General’s investigation, and currently maintains formal policies, that tobacco products, including cigarettes, will be accepted for shipment and delivered only when shipped from a licensed dealer or distributor to another licensed dealer or distributor;

WHEREAS, FedEx’s formal policies include a prohibition on the shipment and delivery of cigarettes to individual consumers in the United States, while still permitting the lawful

shipment and delivery of cigarettes to licensed tobacco businesses and other legally authorized recipients (the “FedEx Cigarette Policy”); and

WHEREAS, FedEx has implemented this policy through its U.S. Terms and Conditions of Service and its Ground Tariff that provides in relevant part: “Tobacco products will be accepted only when shipped from a licensed dealer or distributor to another licensed dealer or distributor.”

WHEREAS, FedEx offers this Assurance of Compliance to resolve the Attorney General’s investigation and any alleged past violations; and

WHEREAS, the Attorney General accepts the following assurances pursuant to EL § 63(15) in lieu of commencing a civil action against FedEx in connection with the matters that were the subject of the investigation described in Paragraphs 6 and 7 of this Assurance of Compliance, including any alleged past violations of PHL § 1399-ll;

NOW, THEREFORE, IT IS HEREBY UNDERSTOOD AND AGREED AS FOLLOWS:

A. Definitions

9. In addition to the terms defined throughout this Assurance of Compliance, the following terms shall have the meanings indicated for purposes of this Assurance of Compliance:

- A. “Authorized Recipient” shall mean licensed tobacco manufacturers, wholesalers, tax agents, retailers, export warehouses, and government employees acting in accordance with their official duties, or any other person or entity to whom cigarettes may be lawfully transported pursuant to federal law and the law of the state in which delivery is made, including those persons described in PHL §1399-ll(1) with respect to the State of New York.
- B. “Cigarettes” shall have the meaning set forth in N.Y. Tax Law § 470(1).

- C. “Delivery Services” shall mean and refer to any pick-up and/or outbound package delivery services provided to a shipper, regardless of the location at which or the means by which the shipper’s packages are tendered to FedEx for delivery (e.g., pick-up by FedEx, delivery to FedEx, drop shipment, drop box, drop-off location).
- D. “Effective Date” shall mean and refer to the date on which this Assurance of Compliance is fully and completely executed by the parties hereto.
- E. “Individual Consumer” shall mean and refer to any person or entity other than an Authorized Recipient.
- F. “Prohibited Shipment” shall mean and refer to any package containing Cigarettes tendered to FedEx where the shipment, delivery or packaging of such Cigarettes would violate PHL § 1399-ll.

B. General Restrictions

10. FedEx shall at all times comply with PHL § 1399-ll.

11. FedEx shall at all times maintain and adhere to the FedEx Cigarette Policy as part of its Tariff and Terms and Conditions of Service, and publish the FedEx Cigarette Policy at <http://www.fedex.com>.

12. FedEx shall revise any and all internal policies, to the extent it has not done so already, to ensure that they are consistent with the terms of this Assurance of Compliance.

13. FedEx shall not amend its Tariff or its Terms and Conditions of Service to allow the shipment or delivery of Cigarettes to Individual Consumers or in any other manner that is inconsistent with this Assurance of Compliance.

C. Identification of and Notifications to Cigarette Shippers

14. If FedEx becomes aware of any person(s) using FedEx’s Delivery Services to ship Cigarettes to Individual Consumers, within five (5) business days after confirmation of such

information, FedEx shall correspond in writing with such person(s), indicating that FedEx does not deliver Cigarettes to Individual Consumers.

15. If the Attorney General or any other governmental authority provides FedEx with evidence that any person is or may be using FedEx's Delivery Services to ship Cigarettes to Individual Consumers, FedEx shall immediately send such shipper a written communication stating that FedEx does not deliver Cigarettes to Individual Consumers, and FedEx shall immediately cease all Delivery Services on behalf of such entity, except that FedEx may continue to provide Delivery Services with respect to: (a) packages addressed to Authorized Recipients; and (b) packages that FedEx knows do not contain Cigarettes.

16. Within thirty (30) days after the Effective Date, FedEx shall provide the Attorney General with a designated contact person in the FedEx Legal Department to whom the Attorney General or any other governmental authority can provide information relating to: (a) individuals or businesses that are believed to be using FedEx's Delivery Services to ship Cigarettes to Individual Consumers; or (b) any other information relating to this Assurance of Compliance.

D. Termination of Shippers Engaged in Violations

17. If FedEx becomes aware that a customer who has received a notice pursuant to Paragraphs 14 or 15 of this Assurance of Compliance, and thereafter has used FedEx's Delivery Services to make a Prohibited Shipment, then no later than five (5) business days after confirmation of such Prohibited Shipment, FedEx shall permanently terminate all Delivery Services for such customer, and shall advise the Attorney General of such action.

E. Communications to Employees and Contractors

18. Within sixty (60) days after the Effective Date, and annually thereafter, FedEx shall issue a written communication to its sales staff and U.S. pick up and delivery employees and contractors responsible for accepting and delivering packages, reiterating: (a) that FedEx policy prohibits the shipment and delivery of Cigarettes to Individual Consumers in the United States; (b) that FedEx employees and contractors may not pick up or accept packages that they know or reasonably believe contain Cigarettes, unless those packages are addressed to an Authorized Recipient; and (c) that FedEx employees and contractors must alert FedEx management if they know or reasonably believe that a shipper is utilizing FedEx's Delivery Services to deliver Cigarettes to Individual Consumers.

F. Access to Information

19. All communications submitted to the Attorney General pursuant to this Assurance of Compliance shall be sent to the attention of:

Vincent P. Esposito, Jr.
Assistant Attorney General
Office of the Attorney General
Health Care Bureau
The Capitol
Albany, NY 12224

20. Within thirty (30) business days of receipt of a subpoena by the Attorney General, FedEx shall provide the Attorney General with access to any information relating to any shipper found to have used FedEx's Delivery Services to ship Cigarettes to Individual Consumers, as well as access to relevant information relating to FedEx's compliance with the terms of this Assurance of Compliance. FedEx stipulates that a subpoena issued for the purpose of obtaining

the information described in this Paragraph shall be considered lawfully issued pursuant to EL § 63(12), and FedEx waives the right to assert any objection to the authority of the Attorney General to issue such subpoena.

21. FedEx shall retain (a) the information required to be created or collected pursuant to this Assurance of Compliance, and (b) any information relating to its compliance with this Assurance of Compliance, for a period of not less than two (2) years.

G. Report on Compliance

22. Within one hundred (100) business days after the Effective Date, a FedEx management official shall file a written report with the Attorney General verifying that FedEx is in full compliance with all of the terms of this Assurance of Compliance and setting forth the details of all compliance measures undertaken by FedEx pursuant to the terms hereof, with specific reference to the sections of this Assurance of Compliance. Such report shall include as attachments sufficient documents reasonably necessary for the Attorney General to determine whether FedEx has complied with this Assurance.

H. Stipulated Penalties

23. FedEx shall pay to the State of New York a stipulated penalty of \$1,000 for each and every violation of this Assurance of Compliance occurring after the Effective Date; provided, however, that no penalty shall be imposed if: (a) the violation involves the delivery of Cigarettes to an Individual Consumer outside the State of New York; or (b) the violation involves the delivery of Cigarettes to an Individual Consumer within the State of New York, but FedEx establishes to the reasonable satisfaction of the Attorney General that FedEx did not know and had no reason to know that the shipment contained Cigarettes.

I. Miscellaneous Provisions

24. The acceptance of this Assurance of Compliance by the Attorney General shall not be deemed or construed as an approval by the Attorney General of any of the activities of FedEx its officers, directors, employees, assignees and any individual, corporation, subsidiary, or division through which FedEx may now or hereinafter act, or of any successors in interest; and none of the parties shall make any representation to the contrary. Neither the existence of this Assurance of Compliance nor the obligations undertaken hereunder shall be deemed or construed as making FedEx an agent of the Attorney General, the State of New York, or any other government entity, agency or official.

25. The acceptance of this Assurance of Compliance by FedEx does not constitute a concession that FedEx concurs with the Attorney General's positions or interpretations of the laws described in this Assurance of Compliance.

26. The acceptance of this Assurance of Compliance by FedEx does not constitute an admission of any guilt or wrongdoing on the part of FedEx or an admission of any violations of PHL § 1399-ll(2), EL § 63(12), or any other laws, regulations, or administrative pronouncements applicable to the conduct of FedEx's operations.

27. This Assurance of Compliance constitutes the entire agreement between the Attorney General and FedEx pertaining to the subject matter herein, and represents a voluntary agreement and settlement of the parties' claims and defenses, subject to the qualifications and limitations discussed in Paragraph 28, entered into as a result of arm's-length negotiations in which all parties hereto were represented by counsel. The agreements contained herein are made

without reliance upon any inducement, statement, promise or representation, other than those expressly contained in this Assurance of Compliance.

28. Nothing about this Assurance of Compliance, including its existence or terms, shall in any way limit, impair or constrain FedEx's ability to seek a court ruling that PHL § 1399-*ll*(2) is unconstitutional, preempted by federal law, or otherwise unenforceable as applied against FedEx, including in any action or proceeding brought by the Attorney General against FedEx alleging that FedEx has violated PHL § 1399-*ll*(2). In entering this Assurance of Compliance, FedEx expressly reserves, and does not waive, its position that PHL § 1399-*ll*(2) is preempted by the Federal Aviation Administration Authorization Act of 1994 and the Airline Deregulation Act of 1978.

29. Notwithstanding the foregoing Paragraph 28, nothing about this Assurance of Compliance, including its existence or terms, or any obligation undertaken by FedEx pursuant to this Assurance of Compliance, shall serve as proof or evidence in support of or in opposition to any claim or contention made in any action or proceeding, whether the claim or contention is asserted by FedEx or any other person, alleging, in whole or in part, that PHL § 1399-*ll* is unconstitutional, preempted by federal law, or otherwise unenforceable as applied against FedEx or any other carrier.

30. As required by EL § 63(15), evidence of any violation of this Assurance of Compliance that involves the shipment of Cigarettes to an Individual Consumer within the State of New York shall constitute *prima facie* proof of a violation PHL § 1399-*ll* in any civil action or proceeding hereafter commenced by the Attorney General against FedEx for violation of PHL § 1399-*ll*.

31. This Assurance of Compliance shall be binding on and apply to FedEx, its officers, directors, employees, affiliates, assignees and any individual, corporation, subsidiary or division through which FedEx may now or hereinafter act, as well as any successors in interest.

32. The rights and remedies in this Assurance of Compliance are cumulative and in addition to any other statutory or other rights that the Attorney General may have at law or equity, including but not limited to any rights and remedies under PHL § 1399-*ll*.

33. This Assurance of Compliance shall not grant any rights or privileges to any person or entity who is not a party to this agreement, nor shall this Assurance of Compliance affect or limit in any way the rights of any such third party.

34. This Assurance of Compliance may not be altered, amended, modified or otherwise changed in any respect or particular whatsoever, except by a writing duly executed by the parties or their authorized representatives.

35. FedEx and the Attorney General shall meet to discuss whether any changes or alterations to this Assurance of Compliance are warranted in the event that: (a) the New York State Legislature repeals or amends PHL § 1399-*ll* in a manner that permits common carriers to deliver Cigarettes to Individual Consumers in New York State; or (b) PHL § 1399-*ll* is determined to be invalid by and/or enforcement of such law against common carriers is enjoined by a court of competent jurisdiction, and no further appeal of such decision is available and no stay of such injunction is in effect. If no agreement can be reached, then FedEx shall have the right to terminate this Assurance of Compliance upon thirty (30) days written notice sent to the Attorney General after such meeting. If such termination is based upon a repeal or amendment to PHL § 1399-*ll* pursuant to clause (a) above, then upon such termination the Attorney General

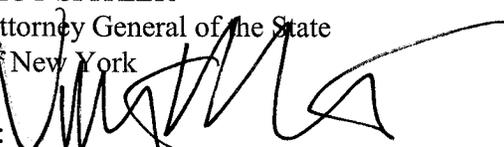
shall have the right to seek any relief for violations of this Assurance of Compliance and/or any applicable laws. Notwithstanding any provision of this Assurance of Compliance to the contrary, the termination of this Assurance of Compliance in accordance with to the terms of this Paragraph 36 shall not constitute a violation of this Assurance of Compliance.

36. This Assurance of Compliance may be executed in telecopied counterparts, each of which will constitute an original but all of which taken together shall constitute one and the same document.

37. The individuals executing this Assurance of Compliance represent that they have full and complete authority to sign this document and to bind their respective parties to all the terms and conditions set forth herein.

WHEREFORE, the following signatures are affixed hereto effective this 3rd day of February ~~January~~, 2006.

ELIOT SPITZER
Attorney General of the State
of New York

By: 

Vincent P. Esposito, Jr.
Assistant Attorney General

FEDERAL EXPRESS CORPORATION

By: _____
Cary S. Blancett
Vice President
Business Transactions &
Risk Management

FEDEX GROUND PACKAGE SYSTEMS,
INC.

By: _____
Clifford P. Johnson
Senior Vice President &
General Counsel

shall have the right to seek any relief for violations of this Assurance of Compliance and/or any applicable laws. Notwithstanding any provision of this Assurance of Compliance to the contrary, the termination of this Assurance of Compliance in accordance with to the terms of this Paragraph 36 shall not constitute a violation of this Assurance of Compliance.

36. This Assurance of Compliance may be executed in telecopied counterparts, each of which will constitute an original but all of which taken together shall constitute one and the same document.

37. The individuals executing this Assurance of Compliance represent that they have full and complete authority to sign this document and to bind their respective parties to all the terms and conditions set forth herein.

WHEREFORE, the following signatures are affixed hereto effective this ___ day of January, 2006.

ELIOT SPITZER
Attorney General of the State
of New York

By: _____
Vincent P. Esposito, Jr.
Assistant Attorney General

FEDERAL EXPRESS CORPORATION

By: _____
Cary S. Blancett
Vice President
Business Transactions &
Risk Management

FEDEX GROUND PACKAGE SYSTEMS,
INC.

By: _____

Clifford A. Johnson
Senior Vice President &
General Counsel

shall have the right to seek any relief for violations of this Assurance of Compliance and/or any applicable laws. Notwithstanding any provision of this Assurance of Compliance to the contrary, the termination of this Assurance of Compliance in accordance with to the terms of this Paragraph 36 shall not constitute a violation of this Assurance of Compliance.

36. This Assurance of Compliance may be executed in telecopied counterparts, each of which will constitute an original but all of which taken together shall constitute one and the same document.

37. The individuals executing this Assurance of Compliance represent that they have full and complete authority to sign this document and to bind their respective parties to all the terms and conditions set forth herein.

WHEREFORE, the following signatures are affixed hereto effective this ___ day of January, 2006.

ELIOT SPITZER
Attorney General of the State
of New York

By: _____
Vincent P. Esposito, Jr.
Assistant Attorney General

FEDERAL EXPRESS CORPORATION

By: 
Cary S. Blancett
Vice President
Business Transactions &
Risk Management

FEDEX GROUND PACKAGE SYSTEMS,
INC.

By: _____
Clifford P. Johnson
Senior Vice President &
General Counsel