

ATTORNEY GENERAL OF THE STATE OF NEW YORK
HEALTH CARE BUREAU

In the Matter of

DHL HOLDINGS USA, INC., and
DHL EXPRESS (USA), INC.

ASSURANCE OF DISCONTINUANCE

Pursuant to New York Executive Law § 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 DHL Holdings USA, Inc. and DHL Express (USA), Inc. and their related companies (collectively, “DHL”). As a result of such inquiry, the Attorney General has made the following findings:

1. DHL Holdings USA, Inc. is a corporation, organized and existing under the laws of the State of Ohio. DHL Express (USA), Inc. is a corporation, organized and existing under the laws of the State of Ohio. Both companies have their principal place of business located at 1200 South Pine Island Road, Suite 600, Plantation, Florida 33324.

2. DHL is a package delivery company and provider of transportation and logistics services, and in the regular course of its business delivers packages to persons located in the State of New York.

3. Public Health Law §1399-ll, entitled “Unlawful Shipment of Cigarettes,” makes it unlawful for a person engaged in the business of selling cigarettes to ship or cause to be shipped

any cigarettes to any person who is not: (a) a licensed cigarette tax agent or wholesale dealer, or a registered retail dealer; (b) an export warehouse proprietor; or (c) a government officer, employee or agent acting in accordance with his or her official duties.

4. Public Health Law § 1399-ll further prohibits any common or contract carrier – such as DHL – from knowingly transporting cigarettes to any person who is not an Authorized Recipient. If cigarettes are transported to a home or residence, it is presumed that the common or contract carrier knew that the purchaser is not an Authorized Recipient.

5. Public Health Law § 1399-ll became effective on or about April 10, 2003 (the “Implementation Date”).

6. Public Health Law § 1399-cc, entitled “Sale of Tobacco Products or Herbal Cigarettes, Rolling Papers or Pipes to Minors Prohibited,” provides that tobacco retailers may not sell tobacco products to any person unless the purchaser has demonstrated, through a governmental or educational photographic identification card, that he or she is at least 18 years of age, except that such identification is not required if the purchaser reasonably appears to be at least 25 years of age.

7. Tax Law § 1814, entitled “Cigarette and Tobacco Products Tax,” prohibits any person from attempting to “evade or defeat” state cigarette and tobacco product taxes.

8. Penal Law § 260.21, entitled “Unlawfully Dealing with a Child in the Second Degree,” prohibits any person from selling tobacco products to children.

9. Penal Law § 115.00, entitled “Criminal Facilitation in the Fourth Degree,” prohibits any person, believing it is probable that he or she is rendering aid to a person who intends to commit a crime, from providing such person with the means or opportunity to commit such crime, and which in fact aids such person to commit a felony.

10. Section 376 of Title 15 of the United States Code, entitled “Report to State Tobacco Tax Administrator,” provides that any person who sells cigarettes in interstate commerce must file certain documents with the tobacco tax administrator of the state into which such cigarettes are sold.

11. Section 1341 of Title 18 of the United States Code, entitled “Frauds and Swindles,” prohibits any person from placing any matter in the mails for the purpose of executing a scheme or artifice to obtain money or property by means of false or fraudulent pretenses or representations.

12. Section 1343 of Title 18 of the United States Code, entitled “Fraud by Wire, Radio, or Television,” prohibits the transmission of interstate wire communications in furtherance of a scheme to obtain money or property by means of false or fraudulent pretenses or representations.

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

14. In 2004, the Attorney General commenced an investigation into: (a) whether certain tobacco businesses were engaging in violations of Public Health Law § 1399-ll, Public Health Law § 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 Public Health Law § 1399-*ll*, Penal Law § 115 and/or other federal or state laws or regulations.

15. On or about August 13, 2004, the Attorney General caused a Subpoena to be served on DHL pursuant to Executive Law § 63(12). Schedule C attached to the Subpoena identified the names of shippers that sell and ship cigarettes in the course of their business, and sought information about whether DHL may have transported cigarettes from such shippers in violation of Public Health Law § 1399-*ll*(2) and Executive Law § 63(12).

16. DHL produced certain documents and information in response to the Subpoena, and has cooperated with the Attorney General's investigation.

WHEREAS, DHL has adopted a formal policy, effective July 1, 2005 expressly prohibiting the shipment or 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 authorized recipients; and

WHEREAS, DHL has adopted a formal policy, effective July 1, 2005 expressly prohibiting the shipment or delivery of tobacco products to persons who have not reached the legal age for the purchase of tobacco products, and implementing measures to ensure that such shipments and deliveries are not made; and

WHEREAS, DHL has implemented these policies through the following amendments to its ground tariff:

Tobacco Products: "DHL will not knowingly accept shipments of cigarettes to individual consumers in the United States and will not knowingly deliver cigarettes to such individual consumers. DHL will not knowingly accept shipments of tobacco

products being shipped to persons who have not reached the legal age for the purchase of tobacco products; DHL will only deliver properly labeled tobacco products where it obtains an in-person signature from a person who has reached such legal purchase age, pursuant to the respective laws of each state.

Shipper warrants that its shipment is acceptable for transportation and that it does not contain:

- cigarettes being shipped to individual consumers; or
- tobacco products being shipped to persons who have not reached the legal age for the purchase of tobacco products.”

WHEREAS, DHL offers this Assurance of Discontinuance in settlement of any alleged violations of Public Health Law § 1399-ll from the Implementation Date to the Effective Date of this Assurance of Discontinuance; and

WHEREAS, the Attorney General accepts the following assurances pursuant to Executive Law § 63(15) in lieu of commencing a civil action against DHL for matters that were the subject of the investigation described in Paragraphs 14, 15 and 16 of this Assurance of Discontinuance;

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

A. Definitions

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

- A. "Authorized Recipient" shall mean licensed tobacco manufacturers, wholesalers, tax agents, retailers, export warehouses, and government employees acting in accordance with their official duties.
- 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 delivery services provided to a shipper, regardless of the location at which or the means by which the shipper's packages are tendered to DHL for delivery (*e.g.*, pick-up by DHL, delivery to DHL, drop shipment, drop box, drop-off location).
- D. "Effective Date" shall mean and refer to the date on which this Assurance of Discontinuance 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 DHL where the shipment, delivery or packaging of such Cigarettes would violate Public Health Law § 1399-ll.
- G. "Tobacco Product" shall have the same meaning set forth in Public Health Law § 1399-aa(5).

B. General Restrictions

18. DHL shall at all times comply with Public Health Law § 1399-ll.

19. DHL shall at all times maintain a formal policy, specifically set forth in its tariff, and as published at www.dhl-usa.com, prohibiting the shipment or delivery of Cigarettes to Individual Consumers in the United States.

20. DHL shall at all times maintain a formal policy, specifically set forth in its tariff, and as published at www.dhl-usa.com, prohibiting the shipment or delivery of Tobacco Products to persons who have not reached the legal age for the purchase of Tobacco Products, and implementing measures to ensure such shipments and deliveries are not made.

21. DHL shall revise any and all internal policies to ensure that they are consistent with the terms of this Assurance of Discontinuance.

22. DHL shall not amend its tariff, its policy prohibiting the shipment or delivery of Cigarettes to Individual Consumers, or its policy prohibiting the shipment or delivery of Tobacco Products to persons who have not reached the legal age for the purchase of Tobacco Products, in a manner that is inconsistent with this Assurance of Discontinuance.

C. Identification of and Notifications to Tobacco Product Shippers

23. Within thirty (30) business days after the Effective Date, DHL shall correspond in writing with its general customer base, including any customers engaged in the business of selling Cigarettes, indicating that DHL no longer delivers Cigarettes to Individual Consumers.

24. If DHL becomes aware of any person(s) using DHL's Delivery Services to ship Cigarettes to Individual Consumers, within five (5) business days after confirmation of such information, DHL shall correspond in writing with such person(s), indicating that DHL does not deliver Cigarettes to Individual Consumers. DHL shall send a copy of each such communication to the Attorney General.

25. Within thirty (30) days after the Effective Date, DHL shall provide the Attorney General with a designated contact person in the DHL 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 DHL's Delivery Services to ship Cigarettes to Individual Consumers; or (b) any other information relating to this Assurance of Discontinuance.

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

D. Termination of Shippers Engaged in Violations

27. If DHL becomes aware that a customer who has received a notice pursuant to Paragraphs 23, 24 or 26 of this Assurance of Discontinuance, and thereafter has used DHL's Delivery Services to make a Prohibited Shipment, then no later than five (5) business days after confirmation of such Prohibited Shipment, DHL shall permanently terminate all Delivery Services for such customer, and shall advise the Attorney General of such action.

E. Personnel Notifications and Training

28. Within thirty (30) days after the Effective Date, DHL shall issue a written communication to all relevant DHL personnel, including but not limited to DHL personnel who pick up or accept packages for delivery, or deliver packages, instructing such personnel: (a) that DHL does not deliver Cigarettes to Individual Consumers in the United States; (b) that DHL personnel 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 DHL

personnel must alert DHL management if they know or reasonably believe that a shipper is utilizing DHL's Delivery Services to deliver Cigarettes to Individual Consumers.

29. DHL shall periodically train its drivers, package handlers and all other relevant DHL employees, including but not limited to the sales force, regarding DHL's policy prohibiting the delivery of Cigarettes to Individual Consumers, and regarding the compliance measures agreed to in this Assurance of Discontinuance.

30. Within one (1) year after the Effective Date, and at least annually thereafter, DHL shall issue a written communication to DHL drivers, package handlers and any DHL employee involved in the compliance measures agreed to in this Assurance of Discontinuance, reminding such personnel: (a) that DHL does not deliver Cigarettes to Individual Consumers in the United States; (b) that DHL personnel may not pick up, accept for delivery, or deliver packages that they know or reasonably believe contain Cigarettes, unless those packages are addressed to an Authorized Recipient; and (c) that DHL personnel must alert DHL management if they know or reasonably believe that a business is utilizing DHL's Delivery Services to deliver Cigarettes to Individual Consumers.

F. Access to Information

31. All communications submitted to the Attorney General pursuant to this Assurance of Discontinuance 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

32. Within thirty (30) business days of receipt of a formal written request, DHL shall provide the Attorney General with access to any information relating to any shipper found to have used DHL's Delivery Services to ship Cigarettes to Individual Consumers, as well as access to relevant information relating to DHL's compliance with the terms of this Assurance of Discontinuance.

33. DHL shall retain (a) the information required to be collected pursuant to this Assurance of Discontinuance, and (b) any information relating to its compliance with this Assurance of Discontinuance, for a period of not less than five (5) years.

G. Affidavit of Compliance

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

H. Stipulated Penalties

35. DHL shall pay to the State of New York a stipulated penalty of \$1,000 for each and every violation of this Assurance of Discontinuance 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 DHL establishes to the reasonable satisfaction of the Attorney General that DHL did not know and had no reason to know that the shipment contained Cigarettes.

I. Miscellaneous Provisions

36. The acceptance of this Assurance of Discontinuance by the Attorney General shall not be deemed or construed as an approval by the Attorney General of any of the activities of DHL its officers, directors, employees, assignees and any individual, corporation, subsidiary, or division through which DHL may now or hereinafter act, or of any successors in interest; and none of the parties shall make any representation to the contrary.

37. The acceptance of this Assurance of Discontinuance by DHL does not constitute a concession that DHL concurs with the Attorney General's positions or interpretations of the laws described in Paragraphs 3 through 13 of this Assurance of Discontinuance.

38. The acceptance of this Assurance of Discontinuance by DHL does not constitute an admission of any guilt or wrongdoing on the part of DHL or an admission of any violations of Public Health Law § 1399-ll(2), Executive Law § 63(12), or any other laws, regulations, or administrative pronouncements applicable to the conduct of DHL's operations.

39. No provision of this Assurance of Discontinuance, or any obligations by DHL pursuant to this Assurance of Discontinuance, shall serve as proof or evidence in any legal proceeding, whether commenced or defended by DHL or any other person, claiming or alleging, in whole or in part, that Public Health Law § 1399-ll is unconstitutional or otherwise unenforceable.

40. This Assurance of Discontinuance constitutes the entire agreement between the Attorney General and DHL pertaining to the subject matter herein, and represents a voluntary agreement and settlement of the parties' claims and defenses, 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 Discontinuance.

41. As required by Executive Law § 63(15), evidence of any violation of this Assurance of Discontinuance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil action or proceeding hereafter commenced by the Attorney General.

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

43. The rights and remedies in this Assurance of Discontinuance 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 Public Health Law § 1399-ll.

44. This Assurance of Discontinuance 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 Discontinuance affect or limit in any way the rights of any such third party.

45. This Assurance of Discontinuance 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.

46. DHL and the Attorney General shall meet to discuss whether any changes or alterations to this Assurance of Discontinuance are warranted in the event that: (a) the New York State Legislature repeals or amends Public Health Law § 1399-*ll* in a manner that permits common carriers to deliver Cigarettes to Individual Consumers in New York State; or (b) Public Health Law § 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 DHL shall have the right to terminate this Assurance of Discontinuance 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 Public Health Law § 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 Discontinuance and/or any applicable laws. Notwithstanding any provision of this Assurance of Discontinuance to the contrary, the termination of this Assurance of Discontinuance in accordance with to the terms of this Paragraph 46 shall not constitute a violation of this Assurance of Discontinuance.

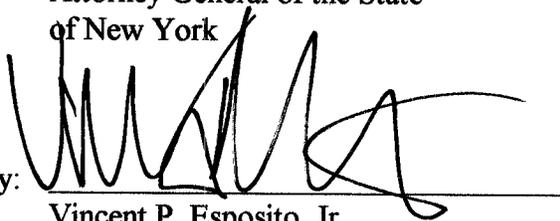
47. This Assurance of Discontinuance may be executed in telecopied counterparts, each of which will constitute an original but all of which taken together shall constitute one and the same document.

48. The individuals executing this Assurance of Discontinuance 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 1st day of ~~June~~ July VE

2005.

ELIOT SPITZER
Attorney General of the State
of New York

By: 

Vincent P. Esposito, Jr.
Assistant Attorney General

**DHL HOLDINGS USA, INC. and
DHL EXPRESS (USA), INC.**

By: 

Jon E. Olin
General Counsel