

Congress Amends the PACT Act to Apply to All Vaping Products, Placing Huge Burden on Small Manufacturers as Third-Party Common Carriers Refuse to Ship Products

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Background on the PACT Act

As part of the “[Consolidated Appropriations Act, 2021](#),” in the most recent COVID-19 relief bill signed into law on December 27, 2020, Congress amended the Prevent All Cigarette Trafficking (“PACT”) Act to apply to e-cigarettes and all vaping products. Originally passed in 2009, the PACT Act amended the existing Jenkins Act of 1949, which required interstate shippers to report cigarette sales to state tobacco tax administrators in order to combat illicit sales and tax avoidance. When it became law 60 years later – the same year the Tobacco Control Act gave FDA authority over tobacco products – the PACT Act, among other things, prohibited the use of the U.S. Postal Service (“USPS”) to deliver cigarettes and smokeless tobacco products directly to consumers.

- In addition to the non-mailing provisions, the PACT Act requires anyone who sells cigarettes or smokeless tobacco to register with the [Bureau of Alcohol, Tobacco, Firearms and Explosives](#) (ATF) and the tobacco tax administrators of the states into which a shipment is made or in which an advertisement or offer is disseminated. Delivery sellers who ship cigarettes or smokeless tobacco to consumers are further required to label packages as containing tobacco, verify the age and identity of the customer at purchase, use a delivery method (other than USPS) that checks ID and obtains adult customer signature at delivery, and maintain records of delivery sales for a period of four years after the date of sale, among other things.
- The PACT Act also requires sellers to file a monthly report with the state tobacco tax administrator and any other local or tribal entity that taxes the sale of cigarettes. Such reports must include the name and address of the persons delivering and receiving the shipment and the brand and quantity of the “cigarettes” that were shipped. These requirements apply to all sales of cigarettes and smokeless tobacco, including sales to consumers and sales between businesses.
- The PACT Act mandates that the ATF maintain a non-compliant list of persons who fail to

comply with the Act. Placement on the list bars common carriers and other persons from delivering products sold by the listed company. ATF distributes the list to common carriers, USPS, credit card companies, and others to help enforce the list.

PACT Act Amendment: Preventing Online Sales of E-Cigarettes to Children Act

- The 2020 PACT Act amendment, the “Preventing Online Sales of E-Cigarettes to Children Act,” modifies the original definition of “cigarette” in the PACT Act to include Electronic Nicotine Delivery Systems (ENDS). The term “ENDS” is defined very broadly to essentially include *all* vaping products, liquids, components, and accessories, whether they contain nicotine or not. Specifically, an ENDS product is defined as “any electronic device that, through an aerosolized solution, delivers nicotine, flavor, **or any other substance** to the user inhaling from the device,” including “an e-cigarette; an e-hookah; an e-cigar; a vape pen; an advanced refillable personal vaporizer; an electronic pipe; and **any component, liquid, part, or accessory** of a device described [above], without regard to whether the component, liquid, part, or accessory is sold separately from the device.” (Emphasis added.) Based on this definition of ENDS, zero-nicotine e-liquids, synthetic “tobacco-free” nicotine e-cigarettes, and CBD/THC/hemp vape pens, among other things, would all appear to be captured.
- The PACT Act requirements summarized above apply to ENDS effective 90 days from the date of enactment, or on or about **March 28, 2021**. Certain requirements (e.g., labeling, weight restrictions, and 21+ age verification on delivery) only apply to direct-to-consumer sales (made through common carriers or private delivery services). The registration and reporting requirements apply to *all* sales, including business-to-business sales. Companies should plan well in advance of the effective date to ensure they are fully compliant with existing state sales and excise taxes, licenses, and registrations. Currently, 28 states plus various localities impose a tax on vapor products, so sellers should plan accordingly. Sellers should also review their system capabilities to ensure excise taxes are being collected from consumers where required and data is properly being captured for required reporting.

USPS Ban on Consumer Sales; Third-Party Common Carriers Refusing to Deliver Vapor Products

- As noted, the amended PACT Act now prohibits the use of the USPS to deliver “ENDS” directly to consumers. In terms of the mail ban’s effective date, the Act states that the prohibition on the mailing of cigarettes shall apply to ENDS *on and after* the date on which the Postal Service promulgates regulations clarifying the applicability of the mail ban on ENDS, which it is required to do within 120 days of the enactment (i.e., by April 27, 2021). The Postal Service has not yet published any clarifying regulations in this regard, but companies should anticipate the mail ban going into effect on or about **April 27, 2021**.
- The PACT Act has historically exempted businesses-to-business deliveries from the USPS ban. Specifically, the USPS ban does not extend to tobacco products “mailed only ... *for business purposes* between legally operating businesses that have all applicable State and Federal Government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research....” See 18 U.S.C. § 1716E(b)(3)(A). Companies seeking to use USPS for business-to-business deliveries must first submit an [application](#) to the USPS Pricing and Classification Service Center and comply

with several other shipping, labeling, and delivery requirements. The Postal Service's yet-to-be-published clarifying regulations could address whether business-to-business deliveries will remain permitted for ENDS.

- Critically for the vapor industry, the most commonly used carriers, Federal Express and United Parcel Service (UPS), have recently announced that they would cease all deliveries of vapor products. According to *Vaping360*, as of March 1, 2021, [FedEx will begin prohibiting](#) “electronic cigarettes, vaping liquids, and other vaping products in the FedEx global network.” A UPS spokesperson also [told Vaping360](#) that, effective April 5, 2021, “UPS will not transport vaping products to, from, or within the United States due to the increased complexity to ship those products.”
- Without effective delivery options, PACT Act compliance becomes moot. Many vapor businesses are exploring arrangements with private logistics and transportation companies, as well as expensive software solutions to help comply with the PACT Act requirements, but the outlook for many small vapor companies and online retailers looks bleak.

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National Law Review, Volume XI, Number 35

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