



## E-Cigarettes and Other Tobacco Products Online: Preventing Sales to Kids

Internet sales of tobacco to youth can significantly undermine efforts to protect public health. Young people are much more likely to become addicted to tobacco, in part because adolescent brains are more sensitive to nicotine.<sup>1</sup> Strong laws restricting the sale of tobacco products to youth play an essential role in stopping a lifetime of addiction and tobacco-related disease before it starts. Yet Internet retailers are able to skirt many of the laws designed to prevent brick-and-mortar retailers from selling to kids. With the boom in popularity of e-cigarettes – a product widely available online – the public health community has a new reason to focus on developing effective policies to stop the illegal online sale of tobacco to youth.



This publication provides an overview of state and federal laws that have sought to prevent the online sale of tobacco to youth since the problem first emerged.<sup>2</sup> It begins with a summary of state laws and legal challenges those laws have faced. Next, it describes efforts to regulate Internet sales of tobacco through voluntary agreements with key players in the field, including credit card and package delivery companies. Finally, it highlights federal laws that have attempted to solve the problem, including the Prevent All Cigarette Trafficking Act (PACT Act) and the Family Smoking Prevention and Tobacco Control Act. Given the significant challenges these efforts have faced so far, a complete prohibition on all Internet sales of tobacco products might be the only way to truly prevent such sales to youth, and protect the public health gains accomplished by age-of-sale laws. Under the Tobacco Control Act, the FDA has the authority to take such action.

### State Action

Many states have taken action in an attempt to curb the problem of Internet tobacco sales, and these efforts have been met with varying degrees of success. Between 1995 and 2006, thirty-four states enacted some kind of law to regulate sales of Internet and mail order tobacco, and thirty-one of these laws specifically addressed youth access issues.<sup>3</sup> Regulatory strategies ran the gamut from laws that outright prohibited cigarette shipments, to laws specifying a particular method of delivery. Some laws required packages to be labeled as containing tobacco, some limited the quantity of shipments, and many required age-verification at the time of delivery.

**Legal Challenges.** Unfortunately, the validity of many of these laws has been called into question. Although a constitutional challenge based on the dormant Commerce Clause was unsuccessful, federal preemption appears to be a significant barrier to many state laws on this topic.

In 2003, the U.S. Court of Appeals for the Second Circuit upheld a New York law that prohibited cigarette shipments to customers within the state. At issue in the case was whether the law violated the dormant Commerce Clause, and the court held that it did not.<sup>4</sup> In general, the “dormant Commerce Clause” refers to the concept that the Commerce Clause of the U.S. Constitution declares regulation of interstate commerce – the flow of goods and services across state borders – to be the responsibility of the federal government, and state laws may not interfere with it too much. However, states have the power and the responsibility to protect the health and well-being of their citizens. As such, courts balance the state’s interest in promoting health against the federal interest in regulating commerce.<sup>5</sup> In this case, the balance came out in favor of the state law. This conclusion was based in part on the significant public health benefits of preventing youth access to cigarettes and reducing cigarette consumption.

In 2008, the Supreme Court of the United States struck down a Maine law which, among other things, required that Internet-based tobacco retailers use a delivery service that checks identification at delivery.<sup>6</sup> The court held that the Federal Aviation Administration Authorization Act (FAAAA) – a federal law de-regulating airlines and delivery carriers like FedEx and UPS – preempted the state law. Even though Maine’s law did not directly regulate the carriers, the court held that it had enough of an effect on the market for delivery services to interfere with the purpose of the de-regulation law. The case suggests that any state law that requires specific actions by a delivery carrier might be preempted by the FAAAA. (The Tobacco Control Legal Consortium and nine national public health and advocacy organizations filed an amicus brief in the U.S. Supreme Court in support of Maine’s law.)<sup>7</sup>

However, not all state action is preempted. As discussed below, the PACT Act specifically preserves state authority to prohibit the shipment of tobacco to individual customers and personal residences within the state. Currently, at least eleven states have such a law: Arizona,<sup>8</sup> Arkansas,<sup>9</sup> Connecticut,<sup>10</sup> Indiana,<sup>11</sup> Maryland,<sup>12</sup> New York,<sup>13</sup> Ohio,<sup>14</sup> South Dakota,<sup>15</sup> Utah,<sup>16</sup> Vermont<sup>17</sup> and Washington.<sup>18</sup>

**Voluntary Agreements.** In 2005, a group of state Attorneys General joined with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to address the problem of Internet tobacco sales by focusing on the credit cards used in the transactions.<sup>19</sup> At the group’s request, many of the major credit card companies issued voluntary policies to prohibit the use of their cards for the illegal sale of cigarettes over the Internet.<sup>20</sup> PayPal modified its acceptable use policy to entirely prohibit the use of its platform to purchase cigarettes.<sup>21</sup> Other companies required only that their merchants certify in writing that they will comply with state and federal laws. Some companies agreed to terminate relationships with merchants that were in violation of the law. Although these promises are not legally enforceable, one study documented a significant drop in the proportion of vendors offering credit cards as a payment option in the years following the agreement.<sup>22</sup> Unfortunately, other payment methods have crept in to fill the void, such as checks, money orders, and gift cards.<sup>23</sup>

Also in 2005, the group of Attorneys General and the ATF turned their attention to the companies that deliver Internet-purchased tobacco.<sup>24</sup> Under New York state law, it is illegal for any carrier to knowingly deliver cigarettes directly to consumers.<sup>25</sup> The Attorney General of New York investigated FedEx, UPS and DHL to determine whether these carriers were delivering cigarettes to consumers in violation of that law. In 2005 and 2006, the delivery carriers signed agreements with the Attorney General of New York, promising to, among other things, amend their policies to prohibit shipments of cigarettes to consumers anywhere in the U.S.<sup>26</sup> However, these agreements did not limit the shipment of tobacco through the U.S. mail. In addition, problems with enforcement of these agreements continue to this day.

In separate lawsuits filed against FedEx and UPS, New York City and State have alleged that the carriers continue to transport cigarettes in violation of the 2005 and 2006 agreements.<sup>27</sup> In addition, the complaints allege that the companies continue to violate several federal and state statutes, including the federal Racketeer Influenced and Corrupt Organizations Act, and the Contraband Cigarette Trafficking Act.<sup>28</sup> These cases are ongoing. They highlight the significant enforcement challenges individual cities and states face when trying to regulate the shipment of tobacco purchased online.

### Federal Action

Two federal laws offer promise for a comprehensive, nationwide policy to restrict youth access to tobacco products online, but they are incomplete. Because state power to fill the gaps is limited, Congress and the FDA may be best positioned to close remaining loopholes. However, given the challenges faced in developing effective age-verification methods, a complete prohibition on Internet sales of tobacco might be the only way to effectively prevent sales to youth. Such a prohibition would be consistent with international norms as established in the WHO Framework Convention on Tobacco Control.<sup>29</sup> For example, Brazil, France, Greece, Hungary, the Republic of Korea, Macao, Singapore, Spain, South Africa, Turkey, and other countries prohibit all Internet sales of tobacco.<sup>30</sup> The FDA has the authority to take this action.<sup>31</sup>

**PACT Act.** The Prevent All Cigarette Trafficking Act of 2009 (PACT Act) was an important step forward in the regulation of Internet sales of tobacco,<sup>32</sup> but opportunities for improvement remain. Significantly, while the Act regulates Internet sales of cigarettes<sup>33</sup> and smokeless tobacco, it omits e-cigarettes and other tobacco products. In addition, it leaves serious loopholes regarding delivery carriers, and constrains state authority to fill the gaps. Finally, portions of the law have been called into question, and were suspended for a period of time due to litigation.<sup>34</sup>

#### The PACT Act:

- Prohibits the online sale of cigarettes and smokeless tobacco to anyone under the legal sales age in their state;<sup>35</sup>
- Requires that an Internet-based retailer who ships tobacco:
  - Label packages as containing tobacco;<sup>36</sup>
  - Verify age and identity at purchase;<sup>37</sup>
  - Use a method of mailing or shipping that checks ID and obtains a customer signature at delivery;<sup>38</sup> and

- Pay state taxes and comply with state laws as if the sale occurred within the state, including laws related to excise taxes, licensing and tax stamping, and restrictions on sales to minors;<sup>39</sup>
- Prohibits the shipment and transport of cigarettes and smokeless tobacco through the U.S. mail;<sup>40</sup>
- Directs the U.S. Attorney General to compile a list of retailers who are not compliant with the Act, and share this list with delivery carriers and the Attorney General of each state;<sup>41</sup>
- Preserves the authority of states to prohibit Internet-based retailers from shipping cigarette and smokeless tobacco products to consumers and residential addresses within their states.<sup>42</sup>

Unfortunately, the Act leaves significant loopholes with regard to delivery carriers. It prohibits state, local, and tribal governments from enacting laws to require delivery carriers to check IDs or obtain signatures at delivery.<sup>43</sup> In addition, although it generally prohibits delivery carriers from accepting a shipment from a retailer on the list compiled by the Attorney General,<sup>44</sup> the Act exempts the major delivery carriers from this provision.<sup>45</sup> It also exempts the major delivery carriers from any state law prohibiting delivery of tobacco.<sup>46</sup>

The PACT Act highlights an opportunity for state action. As mentioned above, it specifically allows states to prohibit “delivery sales” of cigarettes and smokeless tobacco – sales where an order is placed over the phone, mail, or Internet, and the product is shipped to the customer. Unfortunately, the PACT Act limits the ability of states and local governments to regulate the delivery carriers involved in these transactions.<sup>47</sup> Though the Act allows a state to make it illegal for Internet-based *retailers* to ship orders to customers, it prohibits the state from regulating many of the companies that actually conduct the deliveries, complicating enforcement efforts.

In addition, the PACT Act might create an opportunity for a state with an appetite for litigation to close the e-cigarette loophole. As mentioned above, the Act requires Internet-based retailers of cigarettes and smokeless tobacco to use a delivery service that checks ID, but it does not require the same for sales of e-cigarettes and other tobacco. The Act might create room for states to enact such a law, despite the Supreme Court’s ruling in *Rowe v. New Hampshire Motor Transport Ass’n*. This is because the market for delivery services under the PACT Act is different than it was at the time of that case. At the time of that case, delivery carriers did not typically offer ID checking as an option. As the Court explained, a state law requiring retailers to use a delivery service that checks ID would have required carriers to “offer a system of services that the market does not now provide,” and which the carriers would prefer not to offer. But the PACT Act now requires sellers of cigarettes and smokeless tobacco to use a carrier that checks ID. And, many states require the same for alcohol delivery. Therefore, ID checking is likely to be a delivery service that is available in many states. In this environment, a state law requiring e-cigarette retailers to use a delivery service that checks ID might not be preempted under the FAAAA. Arguably, such a law wouldn’t force the carriers to “offer a system of services that the market does not now provide,” because these services now exist in the market – that is, assuming compliance with the PACT Act. However, as mentioned above, it is likely that such a law would invite litigation and any jurisdiction considering this approach should consult with local counsel.

The PACT Act was a significant step forward in preventing online sales of tobacco products to youth, but it could be much stronger. It is primarily focused on regulations of Internet-based retailers, and exempts carriers who deliver the product, complicating enforcement. In addition, it only covers cigarettes and smokeless tobacco, not e-cigarettes or other tobacco products. And unfortunately, the Act limits states' power to close some of these gaps.

**FSPTCA.** The Family Smoking Prevention and Tobacco Control Act of 2009 gives clear instructions to the U.S. Food and Drug Administration (FDA): adopt a regulation to control Internet sales of tobacco products to youth.<sup>48</sup> The Tobacco Control Act established a deadline for this regulation: October 1, 2011. But a regulation has not yet been proposed. Although the FDA has an inspection system in place to ensure compliance with age-verification laws by brick-and-mortar retailers, no equally robust compliance program for Internet-based tobacco retailers exists. This despite the fact that substantial research evidence has shown that minors can and do acquire tobacco products from Internet vendors.<sup>49</sup>

In 2012, the FDA issued what is called an “Advanced Notice of Proposed Rulemaking” to ask for comments from the public on how it could best regulate Internet sales of tobacco. Among others, the National Association of Attorneys General (NAAG) submitted a comment to the FDA on this topic.<sup>50</sup> NAAG explained that despite the enactment of the PACT Act, the existing laws on Internet sales of tobacco do not adequately protect public health, and states' efforts to enforce their laws continue to be frustrated by jurisdictional limitations and the ability of Internet-based sellers to put up new websites as fast as old ones are shut down by states.<sup>51</sup> The NAAG comment highlights problems with existing age-verification methods, and concludes that unless technology can meet the challenges posed by tech-savvy youth, a complete prohibition on non-face-to-face sales of tobacco products may be the only way to prevent online tobacco sales to youth.<sup>52</sup>

If the FDA does regulate Internet sales of tobacco, that regulation will also address Internet sales of e-cigarettes, now that the FDA has finalized [the deeming regulation](#). Under the deeming regulation, e-cigarettes, along with cigars, hookah, and pipe tobacco, will be regulated as tobacco products. And as mentioned, the Tobacco Control Act directs the FDA to regulate Internet sales of “tobacco products.” Unfortunately, the FDA regulation of Internet tobacco sales hasn't moved past the Advanced Notice of Proposed Rulemaking stage. No regulation has been proposed, despite the deadline provided in the Tobacco Control Act.

## Conclusion

States have the authority to prohibit Internet-based retailers from shipping tobacco products to customers within their borders. However, because of jurisdictional and other enforcement challenges inherent in state-by-state regulation of Internet sales, as well as federal preemption of some state action, the federal government is best positioned to stop online sale of tobacco to youth, protecting health in every state. Comprehensive federal regulation would remove PACT Act loopholes to include e-cigarettes and other tobacco products under the provisions of that law, and remove exemptions for delivery carriers. But, given the ease at which youth have been able to circumvent existing age verification techniques, a complete prohibition on Internet sales of tobacco might be the only way to prevent youth access to these dangerous products.



## Other Helpful Resources

The Tobacco Control Legal Consortium and Public Health Law Center's website features several resources on [e-cigarettes](#) and the [regulation of the online sale of tobacco](#). The website also includes several publications explaining the federal [Family Smoking Prevention and Tobacco Control Act of 2009](#) and its impact on state and local tobacco control authority, as well as a page specifically devoted to the [deeming regulation](#). The Campaign for Tobacco Free Kids has a collection of fact sheets on [Internet Sales of Tobacco Products](#). A wealth of published research on the practices of Internet tobacco retailers is available on the website for the [Internet Tobacco Vendors Study](#), including a study on [Electronic Cigarette Sales to Minors via the Internet](#). For more information on the FDA's information-gathering regarding non-face-to-face sales, see [Docket No. FDA-2011-N-0467](#) on [regulations.gov](#).

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium with any questions about the information included in this publication.

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## Notes

<sup>1</sup> Inst. of Med., *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products* 5 (Richard J. Bonnie et al. eds., National Academies Press 2015) ("A critical component in the development of dependence and continued tobacco use is the reinforcing effects of nicotine. Adolescent brains have a heightened sensitivity to the rewarding effects of nicotine, and this sensitivity diminishes with age; (Adriani et al., 2006; Jamner et al., 2003). Thus, the probability that a user escalates to dependence after the first few trials is likely to decrease the further one moves away from adolescence.") <http://www.nap.edu/read/18997/chapter/2#5>.

<sup>2</sup> The Tobacco Control Legal Consortium has conducted research on the problem of Internet tobacco sales to youth for over a decade. See, for example, *Smoke on the Web: Can Children Buy Cigarettes Online? Enforcement Options, Challenges and Recommendations* (The Tobacco Law Project, March 2002), <http://publichealthlawcenter.org/sites/default/files/resources/tlp-tobacco-online-2002.pdf>.

<sup>3</sup> Jamie F. Chriqui et al., *A Comprehensive Review of State Laws Governing Internet and Other Delivery Sales of Cigarettes in the United States*, 10 NICOTINE & TOBACCO RES. 253 (Feb. 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4263913>.

<sup>4</sup> *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

<sup>5</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

<sup>6</sup> *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008).

<sup>7</sup> For more information on this case, see the Tobacco Control Legal Consortium's webpage, <http://publichealthlawcenter.org/resources/rowe-v-new-hampshire-motor-transport-association-128-sct-989-2008>.

<sup>8</sup> ARIZ. REV. STAT. ANN. § 36-798.06 (2015).

<sup>9</sup> *Arkansas Tobacco Control Bd. v. Santa Fe Nat. Tobacco Co.*, 360 Ark. 32, 199 S.W.3d 656 (2004).

- <sup>10</sup> CONN. GEN. STAT. ANN. § 12-285c (2015).
- <sup>11</sup> IND. CODE ANN. § 24-3-5-4.5 (2005).
- <sup>12</sup> MD. CODE ANN., BUS. REG. § 16-223 (West)(cigarettes); MD. CODE ANN. Bus. Reg. § 16.5-217 (West) (other tobacco products).
- <sup>13</sup> N.Y. PUB. HEALTH LAW § 1399-LL (2015).
- <sup>14</sup> OHIO REV. CODE ANN. § 2927.023 (2005).
- <sup>15</sup> S.D. CODIFIED LAWS § 10-50-99 (2009).
- <sup>16</sup> UTAH CODE ANN. §§ 59-14-509 (2009).
- <sup>17</sup> VT. STAT. ANN. TIT. 7, § 1010 (2013).
- <sup>18</sup> WASH. REV. CODE § 70.155.140 (2009).
- <sup>19</sup> Press release, N.Y. Att’y Gen., *State Ags And Atf Announce Initiative With Credit Card Companies To Prevent Illegal Internet Cigarette Sales* (March 17, 2005), <http://www.ag.ny.gov/press-release/state-ag-and-atf-announce-initiative-credit-card-companies-prevent-illegal-Internet>.
- <sup>20</sup> National Association of Attorneys General [hereinafter NAAG], Appendix 1, Comment Letter on Proposed Rule on Non-Face-to-Face Sale and Distribution of Tobacco Products and Advertising, Promotion, and Marketing of Tobacco Products, Docket No. FDA-2011-N-0467, at 1-2 (Feb 23, 2013), <https://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0467-0110>.
- <sup>21</sup> *Acceptable Use Policy*, PayPal.com, <https://www.paypal.com/webapps/mpp/ua/acceptableuse-full> (Last updated July 1, 2015).
- <sup>22</sup> Kurt M. Ribisl et al., *Effectiveness of State and Federal Government Agreements with Major Credit Card and Shipping Companies to Block Illegal Internet Cigarette Sales*, PLOS ONE (Feb, 14 2011), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0016754> (“[T]he proportion of vendors advertising on their site that they accepted credit cards and PayPal dropped markedly following the credit card ban, but this was countered by an increase in the proportion of vendors accepting checks and money orders”).
- <sup>23</sup> *Id.* (“[T]he proportion of all ICVs accepting money orders and personal checks rose from 36.4% before the bans to 78.3% after. The percent of the top 50 ICVs accepting checks and money orders rose from 30% before the bans to 80.6% after.”).
- <sup>24</sup> NAAG *supra* note 20, at 3.
- <sup>25</sup> N.Y. PUB. HEALTH LAW § 1399-LL (2015).
- <sup>26</sup> NAAG *supra* note 20, Appendix 2.
- <sup>27</sup> Amended Complaint at 2, *City of New York v. FedEx Ground Package Sys. Inc.*, 91 F.Supp. 3d 512 (S.D.N.Y. 2015) (No. 13-cv-9173-ER) 2014 WL 1308746; Second Amended Complaint at 1, *New York v. United Parcel Service, Inc.*, No. 15-cv-1136-KBF (S.D.N.Y. November 30, 2015) 2015 WL 9303244.
- <sup>28</sup> *City of New York v. FedEx Ground Package Sys. Inc.*, 91 F. Supp. 3d 512 (S.D.N.Y 2015).
- <sup>29</sup> *Guidelines for Implementation of Article 13 (Tobacco advertising, promotion and sponsorship)*, Framework Convention on Tobacco Control [FCTC], World Health Organization [WHO], Third Session, FCTC/COP3(12) 33, ¶¶ 18-21 (November 22, 2008), [http://apps.who.int/gb/fctc/PDF/cop3/FCTC\\_COP3\\_DIV3-en.pdf](http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf).
- <sup>30</sup> WHO report on the global tobacco epidemic, 2015, Appendix VII Country profiles: France, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/fra.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/fra.pdf?ua=1) Brazil, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/bra.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/bra.pdf?ua=1) Greece, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/grc.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/grc.pdf?ua=1) Hungary [http://www.who.int/tobacco/surveillance/policy/country\\_profile/hun.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/hun.pdf?ua=1) The Republic of Korea, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/kor.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/kor.pdf?ua=1) Macao, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/chn.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/chn.pdf?ua=1) Singapore, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/sgp.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/sgp.pdf?ua=1) Spain, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/esp.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/esp.pdf?ua=1)

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Turkey, [http://www.who.int/tobacco/surveillance/policy/country\\_profile/tur.pdf?ua=1](http://www.who.int/tobacco/surveillance/policy/country_profile/tur.pdf?ua=1)

<sup>31</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, tit. I, sec. 101, § 906(d)(1), 123 Stat. 1776, 1796 (2009) (codified at 21 U.S.C. § 387f(d)(1)).

<sup>32</sup> Much of the PACT Act addresses concerns about taxation, a topic outside the scope of this document.

<sup>33</sup> Defined to include roll-your-own tobacco under 15 U.S.C. § 375(2) (2014).

<sup>34</sup> For example, the provision requiring retailers to pay state taxes and comply with state laws as if the sale occurred within the state, PACT Act, § 2A(a)(3), 124 Stat. 1087, 1091 (codified 15 U.S.C. § 376a(a)(3)), has been challenged under various legal theories, including due process, the dormant Commerce Clause, the Equal Protection clause of the Fifth Amendment, and the Tenth Amendment. *Red Earth, LLC v. U.S.*, 657 F.3d 138 (2d Cir. 2011); *Gordon v. Holder*, 721 F.3d 638, 406 U.S.App.D.C. 6 (D.C. Cir. 2013); *Musser's Inc. v. United States*, 1 F. Supp. 3d 308 (E.D. Pa. 2014). In *Red Earth* and *Gordon*, the court found enough merit to the due process claim to issue a temporary injunction. The injunction in *Red Earth* was lifted in 2013 after the case was dismissed by stipulation. The injunction in *Gordon* was lifted in 2015 when the case was declared moot, and this decision was upheld by the United States Court of Appeals for the D.C. Circuit on April 5, 2016. At the time of this writing the deadline to appeal to the U.S. Supreme Court has not yet expired.

<sup>35</sup> Prevent All Cigarette Trafficking Act, Pub. L. 111-154, sec.2, § 2A(b)(4), 124 Stat. 1087, 1091-2 (2010) (codified at 15 U.S.C. § 376a(b)(4) [hereinafter PACT Act]).

<sup>36</sup> PACT Act, § 2A(b)(1), 124 Stat. 1087, 1091 (codified at 15 U.S.C. § 376a(b)(1)).

<sup>37</sup> PACT Act, § 2A(b)(4)(A)(iii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(iii)).

<sup>38</sup> PACT Act, § 2A(b)(4)(A)(ii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(ii)).

<sup>39</sup> PACT Act, § 2A(a)(3), 124 Stat. 1087, 1091 (codified 15 U.S.C. § 376a(a)(3)).

<sup>40</sup> 18 USC § 1716E(West).

<sup>41</sup> PACT Act, § 2A(e)(1), 124 Stat. 1087, 1093 (codified at 15 U.S.C. § 376a(e)(1)).

<sup>42</sup> PACT Act, § 2A(e)(5)(C), 124 Stat. 1087, 1098 (codified at 15 U.S.C. § 376a(e)(5)(C)).

<sup>43</sup> PACT Act, § 2A(e)(5)(A), 124 Stat. 1087, 1097 (codified at 15 U.S.C. § 376a(e)(5)(A)).

<sup>44</sup> PACT Act, § 2A(e)(2)(A), 124 Stat. 1087, 1095 (codified at 15 U.S.C. § 376a(e)(2)(A)).

<sup>45</sup> PACT Act, § 2A(e)(3), 124 Stat. 1087, 1095 (codified at 15 U.S.C.A. § 376a(e)(3)).

<sup>46</sup> PACT Act, 15 U.S.C. § 376a(e)(5)(C)(ii); 15 U.S.C.A. § 376a(e)(3)(B); *New York v. United Parcel Serv., Inc.*, No. 15-CV-1136 KBF, 2015 WL 5474067, at 8 (S.D.N.Y. Sept. 16, 2015), quoting 155 Cong. Rec. S5822-01, 2009 WL 1423723, at \*104 (May 21, 2009) (“statement of Sen. Kohl, sponsor of Senate version of bill ‘It is important to point out that this bill has been carefully negotiated with the common carriers, including UPS, to ensure that it does not place any unreasonable burdens on these businesses. In recognition of UPS and other common carriers’ agreements to not deliver cigarettes to individual consumers on a nationwide basis, pursuant to agreements with the State of New York, we have exempted them from the bill provided this agreement remains in effect.’”).

<sup>47</sup> PACT Act, § 2A(e)(5)(A), 124 Stat. 1087, 1097 (codified at 15 U.S.C. § 376a(e)(5)(A)).

<sup>48</sup> 21 U.S.C. 387f(d)(4)(A)(i) (The Act requires the FDA to issue regulations “regarding the sale and distribution of tobacco products that occur through means other than a direct, face-to-face exchange between a retailer and a consumer in order to prevent the sale and distribution of tobacco products to individuals who have not attained the minimum age established by applicable law for the purchase of such products, including requirements for age verification[.]”)

<sup>49</sup> Rebecca S. Williams et al., U. North Carolina, Response to Advance Notice of Proposed Rulemaking on Non-Face-to-Face Sale and Distribution of Tobacco Products and Advertising, Promotion, and Marketing of Tobacco Product Docket No. FDA-2011-N-0467 (Feb. 14, 2012), <https://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0467-0100>.

<sup>50</sup> NAAG, *supra* note 20, Comment.

<sup>51</sup> NAAG, *supra* note 20, Comment at 2.



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<sup>52</sup> NAAG, *supra* note 20, Comment at 9.