



ONLINE SALES OF E-CIGARETTES

& Other Tobacco Products



Internet sales of commercial tobacco products to underaged individuals significantly undermine efforts to protect public health and risks creating a new generation of nicotine users.¹ Young people are much more likely than older people to become addicted to commercial tobacco, in part because adolescent brains are more sensitive to nicotine.²

Laws preventing the sale of tobacco products to youth and young adults play an essential role in averting a lifetime of addiction and tobacco-related disease. Unfortunately, internet retailers have often failed to implement necessary controls to avoid illegally selling tobacco products to young people. Comprehensive regulation must succeed in thwarting not only underaged access to tobacco products via fixed retail establishments but also through delivery



sales, including internet/app-based delivery services. Given the concerns about the serious health risks associated with e-cigarette use³ and the easy availability of e-cigarettes to underaged persons online,⁴ the public health community has every reason to take seriously the illegal online sales of tobacco to youth and young adults.


Enforcement of existing laws against online sellers is more costly and complicated than traditional enforcement against in-person, fixed establishment retailers. Although the U.S. Food and Drug Administration (FDA) has an inspection system in place to monitor and enforce compliance with age-verification laws by brick-and-mortar retailers, no equally robust compliance program exists for internet-based tobacco retailers. Unfortunately, substantial evidence has shown that underage persons can and do acquire tobacco products from internet vendors.⁵ One recent study indicates that nearly a third of young e-cigarette users obtain these products online.⁶

This publication provides an overview of available measures, including local, state, and federal laws that have sought to prevent the online sale of tobacco to young people since the problem first emerged.⁷ It begins with a brief overview of the current landscape of internet and delivery-based commercial tobacco product sales. Next, it provides a summary of state laws and legal challenges those laws have faced. It then describes efforts to regulate internet sales of tobacco through voluntary agreements with some of the largest actors in the field of online sales, including credit card and package delivery companies. Finally, it highlights federal laws that address online sales to underage persons, including the Prevent All Cigarette Trafficking Act (PACT Act), its 2020 amendment by the Preventing Online Sales of E-Cigarettes to Children Act, and the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act).

Given the significant regulatory challenges and the failure of existing legislation to prevent widespread online sales of tobacco products to young people, a complete prohibition on all internet sales of tobacco products appears to be the most effective approach to substantially prevent such sales and protect the public health gains accomplished by age-of-sale laws that prevent sales to persons under the age of 21.⁸ Under the Tobacco Control Act, the FDA has the authority to take such action but has thus far failed to do so, and states and local governments are taking the lead in the absence of federal action.⁹ Tribes also have the inherent sovereign power to protect public health and therefore may prohibit online sales, for example, as an extension of existing prohibitions on sales of e-cigarette products.¹⁰

The Shifting Landscape of Internet & Delivery-Based Commercial Tobacco Product Sales

In addition to traditional mail-order sales and the more recent high volume of internet-based retailers of tobacco products, the retail landscape also now includes a growing number of app-based retailers offering local delivery services that are especially popular with young people, heightening the need to fine-tune regulatory approaches. On-demand delivery retailers that rely on internet/app-based customer orders — such as [Gopuff](#), [Door Dash](#), [Saucey](#), and [Pink Dot](#) — may be skirting tobacco retailer laws by avoiding detection as tobacco retailers.

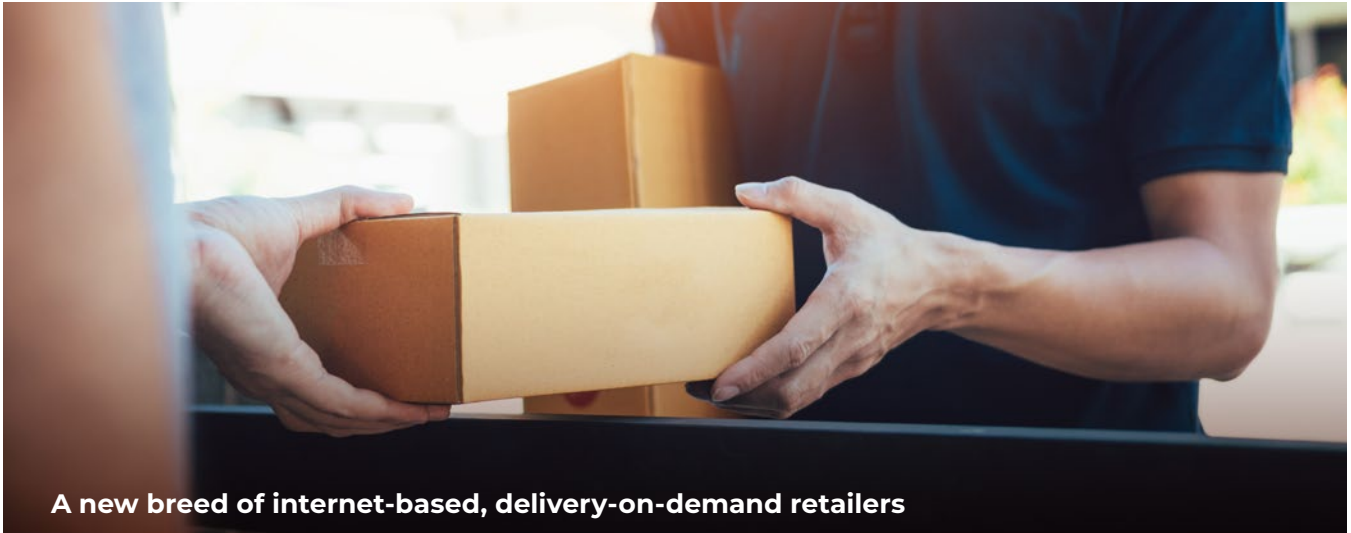


On Juul's website, consumers are able to purchase e-cigarettes, which are shipped directly to them.

Because many on-demand, app-based retailers make local deliveries of tobacco products that do not come within the “common carrier” exemption under Federal law (discussed below), tribal, state, and local jurisdictions may be able to prohibit these types of sales by requiring that all tobacco sales be transacted in-person, in fixed-location brick-and-mortar retail establishments.

Other internet retailers of tobacco or tobacco-related products may also present significant regulatory and enforcement challenges. Manufactured by Juul Labs, Inc., the Juul e-cigarette entered the marketplace in June 2015. By late 2017, Juul had become the most popular e-cigarette in the United States, especially among youth and young adults. Juul's popularity among young people quickly became concerning because Juul e-cigarettes are made with easily-absorbed, potent nicotine salts that deliver a high concentration of nicotine. On Juul's website, consumers are able to purchase e-cigarettes, which are shipped directly to them. And they are encouraged (with the promise of a free product or discounts) to enter into a subscription service that automates product shipments. Due to recent changes in federal law, discussed below, major private delivery companies including UPS and FedEx have voluntarily ceased shipments of e-cigarettes, depriving e-cigarette companies like Juul of their customary, common carrier delivery options and forcing them to seek alternatives.¹¹

While many online retailers, including Juul,¹² claim to verify age by checking a customer's ID at the points of purchase and delivery, effective compliance monitoring and enforcement has proven to be difficult and inconsistent. Moreover, studies indicate that existing age-verification systems are largely ineffective at curtailing underage access to tobacco products via the internet.¹³



A new breed of internet-based, delivery-on-demand retailers

Internet/app-based businesses do not fit the customary commercial, fixed location, walk-in tobacco retailer model. Go Brands, Inc. (dba Gopuff), which bills itself as the “first digital convenience retailer,” is typical of the new breed of internet-based, delivery-on-demand retailers that existing regulations may not capture. Originally conceived as an on-demand hookah product delivery-based retailer in Philadelphia, Pennsylvania, the company rapidly expanded to delivery of typical convenience store items including food, snacks, beverages, over-the-counter drugs, and in many market areas, liquor and tobacco products. Gopuff operates out of warehouses in over one thousand U.S. cities, strategically positioned in many communities with colleges and universities.¹⁴ It does not use third-party couriers, common carriers, or U.S. mail service; instead, its deliveries are made by its own drivers (employees or independent contractors) from its locally based warehouse locations.¹⁵ Consumers place orders directly from Gopuff’s online website or its app and, according to Gopuff, can expect to have the ordered items delivered in a half-hour or less.

In 2019, regulatory investigators in St. Paul, Minnesota, discovered that Gopuff was stocking and selling e-cigarettes and other tobacco and tobacco-related products without having applied for or obtained the city’s required tobacco retailer license. In fact, Gopuff increased its footprint in tobacco product on-demand delivery sales after the enactment of the Preventing Online Sales of E-Cigarettes to Children Act (which ended major common carriers’ shipments of e-cigarettes), by signing an exclusive deal to deliver disposable e-cigarettes made by Bidi Vapor.¹⁶

Saucey, another on-demand delivery-based retailer, deals almost entirely with liquor and tobacco products, delivering these products in several California cities and major hubs such as New York City, Dallas, D.C., and Chicago. As with Gopuff, customers place orders from Saucey’s website or from an app and have products delivered directly to them.

Some online retailers have opted out of tobacco sales entirely. Amazon, the largest online retailer by revenue, does not sell tobacco products on its website, but does sell tobacco-related products such as rolling papers, ashtrays, hookahs, cigar cutters, and pipes.¹⁷ Similarly, Walmart, whose online sales ballooned during the COVID-19 pandemic, offers only tobacco cessation products online, but continues to sell cigarettes in its brick-and-mortar stores.¹⁸ In September 2019, Walmart announced that it would no longer sell e-cigarettes or e-juices of any kind in Walmart or Sam's Club stores due to rising concerns and regulatory complexities related to sales.¹⁹

In addition to traditional internet platforms, a limited, yet significant tobacco trade occurs on non-traditional platforms known as the darknet or darkweb, a subsection of the internet that requires specialized software and offers anonymity to its users. Reports indicate that, globally, the illicit cigarette market accounts for 11.6 percent of tobacco consumption and results in a revenue loss for governments of \$40.5 billion.²⁰ Between 2016 and 2017 alone, according to one study, revenues generated from illicit online tobacco trade increased over 150 percent.²¹ This study notes that if "the illicit tobacco trade were eliminated by 2030, it could potentially save the lives of over 160,000 individuals per year, and create tax revenue of \$31.3 billion."²² The increased availability of cheap tobacco products via the illicit online market disproportionately impacts low-income communities and price-sensitive youth and young adults.²³ With changes in federal law making lawful online sales significantly more burdensome, public health and commercial tobacco regulators will have to continue to be vigilant and shut down illicit sales.

Local Action

Lawsuits. Even when specific regulation of internet-based sales is lacking, jurisdictions may sue online tobacco sellers to enforce their age-of-sale laws. New York City (NYC), Chicago, and Los Angeles have all used this option. Los Angeles, as discussed below, has had success in lawsuits both under consumer protection and state tobacco delivery sales statutes.

In October 2019, NYC filed suit in the Eastern District of New York against twenty-two online retailers, alleging that they created a public nuisance by targeting and selling flavored e-cigarettes to young people under the age of 21.²⁴ The suit claimed that the defendant retailers failed to use available age-verification services that check government databases to verify the age and identity of persons seeking to place orders. In July and August, according to the suit, NYC conducted test purchases from online retailers with the assistance of two NYC residents between the ages of 18 and 21. The underage purchasers each created an email account and used a prepaid Visa gift card to purchase e-cigarette products from each defendant.²⁵ Product deliveries were made without verifying identity and age and without

obtaining a signature.²⁶ The twenty-two companies named in the lawsuit are based outside the State of New York. The suit sought injunctive relief to prevent further underage sales as well as money damages to compensate the city for the “costs of abating the epidemic of underage e-cigarette use in the city.”²⁷ The majority of the defendants entered into settlements with the city agreeing, among other things, to cease delivering e-cigarettes to NYC residents without appropriate age-verification measures.²⁸

Chicago has also used litigation to advance its public health interest in limiting underage access to online vaping products. To date, the City has filed at least four lawsuits against online tobacco product retailers, alleging illegal sales of vaping products to Chicago residents under the age of 21,²⁹ as well as violations of the city’s restriction on selling flavored tobacco products.³⁰ In November 2018, Chicago filed a lawsuit against eight online e-cigarette retailers. In a sting operation conducted by the city’s Business Affairs and Consumer Protection Bureau and the Department of Law, the eight sellers sued were caught selling e-cigarette products via the internet directly to underage residents.

In February 2019, Chicago filed another lawsuit in Cook County Circuit Court, this time against twenty-seven online retailers.³¹ The City alleged that the defendants “actively market their products to Minors, both on Defendants’ websites and through social-media campaigns.”³² Similar to the November 2018 suit, this lawsuit stemmed from a compliance check process where an 18-year-old identified in the suit as “John Doe” used a pre-paid Visa gift card to order nicotine-containing e-liquid from each of the defendants’ websites and had the products delivered to the bureau’s office.³³ According to the suit, “[a]t no time before or during the purchase or delivery of the tobacco products or accessories did Defendants request a valid form of government identification or any other verification of Doe’s age,”³⁴ and “at no time before or after the delivery of the tobacco products and accessories did Defendants call or email Doe to get more identifying information or confirm that Doe was 21 years old or older.”³⁵ According to Chicago’s then Corporation Counsel, Edward Siskel: “Manufacturers and sellers of e-cigarettes were put on notice that Chicago is willing to take legal action to prevent them from peddling their products to Chicago youth, and this second lawsuit demonstrates our commitment to protecting youth and policing online retailers.”³⁶

The City of Chicago has since filed at least two other lawsuits against online tobacco retailers.³⁷ Many of the retailers involved in these suits have reached settlements with the city. In addition to paying fines of over \$500,000, they have agreed to stop selling their products to Chicago residents, to enhance their age-verification processes, and to eliminate marketing practices that target youth.³⁸ The state of Illinois recently passed legislation intended to curb online sales and marketing of e-cigarettes to underage Illinois residents.³⁹



Similar to NYC and Chicago, the city of Los Angeles has pursued successful affirmative litigation against online e-cigarette retailers who have sold regulated products to youth. In 2018, the city filed an unfair competition suit against three online retailers.⁴⁰ In 2019, the City Attorney's Office announced a settlement with two retailers, requiring \$350,000 in fines and four years of strict regulations preventing them from advertising or selling to underage purchasers.⁴¹ The city's suit against one of the online retailers, Kandypens, ended in 2019 with a court order enjoining it from engaging in youth-targeted marketing and a fine of \$1.2 million.⁴²

Regulatory action. Besides litigation, local jurisdictions may pursue legislative measures to restrict access to tobacco products via the internet. In June 2019, San Francisco, then home to the corporate headquarters of Juul Labs, Inc.,⁴³ became the first local government in the nation to completely prohibit sales of e-cigarettes in brick-and-mortar retail stores.⁴⁴ In addition, San Francisco prohibits delivery sales and distribution of these products, including any flavored tobacco products, to any person in the city. Commercial tobacco businesses are prohibited from shipping or otherwise delivering flavored tobacco products and e-cigarettes directly to San Francisco residents. Other localities have since followed suit, prohibiting delivery sales of e-cigarettes.⁴⁵

In instances where state law does not limit local authority to regulate internet sales, local jurisdictions interested in curbing underage access to online tobacco products may completely prohibit direct-to-consumer shipments or deliveries of commercial tobacco products within

their jurisdiction. This could include prohibiting the sale and delivery of tobacco and tobacco-related products through on-demand, internet-based businesses that operate on a local delivery model. For example, a local government may be able to define “tobacco retailer” to include only fixed location retailers that serve walk-in customers, allowing only face-to-face sales transactions. Several local jurisdictions in California have taken this approach, including San Diego County, Oakland, and Oxnard; these jurisdictions expressly prohibit delivery sales of commercial tobacco products, requiring all sales to be conducted in-person at a licensed retail location.⁴⁶ Local jurisdictions also may require that all commercial tobacco retailers be licensed. Federal law does not restrict tribal, state, or local authority to take such actions. Given the enforcement challenges associated with internet-based and non-fixed-location business models, a complete prohibition of tobacco sales, shipments, and deliveries by such businesses is likely the strongest, most effective regulatory option. It is also consistent with many jurisdictions’ existing prohibitions on mobile sales such as door-to-door, vehicle, and kiosk sales.

Although federal law, as discussed below, preempts some tribal, state, and local regulation of common carriers, it does not preempt local governments from regulating consumer sales made by locally-based on-demand, internet/app-based retailers. As previously noted, Gopuff and similar retailers typically hire their own drivers and do not use common carriers.⁴⁷ A city or county could require all delivery persons working for such a retailer to follow strict age-verification processes when delivering products to consumers or, better yet, prohibit delivery sales altogether as San Diego County, Oakland, and Oxnard have done.⁴⁸ In the absence of laws specifically regulating internet- and delivery-based businesses, local jurisdictions may, like the cities of Chicago, New York, and Los Angeles, enforce existing minimum legal sales age laws, and other commercial tobacco control laws, by pursuing litigation against businesses that sell or deliver tobacco or tobacco-related products to underage persons within their jurisdictions.

Tribal and State Action

In the wake of alarming news reports that surfaced in 2019, of vaping-related lung injuries affecting youth and young adults, the public health community and government officials at both state and local levels stepped up efforts to curb underage access to e-cigarettes. Some tribal governments and states have employed their executive authority (i.e., the governor and agencies’ authority to execute existing powers rather than the legislature’s ability to pass laws) and emergency powers to temporarily prohibit sales of flavored e-cigarettes, while others have pursued litigation and other legal avenues.⁴⁹

While cities and counties can take significant measures to curb access to tobacco products online, tribes and states are better positioned, given the jurisdictional limitations of localities,

to enact effective policies in this domain. In the early days of internet commerce, when mail-order deliveries were legal and the norm, many states attempted to curb the problem of internet tobacco sales via efforts that met with varying degrees of success.⁵⁰

Legal Challenges. Federal courts have upheld the constitutionality of prohibitions on internet and delivery sales, but federal preemption may be a barrier to some state laws on this topic. In 2003, for example, 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” of the U.S. Constitution, and the court held that it did not.⁵¹ In general, the Dormant Commerce Clause refers to the concept that the Commerce Clause of the U.S. Constitution reserves regulation of interstate commerce — the flow of goods and services across state borders — to the federal government, with the result that other jurisdictions’ laws may not interfere unduly with interstate commerce. However, tribes, states, and often local governments have established authority and responsibility to protect the health and well-being of their residents. As such, when assessing a Dormant Commerce Clause challenge to a state law, courts balance the state’s interest in promoting public health against the federal interest in regulating and protecting the flow of interstate commerce.⁵² In the New York case, the balance was resolved in favor of the state law, which aimed to protect public health. This conclusion was based in part on the court’s recognition of the significant public health benefits of preventing underage access to cigarettes and reducing cigarette consumption. Similar urgent public health concerns about the epidemic youth use of e-cigarettes support similar policies today.

Federal statutes, however, can limit states’ authority to impose limits on delivery companies (distinguished from the businesses directly selling the products). In 2008, the U.S. Supreme Court struck down a Maine law which, among other things, required internet-based tobacco retailers to use a delivery service that checked identification at delivery.⁵³ (The Public Health Law Center and nine national public health and advocacy organizations filed an amicus brief in the U.S. Supreme Court in support of Maine’s law).⁵⁴ The Court held that the Federal Aviation Administration Authorization Act (FAAAA) — a federal law that de-regulated airlines and common carriers like FedEx and United Parcel Service (UPS) — preempted Maine’s law. Even though Maine’s law did not directly regulate the carriers, the Court decided that the effect of the state law on the market for delivery services interfered with the purpose of the de-regulation law. This case suggests that any state law that requires specific actions by a common carrier might be preempted by the FAAAA. The PACT Act, discussed below, also limits state authority to regulate common carriers.

Nevertheless, New York and other states have successfully pursued litigation against common carriers such as UPS for violating state and federal laws and voluntary agreements regarding cigarette shipments. In *State v. United Parcel Service*, the U.S. District Court for the Southern

District of New York found that UPS knowingly shipped contraband cigarettes to unauthorized recipients in New York State and NYC in violation of various laws and agreement, including the Contraband Cigarette Trafficking Act (CCTA), the PACT Act, and the Assurance of Discontinuance (AOD) agreement with the state. Significantly, the court held that because UPS had violated, for several years, the AOD agreement, under which it had agreed to take measures to prevent unlawful shipments of cigarettes, it was not entitled to the PACT Act's delivery services exemptions.⁵⁵ The State of New York has litigated similar cases against all of the largest common carriers.⁵⁶

More recently, in 2018, the Supreme Court, in *South Dakota v. Wayfair*, upheld the authority of a state to require out-of-state sellers, including online retailers that engage in substantial business within the state, to collect and remit sales tax to the state.⁵⁷ South Dakota had filed suit against several major online retailers with no employees or real estate in South Dakota, alleging that these sellers violated a state law requiring them to collect and remit sales tax "as if the seller had a physical presence in the State." Although the online retailers engaged in sufficient business within South Dakota to satisfy the state law's minimum sales or transactions requirement, they did not collect state sales tax, as South Dakota required. The South Dakota Supreme Court had affirmed the judgment for the online retailers, holding that the South Dakota law violated the Dormant Commerce Clause (interference with interstate commerce). The U.S. Supreme Court vacated this judgment and ruled in favor of South Dakota, overturning its prior controlling precedent in *Quill v. North Dakota*,⁵⁸ which had required physical presence within a state; the court held that the outcome in *Quill* was unsound and incorrect in light of changed market circumstances and the inequities it encourages between retailers.⁵⁹ The *Wayfair* decision by the U.S. Supreme Court is consistent with the PACT Act's requirement that delivery sellers pay all applicable tribal, state, and local taxes as if they had made the delivery sale where the product was delivered.

In sum, while some laws, especially those regulating common carriers, may be subject to preemption, tribes and states retain significant regulatory authority. The PACT Act, discussed more fully below, specifically preserves state authority to prohibit commercial tobacco sellers from shipping tobacco to individual customers and personal residences within the state.

Regulatory action. Currently, at least fourteen states have laws prohibiting direct-to-consumer shipments of some tobacco products: Arizona,⁶⁰ Arkansas,⁶¹ Connecticut,⁶² Indiana,⁶³ Maine,⁶⁴ Maryland,⁶⁵ New York,⁶⁶ Ohio,⁶⁷ South Dakota,⁶⁸ Utah,⁶⁹ Oregon,⁷⁰ Massachusetts,⁷¹ Vermont⁷² and Washington.⁷³ Five of these states, Arkansas, Maine, South Dakota, Utah, and Vermont, have enacted more comprehensive laws, including extending these prohibitions to e-cigarettes. (On page 17 is a table summarizing the key provisions of these states' laws, including provisions on penalties and enforcement.)



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.⁷⁴ At the group's request, many major credit card companies agreed to establish voluntary policies to prohibit the use of their cards for the illegal sale of cigarettes over the internet.⁷⁵ PayPal modified its acceptable use policy to entirely prohibit the use of its platform to purchase cigarettes.⁷⁶ Other companies required only that their merchants certify in writing that they will comply with applicable state and federal laws. Some companies agreed to terminate relationships with merchants who were in violation of the law. Although these voluntary measures 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 agreements.⁷⁷ Unfortunately, other payment methods such as checks, money orders, and gift cards have crept in to fill the void.⁷⁸ The increasing popularity of peer-to-peer payment apps and other online payment services that allow direct payments might provide another way for businesses to side-step the voluntary measures adopted by major credit card and other payment companies.⁷⁹ Moreover, the voluntary agreements are of limited effectiveness or utility in the present regulatory context because the agreements do not address internet sales of e-cigarettes and other non-cigarette tobacco products. Online e-cigarette vendors are still able to accept credit card payments because the voluntary agreements do not apply to this category of products.

Also in 2005, the same group of Attorneys General and the ATF turned their attention to delivery issues among companies that deliver internet-purchased tobacco.⁸⁰ Under New York state law, it is illegal for any carrier to knowingly deliver cigarettes directly to consumers.⁸¹ The Attorney General of New York investigated FedEx, UPS, and DHL to determine whether any of these carriers were delivering cigarettes to consumers in violation of that law. In 2005 and 2006, these three delivery carriers each signed agreements with New York's Attorney General, promising, among other things, to modify their policies to prohibit shipments of cigarettes to consumers anywhere in the U.S.⁸² These agreements did not limit the shipment of tobacco through the U.S. mail (now forbidden by the PACT Act), and, for the most part,⁸³ did not apply to tobacco products other than cigarettes. Following the December 2020 amendment of the PACT Act, which extended the PACT Act's U.S. mail delivery sales restrictions to cover e-cigarettes, the main common carrier delivery companies, including UPS,⁸⁴ FedEx,⁸⁵ and DHL, voluntarily agreed to cease shipments of e-cigarettes to consumers.⁸⁶

Problems with enforcement of voluntary agreements continue to this day. New York State and NYC have filed lawsuits against FedEx and UPS alleging violation of the agreements and state and federal statutes. One such lawsuit is *State v. United Parcel Service*, discussed above. In that case, the court found that UPS had repeatedly failed to honor its agreement with New York State. These suits highlight the significant enforcement challenges individual states and cities face when trying to regulate direct-to-consumer shipments of tobacco purchased online.

Federal Action

Two federal laws offer promise for a comprehensive, nationwide policy to restrict youth and young adult access to tobacco products online, but they have not been fully implemented.

PACT Act. The Prevent All Cigarette Trafficking Act of 2009 (PACT Act) has played an important role in regulating internet sales of commercial tobacco,⁸⁷ yet opportunities for improvement remain. In December 2020, the PACT Act was amended to extend its delivery sales restrictions to e-cigarettes; previously, PACT Act restrictions applied only to cigarettes, including roll-your-own and smokeless tobacco. This amendment closed a gaping loophole that allowed young e-cigarette users to obtain e-cigarettes online, undermining age verification laws meant to curb underage tobacco access and use.⁸⁸ Unfortunately, other tobacco products — including cigars and pipe tobacco — remain uncovered by the PACT Act's provisions. Loopholes enable delivery carriers to evade sufficient responsibility. State and local jurisdictions are also constrained by a preemption clause that hampers their authority to address some of the remaining gaps.

The December 2020 amendment of the PACT Act resulted from passage by Congress of the Preventing Online Sales of E-cigarettes to Children Act,⁸⁹ which expanded the PACT Act's definition of "cigarette"⁹⁰ to include **all** e-cigarette products, whether or not they contain nicotine. Products regulated as "cigarettes" now include e-hookahs, e-cigars, vape pens, advanced refillable personal vaporizers, and electronic pipes, as well as e-liquids and components, parts, and accessories of e-cigarettes. The Act's broad definition of e-cigarettes also captures zero nicotine e-liquids, synthetic nicotine e-cigarettes, aromatherapy, vitamin, and CBD/THC/hemp e-cigarette products. The definition of "cigarette" excludes any product that is approved by the United States Food and Drug Administration for sale as a tobacco cessation product or any other therapeutic purpose and is marketed and sold solely for such approved purpose. To date, no e-cigarette products have received this type of FDA approval.

Importantly, the PACT Act's recent amendment essentially prohibits shipments of e-cigarettes, along with conventional cigarettes, roll-your-own tobacco, and smokeless tobacco via the U.S. Postal Service (with a few limited exceptions).⁹¹

The PACT Act —

- Prohibits the online sale of cigarettes, including e-cigarettes, and smokeless tobacco to anyone under the legal sales age in their state;⁹²
- Requires that a delivery-seller retailer who ships tobacco:
 - Label packages as containing tobacco;⁹³
 - Verify age and identity of the buyer at purchase;⁹⁴
 - Use a method of shipping that checks ID and obtains a customer signature at delivery;⁹⁵ and
 - Pay applicable tribal, state, or local taxes and comply with the receiving jurisdiction's laws as if the sale occurred within that jurisdiction, including laws related to excise taxes, licensing and tax stamping, and restrictions on sales to underage persons;⁹⁶
- Prohibits the shipment and transport of cigarettes, including e-cigarettes and their parts and accessories, and smokeless tobacco through the U.S. mail, with limited exceptions;⁹⁷
- 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;⁹⁸
- Preserves the authority of jurisdictions to prohibit internet-based retailers from shipping cigarette, e-cigarette, and smokeless tobacco products to consumers and residential addresses within their territory.⁹⁹

Unfortunately, significant loopholes remain regarding shipments by “common carriers” like UPS, FedEx, and other traditional delivery companies. With respect to delivery sales of cigarettes, e-cigarettes, and smokeless tobacco, the PACT Act prohibits state, local, and tribal governments from enacting laws to require common carriers to check IDs or obtain signatures at delivery.¹⁰⁰ In addition, although it generally prohibits delivery carriers from accepting a shipment from any retailer on the list of non-compliant retailers compiled by the U.S. Attorney General,¹⁰¹ the Act exempts major common carriers from this provision.¹⁰² The PACT Act also exempts the major common carriers, bound by existing settlement agreements with the state of New York, from direct liability under most of the PACT Act and any state law prohibiting delivery of tobacco.¹⁰³ Yet, because the leading “common carrier” delivery companies, including UPS and FedEx, have voluntarily agreed to end direct-to-consumer shipments of some or all tobacco products including e-cigarettes,¹⁰⁴ some of the potential effect of the loophole regarding state inability to regulate common carriers may be lessened. Given the common carriers’ departure, and the non-mailability of cigarettes, e-cigarettes, and smokeless tobacco, the industry is now limited to far less convenient and potentially more expensive options for tobacco delivery.¹⁰⁵

Delivery sales concerns remain thorny with regard to the newer breed of internet/app-based on-demand retailers such as Gopuff, which operates from locally-based warehouses and delivers tobacco products directly to customers using its own drivers. These on-demand retailers do not ship via common carriers or third-party delivery services, and are likely not covered by the PACT Act’s exemptions for common carriers. As such, they remain subject to state and local regulation, and must comply with the PACT Act to the extent that they are the seller of the product. As mentioned earlier, the PACT Act specifically allows states to enact legislation to prohibit retailers from making “delivery sales”¹⁰⁶ of cigarettes, e-cigarettes, and smokeless tobacco. State and local jurisdictions can consider prohibiting all online and app-based sales and deliveries of tobacco products, using a broader definition of “delivery sales”¹⁰⁷ that includes delivery by means other than shipping, thereby thwarting sales by retail entities like Gopuff that operate without a storefront.

It is important to emphasize that the PACT Act still fails to cover all tobacco products. Entire categories of products including pipe tobacco and cigars — both premium and cheap, flavored types, the latter of which are marketed to and appeal to youth and young adults — remain uncovered. Even if these product category gaps are eventually filled, the PACT Act will remain a limited approach to effectively curbing underage access to online tobacco products since substantial evidence indicates that age-verification processes, which the law relies upon for allowed delivery sales, are largely ineffective.

TCA. The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act or TCA)¹⁰⁸ gave clear instructions to the FDA: adopt a regulation to control internet sales of tobacco products to youth.¹⁰⁹ The Tobacco Control Act even established a deadline for this regulation: October 1, 2011.

In 2012, the FDA issued an “Advance Notice of Proposed Rulemaking” requesting public comment on how the agency could best regulate internet sales of tobacco. Among others, the National Association of Attorneys General (NAAG) submitted a comment to the FDA,¹¹⁰ in which it explained that the PACT Act and other existing laws on delivery sales of tobacco do not adequately protect public health, and that states’ efforts to enforce their laws continue to be frustrated by both jurisdictional limitations and the ability of internet-based sellers to put up new websites as fast as states shut down old ones.¹¹¹ The NAAG comment highlighted problems with age-verification methods and concluded that unless technology could meet the challenges posed by tech-savvy youth, a complete prohibition on non-face-to-face sales of tobacco products might be the only way to prevent online tobacco sales to youth.¹¹² In the absence of subsequent FDA action, these points continue to have merit. The concerns NAAG expressed have become increasingly urgent as online sales of tobacco products have continued without comprehensive oversight. Ease of access leaves underage persons at risk. State and local governments are increasingly acting, when not preempted from doing so, rather than waiting for a federal fix.

While tribes, states, and localities can take significant steps to address remaining regulatory gaps, Congress or the FDA may ultimately be best positioned to close delivery sale loopholes. Given the challenges in developing effective age-verification methods, a complete prohibition on internet sales of tobacco and related products, including e-cigarette accessories and components whether or not they include nicotine, might be the only way to effectively prevent large-scale sales to underage persons. Such a prohibition would be consistent with international norms established in the World Health Organization Framework Convention on Tobacco Control.¹¹³ For example, Brazil, France, Greece, Hungary, the Republic of Korea, Macau, Singapore, Spain, South Africa, Turkey, and other countries prohibit all internet sales of tobacco.¹¹⁴ Under existing federal law, the FDA has the authority, and some would say responsibility, to prohibit internet sales of commercial tobacco.¹¹⁵



Conclusions

Tribes and states have authority to prohibit internet-based retailers from selling, shipping, and delivering tobacco products to consumers within their borders. Local governments also have begun examining their authority and ability to further prohibit and regulate online sales and delivery of tobacco products. Because of jurisdictional and other enforcement challenges inherent in jurisdiction-by-jurisdiction regulation of internet sales, as well as federal preemption of some other means of controlling delivery companies, the federal government may be best positioned to fully prohibit online sale of commercial tobacco to underage persons, thereby protecting health nationwide. FDA regulation could close the PACT Act loopholes that currently exclude certain tobacco products and address the exemptions for common carriers. Given the ease with which underage persons have been able to circumvent existing age verification processes, a complete prohibition on internet sales of all commercial tobacco and tobacco-related products shows greatest promise as an effective means to prevent many illicit sales of these dangerous products.

Additional Helpful Resources

The Public Health Law Center's website features a [resource](#) that explains the recent amendment to the PACT Act and a [resource](#) highlighting state and local actions taken to address the youth e-cigarette epidemic in the wake of the emergence of vaping-related lung injuries. The Center's website includes numerous resources on [e-cigarettes](#), including resources on [Juul](#), as well as an [overview](#) of state laws regulating e-cigarettes. For additional background information on tribal, federal, state, and local tobacco control authority, the Center has several publications, including resources explaining the federal [Family Smoking Prevention and Tobacco Control Act of 2009](#) and the FDA's [deeming regulation](#). The Campaign for Tobacco Free Kids also has a collection of fact sheets on [Internet Sales of Tobacco Products](#).

Contact Us

Please feel free to contact the Public Health Law Center with any questions about the information included in this publication.

State Laws Prohibiting Online E-Cigarette Sales & Shipments to Consumers

This chart is a snapshot of state laws in effect as of April 15, 2022, that prohibit online direct-to-consumer sales and shipments of electronic cigarettes.

Arkansas

Key Provisions

Entities (manufacturers, wholesalers, retailers) cannot deal with, deliver, or cause to be delivered any tobacco, vapor (e-cigarette), alternative nicotine, or e-liquid product to a retailer or consumer in Arkansas without first registering with the Director of Tobacco Control and obtaining a permit. If conducting business from more than one location, each location must register and obtain a separate permit. A permitted wholesaler may function as a retailer only if a retailer permit is also obtained.

Amendment to Arkansas Tobacco Products Tax Act of 1977, sec. 11, 2019 Ark. Acts 1071 (to be codified at ARK. CODE ANN. § 26-57-214 (a-d)).

A privilege fee for doing business in Arkansas must also be paid before commencing business.

Amendment to Arkansas Tobacco Products Tax Act of 1977, sec. 11, 2019 Ark. Acts 1071 (to be codified at ARK. CODE ANN. § 26-57-215 (a-d)).

Retailer is defined in Arkansas Code § 26-57-203(27) to include entities that purchase tobacco, vapor, and related products for the purpose of selling those products to consumers in person and over the counter. Online retailers do not meet this definition and thus are ineligible to obtain a permit to sell to Arkansas consumers.

Amendment to Arkansas Tobacco Products Tax Act of 1977, sec. 6, 2019 Ark. Acts 1071 (to be codified at Ark. Code Ann. § 26-57-203(11)).

Penalties & Enforcement

Selling, delivering, or causing to be delivered (immediately or in the future), without a valid permit, tobacco, vapor, alternative nicotine, or e-liquid products to retailers or consumers is a Class A misdemeanor.

A person engaged in buying, selling, or otherwise doing business in tobacco, vapor, alternative nicotine, or e-liquid products in Arkansas without a permit is subject to a Class A misdemeanor.

Amendment to Arkansas Tobacco Products Tax Act of 1977, sec. 15, 2019 Ark. Acts 1071 (to be codified at ARK. CODE ANN. § 26-57-226).

A person who violates any section of this subchapter for which a specific penalty is not provided is subject to a criminal violation and administrative civil penalties.

Penalties & Enforcement

Amendment to Arkansas Tobacco Products Tax Act of 1977, sec. 7, 2019 Ark. Acts 1071 (to be codified at Ark. Code Ann. § 26-57-204).

(continued)

Maine

Key Provisions

Tobacco products may not be shipped to anyone other than a licensed retailer or distributor in the state.

ME. REV. STAT. ANN. tit. 22, § 1555-F (2018).

A person may not knowingly transport or cause to be delivered to a person a tobacco product purchased from any person not licensed as a tobacco retailer. This provision does not apply to transportation or delivery of tobacco products to licensed distributors or retailers.

ME. REV. STAT. ANN. tit. 22, § 1555-D (2018).

“Tobacco Product” includes products made or derived from tobacco or that contain nicotine, as well as e-cigarettes and e-liquids (nicotine or non-nicotine).

ME. REV. STAT. ANN. tit. 22, § 1551 (3) (2018).

Penalties & Enforcement

Attorney General may bring an enforcement action seeking injunctive relief and fines, penalties, and equitable relief.

ME. REV. STAT. ANN. tit. 22, § 1555-F (3D) (2018).

Violators of this law commit a civil violation and are subject to a fine of between \$1,000 and \$5,000 per offense.

ME. REV. STAT. ANN. tit. 22, § 1555-F (3A) (2018).

South Dakota

Key Provisions

The shipping of tobacco products to any consumer in the state is prohibited, whether the seller is located within or outside the state.

S.D. CODIFIED LAWS § 10-50-99 (2019).

Vapor products are included in the definition of “tobacco product.”

S.D. CODIFIED LAWS § 34-46-20 (2019).

Penalties & Enforcement

Injunction to restrain a threatened or actual violation.

S.D. CODIFIED LAWS § 10-50-100 (2019).

Civil penalty: 1st violation, the greater of up to \$1,000 or 5 times the value of the products.

S.D. CODIFIED LAWS § 10-50-101 (2019).

Utah

Key Provisions

Only “licensed persons” can place orders or make purchases via the internet, mail, phone, or other electronic means.

UTAH CODE ANN. § 59-14-509 (2019).

Retailers may only sell tobacco products and e-cigarettes to consumers in face-to-face exchanges. Tobacco specialty stores and adult facilities may have vending machines or self-service displays.

UTAH CODE ANN. § 76-10-105.1 (2019).

Penalties & Enforcement

A violation is an unfair and deceptive trade practice, the penalty for which is a misdemeanor for each violation (fine no greater than \$5,000, or imprisonment of up to 12 months, or both). The court may order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the state for deposit in the General Fund. Each order is a separate violation.

(continued)

Utah *(continued)*

A person may not sell, offer to sell, or distribute e-cigarettes without a license (unless the person has a license to sell tobacco products). Licensure to sell e-cigarettes is valid only at one fixed address, and only at a physical location within Utah.

Utah Code Ann. § 59-14-803 (2019).

In addition, each violation subjects a violator to the following: a civil penalty of no more than \$5000; an injunction to restrain a threatened or actual violation; and recovery of the state's costs (investigation; expert witnesses; costs of action; and attorney's fees).

Utah Code Ann. § 59-14-509 (2019).

A violation of Utah Code Ann. § 76-10-105.1 (2019) is a class C misdemeanor (1st offense); a class B misdemeanor (2nd offense); and a class A misdemeanor (3rd and subsequent offenses).

A violation of the requirement to be properly licensed to sell, offer to sell, or distribute e-cigarettes is a class B misdemeanor.)

Utah Code Ann. § 59-14-803 (2019).

Vermont

Key Provisions

No person shall cause tobacco, tobacco substitutes, substances containing nicotine or otherwise intended for use with a tobacco substitute, or tobacco paraphernalia, ordered or purchased by mail or through a computer network, telephonic network, or other electronic network, to be shipped to anyone other than a licensed wholesale dealer or retail dealer in this State. 2019 Vt. Acts & Resolves 22 (to be codified at Vt. STAT. ANN. tit. 7, § 1010(b) (2019)).

Penalties & Enforcement

A violation is punishable by up to 5 years imprisonment, \$5,000 fine, or both.

Vt. STAT. ANN. tit. 7, § 1010(d) (2019).

Enforcement: Attorney General

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit resulting in disease and death. For more information visit: <http://www.keepitsacred.itcmi.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 INSTITUTE OF MEDICINE, 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.”); Menglu Yuan et al., *Nicotine and the Adolescent Brain*, 593 J. PHYSIOL 3397 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4560573>; Natalia A. Goriounova et al., *Short- and Long-Term Consequences of Nicotine Exposure during Adolescence for Prefrontal Cortex Neuronal Network Function*, 2 COLD SPRING HARB PERSPECT MED. a012120 (2012), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3543069/#:~:text=The%20adolescent%20brain%20is%20particularly,cognitive%20impairment%20in%20later%20life2\(12\)](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3543069/#:~:text=The%20adolescent%20brain%20is%20particularly,cognitive%20impairment%20in%20later%20life2(12)) (“Studies in human subjects indicate that smoking during adolescence increases the risk of developing psychiatric disorders and cognitive impairment in later life. In addition, adolescent smokers suffer from attention deficits, which aggravate with the years of smoking.”)
- 3 Off. Surgeon Gen., *Surgeon General’s Advisory on E-Cigarette Use Among Youth* (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>; Karen A. Cullen et al., *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students — United States, 2011–2018*, 67 MORBIDITY & MORTALITY WKLY. REP. 1276 (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm>.
- 4 Rebecca S. Williams et al., *Electronic Cigarette Sales to Minors via the Internet*, 169 JAMA PEDIATRICS e1563 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4408777/>; see also Brian A. King et al., *Electronic Cigarette Sales in the United States, 2013–2017*, 320 JAMA 1379 (2018), <https://jamanetwork.com/journals/jama/fullarticle/2705175>.
- 5 Rebecca S. Williams et al., *Cigarette Sales to Minors via the Internet: How the Story has Changed in the Wake of Federal Regulation*, 26 TOBACCO CONTROL 415 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5236008/>; Rebecca S. Williams et al., *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 Products*, Docket No. FDA-2011-N-0467 (Jan. 19, 2012), <https://www.regulations.gov/comment/FDA-2011-N-0467-0100>.
- 6 Jessica K. Pepper et al., *How Do Adolescents Get Their E-Cigarettes and Other Electronic Vaping Devices?*, 33 AM. J. HEALTH PROMOTION 420 (2018), <https://journals.sagepub.com/doi/10.1177/0890117118790366>.
- 7 The Public Health Law Center has conducted research on the problem of online tobacco sales to youth for two decades. See The Tobacco Law Project, *Smoke on the Web: Can Children Buy Cigarettes Online? Enforcement Options, Challenges and Recommendations* (2002), <http://publichealthlawcenter.org/sites/default/files/resources/tlp-tobacco-online-2002.pdf>.
- 8 Effective December 20, 2019, federal law prohibits sales of tobacco products to persons under the age of 21. 21 U.S.C. § 387f(d)(5).
- 9 Currently, five states have legislation prohibiting direct-to-consumer sales and shipments of tobacco products including e-cigarettes via the internet: Arkansas, Maine, South Dakota, Utah, and Vermont. See table in this document for key provisions of these laws.

- 10 *States and Tribes Stepping in to Protect Communities from the Dangers of E-Cigarettes: Actions and Options* (2020), Public Health Law Center (Feb. 25, 2020), <https://www.publichealthlawcenter.org/resources/states-and-tribes-stepping-protect-communities-dangers-e-cigarettes-actions-and-options>.
- 11 *One Shipping Carrier Steps Up to Ship Vape and E-Cigarette Products in the United States*, CISION PR NEWSWIRE (Feb. 23, 2021, 8:44 AM), <https://www.prnewswire.com/news-releases/one-shipping-carrier-steps-up-to-ship-vape-and-e-cigarette-products-in-the-united-states-301233440.html>.
- 12 In a lawsuit filed by the state of California against Juul Labs, Inc., the state alleged that Juul's online age-verification processes contain significant flaws and failed to minimize sales to underage persons. According to the state, Juul allowed hundreds of thousands of tobacco product sales and deliveries to fictitious persons and addresses, some of whom may have been underage California residents, including deliveries to "Beer Can," "Patricia Juul," "John JUUL Kordahl," and "?zge FIRAT." These flaws, according to the state's Complaint, resulted from the company's intentional decisions, which prioritized maximizing the pass rate for the age-verification process over minimizing underage sales. Complaint at 41-63, *State of California v. JUUL Labs, Inc.* (Cal. Super. Ct. Nov. 18, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/91186258.pdf>.
- 13 Williams et al., *TOBACCO CONTROL*, *supra* note 5; see also Williams et al., *supra* note 3; see also Rebecca S. Williams et al., *Content Analysis of Age Verification, Purchase and Delivery Methods of Internet E-Cigarette Vendors, 2013 and 2014*, 27 *TOBACCO CONTROL* 287 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5677573/>.
- 14 *About Us*, GOPUFF, <https://gopuff.com/go/about-us> (last visited Mar. 7, 2022).
- 15 *Id.*
- 16 *Bidi Vapor Advances to PMTA Final Substantive Review Phase for Bidi Stick Flavors*, CSTORE DECISIONS (Feb. 26, 2021), <https://cstoredecisions.com/2021/02/26/bidi-vapor-advances-to-pmta-final-substantive-review-phase-for-bidi-stick-flavors/>.
- 17 Search for Cigarettes, AMAZON, <https://www.amazon.com/> (search for "cigarettes").
- 18 Search for Cigarettes, WALMART, <https://www.walmart.com/> (search for "cigarettes").
- 19 *Walmart to Stop Selling E-Cigarettes*, NPR (Sept. 20, 2019), <https://www.npr.org/2019/09/20/762817754/walmart-to-stop-selling-e-cigarettes>.
- 20 Viviana Barrera et al., *Size and Scope of the Tobacco Trade on the Darkweb*, 20 *GLOBAL CRIME* 26, 27 (2019), <https://www.tandfonline.com/doi/abs/10.1080/17440572.2019.1569520>.
- 21 *Id.* at 37.
- 22 *Id.* at 27.
- 23 *Id.* at 29.
- 24 Complaint at 1, *City of New York v. Artisan Vapor Franchise LLC*, No. 1:19-cv-05693 (E.D.N.Y. October 8, 2019).
- 25 *Id.* at 49-50.
- 26 *Id.*
- 27 *Id.* at 1.
- 28 *City of New York v. Artisan Vapor Franchise LLC*, No. 19CV5693CBARER, 2020 WL 6887883 (E.D.N.Y. Nov. 2, 2020), *report and recommendation adopted*, No. 19CV05693CBARER, 2020 WL 6901095 (E.D.N.Y. Nov. 24, 2020).
- 29 *City of Chicago v. Eliquid Depot*, No. 2018-CH-14183 (Ill. Cir. Ct. Nov. 13, 2018); *City of Chicago v. BCC Distribution Inc.*, No. 2019-CH-01756 (Ill. Cir. Ct. Feb. 11, 2019); *City of Chicago v. Eluminate LLC*, No. 2019-CH-05987 (Ill. Cir. Ct. May 14, 2019); *City of Chicago v. Gold Strike LLC*, No. 2019-CH-12943 (Ill. Cir. Ct. Nov. 7, 2019).

- 30 City of Chicago v. Equite LLC, No. 1:21-cv-00518 (N.D. Ill. filed Jan 29, 2021); Press Release, Off. Mayor, *Mayor Lightfoot Take Latest Action Against E-Cigarette Industry*, CITY CHI. (Feb. 1, 2021), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2021/february/ActionAgainstECigarette.html.
- 31 Complaint at 1, City of Chicago v. BCC Distribution Inc., No. 2019-CH-01756 (Ill. Cir. Ct. Feb. 11, 2019).
- 32 *Id.* at 15.
- 33 *Id.* at 12-14.
- 34 *Id.* at 14.
- 35 *Id.*
- 36 Kristen Thometz, *Chicago Sues 27 Online Retailers Over E-Cigarette Sales*, WTTW (Feb. 12, 2019, 2:35 PM), <https://news.wttw.com/2019/02/12/chicago-sues-27-online-retailers-e-cigarettes>.
- 37 City of Chicago v. Eluminate LLC, No. 2019-CH-05987 (Ill. Cir. Ct. May 14, 2019); City of Chicago v. Gold Strike LLC, No. 2019-CH-12943 (Ill. Cir. Ct. Nov. 7, 2019).
- 38 Press Release, Off. Mayor, *Mayor Lightfoot Announces New Milestone in the Fight Against E-Cigarette Retailers Selling to Minors*, CITY CHI. (Aug. 23, 2019), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2019/august/SettlementsECigaretteRetailers.html; Kristen Thometz, *City Reaches Settlements with 16 E-Cigarette Retailers for Selling to Minors*, WTTW (Aug. 23, 2019, 1:26 PM), <https://news.wttw.com/2019/08/23/city-reaches-settlements-16-e-cigarette-retailers-selling-minors>.
- 39 Press Release, Ill. Att’y Gen. Kwame Raoul, *Attorney General Raoul Applauds Passage of Measure to Strengthen Regulations of Electronic Cigarette Marketing* (May 31, 2021), https://www.illinoisattorneygeneral.gov/press-room/2021_05/20210531b.html; Press Release, Gov. Pritzker Signs Legislation Preventing Underage Electronic Cigarette Sales (Aug. 24, 2021), <https://www.illinois.gov/news/press-release.23797.html>.
- 40 City Attorney Feuer Seeking Injunctions Against Vape Companies for Allegedly Targeting Children, L.A. CITY ATT’Y (Apr. 19, 2021), <https://www.lacityattorney.org/post/2018/10/31/city-attorney-mike-feuer-seeks-injunctions-against-three-online-e-cig-companies-for-alleg>.
- 41 City Attorney Mike Feuer Settles with Vape Companies, L.A. CITY ATT’Y (Mar. 5, 2021), <https://www.lacityattorney.org/post/2019/09/20/city-attorney-mike-feuer-settles-with-vape-companies>.
- 42 Feuer Secures Injunction, \$1.2-Million Penalty Against Vape Company for Youth Targeted Marketing, L.A. CITY ATT’Y (Apr. 19, 2021), <https://www.lacityattorney.org/post/feuer-secures-injunction-1-2-million-penalty-against-vape-company-for-youth-targeted-marketing>.
- 43 In 2020, Juul Labs, Inc., moved its headquarters from San Francisco to Washington, D.C.
- 44 S.F., CAL., ORDINANCE No. 122-19 (June 25, 2019), <https://sfbos.org/sites/default/files/o0122-19.pdf>.
- 45 See, e.g., SAN DIEGO CNTY., CAL., CODE REGUL. ORDINANCES, tit. 2, div. 1, ch. 26, § 21.2603 (effective Jan. 7, 2021), https://codelibrary.amlegal.com/codes/san_diego/latest/sandiego_regs/0-0-0-101659; OXNARD, CAL. CODE ORDINANCES, ch. 11, art. XIV, § 11-373 (2020), https://codelibrary.amlegal.com/codes/oxnard/latest/oxnard_ca/0-0-0-50564; OAKLAND, CAL., CODE ORDINANCES, tit. 5, ch. 5.91 (2021), https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT5BUTAPERE_CH5.91LITORE.
- 46 *Id.*
- 47 Gopuff, *supra* note 11.
- 48 CODE § 21.2603, *supra* note 44; CODE § 11-373, *supra* note 44; CODE ch. 5.91, *supra* note 44.

- 49 For more information on these state and local measures, see the resource on the Public Health Law Center's webpage, <https://www.publichealthlawcenter.org/resources/states-and-tribes-stepping-protect-communities-dangers-e-cigarettes-actions-and-options>.
- 50 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. 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.
- 51 *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).
- 52 *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.").
- 53 *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008).
- 54 Brief for Tobacco Control Legal Consortium et al. as Amicus Curiae Supporting Petitioner, *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) (No. 66-457), <https://www.publichealthlawcenter.org/sites/default/files/Amicus-Rowe-2007.pdf>.
- 55 *State v. United Parcel Service, Inc.*, 253 F. Supp 3d 583, 664 (S.D.N.Y. 2017) (the court found evidence of "'a sufficiently large number of instances of shipments of contraband cigarettes' as to establish that 'UPS is, overall, turning a blind eye towards such unlawful shipments' or that 'UPS policymakers have in fact turned a blind eye to shipments of contraband cigarettes.'").
- 56 See *City of New York v. United States Postal Serv.*, 2021 U.S. Dist. LEXIS 28144 (E.D.N.Y. Feb. 16, 2021); see also Press Release, A.G. Schneiderman Announces \$70 Million Lawsuit Against Fedex For Illegally Shipping 80 Million Untaxed Cigarettes To Consumers, N.Y. OFF. ATT'Y GEN. (Mar. 31, 2014), <https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-70-million-lawsuit-against-fedex-illegally-shipping-80>.
- 57 *South Dakota v. Wayfair, Inc.*, 138 U.S. 2080, 2094-96 (2018).
- 58 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
- 59 *Wayfair*, 138 U.S. at 2094-96.
- 60 ARIZ. REV. STAT. ANN. § 36-798.06 (2015).
- 61 *Arkansas Tobacco Control Bd. v. Santa Fe Nat. Tobacco Co.*, 360 Ark. 32, 199 S.W.3d 656 (2004).
- 62 CONN. GEN. STAT. ANN. § 12-285c (2015).
- 63 IND. CODE ANN. § 24-3-5-4.5 (2005).
- 64 ME. REV. STAT. ANN. § 1555-D (2012).
- 65 MD. CODE ANN., BUS. REG. § 16-223 (West) (cigarettes); MD. CODE ANN. BUS. REG. § 16.5-217 (West) (other tobacco products).
- 66 N.Y. PUB. HEALTH LAW § 1399-LL (2015).
- 67 OHIO REV. CODE ANN. § 2927.023 (2005).
- 68 S.D. CODIFIED LAWS § 10-50-99 (2009).
- 69 UTAH CODE ANN. §§ 59-14-509 (2009).

- 70 OR. REV. STAT. ANN. § 180.441 (2022).
- 71 MASS. GEN. LAWS ANN. CH. 64C, § 7E (2020).
- 72 VT. STAT. ANN. tit. 7, § 1010 (2013).
- 73 WASH. REV. CODE § 70.155.140 (2009).
- 74 Press Release, *State Ags and ATF Announce Initiative With Credit Card Companies To Prevent Illegal Internet Cigarette Sales*, N.Y. OFF. ATT'Y GEN. (Mar. 17, 2005), <http://www.ag.ny.gov/press-release/state-ags-and-atf-announce-initiative-credit-card-companies-prevent-illegal-Internet>.
- 75 Nat'l Ass'n Att'ys Gen., *Comment Letter on Proposed Rule on Non-Face-to-Face Sale and Distribution of Tobacco Products and Advertising, Promotion, and Marketing of Tobacco Products, Appendix 1*, at 1-2, Docket No. FDA-2011-N-0467-0110 (Feb 22, 2012), <https://www.regulations.gov/comment/FDA-2011-N-0467-0110>.
- 76 *Acceptable Use Policy*, PAYPAL, <https://www.paypal.com/webapps/mpp/ua/acceptableuse-full> (last visited Mar. 7, 2022).
- 77 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*, 6 PLoS ONE e16754 (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”).
- 78 *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.”).
- 79 Justin Ho, *New Small Businesses Have Helped P2P Payment Apps Boom During the Pandemic* (Apr. 2, 2021), <https://www.marketplace.org/2021/04/02/new-small-businesses-have-helped-p2p-payment-apps-boom-during-pandemic/>.
- 80 Nat'l Ass'n Att'ys Gen., *supra* note 75, at 3.
- 81 N.Y. PUB. HEALTH LAW § 1399-LL (2015).
- 82 Nat'l Ass'n Att'ys Gen., *supra* note 75, Appendix 2.
- 83 FedEx appears to have ceased shipments of all tobacco products in 2016, well before the 2020 amendment to the PACT Act. See Patrick Lagreid, *FedEx Ending Tobacco Shipping Next Year*, HALFWHEEL (September 22, 2015), <https://halfwheel.com/fedex-ending-tobacco-shipping-next-year/96285/>.
- 84 *List of Prohibited and Restricted Items for Shipping*, UPS, <https://www.ups.com/us/en/support/shipping-support/shipping-special-care-regulated-items/prohibited-items.page> (last visited Mar. 7, 2022).
- 85 *Tobacco Shipping is Prohibited*, FEDEx, <https://www.fedex.com/en-us/shipping/guidelines-for-shipping-tobacco.html> (last visited Mar. 7, 2022) (FedEx prohibits shipping of all tobacco products).
- 86 *Goods Exclusions for DHL Freight*, DHL, <https://www.dhl.com/global-en/home/our-divisions/freight/customer-service/dangerous-goods-and-prohibited-items.html> (last visited Mar. 7, 2022).
- 87 The PACT Act of 2009 amended and expanded the earlier Jenkins Act of 1949, which required interstate shippers to report cigarette and smokeless tobacco sales to state, local and tribal tobacco tax administrators in order to address tax avoidance and illicit sales. Much of the PACT Act addresses concerns about taxation, a topic outside the scope of this document.
- 88 Pepper et al., *supra* note 6.

- 89 The “Preventing Online Sales of E-Cigarettes to Children Act” which amended the PACT Act was incorporated into the December 2020 COVID-19 relief bill titled “Consolidated Appropriations Act, 2021,” which was signed into law on December 27, 2020. The PACT Act amendment appears on page 5136 of the Appropriations Act.
- 90 The term “cigarette” as defined in the Jenkins Act (and PACT Act) was expanded to include all e-cigarettes. This means that the reporting requirements contained in the Jenkins Act now extend also to e-cigarettes, their component parts, and accessories, and e-cigarette businesses that ship their products into state, local, and tribal jurisdictions with a relevant tax must now make regular monthly reports to those relevant authorities accounting for the volume and content of their shipments.
- 91 The Act gave the U.S. Postal Service (“USPS”) four months from December 27, 2020 (the date of enactment) to implement rules to comply with the prohibition on the mailing of e-cigarettes and decide how or whether to extend certain exceptions to these new products. On October 21, 2021, USPS published its final rule prohibiting the mailing of e-cigarettes subject to certain exceptions. See *Treatment of E-Cigarettes in the Mail*, 86 C.F.R. 58398 (Oct. 21, 2021) (to be codified at 39 C.F.R. 111), <https://www.federalregister.gov/documents/2021/10/21/2021-22787/treatment-of-e-cigarettes-in-the-mail>.
- 92 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]).
- 93 PACT Act, § 2A(b)(1), 124 Stat. 1087, 1091 (codified at 15 U.S.C. § 376a(b)(1)).
- 94 PACT Act, § 2A(b)(4)(A)(iii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(iii)).
- 95 PACT Act § 2A(b)(4)(A)(ii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(ii)).
- 96 PACT Act § 2A(a)(3), 124 Stat. 1087, 1091 (codified 15 U.S.C. § 376a(a)(3)).
- 97 18 U.S.C. § 1716E (West).
- 98 PACT Act § 2A(e)(1), 124 Stat. 1087, 1093 (codified at 15 U.S.C. § 376a(e)(1)).
- 99 PACT Act § 2A(e)(5)(C), 124 Stat. 1087, 1098 (codified at 15 U.S.C. § 376a(e)(5)(C)).
- 100 PACT Act § 2A(e)(5)(A), 124 Stat. 1087, 1097 (codified at 15 U.S.C. § 376a(e)(5)(A)).
- 101 PACT Act § 2A(e)(2)(A), 124 Stat. 1087, 1095 (codified at 15 U.S.C. § 376a(e)(2)(A)).
- 102 PACT Act § 2A(e)(3), 124 Stat. 1087, 1095 (codified at 15 U.S.C. § 376a(e)(3)).
- 103 PACT Act, 15 U.S.C. § 376a(e)(5)(C)(ii); 15 U.S.C. § 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.’”).
- 104 Jim McDonald, *UPS Will End Home Delivery of Vaping Products*, VAPING360 (Jan. 29, 2021), <https://vaping360.com/vape-news/108064/ups-will-end-home-delivery-of-vaping-products/>; FedEx, *supra* note 85.
- 105 See, e.g., Dean Jutilla, *Shipping Alternatives for the Vaping and E-Cigarette Industry*, USHIP (Feb. 11, 2021), <https://www.uship.com/blog/business-shipping/shipping-alternatives-for-vaping-e-cigarettes/>.
- 106 “Delivery sales” include sales where an order is placed over the phone, mail, or internet, and the product is shipped to the customer. 15 U.S.C. § 375(5).

- 107 “Delivery sale” could be defined as: “The sale of any tobacco product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the-counter sales transaction in a tobacco retail establishment. Delivery sale includes the sale of any tobacco product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. Delivery sale includes delivery by licensees or third parties by any means, including curbside pick-up.”
- 108 On March 15, 2022, President Joe Biden signed the 2022 Omnibus Spending Bill that, among other things, amended the Tobacco Control Act, to change the definition of “tobacco products” contained in the Act to include synthetic nicotine products. According to the new definition, “tobacco product” means “any product made or derived from tobacco **or containing nicotine from any source** that is intended for human consumption, including any component, part, or accessory of a tobacco product ...” (emphasis added). With this amendment, increasingly popular synthetic nicotine products will now come under FDA regulation. See H.R. 2471, 117th Congress (2022), <https://www.congress.gov/bill/117th-congress/house-bill/2471/text>.
- 109 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[.]”).
- 110 Nat’l Ass’n Att’ys Gen., *supra* note 75.
- 111 Nat’l Ass’n Att’ys Gen., *supra* note 75, Comment, at 2.
- 112 Nat’l Ass’n Att’ys Gen., *supra* note 75, Comment, at 9.
- 113 *Guidelines for Implementation of Article 13 (Tobacco advertising, promotion and sponsorship)*, FRAMEWORK CONVENTION ON TOBACCO CONTROL, WORLD HEALTH ORG., Third Session, FCTC/COP3(12) 33, ¶¶ 18-21 (Nov. 22, 2008), http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf.
- 114 WORLD HEALTH ORG., WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2019, Appendix VII, (2019), <https://www.who.int/publications/i/item/9789241516204>.
- 115 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)).