

RETURN TO SENDER

E-cigarette Delivery Sales in 2021



On December 27, 2020, the federal government passed an omnibus spending package and coronavirus relief law.

[The bill](#) contained legislation that includes an amendment to the definition of “cigarette” in existing laws covering delivery sales and shipments of cigarettes (including roll-your-own tobacco), and smokeless tobacco*. For the first time, these laws will cover e-cigarettes. This updated definition impacts multiple federal agencies and legal regimes; consequently, including e-cigarettes in these legal regimes will take some time to achieve full implementation.

What did Congress Accomplish in this New Legislation?

In December 2020, Congress enacted legislation dubbed [The Preventing Online Sales of E-Cigarettes to Children Act](#), which was included as part of the omnibus federal spending bill for



fiscal year 2021. The legislation extends the same protections already in place for cigarettes and smokeless tobacco to prevent online sales of e-cigarettes to children and youth. It accomplished this by amending the definition of “cigarette” that applies to the Jenkins and PACT

* 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.

Acts to include: *“any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device.”*

Because this definition now includes “any other substance,” it covers products whether or not they contain nicotine, including products such as aromatherapy, vitamin, and CBD/THC e-cigarette products. The definition explicitly includes an e-cigarette, e-hookah, e-cigar, vape pen, advanced refillable personal vaporizer, and electronic pipe, as well as *“any component, liquid, part, or accessory of [such electronic device] without regard to whether the component, liquid, part, or accessory is sold separately from the device.”*

The only exception Congress has allowed in this expansion of the definition of “cigarette” is for a product approved by the Food and Drug Administration (FDA) for sale as a tobacco cessation product or any other therapeutic purpose, and marketed and sold solely for such a purpose.

It is critical to underscore that, to date, no e-cigarette has been approved by the FDA for sale as a cessation product or for any other therapeutic purpose, and that this language does not provide an exception for a new [tobacco product authorization](#). The amended definition of “cigarette” only exempts products that clear the FDA’s different [approval process](#) for drugs and devices.

Impact on the Jenkins Act

The Jenkins Act is a 1949 law that imposes [reporting requirements](#) on any person outside a jurisdiction who sells and ships (interstate or through Indian country) cigarettes and smokeless tobacco products inside any state, Indian country, or local government that taxes these products. The person or business selling and shipping covered products to a purchaser must report the sale to the purchaser’s tribal, state, or local government tobacco tax administrator every month. Jurisdictions use the reported information to prevent [tax avoidance](#) and thwart illicit sales.

As a result of the expanded scope of the federal definition of “cigarette,” out-of-state/tribal land e-cigarette shippers must now make regular monthly reports to the relevant tribal, state, and local government tax authorities regarding the volume and content of their shipments. These out-of-state e-cigarette sellers must comply with the applicable regulators’ interpretation of whether their jurisdictions’ tax provisions require reporting for all products that now come within the amended federal definition of “cigarette.”

Including E-Cigarettes Within the PACT Act's Delivery Sales Provisions

The Prevent All Cigarette Trafficking Act (PACT Act), originally enacted in 2009, amended the Jenkins Act to impose constraints on any person who engages in interstate advertisements, sales, or shipments of cigarettes and smokeless tobacco directly to consumers—what the PACT Act calls “delivery sales.” The PACT Act [requires delivery sellers to register with](#) the U.S. Attorney General (who [has delegated](#) this authority to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)). Delivery sellers must follow all the tobacco laws of the destination jurisdiction (tribes, states, and local governments), and must pay the applicable taxes as if the products were sold in that jurisdiction. When shipping directly to consumers, sellers also must:

- Label packages containing tobacco, using language specified in the law
- Verify the age and identity of the consumer at purchase
- Use a delivery service that checks a purchaser's ID and obtains their signature at the point of delivery
- Avoid shipping any package that weighs over ten pounds
- Retain all delivery sale records for four years and make them available to investigators

Significantly, the PACT Act also created a blacklist of noncompliant delivery sellers, administered by the U.S. Attorney General/ATF, that serves to block delivery services from providing their services to listed noncompliant sellers. The PACT Act leaves open the opportunity for tribal, state, and local governments to prohibit delivery sales entirely and lets these governments nominate noncompliant sellers to the ATF list.

While these requirements generally do not apply directly to delivery services or common carriers, the largest delivery companies (e.g., UPS, FedEx, DHL) have [all recently announced](#) that they will stop shipping e-cigarettes directly to consumers in light of the recent changes to federal law. Doing so protects them from potential liability under the PACT Act's [penalties](#) and other penalties they might incur under existing enforcement [agreements](#) reached with certain states. Smaller delivery services and app-based businesses will need to determine how to comply with the law if they [continue to facilitate](#) tobacco product deliveries directly to consumers.

Impact on the Mailability of E-Cigarette Products

The PACT Act generally prohibits sellers from mailing cigarettes and smokeless tobacco directly to consumers through the U.S. mail [subject to a few exceptions](#). The 2020 Preventing Online Sales of E-Cigarettes to Children Act will now require the U.S. Postal Service to impose these same restrictions on mailings of e-cigarettes within four months of passage.

What the Recent Change to Federal Law Does Not Do

The recent amendment certainly added new layers of regulation and oversight to delivery sellers of e-cigarettes and their component parts or accessories. However, the federal laws do not forbid all such shipments, and jurisdictions that want to [protect youth](#) from accessing these devices must continue to [watch out](#) for [bad actors](#).

It is also important to recognize that this recent update to federal law does not impact delivery sales of all tobacco products—cigars, which are [popular among youth](#), and pipe tobacco remain excluded. Tribal, state, and local governments can play important roles in comprehensively regulating or prohibiting delivery sales of all tobacco products by addressing these omissions. Since certain tobacco products are [targeted at youth](#) generally — and diverse communities and those with [mental health issues in particular](#) — comprehensive policies that cover all tobacco products equally are most likely to succeed in promoting health equity and preventing initiation among vulnerable young people who may still be able to access [these products](#) online.

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