

# PREVENTING ONLINE SALES OF E-CIGARETTES TO CHILDREN ACT

OCTOBER 28, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

[To accompany H.R. 3942]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3942) to apply requirements relating to delivery sales of cigarettes to delivery sales of electronic nicotine delivery systems, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

### CONTENTS

Purpose and Summary .....	Page 1
Background and Need for the Legislation .....	2
Hearings .....	4
Committee Consideration .....	4
Committee Votes .....	4
Committee Oversight Findings .....	4
New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate .....	4
Duplication of Federal Programs .....	4
Performance Goals and Objectives .....	5
Advisory on Earmarks .....	5
Section-by-Section Analysis .....	5
Changes in Existing Law Made by the Bill, as Reported .....	5

### Purpose and Summary

H.R. 3942, the “Preventing Online Sales of E-Cigarettes to Children Act” would amend current law to tackle problems that have arisen from the online sale of e-cigarettes. Specifically, the bill would amend the Jenkins Act to extend the statute that regulates

the “delivery sale” of cigarettes to minors to cover e-cigarettes, broadly defined.<sup>1</sup>

### Background and Need for the Legislation

Excise taxes are imposed on the sale of tobacco products at the federal, state, and local levels.<sup>2</sup> The Jenkins Act regulates sales of tobacco products via interstate shipment. Congress passed the Act in 1949 in part to reduce state tax losses resulting from tax arbitrage through mail order interstate cigarette sales.<sup>3</sup> The Act requires an interstate cigarette retailer to register with states in which it advertises or sells cigarettes and to file a report with the state tax administrator providing the quantity of cigarettes sold to a customer, as well as the customer’s name and address.<sup>4</sup> Violation of the Act is a federal felony punishable by up to three years in prison.<sup>5</sup>

Starting in the mid-1990s, the Internet became a popular shopping destination for cigarette buyers because of the ability to evade regulation. A 1997 survey identified 13 online cigarette vendors.<sup>6</sup> A decade later, that number had multiplied to over 700.<sup>7</sup> To address issues pertaining to internet sales of cigarettes, Congress enacted the PACT Act.

The PACT Act became law in 2010 with broad bipartisan support. It passed the Senate by unanimous consent<sup>8</sup> and then the House by a vote of 387 to 25.<sup>9</sup> The PACT Act was enacted to help deal with problems stemming from the internet sales of cigarettes. There were two principal problems with these sales—deficiencies in verifying the age of purchasers to prevent underage sales and evasion of state and local taxes on the sales. The PACT Act addressed each of these problems. It required internet sellers of cigarettes to ensure that delivery agents checked identification in person on the delivery of the product.<sup>10</sup> It also required internet sellers to collect and remit state and local taxes on their sales of cigarettes.<sup>11</sup> In addition, the PACT Act increased the penalty for violation of the Jenkins Act from a misdemeanor with a statutory maximum of six months to a felony punishable by up to three years in prison.<sup>12</sup> The PACT Act also added civil penalties.<sup>13</sup> The PACT Act also made it

<sup>1</sup> Pub. L. No. 81–363, 63 Stat. 884 (1949), as amended by the Prevent All Cigarette Trafficking Act, or “PACT Act,” Pub. L. No. 111–154, 124 Stat. 1087 (2010).

<sup>2</sup> U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., Report Number I–2009–005, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ Efforts to Prevent the Diversion of Tobacco*, at i (2009), available at <https://www.oversight.gov/report/doj/review-bureau-alcohol-tobacco-firearms-and-explosives-efforts-prevent-diversion-tobacco>.

<sup>3</sup> *City of New York v. Smoke-Spirits.com*, 541 F.3d 425, 433 (2d Cir. 2008), rev’d sub nom. *Hemi Group v. City of New York*, 559 U.S. 1 (2010).

<sup>4</sup> 15 U.S.C. § 376 (2019).

<sup>5</sup> 15 U.S.C. § 377 (2019).

<sup>6</sup> Kurt M. Ribisi, et al., *Are the Sales Practices of Cigarette Vendors Good Enough to Prevent Sales to Minors?*, AM. J. PUB. HEALTH 940–941 (June 2002) (citation omitted).

<sup>7</sup> Christopher Banthin, Tobacco Control Legal Consortium, *Public Health Policy for Internet Cigarette Retailers*, at 1 (2006).

<sup>8</sup> 156 CONG. REC. S1480–S1487 (daily ed. Mar. 11, 2010).

<sup>9</sup> See <http://clerk.house.gov/evs/2010/roll124.xml>.

<sup>10</sup> PACT Act, 124 Stat. 1091–92, § 2A (codified at 15 U.S.C. § 376a(b)(4)).

<sup>11</sup> PACT Act, 124 Stat. 1093, § 2A (codified at 15 U.S.C. § 376a(d)).

<sup>12</sup> PACT Act, 124 Stat. 1100, § 3 (codified at 15 U.S.C. § 377(a)(1)) (“Except as provided in paragraph (2), whoever knowingly violates this chapter shall be imprisoned not more than 3 years, fined under title 18, or both.”)

<sup>13</sup> PACT Act, 124 Stat. 1100–01, § 3 (codified at 15 U.S.C. § 377). In the case of a delivery seller, civil penalties are the greater of \$5,000 (for a first violation) or \$10,000 (for subsequent violations), or 2% of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation. 15 U.S.C. § 377(b)(1)(A). In the case of

possible to levy criminal fines under title 18,<sup>14</sup> in addition to any civil penalties.<sup>15</sup>

The market for tobacco products has changed since enactment of the PACT Act in 2010 and there are particular concerns about the growing use of e-cigarettes among young people. According to the Centers for Disease Control and Prevention (CDC), e-cigarettes have been the most commonly used tobacco product among youth since 2014.<sup>16</sup> The Surgeon General has concluded that e-cigarette use among youth and young adults is a public health concern; exposure to nicotine during adolescence can cause addiction and can harm the developing adolescent brain.<sup>17</sup> The 2018 National Youth Tobacco Survey (NYTS)<sup>18</sup> found an alarming surge in the use of e-cigarettes by youth in just one year: between 2017 and 2018, there was a 78% increase in e-cigarette use among high school students and a 48% increase among middle school students.<sup>19</sup> This increase is likely a result of the recent popularity of e-cigarettes shaped like a USB flash drive; these products can be used discreetly, have a high nicotine content, and come in flavors that appeal to young people.<sup>20</sup> Of the 5 million youth who used any tobacco product in 2018, over 3.6 million youth used e-cigarettes in 2018.<sup>21</sup>

Alarming, in the summer of 2019, doctors began to see hundreds of cases where patients—often previously healthy young adults—showed up in emergency rooms, suddenly stricken with dangerous respiratory damage. As of October 1, 2019, 1,080 lung injury cases associated with using e-cigarette or vaping products had been reported to the CDC from 48 states and one U.S. territory.<sup>22</sup> Eighteen deaths have been confirmed in 15 states.<sup>23</sup>

Data from the CDC, as well as the Food and Drug Administration and the National Institutes of Health, suggest that an overwhelming majority of young people who use e-cigarettes do not get them from brick and mortar retail establishments.<sup>24</sup> Given the evi-

a common carrier or other delivery service, \$2,500 for a first violation, \$5,000 for any violation within 1 year of a prior violation. 15 U.S.C. § 377(b)(1)(B).

<sup>14</sup> See 15 U.S.C. § 377(a)(1).

<sup>15</sup> 15 U.S.C. § 377(b)(2) (“A civil penalty . . . shall be imposed in addition to any criminal penalty . . . and any other damages, equitable relief, or injunctive relief awarded by the court, including the payment of any unpaid taxes to the appropriate Federal, State, local or tribal governments.”)

<sup>16</sup> See Karen A. Cullen et al., CTRS. FOR DISEASE CONTROL & PREVENTION, *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students—United States, 2011–2018*, Morbidity and Mortality Weekly Report (Nov. 16, 2018), available at <https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm>.

<sup>17</sup> See U.S. DEP’T HEALTH & HUMAN SVCS., CTRS. FOR DISEASE CONTROL & PREVENTION, *E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General* (2016), at 5.

<sup>18</sup> The National Youth Tobacco Survey is a cross-sectional, voluntary, school-based, self-administered, pencil-and-paper survey of middle school and high school students. *Id.*

<sup>19</sup> See U.S. FOOD & DRUG ADMIN., *Youth Tobacco Use: Results from the National Youth Tobacco Survey*, available at <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey#2>.

<sup>20</sup> Cullen, et al. *supra* note 19.

<sup>21</sup> See *id.*

<sup>22</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping* (Oct. 3, 2019), available at <https://www.cdc.gov/tobacco/basic-information/e-cigarettes/severe-lung-disease.html>.

<sup>23</sup> *Id.*

<sup>24</sup> See Laura Kann, et al. CTRS. FOR DISEASE CONTROL & PREVENTION, *Youth Risk Behavior Surveillance—United States, 2017*, Morbidity and Mortality Weekly Report (Jun 15, 2018), available at <https://www.cdc.gov/mmwr/volumes/67/ss/ss6708a1.htm> (among the students who used “electronic vapor products,” only 13.6% had usually gotten their products by buying them in a store during the 30 days before the survey); U.S. FOOD & DRUG ADMIN. AND NAT’L INSTS. OF HEALTH, *Population Assessment of Tobacco and Health (PATH) Study, DS3002 Wave 3: Youth/Parent Questionnaire Data* [Public-Use Files (ICPSR 36498)] (Sep. 28, 2018), available at <https://www.icpsr.umich.edu/icpsrweb/NAHDAP/studies/36498/datadocumentation#question>

Continued

dence that internet e-cigarette vendors do not reliably screen underage purchasers, this data suggests that many young people purchase these products online. Curbing internet sales is, therefore, one way for Congress to address the prevalent use of e-cigarettes by young people. Because the Jenkins Act regulates the delivery sale of cigarettes to minors—and the PACT Act extended the Jenkins Act to cover Internet sales—the amendments proposed by H.R. 3942 are an appropriate and effective vehicle to extend coverage of the Jenkins Act to regulating the delivery sale of e-cigarettes.

### **Hearings**

The Committee held no hearings on H.R. 3942.

### **Committee Consideration**

On Tuesday, October 16, 2019, the Committee met in open session and ordered H.R. 3942 favorably reported by a voice vote, a quorum being present.

### **Committee Votes**

Clause 3(b) of rule XIII of the Rules of the House of Representatives is inapplicable because no recorded votes were taken regarding this legislation.

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate**

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this Report from the Director of the Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this Report contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

### **Duplication of Federal Programs**

No provision of H.R. 3942 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the

---

R03 YV1118: In past 30 days, how you usually got your own [electronic nicotine products/cartridges/e-liquid]; answer: 86.1% of respondents did not get them from a store).

Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3942 would amend the statute that regulates the “delivery sale” of cigarettes to minors to cover e-cigarettes, thereby protecting the health and safety of minors.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3942 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Sec. 1. Short title.* Section 1 sets forth the short title of the bill as the “Preventing Online Sales of E-Cigarettes to Children Act.”

*Sec. 2. Amendments to the Jenkins Act.* Section 2 would amend the Jenkins Act by redefining the term “cigarette” to include “an electronic nicotine delivery system.” Section 2 would further define “electronic nicotine delivery system” as a “any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling the device and includes e-cigarettes, e-hookahs, e-cigars, vape pens, advanced refillable personal vaporizers, electronic pipes,” and any component thereof. Section 2 includes exceptions for products approved by the FDA for sale as tobacco cessation products or for other therapeutic purposes, and marketed and sold solely for such purposes. Section 2 would also mandate that any seller shipping a package containing cigarettes or smokeless tobacco include on any bill of lading and on the outside of the shipping package a label stating that the contents may include nicotine. Section 2 would take effect 90 days after the date of enactment of the bill.

*Sec. 3. Nonmailability of Electronic Nicotine Delivery Systems.* Section 3 would direct the U.S. Postal Service to promulgate regulations to clarify the applicability of the prohibition on mailing cigarettes under 18 U.S.C. § 1716E to electronic nicotine delivery systems. Section 3 would make 18 U.S.C. § 1716E applicable to electronic nicotine delivery systems on and after the date the U.S. Postal Service promulgates these regulations.

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 3942, as reported, are shown as follows:

### Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

### ACT OF OCTOBER 19, 1949

AN ACT To assist States in collecting sales and use taxes on cigarettes.

#### SECTION 1. DEFINITIONS.

As used in this Act, the following definitions apply:

(1) ATTORNEY GENERAL.—The term “attorney general”, with respect to a State, means the attorney general or other chief law enforcement officer of the State.

(2) CIGARETTE.—

(A) IN GENERAL.—The term “cigarette”—

(i) has the meaning given that term in section 2341 of title 18, United States Code; and

(ii) **includes roll-your-own tobacco** *includes*—

*(I) roll-your-own tobacco* (as defined in section 5702 of the Internal Revenue Code of 1986)**[.]**;  
*and*

*(II) an electronic nicotine delivery system.*

(B) EXCEPTION.—The term “cigarette” does not include a cigar (as defined in section 5702 of the Internal Revenue Code of 1986).

(3) COMMON CARRIER.—The term “common carrier” means any person (other than a local messenger service or the United States Postal Service) that holds itself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise (regardless of whether the person actually operates the vessel, vehicle, or aircraft by which the transportation is provided) between a port or place and a port or place in the United States.

(4) CONSUMER.—The term “consumer”—

(A) means any person that purchases cigarettes or smokeless tobacco; and

(B) does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.

(5) DELIVERY SALE.—The term “delivery sale” means any sale of cigarettes or smokeless tobacco to a consumer if—

(A) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(B) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the

physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

(6) **DELIVERY SELLER.**—The term “delivery seller” means a person who makes a delivery sale.

(7) **ELECTRONIC NICOTINE DELIVERY SYSTEM.**—*The term “electronic nicotine delivery system”*—

(A) *means any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device;*

(B) *includes—*

(i) *an e-cigarette;*

(ii) *an e-hookah;*

(iii) *an e-cigar;*

(iv) *a vape pen;*

(v) *an advanced refillable personal vaporizer;*

(vi) *an electronic pipe; and*

(vii) *any component, liquid, part, or accessory of a device described in subparagraph (A), without regard to whether the component, liquid, part, or accessory is sold separately from the device; and*

(C) *does not include a product that is—*

(i) *approved by the Food and Drug Administration for—*

(I) *sale as a tobacco cessation product; or*

(II) *any other therapeutic purpose; and*

(ii) *marketed and sold solely for a purpose described in clause (i).*

[(7)] (8) **INDIAN COUNTRY.**—The term “Indian country”—

(A) *has the meaning given that term in section 1151 of title 18, United States Code, except that within the State of Alaska that term applies only to the Metlakatla Indian Community, Annette Island Reserve; and*

(B) *includes any other land held by the United States in trust or restricted status for one or more Indian tribes.*

[(8)] (9) **INDIAN TRIBE.**—The term “Indian tribe”, “tribe”, or “tribal” refers to an Indian tribe as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) or as listed pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1).

[(9)] (10) **INTERSTATE COMMERCE.**—

(A) **IN GENERAL.**—The term “interstate commerce” means commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

(B) **INTO A STATE, PLACE, OR LOCALITY.**—A sale, shipment, or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered.

[(10)] (11) **PERSON.**—The term “person” means an individual, corporation, company, association, firm, partnership,

society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company.

[(11)] (12) STATE.—The term “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

[(12)] (13) SMOKELESS TOBACCO.—The term “smokeless tobacco” means any finely cut, ground, powdered, or leaf tobacco, or other product containing tobacco, that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.

[(13)] (14) TOBACCO TAX ADMINISTRATOR.—The term “tobacco tax administrator” means the State, local, or tribal official duly authorized to collect the tobacco tax or administer the tax law of a State, locality, or tribe, respectively.

[(14)] (15) USE.—The term “use” includes the consumption, storage, handling, or disposal of cigarettes or smokeless tobacco.

\* \* \* \* \*

#### SEC. 2A. DELIVERY SALES.

(a) IN GENERAL.—With respect to delivery sales into a specific State and place, each delivery seller shall comply with—

- (1) the shipping requirements set forth in subsection (b);
- (2) the recordkeeping requirements set forth in subsection (c);
- (3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing—
  - (A) excise taxes;
  - (B) licensing and tax-stamping requirements;
  - (C) restrictions on sales to minors; and
  - (D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and
- (4) the tax collection requirements set forth in subsection (d).

(b) SHIPPING AND PACKAGING.—

(1) REQUIRED STATEMENT.—For any shipping package containing cigarettes or smokeless tobacco, the delivery seller shall include on the bill of lading, if any, and on the outside of the shipping package, on the same surface as the delivery address, a clear and conspicuous statement providing as follows: “CIGARETTES/NICOTINE/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS”.

(2) FAILURE TO LABEL.—Any shipping package described in paragraph (1) that is not labeled in accordance with that paragraph shall be treated as nondeliverable matter by a common carrier or other delivery service, if the common carrier or other delivery service knows or should know the package contains cigarettes or smokeless tobacco. If a common carrier or other delivery service believes a package is being submitted for deliv-



ery in violation of paragraph (1), it may require the person submitting the package for delivery to establish that it is not being sent in violation of paragraph (1) before accepting the package for delivery. Nothing in this paragraph shall require the common carrier or other delivery service to open any package to determine its contents.

(3) WEIGHT RESTRICTION.—A delivery seller shall not sell, offer for sale, deliver, or cause to be delivered in any single sale or single delivery any cigarettes or smokeless tobacco weighing more than 10 pounds.

(4) AGE VERIFICATION.—

(A) IN GENERAL.—A delivery seller who mails or ships tobacco products—

(i) shall not sell, deliver, or cause to be delivered any tobacco products to a person under the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery;

(ii) shall use a method of mailing or shipping that requires—

(I) the purchaser placing the delivery sale order, or an adult who is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery, to sign to accept delivery of the shipping container at the delivery address; and

(II) the person who signs to accept delivery of the shipping container to provide proof, in the form of a valid, government-issued identification bearing a photograph of the individual, that the person is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery; and

(iii) shall not accept a delivery sale order from a person without—

(I) obtaining the full name, birth date, and residential address of that person; and

(II) verifying the information provided in subclause (I), through the use of a commercially available database or aggregate of databases, consisting primarily of data from government sources, that are regularly used by government and businesses for the purpose of age and identity verification and authentication, to ensure that the purchaser is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery.

(B) LIMITATION.—No database being used for age and identity verification under subparagraph (A)(iii) shall be in the possession or under the control of the delivery seller, or be subject to any changes or supplementation by the delivery seller.

## (c) RECORDS.—

(1) IN GENERAL.—Each delivery seller shall keep a record of any delivery sale, including all of the information described in section 2(a)(2), organized by the State, and within the State, by the city or town and by zip code, into which the delivery sale is so made.

(2) RECORD RETENTION.—Records of a delivery sale shall be kept as described in paragraph (1) until the end of the 4th full calendar year that begins after the date of the delivery sale.

(3) ACCESS FOR OFFICIALS.—Records kept under paragraph (1) shall be made available to tobacco tax administrators of the States, to local governments and Indian tribes that apply local or tribal taxes on cigarettes or smokeless tobacco, to the attorneys general of the States, to the chief law enforcement officers of the local governments and Indian tribes, and to the Attorney General of the United States in order to ensure the compliance of persons making delivery sales with the requirements of this Act.

## (d) DELIVERY.—

(1) IN GENERAL.—Except as provided in paragraph (2), no delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender—

(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State;

(B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered has been paid to the local government; and

(C) any required stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

(2) EXCEPTION.—Paragraph (1) does not apply to a delivery sale of smokeless tobacco if the law of the State or local government of the place where the smokeless tobacco is to be delivered requires or otherwise provides that delivery sellers collect the excise tax from the consumer and remit the excise tax to the State or local government, and the delivery seller complies with the requirement.

## (e) LIST OF UNREGISTERED OR NONCOMPLIANT DELIVERY SELLERS.—

## (1) IN GENERAL.—

(A) INITIAL LIST.—Not later than 90 days after this subsection goes into effect under the Prevent All Cigarette Trafficking Act of 2009, the Attorney General of the United States shall compile a list of delivery sellers of cigarettes or smokeless tobacco that have not registered with the Attorney General of the United States pursuant to section 2(a), or that are otherwise not in compliance with this Act, and—

(i) distribute the list to—

(I) the attorney general and tax administrator of every State;

(II) common carriers and other persons that deliver small packages to consumers in interstate commerce, including the United States Postal Service; and

(III) any other person that the Attorney General of the United States determines can promote the effective enforcement of this Act; and

(ii) publicize and make the list available to any other person engaged in the business of interstate deliveries or who delivers cigarettes or smokeless tobacco in or into any State.

(B) LIST CONTENTS.—To the extent known, the Attorney General of the United States shall include, for each delivery seller on the list described in subparagraph (A)—

(i) all names the delivery seller uses or has used in the transaction of its business or on packages delivered to customers;

(ii) all addresses from which the delivery seller does or has done business, or ships or has shipped cigarettes or smokeless tobacco;

(iii) the website addresses, primary e-mail address, and phone number of the delivery seller; and

(iv) any other information that the Attorney General of the United States determines would facilitate compliance with this subsection by recipients of the list.

(C) UPDATING.—The Attorney General of the United States shall update and distribute the list described in subparagraph (A) at least once every 4 months, and may distribute the list and any updates by regular mail, electronic mail, or any other reasonable means, or by providing recipients with access to the list through a non-public website that the Attorney General of the United States regularly updates.

(D) STATE, LOCAL, OR TRIBAL ADDITIONS.—The Attorney General of the United States shall include in the list described in subparagraph (A) any noncomplying delivery sellers identified by any State, local, or tribal government under paragraph (6), and shall distribute the list to the attorney general or chief law enforcement official and the tax administrator of any government submitting any such information, and to any common carriers or other persons who deliver small packages to consumers identified by any government pursuant to paragraph (6).

(E) ACCURACY AND COMPLETENESS OF LIST OF NONCOMPLYING DELIVERY SELLERS.—In preparing and revising the list described in subparagraph (A), the Attorney General of the United States shall—

(i) use reasonable procedures to ensure maximum possible accuracy and completeness of the records and information relied on for the purpose of determining that a delivery seller is not in compliance with this Act;

(ii) not later than 14 days before including a delivery seller on the list, make a reasonable attempt to send notice to the delivery seller by letter, electronic

mail, or other means that the delivery seller is being placed on the list, which shall cite the relevant provisions of this Act and the specific reasons for which the delivery seller is being placed on the list;

(iii) provide an opportunity to the delivery seller to challenge placement on the list;

(iv) investigate each challenge described in clause (iii) by contacting the relevant Federal, State, tribal, and local law enforcement officials, and provide the specific findings and results of the investigation to the delivery seller not later than 30 days after the date on which the challenge is made; and

(v) if the Attorney General of the United States determines that the basis for including a delivery seller on the list is inaccurate, based on incomplete information, or cannot be verified, promptly remove the delivery seller from the list as appropriate and notify each appropriate Federal, State, tribal, and local authority of the determination.

(F) CONFIDENTIALITY.—The list described in subparagraph (A) shall be confidential, and any person receiving the list shall maintain the confidentiality of the list and may deliver the list, for enforcement purposes, to any government official or to any common carrier or other person that delivers tobacco products or small packages to consumers. Nothing in this section shall prohibit a common carrier, the United States Postal Service, or any other person receiving the list from discussing with a listed delivery seller the inclusion of the delivery seller on the list and the resulting effects on any services requested by the listed delivery seller.

(2) PROHIBITION ON DELIVERY.—

(A) IN GENERAL.—Commencing on the date that is 60 days after the date of the initial distribution or availability of the list described in paragraph (1)(A), no person who receives the list under paragraph (1), and no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the list, unless—

(i) the person making the delivery knows or believes in good faith that the item does not include cigarettes or smokeless tobacco;

(ii) the delivery is made to a person lawfully engaged in the business of manufacturing, distributing, or selling cigarettes or smokeless tobacco; or

(iii) the package being delivered weighs more than 100 pounds and the person making the delivery does not know or have reasonable cause to believe that the package contains cigarettes or smokeless tobacco.

(B) IMPLEMENTATION OF UPDATES.—Commencing on the date that is 30 days after the date of the distribution or availability of any updates or corrections to the list described in paragraph (1)(A), all recipients and all common carriers or other persons that deliver cigarettes or smoke-

less tobacco to consumers shall be subject to subparagraph (A) in regard to the corrections or updates.

(3) EXEMPTIONS.—

(A) IN GENERAL.—Subsection (b)(2) and any requirements or restrictions placed directly on common carriers under this subsection, including subparagraphs (A) and (B) of paragraph (2), shall not apply to a common carrier that—

(i) is subject to a settlement agreement described in subparagraph (B); or

(ii) if a settlement agreement described in subparagraph (B) to which the common carrier is a party is terminated or otherwise becomes inactive, is administering and enforcing policies and practices throughout the United States that are at least as stringent as the agreement.

(B) SETTLEMENT AGREEMENT.—A settlement agreement described in this subparagraph—

(i) is a settlement agreement relating to tobacco product deliveries to consumers; and

(ii) includes—

(I) the Assurance of Discontinuance entered into by the Attorney General of New York and DHL Holdings USA, Inc. and DHL Express (USA), Inc. on or about July 1, 2005, the Assurance of Discontinuance entered into by the Attorney General of New York and United Parcel Service, Inc. on or about October 21, 2005, and the Assurance of Compliance entered into by the Attorney General of New York and Federal Express Corporation and FedEx Ground Package Systems, Inc. on or about February 3, 2006, if each of those agreements is honored throughout the United States to block illegal deliveries of cigarettes or smokeless tobacco to consumers; and

(II) any other active agreement between a common carrier and a State that operates throughout the United States to ensure that no deliveries of cigarettes or smokeless tobacco shall be made to consumers or illegally operating Internet or mail-order sellers and that any such deliveries to consumers shall not be made to minors or without payment to the States and localities where the consumers are located of all taxes on the tobacco products.

(4) SHIPMENTS FROM PERSONS ON LIST.—

(A) IN GENERAL.—If a common carrier or other delivery service delays or interrupts the delivery of a package in the possession of the common carrier or delivery service because the common carrier or delivery service determines or has reason to believe that the person ordering the delivery is on a list described in paragraph (1)(A) and that clauses (i), (ii), and (iii) of paragraph (2)(A) do not apply—

(i) the person ordering the delivery shall be obligated to pay—

(I) the common carrier or other delivery service as if the delivery of the package had been timely completed; and

(II) if the package is not deliverable, any reasonable additional fee or charge levied by the common carrier or other delivery service to cover any extra costs and inconvenience and to serve as a disincentive against such noncomplying delivery orders; and

(ii) if the package is determined not to be deliverable, the common carrier or other delivery service shall offer to provide the package and its contents to a Federal, State, or local law enforcement agency.

(B) RECORDS.—A common carrier or other delivery service shall maintain, for a period of 5 years, any records kept in the ordinary course of business relating to any delivery interrupted under this paragraph and provide that information, upon request, to the Attorney General of the United States or to the attorney general or chief law enforcement official or tax administrator of any State, local, or tribal government.

(C) CONFIDENTIALITY.—Any person receiving records under subparagraph (B) shall—

(i) use the records solely for the purposes of the enforcement of this Act and the collection of any taxes owed on related sales of cigarettes and smokeless tobacco; and

(ii) keep confidential any personal information in the records not otherwise required for such purposes.

(5) PREEMPTION.—

(A) IN GENERAL.—No State, local, or tribal government, nor any political authority of 2 or more State, local, or tribal governments, may enact or enforce any law or regulation relating to delivery sales that restricts deliveries of cigarettes or smokeless tobacco to consumers by common carriers or other delivery services on behalf of delivery sellers by—

(i) requiring that the common carrier or other delivery service verify the age or identity of the consumer accepting the delivery by requiring the person who signs to accept delivery of the shipping container to provide proof, in the form of a valid, government-issued identification bearing a photograph of the individual, that the person is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by either State or local law at the place of delivery;

(ii) requiring that the common carrier or other delivery service obtain a signature from the consumer accepting the delivery;

(iii) requiring that the common carrier or other delivery service verify that all applicable taxes have been paid;

(iv) requiring that packages delivered by the common carrier or other delivery service contain any particular labels, notice, or markings; or

(v) prohibiting common carriers or other delivery services from making deliveries on the basis of whether the delivery seller is or is not identified on any list of delivery sellers maintained and distributed by any entity other than the Federal Government.

(B) RELATIONSHIP TO OTHER LAWS.—Except as provided in subparagraph (C), nothing in this paragraph shall be construed to nullify, expand, restrict, or otherwise amend or modify—

(i) section 14501(c)(1) or 41713(b)(4) of title 49, United States Code;

(ii) any other restrictions in Federal law on the ability of State, local, or tribal governments to regulate common carriers; or

(iii) any provision of State, local, or tribal law regulating common carriers that is described in section 14501(c)(2) or 41713(b)(4)(B) of title 49 of the United States Code.

(C) STATE LAWS PROHIBITING DELIVERY SALES.—

(i) IN GENERAL.—Except as provided in clause (ii), nothing in the Prevent All Cigarette Trafficking Act of 2009, the amendments made by that Act, or in any other Federal statute shall be construed to preempt, supersede, or otherwise limit or restrict State laws prohibiting the delivery sale, or the shipment or delivery pursuant to a delivery sale, of cigarettes or other tobacco products to individual consumers or personal residences.

(ii) EXEMPTIONS.—No State may enforce against a common carrier a law prohibiting the delivery of cigarettes or other tobacco products to individual consumers or personal residences without proof that the common carrier is not exempt under paragraph (3) of this subsection.

(6) STATE, LOCAL, AND TRIBAL ADDITIONS.—

(A) IN GENERAL.—Any State, local, or tribal government shall provide the Attorney General of the United States with—

(i) all known names, addresses, website addresses, and other primary contact information of any delivery seller that—

(I) offers for sale or makes sales of cigarettes or smokeless tobacco in or into the State, locality, or tribal land; and

(II) has failed to register with or make reports to the respective tax administrator as required by this Act, or that has been found in a legal proceeding to have otherwise failed to comply with this Act; and

(ii) a list of common carriers and other persons who make deliveries of cigarettes or smokeless tobacco in or into the State, locality, or tribal land.

(B) UPDATES.—Any government providing a list to the Attorney General of the United States under subparagraph (A) shall also provide updates and corrections every 4 months until such time as the government notifies the Attorney General of the United States in writing that the government no longer desires to submit information to supplement the list described in paragraph (1)(A).

(C) REMOVAL AFTER WITHDRAWAL.—Upon receiving written notice that a government no longer desires to submit information under subparagraph (A), the Attorney General of the United States shall remove from the list described in paragraph (1)(A) any persons that are on the list solely because of the prior submissions of the government of the list of the government of noncomplying delivery sellers of cigarettes or smokeless tobacco or a subsequent update or correction by the government.

(7) DEADLINE TO INCORPORATE ADDITIONS.—The Attorney General of the United States shall—

(A) include any delivery seller identified and submitted by a State, local, or tribal government under paragraph (6) in any list or update that is distributed or made available under paragraph (1) on or after the date that is 30 days after the date on which the information is received by the Attorney General of the United States; and

(B) distribute any list or update described in subparagraph (A) to any common carrier or other person who makes deliveries of cigarettes or smokeless tobacco that has been identified and submitted by a government pursuant to paragraph (6).

(8) NOTICE TO DELIVERY SELLERS.—Not later than 14 days before including any delivery seller on the initial list described in paragraph (1)(A), or on an update to the list for the first time, the Attorney General of the United States shall make a reasonable attempt to send notice to the delivery seller by letter, electronic mail, or other means that the delivery seller is being placed on the list or update, with that notice citing the relevant provisions of this Act.

(9) LIMITATIONS.—

(A) IN GENERAL.—Any common carrier or other person making a delivery subject to this subsection shall not be required or otherwise obligated to—

(i) determine whether any list distributed or made available under paragraph (1) is complete, accurate, or up-to-date;

(ii) determine whether a person ordering a delivery is in compliance with this Act; or

(iii) open or inspect, pursuant to this Act, any package being delivered to determine its contents.

(B) ALTERNATE NAMES.—Any common carrier or other person making a delivery subject to this subsection—

(i) shall not be required to make any inquiries or otherwise determine whether a person ordering a delivery is a delivery seller on the list described in paragraph (1)(A) who is using a different name or address in order to evade the related delivery restrictions; and



(ii) shall not knowingly deliver any packages to consumers for any delivery seller on the list described in paragraph (1)(A) who the common carrier or other delivery service knows is a delivery seller who is on the list and is using a different name or address to evade the delivery restrictions of paragraph (2).

(C) PENALTIES.—Any common carrier or person in the business of delivering packages on behalf of other persons shall not be subject to any penalty under section 14101(a) of title 49, United States Code, or any other provision of law for—

(i) not making any specific delivery, or any deliveries at all, on behalf of any person on the list described in paragraph (1)(A);

(ii) refusing, as a matter of regular practice and procedure, to make any deliveries, or any deliveries in certain States, of any cigarettes or smokeless tobacco for any person or for any person not in the business of manufacturing, distributing, or selling cigarettes or smokeless tobacco; or

(iii) delaying or not making a delivery for any person because of reasonable efforts to comply with this Act.

(D) OTHER LIMITS.—Section 2 and subsections (a), (b), (c), and (d) of this section shall not be interpreted to impose any responsibilities, requirements, or liability on common carriers.

(f) PRESUMPTION.—For purposes of this Act, a delivery sale shall be deemed to have occurred in the State and place where the buyer obtains personal possession of the cigarettes or smokeless tobacco, and a delivery pursuant to a delivery sale is deemed to have been initiated or ordered by the delivery seller.

\* \* \* \* \*

