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Official Publication of the International Premium Cigar & Pipe Retailers Association (IPCPR)

JUNE 2010



## PACT Act is Here

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# The PACT Act

*The latest federal tobacco regulation introduces sweeping new requirements for tobacco product shipments* >BY **BRYAN M. HAYNES**

On March 31, 2010, President Obama signed into law the Prevent All Cigarette Trafficking (PACT) Act; it takes effect 90 days after its passage on June 29, 2010.

Proposed in various forms since at least 2003, the PACT Act is directed primarily at remote tobacco sales via the Internet and U.S. Mail. In addition to preventing the U.S. Postal Service from delivering cigarettes in most cases, the act requires remote sellers to: (1) pay all applicable federal, state, local, or tribal tobacco taxes and affix any related tax stamps before delivering cigarettes or smokeless tobacco products to any customer in a state; (2) comply with various state and local laws as if the remote sellers were tobacco product retailers located in the same state as their customers; (3) register with the state and make periodic reports to state tax collection officials; and (4) verify the age and identity of customers both at purchase and delivery to stop tobacco sales to minors.

The practical effect of the PACT Act will be a near-ban on remote sales of cigarettes, including through the Internet.

## AMENDMENTS TO THE JENKINS ACT

The PACT Act amends the federal Jenkins Act. The Jenkins Act, enacted in 1949, requires any person who sells and ships cigarettes across a state line to a buyer (other than a licensed distributor) to report the sale to the buyer's state tobacco tax administrator. The PACT Act amends the Jenkins Act to cover not just cigarettes, but also RYO and smokeless tobacco. Cigars are expressly exempted from both acts. The PACT Act also amends the Jenkins Act to cover shipments to Indian reservations, where the tribe taxes the sale or use of tobacco. Another important change is that the PACT Act eliminates the exemption for shipments to licensed distributors, rendering the Jenkins Act's reporting requirements applicable to all shipments where a state or tribe taxes the sale or use of the cigarettes.

## NEW REPORTING REQUIREMENTS

Shipments covered by the PACT Act must be reported, not only to the state taxing authority, but also to the U.S.

Attorney General. In other words, under the PACT Act, any person who sells, transfers, or ships cigarettes to a state or Indian reservation that taxes the cigarettes, or who even advertises or offers such a sale, transfer, or shipment, must: (1) file registration information regarding the seller's business with the state taxing authority and the U.S. Attorney General; (2) file with the state taxing authority, by the 10th of each month, a memorandum or invoice covering each and every shipment of tobacco products, including the quantity, information regarding the recipient, and information regarding the person delivering the shipment; and (3) file the previously described information with the chief law enforcement officers of any local governments or Indian tribes that tax the sale or use of such cigarettes.

## U.S. MAIL TOBACCO RESTRICTIONS

The PACT Act provides that all cigarettes (including roll-your-own) and smokeless tobacco (but not cigars) are considered nonmailable matter, and cannot be transported through the U.S. Postal Service. The U.S. Postal Service generally is not permitted to deliver any package that it reasonably believes contains cigarettes or smokeless tobacco. An important exception to this provision is tobacco products mailed for business purposes between legally operating businesses that have all applicable state and federal licenses or permits and that are engaged in tobacco manufacturing, distribution, import, testing, etc. U.S. Postal Service deliveries from distributors to retailers may be prohibited under this provision. U.S. Postal Service deliveries to consumers are clearly prohibited under this provision, with some minor exceptions. Nonmailable tobacco products that are deposited in the mail are subject to seizure and forfeiture, as well as penalties in the amount of ten times the retail value of the nonmailable cigarettes and criminal penalties up to one year.

## REQUIREMENTS FOR REMOTE SALES

The PACT Act contains new requirements for "delivery sales," which are defined as remote tobacco sales to con-

sumers, where the order is made remotely, such as by phone, mail, or the Internet, or where the cigarettes are delivered remotely to the consumer, such as by common carrier or private delivery service. The seller in "delivery sales" must (1) comply with all state, local or tribal laws, as if the sale occurred entirely within that state or place, including laws imposing excise taxes, licensing and stamping requirements, and restrictions on sales to minors; (2) include on the bill of lading and packaging a statement indicating that the package contains cigarettes or smokeless tobacco, and that federal law requires compliance with all applicable state laws, including tax payments and stamping; (3) limit their shipments to 10 pounds; (4) take steps to ensure that minors do not receive the tobacco products, including age-verification for the person accepting the delivery and the person making the order; and (5) keep records of each "delivery sale" for four years, and provide access to those records to federal, state, and tribal officials.

#### **NONCOMPLIANT DELIVERY SELLERS**

The PACT Act also requires the U.S. Attorney General to establish a "List of Unregistered or Noncompliant Delivery Sellers" that have failed to register with the Attorney General, or who have otherwise failed to comply with the PACT Act. This non-compliant list will be disseminated to the Attorney General and tax administrator of every state, and to common carriers

that deliver packages to consumers, including the U.S. Postal Service. The PACT Act prohibits deliveries to consumers of cigarettes manufactured or sold by companies on the noncompliant list. The Act also requires state, local, and tribal governments to provide the U.S. Attorney General with the name of any delivery seller that has failed to register or make the reports required by the Act. Such sellers are included in the noncompliant list.

#### **PENALTIES AND ENFORCEMENT**

The PACT Act also expands the Jenkins Act's penalties. Under the Jenkins Act, violations are punishable as a misdemeanor, with fines up to \$1,000 and prison up to six months. Under the PACT Act, knowing violations are punishable as a felony, with prison up to three years. Any violation is also subject to civil penalties of \$5,000 for the first violation and \$10,000 for each subsequent violation, or two percent of the company's gross sales during the year predating the violation.

The U.S. Attorney General enforces the PACT Act through actions filed in federal court. State, local, and tribal governments also have the authority to enforce the PACT Act in federal court, although the Act specifically provides that it does not constitute a waiver of tribal sovereign immunity. Companies that hold federal tobacco manufacturing permits are also permitted to bring actions in federal court to enjoin violations of the Act.

The PACT Act authorizes the Bureau of Alcohol, Tobacco and Firearms to conduct inspections of manufacturers' records. It also requires the Bureau to create regional tobacco trafficking teams and to conduct undercover operations. It also requires the creation of a computer database to monitor remote sales.

#### **SPECIAL PROVISION FOR TRIBAL SALES**

The PACT Act contains a special provision for tribal sales. It provides that the Act should not be construed as affecting any state/tribal compacts regarding tobacco tax collection. It also does not modify any federal restrictions on state regulatory authority regarding the sale of cigarettes on Indian reservations. The Act does, however, specifically provide that the U.S. Attorney General has the authority to enforce the Act on Indian reservations.

#### **CONCLUSION**

The PACT Act imposes sweeping new changes for anyone shipping cigarettes, roll-your-own or smokeless tobacco across state lines, and imposes particularly stringent limitations on remote sales. The PACT Act raises particularly thorny issues with respect to shipments to entities that are not state licensed, such as retailers or entities having only a tribal license. Manufacturers, distributors and retailers falling into the foregoing categories of merchants should contact counsel before proceeding with any such shipments after June 29. **S**

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