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Ensuring PACT Act & Excise Compliance

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- **State Tobacco Excise Taxes and Common Issues**
- **PACT Act Compliance and Common Issues**

State Tobacco Excise Taxes

- Is my product covered?
 - State-by-state analysis
 - Carefully consider the product definitions
- How is the tax calculated?
 - Different excise tax bases: by unit, weight, volume, or value (e.g., ad valorem)
 - Where am I in the distribution chain? (e.g., wholesaler, retailer)
- Discounts for modified risk tobacco products (“MRTPs”)



- Who pays the tax?
 - State-by-state analysis – Manufacturer, distributor/wholesaler, subjobber, manufacturer's representative, sales representative, unclassified acquirer, retailer?
 - Carefully consider the definitions
 - Relationship to licensing and reporting obligations
- Evidence of tax payment?
 - Stamps? Labels? Receipts?
- When is the tax paid?
 - Receipt in the state?
 - Sale/shipment into the state? to a distributor? to a retailer? to a consumer?

- Designate personnel to oversee compliance with state excise tax licensing, reporting, collection and payment requirements
- Calendar recurring monthly reporting deadlines
- Consider conducting an internal audit to see if you are in compliance in the states where you sell tobacco products:
 - Do you need a license?
 - Are you handling tax-not-paid products appropriately?
 - Are the entities in your supply chain appropriately licensed? Do you use third-party service providers?
 - Consider whether your audit should be privileged (i.e., conducted by an attorney)
- Recordkeeping
 - Maintain proof of compliance including copies of any required applications, licenses, reports, and returns
 - Maintain customer licenses, invoices, bills of lading

Preventing All Cigarette Trafficking Act (“PACT Act”) 15 U.S.C. § 375 *et seq.*

- **1949**
 - Congress enacts a law to “assist States in collecting sales and use taxes on cigarettes,” popularly known as the “Jenkins Act”
 - Requires any person selling or disposing of cigarettes in interstate commerce to anyone other than a licensed distributor in a state taxing the sale or use of cigarettes to report shipments to state tobacco tax administrators
- **1955**
 - Congress amends the Jenkins Act by adding and editing key definitions and adding requirements to not only report shipments to State tax administrators, but also register with them by filing “statements”

- **2010**
 - Congress enacts the Preventing All Cigarette Trafficking Act (“PACT Act”), which amends the Jenkins Act by:
 - Replacing the key definitions section to include, in part, delivery sales, roll-your-own tobacco (included in definition of “cigarette”), and smokeless tobacco
 - Adding a registration requirement with the U.S. Attorney General, in addition to State tax administrators
 - Adding additional requirements for delivery sellers, including a non-preemption clause stating that the PACT Act does not supersede state law otherwise prohibiting delivery sales
 - Amends Ch. 83 of Title 18, United States Code by adding § 1716E prohibiting cigarettes and smokeless tobacco from being mailed through USPS
- **2020**
 - Congress enacts the Preventing Online Sales of E Cigarettes to Children Act amending the Jenkins Act by including ENDS in the definition of “cigarette” and making ENDS nonmailable under 18 U.S.C. § 1716E upon the USPS’ promulgation of related regulations (which USPS later promulgated)

- **Cigarettes**

- “...any roll of tobacco wrapped in paper or in any substance not containing tobacco; and ... any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette...”
- Does NOT include a “cigar” or “any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette” as described above.



- **Roll-Your-Own Tobacco** (included as a “cigarette”)

- “...any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof.”



- **Electronic Nicotine Delivery Systems** (included as a “cigarette”)

- “...any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device ... 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 ... 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; an (ii) marketed and sold solely for a purpose described in clause (i).”



- **Smokeless Tobacco** (defined separately from a “cigarette”)

- “...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.”



- **Any person who sells, transfers, or ships for profit cigarettes, roll-your-own tobacco, ENDS, or smokeless tobacco in interstate commerce**, whereby such products are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of such products or who advertises or offers such products for such sale, transfer, or shipment
- **Delivery sellers** with respect to delivery sales into a specific State or place
 - A “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.
 - NOTE: The term “consumer” can include businesses that are not “lawfully operating.”
- **Common carriers and other delivery services** in the context of delivery sales (e.g., DHL Holdings USA, Inc.; DHL Express (USA), Inc.; United Parcel Service, Inc.; Federal Express Corp.; and FedEx Ground Package Systems, Inc.)

PACT Act: Federal Registration Requirement

- The Attorney General has delegated to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) authority to administer and enforce the PACT Act
- A covered person must register with the ATF by filing ATF Form 5070.1
- Covered persons submit the registration information via e-mail to PACTActregistrationinbox@atf.gov or via mail to:

Bureau of Alcohol, Tobacco, Firearms and Explosives
Alcohol and Tobacco Enforcement Branch
99 New York Avenue, NE., Mailstop 6.N-509
Washington, D.C. 20226 USA

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0098 (09/30/2023)

Prevent All Cigarette Trafficking (PACT) Act Registration Form

Any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco or who advertises or offers cigarettes or smokeless tobacco for such a sale, transfer, or shipment shall first file with the Attorney General of the United States and with the tobacco tax administrators of the State and place into which such shipment is made, advertised, or offer is disseminated.

Section I - Principal Business Information

1. Name of Person (See Definition #1)		2. Name of Person (If an Individual) (Last, first, middle)		
		Last	First	Middle
3. Trade Name(s)		4. Principal E-Mail Address		
5. Address of Principal Place of Business		6. Telephone Number for Principal Place of Business	7. Principal Website Address	

Section II - Additional Places of Business

8a. Name of Additional Place of Business		9a. Website Address for Additional Place of Business		
10. Address of Additional Place of Business		11a. Telephone Number at Additional Location		
a. Street Address	City	State	Zip Code	
8b. Name of Additional Place of Business		9b. Website Address for Additional Place of Business		
10. Address of Additional Place of Business		11b. Telephone Number at Additional Location		
b. Street Address	City	State	Zip Code	
8c. Name of Additional Place of Business		9c. Website Address for Additional Place of Business		
10. Address of Additional Place of Business		11c. Telephone Number at Additional Location		
c. Street Address	City	State	Zip Code	

Section III - Agent Authorized to Accept Service

12a. Name of Agent Authorized to Accept Service on Behalf of the Person (Person or Business Entity)	
13a. Address of Authorized Agent	14a. Telephone Number of Authorized Agent
12b. Name of Agent Authorized to Accept Service on Behalf of the Person (Person or Business Entity)	
13b. Address of Authorized Agent	14b. Telephone Number of Authorized Agent

NOTE: In addition to registering with the Bureau of Alcohol, Tobacco, Firearms and Explosives, the PACT Act also requires a person to register with each State tobacco tax administrator in which the person sells and/or advertises cigarettes and/or smokeless tobacco products.

ATF Form 5070.1
Revised October 2020

PACT Act: State Registration Requirement

- A covered person must register with the tobacco tax administrators of the State and place into which such shipment, advertisement, or offer is made
- Some states require registration with State AG's Office



ALABAMA DEPARTMENT OF REVENUE
BUSINESS & LICENSE TAX DIVISION
TOBACCO TAX SECTION
P. O. Box 327555 • Montgomery, AL 36132-7555 • (334) 242-9627
www.revenue.alabama.gov

TOB: JEN-REG 1/13

Reset

Jenkins Act Registration Form
As Amended by the PACT ACT of 2009

THIS FORM MUST BE COMPLETED BY ANYONE DISTRIBUTING CIGARETTES OR SMOKELESS TOBACCO INTO ALABAMA.

COMPANY NAME: _____ TELEPHONE NUMBER: (____) ____-____
ADDRESS: _____ COMPANY E-MAIL ADDRESS: _____
CITY: _____ STATE: _____ ZIP: _____
WEBSITE ADDRESS(ES): _____

TRADE NAMES (IF ANY): _____
ADDRESS AND TELEPHONE NUMBER OF OTHER PLACES OF BUSINESS: _____

REGISTERED AGENT FOR SERVICE OF PROCESS
(Agent within the State authorized to accept service on behalf of the person.)

Agent Name: _____
Company: _____
Address: _____
City: _____ State: _____ Zip: _____
Telephone Number: (____) _____ Fax Number: (____) _____
Signature of Registered Agent: _____

PACT Act: State Reporting Requirement

- No later than the 10th of each month, a covered person must file with the tobacco tax administration of the State into which such shipment is made a “memorandum or a copy of the invoice covering each and every shipment of [covered products] made during the previous calendar month into such State....”
- Copies of the same memoranda and invoices must be filed with the tobacco tax administrators and chief law enforcement officers of localities and tribes, within the borders of such State, that impose their own taxes on covered products
- Some States have separate PACT Act reporting forms, while others incorporate PACT Act reporting requirements into their standard tax reporting forms
- Some States have separate PACT Act reporting forms for each type of covered product

The image displays two Pennsylvania PACT Act reporting forms. The top form is REV-1163, titled 'MONTHLY PACT ACT REPORT CIGARETTE SALES REPORT'. The bottom form is REV-1164, titled 'MONTHLY PACT ACT REPORT TOBACCO/ELECTRONIC DELIVERY SYSTEM SALES REPORT'. Both forms are divided into three main sections: SECTION I (BUSINESS INFORMATION), SECTION II (SALES INTO PENNSYLVANIA), and SECTION III (CERTIFICATION). SECTION I includes fields for Business Name, Mailing Address, City, State, ZIP Code, Country/Territory, Business Telephone Number, Contact Name, Email Address, and Contact Telephone Number. SECTION II includes a table for sales entries with columns for Date, Invoice Number, License Number, FEIN, Brand, UPC, Type, Total Weight/Purchase Price, Quantity, Wholesale List Price, Buyer, Buyer Address, Sale Price, Deliverer, and Deliverer Address. SECTION III is a certification statement signed by the Owner/Officer. The forms also include a 'START HERE' arrow, a 'NEXT PAGE' button, and a 'PRINT FORM' button.

PACT Act: Nonmailability

- Cigarettes, roll-your-own tobacco, smokeless tobacco, and ENDS are nonmailable through the USPS, unless an exception applies.
- In general, the discrete statutory exceptions to the nonmailability provisions cover the subjects of:
 - cigars;
 - noncontiguous States (Hawaii and Alaska);
 - business/regulatory purposes;
 - certain individuals (a/k/a noncommercial purposes);
 - consumer testing; and
 - public health.



PACT Act: Delivery Sale Requirements

- All State, local, tribal and other laws applicable to cigarettes, roll-your-own tobacco, ENDS, and smokeless tobacco apply as if the delivery sales occurred entirely within the specific State and place
- Bill of Lading and shipping package statement/label
 - “CIGARETTES/NICOTINE/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS”
- Weight restriction
 - No single sale or delivery of any covered products weighing more than 10 pounds
- Age Verification
 - Signature upon delivery by the adult purchaser who placed the order
 - Government ID required upon delivery
 - Acceptance of delivery sale order only after obtaining full name, DOB, and residential address of purchaser; and verifying information in a commercially available database consisting primarily of data from government sources
- Records
 - Keep record of every delivery sale until the end of the 4th calendar year beginning after the date of the delivery sale
- State or local excise taxes must be paid prior to delivery

- For knowing violations of the PACT Act, violators can be subject to criminal penalties of up to 3 years imprisonment, or criminal fines, or both, as well as injunctive relief to restrain violations.
- For delivery sellers, including those who sell to businesses that are not “lawfully operating,” such violators can be subject to civil penalties of the greater of: \$5,000 for the first violation and \$10,000 for any other violation; or, for any violation, 2 percent of the gross sales of covered products of the delivery seller during the 1-year period ending on the date of the violation.
- In addition to the federal government, State AGs, local government or Indian tribes who levy an excise tax on covered products, and TTB-permitted tobacco manufacturers, importers, and export warehouse proprietors can also seek injunctive relief and civil penalties for violations.
- ATF can place noncompliant persons on the PACT Act Noncompliant List, which is distributed to the attorneys general and tax administrators of each State and common carriers and other delivery services, including USPS.

- Designate personnel to oversee compliance with key PACT Act processes.
- Calendar recurring monthly reporting deadlines including reminders
- Consider conducting an internal audit to see if you are in compliance.
- If you conduct delivery sales, ensure you comply with all delivery sale requirements
 - Check your order funnel for compliance
 - Ensure that your business customers are “lawfully operating” through due diligence
- Recordkeeping
 - Maintain proof of compliance including copies of as submitted registration & reporting forms
 - Maintain customer licenses, invoices, bills of lading



Questions?