ONLINE SALES OF E-CIGARETTES & OTHER TOBACCO PRODUCTS

Internet sales of commercial tobacco products to underaged individuals can significantly undermine efforts to protect public health.[1] Young people are much more likely to become addicted to commercial tobacco, in part because adolescent brains are more sensitive to nicotine.[2]

Strong laws restricting the sale of tobacco products to youth and young adults play an essential role in stopping a lifetime of addiction and tobacco-related disease before it starts. Yet internet retailers can skirt laws designed to prevent brick-and-mortar retailers from selling to young people. Comprehensive regulation must address not only underaged access to tobacco products via fixed retail establishments, but also internet sales, including the growing internet-app delivery services available today which have proven popular with young people. With the boom in popularity of e-cigarettes — a product widely available online[3] — the public health community has a new reason to address illegal online sales of tobacco to youth and young adults, especially given the rapidly increasing use of e-cigarettes among young people and emerging concerns about the serious health risks associated with e-cigarette use.[4]

Enforcement of existing law against online sellers is more costly and complicated than traditional enforcement against in-person sellers. 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 for internet-based tobacco retailers exists. Unfortunately, substantial evidence has shown that minors can and do acquire tobacco products from internet vendors.[5]

This publication provides an overview of available measures, including state and federal laws that have sought to prevent the online sale of tobacco to young people since the problem first emerged.[6] We begin with a brief overview of the current landscape of internet and delivery-based commercial tobacco product sales. Next, we provide a summary of state laws and legal challenges those laws have faced. We then describe efforts to regulate internet sales of tobacco through voluntary agreements with some recognized key players in the field, including credit card and package delivery companies. Finally, we highlight federal laws that have attempted to address online sales to underage persons, including the Prevent All Cigarette Trafficking Act (PACT Act) and the Family Smoking Prevention and Tobacco Control Act. Given the significant challenges these efforts have faced and their failure to prevent widespread sales of online tobacco products to young people, a complete prohibition on all internet sales of tobacco products appears to be the most effective way to substantially prevent such sales and protect the public health gains accomplished by age-of-sale laws. Under the Tobacco Control Act, the FDA has the authority to take such action, but states are taking the lead in the absence of federal action.[7]

Current Landscape of Internet and Delivery-Based Commercial Tobacco Product Sales

In addition to classic mail-order sales and the many internet-based retailers of tobacco products, the growing prevalence of app-based retailers and delivery services especially popular with young people heighten the need for regulatory approaches capable of meeting today's changing landscape. On-demand delivery retailers that rely on internet-app based customer orders — like GoPuff, Saucey, Postmates, Storelist, and PinkDot, to name a few — may initially skirt tobacco retailer laws by avoiding detection as tobacco retailers. However, because many of these relatively new internet-based, on-demand retailers or delivery services do not enjoy the "common carrier" exemption under Federal law discussed below, states and local jurisdictions likely have broad authority to regulate them and even prohibit their business in tobacco products.

These new businesses do not fit a normal commercial, fixed location, walk-in tobacco retailer model, even when selling tobacco products. Go Brands, Inc. (dba GoPuff), which bills itself as the "first digital convenience retailer," is representative of this new breed of internet-based, delivery-on-demand retailers that may be uncaptured by many existing regulations in this domain. Originally an on-demand hookah product delivery-based retailer in Philadelphia, Pennsylvania, the company has rapidly expanded to delivering typical convenience store items such as food, snacks, drinks, over-the-counter drugs, and in some markets, liquor and tobacco products, operating out of warehouses in over one hundred U.S. cities, strategically positioned close to colleges and universities.[8] Unlike some on-demand delivery app-based businesses, GoPuff typically leases local facilities or warehouses in the cities in which it operates. 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 warehouse locations. Consumers place orders, including tobacco products in some locations, directly from GoPuff's online website or its app and, according to GoPuff, get the items delivered in approximately one half-hour or less.

In 2019, investigators in St. Paul, Minnesota found GoPuff stocking, and selling or offering for sale, tobacco and tobacco-related products, including e-cigarettes, without having obtained or applied for the city's required tobacco retailer license. Saucey, another on-demand delivery-based retailer, deals almost entirely with liquor and tobacco products, delivering these products in various major cities, including several in California, as well as in New York City, Dallas, Washington, DC, and Chicago. As with GoPuff, customers may place orders from Saucey's website or from an app, and have products delivered directly to them.

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 market in June 2015. By the end of 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 is particularly concerning as Juul e-cigarettes, made with more-easily-absorbed, potent nicotine salts, typically deliver a very high concentration of nicotine. On Juul's website, consumers are able to purchase e-cigarettes, which are shipped directly to them. Notably, consumers are encouraged (with the promise of a free product or discounts) to enter into a subscription service that automates their "free" product shipments. The behemoth, 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. While many online retailers, including Juul,[9] claim to verify age by checking customers' IDs at purchase and delivery, effective compliance monitoring and enforcement is difficult. Moreover, studies indicate that these age-verification systems are largely ineffective at curtailing youth access to tobacco products via the internet.[10]

In addition to traditional internet platforms, a limited but 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.[11] Between 2016 and 2017 alone, according to one study, revenues generated from illicit online tobacco trade increased over 150 percent.[12] 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."[13] The increased availability of cheap tobacco products via the illicit online market disproportionately impacts low-income communities and price-sensitive youth.[14]

Local Action

Lawsuits

In the wake of alarming reports of vaping-related lung injuries, the public health community and government officials at both state and local levels are taking measures to further curb youth and young adult access to e-cigarettes. Some 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,[15] while a few are pursuing other legal avenues, including litigation. Even in the absence of specific regulation on internet-based sales, states and local jurisdictions may employ litigation against online tobacco sellers to enforce their age-of-sale laws. As discussed below, New York City and Chicago are examples of local jurisdictions that have used this option.

In October 2019, the City of New York (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 below the age of 21.[16] The suit claims that the defendant retailers failed to employ available age-verification services, which check databases of government records to verify the age and identity of purchasers. In July and August, according to the suit, NYC conducted test purchases from online retailers with the assistance of two NYC residents over the age of 18 but under 21. The underage purchasers created an email account and used prepaid Visa gift cards to purchase e-cigarette products from each defendant.[17] The deliveries of these products were made without any identity and age verification and without obtaining a signature.[18] The twenty-two companies named in the lawsuit are based outside the State of New York. The suit seeks 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."[19] This case is ongoing.

Prior to New York City's lawsuit, Chicago also used litigation to advance its public health interest in limiting youth and young adult access to online vaping products. To date, the City has filed four lawsuits against online tobacco product retailers alleging that they illegally sold vaping products to Chicago residents under the age of 21.[20] 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. While this lawsuit is ongoing, it already has resulted in three of those sellers ceasing sales of e-liquids entirely and one leaving the Chicago market area.[21]

In February 2019, Chicago filed another lawsuit in Cook County Circuit Court, this time against twenty-seven online retailers.[22] The defendants, according to the suit, "actively market their products to Minors, both on Defendants' websites and through social-media campaigns."[23] Similar to the November 2018 suit, the February 2019 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 and was able to order "nicotine-containing e-liquid" from each of the defendants' websites and had them delivered to the bureau's office.[24] 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,"[25] 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."[26] This case is also ongoing. 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."[27] The City of Chicago has since filed two other lawsuits against online tobacco retailers.[28]

Regulation by Local Jurisdictions

Besides litigation, local jurisdictions may also take appropriate legislative measures to restrict access to tobacco products via the internet. In June 2019, San Francisco, which is home to the corporate headquarters of Juul Labs, Inc., became the first local jurisdiction in the nation to completely ban sales of e-cigarettes.[29] In addition to prohibiting brick-and-mortar retail sales of e-cigarettes that have not received FDA approval, San Francisco also prohibits online sales and any form of distribution of these products, including any flavored tobacco products, to any person in the city. Internet-based businesses are prohibited from shipping or delivering flavored tobacco products and e-cigarettes to San Francisco residents.

In instances where state law does not limit local authority on the issue, local jurisdictions interested in curbing youth access to online tobacco products may completely prohibit direct-to-consumer tobacco product shipments or deliveries within their jurisdiction. This would include prohibiting the sale and delivery of tobacco and tobacco-related products through on-demand, internet-based delivery businesses. Local jurisdictions may require local tobacco retailer licenses for all sales and may define "tobacco retailer" to include only fixed location retailers that serve walk-in customers, requiring all sales to occur in face-to-face transactions. Federal law does not restrict Tribal, state, or local authority to take such action. Given the enforcement challenges associated with internet-based, 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.

Local jurisdictions may also consider options short of a complete prohibition; however, these, too, would likely present increased enforcement challenges. For instance, a local jurisdiction could require a tobacco retailer license for any internet-based business that intends to sell or deliver tobacco and tobacco-related products within the jurisdiction. A licensing structure might enable the city or county to better regulate such businesses and implement an effective enforcement process. A city or county could also choose to regulate the delivery services or drivers that deliver tobacco products within its jurisdiction by requiring – for instance – certain age-verification processes. While federal law, as discussed below, preempts state and local authority to regulate common carriers in some circumstances, internet-based on-demand retailers, which typically use their own drivers and are not common carriers, are likely not covered by the federal exemption. Finally, in the absence of laws specifically regulating internet- and delivery-based businesses, local jurisdictions may, like the cities of Chicago and New York, enforce existing minimum legal sales age laws by pursuing litigation against such businesses that sell or deliver tobacco or tobacco-related products to underage persons within their jurisdiction.

State Action

While cities and counties can take significant measures to curb access to tobacco products online, states are perhaps 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. 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.[30] 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.

Legal Challenges

Federal courts have upheld the constitutionality of internet and delivery sales prohibitions, 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, and the court held that it did not.[31] In general, the "Dormant Commerce Clause" refers to the concept that the Commerce Clause of the U.S. Constitution declares regulation of interstate commerce — the flow of goods and services across state borders – to be the responsibility of the federal government, and state laws may not interfere with it too much. However, states already have the power and the responsibility to protect the health and well-being of their citizens. As such, courts balance the state's interest in promoting health against the federal interest in regulating commerce.[32]

In this New York cigarette delivery-sale prohibition case, the balance came out in favor of the state law. This conclusion was based in part on the significant public health benefits of preventing youth access to cigarettes and reducing cigarette consumption. Similar urgent public health concerns about rising youth use of e-cigarettes would support similar policies today.

Federal statutes, however, can limit states' authority to impose limits on delivery companies (rather than the businesses selling the products). In 2008, the Supreme Court of the United States struck down a Maine law which, among other things, required internet-based tobacco retailers to use a delivery service that checks identification at delivery.[33] The court held that the Federal Aviation Administration Authorization Act (FAAAA) — a federal law de-regulating airlines and common carriers like FedEx and UPS — preempted the state law. Even though Maine's law did not directly regulate the carriers, the court held that it had enough of an effect on the market for delivery services to interfere with the purpose of the de-regulation law. The case suggests that any state law that requires specific actions by a common carrier might be preempted by the FAAAA. (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).[34] The PACT Act, discussed below, also limits state authority to regulate some major common carriers.

New York and other states have successfully pursued litigation against common carriers such as United Parcel Service (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 UPS guilty of knowingly shipping contraband cigarettes to unauthorized recipients in New York State and City in violation of various laws and agreement, including the Contraband Cigarette Trafficking Act (CCTA), the PACT Act, and the Assurance of Discontinuance (AOD) agreement signed with the state. Significantly, the court held that because UPS had violated, for several years, the AOD agreement under which it agreed to take measures to prevent unlawful shipments of cigarettes, it was not entitled to the PACT Act's delivery services exemptions.[35]

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. South Dakota had filed suit against several major online retailers with no employees or real estate in South Dakota, alleging that these sellers violated state law requiring them to collect and remit sales tax "as if the seller had a physical presence in the State." The online retailers engaged in sufficient business within South Dakota to satisfy the state law's minimum sales or transactions requirement, but did not collect state sales tax. The South Dakota Supreme Court had affirmed the Circuit Court's summary judgment for the online retailers, holding that the South Dakota law violated the Dormant Commerce Clause. In vacating this judgment and ruling for South Dakota, the U.S. Supreme Court overturned its prior controlling precedent, *Quill v. North Dakota*,[36] which had required physical presence within a state, holding that it was unsound and incorrect in light of changed market circumstances and the inequities between retailers it encourages.[37]

Hence, while some state laws, especially those regulating common carriers, may be preempted, 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. Currently, at least twelve states have such a law: Arizona,[38] Arkansas,[39] Connecticut,[40] Indiana,[41] Maine,[42] Maryland,[43] New York,[44] Ohio,[45] South Dakota,[46] Utah,[47] Vermont[48] and Washington.[49] Six of these states, Arkansas, Maine, South Dakota, Utah, Vermont, and Washington, have enacted more comprehensive laws, extending these prohibitions to e-cigarettes. (At the end of this document 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.[50] At the group's request, many of the major credit card companies issued voluntary policies to prohibit the use of their cards for the illegal sale of cigarettes over the internet.[51] PayPal modified its acceptable use policy to entirely prohibit the use of its platform to purchase cigarettes.[52] Other companies required only that their merchants certify in writing that they will comply with state and federal laws. Some companies agreed to terminate relationships with merchants that were in violation of the law. Although these promises 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 agreement.[53] Unfortunately, other payment methods have crept in to fill the void, such as checks, money orders, and gift cards.[54] Moreover, these agreements are of limited effectiveness or utility in the present regulatory context involving the rapid rise in popularity of e-cigarettes and other non-cigarette tobacco products, which are not taken into account in these agreements. Online vendors of products such as Juul can, and do, accept credit card payments because the voluntary agreements do not apply to this category of products.

Also in 2005, the group of Attorneys General and the ATF turned their attention to the companies that deliver internet-purchased tobacco.[55] Under New York state law, it is illegal for any carrier to knowingly deliver cigarettes directly to consumers.[56] The Attorney General of New York investigated FedEx, UPS and DHL to determine whether these carriers were delivering cigarettes to consumers in violation of that law. In 2005 and 2006, the delivery carriers signed agreements with the Attorney General of New York, promising to, among other things, amend their policies to prohibit shipments of cigarettes to consumers anywhere in the U.S.[57] However, these agreements did not limit the shipment of tobacco through the U.S. mail (now independently forbidden by the PACT Act, discussed below), and they do not apply to tobacco products other than cigarettes. In addition, problems with enforcement of voluntary agreements continue to this day. New York State and City have filed various lawsuits against FedEx and UPS alleging violation of these agreements as well as of state and federal statutes. The lawsuit, *State v. United Parcel Service*, discussed above, is one such suit, where the court found that UPS had repeatedly failed to honor its AOD agreement with New York State. These suits highlight the significant enforcement challenges individual cities and states face when trying to regulate the shipment 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. While states (and localities) can take significant steps to fill the remaining gaps, Congress, and particularly the FDA, may be best positioned, in the long run, to close many of these loopholes. Given the challenges faced in developing effective age-verification methods, a complete prohibition on internet sales of tobacco and related products including e-cigarette components, whether or not they include nicotine, might be the only way to effectively prevent large-scale sales to youth. Such a prohibition would be consistent with international norms as established in the World Health Organization Framework Convention on Tobacco Control.[58] 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.[59] Under existing federal law, the FDA has the authority to prohibit internet sales of commercial tobacco.[60]

PACT Act

The Prevent All Cigarette Trafficking Act of 2009 (PACT Act) was an important step in the regulation of internet sales of tobacco,[61] but opportunities for improvement remain. Significantly, while the Act regulates (and mostly prohibits) internet sales of cigarettes[62] and smokeless tobacco, it omits e-cigarettes and other tobacco products from similar restrictions. In addition, it leaves serious loopholes regarding delivery carriers, and constrains state authority to fill the gaps.

The PACT Act:

- Prohibits the online sale of cigarettes and smokeless tobacco to anyone under the legal sales age in their state;[63]
- Requires that an internet-based retailer who ships tobacco:
  - Label packages as containing tobacco;[64]
  - Verify age and identity at purchase;[65]
  - Use a method of mailing or shipping that checks ID and obtains a customer signature at delivery;[66] and
  - Pay state taxes and comply with state laws as if the sale occurred within the state, including laws related to excise taxes, licensing and tax stamping, and restrictions on sales to minors;[67]

- Prohibits the shipment and transport of cigarettes and smokeless tobacco through the U.S. mail;[68]
- 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;[69]
- Preserves the authority of states to prohibit internet-based retailers from shipping cigarette and smokeless tobacco products to consumers and residential addresses within their states.[70]

Unfortunately, the Act leaves significant loopholes with regard to "common carriers" like traditional delivery companies UPS and FedEx. With respect to delivery-sales of cigarettes and smokeless tobacco, it prohibits state, local, and tribal governments from enacting laws to require common carriers to check IDs or obtain signatures at delivery.[71] In addition, although it generally prohibits delivery carriers from accepting a shipment from a retailer on the list compiled by the Attorney General,[72] the Act exempts the major common carriers from this provision.[73] It also exempts the major common carriers from any state law prohibiting delivery of tobacco.[74] But internet-based on-demand retailers, such as GoPuff, discussed above, which deliver products directly to customers using their own drivers, are thus not "common carriers," and are likely not covered by the PACT Act's exemptions for "common carriers." Hence, they likely remain subject to state and local regulation.

The PACT Act highlights an opportunity for state action. As mentioned above, it specifically allows states to prohibit sellers from making "delivery sales" of cigarettes and smokeless tobacco — sales where an order is placed over the phone, mail, or internet, and the product is shipped to the customer. Unfortunately, the PACT Act limits the ability of states and local governments to *regulate* the common carriers involved in these delivery transactions.[75] Though the Act allows a state to make it illegal for internet-based *retailers* to ship cigarette or smokeless tobacco orders to customers, it prohibits the state from regulating many of the biggest companies that actually conduct deliveries, complicating enforcement efforts. However, it is important to note that this preemption of control over common carriers currently appears to apply only to shipments of cigarettes and smokeless tobacco, allowing Tribes, states, and local governments more leeway in dictating conditions on delivery of e-cigarettes and other tobacco products.[76]

The enactment of the PACT Act was a significant step forward in curbing online sales of certain tobacco products to young people, but it leaves large holes that have yet to be filled by the FDA and the majority of states. It is primarily focused on regulating retailers who engage in delivery sales, and exempts carriers who deliver the product from additional state authority, complicating enforcement for states. More importantly, it only covers cigarettes and smokeless tobacco, not e-cigarettes, cigars or other tobacco products. And unfortunately, the Act limits states' power to close some of these gaps. Moreover, even if these gaps are filled, the PACT Act remains a limited approach to effectively curbing youth access to online tobacco products since substantial evidence, as noted, indicates that age-verification processes are largely ineffective.

TCA

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act or TCA) gives clear instructions to the FDA: adopt a regulation to control internet sales of tobacco products to youth.[77] The Tobacco Control Act established a deadline for this regulation: October 1, 2011. More than eight years later, the FDA has failed to propose a regulation consistent with this duty.

In 2012, the FDA issued what is called an "Advance Notice of Proposed Rulemaking" to ask for comments from the public on how it could best regulate internet sales of tobacco. Among others, the National Association of Attorneys General (NAAG) submitted a comment to the FDA on this topic.[78] NAAG explained that despite the enactment of the PACT Act, the existing laws on internet sales of tobacco do not adequately protect public health, and states' efforts to enforce their laws continue to be frustrated by jurisdictional limitations and the ability of internet-based sellers to put up new websites as fast as old ones are shut down by states.[79] The NAAG comment highlights problems with existing age-verification methods, and concludes that unless technology can meet the challenges posed by tech-savvy youth, a complete prohibition on non-face-to-face sales of tobacco products may be the only way to prevent online tobacco sales to youth.[80] In the absence of subsequent FDA action, these critiques continue to have merit, and are increasingly urgent as online sales of tobacco products continue to grow exponentially, while ease of access puts underage persons at risk. State and local governments are increasingly taking action where not preempted from doing so, rather than waiting for a federal fix.

Conclusion

States have the authority to prohibit internet-based retailers from selling and shipping tobacco products to customers within their borders. Local governments have also begun looking at their authority and ability to prohibit and regulate online sales and delivery of tobacco products. Because of jurisdictional and other enforcement challenges inherent in state-by-state regulation of internet sales, as well as federal preemption of some state action, the federal government may be best positioned to stop online sale of tobacco to youth, protecting health in every state. Federal regulation could remove the PACT Act loopholes that currently exclude e-cigarettes, cigars, and other tobacco products from the provisions of that law, as well as the exemptions for common carriers, thus closing some gaps. But given the ease at which underage persons have been able to circumvent existing age verification techniques, a complete prohibition on internet sales of all tobacco and tobacco-related products shows greater promise as an effective way to prevent underage access to these dangerous products.

Additional Helpful Resources

The Public Health Law Center's website features a resource flagging recent actions states and localities have taken to address the youth e-cigarette epidemic in the wake of vaping-related lung injuries. The Center's website also includes numerous resources on e-cigarette and Juul products as well as an overview of current state laws regulating e-cigarettes. For background 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 deeming regulation. The Campaign for Tobacco Free Kids has a collection of fact sheets on Internet Sales of Tobacco Products. A wealth of published research on the practices of internet tobacco retailers is available on the website for the Internet Tobacco Vendors Study, including a study on Electronic Cigarette Sales to Minors via the Internet. For more information on the FDA's information-gathering regarding non-face-to-face sales, see Docket No. FDA-2011-N-0467 on regulations.gov.

Contact Us

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

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

This chart is a snapshot of state laws in effect as of December 1, 2019, that prohibit online direct-to-consumer sales and shipments of electronic cigarettes.

Jurisdiction / Arkansas

Key Provisions	Penalties & Enforcement
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).	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. 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.

Jurisdiction / Maine

Key Provisions	Penalties & Enforcement
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).	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 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).

Jurisdiction / South Dakota

Key Provisions	Penalties & Enforcement
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).	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).

Jurisdiction / Utah

Key Provisions	Penalties & Enforcement
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).	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. 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).
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).	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 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).	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).

Jurisdiction / Vermont

Key Provisions	Penalties & Enforcement
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)).	A violation is punishable by up to 5 years imprisonment, $5,000 fine, or both. Enforcement: Attorney General

Jurisdiction / Washington

Key Provisions	Penalties & Enforcement
No person may conduct a delivery sale or otherwise ship or transport, or cause to be shipped or transported, any vapor product ordered or purchased by mail or through the internet to any person unless such seller has a valid delivery sale license. 2019 Wash. Sess. Laws 8 (effective Oct. 1, 2019).	A violation is a class C felony. A violator is also subject to a civil penalty of up to $5,000 per violation. The Washington Attorney General may seek an injunction to restrain a threatened or actual violation of this section and to compel compliance. The state is entitled to recover investigation costs and reasonable attorneys' fees.

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 Inst. of Med., *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.") http://www.nap.edu/read/18997/chapter/2#5.

3 Rebecca Williams et al., *Electronic Cigarette Sales to Minors via the Internet*, 169 JAMA Pediatr. 1563 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4408777/; *see also* Brian King et al., *Electronic Cigarette Sales in the United States, 2013–2017*, 320 JAMA 1379-80 (2018), https://jamanetwork.com/journals/jama/fullarticle/2705175.

4 U.S. Surgeon General's Advisory on E-Cigarette Use Among Youth, *The E-Cigarette Epidemic Among Youth* (2018), https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf; 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*, 67 Morbidity and Mortality Wkly. Rep. 1276-77 (2018), https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm

5 Rebecca Williams et al., *Cigarette Sales to Minors via the Internet: How the Story has Changed in the Wake of Federal Regulation*, 26 Tobacco Control 415-20 (2016); Rebecca Williams et al., U. North Carolina, 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 (Feb. 14, 2012), https://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0467-0100.

6 The Public Health Law Center has conducted research on the problem of online tobacco sales to youth for over fifteen years. See, for example, *Smoke on the Web: Can Children Buy Cigarettes Online? Enforcement Options, Challenges and Recommendations* (The Tobacco Law Project, March 2002), http://publichealthlawcenter.org/sites/default/files/resources/tlp-tobacco-online-2002.pdf.

7 Currently, six states have legislation prohibiting direct-to-consumer sales and shipments of tobacco products including e-cigarettes via the internet: Arkansas, Maine, South Dakota, Utah, Vermont, and Washington. See table in this document for key provisions of these laws.

8 Founded in 2013, GoPuff, which is headquartered in Philadelphia, Pennsylvania, is an on-demand retailer of convenience products, currently operating in over hundred U.S. locations, with warehouses strategically positioned close to colleges or universities.

9 In a recent 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, it 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.

10 Rebecca Williams et al., Tobacco Control, *supra* note 5; *see also* Williams et al., JAMA Pediatr., *supra* note 3.

11 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.

12 *Id*. at 37.

13 *Id*. at 27

14 *Id*. at 29.

15 For more information on these state and local measures, see the blog on the Public Health Law Center's webpage, https://www.publichealthlawcenter.org/blogs/2019-09-24/states-and-tribes-stepping-protect-communities-dangers-e-cigarettes-actions-and

16 Complaint at 1, City of New York v. Artisan Vapor Franchise LLC et. al., No. 1:19-cv-05693 (E.D.N.Y October 8, 2019).

17 *Id*. at 49-50.

18 *Id.*

19 *Id*. at 1.

20 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).

21 Kristen Thometz, *Chicago Sues 27 Online Retailers Over E-Cigarette Sales*, WTTW (Feb. 12, 2019), https://news.wttw.com/2019/02/12/chicago-sues-27-online-retailers-e-cigarettes.

22 Complaint at 1, City of Chicago v. BCC Distribution Inc., No. 2019-CH-01756 (Ill. Cir. Ct. Feb. 11, 2019).

23 *Id*. at 15.

24 *Id*. at 12-14.

25 *Id*. at 14

26 *Id*.

27 Kristen Thometz, *Chicago Sues 27 Online Retailers Over E-Cigarette Sales*. (Feb. 12, 2019), https://news.wttw.com/2019/02/12/chicago-sues-27-online-retailers-e-cigarettes.

28 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).

29 San Francisco, Ordinance No. 122-19 (June 25, 2019), https://sfbos.org/sites/default/files/o0122-19.pdf

30 Jamie F. Chriqui et al., *A Comprehensive Review of State Laws Governing Internet and Other Delivery Sales of Cigarettes in the United States*. 10 Nicotine & Tobacco Res. 253 (Feb. 2008), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4263913.

31 Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003).

32 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.").

33 Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364 (2008).

34 Amicus brief for the 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.

35 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.'").

36 Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

37 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094-96 (2018).

38 Ariz. Rev. Stat. Ann. § 36-798.06 (2015).

39 Arkansas Tobacco Control Bd. v. Santa Fe Nat. Tobacco Co., 360 Ark. 32, 199 S.W.3d 656 (2004).

40 Conn. Gen. Stat. Ann. § 12-285c (2015).

41 Ind. Code Ann. § 24-3-5-4.5 (2005).

42 Maine Rev. Stat. Ann. § 1555-D (2012).

43 Md. Code Ann., Bus. Reg. § 16-223 (West)(cigarettes); Md. Code Ann. Bus. Reg. § 16.5-217 (West) (other tobacco products).

44 N.Y. Pub. Health Law § 1399-LL (2015).

45 Ohio Rev. Code Ann. § 2927.023 (2005).

46 S.D. Codified Laws § 10-50-99 (2009).

47 Utah Code Ann. §§ 59-14-509 (2009).

48 Vt. Stat. Ann. tit. 7, § 1010 (2013).

49 Wash. Rev. Code § 70.155.140 (2009).

50 Press release, N.Y. Att'y Gen., *State Ags And Atf Announce Initiative With Credit Card Companies To Prevent Illegal Internet Cigarette Sales* (March 17, 2005).

51 National Association of Attorneys General [hereinafter NAAG], Appendix 1, Comment Letter on Proposed Rule 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, at 1-2 (Feb 23, 2013), https://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0467-0110.

52 *Acceptable Use Policy*, PayPal.com, https://www.paypal.com/webapps/mpp/ua/acceptableuse-full (Last updated July 1, 2018).

53 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*, PLOS ONE (Feb, 14 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").

54 *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.").

55 NAAG *supra* note 51, at 3.

56 N.Y. Pub. Health Law § 1399-LL (2015).

57 NAAG *supra* note 51, Appendix 2.

58 *Guidelines for Implementation of Article 13 (Tobacco advertising, promotion and sponsorship)*, Framework Convention on Tobacco Control [FCTC], World Health Organization [WHO], Third Session, FCTC/COP3(12) 33, ¶¶ 18-21 (November 22, 2008), http://apps.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf.

59 WHO report on the global tobacco epidemic, Appendix VII Country (2019) profiles:
France, http://www.who.int/tobacco/surveillance/policy/country_profile/fra.pdf?ua=1
Brazil, http://www.who.int/tobacco/surveillance/policy/country_profile/bra.pdf?ua=1
Greece, http://www.who.int/tobacco/surveillance/policy/country_profile/grc.pdf?ua=1
Hungary http://www.who.int/tobacco/surveillance/policy/country_profile/hun.pdf?ua=1
The Republic of Korea, http://www.who.int/tobacco/surveillance/policy/country_profile/kor.pdf?ua=1
Singapore, http://www.who.int/tobacco/surveillance/policy/country_profile/sgp.pdf?ua=1
Spain, http://www.who.int/tobacco/surveillance/policy/country_profile/esp.pdf?ua=1
South Africa http://www.who.int/tobacco/surveillance/policy/country_profile/zaf.pdf?ua=1
Turkey, http://www.who.int/tobacco/surveillance/policy/country_profile/tur.pdf?ua=1

60 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)).

61 Much of the PACT Act addresses concerns about taxation, a topic outside the scope of this document.

62 Defined to include roll-your-own tobacco under 15 U.S.C. § 375(2) (2014).

63 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].

64 PACT Act, § 2A(b)(1), 124 Stat. 1087, 1091 (codified at 15 U.S.C. § 376a(b)(1)).

65 PACT Act, § 2A(b)(4)(A)(iii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(iii)).

66 PACT Act § 2A(b)(4)(A)(ii), 124 Stat. 1087, 1092 (codified at 15 U.S.C. § 376a(b)(4)(A)(ii)).

67 PACT Act § 2A(a)(3), 124 Stat. 1087, 1091 (codified 15 U.S.C. § 376a(a)(3)).

68 18 USC § 1716E(West).

69 PACT Act § 2A(e)(1), 124 Stat. 1087, 1093 (codified at 15 U.S.C. § 376a(e)(1)).

70 PACT Act § 2A(e)(5)(C), 124 Stat. 1087, 1098 (codified at 15 U.S.C. § 376a(e)(5)(C)).

71 PACT Act § 2A(e)(5)(A), 124 Stat. 1087, 1097 (codified at 15 U.S.C. § 376a(e)(5)(A)).

72 PACT Act § 2A(e)(2)(A), 124 Stat. 1087, 1095 (codified at 15 U.S.C. § 376a(e)(2)(A)).

73 PACT Act § 2A(e)(3), 124 Stat. 1087, 1095 (codified at 15 U.S.C.A. § 376a(e)(3)).

74 PACT Act, 15 U.S.C. § 376a(e)(5)(C)(ii); 15 U.S.C.A. § 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.'").

75 PACT Act § 2A(e)(5)(A), 124 Stat. 1087, 1097 (codified at 15 U.S.C. § 376a(e)(5)(A)).

76 The PACT Act might create an opportunity for a state with a tolerance for litigation to take steps to close certain aspects of the e-cigarette loophole. As mentioned above, the Act requires internet-based retailers of cigarettes and smokeless tobacco to use a delivery service that checks ID, but it does not address sales of e-cigarettes and other tobacco. The Act may leave room for states to enact such a law, despite the Supreme Court's ruling in *Rowe v. New Hampshire Motor Transport Ass'n*. 552 U.S. 364, 372 (2008). Certainly, the market for delivery services is different now than it was at the time of that case. Back then, delivery carriers did not typically offer ID checking as an option. As the Court explained, a state law requiring retailers to use a delivery service that checks ID would have required carriers to "offer a system of services that the market does not now provide" *Id*. and that the carriers would prefer not to offer. 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[.]") The PACT Act requires sellers of cigarettes and smokeless tobacco to use a carrier that checks ID, and many states require the same for alcohol delivery. Therefore, ID checking is likely to be a delivery service that is available in most states. In this environment, a state law requiring e-cigarette retailers to use a delivery service that checks ID might not be preempted under the FAAAA. Arguably, such a law wouldn't force the carriers to "offer a system of services that the market does not now provide," because these services now exist in the market — that is, assuming compliance with the PACT Act. However, as mentioned above, such a law might invite litigation and any jurisdiction considering this approach should consult with local counsel.

77 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[.]")

78 NAAG, *supra* note 51.

79 NAAG, *supra* note 51, Comment at 2.

80 NAAG, *supra* note 51, Comment at 9.