

[U.S. Postal Service
475 L'Enfant Plaza SW, Room 4446
Washington, DC 20260-3436]

June 9, 2021

Re: United States Postal Service Proposed Rule on the Treatment of E-Cigarettes in the Mail, 39 C.F.R. Part 113, 86 Fed. Reg. 10218-20, Doc. No. 2021-03393 (Feb. 19, 2021).

Dear [_____]:

We, the below signed stakeholders, appreciate that the comment period for the referenced *Proposed Rule on the Treatment of E-Cigarettes* has closed; however, since the Final Rule has yet to be issued, we are compelled to emphasize that if the Proposed Rule captures products unrelated to tobacco or nicotine – and more specifically, captures products related to hemp and cannabis use - the impacted industries will be unnecessarily disrupted, and small operators may be forced to shut down.

1. Who we are.¹

The signatories to this letter are collectively parties that work in or have clients in the regulated cannabis and hemp industries. Because we are and/or represent clients and stakeholders that operate in these industries nationwide and across the globe, we are uniquely situated to provide insight into the regulatory hurdles and legal issues faced. We represent all facets of the regulated cannabis and hemp industries, including farmers, processors, manufacturers, distributors, genetic research facilities, testing laboratories, retail outlets, and more. As we frequently navigate the laws and regulations of these industries, our goal is to ensure the greatest possible success for stakeholders while operating within the confines of the legal frameworks. The concern by the signatories is that the proposed rule may sweep in non-tobacco products and devices that are already taxed and subject to extensive regulation under other statutory schemes. If finalized, the additional regulatory burdens the proposed rule would impose on non-tobacco products and devices would have a significant if not ruinous economic impact on the respective operations, of which most are small businesses. Therefore, this group provides the following.

2. Background

On December 21, 2020, Congress passed the second coronavirus relief package as part of an omnibus bill known as the Consolidated Appropriations Act, 2021 (the “Omnibus Bill”).² Spanning 5,593 pages, the Omnibus Bill contained provisions addressing a range of issues not related to coronavirus economic relief, including legislation known as the Preventing Online Sales of E-Cigarettes to Children Act (the “Act”).³

¹ The signatories of this letter are members of various trade associations and bar associations, but, unless the signatory is of any such specific association, this letter does not represent an official policy position of any particular association, and instead solely represents the view of the signatories to this letter.

² [Consolidated Appropriations Act, 2021](#).

³ [Preventing Online Sales of E-Cigarettes to Children Act](#), 116th Cong., S.1253, H.R.3942.

The Act, effective March 27, 2021, amends the Jenkins Act (“Jenkins”)⁴, and Jenkins’ 2010 amendments known as the Prevent All Cigarette Trafficking Act of 2009 (“PACT”).⁵ As amended by PACT, Jenkins generally prohibits mailing of cigarettes to consumers through the United States Postal Service (“USPS”), and, through PACT, requires common carriers to register with the Attorney General and state tobacco tax administrators as well as meet certain shipping and reporting requirements. The Act provides a definition for Electronic Nicotine Delivery Systems (“ENDS”) and subjects such items to the terms of Jenkins, as amended. Congress tasked USPS with promulgating rules clarifying the applicability of the “prohibition on mailing of cigarettes” to ENDS devices.

3. The proposed rule captures products outside the Act’s intended scope.

The objective of the Act was to appropriately include modern delivery devices for nicotine and nicotine-related flavoring substitutes, referred to as ENDS, in Jenkins’ definition of “cigarette.”⁶ This in turn would subject those products to the “prohibition on mailing of cigarettes,” as required under PACT, ensuring children would not have access to modern nicotine-containing products or delivery devices.

As currently written, however, the proposed rule threatens to expand the definition of ENDS beyond tobacco and nicotine-containing devices:

‘Despite the name, an item can qualify as an ENDS without regard to whether it contains or is intended to be used to deliver nicotine; liquids that do not actually contain nicotine can still qualify as ENDS, as can devices, parts, components, and accessories capable of or intended for use with non-nicotine-containing liquids.’

USPS proposes to treat electronic devices and their components and fillers that “deliver either nicotine or non-nicotine substances” as ENDS products. Doing so would subject products and devices already regulated and taxed under other statutory schemes to *another* suite of crippling regulations, unnecessarily.

4. Repeated use of “nicotine” and “tobacco” throughout Jenkins, PACT, and the Act.

The Act’s repeated references to nicotine, cigarettes, and tobacco reflect Congress’s unmistakable intent to limit the Act’s sweep:

- a) The term ‘Electronic Nicotine Delivery System’ is self-defining and limiting.
- b) Jenkins:⁷ a law passed in 1949 and was designed to assist states in collecting sales and use tax on cigarettes.

‘(2) Cigarette

(A) In general

The term “cigarette”-

(i) has the meaning given that term in section 2341 of title 18;

and

(ii) includes roll-your-own tobacco (as defined in section 5702 of title 26).’

⁴ *Jenkins Act*, 15. U.S.C. §375 et seq.

⁵ *Prevent All Cigarette Trafficking Act of 2009*, Pub. L. 111-154; 18 U.S.C. §1716E.

⁶ 15 U.S.C. §375 (2)(A).

⁷ *Id.*

- c) The name of the chapter of 18 U.S.C. §2341, referenced in Jenkins, is ‘Trafficking in Contraband Cigarettes and Smokeless Tobacco.’
- d) PACT: a law enacted in 2009 to address the sale of “illegal cigarettes and smokeless tobacco” products. Specifically, “To prevent tobacco smuggling, to ensure the collection of all tobacco taxes, and for other purposes.”⁸
- e) The Act: includes a shipping and packaging requirement to include “nicotine” on the bill of lading and on the outside of the package to read,

‘CIGARETTES/NICOTINE/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS.’

In light of this plain statutory text, the proposed rule’s treatment of *non-tobacco* and *non-nicotine-related* products and devices as ENDS contravenes the manifest will of Congress.

While the Act does not establish its own findings and purpose, it amends Jenkins and subjects ENDS to PACT, laws Congress expressly limited to tobacco and nicotine products. In passing PACT, Congress made various findings, among them that mail order of cigarettes made it easier for children to obtain tobacco products.⁹ Neither PACT’s findings nor its purpose even hints that Congress intended PACT to apply to anything other than tobacco and nicotine-related products.

5. Historic use of the term “ENDS” is in relation to tobacco.

Even though ENDS are a relatively new tobacco delivery device, the devices have been subject to regulation by the U.S. Food and Drug Administration (“FDA”) under FDA’s authority to regulate tobacco products. FDA’s use of the term ENDS has been strictly in relation to tobacco products, or as a substance to be used with a tobacco product. As noted in an April of 2020 FDA guidance on ENDS,¹⁰ FDA has defined ENDS as follows:

Electronic nicotine delivery systems (or ENDS) include devices, components, and/or parts that deliver aerosolized e-liquid when inhaled. For example, FDA considers vapes or vape pens, personal vaporizers, e-cigarettes, cigalikes, e-pens, e-hookahs, e-cigars, and e-pipes to be ENDS

E-liquids are a type of ENDS product and generally refer to liquid nicotine and nicotine-containing e-liquids (i.e., liquid nicotine combined with colorings, flavorings, and/or other ingredients). Liquids that do not contain nicotine or other material made or derived from tobacco, but that are intended or reasonably expected to be used with or for the human consumption of a tobacco product, may be components or parts and, therefore, subject to FDA’s tobacco control authorities.

...

Tobacco product means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product). The term “tobacco product” does not mean an article that under the FD&C Act is a drug

⁸ PACT, Public Law 111-154.

⁹ *Jenkins*, 15 U.S.C. §375, Findings And Purpose (b)(4), (5).

¹⁰ FDA Guidance for Industry, *Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised)*, April of 2020.

(section 201(g)(1) (21 U.S.C 321(g)(1))), a device (section 201(h)), or a combination product (section 503(g) (21 U.S.C 353(g))). Section 201(rr) of the FD&C Act.

Furthermore, the use of the term ENDS by state regulatory agencies, as defined in their ensuing regulations, is again in relation to tobacco. Please see California Department of Tax and Fee Administration, Tax Guide for Cigarettes and Tobacco Products, [Cigarette and Tobacco Products Taxes](#).

'... the definition of "tobacco products" was amended to include:

- Any product containing, made of, or derived from any amount of nicotine that is intended for human consumption and sold with or without a delivery device or system, and
- Electronic cigarettes or any device or delivery system sold in combination with nicotine, and
- Any component, part, or accessory of an electronic cigarette that is used during the operation of the device when sold in combination with nicotine (for example, a battery used in the operation of the device sold with nicotine for a single price).

Tobacco products do not include delivery devices sold without liquid or substance containing nicotine.'

The term ENDS may be relatively new; however, there is an historic use pattern and established precedence among state and federal regulatory bodies to support that the term ENDS is limited to tobacco and nicotine products.

6. Conclusion

Subjecting non-tobacco products and devices to tobacco regulations without an explicit legislative mandate is rife with challenges. First and foremost, would be the devastating impact on the industries - and in particular the small businesses - that are swept into the proposed rule. We urge the USPS to clearly state that the term "ENDS" only extends to tobacco and nicotine-related products. By doing so, the proposed rule will fully align with Congressional intent and the explicit language of the Act.

Thank you for the consideration.

If you are interested in discussing this matter or connecting with any of the below signatories, as identified on the following page, please ring Tami Wahl, 202.975.9221.