



March 3, 2021

**TO:** The Honorable Guy Guzzone, Chair  
The Honorable Jim Rosapepe, Vice Chair  
Members of the Senate Budget and Taxation Committee  
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Miller Senate Office Building  
Annapolis, MD 21401

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**SUBJECT:** SB 883 Tobacco Tax – Out-of-State Sales of Premium Cigars and Pipe Tobacco

**Position:** Letter of Information

We thank you for the opportunity to provide comments on **SB 883 Tobacco Tax—Out-of-state Sales of Premium Cigars and Pipe Tobacco**.

Enforcement of existing law against online sellers is more 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 licensed retailers, no equally robust compliance program for internet-based tobacco retailers exists. Unfortunately, substantial evidence has shown that youth can and have acquired tobacco products from internet vendors.

The Prevent All Cigarette Trafficking Act of 2009 (PACT Act) was an important step in the regulation of internet sales of tobacco, but opportunities for improvement remain. Significantly, while the Act regulates (and mostly prohibits) internet sales of cigarettes<sup>1</sup> and smokeless tobacco, electronic smoking

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<sup>1</sup> Defined to include roll-your-own tobacco under 15 U.S.C. § 375(2) (2014)



devices (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, 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. At least twelve states have such a law: Arizona, Arkansas, Connecticut, Indiana, Maine, Maryland, New York, Ohio, South Dakota, Utah, Vermont and Washington. Five of these states, Arkansas, Maine, South Dakota, Utah, and Vermont, have enacted more comprehensive laws, extending these prohibitions to e-cigarettes.

The PACT Act limits the ability of states and local governments to regulate the common carriers involved in these delivery transactions.<sup>2</sup> The Act allows a state to make it illegal for internet-based retailers to ship tobacco product orders to customers.

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.<sup>3</sup> 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.<sup>4</sup>

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.

Again, states have the authority to prohibit internet-based retailers from selling and shipping tobacco products to customers within their borders. Federal regulation could remove the PACT Act loopholes that currently exclude cigars, and some 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, it is best for all tobacco products and all tobacco retailers to be regulated the same. Therefore, it is best for all tobacco products to be shipped directly to licensed brick-and-mortar stores and not shipped directly to consumers. This shows greater promise as an effective way to prevent underage access to these dangerous products.**

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

<sup>3</sup> 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>.

<sup>4</sup> 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>.



Moreover, all tobacco license fees should be carefully constructed and reviewed. The fees assessed for a tobacco retail license should be set at an amount that takes into account the government’s cost of

administering and enforcing the law. For example, annual licensing fees should be used to offset employee salaries, the cost of performing compliance checks and related inspections, and other overhead and logistical aspects of properly administering, implementing, and enforcing the law.

The American Cancer Society Cancer Action Network, American Heart Association, and American Lung Association, again thank the committee for the opportunity to provide comments on SB 883.