



FEDERAL LEGISLATION ON INTERNET TOBACCO PRODUCT

Sales of cigarettes and other tobacco products over the Internet (and through other mail-order sales) typically evade state tobacco taxes and other applicable taxes and occur without any safeguards to prevent sales to kids. Faced with increasing cigarette prices (from state cigarette tax increases and other factors), many smokers, especially kids, will quit or cut back, and many youth will never start smoking at all. But the availability of cheap, tax-free cigarettes on the Internet increases smoking rates by providing a ready alternative to quitting or cutting back. These Internet sales are also reducing federal, state, and local tax revenues on tobacco products by hundreds of millions if not billions of dollars each year – funds that could be used, among other things, to support new or expanded tobacco prevention efforts (or to block cuts to existing state tobacco control programs).¹

These problems are not adequately addressed by existing federal laws, such as the Jenkins Act (passed in the 1930s to require interstate mail-order cigarette sellers to report to state tax collection officials). In addition, very few Internet sellers bother to comply with the existing laws and federal enforcement has been basically nonexistent.

While some states have passed helpful laws to try to prohibit Internet cigarette sales to their residents (e.g. New York and Connecticut) or to restrict and regulate such sales to prevent abuses, a comprehensive federal response is needed. Hundreds of Internet sellers both in the United States and overseas are selling to U.S. customers with little or no regard for existing tax or youth access laws. At best, new state laws can only reach small parts of this problem. Besides the limits on the states' ability to regulate interstate commerce, Internet sellers can easily avoid complying with state laws by delivering their products through the U.S. mails (which states have little or no power to stop or regulate), and the states' ability to take action against Internet sellers based overseas or on Indian Tribal lands is seriously limited. In addition, The Supreme Court has ruled that the Federal Aviation Administration Authorization Act preempts many state Internet tobacco laws relating to common carriers, such as those requiring carriers to check the age of the recipient when delivering tobacco products or even those requiring Internet sellers to ensure that the age and identity of consumers is verified at delivery.

Current Federal Legislation

To address the problems with Internet and other mail order sales of cigarettes and smokeless tobacco, in May 2009, the full House of Representatives overwhelmingly approved the Prevent All Cigarette Trafficking Act of 2009 (the PACT Act, H.R. 1676), sponsored by Representative Weiner (D-NY), by a vote of 397 to 11. In November, the Senate Judiciary Committee approved a similar version of the PACT Act (S. 1147), sponsored by Senator Kohl (D-WI), by a voice vote.

The legislation requires Internet and other mail-order sellers to: a) pay the tobacco taxes owed to the relevant state and local governments before delivering any cigarettes or smokeless tobacco products to any customer in a state; b) comply with various state and local laws as if they were tobacco product retailers located in the same state as their customers; c) register with the government and make periodic reports to state, local and Tribal tax collection officials; and d) check age and ID at sale and at delivery. The bills also establish strong new penalties, allowed for enforcement of the new federal law by the attorneys general of the states and chief law enforcement officials of the local or Tribal jurisdictions where the tobacco products are delivered, and provided other enforcement tools that would enable the state and local governments to block deliveries by non-complying Internet sellers. The PACT Act also makes tobacco products nonmailable matter (which is critically important for stopping illegal Internet tobacco sales and deliveries); allows legally operating sellers to make deliveries through common carriers and other delivery services; and increases State, local and Tribal government enforcement rights regarding each of these laws, while fully respecting State and Tribal government sovereignty rights.

Prior Federal Legislation

The pending PACT Act bills have their origin way back in 2002, when the Campaign for Tobacco-Free Kids was developing model state Internet tobacco legislation and a critique of the state Internet legislation being circulated by the Philip Morris cigarette company. At the same time, the Campaign was working with U.S.

Rep. Marty Meehan (D-MA) – who had introduced legislation in the prior session of Congress to require youth access safeguards on Internet sales – to help develop comprehensive federal legislation to address both the Internet youth access and tax evasion problems.

Before that comprehensive legislation could be introduced, other bills appeared in both the U.S. House of Representatives and the U.S. Senate to address just the tax evasion aspect of Internet sales. In both cases, the Campaign and other public health organizations were not be able to support the bills unless substantial changes were made. But Senators Orrin Hatch (R-UT) and Herbert Kohl (D-WI), the Senate bill's sponsors, worked with the public health community, the state attorneys general, and others to make improvements, which led to the Senate Judiciary Committee's unanimous passage of the revised Prevent All Contraband Tobacco Act (the PACT ACT, S. 1177) on July 31, 2003. The sponsor of the House legislation, U.S. Rep. Mark Green (R-WI), similarly worked with Rep. Meehan and the public health groups to make improvements, which prompted the introduction of a new replacement bill, H.R. 2824, which the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property unanimously passed on October 2, 2003.

Due to jurisdictional and political constraints, neither the House nor Senate bill directly addressed the youth access problem; but by preventing tax evasion on Internet sales each would have increased the price barriers to obtaining tobacco products over the Internet.

After the PACT Act passed the Senate Judiciary Committee in 2003, representatives of Native American Tribes raised concerns regarding the bill's impact on Tribal sovereignty rights. These concerns prompted many additional changes to the PACT Act, developed through negotiations between the bill's sponsors, the Senate Indian Affairs Committee, and the states' attorneys general. These changes made the PACT Act completely neutral with regard to Tribal sovereignty and immunity, and provided Tribes (and local governments) with the same kinds of tools to enforce and protect their own tobacco taxes that the Act had given the states. After these and other changes were made, the PACT Act passed the Senate by unanimous consent on December 9, 2003.

Several changes to address Tribal concerns were also made to the House bill; and the revised bill unanimously passed the House Judiciary Committee on January 28, 2004. At that time, several members expressed continuing concerns relating to tribal sovereignty and the bill's two main sponsors said that they would work to address those concerns as the bill continued through the legislative process. After that, however, UPS and other common carriers raised concerns about some of the provisions in the Senate and House bills to block deliveries of cigarettes and smokeless products sold by Internet vendors that have failed to register with state, local, and Tribal tax collection officials and otherwise failed to comply with the new laws. These concerns were fully addressed through proposed changes to the PACT Act and the House legislation. Nevertheless, the House leadership refused to bring the PACT Act up for a House vote and the House legislation was never reported out of the Judiciary Committee, despite passing unanimously, so neither legislation passed into law during the session of Congress that ended in 2004.

Since then, the amount of federal, state, and local tobacco tax revenues lost to Internet-based tax evasion and illegal Internet sellers continued to grow and more and more kids are buying cigarettes and smokeless tobacco online.² It also became increasingly clear that contraband tobacco product trafficking, including Internet cigarette sales, is helping to finance organized crime and terrorist organizations.³ Accordingly, the full House of Representatives passed the PACT Act in 2008 with only a dozen no votes; but the Senate was unable to pass the legislation before that session of Congress ended. Given that the full House and the Senate Judiciary Committee have both passed the PACT Act in the current session of Congress, the PACT Act's prospects for finally being passed into law now look better than ever before.

Campaign for Tobacco-Free Kids, January 12, 2010 / Eric Lindblom

For more information, see the TFK website at <http://tobaccofreekids.org/reports/internet> and <http://tobaccofreekids.org/reports/internet/resources.php>.

¹ For more on the problem of Internet tobacco sales, see the TFK Factsheet *Internet Sales of Tobacco Products – Reaching Kids & Evading Taxes*, <http://tobaccofreekids.org/research/factsheets/pdf/0213.pdf>.

² See <http://tobaccofreekids.org/research/factsheets/pdf/0213.pdf>.

³ See, e.g., Horwitz, S., "Cigarette Smuggling Linked to Terrorism," *The Washington Post*, June 8, 2004, Page A; Blumenthal, L., "Back Tax Asked on Cigarettes: \$4 Million," *The News Tribune*, March 29, 2004.