



## THE PACT ACT AND INDIAN TRIBES

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The Prevent All Cigarette Trafficking (PACT) Act will promote public health, increase and protect government revenues at all levels, and fight crime by stopping illegal Internet and other mail-order cigarette and smokeless tobacco sales. The vast majority of Internet vendors sell cigarettes at cut-rate prices by failing to pay applicable taxes. That not only reduces tobacco tax revenues at all levels of government but also increases smoking and its many harms and costs. Moreover, Internet vendors typically sell cigarettes and smokeless tobacco without any adequate protections in place to prevent sales to kids.<sup>1</sup>

Among other things, the PACT Act requires Internet and other mail order sellers to: a) verify purchasers' age and identity before sale through available ID databases; and b) use delivery methods that verify the age and ID of the person accepting delivery. The Act also requires that all excise taxes on the cigarettes and smokeless tobacco be paid to the applicable state, local, or Tribal governments before delivery, with the delivered packs of cigarette bearing any required state tax stamps. All of the PACT Act's provisions apply equally to all Internet and mail-order sellers that sell to U.S. consumers.<sup>2</sup>

### **What Does the PACT Act Have to Do with Indian Tribes?**

The vast majority of the more than 500 Indian Tribes in the United States have nothing to do with selling cigarettes or smokeless tobacco over the Internet; but a significant portion of all Internet vendors selling cigarettes to consumers in the United States are based on the lands of a small number of Tribes. For example, the most recent available survey of the websites of Internet vendors that sell to U.S. consumers found that 158, or more than one in five, were located on Indian Tribal lands, with 80 percent of all Tribal-land Internet sellers based on Seneca Tribal lands.<sup>3</sup> All of these Internet vendors based on Tribal lands (as well as all Internet vendors not on Tribal lands) would be required to comply with the PACT Act's provisions directed at making sure that no cigarettes or smokeless tobacco are sold to kids and that all applicable tobacco taxes are paid on the Internet sales to adults.

The survey also found that the websites of Internet vendors based on Tribal lands were more likely than those of foreign or other domestic Internet sellers to say explicitly that they sold tax-free cigarettes, kept all consumer information private, and did not report any information to tax authorities. But those cigarette sales are not tax-free.<sup>4</sup> In addition, the long-standing federal Jenkins Act (15 U.S.C. 375 et seq.) requires all Internet and mail-order sellers to report all of their sales of cigarettes to U.S. consumers to the tax officials of the states where those consumers are located.<sup>5</sup>

While Internet vendors based on Tribal lands generally did somewhat better than foreign or other domestic Internet vendors in terms of preventing cigarette sales to kids, the survey found that nearly all Internet sellers did a terrible job of verifying age and stopping sales to kids. For example, less than a third of the websites of Tribal-land vendors required a copy of a photo ID prior to making a cigarette sale; almost half did not have any evidence of an active age warning or certification prior to purchase; and less than one in five said that there would be any age verification at delivery. Similarly, an earlier study of Tribal-land Internet cigarette vendors found that typically the only age verification process was requiring website customers to click on an icon that says "I am over 18 (or 21) years of age."<sup>6</sup>

The Seneca Nation of Indians says that the Internet cigarette sellers based on their lands now do age and ID verification.<sup>7</sup> But it is not clear from the websites of various Internet vendors based on Seneca lands that they are actually doing effective age and ID verification at the point of sale; and it appears that there is no age or ID verification at all when the cigarettes are delivered (typically through the U.S. mails). In addition, there is no evidence (and no claims by the Seneca) that sellers on Seneca or other Tribal lands are now regularly complying with the federal Jenkins Act or are otherwise collecting or paying applicable state and local tobacco taxes.<sup>\*</sup> It is clear that all of the Internet vendors based on Seneca or other Tribal lands – just like any other Internet vendors – would have to improve and correct their practices and procedures substantially to comply with the PACT Act's provisions directed at stopping sales or deliveries kids and ensuring that all applicable tobacco taxes are collected and paid.<sup>8</sup>

### **The PACT Act and Tribal Sovereignty**

In 2002, when the PACT Act was first introduced, it would have given State attorneys general broad rights to bring enforcement lawsuits against any Internet sellers that violated the Act. Tribal interests claimed that giving State attorneys general such enforcement rights against Internet sellers located on Tribal lands or run by Tribal governments would violate existing Tribal sovereignty and immunity rights. Accordingly, the Senate PACT Act was extensively revised to ensure that it fully respected Tribal (and State) sovereignty and immunity rights and did nothing to reduce or expand the scope of those rights. Going further, the Act was revised also to ensure that Tribal and local governments were given all of the same new powers and rights that the Act provided to State governments.

The Senate PACT Act that was revised to respect Tribal Sovereignty (S.1177) subsequently passed the full Senate through unanimous consent in late 2003. Commenting on its passage, the National Congress of American Indians (NCAI) noted that “[I]ast year, NCAI and tribes worked with the Senate Committees on Judiciary and Indian Affairs to address tribal concerns. S.1177 now ensures tribal sovereign immunity and protects existing Federal law on state tax and regulatory authority in Indian country. . . . [It] protects the sovereignty of tribes.”<sup>9†</sup>

In May 2009, the full House of Representatives overwhelmingly approved the PACT Act (H.R. 1676) by a vote of 397 to 11. In November, the Senate Judiciary Committee approved a similar version of the PACT Act (S. 1147) by a voice vote. Both of these bills fully respect Tribal sovereignty and immunity rights – just like the earlier version of the PACT Act sanctioned by the National Congress of American Indians and other Tribal interests.

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<sup>\*</sup> Some Internet vendors based on Seneca lands have websites that claim to do careful age verification, but they do not appear to collect or pay the relevant state or local tobacco taxes and do not say they will be reporting consumer purchase information to state tax collection officials as required by federal law. [See, e.g., [ordersmokesdirect.com](http://ordersmokesdirect.com).] Other Internet vendors based on Seneca lands claim to do age verification but appear not to do so, and expressly say that they sell tax-free cigarettes and will not report any consumer information to tax collection authorities. [See, for example, the website of Allegany Trail Enterprises ([alleganytrail.com](http://alleganytrail.com)), which says that the consumer's driver's license number will be used for age verification but then makes providing that driver's license number optional.]

<sup>†</sup> NCAI also sent a letter to key Senators, before the Senate passed the PACT Act in late 2003, stating that NCAI would not oppose the PACT Act if: a) Internet sellers put on a federal do-not-deliver list of illegally operating Internet sellers were given a formal right to challenge that listing; and b) language were included stating that the Act did not extend state enforcement authority within Indian country. [Letter from Jacqueline L. Johnson, December 8, 2003.] Those changes were made in subsequent versions of the PACT Act, and the currently pending legislation includes both of those changes, as NCAI requested. [See Section 6(a)(5) of the Senate PACT Act (S. 1147), and Sec.2A(e)(1)(E) and (e)(8) of the Jenkins Act, as amended by Section 2 of S.1177, and the identical text in the House PACT Act (H.R. 1676).]

- While Tribal and state government interests sometimes have different conceptions of the scope of Tribal (and state) sovereignty, the current PACT Act does nothing to either expand or contract the existing legal scope of Tribal sovereignty and immunity rights and does not take a position one way or the other on what the scope of those rights is or should be.
- The PACT Act provides for state, local and Tribal government enforcement of the Act to increase compliance. But section 5 explicitly states that the Act does not provide state or local governments with any new authority to bring enforcement actions against persons located in Indian country.
- Section 5 explicitly states that the PACT Act does not affect agreements or compacts between state or local governments and the governments of Indian Tribes regarding the collection of taxes on cigarettes and smokeless tobacco sold in Indian country.
- Current federal law already requires all Internet or mail-order retailers that sell cigarettes into a state (including any Indian Tribes that are Internet retailers) to report those sales to state tax administration officials. The PACT Act does not change that. But it does, for the first time, require any Internet or mail-order retailers selling cigarettes or smokeless tobacco into Tribal lands to report those sales to the tax administration officials of those Tribes. This new reporting requirement, combined with other provisions of the bill, will help Tribes that levy their own cigarette or smokeless taxes from losing revenues to illegal Internet sales.
- Throughout the legislation, the PACT Act gives Tribes the same rights as States and it applies the same requirements on States that it places on Tribes (and vice versa).

There are few, if any, examples of pending legislation or existing federal law that are as careful as the PACT Act not just to respect Tribal sovereignty and immunity rights but also to give Indian Tribes the same rights and powers being given to State governments.

### **The PACT Act Allows Law-Abiding Internet Sales to Continue**

The PACT Act would work to block illegally operating Internet sellers, wherever located, from using the U.S. mails or any other delivery service to evade tobacco tax laws or to sell cigarettes or smokeless tobacco to kids. But the PACT Act also directly provides procedures for any legally operating Internet sellers, including any based on Tribal lands, to sell and deliver cigarettes and smokeless tobacco to their adult consumers through common carriers, couriers or any other type of delivery service.

- Illegally operating Internet and mail-order sellers of cigarettes, including some based on Tribal lands, regularly use the U.S. mails to evade compliance with existing federal, state and local laws. To stop that, the PACT Act prohibits cigarettes and smokeless tobacco products from being sold and delivered to consumers through the U.S. mails.
- Unlike common carriers and other nationwide delivery services, the U.S. Postal Service does not have the capacity or capability to do age and ID verification at delivery for all cigarette and smokeless tobacco deliveries, to ensure that persons submitting cigarettes for delivery are not illegally operating vendors, to stop packages during delivery found to have been submitted by illegal actors, or to otherwise ensure that only legally sold tobacco products are allowed through the U.S. mails. Accordingly, the PACT Act would add cigarettes and smokeless tobacco to the list of other products that are already prohibited from being mailed, including poisons, explosives, and most types of alcohol.

- None of the PACT Act's provisions related to the U.S. mails single out Indian Tribes or Tribal-based Internet sellers; the provisions apply equally to any Internet sellers of cigarettes or smokeless and to all cigarettes or smokeless regardless of who sells them.
- Unlike the U.S. Postal Service, common carriers and other nationally operating couriers and other delivery services carefully track each package they deliver and would be able to ensure that they do not deliver for Internet and mail-order sellers that are violating federal, state, local or Tribal law. Accordingly, the PACT Act sets up procedures for cigarettes and smokeless tobacco sold via the Internet or other mail order to be delivered by common carriers and other delivery services that will block deliveries for any Internet or mail-order vendors that have not registered with the U.S. Attorney General or that have been found by government enforcement officials to be violating other provisions of the PACT Act.
- The PACT Act does not interfere with those state, local and Tribal laws that prohibit Internet or mail-order sales and deliveries of tobacco products to consumers located within their jurisdictional boundaries.<sup>\*</sup> But the PACT Act provides clear procedures for cigarette and smokeless tobacco Internet and mail-order sales and deliveries to consumers located in the vast majority of states and other jurisdictions that allow them.
- Besides the two major common carriers, UPS and FedEx, there are thousands of other common carriers, couriers and other services that deliver small packages directly to consumers throughout the United States.<sup>†</sup>
- The only Indian Tribes that might be impacted significantly by the PACT Act would be those that rely on illegal cigarette sales from Internet vendors based on their lands for substantial amounts of overall Tribal and Tribal member income. But Internet sellers are based on the lands of only a handful of Indian Tribes that also have other significant sources of income. Most notably, the vast majority of Tribal-land Internet sellers are on the lands of the Seneca Nation (which has roughly 7200 enrolled members). But the Seneca Nation is also home to numerous other income-generating businesses, including three casinos and two gaming centers, with two four-star hotels and nine restaurants, a campground, a museum, several construction businesses, and a number of stores and gas stations.

### **PACT Act Stops Illegal Internet Sellers from Harming Legally Operating Businesses**

- Internet and mail-order sellers of cigarettes and smokeless tobacco that stay in business by evading applicable state and local tax and other laws, directly steal business away from both law-abiding Internet sellers and law-abiding bricks-and-mortar retailers.<sup>10</sup> The PACT Act will help to protect these honest businesses, wherever located, from being harmed economically through unfair competition from the many illegally operating Internet and mail-order sellers that sell cigarettes and smokeless tobacco at much lower prices by evading payment of applicable taxes and by failing to follow other federal, state, local and Tribal laws.
- Besides evading applicable taxes, illegally operating Internet sellers sell cigarettes that are illegally manufactured or imported by companies that do not have required federal permits or even counterfeit versions of legitimate brands. The Internet sale of these illegal cigarettes steals sales away from the legal U.S. manufacturers of legitimate cigarettes. Even worse, it

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<sup>\*</sup> A few states – such as New York, Connecticut and Maine – currently prohibit Internet or mail-order sales and deliveries to state consumers.

<sup>†</sup> See, e.g., the websites of the Messenger Courier Association of America ([mcaa.com](http://mcaa.com)); 4SameDay Solutions, which provides lists of courier and delivery services that make pick-ups in each state or zip code for national delivery ([4sameday.com](http://4sameday.com)); and [FreightCenter.com](http://FreightCenter.com).

puts more illegally manufactured and counterfeit cigarettes into circulation, which are the most likely to evade federal taxation, not comply with state fire-safety laws, not be marked with required warning labels, and fail to follow the federal ban on cigarettes with kid-attracting flavors. The PACT Act would block the Internet sale of these illegally manufactured, non-compliant cigarettes.

**Campaign for Tobacco-Free Kids, January 19, 2010**

**More information on internet tobacco product sales is available at**  
[http://www.tobaccofreekids.org/facts\\_issues/fact\\_sheets/policies/internet/](http://www.tobaccofreekids.org/facts_issues/fact_sheets/policies/internet/).

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<sup>1</sup> Campaign for Tobacco-Free Kids factsheet, *Internet Sales of Tobacco Products: Reaching Kids & Evading Taxes*, <http://www.tobaccofreekids.org/research/factsheets/pdf/0213.pdf>. Ribisl, K. et al., "Overview of Internet Cigarette Sales," [http://www.saprp.org/Knowledgeassets/knowledge\\_detail.cfm?KAID=3](http://www.saprp.org/Knowledgeassets/knowledge_detail.cfm?KAID=3), accessed January 19, 2010. American Wholesale Marketers Assoc., *Internet Cigarette Sales – An Illegal Rip-off of Our Nation*, 2009, <http://www.nacsonline.com/NACS/Government/Tobacco/Documents/AWMAStudy2009.pdf>.

<sup>2</sup> The Prevent all Cigarette Trafficking Act (S. 1147) passed by the U.S. Senate by unanimous consent, and was then passed by the U.S. House of Representatives by a 387-25 vote. Full text at: [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s1147es.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1147es.txt.pdf).

<sup>3</sup> Personal correspondence from Professor Kurt M. Ribisl, Gillings School of Public Health, University of North Carolina at Chapel Hill, January 8, 2010 [citing 2006 survey of 762 Internet sellers serving U.S. consumers (2009 data still being tabulated)]. Hodge, FS, et al., "American Indian Internet Cigarette Sales: Another Avenue for Selling Tobacco Products," *American Journal of Public Health* 94(2): 260-61, February 2004. Ribisl, KM et al., "Websites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices," *Tobacco Control* 10(4): 352-59, December, 2001.

<sup>4</sup> Cigarettes sold by Internet vendors based on Tribal lands are certainly subject to the federal cigarette tax and any Tribal cigarette tax, and, when sold to consumers who are not members of the same Tribe, are also subject to any tobacco taxes levied by the states and localities where the consumers reside. In addition, the U.S. Supreme Court has ruled that Tribal sovereignty does not give vendors based on Tribal lands a right to ignore state laws relating to the collection and payment of state tobacco taxes (although Tribal sovereignty does block state or local tobacco tax laws from reaching any cigarettes or other tobacco product sales on Tribal lands that are made to members of that same Tribe). See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991). See, also, National Congress of American Indians (NCAI), "An Introduction to Sovereign Immunity for Federal, State and Tribal Governments," downloaded January 12, 2010, <http://www.ncai.org/ncai/resource/documents/governance/sovintro.htm>.

<sup>5</sup> See, also, Stipulated Judgment, *State of Washington Department of Revenue v. Scott Maybee d/b/a Smoke Signals Tobacco Outlet*, United States District Court, Western District of Washington at Takoma, No. C05-5078FDB, July 6, 2005, [http://www.tobaccofreekids.org/content/what\\_we\\_do/federal\\_issues/internet/WASenecaJudgment.pdf](http://www.tobaccofreekids.org/content/what_we_do/federal_issues/internet/WASenecaJudgment.pdf) [re Internet vendor based on Seneca Tribal lands selling cigarettes into Washington State without complying with the Jenkins Act's reporting requirements].

<sup>6</sup> Hodge, FS, et al., "American Indian Internet Cigarette Sales: Another Avenue for Selling Tobacco Products," *American Journal of Public Health* 94(2):260-61, February 2004.

<sup>7</sup> Press Release, "Seneca Nation Leadership Calls for Defeat of PACT Act," January 5, 2010.

<sup>8</sup> See, e.g., Associated Press, "Idaho Court Rules Against Online Tobacco Seller," January 18, 2010 [re: Idaho Supreme Court against Internet cigarette seller located on Seneca lands for selling into Idaho without registering with the state].

<sup>9</sup> NCAI News (Broadcast 04-031), April 26, 2004. See, also, Letter from Tex T. Hall, on behalf of NCAI, to Chairman F. James Sensenbrenner Jr., Committee on the Judiciary, U.S. House of Representatives, and other selected members of the Committee, Tribal Concerns with H.R. 2824, the Internet Tobacco Sales Enforcement Act, January 20, 2004 ["The Senate recently passed similar legislation, S. 1177, (entitled the "PACT Act,") and we worked with the Senate Judiciary Committee and the Senate Committee on Indian Affairs on the legislation. S. 1177 as passed protects the sovereign immunity of tribes and makes it clear that states do not gain any expanded jurisdiction in Indian country. . . . We greatly appreciate the support of the Senate. . . ."].

<sup>10</sup> See, e.g., National Assoc. of Convenience Stores (NACS), *Issue Update, Remote Sales of Tobacco*, April 24, 2009, [www.nacsonline.com/NACS/Government/Tobacco/Pages/RemoteSalesofTobacco.aspx](http://www.nacsonline.com/NACS/Government/Tobacco/Pages/RemoteSalesofTobacco.aspx).