

HEMP AND CBD SELLERS BEWARE: VAPES SOON SUBJECT TO SIGNIFICANT RESTRICTIONS ON SALES AND SHIPPING

Hodgson Russ Hemp and Medical Cannabis Alert
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Signed into law on December 27, 2020, the federal government's most recent appropriations and COVID relief bill – dubbed the Consolidated Appropriations Act of 2021 (the “Appropriations Act”) – addresses more than just COVID relief. There are two provisions concerning vape products that will be of particular interest to sellers and distributors of vape products containing hemp derivatives. The first provision amends the Jenkins Act, an existing law regarding the sale of cigarettes across state lines. The second provision places significant restrictions on mailing and shipping vapor products. Under these two changes, effective March 27, 2021, retailers of hemp and CBD vapor products will be subject to restrictive federal laws concerning the shipment of their products, some of which carry criminal penalties for violations.

Section 1: Amendments to the Jenkins Act

Originally enacted in 1949, the Jenkins Act is a federal law requiring any person who sells and ships cigarettes across a state line to a buyer that is not a licensed distributor to report the sale to the buyer's state tobacco tax administrator. The Appropriations Act amends the Jenkins Act to include “Electronic Nicotine Delivery Systems” or “ENDS” among the products covered by its provisions. An ENDS is defined as “any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device.” Examples of an ENDS include e-cigarettes, e-hookahs, and vape pens. Notably, the definition specifically includes any component, liquid, part, or accessory of an ENDS, regardless of whether they are sold separately from the device itself. There are no exemptions for hemp or CBD vapes.

Section 2: Mailing Restrictions

The Prevent All Cigarette Trafficking Act (“PACT Act”) imposes stringent rules on online sellers of cigarettes. The Appropriations Act now extends the provisions of the PACT by amending the definition of “cigarette” to include ENDS.

Attorneys

Ariele Doolittle
Christopher Doyle
Carol Fitzsimmons
Patrick Fitzsimmons
Joseph Goldberg
Patrick Hines
Kinsey O'Brien
Matthew Parker
Gary Schober
Daniel Spitzer
Melissa Subject
William Turkovich

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Because ENDS are now subject to the PACT Act, online retailers of ENDS, including hemp vapes and CBD vapes, must:

- Register with the U.S. Attorney General;
- Verify age of customers using a commercially available database;
- Use private shipping services that collect an adult signature at the point of delivery;
- Register with the federal government and with state tobacco tax administrators if selling in states that tax vaping products;
- Collect all applicable local and state taxes, and affix any required tax stamps to the products sold;
- Send each taxing state's tax administrator a list of all transactions with customers in their state, including the names and addresses of each customer sold to, and the quantities and type of each product sold; and
- Maintain records for five years of any "delivery interrupted because the carrier or service determines or has reason to believe that the person ordering the delivery is in violation of the [PACT Act]."

In addition, a shipment cannot exceed 10 pounds. All shipping packages must be outwardly marked with a statement that the package contains cigarettes and that federal law requires payment of excise taxes and compliance with licensing requirements. Retailers who do not register or comply with the shipping and reporting rules of the PACT Act are subject to severe penalties, including up to three years in prison.

As a result, hemp vapor products can no longer be shipped through the USPS as of April 26, 2021. Recently, UPS and FedEx announced they will no longer ship vapor products for home delivery. Beginning April 5, 2021, UPS "will not transport vaping products to, from, or within the United States due to the increased complexity to ship those products." FedEx has ended shipments effective March 1, 2021. This leaves manufacturers of hemp vapor products with fewer options for shipping their goods to consumers. And even if a hemp or CBD vapor product manufacturer finds a shipping company to ship its products to consumers (which is likely to be prohibitively expensive given that USPS, UPS, and FedEx are no longer options), the manufacturer still must comply with the stringent rules of the PACT Act.

The Appropriations Act has many factors, and failure to comply with those factors can result in serious consequences. If you need to know how these changes affect your business, please contact [Melissa Subjeck](#) (716.848.1719), [Patrick Hines](#) (716.848.1679), or any member of Hodgson Russ's [Hemp and Medical Cannabis Practice](#).