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Submitted by e-mail

RE: Treatment of E-Cigarettes in the Mail

The undersigned organizations, committed to protecting and promoting the public health by reducing the use of tobacco products, respectfully submit these comments on the proposed rule to revise Publication 52, *Hazardous, Restricted, and Perishable Mail* (“Proposed Rule”).¹ The Proposed Rule would extend the current tobacco product shipping restrictions to electronic nicotine devices (ENDS), per the Preventing Online Sales of E-Cigarettes to Children Act (“the E-Cigarette Act”).² We urge the U.S. Postal Service (“USPS or Postal Service”) to quickly finalize a strong rule that reflects the youth prevention goal of the E-Cigarette Act and to implement systematic policies and practices to ensure that legally permissible deliveries of tobacco products do not reach youth. As the data demonstrate below, it is still too easy for kids to receive tobacco products through the U.S. mail. Thus, the USPS must do everything in its power to improve compliance with, and strictly enforce, both the general nonmailability of tobacco products and age-verification requirements under the PACT Act.

Background

When Congress enacted the Prevent All Cigarette Trafficking Act of 2009 (“PACT Act”), it recognized “the majority of Internet and other remote sales of cigarettes and smokeless tobacco are being made without adequate precautions to protect against sales to children.”³ Accordingly, one of the purposes of the PACT Act was to “prevent and reduce youth access to inexpensive cigarettes and smokeless tobacco through illegal Internet or contraband sales.”⁴ Since the PACT Act, online cigarette sales have largely shifted overseas,⁵ and e-cigarettes have exploded in popularity among youth and young adults. The shocking increase in youth use of e-cigarettes led to its declaration as an “epidemic” by the U.S. Surgeon

¹ 86 Fed. Reg. 10,218 (February 19, 2021). We note that as of the date of this submission, the proposed edits to Publication 52 have not been made available at <https://pe.usps.com>, despite the statement in the *Federal Register* notice that they would be made available. Because many of the proposed changes are highly technical and would create legally enforceable requirements, we encourage the Postal Service to make the text of proposed edits to Publication 52 available to the public as soon as possible.

² H.R. 133, 116th Cong. (2020), p. 1955, <https://www.congress.gov/bill/116th-congress/house-bill/133/>.

³ PACT Act of 2009, Pub. L. No. 111-154, §1(b)(5), 124 Stat. 1087.

⁴ *Id.* at §1(c)(6), 124 Stat. 1088.

⁵ Rebecca S. Williams, Jason Derrick, & K. Jean Phillips, *Cigarette sales to minors via the internet: how the story has changed in the wake of federal regulation*, 26 *Tobacco Control* 415-420 (2017).

General and Food and Drug Administration (FDA) in 2018.⁶ Internet sales represent one method children use to obtain such products.⁷

Additionally, research shows that tobacco products covered by the PACT Act are still being delivered to those under the legal sales age. A study published in 2016 found that even after the PACT Act's treatment of cigarettes as nonmailable, USPS still delivered packages of cigarettes to youth and universally failed to age verify upon delivery.⁸ Specifically, the Postal Service left 63.6% of received parcels at the customer's door and handed other packages to teen buyers without verifying their age.⁹

Other studies show that e-cigarettes are also delivered to minors. In one study, more than three out of four online orders placed by minors were delivered to them, with 95% of them being left at the door without age verification, and 88% of the packages received by minors were delivered by USPS.¹⁰ There is urgency to this problem as well – a recent study found that more e-cigarette users under 21 years old reported purchasing ENDS online since the COVID-19 pandemic began compared to before.¹¹ In other words, “after the pandemic began, online purchasing was the predominant source for e-cigarette purchases.”¹²

Comments specific to named sections of the Proposed Rule

1. *Current Mailing Restrictions on Cigarettes and Smokeless Tobacco*

Youth tobacco use rates remain unacceptably high, with e-cigarettes reported as the most commonly used products.¹³ The E-Cigarette Act's extension of the PACT Act to e-cigarettes serves the goal of preventing easy access to kids, and given the data discussed above about non-compliance with the nonmailable rule and the lack of age verification upon delivery, it is imperative the USPS work diligently to both enforce the nonmailable requirement and ensure accurate age verification when tobacco products are mailable. For example, subsection 472.231(d) of the current Publication 52, regarding the exception for certain individuals, allows customers to confirm *orally* that the recipient is an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery (emphasis added). The Postal Service should strengthen this policy by requiring the customer to sign and date a written statement that they know the recipient is an adult of at least the minimum age. This requirement should be accompanied by a statement that willfully making a false statement can

⁶ Office of the Surgeon General, HHS, *Surgeon General's Advisory on E-Cigarette Use Among Youth*, (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>; FDA, *Think E-Cigs Can't Harm Teens' Health?*, (Apr. 30, 2020), <https://www.fda.gov/tobacco-products/public-health-education/think-e-cigs-cant-harm-teens-health>.

⁷ Sherry T. Liu et al., *Youth Access to Tobacco Products in the United States, 2016-2018*, 5(6) *Tobacco Regulatory Science* 491-501 (2019).

⁸ *Supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Shivani M. Gaiha,, Lauren K. Lempert, & Bonnie Halpern-Felsher, *Underage Youth and Young Adult e-Cigarette Use and Access Before and During the Coronavirus Disease 2019 Pandemic*, 3(12) *J. Am. Med. Ass'n Network Opene*2027572 (2020).

¹² *Id.*

¹³ CDC, *Tobacco Product Use Among Middle and High School Students—United States, 2020*, 69 *Morbidity & Mortality Weekly Report*1881-88, December 18, 2020, <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6950a1-H.pdf>.

subject the customer to criminal penalties.¹⁴ This would help to ensure that mailers take the age-verification requirement seriously, decrease the chances of illegal USPS delivery of tobacco products to minors, and create a record for identifying and blocking the future use of this exception by persons who provide false age-verification information.

Turning to the policies discussed in the Proposed Rule, we support the Postal Service's determination that cigarettes and smokeless tobacco are nonmailable without exception in any "inbound or outbound international mail, mail to or from the Freely Associated States, or mail presented at overseas Army Post Office (APO), Fleet Post Office (FPO), or Diplomatic Post Office (DPO) locations and destined to addresses in the United States."¹⁵ The Proposed Rule also states that it would "[i]n general ... extend the current treatment of cigarettes and smokeless tobacco to ENDS ... except where context indicates otherwise."¹⁶ Because the context indicates otherwise only with respect to the Consumer Testing and Public Health exceptions (discussed below), we interpret the Proposed Rule to extend the nonmailability rule without exception for international mail; mail to or from the Freely Associated States; and AFO, FPO, and DPO mail destined to U.S. addresses to e-cigarettes as well. As so interpreted, we support this extension of the current mailing restrictions.

2. Extension of Existing Provisions to ENDS in General; Terminology

We support the proposal to streamline the Publication 52 drafting process by using "tobacco products" as a general term to refer to cigarettes, smokeless tobacco, and ENDS as defined in the E-Cigarette Act. The Proposed Rule indicates the Postal Service's intention to add a definition for "tobacco products,"¹⁷ but it does not put forth a proposed definition. Thus, we encourage USPS to make the proposed definition of "tobacco products" it intends to use in Publication 52 available to the public as soon as possible. That definition should make it clear that "tobacco products" encompasses all the products covered by the PACT Act and the E-Cigarette Act.

We disagree with the statement in the Proposed Rule that "ENDS are not products derived from tobacco." The Center for Tobacco Products at the FDA has asserted jurisdiction over ENDS precisely because e-cigarette products generally use nicotine derived from tobacco.¹⁸ Additionally, because ENDS, as defined in the E-Cigarette Act, clearly cover both nicotine- and non-nicotine-containing e-cigarettes, we urge the Postal Service to correct this statement so as not to limit the statutory definition. The E-Cigarette Act's broad definition of ENDS includes both devices that deliver "nicotine, flavor, or *any other substance*" and "*any component, liquid, part, or accessory*" of such a device (emphasis added).¹⁹ Thus, examples of products covered under this broad definition include tobacco-derived nicotine e-cigarettes, non-tobacco-derived nicotine e-cigarettes, non-nicotine containing vapes, e-liquids (regardless of substance), atomizers, cartomizers, clearomisers, tank systems, flavors, and batteries. We encourage USPS to consider providing a non-exhaustive list of products that are nonmailable and that can be updated as new products come on the market to facilitate increased compliance by both the public and Postal Service personnel.

¹⁴ See 18 U.S.C. § 1001.

¹⁵ *Supra* note 1, at 10,219.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products; Final Rule, 81 Fed. Reg. 28,973 (May 10, 2016).

¹⁹ *Supra* note 2, at 1955-56.

3. Standards for Determining Nonmailability

The Proposed Rule discusses the Postal Service's intention to make explicit what constitutes "reasonable cause" for USPS personnel to deny mailability of tobacco products beyond the two examples already enumerated by the PACT Act.²⁰ Presumably, this means edits to Publication 52 stating that in addition to the two instances constituting reasonable cause at 18 U.S.C. 1716E(a)(2), "reasonable cause" also includes other circumstances that USPS personnel observe giving rise to a reasonable suspicion that the mailpiece contains nonmailable tobacco products. We support this interpretation of the statute in concept, but again, we encourage the Postal Service to make the text of proposed edits to Publication 52 available to the public as soon as possible.

Specific to ENDS, the Proposed Rule reasons that because whether the product being shipped is an FDA-approved therapeutic/tobacco-cessation product is knowable by the mailer and not USPS, the burden is on the mailer to provide Postal Service personnel affirmative, credible, and verifiable information that the product is in fact FDA-approved for a therapeutic/tobacco-cessation purpose, and thus, mailable as an exempt therapeutic/tobacco cessation product.²¹ However, because no ENDS product has yet received FDA approval for a therapeutic purpose or as a tobacco cessation product, there can be no credible or verifiable indication of such by any mailer in the near term. Consequently, we urge USPS to treat all ENDS as nonmailable regardless of a mailer's affirmative statement to the contrary under the FDA-approved therapeutic/tobacco-cessation exemption.

As public health organizations seeking to reduce tobacco use, we support easy access of FDA-approved therapeutic/cessation products to tobacco users. Thus, for the long term, we suggest USPS consider amending Publication 52 in the future if and when any e-cigarettes receive FDA-approval for therapeutic or cessation purposes (e.g., by cross-referencing any FDA list of such products), rather than relying on mailers to self-identify their products as having such approval. In addition, USPS should already be utilizing the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers referenced in the Proposed Rule for determining whether there is reasonable cause that mailers may be attempting to mail nonmailable matter. Thus, neither the creation of, or cross-reference to, a list of ENDS that are FDA-approved for therapeutic or cessation purposes, nor the need for USPS personnel to check another list, would be overly burdensome, especially when weighed against the youth e-cigarette epidemic and evidence that tobacco products are still too easily mailable and available to minors.

4. Applicability of Exceptions

The Consumer Testing and Public Health exceptions originally applicable to cigarettes included quantity limits based on the standard cigarette pack size. However, given the wide variety of ENDS packaging and sizes and Congress' silence on appropriate ENDS quantity limits for such exceptions, we agree with the Postal Service's conclusion that it is "reasonable to construe the lack of accommodation for ENDS in the relevant statutory text to render [the Consumer Testing and Public Health] exceptions inapplicable to ENDS."²² As public health organizations concerned about the youth e-cigarette epidemic, we support comprehensive policies that reduce the availability of ENDS to youth, and fewer exceptions for ENDS sellers and shippers to exploit will help to achieve that goal.

²⁰ *Supra* note 1, at 10,219.

²¹ *Id.* at 10,219-20.

²² *Id.* at 10,220.

Conclusion

The PACT Act has helped to address the once widespread delivery of tobacco products, especially to youth. However, tobacco product deliveries to youth remain an ongoing problem, especially from overseas, and the youth e-cigarette epidemic has emerged as a serious new problem worthy of special attention. As such, we support the E-Cigarette Act's extension of the PACT Act to e-cigarettes and the general nonmailability of ENDS, as broadly defined in the E-Cigarette Act. The Proposed Rule to implement the nonmailability of ENDS is strong overall, and with the suggested changes we propose above, we believe the Postal Service is well positioned to reduce youth access to e-cigarettes. We look forward to working with USPS as edits to Publication 52 are finalized by April 26, 2021.

Respectfully,

American Academy of Family Physicians
American Academy of Pediatrics
American Cancer Society Cancer Action Network
American Heart Association
American Lung Association
Campaign for Tobacco-Free Kids
Parents Against Vaping E-Cigarettes
Truth Initiative