

## POSTAL SERVICE

### 39 C.F.R. Part 111

#### Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter

**AGENCY:** Postal Service™.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service is revising *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) 601.11, pertaining to the mailing of tobacco cigarettes and smokeless tobacco. These provisions implement specific requirements of the Prevent All Tobacco Cigarettes Trafficking (PACT) Act, Pub. L. No. 111-154, which restricts the mailability of cigarettes and smokeless tobacco.

**EFFECTIVE DATE:** June 29, 2010.

**FOR FURTHER INFORMATION CONTACT:** Anthony Alverno, 202-268-2997, or Mary Collins, 202-268-5440.

#### SUPPLEMENTARY INFORMATION:

On May 5, 2010, the Postal Service published a proposed rule *Federal Register* (75 FR 24534-24541) to implement the Prevent All Cigarette Trafficking (PACT) Act of 2009, Pub. L. No. 111-154. The Act's purposes include requiring Internet-based and other remote sellers of cigarettes and smokeless tobacco to comply with laws applied to other tobacco retailers by:

- creating disincentives for the illegal smuggling of tobacco products;
- enhancing enforcement tools to deal with cigarette smuggling;
- stemming trafficking, which increases the collection of federal, state, and local excise taxes on cigarettes and smokeless tobacco; and
- preventing youth access through Internet and contraband sales.

Section 3 of the PACT Act pertains to the Postal Service and creates a new Section 1716E of Title 18, U.S. Code. Section 3 of the PACT Act provides that, subject to certain exceptions, cigarettes, including roll-your-own tobacco and smokeless tobacco are nonmailable. Exceptions in the PACT Act permit the mailing of cigarettes and/or smokeless tobacco in narrowly defined circumstances, as described below.

- **Noncontiguous States:** intrastate shipments within Alaska or Hawaii;
- **Business/Regulatory Purposes:** shipments transmitted between verified and authorized tobacco industry businesses for business purposes, or between such businesses and federal or state agencies for regulatory purposes;
- **Certain Individuals:** infrequent, lightweight shipments mailed between adult individuals;

- **Consumer Testing:** shipments of cigarettes sent by verified and authorized manufacturers to adult smokers for consumer testing purposes; and
- **Public Health:** shipments by federal agencies for public health purposes under similar rules applied to manufacturers conducting consumer testing.

The PACT Act provides that the Postal Service cannot accept or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable cigarettes or smokeless tobacco. As in the proposed rule, the final rule explains that the Postal Service has reasonable cause to not accept for delivery or transmit a package based on:

- a statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment; or
- the fact that the mailer or other person on whose behalf a mailing is being made is on the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers.

Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. Senders of nonmailable cigarettes or smokeless tobacco are subject to criminal fines, imprisonment, and civil penalties.

Section 6 of the PACT Act provides that the nonmailability provisions, as well as the noncontiguous states exception, take effect 90 days after enactment. With respect to the remaining exceptions, the PACT Act requires the Postal Service to promulgate a final rule no later than 180 days after enactment of the PACT Act. 18 U.S.C. § 1716E(b)(3)(B)(i), (4)(B)(i), (5)(C)(i). The Postal Service is accordingly publishing this final rule to be effective on June 29, 2010. In this manner, all of the provisions, including the exceptions will be available to mailers as of June 29, 2010.

### **Response to Comments Received**

The Postal Service received several comments in response to the proposed rule. We discuss the comments below and our response to each.

One commenter, an association of state officials engaged in legal and law enforcement issues, expressed favorable comments on the proposed rule. The commenter stated that "strong and effective implementation" of the PACT Act would further the Act's stated objectives, and the proposed rule furthers those criteria. The commenter explicitly endorsed the "reasonable cause" standard in proposed section 601.11.2, by noting that it provides "a workable and effective means of identifying packages that are nonmailable under the PACT Act." The commenter also expressed support for the proposed rule's prohibition of cigarettes and smokeless tobacco in international mail.

A second commenter offered suggestions on several aspects of the proposed rule. First, the commenter suggested that a cross-reference in 601.11.2 was a typographical error, and the Postal Service has corrected the error in the final rule.

Second, the commenter recommended that DMM 601.11.5.1b specify more detailed documentation requirements regarding a mailer's official licensing. This recommendation is well-taken, and although the Postal Service does not believe that it should be incorporated into the final rule at this time, the Postal Service will take the recommendation under advisement and will apply it as necessary in its administration of the application process.

The same commenter also offered suggestions about the "certain individuals" exception in DMM 601.11.6. The commenter noted that the proposed rule neglected to include explicit restriction of the exception to noncommercial uses, including gifts not connected in any way with a commercial transaction. The Postal Service agrees with this recommendation and has incorporated language in DMM 601.11.6 to address the specific concerns. In a suggestion shared with comments by a consumer advocacy group, the commenter also recommended that a sender under the certain individuals exception be required to make his or her required affirmation in writing, under penalty of perjury, rather than orally. The PACT Act does not require that this affirmation be in writing, however, and the Postal Service believes that such a requirement would diminish administrative efficiency while not contributing appreciably to compliance or enforcement, given the additional procedures for verifying recipient age.

Finally, the commenter recommended that the consumer testing exception be revised in two ways. Under the commenter's proposal, the written certification in proposed DMM 601.11.7.1d (restyled as subparagraph b in the final rule) should include all of the conditions of 18 U.S.C. § 1716E(b)(5)(A)(v), not just the requirement that no payment be made by the recipient. (The consumer advocacy group suggested similar changes and that other conditions for the exception be incorporated within the certification.) The citation to clause 1716E(b)(5)(A)(v) is inapposite, however: the cited provision specifies general conditions for the exception, but not for the mailer's certification. The certification requirements are set forth expressly in 18 U.S.C. § 1716E(b)(5)(C)(ii)(II), and the Postal Service believes it has accurately captured them in the proposed and final rules. The commenter also submits that the proposed DMM 601.11.7.2d is overbroad, in that it implies that a recipient can only receive one consumer-test mailing from any manufacturer at all in a 30-day period, rather than one mailing from any one manufacturer. In response to the commenter's suggestion, the final rule has been revised accordingly to track the language of the statute.

As noted above, the Postal Service received a comment from a consumer advocacy group that touched on several aspects of the proposed rule. The commenter recommended that mailers under the business/regulatory purposes and consumer testing exceptions be required to update their applications for all changes in pertinent information and that the mailers be required annually to verify the continuing accuracy of their information. As explained below, the Postal Service has clarified the updating requirement in the final rule. The commenter also noted that, as proposed, the consumer testing exception in DMM 601.11.7.2b6 would not apply to recipients "residing" in a state that prohibits such shipments, whereas the corresponding PACT

Act provision applies to any individuals “located” in such a state. The observation is apt, and the Postal Service has revised the final rule accordingly.

The commenter suggested that the advice in DMM 601.11.2 regarding penalties is insufficiently specific and offers more detailed language for different types of violations. The Postal Service believes that this suggestion is unnecessary and goes beyond the intent of the proposed language, which is simply to alert mailers of the potential consequences of noncompliant mailings. To the extent that greater specificity might be desired, that specificity can be found in the text of the PACT Act itself. See 18 U.S.C. § 1716E(c)-(e). The commenter also recommended that the Postal Service require mailers under the consumer testing exception to provide a list of all potential recipients and that the Postal Service not accept any such mailing to individuals not listed. The Postal Service declines this suggestion as unnecessary, given that the mailer is already obligated to maintain records on all mailings. Moreover, it is unclear how such a requirement would enhance Postal Service administration or serve any clear purpose. The commenter further advised that the Postal Service should bar any consumer test mailings that weigh significantly more than 12 packs of cigarettes, or 12 ounces. While the Postal Service appreciates the desire for more specific guidelines, the Postal Service declines the proposal, as a weight-based standard is an ill-fitting proxy for a content-based regulation, and the proposal could bar a substantial amount of legitimate mailings. For example, a lesser number of packs combined with heavier non-cigarette matter could penetrate a weight cap without transgressing the PACT Act’s 12-pack limit. Finally, the commenter advises that pipe tobacco, “little cigars,” and other tobacco products labeled as such may present challenges in applying the PACT Act. The concern is duly noted and discussed further in response to two of the other comments.

The Postal Service received one comment from a tribal nation. The comment notes a lack of tribal consultation concerning the proposed rule, citing a Presidential Memorandum on Consultation (November 5, 2009), a treaty commitment, and Executive Order 13175. The Presidential memorandum and Executive Order 13175 apply to “agencies” as defined in 44 U.S.C. § 3502(1), however, and not specifically to the Postal Service, which is an independent establishment of the executive branch. 39 U.S.C. § 101; see *Kuzma v. United States Postal Service*, 798 F.2d 29, 32 (2d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); see also *Shane v. Buck*, 658 F. Supp. 908,914-15 (D. Utah 1985), *aff’d*, 817 F.2d 87 (10th Cir. 1987). The proposed rule is not limited in effect to any tribal nation or to tribal nations generally; rather, it applies to all users of the mails nationwide in the same manner as all other postal regulations. Moreover, the Postal Service has also provided adequate notice and an opportunity for meaningful and timely input through the rulemaking process, and the commenter is invited to contact the persons identified in this notice to arrange any further consultations that the commenter would find helpful.

The commenter also advised that the Postal Service should forgo enforcement of the PACT Act’s mailability requirements until after the Department of Justice has compiled the List of Unregistered or Noncompliant Delivery Sellers required by Section

2A(e) of the PACT Act. The Postal Service understands that the list may not be available until 180 days after the PACT Act's enactment, but notes that Congress has directed the mailability provisions to take effect 90 days after enactment. Until the list is available, it cannot be used for enforcement of the mailability rules. Nevertheless, the Postal Service notes that the statute provides other criteria, including a mailer's advertising, for determining whether it has reasonable cause to believe a mailing contains nonmailable tobacco products.

One commenter questioned whether infrequent lightweight shipments of tobacco between individuals would be allowed under the PACT Act. Consistent with the PACT Act and the proposed rule, the final rule permits individual customers to send shipments of cigarettes and smokeless tobacco to other individuals in certain contexts. All intra-state shipments will be permitted within Alaska and Hawaii, including shipments between two individuals located within one of those states. Otherwise, individual customers may mail small quantities of cigarettes and smokeless tobacco in domestic mail, subject to the requirements to the "certain individuals" exception described in DMM 601.11.6. This includes mail to Army Post Office (APO), Fleet Post Office (FPO), and Diplomatic Post Office (DPO) locations where cigarettes and smokeless tobacco are not restricted by the host country. See *Overseas Military/Diplomatic Mail* in the *Postal Bulletin*.

One commenter advised that the regulation is unnecessary, while another expressed concern that the proposed rule would lead to loss of employment for postal employees and higher postage increases. To clarify, the Postal Service is implementing requirements imposed by the PACT Act. The Postal Service does not have discretion to waive the Act's requirements. One of the consequences of the legislation is to prohibit sales transactions of cigarettes and smokeless tobacco conducted by mail. One of the commenters further suggested that clove cigarettes, which the commenter believed to be classified as cigars, purchased from vendors abroad would appear to fall within the scope of the proposed rule. Under Section 907(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111-31), flavored cigarettes and tobacco products marketed as cigarettes, including those with clove flavoring, are prohibited in the United States. To the extent that bona fide cigars are concerned, a cigar is defined, for purposes of the PACT Act, as any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, unless, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, the product is likely to be offered to, or purchased by, consumers as a cigarette. The PACT Act and the proposed rule's mailability prohibitions would not apply to imported tobacco products that are, in fact, classified by U.S. federal authorities as cigars. Other requirements may, however, apply to imported, mailable tobacco products, and as such, foreign mailers should contact private counsel or customs authorities to determine any applicable importation requirements.

Another commenter inquired whether it would be permissible to mail two to three cans of "snus" from Sweden to a friend in the United States. Because the Postal Service understands snus to be a form of smokeless tobacco, as defined by the PACT Act, it

would fall within the scope of the rules at hand. As explained in the proposed rule, the complex verification requirements for the PACT Act's exceptions, combined with the strict consequences of any noncompliance, render it impracticable for these requirements to be made applicable to mail originating or destinating outside of the United States. Therefore, the Postal Service does not believe that any alternative exists at this time to allow U.S. persons to send or receive smokeless tobacco products, such as snus, in international mail under the PACT Act's exceptions.

Two comments were received from retail associations. One expressed full support for the proposed rule, and offered no changes in connection with the rulemaking. The other association offered several suggestions. First, the commenter suggested that the required markings be changed from "PERMITTED TOBACCO PRODUCT" to "PERMITTED TOBACCO MAILING," for consistency with the PACT Act. This suggestion is well-taken and adopted in the final rule. The commenter also suggested that for certain exceptions, the term "PERMITTED" be deleted from the marking. The Postal Service believes that the term "PERMITTED" is acceptable in the context of all exceptions, since it serves as an instruction to personnel that the mailing is permissible and not prohibited from the mail. The commenter also suggested that the Postal Service require an oath or affirmation for all exceptions to the effect that all taxes have been paid on the tobacco product being mailed. As the commenter noted, the consumer testing exception requires that all taxes be paid on consumer testing samples; however, Congress did not impose similar restrictions in the context of other exceptions. The Postal Service disagrees with the commenter that oaths or affirmations regarding tax compliance are necessary upon mailing under the other exceptions, particularly considering that the exceptions' collective scope excludes all commercial transactions with consumers, where the issue of taxation would be most acute. Finally, the commenter suggested that postal retail locations include signage to the effect that it is illegal to mail tobacco (subject to certain exceptions) and that severe penalties apply. The commenter noted that its suggestion does not need to be part of the final rule. The Postal Service appreciates that there is a need for public education, but agrees with the commenter that such signage need not be part of the final rule.

One commenter questioned whether the scope of the proposed rule as it applies to "little cigars," which the commenter states are roughly the same size as a cigarette, are often wrapped in reconstituted tobacco, and often have a filter. The commenter stated that the definitions used in the PACT Act are ambiguous and should be clarified. In particular, the commenter suggested that the definition in the proposed rule incorporate Alcohol, Tobacco, and Firearms Revenue Ruling 73-22 with respect to the classification of little cigars. The Postal Service disagrees with the commenter that the definitions should be further clarified at this time, and notes that the definitions are taken directly from the definitions in the PACT Act. The Postal Service does not believe this rulemaking can resolve all of the issues presented by the commenter, particularly since the product described in the commenter's letter is not uniform.

One commenter, a tobacco company, offered several observations on the proposed rule. First, with respect to the business/regulatory purposes exception, the

commenter stated that the requirement for advance applications by mailers would prove to be an administrative burden on the Postal Service and would result in delays. The commenter offered similar observations on the consumer testing exception and suggested that the Postal Service simply require registration in advance. The Postal Service appreciates these concerns and is examining methods to streamline the process, including the possible use of a standardized form for applications, should the anticipated volume of applications so warrant. However, Congress specifically charged the Postal Service with verifying that mailings under these exceptions are sent by businesses with all proper licenses, an obligation that inheres a measure of due diligence.

Second, the commenter advised that the required markings on the packages comply with section 2A(b) of the Jenkins Act, which requires that delivery sellers apply the following marking to eligible shipments: "CIGARETTES/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS." The commenter further suggested that the Postal Service either not require its own separate markings or else unify its required markings for simplicity. The Postal Service disagrees with this suggestion. As an initial matter, section 2A(b) of the Jenkins Act applies to shipments of delivery sellers. Such shipments are explicitly prohibited from the mail, with the exception of shipments entirely within Alaska and Hawaii. Consequently, this marking is not pertinent to excepted postal shipments, since delivery sales may not be sent via U.S. mail (except within Alaska and Hawaii). Moreover, unique markings on excepted postal shipments are essential, because the acceptance and delivery rules vary according to the applicable exception, and the markings offer important guidance to postal personnel responsible for handling tobacco shipments. As an example, the minimum age for delivery of a consumer testing or public health cigarette sample is always 21; however, a shipment delivered to an individual may be subject to a lower minimum age (18 or 19, depending on state or local law). There is no way for postal employees to apply the correct minimum age requirement absent the use of a unique marking.

Third, the commenter suggested that the Postal Service work with interested parties to further enhance these rules in order to streamline the overall process of compliance. The Postal Service welcomes the opportunity to further improve these rules and encourages customers to continue to submit their ideas for improvement.

Another comment submitted by a tobacco company offered several suggestions on the proposed rule. First, the commenter disagreed with the proposed rule's requirement that excepted shipments (except intra-state shipments in Alaska and Hawaii) use "hold for pickup" service. The commenter believed that this requirement would be unduly burdensome and would affect its business operations. The commenter offered several illustrations to show the difficulties imposed by the hold for pickup requirement and urged that it not be incorporated in the final rule. The Postal Service appreciates the commenter's concerns; however, the final rule maintains the requirement for Express Mail with hold for pickup for the business/regulatory purposes,

certain individuals, consumer testing, and public health exceptions because such a measure will enable the Postal Service to focus its resources on implementing the PACT Act's unique delivery requirements, which have no precedent in postal operations. This, in turn, will enable the Postal Service to tailor the training it must give to personnel involved in the delivery of packages, which in turn will provide better controls to prevent tobacco from reaching minors. Nevertheless, the Postal Service's management is in the process of examining whether its services should be changed to align better with the PACT Act's requirements. The PACT Act's short time frame for implementation does not permit the Postal Service to develop more creative product solutions that may serve the commenter's needs at this early stage.

The commenter also raised several questions about the application process. Specifically, the commenter queried whether a form will be created and submitted. At this time, the final rule speaks of an application letter. Between the final rule's publication in the *Federal Register* and its effective date or some time thereafter, however, the Postal Service may decide to develop a form for use in the application process. The Postal Service will update its DMM regulations should a form be instituted in lieu of an application letter.

The commenter also questioned the application process, and suggested that rules regarding updates to applications be clarified. As noted above, the PACT Act charges the Postal Service with verifying the eligibility of a customer using the business/regulatory purposes, consumer testing, and public health exceptions. Consequently, the final rule requires that a mailer maintain the accuracy of all information in its application. Additionally, with respect to the business/regulatory purposes exception, the Postal Service is explicitly charged with responsibility of verifying the eligibility of the addressees to which business/regulatory mailings are sent. For this reason, a mailer cannot mail to an addressee until the eligibility of that addressee is verified, which implies that the applicant must await the issuance of an updated eligibility letter listing the addressee as an eligible recipient of a business/regulatory mailing.

The commenter also questioned the use of eligibility numbers issued by the Pricing and Classification Service Center (PCSC). The point of the eligibility number is simply to facilitate the organization of Return Receipts sent to the PCSC for shipments under the business/regulatory purposes, consumer testing, and public health exceptions. For clarity, the final rule indicates that each authorization letter under those exceptions will be assigned its own unique number. In addition, the final rule is clarified to state that the eligibility number must appear in the return address of the return receipt, and mailings must be returned to sender if the mailer's eligibility number is missing in the address block of the return receipt.

The commenter questioned the requirement that the applicant must reapply if no mailings take place every six months. The goal of this objective is to prevent eligible mailers from allowing information in their applications to become stale. The Postal Service nevertheless understands the potential paperwork burden on applicants and



has determined to change this requirement from six months to three years. The Postal Service believes that that time frame is adequate to address the commenter's concerns while continuing to meet the Postal Service's administrative needs.

Finally, the commenter questioned whether the final rule will include regulations governing all exceptions, and if not, then whether any shipments may be tendered under the various exceptions. The PACT Act nonmailability rules and intra-Alaska/intra-Hawaii exception become effective on June 29, 2010, which is 90 days after the enactment of the PACT Act. Although the PACT Act grants the Postal Service up to 180 days (or through September 27, 2010) to implement rules to implement the business/regulatory purposes, certain individuals, consumer testing, and public health exceptions, the Postal Service has undertaken to unify its rulemaking into a single, final rule. The Postal Service does not have the discretion to postpone the effectiveness of the start date of the nonmailability prohibitions, and postponement of the final rule would have no effect insofar as the criminal and civil penalties of the PACT Act are concerned. Finally, the commenter suggested that the final rule be delayed until all of its concerns are addressed. Because delay in issuance of the final rule would imply that no mailer could send cigarettes or smokeless tobacco under any of the exceptions (excluding the noncontiguous states exception), the commenter's suggestion is not adopted.

A commenter noted that the proposed rule does not expressly provide that pipe tobacco isailable. The PACT Act restricts the mailability of items that the Postal Service has reasonable cause under the PACT Act to believe contain cigarettes or smokeless tobacco, as those terms are defined in Section 1 of the Jenkins Act of 1949 (15 U.S.C. § 375(2), (12) (as amended)). If a product falls outside of the PACT Act's definitions for cigarettes or smokeless tobacco, then the product is not subject to the PACT Act's restrictions, except where it happens to fall within the scope of the PACT Act's reasonable cause standard. The fact that the PACT Act explicitly acknowledges the mailability of cigars, but not pipe tobacco or other extraneous tobacco products, does not suggest the nonmailability of those other tobacco products.

The commenter went on to state that cigars and pipe tobacco must beailable in all cases, citing Section 8 of the PACT Act. Section 8 expresses the sense of Congress that states should still be able to tax the remote sales of tobacco products. Section 8 of the PACT Act is not an affirmative statement of mailability. More significant than this statement of general intent is the PACT Act's operative provision, codified at 18 U.S.C. § 1716E(a)(1), that the Postal Service "shall not accept for delivery or transmit through the mails any package that it . . . has reasonable cause to believe contains [nonailable] cigarettes or smokeless tobacco." Thus, Congress generally directed that a package be refused if the Postal Service has reasonable cause to believe it contains nonailable cigarettes or smokeless tobacco. To the extent that Section 8 has any bearing on the instant rulemaking, it does not pose a conflict: states remain generally empowered to impose and collect taxes on tobacco products to the extent that those products can legally be sent through the mail or otherwise.

The commenter further requested guidelines as to the burden of proof for a mailer to contest an initial finding of nonmailability. The amount and type of evidence required to overcome reasonable cause would depend on the facts of a particular case.

Finally, the commenter expressed concern that, to the extent the proposed rule's "reasonable cause" standard relies on the presence of an entity on the Attorney General's List of Unregistered or Noncompliant Delivery Sellers, the standard could bar all shipments from such entities, including shipments that do not contain cigarettes or smokeless tobacco. In the commenter's opinion, this exceeds the PACT Act's restrictions and the Postal Service's authority. The Postal Service disagrees. The PACT Act itself, and not merely the Postal Service's proposed rule, defines "reasonable cause" as including the presence of an entity on the Attorney General's List of Unregistered or Noncompliant Delivery Sellers, regardless of the package's actual contents. 18 U.S.C. § 1716E(a)(2)(B). Furthermore, the commenter's attempt to distinguish between "delivery sellers" and sellers of other tobacco is unavailing, as the Attorney General's List of Unregistered or Noncompliant Delivery Sellers pertains to delivery sellers of cigarettes and smokeless tobacco, and not remote sellers of other tobacco products. See 15 U.S.C. §§ 375(5)-(6), 376A(e)(1)(A) (as amended).

#### **Explanation of Changes from Proposed Rule**

The final rule includes several additional changes and corrections. The first pertains to section 503 and 608 of the DMM, which includes standards for return receipt service. As explained in the proposed rule, the Postal Service's administration of the PACT Act exceptions results in a requirement under certain exceptions that customers use return receipts and make them returnable to the Pricing & Classification Service Center (PCSC). Because return receipts are typically made returnable to the sender, the final rule includes a revision to DMM 503 and 608 that implements this procedure.

Another change pertains to mail destined to APO/FPO/DPO destinations under the "certain individuals" exception. Changes to DMM sections 601.11.3 and 601.11.6.2 clarify that mailings of cigarettes and smokeless tobacco are permitted to these destinations only if not otherwise restricted according to the requirements of the host country. Mailings from or between APO/FPO/DPO destinations are not eligible, however, because Hold for Pickup labels are not offered at these destinations for delivery in the United States.

The final rule is clarified to ensure that proper controls are applied to shipments under certain exceptions. In particular, the final rule is modified to require face-to-face transactions (excluding Carrier Pickup and Pickup on Demand arrangements). The final rule is also clarified to the effect that Carrier Pickup and Pickup on Demand services are not available for permissible shipments of cigarettes and smokeless tobacco. These changes are reflected in DMM sections 601.11.4, 601.11.5.2, 601.11.6.1, and 601.11.7.2.

Nonsubstantive changes were made in the arrangement of the text in DMM section 601.11.2, so that standards related to the reasonable cause standard appear in sequence.

The updating requirements for applicants under the business/regulatory and consumer testing exceptions are clarified to apply to all information furnished on the customer's application for as long as the mailer continues to mail under either exception. This results in a reorganization of some text in DMM section 601.11.5.1 and the addition of text in DMM section 601.11.7.1a.

Language has been added to DMM section 601.11.6 to clarify that the certain individuals exception is only available for noncommercial shipments, and that senders must not receive direct or indirect compensation of any kind in connection with the contents being mailed.

The verbiage for markings used for each exception, as listed in DMM sections 601.11.5.2c, 601.11.6.3b, and 601.11.7.2b3, has been changed from "PERMITTED TOBACCO PRODUCT" to "PERMITTED TOBACCO MAILING." Further, the marking and text of the delivery procedures for shipments under the business/regulatory purposes exception in DMM section 601.11.5 were clarified to exclude delivery to the addressee's agents, as the PACT Act only permits employees of the addressee to retrieve such shipments. 18 U.S.C. 1716E(b)(3)(B)(ii)(VII).

As explained above, the restriction on the number of mailings to a tester from any one manufacturer under the consumer testing exception in DMM section 601.11.7.2d was revised to conform to the PACT Act.

For clarity, the final rule indicates that each authorization letter under the business/regulatory purposes, consumer testing, and public health exceptions will be assigned its own unique eligibility number, as noted in DMM sections 601.11.5.1c and 601.11.7.1e. Further, the final rule is clarified to state that the eligibility number must appear in the return address of the return receipt, and mailings must be returned to sender if the mailer's eligibility number is missing in the address block of the return receipt. Otherwise, the Postal Service cannot fulfill its responsibility to maintain records of the mailing because it cannot tie the return receipt to the eligible mailer's identity. In addition, the final rule refers to the "PACT MAILING OFFICE" in lieu of the "TOBACCO MAILING UNIT" and provides specific addressing in DMM section 608.4.1.

The period for lapse in authorization and the requirement for re-application for eligibility under the business/regulatory purposes, consumer testing, and public health exceptions has been changed from six months to three years. This change is reflected in DMM sections 601.11.5.1h and 601.7.1f.

Finally, the final rule clarifies that the required marking for each exception is to be placed directly above, directly below, or to the left of the postage on the address side of

the exterior of the mailpiece. This measure ensures that postal personnel will be able to identify the piece quickly as one falling within the eligible exceptions.

The Postal Service hereby adopts the following changes to the *Mailing Standards for the United States Postal Service*, Domestic Mail Manual (DMM), which is incorporated by reference in the *Code of Federal Regulations*. See 39 CFR Part 111.1

### **List of Subjects in 39 C.F.R. Part 111**

Administrative practice and procedure, Postal Service.

Accordingly, 39 C.F.R. Part 111 is amended as follows:

### **PART 111 – [AMENDED]**

1. The authority citation for 39 C.F.R. Part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301-307; 18 U.S.C. 1692-1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001-3011, 3201-3219, 3403-3406, 3621, 3622, 3626, 3632, 3633, and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) as follows:

### ***Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)***

\* \* \* \* \*

#### **500 Additional Mailing Services**

#### **503 Extra Services**

\* \* \* \* \*

#### **6.0 Return Receipt**

\* \* \* \* \*

#### **6.3 Obtaining Service**

\* \* \* \* \*

*[Add two new sentences to the end of the introductory paragraph of item 3.1 as follows:]*

#### **3.1 At Time of Mailing**

\* \* \* An exception is made for certain restricted mailings of cigarettes and smokeless tobacco. When required by 601.11.5.2, 608.11.7.2, or 608.11.8, a mailer must address the sender's address block to the Pricing and Classification Service Center (PCSC) PACT, Mailing Office (see 608.4.1 for address)

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#### **600 Basic Standards for All Mailing Services**

## 601 Mailability

\* \* \* \* \*

[Renumber current 601.11 and 12 as new 601.12 and 601.13, and add new 601.11 as follows:]

### 11.0 Cigarettes and Smokeless Tobacco

#### 11.1 Definitions

For this standard, we define terms as follows:

- a. *Cigarette*: any roll of tobacco wrapped in paper or in any substance not containing tobacco and any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette. The term cigarette includes roll-your-own-tobacco and excludes cigars.
- b. *Smokeless tobacco*: any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.
- c. *Cigar*: any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, unless, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, the product is likely to be offered to, or purchased by, consumers as a cigarette.
- d. *Roll-your-own tobacco*: any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof.
- e. *Consumer testing*: testing limited to formal data collection and analysis for the specific purpose of evaluating the product for quality assurance and benchmarking purposes of cigarette brands or sub-brands among existing adult smokers.
- f. *State*: any of the 50 states of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

#### 11.2 Nonmailability

Except as provided in 601.11.3, all cigarettes (including roll-your-own tobacco) and smokeless tobacco are nonmailable and shall not be deposited in or carried through the Postal Service mailstream. Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. Any nonmailable cigarettes and smokeless tobacco products seized and forfeited shall be destroyed or retained by the federal government for the detection or prosecution of crimes or related investigations and then destroyed. Senders of nonmailable cigarettes and smokeless tobacco may be subject to seizure and forfeiture of assets, criminal fines, imprisonment, and civil penalties. The Postal Service will not accept for delivery or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable cigarettes or smokeless tobacco. If the Postal Service reasonably suspects that a mailer is tendering nonmailable cigarettes or smokeless tobacco, then the mailer bears the burden of proof in establishing

eligibility to mail. The Postal Service has reasonable cause not to accept for delivery or transmit a package based on:

- a. a statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment; or
- b. the fact that the mailer or other person on whose behalf a mailing is being made is on the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers.

### **11.3 Mailability Exceptions**

Cigarettes and smokeless tobacco are mailable if one of the conditions in 11.4 through 11.8 is met. These exceptions only apply to domestic mail under 608.2.1, including mail sent from the United States to Army Post Office (APO), Fleet Post Office (FPO), and Diplomatic Post Office (DPO) addresses to which tobacco is not restricted (see 703.2.3.1), with the exception that delivery procedures for overseas military mail under the certain individuals exception in 11.6 may vary as practicable. These exceptions do not apply to the following:

- a. mail treated as domestic under 608.2.2;
- b. international mail as defined in 608.2.3; or
- c. mail presented at APO, FPO, or DPO installations and destined to addresses in the United States or other APO, FPO, or DPO addresses.

### **11.4 Mailing Within Noncontiguous States**

Applicable mailings may not be tendered through Pickup on Demand or Carrier Pickup services. Intra-Alaskan and intra-Hawaiian shipments of cigarettes or smokeless tobacco are mailable, provided that such mailings:

- a. are presented in a face-to-face transaction with a postal employee within the state;
- b. destinate in the same state of origin;
- c. bear a valid complete return address that is within the state of origin; and
- d. are marked with the following exterior marking on the address side of the mailpiece: "INTRASTATE SHIPMENT OF CIGARETTES OR SMOKELESS TOBACCO."

### **11.5 Exception for Business/Regulatory Purposes**

Eligibility to mail and to receive mail under the business/regulatory purposes exception is limited to federal and state government agencies and legally operating businesses that have all applicable state and federal government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research under the conditions in 11.5.1 to 11.5.3.

#### **11.5.1 Application**

Each customer seeking to mail cigarettes or smokeless tobacco under the business/regulatory purposes exception must complete an application letter requesting to mail under the business/regulatory purposes exception.

- a. The applicant must furnish:

1. information about its legal status, any applicable licenses, and authority under which it operates;
  2. information about the legal status, any applicable licenses, and operational authority for all entities to which the applicant's mailings under this exception will be addressed; and
  3. all locations where mail containing cigarettes and smokeless tobacco will be presented.
- b. The applicant must establish its and its recipients' eligibility as legally operating businesses that have all applicable state and federal government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research; or, in the case of mailings for regulatory purposes, as a federal or state agency. Only those shipments containing otherwise nonmailable tobacco addressed to recipients on the customer's list of designated recipients are eligible for the business/regulatory purposes exception.
  - c. Applications must be mailed to the manager, Pricing & Classification Service Center (PCSC), see 608.8.4.1 for address. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the business/regulatory purposes exception. A number is assigned to each letter of eligibility.
  - d. The applicant must timely update the information in its application as necessary prior to conducting any mailing for as long as it continues to mail under the business/regulatory exception.
  - e. Customers whose applications or amendments to existing applications are denied in whole or in part may appeal to the manager, Mailing Standards (see 608.8.0).
  - f. Eligibility to mail under the business/regulatory purposes exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. A customer may appeal an adverse initial decision to the manager, Mailing Standards (see 608.8.0). Decisions by the manager, Mailing Standards, to uphold the denial of an application or to revoke a customer's eligibility under the business/regulatory purposes exception may be appealed to the Judicial Officer under 39 C.F.R. Part 953.
  - g. Upon written request by a state or federal agency, the Manager, PCSC, may, in his or her discretion, waive certain application requirements for mailings entered by the requesting state or federal agency for regulatory purposes.
  - h. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any three-year period. After that time, the affected mailer must apply for and receive new authorization for any mailings under this exception.

### **11.5.2 Mailing**

Customers eligible to mail under the business/regulatory purposes exception may enter mailings of cigarettes and smokeless tobacco only at the locations specified in the customer's application. Applicable mailings may not be tendered through Pickup on Demand or Carrier Pickup services. Before mailing any shipment under this exception, the mailer must present proof that the PCSC has authorized the mailer to mail such shipments at that location. All mailings under the business/regulatory purposes exception must:

- a. be entered in a face-to-face transaction with a postal employee as Express Mail with Hold for Pickup service (waiver of signature and pickup services not permitted);
- b. be accompanied by a request for PS Form 3811 return receipt, which must bear the sender's PACT eligibility number issued by the PCSC in the return address block as well as the addressee's full name and address, and be made returnable to the PCSC, PACT Mailing Office (see 608.4.1 for address)
- c. bear the marking "PERMITTED TOBACCO MAILING – DELIVER ONLY TO ADDRESSED BUSINESS/AGENCY — RECIPIENT MUST FURNISH PROOF OF AGE AND EMPLOYMENT" on the address side of the mailpiece (place the marking directly above, below, or to the left of the postage);
- d. bear the business or government agency name and full mailing addresses of both the sender and recipient, both of which must match exactly those listed on the customer's application on file with the Postal Service.

### **11.5.3 Delivery**

Mailings bearing the marking for business/regulatory purposes can only be delivered to a verified employee of the addressee business or government agency. The recipient must show proof that he or she is an employee of the business or government identified as the addressee on the mailing label under the following conditions:

- a. The recipient must be an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.
- b. Once age and the recipient's identity as an employee of the addressee are established, the recipient must sign PS Form 3849 and PS Form 3811 in the appropriate signature blocks. If mailer's eligibility number is missing in the return address block of the PS Form 3811, the mailing must be returned to sender.

### **11.6 Exception for Certain Individuals**

The exception for certain individuals permits the mailing of small quantities of cigarettes or smokeless tobacco by individual adults to businesses or to other adults. Such shipments may include, but are not limited to, cigarettes and smokeless tobacco exchanged as gifts between individual adults and a damaged or unacceptable tobacco product returned by a consumer to the manufacturer. For purposes of this rule, "gifts" do not include products purchased by one individual for another from a third-party vendor through a mail-order transaction, or the inclusion of cigarettes or smokeless tobacco at no additional charge with other matter pursuant to a commercial transaction. Eligibility to mail under the certain individuals exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. A customer may appeal an adverse initial decision to the manager, Mailing Standards (see 608.8.0). The mailer bears the burden of proof in establishing eligibility in the event of revocation. Decisions by the manager, Mailing Standards, to revoke a customer's eligibility under this exception may be appealed to the Judicial Officer under 39 C.F.R. Part 953. Mailings under this exception must be made under the conditions in 11.6.1 through 11.6.3.



### **11.6.1. Entry and Acceptance**

Mailings under the certain individuals exception must be entered under the following conditions:

- a. Cigarettes or smokeless tobacco may only be mailed via a face-to-face transaction with a postal employee. Applicable mailings may not be tendered through Pickup on Demand or Carrier Pickup services.
- b. Cigarettes or smokeless tobacco may only be entered by an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of entry.
- c. The individual presenting the mailing must furnish government-issued photo identification that lists age or date of birth, such as a driver's license or passport, at the time of the mailing. The name on the identification must match the name of the sender appearing in the return address block of the mailpiece.
- d. For mailings addressed to an individual, at the time the mailing is presented, the customer must orally confirm that the addressee is an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery.

### **11.6.2 Mailing**

No customer may send or cause to be sent more than 10 mailings under this exception in any 30-day period. Each mailing under the certain individuals exception must:

- a. be entered as Express Mail; (waiver of signature and pickup services not permitted);
- b. bear the marking "PERMITTED TOBACCO MAILING – DELIVER ONLY TO AGE-VERIFIED ADULT OF LEGAL AGE" on the address side of the exterior of the mailpiece (place the marking directly above, below, or to the left of the postage);
- c. bear the full name and mailing address of the sender and recipient on the Express Mail label;
- d. weigh no more than 10 ounces;
- e. not be sent to APO/FPO/DPO addresses to which the mailing of tobacco is restricted (see 703.2.3.1);
- f. with the exception of shipments from civilian locations to APO/FPO/DPO addresses, request delivery through Hold for Pickup service; and
- g. not be entered at an APO/FPO/DPO installation.

### **11.6.3 Delivery**

Delivery under the certain individuals exception is made under the following conditions:

- a. The recipient signing for the Express Mail article must be an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery.
- b. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.
- c. Once age is established, the recipient must sign PS Form 3849 in the appropriate signature block.

## **11.7 Consumer Testing Exception**

The exception for consumer testing permits a legally operating cigarette manufacturer or a legally authorized agent of a legally operating cigarette manufacturer to mail cigarettes to verified adult smokers solely for consumer testing purposes. The manufacturer for which mailings are entered under this exception must have a permit, in good standing, issued under 26 U.S.C. § 5713. The consumer testing exception applies only to cigarettes and not smokeless tobacco. Items must be mailed under conditions in 11.7.1 through 11.7.3.

### **11.7.1 Application**

Each customer seeking to mail cigarettes under the consumer testing exception must submit an application letter to mail under consumer testing exception. In support of its application, the following must be met:

- a. The applicant must furnish information to establish that the customer, or the customer's principal if the customer is a manufacturer's agent, is a cigarette manufacturer in good standing under 26 U.S.C. § 5713; if the customer is an agent of a manufacturer, complete details about the agency relationship with the manufacturer; and all locations where mail containing cigarettes for consumer testing will be presented. The applicant must timely update all information in its application as necessary prior to conducting any mailing for as long as it continues to mail under the consumer testing exception.
- b. As part of its application, the applicant must certify in writing that it will comply with the following requirements:
  1. any recipient of consumer testing samples of cigarettes is an adult established smoker;
  2. no recipient has made any payment for the cigarettes;
  3. every recipient will sign a statement indicating that the recipient wishes to receive the mailings;
  4. the manufacturer or the legally authorized agent of the manufacturer will offer the opportunity for any recipient to withdraw the recipient's written statement at least once in every three-month period;
  5. any package mailed under this exception will contain not more than 12 packs of cigarettes (maximum of 240 cigarettes) on which all taxes levied on the cigarettes by the state and locality of delivery have been paid and all related state tax stamps or other tax-payment indicia have been applied; and
  6. the manufacturer will maintain records establishing compliance with these obligations for a three-year period from the date of each mailing.
- c. The application must be submitted to the manager, Pricing & Classification Service Center (PCSC) (see 608.8.4.1 for address).
- d. The applicant must provide any requested copies of records establishing compliance to the manager, PCSC, and/or the manager, Mailing Standards (see 608.8.0), upon request no later than 10 business days after the date of the request.
- e. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the consumer testing exception. A number is assigned to each letter of eligibility. Customers whose applications are denied in whole or in part may appeal to the manager, Mailing Standards. Eligibility to mail under the

consumer testing exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. Decisions by the manager, Mailing Standards, to uphold the denial of an application or to revoke a customer's eligibility under the consumer testing exception may be appealed to the Judicial Officer under 39 C.F.R. Part 953.

- f. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any three-year period. After that time, the affected mailer must apply for and receive new authorization for any further mailings under this exception.

### **11.7.2 Mailing**

Customers eligible to mail under the consumer testing exception may enter mailings of cigarettes only at the locations specified in the customer's application. Applicable mailings may not be tendered through Pickup on Demand or Carrier Pickup services. Mailings must be tendered under the following conditions:

- a. Before tendering any shipment under this exception, the mailer must present proof (PCSC Eligibility letter) that the PCSC has authorized the mailer to tender such shipments at that location.
- b. All mailings under the consumer testing exception:
  1. must be entered in face-to-face transactions with postal employees as Express Mail with Hold for Pickup service requested (waiver of signature and pickup services not permitted);
  2. be accompanied by a request for PS Form 3811 return receipt, which must bear the sender's PACT eligibility number issued by the PCSC in the return address block, as well as the addressee's full name and address, and be made returnable to PCSC, PACT Mailing Office (see 608.4.1 for address)
  3. must bear the marking "PERMITTED TOBACCO MAILING – DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION - AGE 21 OR ABOVE" on the address side of the mailpiece (place the marking directly above, below, or to the left of the postage);
  4. must bear the full mailing addresses of both the sender and recipient on the Express Mail label (the name and address of the sender must match exactly those listed on the customer's application on file with the PCSC);
  5. are limited in tobacco contents to no more than 12 packs of cigarettes (maximum 240 cigarettes) on which all taxes levied on the cigarettes by the destination state and locality have been paid and all related state tax stamps or other tax-payment indicia have been applied;
  6. may not be addressed to an addressee located in a state that prohibits the delivery or shipment of cigarettes to individuals in the destination state;
  7. may be sent only to an addressee who has not made any payment for the cigarettes, is being paid a fee for participation in consumer tests, and has agreed to evaluate the cigarettes and furnish feedback to the manufacturer in connection with the consumer test.
- c. Customers must maintain records to establish compliance with the requirements in 11.7 for a three year period.

- d. Mailing frequency may not exceed more than one package from any one manufacturer to an adult smoker during any 30-day period.
- e. Nothing in these rules shall preempt, limit, or otherwise affect any related state laws.

### **11.7.3 Delivery**

Mailings bearing the marking for consumer testing can only be delivered to the named addressee under the following conditions:

- a. The recipient signing for the Express Mail Hold for Pickup service article must be an adult of at least 21 years of age.
- b. The recipient must furnish proof of age through production of a driver's license, passport, or other government-issued photo identification that lists age or date of birth.
- c. The name on the identification must match the name of the addressee on the Express Mail label.
- d. Once age is established, the recipient must sign the PS Form 3849 and PS Form 3811 in the appropriate signature blocks. If mailer's eligibility number is missing in the return address block of the PS Form 3811 return receipt, the mailing must be returned to sender.

### **11.8 Public Health Exception**

Federal government agencies involved in the consumer testing of tobacco products solely for public health purposes may mail cigarettes under the mailing standards of 11.7, except as provided herein. The federal agency shall not be subject to the requirement that the recipient be paid a fee for participation in consumer tests. Upon written request, the manager, PCSC, may, in his or her discretion, waive certain of the application requirements.

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### **608 Postal Information and Resources**

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### **8.0 USPS Contact Information**

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### **8.4. PCSC and District Business Mail Entry Offices Contact Information**

*[Add second listing to the PCSC under the current listing as follows:]*

#### **4.1 Pricing and Classification Service Center (PCSC)**

For return receipts mailed under the provisions in 601.11.5, 601.11.7, and 601.11.8, use the following address:

PCSC, PACT MAILING OFFICE  
 USPS ELIGIBILITY NO. XX-00-0000  
 90 Church Street Suite 3100  
 New York, NY 10007-2951

\* \* \* \* \*

We will publish an amendment to 39 C.F.R. 111 to reflect these changes.

**Stanley F. Mires**

*Chief Counsel, Legislative.*

[END DOCUMENT]