



Dale Kennedy
Manager, Product Classification
United States Postal Service
475 L'Enfant Plaza SW, Room 4446
Washington DC 20260-3436
VIA ELECTRONIC MAIL TO PCFederalRegister@usps.gov

March 22, 2021

**RE: COMMENTS ON THE TREATMENT OF E-CIGARETTES IN THE MAIL
(86 FR 10218).**

Dear Mr. Kennedy:

On behalf of the members of the California Cannabis Industry Association (CCIA), we submit these comments seeking clarification on the proposed revisions to the definition of Electronic Nicotine Delivery Systems (“ENDS”) as it relates to non-tobacco and non-nicotine products. We are a diverse organization of businesses that sell, manufacture, and distribute state legal cannabis and cannabis derived products, including hemp products produced under the Agriculture Improvement Act of 2018 (Pub. L. 115-334).

Considering the pending USPS Rule on *Hazardous, Restricted and Perishable Mail, 52*, we write to you in hopes of gaining clarity on the proposed rule as it relates to herbal non-tobacco products that do not contain nicotine. As written, the proposed rule casts an exceptionally wide net and includes products legal under California state law. If enacted as written, the proposed rule could have devastating consequences on small businesses due to increased operational costs.

The undersigned businesses and organizations unambiguously support restricting the sale of tobacco and nicotine to minors. By extension we also support restricting the sale of cannabis, cannabis products and paraphernalia consistent with state law.^[1] Most individuals begin smoking as teens rather than later in life, so it is critical to implement strategies to curb youth smoking and access to tobacco products. About 1 of every 5 high school students in 2020 (19.6%) reported using tobacco e-cigarettes and we should do all possible to limit youth access, including restricting online sales.^[2] However, the proposed changes to USPS could unintentionally regulate products that Congress had no original intent of capturing.

Additional concern surrounds the direct and detrimental economic impacts that the overly broad interpretation will have on the already financially compromised USPS. The Postal Service has not recorded any profit since 2006 and the agency's total revenue has mostly fallen or stagnated since 2008. Additionally, the agency has experienced a steep decline in the volume of mail delivered over the last two decades. Between 2000 and 2019 there was a 31.4% decline in the total volume of mail delivered.^[3]

In light of the well documented financial constraints, the USPS should be exploring alternatives to increase revenue streams, for example by maintaining and expanding its current guidance on

mailing hemp products. The USPS has been engaged in protocols and a framework for use of the postal system by compliant hemp companies. The agency has established internal guidance for pre-vetting hemp operators to ease supply chain interruption during shipping. The loss of non-nicotine related products and devices including hemp products will create a severe handicap and potentially insurmountable, unintended financial consequence.

Furthermore, it is important to note the totality of the circumstances, that the most commonly used carriers other than USPS, namely Federal Express, United Parcel Service (“UPS”), and DHL, are following USPS’ lead. They all recently made announcements regarding the cessation and prohibition on deliveries of vaporizer devices and products in some capacity. This blanket limitation on mailing non-nicotine products will completely cripple entire industries including manufacturers of hemp-derived and botanical aromatic products and devices.

1. The Definition of ENDS is Overly Broad and Contradicts the Plain Language of Preventing Online Sales of E-Cigarettes to Children Act of 2020.

The notice for rulemaking creates an immediate inconsistency regarding nicotine versus non-nicotine products:

“despite the name, an item can qualify as an ENDS without regard to whether it contains or is intended to be used to deliver nicotine; liquids that do not actually contain nicotine can still qualify as ENDS, as can devices, parts, components, and accessories capable of or intended for use with non-nicotine-containing liquids.”

(emphasis added)^[4]

Indeed,, the proposed rule covers “any other substance’ beyond nicotine.

By including any item or substance “without regard to whether it contains or is intended to be used to deliver nicotine,” this rule encompasses non-tobacco herbal substances that are used for therapeutic and non-therapeutic purposes, many of which are far less dangerous than tobacco, and at least in California, are regulated differently than tobacco products. In fact, California has created a specific exemption for non-nicotine herbal products from state laws regarding tobacco and nicotine. For example, California's law on flavored tobacco products makes no reference to non-nicotine herbal products including cannabis.^[5]

By its plain language, ENDS is applicable to nicotine devices only. Moreover, the United States Supreme Court has held that in the context of legislative drafting, the phrase “any other” conveys a broad meaning. However, this phrase is not without limitation, particularly when viewed under the *ejusdem generis* doctrine which provides that “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with the specific enumeration.” Here, the specific term is the delivery of “nicotine” and the general term is “any other substance” in addition to nicotine. In this case, the designation of other substances refers to substances of the same type and kind as nicotine liquid. Non-tobacco herbal products including

cannabis are not the same type and kind as nicotine liquid. Accordingly, they merit more clarity around this proposed rule and how, and if it should, apply to non-nicotine products.

For our organizations, the products most impacted include vaporization devices with tetrahydrocannabinol (“THC”) and cannabidiol (“CBD”) – though as written this rule also captures other cannabinoids such as CBG and CBN. We do not dispute that even before amendments to the PACT Act were considered that the shipment of THC products that exceeded 0.3% THC violated federal law nor are we suggesting that this rule should exempt THC absent a change in Federal law. However, by broadly defining both e-liquids and aerosolized solutions to include non-tobacco products, this rule captures products produced legally under the Agricultural Improvement Act of 2018 (“Farm Bill”).

Nor should the rule include hardware that is intended to be utilized by licensed and compliant operators be interrupted or potentially disrupted by legislation intended to curtail and prohibit the sale of tobacco products.

Specifically, hemp-derived CBD products will be captured and harmed by this overly broad regulation. These products are lawful under the Farm Bill, yet would be subject to the expansive definition of ENDS. Further still, vaporization devices intended for essential oils and herbs including but not limited to melatonin, basil, blue lotus, flower, chamomile, and other substances may be unintended casualties of the misguided definition. Before promulgation of the final rule, we strongly urge USPS to revise the language to focus solely on tobacco and nicotine products as is the intention and direction of the underlying PACT Act.

2. Proposed Definition of ENDS is Outside of the Legislative Intent.

To the greatest extent possible when agencies develop regulations, they should do so in a way that is not contrary or inconsistent with Congressional intent.^[6] Guidance from the Government Accountability Office further indicates that when there is statutory ambiguity, legislative intent can be used for additional clarity in rulemaking.^[7]

As mentioned above, the inclusion of non-nicotine devices under the phrase “any other substance” could be interpreted in a variety of ways, creating ambiguity. Turning to the legislative history of the Preventing All Cigarette Trafficking Act and its amendments, including those that address the definition of ENDS, show that the legislative language has consistently focused on nicotine and tobacco products.

When the bill was introduced in the Senate, bill sponsor Senator Diane Feinstein (D-CA) focused exclusively on nicotine rather than other vaporized substances:

“According to a U.S. Surgeon General report on e-cigarette use among youth and young adults, the developing adolescent brain is uniquely sensitive to *nicotine*. Studies have also shown that the development of the brain during adolescence can be permanently altered by *nicotine*. As a result, children exposed to *nicotine* may be at greater risk for acting out drug-seeking behaviors, experiencing deficits in attention and cognition, and suffering from mood disorders. These effects may continue into adulthood, long after e-cigarette use has stopped. (*emphasis added*).^[8]

As a standalone bill, Senator Feinstein’s ENDS tobacco amendments were passed under unanimous consent, meaning that no Senator objected to them. Similar nicotine-based arguments were made in the House in the Committee Report from the House Judiciary Committee.^[9] Members of Congress had ample opportunity to include discussion of non-nicotine vaping devices in these discussions and elected not to do so.

If Congress meant for the definition to apply more broadly they would have included a more generalized term or terms. Moreover, a review of the legislative history and transcripts reveal a complete lack of discussion or even mention of the words “marijuana,” “hemp,” or “cannabis.” Committee discussions were limited to the alarming increase in youth **nicotine** use and the historical effectiveness of PACT in reducing consumption of tobacco cigarettes by minors. Senator Feinstein’s statements on the bill above and as follows highlights the precision focus of intention, “[g]iven the effects of nicotine on children, it is critical that we close any legal loopholes that have allowed underage youth to gain access to tobacco, particularly through e-cigarettes.”^[10] The genesis for Congress’ action was rooted in tobacco and the concerns surrounding the effects of **nicotine** in tobacco products.

However, without even diving into legislative history, one needs to look no further than the self-defining term, “Electronic **Nicotine** Delivery System” (emphasis added). The USPS in its Proposed Revision, note that these are products made for use with **nicotine**. Congress’ intention is clearly focused on **nicotine**; the bill was introduced as a response to JUUL and the continued glamorization of tobacco cigarettes to America’s youth.

The end result of the lack of focus will be severe with wide ranging unintended consequences for non-nicotine operators, hardware device manufacturers, and the USPS. The legislative intention behind PACT is unquestionably to address access of tobacco and nicotine products to children and young adults. We do not dispute or disagree with the intention. We fully support and believe that intention should not be diluted in purpose with the expansive definition of ENDS.

3. The Postal Service Should Provide an Exemption for Non-Tobacco Products.

Good public policy demands precision drafting and education rather than a blanket action to address issues of nuanced complexity. Within the USPS existing framework there are various products exempted from postal service regulations like cigars, for example. Cigars are excluded from the mailability ban, and therefore may be mailed regardless of any conditions required for the mailing or other applicable products under the PACT Act exceptions.^[11] A similar exception could be made for non-tobacco vaping products (excluding those with THC given the federal illegality). The coalition recommends the following clarification be included in USPS’ rule:

“ENDS are not personal vaporizers designed for use with non-tobacco herbs or concentrates of non-tobacco herbs that do not contain nicotine, such as hemp and aromatics.”

Without this additional clarity, many other vaporization products and devices will be unfairly and incorrectly impacted. The result of which would deprive many Americans of access to non-nicotine vaporizers they rely upon to safely consume hemp and other legal substances. The overly broad application will deprive Americans from accessing vaporization products and devices, which have become the preferred standard for the consumption of cannabis (THC and hemp). Vaporization as

part of a wellness regimen provides a palliative alternative to the symptoms of multiple sclerosis, nausea, posttraumatic stress disorder, cancer, epilepsy, cachexia, glaucoma, HIV/AIDS, and degenerative neurological conditions. Vaporizers used for this purpose simply do not present the same concerns as vaporizers used to deliver nicotine and were not intended as discussed herein to fall within the scope of the PACT Act and its implementing regulations.

4. The Broad Definition of ENDS creates additional confusion and uncertainty for USPS's Business/Regulatory Purpose Exception.

Non-mailability provisions of the PACT Act have several exemptions, including Business/Regulatory Purposes. Publication 52 - Hazardous, Restricted, and Perishable Mail - provides that "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 . . ."

While seemingly innocuous at first blush, the broad definition of ENDS frustrates this exception, making it virtually inapplicable to non-tobacco or non-nicotine products. Indeed, as the rule states, and as the USPS "PACT Application for Business/Regulatory Purpose Exception" requires, applicants seeking to take advantage of this exception must provide the USPS with "all applicable state and federal licenses or permits that authorize the entity covered by this application to engage in the applicable business."^[12] The problem for the hemp industry specifically is that many of their products, including vape devices, herbal vaporizers, and liquid vaporizers used for hemp-derived cannabinoids do not contain nicotine or tobacco and therefore companies selling these products in interstate commerce never had to register or obtain a license with federal or state agencies. Accordingly, they do not have any "applicable state and federal licenses or permits" demonstrating they are able to engage in the applicable business.

Similarly, field 5(c) of PS Form 4615 requires the applicant to provide copies of all recipients applicable licenses along with its applicable to take advantage of the Business/Regulatory Purpose Exception. Because hemp-derived products and devices used to consume those products were never subject to the PACT Act requirements before enactment of the Act, applicants have nothing to provide and therefore will inevitably be denied approval to take advantage of this exception.

The USPS can easily remedy this catch-22 that hemp companies now find themselves in by clarifying that ENDS does not include personal vaporizers designed for use with non-tobacco herbs or concentrates of non-tobacco herbs that do not contain nicotine, such as hemp and aromatics.

5. Reporting, Taxing, and Packaging Requirements Create Unknown Liabilities for Businesses Shipping Non-Nicotine and Non-Tobacco Vape Products and Devices.

PACT's reporting requirements require sellers of products covered by the Act to register with the ATF and the tobacco tax administrators in the states receiving a shipment. The Act requires that the ATF maintain a non-compliant list of persons who fail to comply with the Act. Placement on the list bars common carriers and other persons from delivering products sold by the listed company. ATF distributes the list to common carriers, USPS, credit card companies, and other entities.

When using a delivery method other than USPS, sellers must file a monthly report with the state tobacco tax administrator and any other entity that taxes the sale of cigarettes, including the name and address of the persons delivering and receiving the shipment and the brand and quantity of the products. These requirements apply to both B2C and B2B transactions. However, the individualized states tax program indicated in these reporting requirements are geared towards nicotine/tobacco taxing and simply extending ENDS definition imposes inconsistent and conflicting requirements on non-nicotine product manufacturers.

In the case of devices intended for cannabis use specifically, though the cannabis supply chain in California is a closed loop system, hardware and non-cannabis raw material intended for use with, or incorporation into, cannabis products must still be mailed between legitimate businesses. These reporting requirements would create not only inconsistencies and confusion when coupled with existing regulatory and tax requirements imposed on licensed cannabis companies, but would furthermore avail compliant cannabis operators to federal agency tracking. This type of tracking is the antithesis of States' rights and individual state legalization efforts. Failing to exclude devices intended for cannabis use from the definition of ENDS would create a completely untenable situation for otherwise compliant operators.

Sellers must also label packages as containing tobacco with the following statement:

CIGARETTES/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL
APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND
TAX-STAMPING OBLIGATIONS

In addition, sellers must verify the age and identity of the person accepting delivery and obtain adult customer signature at delivery. Sellers must maintain records of delivery sales for a period of four years after the date of sale, among other requirements.

However, the requirement that a seller label a non-tobacco product as tobacco, as would be required for non-nicotine vaping products, could amount to fraudulent product identification to consumers and would certainly lead to confusion among businesses. Hemp, herbs and aromatics i.e. non-nicotine should not be required to be labeled as tobacco.

The USPS can address these inconsistencies by clarifying the definition of ENDS as excluding personal vaporizers designed for use with non-tobacco herbs or concentrates of non-tobacco herbs that do not contain nicotine, such as cannabis, hemp, and aromatics.

6. The Postal Service Could Implement Reasonable Age Verification Systems.

The proposed rule requires retailers of ENDS products who ship using private carriers to verify the age of the person accepting delivery using a commercially available database. Despite the rule only applying to USPS, private common carriers, such as UPS and FedEx have followed the directives and intentions set by the USPS as mentioned above. If the USPS elected to incorporate additional regulations regarding age verification, these private common carriers would be more than inclined to reverse their stance and incorporate any systems or guidance provided by USPS.

Alternatives to the current age verification process can provide an additional layer of protection against cyber fraud. For example, optical character recognition based software uses AI learning algorithms to analyze and process identification as part of a security system to verify identity. The

software can be used as part of a biometric verification system by comparing selfie photos against a database containing data extracted from driver's licenses. Similarly, Virginia's Electronic Identity Management Act sought to strengthen cybersecurity by creating a common set of identity proofing and provider standards. The Act created an advisory board composed of public and private actors to oversee the development of standards for identity verification and authentication, and grants limited liability to those identity providers that follow the specifications. This legal framework can be used as a model by USPS.

7. Conclusion

It is with strong support for the services provided by the USPS in combination with the implementation of PACT for its intended purpose of preventing trafficking of nicotine and nicotine products that these comments are submitted.

Thank you for your thoughtful consideration of these comments and recommendations.

Respectfully submitted,

^[1] While California law allows minors to be medical cannabis patients, they can not purchase products without the supervisor of a qualified caregiver over the age of 21.
(https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=10.&title=&part=&chapter=14.&article=)

^[2] <https://www.cdc.gov/mmwr/volumes/69/wr/mm6950a1.htm>

^[3]

<https://www.pewresearch.org/fact-tank/2020/05/14/the-state-of-the-u-s-postal-service-in-8-charts/>

^[4] <https://public-inspection.federalregister.gov/2021-03393.pdf>

^[5] https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200SB793&showamends=false

^[6] See generally *Holly farms Corp. v. Nat'l Labor . Rels. Labor Bd.*, 517 U.S. 392 (U.S. 1996)

^[7] <https://www.gao.gov/assets/gao-16-463sp.pdf>

^[8] <https://www.congress.gov/congressional-record/2019/04/30/senate-section/article/S2519-1>

^[9] <https://www.congress.gov/congressional-report/116th-congress/house-report/260/1>

^[10] <https://www.congress.gov/congressional-record/2019/04/30/senate-section/article/S2519-1>

^[11] Revised Mailing Standards of the United States Postal Service, Domestic Mail Manual 503.6.3.1, 601.11, and 608.8.4.1.

^[12] PS Form 4615, field 5(b).

EMAIL with subject line "E-Cigarette Restriction"

Lindsay Robinson,
Executive Director, California Cannabis Industry Association (CCIA)

Conrad Gregory,
Head of Gov't Relations, Harborside

Pamela Epstein,
Chief Regulatory & Licensing Officer, Eden
Enterprises

Sabrina Noah,
VP of Public Affairs, Cresco Labs

Michael Boniello,
Managing Partner, Poseidon Asset
Management

James Anthony,
Principal, Anthony Law Group

Vera Levitt,
Chief Operating Officer, Mankind Dispensary

Tiffany Devitt,
Chief of Gov't and Consumer Affairs,
CannaCraft

Yvette McDowell,
Founder, Law Office of Yvette McDowell

AnnaRae Grabstein,
Chief Compliance Officer, Norcal Cannabis

Kristin Nevedal,
Cannabis Program Manager, County of
Mendocino

David Hua,
Co-Founder & CEO, Meadow

Kristi Palmer,
Co-Founder, Kiva Confections

Dr. Swetha Kaul

Kimberly Simms,
Founding Attorney, Law Offices of Kimberly R.
Simms