



39 CFR Part 113

Treatment of E-Cigarettes in the Mail

AGENCY: Postal Service™.

ACTION: Proposed revision, invitation for comment

SUMMARY: The Postal Service proposes to revise Publication 52, *Hazardous, Restricted, and Perishable Mail*, to incorporate new statutory restrictions on the mailing of electronic nicotine delivery systems. Such items would be subject to the same prohibition as cigarettes and smokeless tobacco, subject to many of the same exceptions.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Mail or deliver written comments to the Manager, Product Classification, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 4446, Washington, DC 20260-3436. Email comments, containing the name and address of the commenter, may be sent to: PCFederalRegister@usps.gov, with a subject line of "E-Cigarette Restrictions." Faxed comments are not accepted. All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

You may inspect and photocopy all written comments, by appointment only, at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, D.C. 20260. These records are available for review Monday through Friday, 9 a.m. and 4 p.m. by calling 202-268-2906.

FOR FURTHER INFORMATION CONTACT: Dale E. Kennedy, 202-268-6592.

SUPPLEMENTARY INFORMATION:

The Postal Service is proposing to amend Publication 52 with the provisions described below and, once adopted, will incorporate the revised Publication 52 by reference into 39 C.F.R. Part 113. You may view the text of the proposed edits to Publication 52 at <https://pe.usps.com>.

On December 27, 2020, the Preventing Online Sales of E-Cigarettes to Children Act (“Act”), Pub. L. No. 116-160, div. FF, title VI (2020), was enacted. Effective 90 days after enactment, Section 602 of the Act adds “electronic nicotine delivery systems” (ENDS) to the definition of “cigarettes” subject to regulation under the Jenkins Act, 15 U.S.C. 375 et seq. Consequently, ENDS will also become subject to the mailability restrictions and exceptions in 18 U.S.C. 1716E, which rely on the Jenkins Act definition of “cigarettes.” 18 U.S.C. 1716E(a)(1). Section 603 of the Act requires the Postal Service to promulgate implementing regulations not later than 120 days after enactment and provides that the prohibition on mailing ENDS will apply immediately “on and after” the date of the final rule.

Current Mailing Restrictions on Cigarettes and Smokeless Tobacco

Currently, 18 U.S.C. 1716E bans the mailing of cigarettes and smokeless tobacco except 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:** lightweight shipments mailed between adult individuals, limited to 10 per 30-day period;

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

18 U.S.C. 1716E(b)(2)-(6). Outside of these exceptions, the Postal Service cannot accept or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable smokeless tobacco or cigarettes. *Id.* at (a)(1).

The Postal Service has determined that the exceptions above cannot feasibly be applied to 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. Publication 52, *Hazardous, Restricted and Perishable Mail* 472.2. As such, all cigarettes and smokeless tobacco in such mail are nonmailable, without exception.

Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. 18 U.S.C. 1716E(c). Senders of nonmailable cigarettes or smokeless tobacco are subject to criminal fines, imprisonment, and civil penalties, in addition to enforcement under other federal, state, and local laws. *Id.* at (d), (e), (h).

Definition of ENDS

The proposed rule uses the definition of ENDS contained in 15 U.S.C. 375(7), as amended by section 602(a)(1)(C) of the Act. Under this definition, an ENDS is any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device.

Examples include e-cigarettes, e-hookahs, e-cigars, vape pens, advanced refillable personal vaporizers, and electronic pipes. Provisions relating to ENDS also extend to any component, liquid, part, or accessory of an ENDS, regardless of whether sold separately from the device. 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.

Excluded from the statutory definition are products approved by the Food and Drug Administration for sale as tobacco cessation products or for other therapeutic purposes and marketed and sold solely for such purposes.

Accordingly, the proposed rule excludes such items from the definition of ENDS.

Approved tobacco cessation and therapeutic products thus remain mailable in domestic mail, international mail, mail treated as domestic, and mail from overseas APO/FPO/DPO addresses to United States destination addresses.

Extension of Existing Provisions to ENDS in General; Terminology

In general, the proposed rule would extend the current treatment of cigarettes and smokeless tobacco to ENDS. This is consistent with how the Act formally includes ENDS within the definition of “cigarettes” in 15 U.S.C. 375(2)(A)(ii), which is used in 18 U.S.C. 1716E. Consequently, all existing restrictions on and exceptions for “cigarettes” apply to ENDS, except where context indicates otherwise.

It is not intuitive that ENDS should be understood as a form of “cigarette.” In general parlance, “cigarettes” most commonly consist of ground leaf tobacco wrapped in paper, which deliver nicotine to a smoker when solid matter is combusted, and the resulting smoke inhaled. ENDS are electronic devices and

their components and fillers, which deliver either nicotine or non-nicotine substances to a user when a liquid is vaporized, and the resulting vapor inhaled. To facilitate understanding by readers not versed in the statute, we propose to treat ENDS as a standalone category, albeit one generally subject to the same restrictions and exceptions as cigarettes, consistent with the statute.

We have considered two ways in which to express this generally equivalent treatment. First, cigarettes, ENDS, and smokeless tobacco could be listed serially in every applicable instance; however, this option appears to unduly clutter the rules' text. Second, we could employ a shorthand term to encompass all three types of items. Indeed, the statute itself appears to take this approach. Although the term is not defined in either 18 U.S.C. 1716E or 15 U.S.C. 375, "tobacco product" is used in the title of 18 U.S.C. 1716E and throughout its text as apparent shorthand for the products made nonmailable by that section (i.e., cigarettes and smokeless tobacco). Because ENDS now fall within that scope through their inclusion in the pertinent statutory definition of "cigarettes," it seems reasonable to use the umbrella term "tobacco product" to refer to ENDS as well as cigarettes and smokeless tobacco. Hence, we propose to add a definition of "tobacco products" and to replace numerous instances of "cigarettes and smokeless tobacco" with "tobacco products."

This proposed solution admittedly shares some of the same conceptual difficulty discussed above in relation to cigarettes: technically speaking, ENDS are not products derived from tobacco. In this instance, however, the general conceptual alignment, together with the benefits of a shorthand term and consistency with the statute's use of the term, appear to weigh in favor of "tobacco product" in reference to all products nonmailable under 18 U.S.C.

1716E. Commenters are invited to propose alternative terminological approaches and to discuss the relative merits of their proposals.

Standards for Determining Nonmailability

Current law requires the Postal Service to treat shipments of cigarettes and smokeless tobacco as nonmailable not only where Postal Service personnel have actual knowledge that a shipment contains such items, but also where Postal Service personnel have “reasonable cause to believe” that such contents are present. 18 U.S.C. 1716E(a)(1). “Reasonable cause” exists where a party is on the U.S. Attorney General’s List of Unregistered or Noncompliant Delivery Sellers, and where public statements or advertisements indicate an intent to mail nonmailable cigarettes or smokeless tobacco for payment. *Id.* at (a)(2). The statute’s use of “includes” before these enumerations of “reasonable cause” plainly indicates that the list is illustrative, rather than exhaustive, but it is silent on what else constitutes “reasonable cause.” Beyond those enumerated indicia of suspicion, other circumstances pertaining to a mailpiece may give rise to a reasonable suspicion that a package contains nonmailable cigarettes, smokeless tobacco, or ENDS. Where Postal Service personnel observe such circumstances and determine that reasonable cause exists, they may treat a package as nonmailable. The proposed rule would make this explicit.

In the specific context of ENDS, the new statutory definition conditions mailability on factors that are extrinsic to the physical item: namely, whether a product is FDA-approved for therapeutic or tobacco-cessation use, and whether it is marketed and sold exclusively for such purposes. These circumstances are known or knowable by a mailer, but they are not necessarily apparent to Postal Service personnel reviewing a package. If the possessor of an FDA-approved and exclusively marketed therapeutic or tobacco-cessation product wishes to

mail it, then that person has the unique means and incentive to provide adequate information with the package so that Postal Service personnel can identify the otherwise nonmailable item as, in fact, mailable. If a mailer does not do so, then the Postal Service has no basis to disbelieve indicia indicating the presence of a nonmailable ENDS.

In expecting the mailer to supply such information, the Postal Service must be able to verify that the mailer is acting in good faith and not illegitimately treating the therapeutic/tobacco-cessation exclusion as an opportunity to evade the general mailing ban. If the mailer's claim to the exclusion is not appropriately credible or verifiable, then that claim may not be sufficient to deprive the Postal Service of reasonable cause to believe that the item is a nonmailable ENDS. Therefore, the proposed rule would authorize Postal Service personnel, upon reasonable cause to believe that a package contains cigarettes, smokeless tobacco, or ENDS, to treat the package as nonmailable unless the customer has affirmatively, credibly, and verifiably indicated that the relevant contents are, in fact, mailable.

Commenters are invited to offer their views on this proposed standard for reasonable cause in connection with ENDS-type items (or any other tobacco products). To the extent that commenters might propose alternative standards, commenters are advised to account specifically for the need to prevent abuse of the narrow exclusion of therapeutic and tobacco-cessation products; the asymmetry between mailers' and the Postal Service's access to information about the FDA-approval status and marketing of particular products; the Postal Service's limited resources; and its limited legal authority to open mailpieces that are sent in sealed mail classes without a warrant. 39 U.S.C. 404(c); 39 CFR 233.3(c)(3)-(4), (g)(1)-(2).

Applicability of Exceptions

The existing Noncontiguous States, Business/Regulatory Purposes, and Certain Individuals exceptions appear to be articulated in terms that can apply to ENDS as well as to cigarettes and smokeless tobacco. As such, the proposed use of the umbrella term “tobacco products” in the rules for each exception would automatically apply all such existing rules to ENDS. Commenters are nonetheless invited to identify any potential anomalies or other problems that this approach might create and to recommend solutions for such problems.

The Consumer Testing and Public Health exceptions apply only to “cigarettes,” and not to smokeless tobacco. 18 U.S.C. 1716E(b)(5)-(6). As noted earlier, the Act technically includes ENDS within the relevant definition of “cigarettes.” Without more, this would ordinarily indicate that these exceptions should apply to ENDS as well as other forms of “cigarettes.” However, 18 U.S.C. 1716E(b)(5)(A)(ii) or (C)(ii)(III) confine the exceptions to packages containing “not more than 12 packs of cigarettes (240 cigarettes).” Congress did not amend these provisions when it included ENDS, broadly defined, in the definition of “cigarettes,” and neither the text of the Act nor its legislative history contains any guidance as to how these conditions should apply to ENDS.

ENDS are not packaged in such standard quantities as traditional cigarettes. ENDS rely on devices that can be used in an open-ended fashion, with potentially limitless quantities of liquid filled cartridges, whereas traditional cigarettes are self-contained, single-use items. Moreover, ENDS filler liquids can contain varying quantities of nicotine, or even no nicotine, whereas cigarettes uniformly contain nicotine. As such, it does not appear possible even to devise an administrable standard of equivalence that would allow “12 packs of cigarettes

(240 cigarettes)” to be translated into some quantity of ENDS filler liquid, let alone ENDS products other than filler liquid.

Given the Act’s broad definition of ENDS and the material differences between ENDS products and the types of products originally encompassed by the Consumer Testing and Public Health exceptions, it appears reasonable to construe the lack of accommodation for ENDS in the relevant statutory text to render those exceptions inapplicable to ENDS. To the extent that commenters believe that the Consumer Testing and Public Health exceptions should apply to ENDS, commenters are invited to recommend alternative standards consistent with Congress’s apparent intent to limit the quantity of items mailed in packages under the exceptions. Commenters should explain in detail how any proposed alternative quantity limits are analogous to or otherwise consistent with those in 18 U.S.C. 1716E(b)(5)(A)(ii) or (C)(ii)(III), or why such consistency is not necessary. Commenters are also invited to furnish any relevant documentation or supporting information that may aid the Postal Service in evaluating their recommendations.

Effective Date of Eventual Final Rule

Particularities here merit a brief discussion of the timing of the eventual final rule, in the interest of providing stakeholders with advance information. Section 603(a) of the Act requires the Postal Service “promulgate regulations to clarify the applicability of the prohibition on mailing of cigarettes” to ENDS not later than 120 days after enactment (i.e., April 26, 2021). Section 603(b) provides that the prohibition will apply to mailings of ENDS “on and after” the publication date of the final rule. In specifying this immediate effective date, Congress expressly abrogated the standard 30-day notice period for a final rule under the Administrative Procedure Act (APA), which would otherwise apply to rulemakings

concerning the mailability statute here. 5 U.S.C. 553(d), 559; 39 U.S.C. 3001(m). To the extent that this rulemaking concerns not only the mailing prohibition referenced in the Act, but also the application of exemptions from that prohibition, the APA permits those aspects of the eventual final rule likewise to take effect with less than 30 days' notice (e.g., immediately upon publication). 5 U.S.C. 553(d)(1).

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