

## Publication

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### Client Alert: Congress Orders Imposition of Shipping Restrictions on Vaporizer Devices, Components, and Accessories

Effective March 27, 2021, the Preventing Online Sales of E-Cigarettes to Children Act (E-Cig Act) expands on existing legislation governing the shipment of cigarettes to impose restrictions on the shipment of “Electronic Nicotine Delivery Systems” (ENDS). Despite the E-Cig Act’s named purpose of preventing nicotine sales to children, however, it is not narrowly tailored to address either children or nicotine. Rather, under the E-Cig Act, ENDS are broadly defined as “any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device.” The Act specifies that this includes:

- E-cigarettes;
- E-hookahs;
- E-cigars;
- Vape pens;
- Advanced refillable personal vaporizers;
- Electronic pipes; and
- Any component, liquid, part, or accessory of a device described [listed above], without regard to whether the component, liquid, part, or accessory is sold separately from the device.

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Based on the E-Cig Act's broad definition of ENDS, its requirements for compliance (discussed below), and its expected carveouts, it appears that the E-Cig Act's primary effect will be on smaller businesses that lack their own distribution capabilities and rely on mail or courier services to distribute their products. This may drive industry consolidation under traditional, larger tobacco companies that can afford to self-distribute, and that are well-accustomed to operating in a highly regulated environment.

The E-Cig Act requires each seller of ENDS (including the components listed above) that transports such products by mail or courier service to register with the Bureau of Alcohol Tobacco and Firearms as well as the tobacco tax administrator of the state into which the product is to be shipped. Sellers must report shipments to each recipient state's tobacco tax administrator each month and pay all applicable taxes prior to delivery and must limit shipment of ENDS to 10 pounds, while recipients must provide proof of identification upon delivery. The E-Cig Act further imposes a duty on each shipping company to ensure that it does not ship ENDS from non-compliant sellers. Sellers that violate these regulations shall be fined the greater amount of \$5,000 for a first violation and \$10,000 for other violations OR 2% of the gross sales of ENDS devices during the one-year period ending on the date of the violation.

By April 26, 2021, the United States Postal Service (USPS) is to provide regulations clarifying the limitations on mailing of ENDS, and that such limitations shall take effect upon the release of these regulations. Existing USPS regulations prohibiting shipment of cigarettes and smokeless tobacco products specifically exempt shipments between verified and authorized tobacco industry businesses for business purposes, or between such businesses and federal or state agencies for regulatory purposes. Therefore, it is likely these exemptions will also extend to ENDS. However,



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traditional courier services such as FedEx, UPS and DHL have already announced policies prohibiting ENDS shipments completely. These policies have left businesses in the burgeoning vape pen industry, including those that sell devices, batteries, cartridges and fill material, struggling to find logistics solutions. We will continue to monitor this situation and be prepared to address questions about the USPS rules promulgation when it is released.

If you have any questions about this new legislation, or concerns about how it may affect your business, please contact Mike Turner, Andrew Wood or your Neal Gerber Eisenberg attorney.

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