

POSTAL SERVICE

39 C.F.R. Part 111

Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: The Postal Service proposes to revise *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 to be in compliance with the Prevent All Tobacco Cigarettes Trafficking (PACT) Act, Pub. L. No. 111-154, which restricts the mailability of cigarettes and smokeless tobacco.

DATES: Submit comments on or before [10 DAYS FROM DATE OF PUBLICATION].

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 3436, Washington, DC 20260-3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, D.C., between 9 a.m. and 4 p.m., Monday through Friday. Email comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov*, with a subject line of "PACT Act." Faxed comments are not accepted.

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

SUPPLEMENTARY INFORMATION:

On March 31, 2010, the Prevent All Cigarette Trafficking (PACT) Act of 2009, Pub. L. No. 111-154 was enacted. 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;
- creating disincentives for the illegal smuggling of tobacco products;
- enhancing enforcement tools to deal with cigarette smuggling;
- stemming trafficking;
- increasing 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 smokeless tobacco or cigarettes. The proposed 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 accordingly will attempt to publish a final rule effective June 29, 2010, that, at a minimum, will cover the general nonmailability provisions and the noncontiguous states exception. The Postal Service will attempt to issue a final rule to give effect to the remaining exceptions to the PACT Act as soon as possible, but no later than September 27, 2010.

The Postal Service offers the following observations on the various aspects of the proposed rule below.

Definitions: Consistent with the PACT Act, the proposed rule uses the definitions of cigarettes, roll-your-own tobacco, smokeless tobacco, cigars, consumer testing, and states found in federal law in Titles 15, 18, and 26 of the U.S. Code. As provided in 18 U.S.C. § 1716E(b)(1), cigars are excluded from the mailability ban and therefore may be mailed regardless of any conditions required for the mailing of other applicable products under the PACT Act exceptions.

Mailability: The proposed rule incorporates the PACT Act mailability restrictions for cigarettes and smokeless tobacco.

Coverage of Exceptions: The PACT Act governs the permissibility of certain items within the Postal Service's mailstream network. 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 Postal Service's service area. Therefore, the Postal Service does not believe that any alternative exists at this time to allow U.S. mailers to tender cigarettes and smokeless tobacco as outbound international mail or to receive them as inbound international mail under the PACT Act's exceptions. The proposed rule incorporates these principles by restricting the exceptions' applicability to domestic mail, but not to mail treated as domestic under *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) 608.2.2 or international mail as defined in DMM 608.2.3.

The applicability of these proposed rules to domestic mail under DMM 608.2.1 would include mail to, from, and between military installations, Army Post Offices (APOs), Fleet Post Offices (FPOs), and Diplomatic Post Offices (DPOs), except for mail treated as domestic under DMM 608.2.2. Delivery rules would apply to overseas military mail as practicable under the certain individuals' exception. Hold for Pickup service would not be required for delivery to APO, FPO, and DPO addresses.

Noncontiguous States Exception: The PACT Act permits the mailing of cigarettes and smokeless tobacco within the State of Alaska and within the State of Hawaii. 18 U.S.C. § 1716E(b)(2). The proposed rule would require that intra-Alaskan and intra-Hawaiian shipments of cigarettes or smokeless tobacco:

- be presented in a face-to-face transaction with a postal employee (thereby enabling acceptance personnel to verify that the shipment will destinate in the noncontiguous state of origin),
- destinate in the state of origin,
- bear a return address that is within the state of origin, and
- be marked with the following exterior marking on the address side of the mailpiece: "INTRASTATE SHIPMENT OF CIGARETTES OR SMOKELESS TOBACCO."

Business/Regulatory Purposes Exception: Eligible mailers and recipients under the business/regulatory purposes exception include federal and state agencies, 18 U.S.C. § 1716E(b)(3)(A)(ii), as well 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.” 18 U.S.C. § 1716E(b)(3)(A)(i). The PACT Act charges the Postal Service with verifying that any person submitting an otherwise nonmailable tobacco product into the mails, and any person receiving such a product through the mails, as authorized under the business/regulatory purposes exception, is a business or government agency within the scope of the exception. 18 U.S.C. § 1716E(b)(3)(B)(ii)(I)-(II).

The Postal Service proposes to require that each customer seeking to avail itself of this exception submit an application to the manager, Pricing and Classification Service Center (PCSC). The application requires the customer to furnish information about its legal status, any applicable licenses, and authority under which it operates. In addition, the applicant would be required to furnish similar information for all entities to which its mailings under this exception are addressed and to identify all locations where the applicant will present mail containing cigarettes and smokeless tobacco. The applicant would be required to update this information anytime it intends to mail to an entity or at a location not previously on its list. Only those shipments addressed to designated recipients and presented at designated locations would be eligible for the business/regulatory purposes exception. Before tendering any shipment under this exception, the mailer must present proof that the Postal Service has authorized the mailer to tender such shipments at that location.

Based on information furnished in the customer's application, the Postal Service will make determinations of eligibility to mail under this exception. The applicant bears the burden of establishing its and its recipients' eligibility as legally operating businesses that have all applicable state and federal government licenses or permits and that are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research; or, in the case of mailings for regulatory purposes, the applicant's or its recipient's status as a federal or state agency. Customers whose applications or amendments to existing applications are denied in whole or in part may appeal to the manager, PCSC. The proposed rule provides that 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. Decisions by the manager, PCSC, 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. In order to ensure that eligibility determinations remain current, the proposed rule provides that any authorization to mail under this exception will lapse if the mailer does not actually tender any such mail during any six-month period, and that the mailer must submit a new application for eligibility for any future mailings after that point.

The PACT Act requires that eligible shipments under this exception be sent via mail classes that provide for the “tracking and confirmation of the delivery.” 18 U.S.C. § 1716E(b)(3)(B)(ii)(III). The mail service that fulfills this requirement is Express Mail service, which offers tracking information and confirmation of delivery. Consequently, the proposed rule specifies that eligible shipments under the business/regulatory purposes exception would be required to use Express Mail service.

The PACT Act provides that eligible mailings be “marked with marking that makes it clear to employees of the United States Postal Service that it is a permitted mailing of otherwise nonmailable tobacco products that may be delivered only to a permitted government agency or business and may not be delivered to any residence or individual person.” 18 U.S.C. § 1716E(b)(3)(B)(ii)(VI). The Postal Service accordingly proposes that each mailing tendered under the business/regulatory purposes exception bear the following marking: “PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO ADDRESSED BUSINESS/AGENCY-- RECIPIENT MUST FURNISH PROOF OF AGE AND EMPLOYMENT OR AGENCY.” The marking would be required to appear on the exterior of the address side of the mailing container.

The PACT Act requires that the Postal Service maintain information, to include “the identity of the business or government entity submitting the mailing containing otherwise nonmailable tobacco products for delivery and the identity of the business or government entity receiving the mailing” for a three-year period beginning on the date of the mailing. 18 U.S.C. § 1716(b)(3)(B)(ii)(IV)-(V). Such information must be made available to designated law enforcement agencies during the designated period of retention. The Postal Service understands this retention requirement to apply to sender and recipient name and address information for each mailing. Currently, the Postal Service does not organize or retain handwritten or typed Express Mail mailing labels for the designated statutory retention period. To comply with this requirement, the Postal Service proposes that all customers seeking to mail under this exception use Express Mail service with Return Receipt. The Return Receipt must bear the sender’s eligibility number issued by the PCSC as well as the addressee’s full name and address, and be made returnable to the manager, PCSC, which will retain the record for the requisite period. Further, the business or government name and full mailing address of the sender and recipient would be required to appear on the Express Mail label, and match those listed on the customer’s application on file with the Postal Service. 18 U.S.C. § 1716E(b)(3)(B)(ii)(IV).

The PACT Act provides that eligible mailings under the business/regulatory purposes exception “be delivered only to a verified employee of the recipient business or government agency, who is not a minor and who shall be required to sign for the mailing.” 18 U.S.C. § 1716E(b)(3)(B)(ii)(VII). For this exception, the term “minor” is defined as “an individual who is less than the minimum age required for the legal sale or purchase of tobacco products as determined by applicable law at

the place the individual is located.” 18 U.S.C. § 1716E(b)(3)(C). To implement this requirement, the proposed rule would require that Express Mail service be used without the option for waiver of signature. Further, to ensure that delivery is effected on a person who is a representative of the company and not a minor, the proposed rule would require that all Express Mail shipments under this exception be required to be delivered using Hold for Pickup service. Hold for Pickup is shipped directly to a postal retail location, in lieu of being deposited at the recipient’s address. The package is held until the recipient retrieves it during retail office hours. This measure would reduce the potential that underage or unauthorized individuals may receive a nonmailable shipment of cigarettes or smokeless tobacco. Furthermore, the recipient would be required to 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, as well as proof that the recipient is an employee or agent of the business or government entity identified on the mailing label.

Certain Individuals: The exception for certain individuals generally permits the mailing of small quantities of cigarettes or smokeless tobacco sent non-commercially by individual adults to businesses or other adults. 18 U.S.C. § 1716E(b)(4)(A). Such shipments can include, but are not limited to, the following:

- cigarettes and smokeless tobacco exchanged as gifts between individual adults; and
- the return by a consumer of a damaged or unacceptable tobacco product to the manufacturer.

For purposes of the certain individuals’ exception, the PACT Act requires the Postal Service to “verify that any person submitting an otherwise nonmailable tobacco product into the mails ... is the individual identified on the return address label of the package and is not a minor.” 18 U.S.C. § 1716E(b)(4)(B)(ii)(I). Further, for a mailing addressed to an individual recipient, the PACT Act specifies that the sender affirm that the recipient is not a minor. 18 U.S.C. § 1716E(b)(4)(B)(ii)(II). For purposes of this exception, a minor is “an individual who is less than the minimum age required for the legal sale or purchase of tobacco products as determined by applicable law at the place the individual is located.” 18 U.S.C. § 1716E(b)(4)(C).

To give effect to these statutory requirements, the proposed rule provides that shipments by individuals of cigarettes or smokeless tobacco would be required to bear the sender’s name in the return address, and that such shipments be presented in a face-to-face transaction with a postal employee. In this manner, the Postal Service would be able to discharge its obligation to verify the sender’s age and confirm that the sender’s identification matches the name listed in the return address. Age and identity would be verified through the use of government-issued photo identification that lists age or date of birth, such as a driver’s license or passport. Further, for shipments addressed to an individual, the proposed rule would require that the recipient’s first and last name appear in the address block (in lieu of a generic descriptor, such as “resident” or “occupant”) on the mailpiece. To fulfill the requirements of the PACT Act, the proposed rule specifies that at the time

of the mailing, the customer would be required to orally affirm to the accepting postal employee that the recipient is not a minor under the laws applicable to the recipient at the destination location.

The PACT Act also specifies additional quantity and frequency limitations on the certain individuals' exception. In particular, such mailings cannot weigh in excess of 10 ounces. 18 U.S.C. § 1716E(b)(4)(B)(ii)(III). Shipments entered under this exception are capped at no more than 10 mailings in any 30-day period. 18 U.S.C. § 1716E(b)(4)(B)(ii)(VII). Further, as with the business/regulatory purposes exception, such mailings may only be sent via mail classes that provide for the "tracking and confirmation of the delivery." 18 U.S.C. § 1716E(b)(4)(B)(ii)(IV). Again, the mail service that fulfills this requirement is Express Mail, which offers tracking information and confirmation of delivery. As explained above, the proposed rule specifies that eligible shipments under the certain individuals' exception would be required to use Express Mail with Hold for Pickup service.

The PACT Act provides that mailings under the certain individuals' exception "shall not be delivered or placed in the possession of any individual who has not been verified as not being a minor." 18 U.S.C. § 1716E(b)(4)(B)(ii)(V). To implement this requirement, the proposed rule would require that Express Mail be delivered in the context of a face-to-face interaction between the recipient and postal employee, thereby enabling age verification. Each piece would be required to be marked with a special marking, thereby triggering the need for age verification at delivery: "PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO AGE-VERIFIED ADULT OF LEGAL AGE." To ensure that delivery is effected on a person who is not a minor, the proposed rule would require that Express Mail shipments (other than Express Mail shipments to APO, FPO, or DPO addresses) under this exception be delivered using Hold for Pickup service, whereby the shipment would be held at a postal retail unit for pickup by the recipient. Further, the recipient would be required to 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.

The proposed rule provides that 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 decision to the manager, Mailing Standards. 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.

Consumer Testing: The exception for consumer testing permits a legally operating cigarette manufacturer (or legally authorized agent) to mail cigarettes to verified adult smokers solely for consumer testing purposes. 18 U.S.C. § 1716E(b)(5)(A). Consumer testing is defined in the PACT Act as "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." 18 U.S.C. § 1716E(b)(5)(D)(ii). Notably, the statutory

exception applies only to cigarettes and cigarette manufacturers (or legally-authorized agents) and not to smokeless tobacco or non-manufacturer participants in the tobacco industry.

The PACT Act limits eligibility to cigarette manufacturers that have “a permit, in good standing, issued under section 5713 of the Internal Revenue Code of 1986” and the legally authorized agents of such manufacturers. 18 U.S.C. § 1716E(b)(5)(A)(i). The PACT Act requires the Postal Service to “verify that any person submitting a tobacco product into the mails under this paragraph is a legally operating cigarette manufacturer permitted to make a mailing under this paragraph, or an agent legally authorized by the legally operating cigarette manufacturer to submit the tobacco product into the mails on behalf of the manufacturer.” 18 U.S.C. § 1716E(b)(5)(C)(ii)(I). As with the business/regulatory purposes exception, the Postal Service intends to discharge this obligation by requiring customers to submit an application to the manager, PCSC, for eligibility to mail under this exception. The application would require the applicant to provide 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. In addition, the applicant would be required to identify all locations where mail containing cigarettes for consumer testing will be presented. Any changes to the customer’s information or entry locations would require a subsequently filed amendment to the customer’s application. As part of its application, the customer would sign a certification to the effect that the customer will comply with the following PACT Act requirements, 18 U.S.C. § 1716E(b)(5)(C)(ii)(II)-(III):

- any recipient of consumer testing shipments of cigarettes is an adult established smoker;
- no recipient has made any payment for the cigarettes;
- any recipient will sign a written statement to the effect indicating that the recipient wishes to receive the mailings;
- 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; and
- any package mailed under this exception will contain not more than 12 packs of cigarettes (240 cigarettes), on which all taxes levied by the destination state and locality have been paid and all related destination state tax stamps or other tax-payment indicia have been applied.

To facilitate administration and enforcement of this exception, the proposed rule also requires that the customer certify that it will maintain records establishing compliance with these obligations for a three-year period from the date of each mailing. Customers must provide copies of records establishing compliance to the manager, PCSC, upon request no later than ten business days after the date of the request. Before tendering any shipment under this exception, the mailer must present proof that the Postal Service has authorized the mailer to tender such shipments at that location.

Customers whose applications are denied by the Manager, PCSC, may appeal to the manager, Mailing Standards. The proposed rule provides that eligibility to mail under the consumer testing exception may be revoked by the manager, Mailing Standards, 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. To ensure that eligibility determinations remain current with respect to mailers' behavior, the proposed rule provides that any authorization to mail under this exception would lapse if the mailer does not actually tender any such mail during any six-month period, and that the mailer must submit a new application for eligibility for any future mailings after that point.

The PACT Act establishes quantity, frequency, and other limitations. The proposed rule accordingly limits quantity to twelve packs of cigarettes per package and frequency of no more than one package from any one manufacturer to an adult smoker during any 30-day period. 18 U.S.C. § 1716E(b)(5)(A)(ii)-(iii). The proposed rule also implements PACT Act requirements for payment of destination state and locality taxes and the use of tax stamps or other indicia. 18 U.S.C. § 1716E(b)(5)(A)(iv). Additionally, the proposed rule incorporates conditions for consumer testing:

- that no payment by the recipient for the cigarettes is permitted;
 - the recipient must be paid a fee for participation in consumer tests;
 - the recipient must evaluate the cigarettes and provide feedback to the manufacturer in connection with the consumer test;
 - and the total calendar-year distribution of cigarettes under the consumer testing exception may not exceed one percent of the manufacturer's total cigarette sales for the prior calendar year.
- 18 U.S.C. § 1716E(b)(5)(A)(v)(I)-(III), (B)(ii).

Consistent with the PACT Act, the mailing of cigarettes for consumer testing purposes would not be permitted to states that prohibit the delivery of cigarettes to individuals, and these rules shall not preempt, limit, or otherwise affect any related state laws. 18 U.S.C. § 1716E(b)(5)(B)(i). The proposed rule provides that customers maintain records to establish compliance with all of these requirements for three years.

The PACT Act requires that eligible shipments under this exception be sent via mail systems that provide for the "tracking and confirmation of the delivery." 18 U.S.C. § 1716E(b)(5)(C)(ii)(IV). As explained above, the mail service that fulfills this requirement is Express Mail service, which offers tracking information and confirmation of delivery. Consequently, the proposed rule specifies that eligible shipments under the consumer testing exception would be required to use Express Mail service.

The PACT Act provides that eligible mailings under the consumer testing exception be delivered “only to the named recipient and only after verifying that the recipient is an adult.” 18 U.S.C. § 1716E(b)(5)(C)(ii)(VII). For purposes of the consumer testing exception, the term “adult” is defined in this exception as “an individual who is not less than 21 years of age.” 18 U.S.C. § 1716E(b)(5)(D)(i). To implement this requirement, the proposed rule would require that Express Mail service be used without the option for waiver of signature. Further, to ensure that delivery is effected on a person who is the named individual on the package and at least 21 years of age, the proposed rule would require that all Express Mail shipments under this exception be required to be delivered using Hold for Pickup service. For age and identity verification, the recipient would be required to 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.

The PACT Act provides that eligible mailings be “be marked with marking that makes it clear to employees of the United States Postal Service that it is a permitted mailing of otherwise nonmailable tobacco products that may be delivered only to the named recipient after verifying that the recipient is an adult.” 18 U.S.C. § 1716E(b)(5)(C)(ii)(VI). The Postal Service accordingly proposes that each mailing tendered under the consumer testing exception bear the following marking: “PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION – AGE 21 OR ABOVE.” The marking would be required to appear on the exterior of the address side of the mailing container, so as to ensure that eligible shipments are correctly identified as falling under the consumer testing exception.

The PACT Act requires that the Postal Service maintain records “relating to a mailing” under the consumer testing exception for a three-year period beginning on the date of the mailing. 18 U.S.C. § 1716E(b)(5)(C)(ii)(V). Such information must be made available to certain law enforcement agencies during the designated period of retention. The Postal Service understands this retention requirement to apply to mailing information, including sender and address information, for each mailing. Currently, the Postal Service does not organize or retain handwritten or typed Express Mail mailing labels for the designated statutory retention period. To comply with this requirement, the Postal Service proposes that customers seeking to mail under this exception use Express Mail service with Return Receipt. The Return Receipt must bear the sender’s eligibility number issued by the PCSC, as well as the addressee’s full name and address, and be made returnable to the Manager, PCSC, who will retain the record for the requisite period.

Public Health: The PACT Act provides that federal government agencies “involved in the consumer testing of tobacco products solely for public health purposes may mail cigarettes under the same requirements, restrictions, and rules and procedures that apply to consumer testing mailings of cigarettes by manufacturers,” with the exception that the agency shall not be required to pay recipients for participating in testing. 18 U.S.C. § 1716E(b)(6). The proposed rule accordingly creates a public

health exception for federal agencies. This exception is made subject to the same mailing standards as those applied to manufacturers involved in consumer testing, with the exception that federal agencies do not need to comply with the mailing standard requiring that the customer certify that the recipient is being paid a fee for participation in consumer tests.

The Postal Service accordingly invites comments on the following proposed revision of the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual, incorporated by reference in the *Code of Federal Regulations*. See 39 CFR 111.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

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

PART 111 – [AMENDED]

1. The authority citation for 39 C.F.R. Part 111 is revised 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)**

* * * * *

600 Basic Standards for All Mailing Services

601 Mailability

* * * * *

[Renumber current 601.11 and 12 as new 12 and 13, and add new 11 as follows:]

11 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 11.8.3, 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. 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. In the event 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. 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 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 conditions in 11.4 through 11.8 is met. These exceptions only apply to domestic mail under 608.2.1, including mail to, from, and between military installations and Army Post Office (APO), Fleet Post Office (FPO), and Diplomatic Post Office (DPO) addresses, 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 mail treated as domestic under 608.2.2 or international mail as defined in 608.2.3.

11.4 Mailing Within Noncontiguous States

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, only under the conditions in 11.5.1 through 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. The applicant must update this information anytime it intends to mail to an entity not on its list. Only those shipments containing otherwise nonmailable tobacco addressed to recipients on the customer's list of designated recipients would be eligible for the business/regulatory purposes exception.
- 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.

- c. Applications must be mailed to the manager, Pricing & Classification Service Center (PCSC), see 608.8.0 for address. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the business/regulatory purposes exception.
- d. 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).
- e. Eligibility to mail under the business/regulatory purposes exception may be revoked by the manager, Mailing Standards, 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 business/regulatory purposes exception may be appealed to the Judicial Officer under 39 C.F.R. Part 953.
- f. Upon written request by a state or federal agency, the manager, Mailing Standards, may, in his or her discretion, waive certain application requirements for mailings entered by the requesting state or federal agency for regulatory purposes.
- g. 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 six-month 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. 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 as Express Mail with Hold for Pickup service (waiver of signature not permitted) (see 113);
- b. be accompanied by a request for return receipt (PS Form 3811, see 503.6), which must bear the sender's eligibility number issued by the PCSC as well as the addressee's full name and address, and be made returnable to the manager, PCSC — Tobacco Mailing Unit (see 608.8.0 for address), which will retain the record for a three-year period;
- c. bear the marking "PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO ADDRESSED BUSINESS/AGENCY---- RECIPIENT MUST FURNISH PROOF OF AGE AND EMPLOYMENT OR AGENCY." on the address side of the mailpiece; and
- 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 or agent of the business or government identified as the addressee on the mailing label. Delivery is completed 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 or agent of the addressee are established, the recipient must sign PS Form 3849 and PS Form 3811 in the appropriate signature blocks.

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. 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.
- 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. All mailings under the certain individual's exception must:

- a. be entered as Express Mail with Hold for Pickup service requested (except overseas military mail shipments ((waiver of signature not available)); see 11.3.
- b. bear the marking "PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO AGE-VERIFIED ADULT OF LEGAL AGE" on the address side of the exterior of the mailpiece;
- 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.

11.6.3 Delivery

Delivery under the certain individual's 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 Exception for Consumer Testing

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. The applicant must furnish:

- a. 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;
- b. if the customer is an agent of a manufacturer, complete details about the agency relationship with the manufacturer; and
- c. all locations where mail containing cigarettes for consumer testing will be presented.
- d. 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.
- e. The applicant must establish its eligibility by submitting applications to the manager, Pricing & Classification Service Center (PCSC).
- f. The applicant must provide any requested copies of records establishing compliance to the manager, PCSC (see 608.8.0), and/or the manager, Mailing Standards (see 608.8.0), upon request no later than 10 business days after the date of the request.
- g. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the consumer testing exception. 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, Mailing Standards, 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.
- 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 six-month 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 and under the following conditions:

- a. Before tendering any shipment under this exception, the mailer must present proof 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 as Express Mail with Hold for Pickup service requested (waiver of signature not available); see 113.

2. be accompanied by a request for return receipt (PS Form 3811; see 503.6), which must bear the sender's eligibility number issued by the PCSC, as well as the addressee's full name and address, and be made returnable to the manager, PCSC — Tobacco Mailing Unit (see 608.8.0 for address);
 3. must bear the marking "PERMITTED TOBACCO PRODUCT – DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION - AGE 21 OR ABOVE" on the address side of the exterior of the mailpiece;
 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 residing 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.
 - d. Mailing frequency may not exceed more than one package from any 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 (see 113) 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.

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, Mailing Standards, may, in his or her discretion, waive certain of the application requirements.

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We will publish an appropriate amendment to 39 C.F.R. 111 to reflect these changes when the proposal is adopted.

Stanley F. Mires
Chief Counsel, Legislative.
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