



Selling Tobacco Online? Know the Law

Avoiding legal pitfalls for remote sales. >BY BRYAN HAYNES

Many people assume that tobacco and vapor products sold online are not subject to the legal requirements applicable to brick-and-mortar sales. In fact, with a few exceptions, online sales are subject to the same legal requirements applicable to sales in gas stations, convenience stores, etc. And, in some cases, there are actually additional legal requirements and/or prohibitions for online sales. Here are a few ways to avoid legal pitfalls for the unwary.

AGE VERIFICATION

With the passage of the Family Smoking Prevention and Tobacco Control Act in 2009, it is illegal nationwide to sell “tobacco products” to anyone under 18. “Tobacco products” includes any product made or derived from tobacco and intended for human consumption and their components. This covers products such

as cigarettes, smokeless tobacco, cigarette tobacco, roll-your-own tobacco, pipe tobacco, shisha tobacco, cigars, and most vapor products (to the extent they contain nicotine derived from tobacco) and their components, such as vaporizers.

This requirement applies equally to remote sales, such as catalog or Internet orders. Some online sellers assume that sufficient age verification includes a self-verification that the purchaser is above the legal age to purchase tobacco products, or where the purchaser provides a date of birth indicating that they are older than 18. In fact, neither of these is sufficient because the online merchant has no way of verifying that these statements are true.

However, there are many providers that can assist online merchants with verifying that an online purchaser is above the legal age to purchase tobacco products. These systems verify that the

purchaser is of legal age, through commercially-available databases consisting of data from government services and checking the purchaser’s name, birthdate, address, and other identifying information. Another option is to require adult-only acceptance of the package at delivery.

Note that in addition to federal age-verification requirements under the Family Smoking Prevention and Tobacco Control Act, the states have their own age-verification laws. In some of these states, the minimum age to purchase tobacco products is higher than 18, and certain states have specific requirements for online age-verification.

THE PACT ACT AND STATE DELIVERY SALES LAWS

In 2010, Congress functionally prohibited online sales of cigarettes, smokeless tobacco, and roll-your own tobacco with the Prevent All Cigarette Trafficking (“PACT”) Act. The PACT Act’s requirements include the following: (1) online sellers must collect and remit state and local tobacco products excise taxes that would be due as if the sale were conducted face-to-face in the purchaser’s jurisdiction, (2) online sellers must become licensed with state and local taxing authorities in the jurisdictions in which they seek to conduct sales, (3) use of the U.S. Postal Service to deliver tobacco products is prohibited except under narrowly-defined circumstances, (4) particular package labeling and weight requirements, and (5) age-verification requirements.

Although the PACT Act does not outright prohibit online sales of these types of tobacco products, the requirements to become licensed and collect and remit excise taxes in a myriad of state and local jurisdictions are functionally impossible for most businesses.

In addition to the PACT Act’s requirements, many states have particular requirements for online sales of tobacco products, and in some cases impose an outright ban on remote sales. For example, Washington law prohibits the remote sale of “tobacco products,” unless the delivery is to a Washington-licensed

retailer or wholesaler. "Tobacco products" are generally defined to include anything that contains tobacco and is intended for human consumption. However, cigars weighing more than three pounds per thousand are exempted. So the coverage of the Washington law is much broader than the coverage of the PACT Act.

EXCISE AND SALES TAXES

While the PACT Act requires online merchants to collect and remit excise taxes for cigarettes, smokeless tobacco and roll-your-own tobacco, the law does

not apply to other tobacco products, including cigars, pipe tobacco, and vapor products. As a result, traditional principles of "nexus" taxation apply to online sales of these products, which generally means that online sellers cannot be forced to collect and remit taxes in jurisdictions where they have no physical presence. Known as the "Quill" doctrine of constitutional law, this concept is not unique to tobacco and is why online merchants often do not charge sales taxes for consumer goods unless they have a national presence, such as Amazon and Best Buy.

So, if an online merchant is located in Virginia and sells to a consumer in Virginia, the merchant generally must collect and remit all applicable taxes, including sales and excise taxes. If, on the other hand, the Virginia merchant sells to a consumer in New Mexico, and does not have a physical presence or other nexus with New Mexico, the merchant is not required to collect the state taxes. This obligation is ostensibly borne by the consumer, although consumers rarely self-report taxes in these circumstances.

It is important to note, however, that the constitutional concept of nexus is filled with exceptions and is a rapidly growing area of the law due to the increasing prevalence of online sales. For example, the seller sending salespeople to the taxing jurisdiction, having independent contractors working in the taxing jurisdiction, or owning real estate in the taxing jurisdiction all could lead to a nexus with the taxing state, such that the seller must collect and remit state and/or local taxes.

Perhaps most significantly, the United States Supreme Court recently agreed to hear a case in which it may reconsider the Quill physical presence doctrine. The case arises under a South Dakota law that seeks to collect sales taxes from all online merchants, irrespective whether they have a physical presence in South Dakota, so long as their sales into the state meet a specified dollar threshold. The specific question raised in the case is whether the Court should "abrogate Quill's sales-tax-only, physical-presence requirement." Online merchants, including those in the tobacco sector, will be watching the Court for a decision later this year, which at a minimum will hopefully provide needed clarity in this murky area of the law, but which could have the consequence of imposing substantial new requirements for online merchants. S

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