

SC INFORMATION LETTER #11-9

**SUBJECT:** Remittance of Cigarette and Tobacco Taxes by “Delivery Sellers” under the Federal “Prevent All Cigarette Trafficking Act” and South Carolina Cigarette and Tobacco Tax Laws

**DATE:** June 27, 2011

**REFERENCE:** SC Code Section 12-21-610 et. seq. (2000; Supp. 2010)  
15 U.S.C. Section 375 et. seq. (Amended 2010)

**AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2000)  
SC Revenue Procedure #09-3

**SCOPE:** An Information Letter is a written statement issued to the public to announce general information useful in complying with the laws administered by the Department. An Information Letter has no precedential value.

**Prevent All Cigarette Trafficking Act (“PACT”)**  
**South Carolina Cigarette and Tobacco Excise Taxes**

**Background:**

The federal Prevent All Cigarette Trafficking Act (“PACT Act”) amends and extends the provisions of the Jenkins Act governing the delivery of all shipments of cigarettes and smokeless tobacco in interstate commerce. The provisions of the PACT Act apply to manufacturers, common carriers, and delivery sellers. However, this information letter will only address the requirements of a “delivery seller” (as defined below) to pay of South Carolina cigarette and tobacco taxes and sales and use taxes and to provide information to the Department of Revenue concerning shipments into South Carolina.

The PACT Act establishes certain requirements a delivery seller must follow in order to sell at retail and ship cigarettes and smokeless tobacco into a state.

A “delivery seller” is a person who makes a delivery sale and a “delivery sale” is any sale of cigarettes or smokeless tobacco to a consumer if--

- (a) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(b) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

Under 15 U.S.C. Section 376a(a)(3) of the PACT Act, the delivery seller must comply with:

all state, local, tribal, and other laws generally applicable to sales of cigarette or smokeless tobacco as if the delivery sales occurred entirely within [South Carolina], including laws imposing –

- (A) excise taxes;
  - (B) licensing and tax-stamping requirements;
  - (C) restrictions on sales to minors; and
- other payment obligations and legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco;

However, since South Carolina has a reporting system for the payment of the cigarette tax, it is important to note that under 15 U.S.C. Section 376a(d) a delivery seller must not sell or deliver to any consumer or common carrier or other delivery service any cigarettes or smokeless tobacco **unless in advance of the sale, delivery or tender to the common carrier or delivery service** (i) the excise tax imposed by SC has been paid; (ii) the excise tax imposed by a local government has been paid; and (iii) any tax stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

This requirement does not apply to delivery sales of smokeless tobacco if state law requires the delivery seller collect the excise tax from the consumer and remit the excise tax to the state and the delivery seller complies with this requirement. 15 U.S.C. Section 376a(d). However, since South Carolina law does not require the seller to collect the excise tax on smokeless tobacco from the consumer, delivery sellers must remit the excise tax on smokeless tobacco **in advance of the sale, delivery or tender to the common carrier or delivery service**.

Please note that a delivery seller must comply with various other state provisions pursuant to the requirements of the PACT Act, including, but not limited to, the requirement to file with the SC Department of Revenue by the 10<sup>th</sup> of each calendar month a memorandum or a copy of each and every invoice covering every shipment of cigarettes and smokeless tobacco made in the prior month into South Carolina. 15 U.S.C. Section 376(a)(2).

### **Compliance with the PACT Act:**

Since South Carolina (1) does not require use tax stamps or tax indicia to be affixed to cigarettes, (2) does not require that smokeless tobacco to be collected from the consumer, and (3) uses a monthly reporting system in which the tax is paid after the cigarettes and smokeless tobacco are sold (sales method) or received (receipt method), delivery sellers cannot ship cigarettes or smokeless tobacco in or into South Carolina unless the delivery seller can develop some method of paying the excise tax in advance of the sale, delivery or tender to the common carrier or delivery service as required by the PACT Act.

If a delivery seller cannot remit the South Carolina cigarette and tobacco tax in advance of the sale, delivery or tender to the common carrier or delivery service as required by the PACT Act, then the delivery seller cannot ship cigarettes or smokeless tobacco in or into South Carolina.

While not necessarily the only method, a delivery seller could pay the excise tax in advance of the sale, delivery or tender to the common carrier or delivery service as required by the PACT Act by establishing a tax paid South Carolina inventory of cigarettes and smokeless tobacco as follows:

- (1) Obtain a South Carolina cigarette and tobacco tax license.
- (2) Set aside a portion of the inventory for South Carolina only. This inventory set aside for South Carolina does not need to be located in a separate warehouse. It can be located at the delivery seller's warehouse that contains the delivery seller's inventory for other states, whether such warehouse is located in or out of South Carolina, but must be maintained separately within that warehouse from the inventory for other states.
- (3) Pay on a monthly return the South Carolina cigarette and smokeless tobacco excise tax on the portion of the inventory that was set aside for South Carolina OR purchase South Carolina tax paid cigarettes and smokeless tobacco from a licensed South Carolina distributor for the portion of the inventory to be set aside for South Carolina.
- (4) Ship South Carolina tax paid product that is being maintained in a separate inventory only to South Carolina consumers upon receiving orders from South Carolina consumers. Specific cigarettes and smokeless tobacco in this South Carolina inventory will only be considered tax paid either after the monthly return and advanced tax payments are mailed for those specific cigarettes and smokeless tobacco set aside for South Carolina OR the cigarettes and smokeless tobacco were purchased tax paid from a licensed South Carolina distributor for the South Carolina inventory.
- (5) Continue advance payments of the South Carolina tax, or purchase tax paid inventory from a licensed South Carolina distributor, as needed, with respect to additions to the South Carolina inventory to ensure a separately maintained South Carolina tax paid inventory is always available for future shipments in or into South Carolina.

### **Compliance with South Carolina Cigarette and Tobacco Tax Laws:**

If a direct seller maintains a tax paid South Carolina inventory as described above, or the direct seller uses some other advance payment method, so as to ensure the South Carolina cigarette or smokeless tobacco excise tax has been paid in advance of the sale, delivery or tender to the common carrier or delivery service, then the delivery seller must comply with the following:

1. Delivery sellers must obtain a cigarette and tobacco tax license in accordance with Code Section 12-21-660. This is the same license issued to distributors.
2. Delivery sellers must submit a bond (cash or surety) or statement of financial stability in accordance with Code Section 12-21-735 to cover possible losses resulting from the delivery seller's failure to remit taxes. This is the same bond/financial statement requirement imposed upon distributors. The minimum bond requirement established by the Department is \$5,000.00.

3. The cigarette and tobacco excise taxes must be paid in advance of the sale, delivery or tender to the common carrier or delivery service. (This is a federal requirement, but is noted here for completeness.)
4. Delivery seller must file a monthly cigarette and tobacco tax return (Form L-922) by the 20<sup>th</sup> of the month.
5. Delivery sellers must be licensed for sales and use tax purposes and must remit the state and local sales or use tax on sales of cigarettes, smokeless tobacco and other items into South Carolina by the 20<sup>th</sup> of the month following the month in which the sale took place.
6. Delivery sellers must file with the Department by the 10<sup>th</sup> of each calendar month a memorandum or a copy of each and every invoice covering every shipment of cigarettes and smokeless tobacco made in the prior month into SC. This information must be mailed to:

South Carolina Department of Revenue  
PACT Act Shipment Information  
Miscellaneous Tax Section  
Columbia, South Carolina 29214-0138

The memo or invoice in each case must include the name and address of the person receiving the shipment; the brand and quantity thereof; and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller. All memo and invoice information relating to specific customers must be organized by city, town or zip code. 15 U.S.C. Section 376(a)(2). (This is a federal requirement, but is noted here for completeness.) This information must be filed separate from, and cannot be combined with, the cigarette and tobacco tax return that is due by the 20<sup>th</sup> of the month (see Item #4 above) or the sales tax return that is due by the 20<sup>th</sup> of the month (See Item #5 above).

As such, delivery sellers must make three monthly filings with the Department: (1) the memorandum or invoice copies that are due by the 10<sup>th</sup> of the month that concern sales into South Carolina (as required under federal law); (2) the cigarette and tobacco tax return due by the 20<sup>th</sup> of the month (whether the return includes an “advance payment” as described above or is only an “informational return” noting the sale of tax paid inventory); and (3) the sales tax return due by the 20<sup>th</sup> of the month.<sup>1</sup>

Note: The cigarette and tobacco tax returns, and the sales tax returns, must be filed each month whether or not any sales were made into South Carolina during the month. However, the memorandums or copies of invoices required, under 15 U.S.C. Section 376(a)(2), to be filed with the Department by the 10<sup>th</sup> of each calendar month are only required if shipments of cigarettes or smokeless tobacco were made into South Carolina during the applicable month.

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<sup>1</sup> Code Section 12-21-785 allows the Department to require the cigarette and tobacco tax return to be filed for other than monthly periods (*e.g.*, quarterly). Code Section 12-36-2580 authorizes quarterly sales and use tax returns if a retailer’s tax liability does not exceed \$100 for any month. In addition, Code Section 12-36-2590 allows the Department to require the sales and use tax return to be filed for other than monthly periods. Contact the Department’s License and Registration Section to determine if your business is eligible to file cigarette and tobacco tax returns and sales and use tax returns for periods other than monthly (*e.g.*, quarterly).