

TOBACCO 21: THE IMPACT ON THE TOBACCO AND ALCOHOL MARKETPLACE

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On December 20, 2019, President Donald Trump signed into law legislation raising the federal legal age for purchasing tobacco from 18 to 21 as part of a \$1.4 trillion appropriations bill.¹ The specific provision, commonly referred to as “Tobacco 21,” prohibits the sale or distribution of traditional tobacco products such as cigarettes, cigars, and chewing tobacco as well as the increasingly popular e-cigarettes and vaping cartridges to anyone under the age of 21 in the United States. The law additionally requires age verification for individuals purchasing tobacco who appear to be under the age of 30, an increase from the previous guideline requiring age verification for individuals who appeared to be under the age of 27. Failure to comply with this new federal law may put Florida licensed alcohol beverage retailers at risk.

The *Florida Beverage Law* provides that licensed alcohol beverage retailers who violate federal law may be subject to license suspensions and/or revocations.² Accordingly, failure to comply with the federal prohibition on the sale of tobacco products to individuals under 21 years of age can put an alcohol beverage retailer’s license at risk. Therefore, all licensed alcohol beverage retailers, their managers, and their employees should comply with this new federal law to protect their licenses from revocation or suspension by the Florida Division of Alcoholic Beverages and Tobacco.

Initially, controversy and confusion surrounded the effective date and enforcement of Tobacco 21. Even though the law indicated that the change is effective immediately, it simultaneously gave the Secretary of the U.S. Department of Health and Human Services 180 days to update the regulations governing tobacco enforcement pursuant to the *Federal Food, Drug, and Cosmetic Act* (21 U.S.C. 387 *et seq.*) (“FD&C Act”).³

The FD&C Act gives the U.S. Food and Drug Administration (FDA) authority to regulate the sale and distribution of tobacco products.⁴ However, FDA has yet to issue proposed regulations amending the relevant provision of part 1140 of title 21, Code of Federal Regulations to adopt Tobacco 21. Accordingly, even though Tobacco 21 provides that the change is effective immediately, FDA’s regulations enforcing this provision will not be promulgated until later in the year. This delay between the passage of the federal law and the issuance of the FDA regulations initially created some confusion for the industry regarding the effective enforcement date for Tobacco 21.

¹ Sec. 603, Further Consolidated Appropriations Act of 2020, P.L. 116-94, accessible online at <https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865enr.pdf>.

² See Fla. Stat. § 561.29(1)(a) & (b).

³ Sec. 603A(1), Further Consolidated Appropriations Act of 2020, P.L. 116-94, accessible online at <https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865enr.pdf>.

⁴ See 21 USC § 387(a) (2019), accessible online at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title21-section387a&num=0&edition=prelim>.

However, FDA addressed this confusion by posting a statement on the Agency’s website providing: “It is now illegal for a retailer to sell any tobacco product—including cigarettes, cigars, and e-cigarettes—to anyone under 21.”⁵ Accordingly, FDA is taking the position that the federal 21+ age requirement is currently effective and tobacco retailers cannot sell tobacco products to individuals who are under 21 years of age. However, in a statement issued January 15, 2020, FDA recognized that both the Agency and regulated industry will need time to update current practices. Therefore, FDA has advised that “during this ramp-up period, FDA will continue to only use minors under the age of 18 in its compliance check program.”⁶

It is important to note that Tobacco 21 applies to all tobacco products including cigarettes, cigars, e-cigarettes, and vape products. In 2009, Congress passed, and the President signed, the *Family Smoking Prevention and Tobacco Control Act* (Tobacco Control Act), which gave FDA authority to regulate cigarettes, smokeless, and self-roll tobacco, leaving e-cigarettes and vaping cartridges unregulated by FDA. However, the Tobacco Control Act gave FDA the authority to deem other products tobacco products subject to the Agency’s regulatory authority. In 2016, the FDA exercised that authority and finalized a rule deeming e-cigarettes and vaping cartridges regulated tobacco products. Accordingly, FDA’s regulatory authority now extends to the manufacturing, distribution, and marketing of all tobacco products—including e-cigarettes and vaping cartridges.⁷

The Tobacco 21 law does not impose new or additional penalties for sales to minors. Such violations will be subject to the same penalty schedule as a sale to an individuals under 18+ was under the previous federal requirement. This penalty schedule is found in section 103(q)(2)(A) of the Tobacco Control Act. The penalty assessed depends on the number of violations the retailer has had within a specified time period. According to the FDA’s website, the current maximum penalties are:⁸

Number of Regulation Violations	CMP Amount
1	\$0 (FDA will send a Warning Letter)
2 within a 12-month period	\$292
3 within a 24-month period	\$584
4 within a 24-month period	\$2,340
5 within a 36-month period	\$5,849
6 within a 48-month period	\$11,698

The way Tobacco 21 was passed and the dearth of corresponding regulations from FDA creates a degree of uncertainty for retailers across the country, making it difficult to develop regulatory

⁵ See U.S. Food and Drug Administration, “Selling Tobacco Products in Retail Stores,” accessible online at: <https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/selling-tobacco-products-retail-stores>.

⁶ See U.S. Food and Drug Administration, “Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21,” accessible online at: <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21>.

⁷ See U.S. Food and Drug Administration, “The Facts on the FDA’s New Tobacco Rule,” accessible online at: <https://www.fda.gov/consumers/consumer-updates/facts-fdas-new-tobacco-rule>.

⁸ See U.S. Food and Drug Administration, “CTP Compliance & Enforcement,” accessible online at: <https://www.fda.gov/tobacco-products/compliance-enforcement-training/ctp-compliance-enforcement>.

compliance programs. Nonetheless all tobacco retailers should train sales clerks immediately regarding the new federal age restriction for tobacco products. Doing so will not only ensure compliance with federal law but also allow retailers who sell alcohol beverage products to protect their alcohol beverage licenses from suspension or revocation for failure to comply with federal law. Retailers should also continue to monitor FDA's rulemaking activities and the Agency's website for further guidance regarding enforcement policies.

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