

RESPONSE TO TRIBAL CONSULTATIONS ON THE IMPLEMENTATION OF CERTAIN PROVISIONS OF THE USA PATRIOT ACT RELATING TO TRAFFICKING IN CONTRABAND CIGARETTES OR SMOKELESS TOBACCO

On July 28, 2010, the Department of Justice (Department) published in the Federal Register a notice of proposed rulemaking (NPRM) to implement certain provisions of section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005 (PATRIOT Act) (ATF 22P, 75 FR 44173). This NPRM stipulated the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) intended to amend the regulations in 27 CFR 646.150 concerning distributors' retention of required records. In general, section 646.150 provides that each distributor of cigarettes shall retain the records required by sections 646.146 and 646.147 for three years following the close of the year in which the records are made and shall keep the required records on the distributor's business premises. The amendment would extend the record retention requirement to five years and harmonize the regulations with the applicable statute of limitations for Contraband Cigarette Trafficking Act (CCTA) violations, which is five years.

The Department solicited tribal views on the amendments in February 2015, and received significant and helpful comments. On February 24 and 25, 2015, the Department invited the leaders of federally recognized tribes to consult on the proposed policy. Prior to the consultation, the Department provided a framing paper that outlined the proposed amendments. The consultation process provided the Department useful feedback from tribes and tribal organizations. This document sets forth the Department's response to written comments received from the Winnebago Tribe of Nebraska, the Onondaga Tribe of New York, the Shoshone-Bannock Tribes of Idaho and Big Sandy Rancheria (Tribes) of California.

The Winnebago Tribe and the Shoshone Bannock commentators noted that Section 121(c) of the amended CCTA, 18 U.S.C §§ 2341-2346, requires that all distributors who engage in delivery sales and who sell in excess of 10,000 cigarettes or 500 units of smokeless tobacco within a single month, except tribal governments, shall submit reports to the Attorney General. During the tribal consultation, ATF indicated that, in its opinion, a business that was wholly owned and operated by a Tribal Government, would fall within this reporting exemption. Both tribes asked for the statute to define the term "Tribal Business". The statutory language of the amended CCTA does not use the term "tribal business". ATF does not believe that it is within the scope of our authority to create and define the term "Tribal Business" in these regulations. If any issues arise concerning Native American businesses as potential reporting entities occur, ATF believes it would be optimal to analyze specific factual situations to ascertain if the specific business is part of a Tribal Government and is therefore exempt from the reporting requirements.

The Winnebago Tribe and the Shoshone Bannock recommended that section 121(e) of the amended CCTA be amended to include tribal governments and section 121(e) should also be amended to include Tribal jurisdiction. Expanding the scope of the statute in a regulation is beyond ATF's regulatory authority. The amended CCTA specifically creates exemptions for tribal governments in multiple other instances. Additional inclusions or exemptions in section 121(e) would require congressional action.

The Winnebago Tribe, Shoshone Bannock, and Onondaga Nation recommended that ATF amend section 121(f) to preclude the creation of new causes of action against Tribal governments or wholly owned tribal companies. The statutory language of the CCTA is clear on this point. The amended CCTA, 18 U.S.C. § 2346(b)(1) bars the States or persons who hold an Internal Revenue Code Permit (IRC permit) to manufacture or import tobacco from bringing a civil action against an Indian tribe or an Indian in Indian country as defined in 18 U.S.C. § 1151. The proposed ATF regulations in no way alter the operation of this provision of the statute. States and IRC permit holders will still be barred from bringing new civil causes of action against tribes under the amended CCTA.

Tribal Governments further contended that the amending of the CCTA and the development of the Prevent All Cigarette Trafficking Act of 2009 (PACT Act) were roughly parallel/synonymous, therefore the term “consumer” should be defined the same way in each statute. ATF does not view this rulemaking, which involves only the 2006 amendments to the CCTA and does not involve the 2009 PACT Act, as the appropriate vehicle for issuing the proposition that Congress, in amending the CCTA in 2006, intended to have precisely the same definition as that in the PACT Act, which it passed in 2009. Congress did not include this definition in the CCTA. If Congress had intended identical definitions, we believe Congress, which also amended the CCTA, when it passed the PACT Act in 2009, would have inserted the identical definition to the appropriate section of the CCTA.

Tribal Government commenters also queried the Department regarding “the intent of Congress in 2006 when it passed 18 U.S.C. § 2343(e), which reads, in part, ‘In this section, the term “delivery sale” means any sale of cigarettes or smokeless tobacco in interstate commerce to a consumer if...’.” The Department notes that the purpose of the CCTA (as well as the PACT Act) is to assist State and Tribal Governments in combatting criminal groups that defraud Governments by illegally profiting from the distribution of untaxed cigarettes. It has been well documented that criminal groups, including terrorists and drug cartels, have financed their activities through the purchase and sale of untaxed cigarette. Additionally, the distribution of cigarettes costs Governments billions of dollars in health care costs.

In 2006, Congress amended the CCTA to combat these concerns. The 2006 amendments to the CCTA principally lowered the contraband cigarette threshold to 10,000 cigarettes, and added contraband smokeless tobacco, which is 500 units of untaxed smokeless tobacco, to the CCTA. Congress specifically authorized ATF to promulgate record keeping regulations enforcing the amendments to 18 U.S.C. § 2343(a) and (b). ATF has worked to promulgate these regulations so that ATF can fulfill the intent of Congress and prosecute certain criminals for violations of 18 U.S.C. § 2343. Moreover, in 18 U.S.C. § 2343(e), Congress specifically defined a delivery sale as:

Delivery sale means any sale of cigarettes or smokeless tobacco in interstate commerce if:

- (1) The consumer submits the order for such sale by means of telephone or other method of voice transmission, the mails, or the internet or other online service, or by any other means where the consumer is not in the same physical location as the seller when the purchase or offer for sale is made or

- (2) The cigarettes or smokeless tobacco are delivered by use of the mails, common carriers, private delivery service or any other means where the consumer is not in the same physical location as the seller when the consumer obtains physical possession of the cigarettes or smokeless tobacco.

Big Sandy Rancheria additionally commented that ATF's proposed rule "should also make clear that business-to-business transactions will not be included in the determining the cumulative monthly total under 18 U.S.C. § 2343(b)." Any non-exempt business-to-business delivery sales that exceed 10,000 cigarettes in a month will trigger the reporting requirement. This requirement applies only to dispositions that constitute delivery sales. We note that all persons must keep detailed records of all sales or shipments in excess of 10,000 cigarettes or 500 units of smokeless tobacco under 18 U.S.C. § 2343(a) which are subject to inspection by ATF.

Lastly, the Onondaga Nation objected to Congress lowering the CCTA threshold from 60,000 to 10,000 cigarettes. ATF notes that only Congress can amend statutory language lowering the threshold amount triggering reporting requirements under the CCTA, ATF cannot do so in this rulemaking.