



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

April 2, 2008

The Honorable Vito Fossella  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Fossella:

I would like to thank you and your staff for meeting with officials from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regarding the problems relating to the illegal trafficking of tobacco products. This letter is in response to your request that ATF comment on Title III (Prevention of Illicit Trade in Tobacco Products) of H.R. 1108 (Family Smoking Prevention and Tobacco Control Act), which is currently pending in the House Energy and Commerce Committee.

As you know, tobacco trafficking is an international law enforcement problem whereby criminals make billions of dollars of profits by illegally obtaining or producing tobacco products without paying applicable taxes and transporting (diverting) the tobacco products for untaxed sales. Proceeds of these crimes have financed terrorist activities, as well as other crimes including money laundering.

ATF enforces the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. Chapter 114, which prohibits the possession, sale, and distribution of more than 10,000 cigarettes (less than one case of cigarettes) or 500 units of smokeless tobacco which do not have proper indicia of tax payment, usually in the form of a cigarette tax stamp on the cigarette package. ATF also enforces the Federal money laundering, racketeering, and mail and wire fraud statutes in tobacco trafficking cases.

ATF also enforces the Jenkins Act, 15 U.S.C. § 375, which prohibits the shipment or mailing of any amount of cigarettes in interstate commerce to anyone other than a licensed distributor unless the shipper notifies the State tax authorities of the shipment, which enables the State tax authorities to collect appropriate taxes. As you also know, the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau (TTB) already extensively regulates the taxation, manufacture, importation, and export of cigarettes under the Internal Revenue Code, 26 U.S.C. Chapter 52.

Upon review of the proposed legislation, we believe that certain sections of the bill duplicate or fail to take into account existing law. This overlap could stress limited resources and lead to unnecessary and at times inconsistent overlap between Federal agencies enforcing similar provisions of different statutes.

In that regard, section 921(a), as amended by the proposed legislation, should be deleted because current law adequately addresses the issue of which tobacco products can lawfully appear in the domestic market. The provision would require all products manufactured in or imported into the United States to bear the statement “sale only allowed in the United States.” We believe this provision to be unnecessary in light of 26 U.S.C. § 5704 and regulations issued by TTB. Under those authorities, tobacco products can be manufactured in the United States and exported without payment of tax only if they are marked “Tax Exempt for use outside U.S.” or “U.S. Tax-Exempt for use outside U.S.”.

Similarly, 26 U.S.C. § 5754(a) prohibits the sale of such products in the United States unless the packages are returned to the original manufacturer and repackaged in new packaging without the aforementioned language.

In addition, section 921(b)(1), as amended by the proposed legislation, mandates that any person who manufactures, distributes, receives, exports, or imports tobacco products would have to adhere to new record keeping requirements. However, section 2343(a) of the CCTA already imposes stringent record keeping requirements for anyone who distributes more than 10,000 cigarettes or 500 units of smokeless tobacco including detailed purchaser information and a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another). Additionally, section 2343(b) of the CCTA prescribes that any person, except a tribal government, who engages in a delivery sale or distributes more than 10,000 cigarettes or 500 units of smokeless tobacco in a single month, must submit to ATF a report detailing their monthly inventory, the quantity of product received and from whom and the quantity of product sold and to whom.

Furthermore, pursuant to 26 U.S.C. Chapter 52, TTB prescribes extensive inventory and record keeping requirements for every manufacturer, importer, and export warehouse proprietor involved in distributing tobacco products. While we recognize that section 4(c) of the bill as marked up by the Energy and Commerce Subcommittee on Health includes a provision preventing the construction of certain new authority created by the bill in a manner that would affect any authority of the Secretary of the Treasury under chapter 52 of the Internal Revenue Code of 1986 or of the Attorney General, we believe section 923(b)(1) should be deleted from the legislation as it essentially duplicates existing law.

Similarly, section 923(b)(2) authorizes a right of inspection of records by the Secretary of Health and Human Services (HHS) of anyone who he has a reasonable belief is involved in illegal tobacco trafficking. However, section 2343(c) of the CCTA allows ATF, through consent or through the issuance of a search warrant, the right to inspect all of the required CCTA records previously discussed. Additionally, TTB has a right of inspection of all manufacturer, importer, and exporter records under 26 U.S.C. § 5741. To the extent that HHS requires such information, it could coordinate an inspection under ATF’s, and presumably TTB’s, existing authority. Accordingly, sections 923(b)(2) and (c) duplicate existing law and should be deleted from the bill.

Thank you for your interest in the problem of illegal trafficking of tobacco products and in ATF's comments on the proposed bill. If you have further questions please do not hesitate to contact me. Again, please note that we have limited our discussion at this time to Title III of the bill. It is our understanding that other Executive Branch departments and agencies are reviewing H.R. 1108 and may have additional comments on any portion of the bill, including Title III. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski". The signature is fluid and cursive, with a prominent initial "B" and a long, sweeping underline.

Brian A. Benczkowski  
Principal Deputy Assistant Attorney General