



NATIONAL CONGRESS OF AMERICAN INDIANS

March 21, 2012

The Honorable Max Baucus, Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

RE: The Smuggled Tobacco Prevention Act, S. 1706

Dear Chairman Baucus:

As you know, tribal governments have raised significant concerns about the above referenced legislation, and the ways it could inadvertently undermine tribal taxing jurisdiction and upset long-settled tax agreements between Indian tribes and states. The revenues that tribal governments receive from tobacco taxation are critical for the provision of services, and the tobacco sales and production are an important part of the economy on many reservations.

We greatly appreciate your efforts to work with tribes to resolve our concerns regarding the legislation. We have worked collectively with the National Congress of American Indians, the Native Tobacco Trade Association, the Native American Finance Officers Association, the United Southern and Eastern Tribes and the California Association of Tribal Governments to propose amendments, which are included with this letter.

We understand that the Committee will be working on the legislation in the coming weeks and months, and we encourage continued outreach and dialogue with tribal governments as the development of the legislation continues. Thank you for your consideration of tribal sovereignty and treaty rights on this legislation. We greatly appreciate all of your efforts to support tribal governments and look forward to talking with you about this issue and other pressing issues throughout Indian Country.

Sincerely,

Jefferson Keel

EXECUTIVE COMMITTEE

PRESIDENT
Jefferson Keel
Chickasaw Nation

FIRST VICE-PRESIDENT
Juana Majel Dixon
Pauma Band of Mission Indians

RECORDING SECRETARY
Edward Thomas
*Central Council of Tlingit & Haida
Indian Tribes of Alaska*

TREASURER
W. Ron Allen
Jamestown S'Klallam Tribe

**REGIONAL VICE-
PRESIDENTS**

ALASKA
Bill Martin
*Central Council of Tlingit & Haida
Indian Tribes of Alaska*

EASTERN OKLAHOMA
S. Joe Crittenden
Cherokee Nation

GREAT PLAINS
Robert Shepherd
Sisseton Wahpeton

MIDWEST
Matthew Wesaw
Pokagon Band of Potawatomi

NORTHEAST
Lance Gumbs
Shinnecock Indian Nation

NORTHWEST
Fawn Sharp
Quinault Indian Nation

PACIFIC
Don Arnold
Scotts Valley Band of Pomo Indians

ROCKY MOUNTAIN
Scott Russell
Crow Tribe

SOUTHEAST
Larry Townsend
Lumbee Tribe

SOUTHERN PLAINS
Robert Tippeconnie
Comanche Nation

SOUTHWEST
Joe Garcia
Ohkay Owingeh

WESTERN
Ned Norris, Jr
Tohono O'odham Nation

EXECUTIVE DIRECTOR
Jacqueline Johnson Pata
Tlingit

NCAI HEADQUARTERS

1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

PROPOSED AMENDMENTS TO S. 1706

The National Congress of American Indians, the Native Tobacco Trade Association, the Native American Finance Officers Association, the United Southern and Eastern Tribes and the California Association of Tribal Governments propose amendments to Sections 105, 110, 112 and Title III (Section 301) of Senate Bill 1706, the “Smuggled Tobacco Prevention Act of 2011” (“STOP Act” or “Act”). The proposed amendments are set forth below.

1. PROPOSED AMENDMENT TO S. 1706 SECTION 105

(a) **Concern.** Under Section 105 an applicant for a TTB permit will be required to demonstrate compliance with a variety of federal tobacco laws (CCTA, PACT Act, USDA buy-out taxes, Jenkins Act and the 2009 Family Smoking Prevention and Tobacco Control Act). Under Section 105 (a) (2) (A), the TTB will not issue a permit unless:

- (A) the applicant is in compliance with the requirements of-
 - (i) this chapter,
 - (ii) chapter 114 of title 18, United States Code,
 - (iii) the Act of October 19, 1949 (15 U.S.C. 375 et seq.; commonly referred to as the ‘Jenkins Act’),
 - (iv) the Fair and Equitable Tobacco Reform Act of 2004, and any amendments made thereby,
 - (v) the Family Smoking Prevention and Tobacco Control Act, and any amendments made thereby,
 - (vi) the Prevent All Cigarette Trafficking Act of 2009, and any amendments made thereby, and
 - (vii) any related regulations thereunder, as in effect on the date of the issuance of the permit.

S. 1706, Section 105 (a) (2) (A). This is not a major change since TTB permit holders are already required to comply with these laws. However, under Section 105 (a) (2) (B), the TTB will also require that:

- (B) the applicant certifies that the applicant is in compliance with all other Federal, State, local, and Indian tribal laws relating to the taxation, manufacture, importation, exportation, distribution, marketing, sale, or transportation of tobacco products, processed tobacco, or tobacco production machines, as in effect on the date of the issuance of the permit...

S. 1706, Section 105 (a) (2) (B) (emphasis added). This is an issue since it imports into a federal statute, Chapter 52, a requirement for compliance with state and local tax laws and makes compliance with state and local taxes a condition for obtaining and maintaining a TTB permit. Under this provision, a State Attorney General could send a letter to TTB that a manufacturer has

violated state tax laws and this could be grounds for TTB permit revocation or suspension. This could happen even though the letter is based on the state AG's interpretation of the law without any input from the manufacturer or final determination regarding actual liability by a court. As you can see, this would put the TTB in the precarious position of having to arbitrate a dispute between a state and a native tobacco business over a state tax issue. Clearly it is not, and should not be, the mission of TTB to facilitate enforcement of state tax laws since its statutory mandate is collection of federal taxes).

(b) Proposed Amendment. NTTA proposes that Subsection (B) be amended to read:

(a) Issuance. Subsection (a) of section 5713 ((26 USCA 5713)) is amended to read as follows:

(a) Issuance.-

(2) Conditions. The Secretary shall not issue a permit under this section unless-

(B) the applicant certifies that the applicant is in compliance with all other Federal ~~State, local, and Indian tribal~~ laws relating to the taxation, manufacture, importation, exportation, distribution, marketing, sale, or transportation of tobacco products, processed tobacco, or tobacco production machines, as in effect on the date of the issuance of the permit, and

(C) the applicant identifies in the application any violation of a law described in subparagraph (A) or (B) by the applicant resulting in a penalty under any such law during the 5-year period ending on the date of the application.

2. PROPOSED AMENDMENT TO S. 1706 SECTION 110

(a) Concern. The STOP Act would add a new section to Chapter 52, Subchapter F. Under this new §5755 “the Secretary shall make reasonable efforts to coordinate with other Federal agencies and with officials of foreign, State, local, Indian tribal, and other governments to promote the purposes of this chapter, to prevent and reduce tobacco tax evasion and contraband trafficking in tobacco products and processed tobacco, to enforce settlement agreements between tobacco companies and State or other governments and related laws, or for other law enforcement or administration purposes.”.This adds a provision titled, “Information sharing for tobacco product law administration and enforcement purposes:”

(i) Federal, state, local, and tribal governments. Returns and return information with respect to taxes imposed by chapter 52 may be open to inspection by or disclosure to officers and employees of any Federal agency, the State Tax Administrators, or any other agency of any State, local, or Indian tribal government responsible for the administration and enforcement of laws and regulations relating to tobacco products and processed tobacco, or their legal

representative, solely for use in such administration and enforcement, unless the Secretary determines that such disclosure would seriously impair Federal tax administration.

This new provision is a problem since it allows states and local governments to have access to TTB tax return records of native businesses operating lawfully on their reservations and within the jurisdiction of the tribal government . This provision would be unprecedented since there has never been any federal statute or law that allows state and local governments to have access to the records of tribes or native businesses operating in Indian Country. It would be a clear infringement of tribal sovereignty.

(b) Proposed Amendment. Section 110 (b) (1) (C) should be amended to read as follows (showing redlined changes):

(a) In General. Subchapter F of chapter 52 is amended by adding at the end the following new section:

SEC. 5755. COORDINATION WITH OTHER GOVERNMENT OFFICIALS.

(b) Information Sharing.-

(1) In general. Paragraph (1) of section 6103(o) ((26 USCA 6103))is amended by adding at the end the following new subparagraph:

(C) Information sharing for tobacco product law administration and enforcement purposes.-

(i) Federal, state, local, and tribal governments. Returns and return information with respect to taxes imposed by chapter 52 may be open to inspection by or disclosure to officers and employees of any Federal agency, the State Tax Administrators, or any other agency of any State, local, or Indian tribal government responsible for the administration and enforcement of laws and regulations relating to tobacco products and processed tobacco, or their legal representative, solely for use in such administration and enforcement, unless the Secretary determines that such disclosure would seriously impair Federal tax administration provided that no records of any person operating under a license from an Indian tribe shall be disclosed to state or local authorities without the consent of the Indian tribe that issued the license.

3. PROPOSED AMENDMENT TO S. 1706 SECTION 112

(a) Concern. Currently the CCTA (“Trafficking in Contraband Cigarettes and Smokeless Tobacco Act”), 18 U.S.C. §2341 (2) defines the term “contraband cigarettes “as follows:

(2) the term “contraband cigarettes” means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

* * *

(C) a person--

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State....

18 U.S.C. §2341 (2) (C) (emphasis added). The STOP Act amends 18 U.S.C. §2341 (2) (C) by inserting the phrase “in regard to State, local, or Indian tribal government taxes” before the term “a person.” Thus, (2) (C) would read:

(C) in regard to State, local, or Indian tribal government taxes a person--
(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State....

There are several concerns with this amendment. First, the amendment is awkwardly drafted and so vaguely worded that it is unclear what it means and what new requirements it imposes. Indeed, it is so ambiguous that, in its present form, it is destined to invite litigation. In addition, we are concerned is that it could be interpreted as conferring authority upon the states to impose their regulations on sales of cigarettes and tobacco products shipped into Indian Country—a power currently denied the states under federal law. Under this proposed language, a state could argue, for example, that for all cigarettes, even those subject to “tribal government taxes,” a state licensed shipper must be used. Yet, that is not what the law requires and it conflicts with another provision of the STOP Act, Section 108 (c) (2) it is unlawful:

(2) for a manufacturer, importer, or wholesaler to knowingly ship, transport, deliver, or receive any tobacco products or processed tobacco from or to any person other than a person who has obtained the permit required by this chapter, a retailer, or a person handling such products or processed tobacco solely for purposes of shipment or delivery; except that an importer who has obtained the permit required by this chapter may receive, from a foreign manufacturer or a foreign distributor, foreign tobacco products or processed tobacco that have not previously entered the United States...

S. 1706 Section 108 (c) (2) (emphasis added). Under the above quoted section, a native manufacturer can ship product to a federally permitted entity, a retailer or a common carrier. There is no requirement that the entity must be state licensed.

(b) Proposed Amendment. We propose that the amendment to the CCTA be deleted in its entirety.

Sec. 112—Conforming Amendments.

~~(a) Paragraph (2)(C) of section 2341 of title 18, United States Code is amended by inserting 'in regard to State, local, or Indian tribal government taxes,' before 'a person'~~

4. PROPOSED AMENDMENT TO S. 1706 SECTION 301 (TITLE III)

(a) Concern. Title III, Section 301, of the STOP Act addresses “Indian Tribes and Tribal Matters.” It reads:

SEC. 301. EXCLUSIONS REGARDING INDIAN TRIBES AND TRIBAL MATTERS.

(a) In General. Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect-

- (1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe relating to the collection of taxes on tobacco products sold in Indian country;
- (2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on tobacco products sold in Indian country;
- (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of tobacco products or processed tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
- (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any Indian tribe, tribal member, tribal enterprise, Indian reservations, or other land held by the United States in trust for one or more Indian tribes; or
- (5) any State or local government authority to bring enforcement actions against persons located in Indian country.

(b) Coordination of Law Enforcement. Nothing in this Act or the amendments made by this Act (other than the amendments relating to section 6103 of the Internal Revenue Code of 1986) shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by 1 or more States or other jurisdictions, including Indian tribes, through interstate compact or otherwise, that-

- (1) provides for the administration of tobacco product laws or laws pertaining to interstate sales or other sales of tobacco products or processed tobacco;
- (2) provides for the seizure of tobacco products, processed tobacco, or other property related to a violation of such laws; or
- (3) establishes cooperative programs for the administration of such laws.

(c) Treatment of State and Local Governments. Nothing in this Act or the amendments made by this Act shall be construed to authorize, deputize, or commission States or local governments as instrumentalities of the United States.

(d) Enforcement Within Indian Country. Nothing in this Act or the amendments made by this Act shall prohibit, limit, or restrict enforcement by the Attorney General of the United States of this Act or an amendment made by this Act within Indian country.

(e) Ambiguity. Any ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in favor of this section.

- (f) Definitions. In this section-
- (1) the term 'Indian country' has the meaning given that term in section 1151 of title 18, United States Code;
 - (2) the term 'tribal enterprise' means any business enterprise, regardless of whether incorporated or unincorporated under Federal or tribal law, of an Indian tribe or group of Indian tribes;
 - (3) the term 'Indian reservation' has the meaning given that term in section 168(j)(6) of the Internal Revenue Code of 1986;
 - (4) the term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)); and
 - (5) the terms 'tobacco products' and 'processed tobacco' have the meanings given such terms by section 5702 of the Internal Revenue Code of 1986.

The idea of having a “savings clause” or a provision to provide “exclusions” for tribes and tribal matters is something that Tribes support and it is helpful to have this Section in the STOP Act. Having this provision in the Act maintains the status quo with respect to any existing Tribal-State tax agreements; and the state of the law with respect to state taxation authority over sales involving tribal and reservation sales. Also, to the extent there are any ambiguities in the Act those should be resolved in favor of tribes. Nonetheless, we propose a further savings provision that will provide additional protection for tribes against overreaching by states based on any provision of the Act.

We also have a concern that a similar tribal savings clause in the Prevent All Cigarette Trafficking (PACT) Act was not codified and would encourage that this savings clause be expressly incorporated in the U.S. Code.

(b) Proposed Amendment. Section 301 (a) should be amended to read as follows:

- (a) In General. Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect-
- (1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe relating to the collection of taxes on tobacco products sold in Indian country;
 - (2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on tobacco products sold in Indian country;
 - (3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of tobacco products or processed tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;
 - (4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any Indian tribe, tribal member, tribal enterprise, Indian reservations, or other land held by the United States in trust for one or more Indian tribes;

~~or~~ (5) any State or local government authority to bring enforcement actions against persons located in Indian country; or
(6) commerce in Indian country or between or among Indian tribes or their licensed cigarette sellers.