

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

HO-CHUNK, INC.,
WOODLANDS DISTRIBUTION COMPANY,
HCI DISTRIBUTION COMPANY, and
ROCK RIVER MANUFACTURING COMPANY,

Plaintiffs,

v.

LORETTA LYNCH,
UNITED STATES DEPARTMENT OF JUSTICE,
THOMAS E. BRANDON, and
UNITED STATES BUREAU OF ALCOHOL,
TOBACCO, FIREARMS AND EXPLOSIVES

Defendants.

Case No. 1:16-CV-1652-CRC

NOTICE OF SUPPLEMENTAL AUTHORITY

Introduction

In further support of their Cross Motion for Summary Judgment (ECF 11), Plaintiffs Ho-Chunk, Inc.; Woodlands Distribution Company; HCI Distribution Company; and Rock River Manufacturing Company (“Tribal Entities”) respectfully submit this Notice of Supplemental Authority attaching H.R. CONF. REP. 95-1778, 1978 U.S.C.C.A.N. 5535 (Exhibit 1) and 45 F.R. 48609 (Exhibit 2). These attachments consist of the following: (1) the Joint Explanatory Statement of the Committee of Conference on the passage of the 1978 Contraband Cigarette Trafficking Act, and (2) the Department of Treasury’s final rule requiring each person who distributes more than 60,000 cigarettes in a single transaction to keep suitable commercial records of each such disposition. The Tribal Entities draw the Court’s attention specifically to page 5538 and FN 17 of the Joint Explanatory Statement (Exhibit 1) and to page 48612, first column, number 2 (Government agencies and

instrumentalities) of the Treasury's final rule (Exhibit 2). Counsel for the Tribal Entities discovered these highly-relevant materials on Friday, April 21, 2017, and respectfully submits the same to aid in the Court's resolution of this matter.

These supplemental authorities are of critical importance as they directly address whether the record keeping provisions of the CCTA apply to the Tribal Entities. Contrary to the AG's position on page 14 of its Motion for Summary Judgment (ECF 7 at 14), these new submissions demonstrate that the Tribal Entities, as governmental instrumentalities, are not "persons" under 18 U.S.C. §2343(a) and are therefore exempt from the record keeping provisions set forth in that section. Exhibit 1 clearly sets forth the Congressional intent of the CCTA, which is to target organized crime, not Indian Tribes. Exh. 1 at *5537, 5540. Finally, footnote 17 of Exhibit 1 references the distinction between "Indian country" and "State", a distinction that the AG ignores in its attempt to apply the regulations to the Tribal Entities here.

Discussion

The AG argues that because Tribal governments are specifically exempt from the 18 U.S.C. §2343(b) definition of person, relating to delivery sale shipments, Congress did not intend to exempt them from the definition of person in §2343(a), relating to recordkeeping. See ECF 7 at 14. However, these two sections were adopted at different times. As discussed below, the Congress adding the tribal governmental exemption to the reporting requirements of 18 U.S.C. 2343(b) in 2006 was merely carrying forward the exemption which already existed in the recordkeeping requirements of 18 U.S.C. 2343(a).

The recordkeeping provisions were initially adopted in 1978. The Conference Committee reconciled the House and Senate versions of the bill by deleting the definition of "person." Exhibit 1 at *5538. It did this "because 'person' is defined in 1 U.S.C. 1 for all act [sic] of Congress." Id.

In 1980, two years after enactment of the recordkeeping provisions of 18 U.S.C. §2343(a), the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms adopted the implementing regulations at issue here and stated that it “agrees that government agencies and instrumentalities are exempt from the [recordkeeping] requirements of this rule.” Exhibit 2 at 48612. It did this to uphold the Congressional intent of the CCTA recordkeeping requirements sought to be applied here:

The conference report indicates that Congress has intended the definition of “person” in 1 U.S.C. 1 to apply in this case. Government agencies and instrumentalities are not included in that definition.

Also government agencies and instrumentalities are not included in the definition of “person” in these regulations. Since the regulatory definition of “person” is clear, ATF does not feel that any further specific regulatory language is necessary.

Exhibit 2 at 48612.

In 2006, Congress amended the CCTA to include the reporting requirements of 18 U.S.C. 2343(b). In the 2006 amendment, Congress did not alter the definition of “person” under the 1978 enactment. The CCTA did not add a definition of “person” apart from as originally used in the statute and found in 1. U.S.C. 1. Instead, in 2006, Congress carried forward the governmental exemption to “person” per 1 U.S.C. 1 that has existed in 18 U.S.C. 2343(a) since that section was enacted in 1978 and clarified that a “tribal government” is among the “government agencies and instrumentalities” exempt from the definition of “person” under the statute.

Defendants do not dispute that the Tribal Entities are governmental instrumentalities. See, e.g. Defendants Response to Plaintiffs’ Statement of Material Facts Not in Genuine Dispute (ECF 14-1 at 1-2) (“Defendants do not dispute that the Winnebago Tribe of Nebraska created Ho-Chunk, Inc., as a wholly-owned tribal corporation to serve as the Tribe’s primary economic development arm. . . . Defendants admit that HCID,

Woodlands, and Rock River are subsidiary corporations.”) As governmental instrumentalities, the Tribal Entities are not included in the definition of “person” in 18 U.S.C. 1 as used from enactment of the CCTA through today.

The exemption for the Tribal Entities is consistent with the purpose of the statute, which is to target “organized crime,” not governmental agencies or instrumentalities, tribal or otherwise. Exh. 1 at *5540. See also Reply Brief at 8 (ECF 16) (Citing the legislative history of 2006 amendments to the CCTA stating that Indian Tribal governments are clearly not the “types of entities we are targeting with this provision”)

Further Congress did not intend to “extinguish rights of certain Indians and Indian tribes under current law to engage in the commercial sales of cigarettes within Indian country free of state taxation.” Exhibit 1 at fn 17. See also Reply Brief at 8 (ECF 16) (Citing the legislative history of 2006 amendments to the CCTA stating that Indian Tribal governments are clearly not the “types of entities we are targeting with this provision”)

Conclusion

The attached Exhibits are highly relevant to the issues before the Court as set forth in the Tribal Entities’ Complaint at pg. 11 (ECF 1), Cross Motion for Summary Judgment at pg. 1 (ECF 12-1), and Reply Brief at pg. 3-4 (ECF 16). The Tribal Entities’ are not subject to the record keeping requirements of 18 U.S.C. §2343(a) as they are not a “person” under the statute or implementing regulations. The Conference Report statement that the CCTA does not “affect . . . any . . . immunity from state tax held by any Indian or Indian tribe” clearly exhibits that Congress recognized the distinction between Indian country and states when it passed the CCTA in 1978. The AG fails to carry that distinction forward in its attempt to apply the regulations to the Tribal Entities here.

Respectfully submitted this 24th day of April, 2017,

/s/ B Benjamin Fenner

DC Bar No. 1011266

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H.R. CONF. REP. 95-1778, H.R. Conf. Rep. No. 1778, 95TH Cong.,
2ND Sess. 1978, 1978 U.S.C.A.N. 5535, 1978 WL 8548 (Leg.Hist.)
P.L. 95-575, CIGARETTES-- DISTRIBUTION-- RACKETEERING
SEE PAGE 92 STAT. 2463
SENATE REPORT (JUDICIARY COMMITTEE) NO. 95-962, JUNE 28,
1978 (TO ACCOMPANY S. 1487)
HOUSE REPORT (JUDICIARY COMMITTEE) NO. 95-1629, SEPT. 26,
1978 (TO ACCOMPANY H.R. 8853)
HOUSE CONFERENCE REPORT NO. 95-1778, OCT. 12, 1978 (TO
ACCOMPANY S. 1487)
CONG. RECORD VOL. 124 (1978)
DATES OF CONSIDERATION AND PASSAGE
SENATE SEPTEMBER 29, OCTOBER 15, 1978
HOUSE OCTOBER 3, 15, 1978
THE SENATE BILL WAS PASSED IN LIEU OF THE HOUSE BILL. THE
SENATE REPORT (THIS PAGE) AND THE HOUSE CONFERENCE
REPORT (P. 5535) ARE SET OUT.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED
MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE CONFERENCE REPORT NO. 95-1778

OCT. 12, 1978

* * * *

***7 **5535 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE**

THE MANAGERS ON THE PART OF THE HOUSE AND THE SENATE AT THE CONFERENCE ON THE
DISAGREEING VOTES OF THE TWO HOUSES ON THE AMENDMENTS OF THE HOUSE TO THE BILL
(PS. 1487) TO ELIMINATE RACKETEERING IN THE SALE AND DISTRIBUTION OF CIGARETTES, AND
FOR OTHER PURPOSES, SUBMIT THE FOLLOWING JOINT STATEMENT TO THE HOUSE AND THE
SENATE IN EXPLANATION OF THE EFFECT OF THE ACTION AGREED UPON BY THE MANAGERS
AND RECOMMENDED IN THE ACCOMPANYING CONFERENCE REPORT:

THE HOUSE AMENDMENT TO THE TEXT OF THE BILL STRUCK OUT ALL OF THE SENATE BILL
AFTER THE ENACTING CLAUSE AND INSERTED A SUBSTITUTE TEXT.

THE SENATE RECEDES FROM ITS DISAGREEMENT TO THE AMENDMENT OF THE HOUSE WITH
AN AMENDMENT WHICH IS A SUBSTITUTE FOR THE SENATE BILL AND THE HOUSE AMENDMENT.
THE DIFFERENCES BETWEEN THE SENATE BILL, THE HOUSE AMENDMENT, AND THE SUBSTITUTE
AGREED TO IN CONFERENCE ARE NOTED BELOW, EXCEPT FOR CLERICAL CORRECTIONS,
CONFORMING CHANGES MADE NECESSARY BY AGREEMENTS REACHED BY THE CONFEREES,
AND MINOR DRAFTING AND CLARIFYING CHANGES.

(1) STATEMENT OF FINDINGS AND PURPOSE

THE SENATE BILL CONTAINS A 'STATEMENT OF FINDINGS AND PURPOSE'.

THE HOUSE AMENDMENT CONTAINS NO COMPARABLE PROVISION.

THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE VERSION WITH THE INTENT THAT SINCE THE SENATE PROVISION MERELY SUMMARIZES THE LEGISLATIVE HISTORY GIVING RISE TO THIS ACT, IT SERVES NO LEGISLATIVE PURPOSE TO RESTATE IT IN THE ACT ITSELF.

****5536** NEVERTHELESS, THE CONFEREES ACKNOWLEDGE THE ACCURACY OF THE STATEMENTS CONTAINED IN THE 'STATEMENT OF FINDINGS AND PURPOSE' OF THE SENATE BILL, TO WIT, THE FOLLOWING:

(1) THERE IS WIDESPREAD TRAFFIC IN CIGARETTES MOVING IN OR OTHERWISE AFFECTING INTERSTATE OR FOREIGN COMMERCE, AND THAT THE STATES ARE NOT ADEQUATELY ABLE TO STOP THE MOVEMENT INTO THEIR STATES AND THE SALE OF SUCH CIGARETTES IN VIOLATION OF THEIR TAX LAWS THROUGH THE EXERCISE OF THEIR POLICE POWER;

(2) THERE IS A CASUAL RELATIONSHIP BETWEEN THE FLOW OF CIGARETTES INTO INTERSTATE COMMERCE TO BE SOLD IN VIOLATION OF STATE LAWS AND THE RISE OF RACKETEERING IN THE UNITED STATES;

(3) A FEDERAL ROLE IN THE FIGHT AGAINST CIGARETTE SMUGGLING WILL ASSIST THE STATES IN THEIR LAW ENFORCEMENT EFFORTS AND WILL BE UNDERTAKEN WITH THE RECOGNITION THAT PRIMARY ENFORCEMENT RESPONSIBILITY REMAINS WITH THE INDIVIDUAL STATES;

(4) CERTAIN RECORDS MAINTAINED BY PERSONS POSSESSING, SELLING, DISTRIBUTING, CARRYING, TRANSPORTING, PURCHASING, OR RECEIVING CIGARETTES COULD HAVE A HIGH DEGREE OF USEFULNESS IN CRIMINAL INVESTIGATIONS.

***8** (5) IT IS THE PURPOSE OF THIS ACT TO PROVIDE A TIMELY SOLUTION TO A SERIOUS ORGANIZED CRIME PROBLEM AND TO HELP PROVIDE LAW ENFORCEMENT ASSISTANCE TO INDIVIDUAL STATES.

WITH RESPECT TO ANY POSSIBLE EFFECT WHICH THE ABSENCE OF A STATEMENT OF FINDINGS AND PURPOSE MIGHT HAVE-- PARTICULARLY THE ABSENCE OF ITS MENTION OF CIGARETTES BOOTLEGGING MOVING IN OR OTHERWISE AFFECTING INTERSTATE OR FOREIGN COMMERCE-- THE FOLLOWING LETTER FROM JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WAS BEFORE THE CONFEREES:

DEPARTMENT OF JUSTICE

WASHINGTON, D.C. OCTOBER 2, 1978.

HON. JOHN CONYERS, JR.,

CHAIRMAN, SUBCOMMITTEE ON CRIME, COMMITTEE ON THE JUDICIARY,

HOUSE OF REPRESENTATIVES, WASHINGTON, D.C.

DEAR CONGRESSMAN CONYERS: THIS IS IN RESPONSE TO YOUR LETTER OF SEPTEMBER 18, 1978, REQUESTING THE FORMAL VIEWS OF THIS DEPARTMENT AS TO WHETHER OR NOT ABSENCE OF SPECIFIC MENTION OF 'INTERSTATE COMMERCE' IN H.R. 8853 RENDERS IT CONSTITUTIONALLY DEFECTIVE.

WE DO NOT THINK THE BILL IS CONSTITUTIONALLY DEFECTIVE BECAUSE OF ITS FAILURE TO MENTION 'INTERSTATE COMMERCE' SPECIFICALLY. THE INTERSTATE ASPECT OF CIGARETTE BOOTLEGGING IS INHERENT IN THE ACTIVITY. CONGRESS LEGISLATIVE EFFORTS TO MAKE IT A CRIME ARE PREMISED ON THE INTERSTATE ELEMENT: IT IS BECAUSE OF THE INTERSTATE NATURE OF THE ACTIVITY; AND THE INABILITY OF THE STATES TO CONTROL IT, THAT THE EFFORT TO LEGISLATE WAS UNDERTAKEN. THESE FACTORS ARE MADE CLEAR, AS YOU POINT OUT, BY THE LEGISLATIVE HISTORY OF THE BILL. THEREFORE, THE LACK OF A STATEMENT OF FINDINGS AND PURPOSES RELATING TO THE INTERSTATE NATURE OF BOOTLEGGING IN THIS MOST RECENT VERSION OF THE BILL DOES NOT SEEM TO US TO BE A DEFECT. MOST BILLS, AFTER ALL, DO NOT SPECIFICALLY SET FORTH THE FINDINGS OF FACT UPON WHICH THEY ARE BASED, AND THERE IS NO REQUIREMENT THAT THEY DO SO. PEREZ V. UNITED STATES, 402 U.S. 146,156 (1971).¹⁶

NOR DO WE SEE A PROBLEM BECAUSE THE SUBSTANTIVE PROVISIONS ARE NOT LIMITED TO INTERSTATE TRAFFIC IN CIGARETTES. WITH RESPECT TO PROSPECTIVE **5537 CRIMINAL CASES WHERE AN INTERSTATE ELEMENT IS SHOWN, THE BILL IS CLEARLY CONSTITUTIONAL. SHOULD STRICTLY INTRASTATE ACTIVITIES BECOME THE SUBJECT OF PROSECUTION, WE THINK ANY COURT WOULD FIND, JUST AS THE SUPREME COURT DID IN PEREZ, SUPRA, THAT THE ACTIVITIES AFFECT INTERSTATE COMMERCE ON THE BASIS OF THE CONGRESS DETAILED FINDINGS AS THEY APPEAR IN THE LEGISLATIVE HISTORY OF THE LEGISLATION.

IN PEREZ, THE COURT FOUND THAT '(EXTORTIONATE CREDIT TRANSACTIONS, THOUGH PURELY INTRASTATE, MAY IN THE JUDGMENT OF CONGRESS AFFECT INTERSTATE COMMERCE. ' ID. AT 154. ACCORDING TO THE COURT, CONGRESS MAY DELIVERATELY WRITE A LAW ENCOMPASSING 'MORE THAN THE PRECISE THING TO BE PREVENTED' IF NECESSARY TO PREVENT AN EVIL. FINALLY, AS A PRACTICAL MATTER, THE INCIDENCE OF CASES INVOLVING PURELY INTRASTATE ACTIVITIES SHOULD BE RARE SINCE THE DEPARTMENT HAS REPEATEDLY DECLARED ITS INTENTION TO PROSECUTE ONLY WHEN ORGANIZED CRIME IS INVOLVED.

IN OUR VIEW, THE ONLY QUESTION HERE IS WHETHER CIGARETTE BOOTLEGGING IS A CLASS OF ACTIVITIES WITHIN THE POWER OF CONGRESS TO REGULATE. THE ANSWER TO THE QUESTION IS UNLIKELY TO DEPEND ON WHETHER CONGRESS RESTRICTS THE BILL'S SUBSTANTIVE PROVISIONS TO TRANSACTIONS INVOLVING INTERSTATE *9 ACTIVITIES OR WHETHER IT ATTACHES FORMAL FINDINGS AS A PREAMBLE.

PLEASE LET ME KNOW IF I CAN BE OF ANY FURTHER ASSISTANCE.

SINCERELY,

JOHN C. KEENEY,

DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION.

(2) DEFINITIONS

A. DEFINITION OF THE TERM ‘CONTRABAND CIGARETTES’

1. THE SENATE BILL DEFINES ‘CONTRABAND CIGARETTES’ AS A QUANTITY OF SIXTY THOUSAND OR MORE CIGARETTES, BEARING NO EVIDENCE OF THE PAYMENT OF APPLICABLE STATE CIGARETTE TAXES IN THE STATE IN WHICH THEY ARE FOUND.

THE HOUSE AMENDMENT IS SIMILAR BUT DEFINES ‘CONTRABAND CIGARETTES’ AS A QUANTITY IN EXCESS OF 30,000 CIGARETTES.

THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISION WITH A MODIFICATION PROVIDING THAT ‘CONTRABAND CIGARETTES’ MEANS A QUANTITY IN EXCESS OF 60,000 CIGARETTES. ¹⁷

2. THE SENATE BILL EXCLUDES FROM THE DEFINITION OF ‘CONTRABAND CIGARETTES’ THOSE CIGARETTES IN THE POSSESSION OF FOUR SPECIFIC CLASSES OF PERSONS.

THE HOUSE AMENDMENT SIMILARLY EXCLUDES FROM THE DEFINITION OF ‘CONTRABAND CIGARETTES’ CIGARETTES IN THE POSSESSION OF THE SAME FOUR CLASSES OF PERSONS, EXCEPT THAT (1) THE EXCLUSION FOR CIGARETTES IN THE POSSESSION OF COMMON OR CONTRACT CARRIERS ONLY APPLIES TO THOSE TRANSPORTING CIGARETTES UNDER A PROPER BILL OF LADING OR FREIGHT BILL WHICH STATES THE QUANTITY, SOURCE AND DESTINATION OF SUCH CIGARETTES, AND (2) THE EXCLUSION FOR CIGARETTES IN THE POSSESSION OF PERSONS LICENSED OR OTHERWISE AUTHORIZED BY THE STATE WHERE THE CIGARETTES ARE FOUND TO ACCOUNT FOR AND PAY CIGARETTE TAXES IMPOSED BY SUCH STATE ONLY APPLIES TO THOSE WHO HAVE ACTUALLY COMPLIED WITH THE ACCOUNTING AND TAX PAYMENT REQUIREMENTS RELATING TO SUCH LICENSE OR AUTHORIZATION WITH RESPECT TO THE CIGARETTES INVOLVED.

****5538** THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISION WITH MODIFICATIONS.

(3) UNLAWFUL ACTS

SECTION 1286 OF THE SENATE BILL MAKES IT UNLAWFUL FOR ANY PERSON KNOWINGLY TO POSSESS, SELL, DISTRIBUTE, CARRY, TRANSPORT, PURCHASE, OR RECEIVE CONTRABAND CIGARETTES. SECTION 1288 (B) INCLUDED AN OFFENSE FOR KNOWINGLY MAKING A FALSE STATEMENT OR REPRESENTATION WITH RESPECT TO INFORMATION REQUIRED BY THE SECRETARY TO BE KEPT IN THE RECORDS OF A PERSON.

THE HOUSE AMENDMENT DECLARES: (A) IT SHALL BE UNLAWFUL TO KNOWINGLY SHIP, TRANSPORT, RECEIVE, POSSESS, SELL, DISTRIBUTE, OR PURCHASE ***10** CONTRABAND CIGARETTES. (B) IT SHALL BE UNLAWFUL TO KNOWINGLY MAKE ANY FALSE STATEMENT OR REPRESENTATION WITH RESPECT TO THE INFORMATION REQUIRED TO BE KEPT IN THE RECORDS OF A DEALER.

THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISION WITH MODIFICATIONS ADDING THE PHRASE ‘WHOEVER’ TO BOTH SUBSECTIONS (A) AND (B).

B. DEFINITIONS OF 'DEALER' AND 'PERSON'

THE SENATE BILL DOES NOT USE OR DEFINE THE TERM 'DEALER'. COVERAGE OF THE BILL IS DIRECTED AT ANY 'PERSON', DEFINED TO INCLUDE 'ANY INDIVIDUAL, CORPORATION, COMPANY, ASSOCIATION, FIRM, PARTNERSHIP, SOCIETY, OR JOINT STOCK COMPANY.'

THE HOUSE BILL DEFINES THE TERM 'DEALER' TO MEAN 'ANY PERSON WHO SELLS OR DISTRIBUTES IN ANY MANNER ANY QUANTITY OF CIGARETTES IN EXCESS OF 30,000 IN A SINGLE TRANSACTION'. 'PERSON' IS NOT DEFINED.

THE CONFERENCE SUBSTITUTE DELETES THE DEFINITION OF 'PERSON' BECAUSE 'PERSON' IS DEFINED IN 1 U.S.C. 1 FOR ALL ACT OF CONGRESS. THE TERM 'DEALER' IS ALSO NOT INCLUDED IN THE CONFERENCE SUBSTITUTE.

THE TERM 'DEALER' WAS PRIMARILY USED IN THE HOUSE BILL TO DESIGNATE AND LIMIT THOSE PERSONS SUBJECT TO THE RECORDKEEPING PROVISIONS. THIS CAN BE EFFECTIVELY ACCOMPLISHED BY SELECTIVE USE OF THE OPERATIVE LANGUAGE IN THE DEFINITION OF THE PROHIBITED CONDUCT.

C. DEFINITION OF 'COMMON OR CONTRACT CARRIER'

THE HOUSE BILL PROVIDES A MORE DETAILED DEFINITION OF 'COMMON OR CONTRACT CARRIER' THAN THE SENATE VERSION BY EXPLICITLY INCLUDING A CARRIER HOLDING 'A PERMIT FOR CONTRACT CARRIER BY MOTOR VEHICLE, OR OTHER VALID OPERATING AUTHORITY UNDER THE INTERSTATE COMMERCE ACT'.

THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISION.

D. DEFINITION OF 'STATE'

THE SENATE BILL DEFINES 'STATE' TO INCLUDE 'PUERTO RICO, OR A TERRITORY OR POSSESSION OF THE UNITED STATES'.

THE HOUSE PROVISION SUBSTITUTES 'THE 'COMMONWEALTH OF PUERTO RICO, OR THE VIRGIN ISLANDS' FOR THIS LANGUAGE.

****5539** THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISIONS AS MORE ACCURATELY DELINEATING THE PRACTICAL SCOPE OF THIS LEGISLATION.

ENFORCEMENT, REGULATIONS, RECORDKEEPING, REPORTING AND INSPECTION

THE SENATE BILL CONTAINED THE FOLLOWING LANGUAGE IN SEC. 1287:

SEC. 1287. ENFORCEMENT AND REGULATIONS

‘THE SECRETARY SHALL ENFORCE THE PROVISIONS OF THIS CHAPTER AND MAY PRESCRIBE SUCH RULES AND REGULATIONS WHICH ARE REASONABLY NECESSARY TO CARRY OUT THE PROVISIONS OF THIS CHAPTER:

PROVIDED, HOWEVER, THAT NOTHING CONTAINED IN THIS CHAPTER SHALL BE INTERPRETED AS AUTHORIZING THE SECRETARY TO REQUIRE PERSONS WHO SELL, DISTRIBUTE, TRANSPORT OR PURCHASE CIGARETTES IN THE ORDINARY COURSE OF BUSINESS TO MAINTAIN RECORDS OF SUCH ACTIVITIES OR TO REPORT SUCH ACTIVITIES TO THE SECRETARY; EXCEPT THAT THE SECRETARY MAY REQUIRE THAT ANY PERSON INVOLVED IN ANY TRANSACTION OF A QUANTITY OF SIXTY THOUSAND OR MORE CIGARETTES SHALL NOTE, ON EXISTING BUSINESS RECORDS KEPT IN THE ORDINARY COURSE OF BUSINESS, THE IDENTITY AND DESTINATION OF THE PERSON RECEIVING SUCH CIGARETTES.

*11 THE HOUSE AMENDMENT CONTAINED ESSENTIALLY THE SAME LANGUAGE AS THE FIRST SENTENCE OF SEC. 1287 IN SEC. 2346. THE HOUSE AMENDMENT ALSO CONTAINED SEC. 2343, WHICH READ AS FOLLOWS:

SEC. 2343. RECORDKEEPING, REPORTING, AND INSPECTION

‘EACH DEALER SHALL--

‘(1) MAINTAIN SUCH RECORDS OF SHIPMENT, RECEIPT, SALE, AND OTHER DISTRIBUTION OF CIGARETTES; AND

‘(2) SUBMIT TO THE SECRETARY SUCH REPORTS AND INFORMATION WITH RESPECT TO SUCH RECORDS;

IN SUCH FORM AND MANNER AS THE SECRETARY SHALL BY REGULATION PRESCRIBE. UPON THE CONSENT OF ANY DEALER, OR PURSUANT TO A DULY ISSUED SEARCH WARRANT, THE SECRETARY MAY ENTER THE PREMISES (INCLUDING PLACES OF STORAGE) OF SUCH DEALER FOR THE PURPOSE OF INSPECTING ANY RECORDS OR DOCUMENTS REQUIRED TO BE MAINTAINED BY SUCH DEALER UNDER THIS CHAPTER, AND ANY CIGARETTES KEPT OR STORED BY SUCH DEALER AT SUCH PREMISES.

THE CONFERENCE SUBSTITUTE ADOPTS THE FOLLOWING LANGUAGE:

‘(A) ANY PERSON WHO SHIPS, SELLS, OR DISTRIBUTES ANY QUANTITY OF CIGARETTES IN EXCESS OF 60,000 IN A SINGLE TRANSACTION SHALL MAINTAIN SUCH INFORMATION ABOUT THE SHIPMENT, RECEIPT, SALE, AND DISTRIBUTION OF CIGARETTES AS THE SECRETARY MAY PRESCRIBE BY RULE OR REGULATION. THE SECRETARY MAY REQUIRE SUCH PERSON TO KEEP ONLY--

‘(1) THE NAME, ADDRESS, DESTINATION (INCLUDING STREET ADDRESS), VEHICLE LICENSE NUMBER, DRIVER'S LICENSE NUMBER, SIGNATURE OF THE PERSON RECEIVING SUCH CIGARETTES, AND THE NAME OF THE PURCHASER;

‘(2) A DECLARATION OF THE SPECIFIC PURPOSE OF THE RECEIPT (PERSONAL USE, RESALE, OR DELIVERY TO ANOTHER); AND

‘(3) A DECLARATION OF THE NAME AND ADDRESS OF THE RECIPIENT'S PRINCIPAL IN ALL CASES WHEN THE RECIPIENT IS ACTING AS AN AGENT.

TO THE EXTENT THAT SUCH INFORMATION IS CONTAINED IN EXISTING BUSINESS RECORDS, NO ADDITIONAL RECORDS SHALL BE REQUIRED BY THE SECRETARY. NOTHING CONTAINED HEREIN SHALL AUTHORIZE THE SECRETARY TO REQUIRE REPORTING UNDER THIS SECTION.

****5540** THE INTENT OF THE CONFEREES IN ARRIVING AT THE LANGUAGE OF SECTION 2343(A) IS TO RECOGNIZE THE NECESSITY OF BALANCING TWO IMPORTANT CONCERNS: THAT THOSE RESPONSIBLE FOR THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME CASES IN THIS AREA HAVE THE NECESSARY INFORMATION TO ACHIEVE THIS RESULT, AND THAT THOSE REQUIRED TO KEEP RECORDS NOT BE UNDULY BURDENED BY UNNECESSARILY EXCESSIVE RECORDKEEPING REQUIREMENTS. FOR THIS LATTER REASON, THE CONFEREES ALSO DELETED ALL REPORTING REQUIREMENTS. IT IS THE UNDERSTANDING OF THE CONFEREES THAT NOTHING IN THIS ACT IS INTENDED TO AUTHORIZE THE SECRETARY TO REQUIRE ANY REPORTS. THIS IS CLARIFIED BY THE STATUTORY LANGUAGE IN SECTION 2346 WHICH EXPRESSLY MAKES THAT GENERAL SECTION SUBJECT TO SECTION 2343(A).

(5) PENALTIES

THE SENATE BILL (A) ESTABLISHES A FINE OF NOT MORE THAN \$100,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS, OR BOTH FOR A PERSON WHO KNOWINGLY POSSESSES, SELLS, DISTRIBUTES, CARRIES, TRANSPORTS, PURCHASES OR RECEIVES CONTRABAND CIGARETTES, AND (B) ESTABLISHES A FINE OF \$5,000 OR IMPRISONMENT FOR NOT MORE THAN THREE YEARS, OR BOTH, FOR A PERSON *12 WHO KNOWINGLY VIOLATES ANY RULES OR REGULATIONS PROMULGATED UNDER SECTION 1287 (ENFORCEMENT AND REGULATIONS) OR WHO KNOWINGLY MAKES ANY FALSE STATEMENT OR REPRESENTATION WITH RESPECT TO THE INFORMATION REQUIRED BY THE SECRETARY TO BE KEPT IN THE RECORDS OF A PERSON.

THE HOUSE AMENDMENT ESTABLISHES A FINE OF NOT MORE THAN \$10,000 OR IMPRISONMENT FOR NOT MORE THAN TWO YEARS, OR BOTH, FOR WHOEVER VIOLATES ANY PROVISION OF THIS CHAPTER OR REGULATIONS PROMULGATED THEREUNDER.

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION, WITH THE MODIFICATION THAT (A) A PERSON WHO KNOWINGLY VIOLATES SECTION 2342(A) SHALL BE SUBJECT TO A FINE OF NOT MORE THAN \$100,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE YEARS, OR BOTH AND (B) A PERSON WHO KNOWINGLY VIOLATES ANY RULES OR REGULATIONS PROMULGATED UNDER SECTION 2343 OR SECTION 2342(B) OF THIS CHAPTER SHALL BE FINED NOT MORE THAN \$5,000 OR IMPRISONMENT FOR NOT MORE THAN THREE YEARS, OR BOTH.

IT IS NOTED THAT SECTION 2342(B) AS ADOPTED BY THE CONFERENCE IS THE FALSE STATEMENT OFFENSE WHICH WAS DEEMED MORE APPROPRIATELY LOCATED IN THE ‘UNLAWFUL ACTS’ SECTION AS PROVIDED IN THE ORIGINAL HOUSE VERSION.

(6) EFFECT ON STATE LAW

THE SENATE BILL STATES THAT NOTHING IN THIS CHAPTER SHALL BE CONSTRUED TO INHIBIT OR OTHERWISE AFFECT ANY COORDINATED LAW ENFORCEMENT EFFORT BY A

NUMBER OF STATES, THROUGH INTERSTATE COMPACT OR OTHERWISE, TO PROVIDE FOR THE ADMINISTRATION OF STATE CIGARETTE TAX LAWS, TO PROVIDE FOR THE CONFISCATION OF CIGARETTES AND OTHER PROPERTY SEIZED IN VIOLATION OF SUCH LAWS AND TO ESTABLISH COOPERATIVE PROGRAMS FOR THE ADMINISTRATION OF SUCH LAWS.

THE HOUSE AMENDMENT CONTAINS NO COMPARABLE PROVISION.

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE PROVISION.

****5541** (7) TREASURY DEPARTMENT STUDY

THE SENATE BILL AUTHORIZES THE SECRETARY OF THE TREASURY TO CARRY OUT A STUDY WITH A VIEW TO RECOMMENDING TO THE CONGRESS A PROGRAM PURSUANT TO WHICH THE SEVERAL STATES WOULD BE ENCOURAGED TO ADOPT AND ADMINISTER COMPREHENSIVE LAWS ESTABLISHING REASONABLE CIGARETTE TAXES AND EFFECTIVE CRIMINAL PROVISIONS PROVIDING PENALTIES FOR TRAFFICKING IN CONTRABAND CIGARETTES IN ORDER TO ELIMINATE OR CONTROL SUCH TRAFFICKING. THE SENATE BILL ALSO STATES THAT SUCH A STUDY SHALL INCLUDE RECOMMENDATIONS RELATING TO THE TYPES AND AMOUNTS OF FEDERAL ASSISTANCE, INCLUDING TECHNICAL AND FINANCIAL, WHICH SHOULD BE PROVIDED UNDER ANY SUCH PROGRAM.

THE HOUSE AMENDMENT CONTAINS NO COMPARABLE PROVISION.

THE CONFERENCE SUBSTITUTE ADOPTS THE HOUSE PROVISION, IN RECOGNITION OF THE FACT THAT THE CONFERENCE SUBSTITUTE ALREADY STATES THAT THE CONCURRENT JURISDICTION OF THE STATES TO ENACT AND ENFORCE CIGARETTE TAX LAWS IS UNDISTURBED AND THAT NOTHING IN THIS CHAPTER SHALL INHIBIT ANY COORDINATED LAW ENFORCEMENT EFFORT BY A NUMBER OF STATES, THROUGH INTERSTATE COMPACTS OR OTHERWISE, TO PROVIDE FOR THE ESTABLISHMENT OF COOPERATIVE PROGRAMS FOR THE ADMINISTRATION OF SUCH LAWS.

THE CONFEREES HAD BEFORE THEM A STUDY CONDUCTED FOR THE SUBCOMMITTEE ON CRIME OF THE HOUSE COMMITTEE ON THE JUDICIARY BY THE CONGRESSIONAL *13 RESEARCH SERVICE OF THE LIBRARY OF CONGRESS WHICH FOUND THAT THE RELEVANT STATUTES OF SEVERAL OF THE STATES MOST SEVERELY AFFECTED BY CIGARETTE BOOTLEGGING WERE EXTREMELY LAX IN THAT MANY ARE MERELY MISDEMEANOR STATUTES CALLING FOR RELATIVELY MILD FINES OR PRISON TERMS. THE CONFEREES ALSO RECOGNIZE THAT STATE LAW ENFORCEMENT EFFORTS, PARTICULARLY IN THOSE STATES MOST SEVERELY AFFECTED BY CIGARETTE BOOTLEGGING, MUST BE SIGNIFICANTLY IMPROVED AND THAT ENACTMENT OF THIS LEGISLATION IS NOT TO BE INTERPRETED AS A SIGNAL TO THE STATES TO LESSEN THEIR EFFORTS IN THIS REGARD. THE MAJOR RESPONSIBILITY FOR ENFORCING STATE CIGARETTE TAX LAWS IS NOW AND MUST CONTINUE TO BE THE BURDEN OF THE STATES. THE PROPOSED LEGISLATION IS DESIGNED TO SUPPLEMENT CURRENT EFFORTS BY THE STATES TO COMBAT CIGARETTE BOOTLEGGING, NOT TO SUPPLANT THEM. STATES ARE ENCOURAGED TO UPGRADE THEIR CAPABILITIES IN THIS REGARD, BOTH IN TERMS OF INCREASED RESOURCES AND STRONGER STATE CIGARETTE BOOTLEGGING STATUTES, WHICH PRESUMABLY CAN BE APPROPRIATELY SUPPORTED BY INCREASED SAVING OF TAX DOLLARS THROUGH EFFECTIVE LAW ENFORCEMENT.

(8) AUTHORIZATION

THE SENATE BILL AUTHORIZES TO BE APPROPRIATED FOR THE FISCAL YEAR BEGINNING OCTOBER 1, 1978, SUCH SUMS AS MAY BE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ACT. THE HOUSE AMENDMENT HAS NO COMPARABLE PROVISION.

THE CONFERENCE SUBSTITUTE ADOPTS THE SENATE VERSION, BUT DELETES THE PHRASE 'FOR THE FISCAL YEAR BEGINNING OCTOBER 1, 1978'.

JOHN CONYERS,

ELIZABETH HOLTZMAN,

ALLEN E. ERTEL

LAMAR GUDGER,

HAROLD VOLKMER,

PETER RODINO,

****5542** TOM RAILSBACK,

JOHN ASHBROOK,

MANAGERS ON THE PART OF THE HOUSE.

JAMES O. EASTLAND,

EDWARD KENNEDY,

JOE BIDEN,

STROM THURMOND,

ORRIN G. HATCH,

MANAGERS ON THE PART OF THE SENATE.

16 91 S.CT. 1357, 28 L.ED.2D 686.

17 SOME CONCERN WAS EXPRESSED IN THE COURSE OF THE CONFERENCE THAT THE DEFINITION OF 'CONTRABAND CIGARETTES' INADVERTENTLY EXTINGUISHED RIGHTS OF CERTAIN INDIANS AND INDIAN TRIBES UNDER CURRENT LAW TO ENGAGE IN THE COMMERCIAL SALE OF CIGARETTES WITHIN INDIAN COUNTRY FREE OF STATE TAXATION. THE PHRASE 'APPLICABLE STATE CIGARETTE TAXES' MAKES IT CLEAR THAT THIS LEGISLATION IS NOT INTENDED TO AFFECT TRANSPORTATION OR SALE BY INDIANS OR INDIAN TRIBES ACTING IN ACCORDANCE WITH LEGALLY ESTABLISHED RIGHTS. THE CONFEREES DO NOT INTEND THAT

THIS BILL ADDRESS THE CURRENT EXEMPTION FROM STATE TAXATION OF CIGARETTE SALES ON INDIAN RESERVATIONS AND NOTHING IN THIS BILL IS INTENDED TO AFFECT THIS OR ANY OTHER IMMUNITY FROM STATE TAX HELD BY ANY INDIAN OR INDIAN TRIBE. SIMILARLY OTHER COMMERCIAL CIGARETTE SALES EXEMPTED BY LAW FROM STATE TAXATION (FOR EXAMPLE, MILITARY POST EXCHANGES) ARE NOT AFFECTED BY THIS LEGISLATION.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****. 2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

H.R. CONF. REP. 95-1778, H.R. Conf. Rep. No. 1778, 95TH Cong., 2ND Sess. 1978, 1978 U.S.C.C.A.N. 5535, 1978 WL 8548 (Leg.Hist.)

End of Document

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goods used in the manufacture of such fasteners. The amount which may be imported under a permit is calculated with reference to a fixed percentage of the f.o.b. value of the exported fasteners. The purpose of the program is to allow manufacturers/exporters to replenish their stock of imported inputs. The permits are negotiable. To extent they have a market value, they could confer a special benefit upon the manufacturer/exporter. However, we have found that the permits obtained by the fasteners manufacturers are not resold and thus do not constitute a subsidy within the meaning of section 303 of the Act.

2. *Kandla Free Trade Zone*—The petition alleged that benefits were received by manufacturers or exporters of industrial fasteners based on their location within the Kandla Free Trade Zone. Information has been provided which shows that one company has been given a license to locate in the zone but to date has not produced or exported fasteners from the zone. Thus, there is no question of any benefit that would constitute a subsidy within the meaning of the countervailing duty law.

Programs Found Not to be Subsidies

1. *Tax Deductions for Capital Equipment and New Industrial Undertakings*—The Government of India allows income tax deductions for purchases of new capital equipment and establishment of new industrial enterprises. We have found that these deductions are generally available (i.e., they are not industry or enterprise specific) and therefore have concluded that they are not subsidies as defined in section 771(5) of the Act.

2. *Market Development Assistance*—Under the Market Development Assistance program grants have been provided for export promotion to the Engineering Export Promotion Council (EEPC) and the Trade Development Authority (TDA). These grants have been used by the EEPC and the TDA to operate overseas offices and organize exhibits designed to promote Indian exports generally. Firms which belong to these organizations pay dues which exceed any specific benefits they derive from EEPC and TDA activities. In addition, the firms are billed for all special services such as participation in trade shows, listing in directories, etc. We have, accordingly, decided that such market development assistance does not amount to a subsidy under the countervailing duty law.

Verification

Staff in our Office of Investigations verified the information relied upon in reaching this determination through

examination of Government documents, discussions with Government, trade organizations, and corporate officials, and corporate books and records. Examples of the type of documents examined include an official report published by the Ministry of Commerce, announcements of Government programs, letters from banks, ledger sheets, and income tax reports.

Determination

I hereby determine that the Government of India provides bounties or grants (subsidies) within the meaning of section 303 of the Act and that the estimated aggregate net amount of these benefits equals 18.0% of the f.o.b. value of the exported merchandise.

The Department has afforded interested parties an opportunity to present oral views in accordance with § 355.35, Commerce Regulations (19 CFR 353.35, 45 FR 4946). In addition, written views and oral views have been received in accordance with § 355.34(a), Commerce Regulations (19 CFR 355.34(a), 45 FR 4946).

Customs officers are hereby directed to assess within 6 months after the date on which the Secretary of Commerce receives satisfactory information on which the assessment may be based, but in no event later than 12 months after the end of the annual reporting period of the manufacturer or exporter within which the merchandise is entered or withdrawn from warehouse for consumption, countervailing duties on entries of certain fasteners from India on which liquidation was suspended, equal to the amount of the net subsidy determined or estimated to exist. Those entries for which liquidation was previously suspended should be liquidated within six months of publication of this notice.

Effective on the date of publication of this notice in the *Federal Register* and until further notice, deposit of estimated countervailing duties shall be required at the time of entry, or withdrawal from warehouse, for consumption. The amount to be deposited is 18.0% of the f.o.b. value of the merchandise.

Annex III part 353 of the Department of Commerce regulations (19 CFR Part 355) is amended by inserting after the last entry for India the words "certain fasteners" in the column headed "commodity", the *Federal Register* citation of this notice in the column headed "Treasury Decision" and the words "Net Subsidy Declared—Rate" in the column headed "Action."

This notice is published pursuant to sections 303 and 706 of the Act (19 U.S.C. 1303, 1971(e)), and § 355.36 of the

Department of Commerce regulations (19 CFR 355.36).

Robert E. Herzstein,

Under Secretary for International Trade.

(FR Doc. 80-21807 Filed 7-18-80; 8:45 am)

BILLING CODE 3510-25-M

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 296

(T.D. ATF-73, Ref: Notice No. 334)

Regulations Relating to the Distribution of Cigarettes

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF).

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision requires each person who distributes more than 60,000 cigarettes in a single transaction to keep suitable commercial records of each disposition of more than 60,000 cigarettes. This rule implements the recordkeeping provisions of Pub. L. 95-575. The Bureau of Alcohol, Tobacco and Firearms feels that records of disposition maintained by persons who distribute more than 60,000 cigarettes in a single transaction would be useful in tracing the movement of contraband cigarettes and would help curtail the illicit traffic of cigarettes between States.

EFFECTIVE DATE: September 19, 1980.

FOR FURTHER INFORMATION CONTACT: Thomas L. Minton, Research and Regulations Branch, 202-566-7626.

SUPPLEMENTARY INFORMATION:

Background Information

On January 15, 1980, ATF published Notice No. 334 in the *Federal Register* (45 FR 2855) which proposed amending 27 CFR Part 296, by adding Subpart F—Distribution of Cigarettes. The purpose of this proposal was to implement the recordkeeping requirements of Pub. L. 95-575.

Interested persons were given until February 29, 1980, to submit relevant data, views, or arguments regarding this proposal. This Treasury decision is the result of that proposal.

Discussion of Regulations

These regulations amend 27 CFR Part 296—Miscellaneous Regulations Relating to Cigars, Cigarettes, and Cigarette Papers and Tubes by adding a new Subpart F—Distribution of Cigarette. The requirements of this new subpart apply to each distributor of

cigarettes. A "distributor" is any person who sells, ships, issues, gives, transfers, or otherwise disposes of more than 60,000 cigarettes in a single transaction. Persons who distribute cigarettes in single transactions consisting of 60,000 or less are not considered a "distributor" under these regulations and are not subject to the requirements of this subpart.

Pub. L. 95-575 makes it unlawful for most persons to purchase, receive, possess, transport, ship, sell or distribute more than 60,000 cigarettes in a single transaction on which the State cigarette tax has not been paid. However, the law does allow certain persons to possess and handle cigarettes on which the State tax has not been paid. These persons are referred to in the regulations as "exempted persons." An exempted person is any person who—

- (1) Holds a permit as a manufacturer of tobacco products or as an export warehouse proprietor;
- (2) Operates a customs bonded warehouse;
- (3) Is an agent for a tobacco products manufacturer, export warehouse proprietor, or customs bonded warehouse operator;
- (4) Is a common or contract carrier transporting cigarettes under a proper bill of lading or freight bill which states the quantity, source, and destination of the cigarettes;
- (5) Is licensed by the State in which he possesses cigarettes to account for and pay cigarette taxes imposed by that State and who has complied with the accounting and payment requirements with respect to any cigarettes involved;
- (6) Is an agent of the United States, an individual State or a political subdivision of a State and who has possession of cigarettes in connection with performance of official duties; or
- (7) Operates within a foreign-trade zone established under 19 U.S.C. 81b, when the cigarettes involved have been entered into the zone under zone-restricted status, or in respect to foreign cigarettes, have been admitted into the zone but which have not been entered into the United States.

Each distributor of cigarettes is required to show certain information on commercial records relating to each disposition of more than 60,000 cigarettes. The type of information required to be kept depends on whether the parties involved in the transaction are "exempted persons."

Discussion of Comments

Several written comments were received in response to the notice of proposed rulemaking. Most of the

commenters agreed with the objectives of the regulations and were concerned about the detrimental effects which the traffic in contraband cigarettes has had upon the States involved and on the legitimate cigarette industry. Some commenters suggested changes and voiced questions concerning the regulations. A discussion of the comments follows.

Definition of Contraband Cigarettes

One commenter suggested that the definition of "contraband cigarettes" be revised to exclude untaxed cigarettes used for experimental purposes. Under 26 U.S.C. 5704(a), cigarettes used for experimental purposes are exempt from Federal excise taxes. Section 270.232, 27 CFR, allows, with the prior approval of ATF, the shipment of cigarettes exempt from Federal taxes to research facilities. The commenter felt that these cigarettes would be subject to seizure as contraband and should, therefore, be excluded from the definition of contraband cigarettes.

ATF has decided against modifying the definition of contraband cigarettes for several reasons. First, cigarettes used for experimental purposes cannot be excluded from the contraband cigarette category since the Congress enacted a specific definition of the term "contraband cigarettes."

Further, ATF does not believe that the definition of contraband cigarettes will adversely affect the distribution of cigarettes used for experimental purposes. The exemption of Federal taxes on cigarettes used for experimental purposes is irrelevant to the contraband cigarette definition. Rather, the question of whether cigarettes are contraband revolves on the applicable State taxes. Therefore, in States which do not impose a tax on cigarettes used for experimental purposes, these cigarettes cannot be contraband. However, if a State does impose a tax on cigarettes used for experimental purposes, then all applicable State requirements must be complied with prior to disposing of the cigarettes in quantities of more than 60,000 to other than an exempted person.

Definition of Exempted Person

(1) *Agents.* Two commenters suggested that the definition of "exempted person" be broadened to include all employees or representatives who may not be actual agents of a tobacco products manufacturer, export warehouse proprietor or customs bonded warehouse operator but are acting on their behalf. This proposed definition would include operators of

private and public warehouses storing cigarettes for a manufacturer and contract distributors of complimentary products.

The category of persons who may possess or handle untaxed cigarettes are specifically listed in the law. For this reason, ATF is unable to broaden the definition of "exempted person" to include representatives of manufacturers, export warehouse proprietors, and customs bonded warehouse operators who are not agents of these principals.

However, ATF considers employees acting on behalf of their employers to be agents of their employers. Also, most manufacturers often use public warehouses as their regional distribution facilities. The manufacturer usually stores its cigarettes in the public warehouse for shipment to accounts in the particular region where the warehouse is located. The manufacturer maintains title to the cigarettes and is responsible for the sale of the cigarettes, while the warehouse operator makes disposition of the cigarettes by releasing them for delivery to the customers of the manufacturer as required by the manufacturer. In these cases, the warehouse operator is acting as an agent for the manufacturer and is, therefore, considered an exempted person.

(2) *Government employees.* One commenter felt the regulations should be clarified to include expressly the employees of the Puerto Rican, the District of Columbia, and the Virgin Islands governments as exempted persons in the same category as "State" employees. ATF agrees. Pub. L. 95-575 includes these jurisdictions in the statutory definition of the term "State." ATF fully intended the regulations to include employees of these jurisdictions in the same category as employees of any State. In order to eliminate any confusion over this issue, § 296.143 is changed to include the statutory definition of the term "State." The term "State" is defined in the regulations as, "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands."

(3) *Carriers.* Section 296.143 basically defines a "common or contract carrier" as a carrier holding a valid operating authority under the Interstate Commerce Act, or an equivalent operating authority from a regulatory agency of the United States or of any State.

One commenter stated that some States do not require any operating authority for local for-hire carriers operating within a limited jurisdiction. The commenter stated that these local unregulated dray operators often service

the cigarette industry by conveying untaxpaid cigarettes from the manufacturer's distribution facility to the licensed wholesaler. By doing so, however, the unregulated carriers may be in violation of the law by possessing untaxpaid cigarettes since these carriers are not exempted persons. The commenter suggested expanding the definition of common or contract carrier to include local carriers operating within an unregulated jurisdiction in accordance with the laws of that jurisdiction.

The definition of common or contract carrier in § 296.143 parallels the statutory definition in Pub. L. 95-575. The law is specific. The legislative history of the law shows that the Senate bill, the House bill, and the conference committee recommendation intended to limit the independent transportation of untaxpaid cigarettes in quantities of more than 60,000 to regulated carriers. Therefore, the definition of common or contract carrier cannot be expanded. Local unregulated carriers may transport untaxpaid cigarettes only when acting as an agent for a manufacturer of tobacco products, export warehouse proprietor, or customs bonded warehouse operator. However, ATF believes that a local unregulated carrier transporting a manufacturer's untaxpaid cigarettes to the manufacturer's customer in the same state under the manufacturer's invoice would be acting as an agent for the manufacturer in making that delivery.

(4) *Licensed distributors.* One commenter questioned the meaning of the language in the definition of "exempted person" requiring that the distributors licensed by a State account for and pay the applicable State tax. This language states that a licensed cigarette distributor qualifies as an exempted person only when the distributor "has complied" with accounting and payment requirements relating to the State license and with respect to the cigarettes involved.

The commenter felt that because the definition is phrased in the past tense, it could pose a problem for the cigarette distributor who is in compliance with accounting and payment requirements at a specific instant yet has not complied by making actual payment or by making an actual accounting at the moment the licensed person takes possession of the untaxpaid cigarettes. The commenter cited an example where a State may permit a licensed distributor to hold cigarettes without the application of State indicia for a specified period of time after receipt, usually not exceeding 48 hours. Also, the

commenter felt that a problem may arise where special circumstances or emergencies may dictate that the compliance requirements of the State cannot be met.

The language in the definition concerning a licensed distributor's compliance with State requirements was adopted from the law. ATF feels that the present language should not pose a problem. The definition does not require a licensed distributor to immediately account for and pay the State tax in order to be an exempted person unless the State requires immediate accounting and payment. The distributor must have complied with the State's accounting and payment requirements. If the State's requirements allow a licensed distributor to hold cigarettes before accounting for and paying the applicable taxes, then at any specific instant during the allowed holding period, the distributor has complied with the State's accounting and payment requirements even though the distributor has not yet accounted for or paid the tax.

A similar interpretation applies in cases where an emergency or special circumstance causes a deviation from the normal compliance requirements of the State. Where the State allows a deviation from normal compliance requirements in emergencies or under special circumstances, the distributor has complied if the allowed procedures have been followed. In all cases, the licensed distributor must have complied with all applicable State accounting and payment requirements up to the specific instant in question.

Recordkeeping Requirements

A commenter suggested that a distributor should not be required to maintain records concerning dispositions of cigarettes if the dispositions are carried out on behalf of a tobacco products manufacturer and the manufacturer's records show the required information concerning the dispositions. This commenter also stated that the retention period in § 296.150 was much longer than the period for which these records are normally maintained by public warehouse operators. The commenter felt that the required retention period would place an undue burden on some distributors.

Section 2343(a), 19 U.S.C., places the recordkeeping requirements on "Any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction * * *." Therefore each distributor must meet the recordkeeping requirements for qualifying dispositions. Also, the purpose of the recordkeeping requirement is to assist ATF in tracing

the movement of contraband cigarettes. By maintaining disposition records at a location other than the business premises, a possible violator could hamper an investigation.

Section 296.150 requires each distributor to maintain records of disposition for 3 years following the close of the calendar year in which the records are made. ATF feels that this retention period will not normally impose a burden on most distributors. Tax-related records are customarily retained over a period of several years. Further, by allowing disposition records to be discarded shortly after a cigarette disposition is made, ATF would lose an important investigative tool specifically provided for in the authorizing legislation.

However, ATF realizes that situations may arise where a distributor's required records may be duplicated by the tobacco products manufacturer. Therefore a provision has been added to § 296.150 which permits, in certain circumstances, distributors to apply for permission to employ a shorter record retention period. This provision applies where the distributor is an agent of a tobacco products manufacturer, the manufacturer will keep the required record of the distributor's dispositions for the full retention period, and a shorter retention period will not unduly hinder the administration or enforcement of these regulations. Each distributor proposing to employ a shorter retention period must apply to the regional regulatory administrator of the region in which the distributor is located. A definition of "regional regulatory administrator" is added to § 296.143.

Other Comments

(1) *Name of purchaser.* A commenter felt that the requirement to show the full name of the purchaser on records of disposition could cause confusion to distributors in cases where there may not be a purchaser. This confusion could arise where cigarettes are being shipped to research facilities, sampling contractors, or public warehouses for storage until sold. In cases such as these, the recipient is not a purchaser.

ATF agrees that a situation may arise where the recipient is not a purchaser. Therefore, § 296.147(a)(1)(i) is changed to require the name of the recipient of the cigarettes when there is no purchaser. Section 296.147(a)(1)(i) now reads—

"(i) The full name of the purchaser (or the recipient if there is no purchaser):". Also, a parenthetical phrase is added to § 296.147(a)(2)(i) to indicate that the name of the purchaser is not required

when there is no purchaser. Section 296.147(a)(2)(i) now reads—

"(i) The full name of the purchaser (if any);".

(2) *Government agencies and instrumentalities.* The government instrumentality which handles cigarettes for sale on military reservations requested specific regulatory language exempting it from the recordkeeping requirements of this subpart.

ATF agrees that government agencies and instrumentalities are exempt from the requirements of this rule. The conference report indicates that Congress has intended the definition of "person" in 1 U.S.C. 1 to apply in this case. Government agencies and instrumentalities are not included in that definition.

Also government agencies and instrumentalities are not included in the definition of "person" in these regulations. Since the regulatory definition of "person" is clear, ATF does not feel that any further specific regulatory language is necessary.

(3) *Government access to records.* One commenter objected to § 296.153(a) which permits any ATF officer to enter the business premises of any cigarette distributor to inspect the records required by these regulations pursuant to either an administrative inspection warrant or a criminal search warrant. The commenter felt that this rule was an "attempt by regulations to change the statutory requirements for a 'search warrant' into a regulatory requirement for an 'administrative inspection warrant.'"

Public Law 95-575 authorizes ATF officers, as agents of the Secretary of Treasury, to enter a distributor's premises upon that distributor's consent or in accordance with a "duly issued search warrant." There is no specific mention of an administrative inspection warrant in the law itself. The legislative history of both the Senate bill, S. 1487, and the House bill, H.R. 8853, indicate "at the search warrant requirement was intended to bring the law in line with the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S.C. 307 (1978), wherein the Court set out guidelines for the use of administrative inspection warrants. See *Senate Rep. No. 95-962*, 95th Cong., 2d Sess. 18 (1978); and *H.R. Rep. No. 95-1629*, 95th Cong., 2d Sess. 8 (1978). Therefore, these regulations reflect the Congressional intent by authorizing the use of an administrative inspection warrant.

(4) *Splitting dispositions.* The Departments of the Revenue of two States submitted comments concerning the language in § 296.146 relating to a cigarette distributor dividing a single

agreement for the disposition of more than 60,000 cigarettes into the delivery of smaller components of 60,000 cigarettes in order to avoid the recordkeeping requirements of this rule.

One state tax commissioner stated that experience based on the results of a recent joint investigation conducted with ATF, indicates that the splitting of cigarette dispositions by distributors is currently being practiced to remove shipments of cigarettes from the jurisdiction of Pub. L. 95-575. A representative of the other State tax agency questioned the language of § 296.146 and asked for clarification of "what constitutes evidence of a distributor's intent to split cigarette dispositions to avoid the regulatory recordkeeping requirements?"

The regulations do not preclude a distributor from dividing a single agreement for the disposition of more than 60,000 cigarettes into smaller components of 60,000 cigarettes or less; however, the distributor must record the required information for each component of the agreement. If a distributor fails to keep the required records for each component of an agreement for the disposition of more than 60,000 cigarettes, the distributor would be in violation of the regulations. The word "agreement" is a term of art in the field of contract law, particularly under the uniform Commercial Code, and is susceptible to a uniform application by the courts. Even so, ATF cannot make a general or universal statement of what constitutes evidence of a distributor's intent to avoid the regulatory requirements of this rule. The evidence indicating any violation of the requirements cannot be defined outside the context of a particular case.

(5) *Forfeitures.* A commenter requested that specific provisions be implemented which would allow the affected State to recover lost revenue through the resale of contraband seized in accordance with these regulations.

While the affected State may be allowed through its concurrent jurisdiction to seize contraband involved in a violation of State tax laws, contraband seized by ATF for a violation of 18 U.S.C. Chapter 114 must be disposed of in accordance with 27 CFR Part 72—Disposition of Seized Personal Property. Section 2344(c), 18 U.S.C., does not require that the seizure of contraband subject to seizure and forfeiture under both State and Federal law be accomplished under the Federal statute. Nevertheless, regulatory language permitting the automatic transfer of property seized by ATF to the affected State is not authorized.

Changes in the Final Rule

The following changes are made in the final rule:

(1) Definitions of "state" and "regional regulatory administrator" are added to § 296.143.

(2) Sections 296.147(a)(1)(i) and 296.147(a)(2)(i) are changed to clarify the recordkeeping requirements where the recipient of the cigarettes may not be the purchaser.

(3) A provision permitting, a distributor, in certain circumstances, to retain the required records for a shorter retention period is added to § 296.150.

Drafting Information

The principal author of this document is Thomas L. Minton of the Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms.

Authority

This Treasury decision is issued under the authority of 18 U.S.C. 2346.

Regulations

On the basis of the foregoing, 27 CFR Part 296 is amended as follows:

PART 296—MISCELLANEOUS REGULATIONS RELATING TO CIGARS, CIGARETTES, AND CIGARETTE PAPERS AND TUBES

1. The table of sections in 27 CFR Part 296 is amended to include the addition of a new Subpart F as follows:

Subpart F—Distribution of Cigarettes

General

Sec.	
296.141	Scope of subpart.
296.142	Territorial extent.
296.143	Meaning of terms.

Records

296.146	General requirements.
296.147	Required information.
296.150	Retention of records.

Other Provisions Relating to the Distribution of Cigarettes

296.153	Authority of ATF officers to enter business premises.
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Penalties and Forfeitures

296.154	Penalties.
296.155	Forfeitures.

2. Part 296, 27 CFR, is amended by the addition of Subpart F—Distribution of Cigarettes. Subpart F reads as follows:

Subpart F—Distribution of Cigarettes

Authority: 18 U.S.C. 2341-2346, unless otherwise noted.

General**§ 296.141 Scope of subpart.**

The regulations in this subpart relate to the distribution of cigarettes in excess of 60,000 in a single transaction.

§ 296.142 Territorial extent.

The provisions of the regulations in this subpart apply in the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

§ 296.143 Meaning of terms.

When used in this subpart, terms are defined as follows in this section. Words in the plural shall include the singular, and vice versa. Words indicating the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not named which are in the same general class or are otherwise within the scope of the term defined.

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this subpart.

Business premises. When used with respect to a distributor, the property on which the cigarettes are kept or stored. The business premises includes the property where the records of a distributor are kept.

Common or contract carrier. A carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act, or under equivalent operating authority from a regulatory agency of the United States or of any State.

Contraband cigarettes. Any quantity of cigarettes in excess of 60,000, if—

(a) The cigarettes bear no evidence of the payment of applicable State cigarette taxes in the State where the cigarettes are found;

(b) The State in which the cigarettes are found requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes; and

(c) The cigarettes are in the possession of any person other than an exempted person.

Disposition. The movement of cigarettes from a person's business premises, wherever situated, by shipment or other means of distribution.

Distribute. To sell, ship, issue, give, transfer, or otherwise dispose of.

Distributor. Any person who distributes more than 60,000 cigarettes in a single transaction.

Exempted person. Any person who is—

(a) Holding a permit issued pursuant to Chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor;

(b) Operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555);

(c) An agent of a tobacco products manufacturer, an export warehouse proprietor, or an operator of a customs bonded warehouse;

(d) A common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of the cigarettes;

(e) Licensed or otherwise authorized by the State, in which he possesses cigarettes, to account for and pay cigarette taxes imposed by that State; and who has complied with the accounting and payment requirements relating to his license or authorization with respect to the cigarettes involved; or

(f) An agent of the United States, of an individual State, or of a political subdivision of a State and having possession of cigarettes in connection with the performance of official duties.

(g) Operating within a foreign-trade zone established under 19 U.S.C., section 81b, when the cigarettes involved have been entered into the zone under zone-restricted status or, in respect to foreign cigarettes, have been admitted into the zone but have not been entered in the United States.

Person. Any individual, corporation, company, association, firm, partnership, society, or joint stock company.

Regional Regulatory Administrator. The regional official in charge of regulatory enforcement.

State. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands.

Records**§ 296.146 General requirements.**

Each distributor of cigarettes shall keep copies of invoices, bills of lading, or other suitable commercial records relating to each disposition of more than 60,000 cigarettes. Dividing a single agreement for the disposition of more than 60,000 cigarettes into the delivery of smaller components of 60,000 cigarettes or less does not exempt the distributor from the recordkeeping

requirements of this subpart. The distributor shall include the information prescribed in § 296.147 in his commercial records of disposition.

§ 296.147 Required information.

(a) **Distributors who are exempted persons.** Each distributor who is an exempted person as defined in § 296.143 shall show the following information in his commercial records.

(1) For each disposition of more than 60,000 cigarettes to an exempted person; or for each disposition of more than 60,000 cigarettes to a person who is not an exempted person and which is delivered by the distributor to the recipient's place of business, the distributor shall show on dated records—

(i) The full name of the purchaser (or the recipient if there is no purchaser);

(ii) The street address (including city and state) to which the cigarettes are destined; and

(iii) The quantity of cigarettes disposed of.

(2) For each disposition of more than 60,000 cigarettes, other than the dispositions specified in paragraph (a)(1) of this section, the distributor shall show on dated records—

(i) The full name of the purchaser (if any);

(ii) The name, address (including city and state), and signature of the person receiving the cigarettes;

(iii) The street address (including city and state) to which the cigarettes are destined;

(iv) The quantity of cigarettes disposed of;

(v) The driver's license number of the individual receiving the cigarettes;

(vi) The license number of the vehicle in which the cigarettes are removed from the distributor's business premises;

(vii) A declaration by the individual receiving the cigarettes of the specific purpose of receipt (such as personal use, resale, delivery to another person, etc.); and

(viii) A declaration by the person receiving the cigarettes of the name and address of his principal when he is acting as an agent.

(b) **Distributors who are not exempted persons.** Each distributor who is not an exempted person as defined in § 296.143 shall show on dated commercial records the information specified in paragraphs (a)(2)(i)—(a)(2)(viii) of this section for each disposition of more than 60,000 cigarettes.

§ 296.150 Retention of records.

(a) **General.** Each distributor of cigarettes shall retain the records required by §§ 296.146 and 296.147 for

three years following the close of the year in which the records are made. The distributor shall keep the required records on his business premises.

(b) *Shorter retention periods.* The regional regulatory administrator may, pursuant to an application submitted by a distributor, approve a shorter retention period where—

(1) The distributor requesting the shorter retention period is an agent of a tobacco products manufacturer;

(2) The tobacco products manufacturer will keep the required record for each disposition of more than 60,000 cigarettes from the agent's premises for the full retention period specified in paragraph (a) of this section; and

(3) The approval of a shorter retention period will not unduly hinder the administration of enforcement of this subpart.

(c) *Application requirements.* Each distributor proposing to employ a shorter retention period shall submit a written application, in duplicate, to the regional regulatory administrator of the region in which the distributor is located. A distributor may employ a shorter retention period only if approval is received from the regional regulatory administrator. Each application should indicate the duration of the proposed retention period and should include the information required by paragraph (b) of this section.

Other Provisions Relating to the Distribution of Cigarettes

§ 296.153 Authority of ATF officers to enter business premises.

Any ATF officer may enter the business premises of any distributor of cigarettes to inspect the records required by §§ 296.146–296.147 or to inspect any cigarettes stored on the premises—

(a) Pursuant to duly issued search warrant or an administrative inspection warrant; or

(b) Upon the consent of the distributor to enter his premises.

Penalties and Forfeitures

§ 296.154 Penalties.

(a) Any person who knowingly ships, transports, receives, possesses, sells, distributes, or purchases contraband cigarettes shall be fined not more than \$100,000 or imprisoned not more than five years, or both.

(b) Any person who knowingly violates any regulation contained in this subpart or makes any false statement or misrepresentation with respect to the information required to be recorded by this subpart shall be fined not more than

\$5,000 or imprisoned not more than three years, or both.

§ 296.155 Forfeitures.

(a) Any contraband cigarettes involved in any violation of the provisions of 18 U.S.C. Chapter 114 shall be subject to seizure and forfeiture. All provisions of the Internal Revenue Code of 1954 (Title 26 U.S.C.) relating to the seizure, forfeiture, and disposition of firearms, as defined in § 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures of contraband cigarettes under the provisions of 18 U.S.C. Chapter 114.

(b) Any vessel, vehicle or aircraft used to transport, carry, convey, or conceal or possess any contraband cigarettes with respect to which there has been committed any violation of any provision of 18 U.S.C. Chapter 114 or the regulations in this subpart shall be subject to seizure and forfeiture under the Customs laws, as provided by the Act of August 9, 1939 (49 U.S.C. 781–788).

(18 U.S.C. 2344; 53 Stat. 1291 (49 U.S.C. 782))

Signed: May 23, 1980.

Stephen E. Higgins,
Acting Director.

Approved: July 10, 1980.

Richard J. Davis,
Assistant Secretary (Enforcement and Operations).

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1601

Procedural Regulations

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim rule with request for comments.

SUMMARY: The Equal Employment Opportunity Commission is publishing revisions to its procedural regulations §§ 1601.21 (b) and (d) and 1601.28(d). They are effective immediately. They are, however, interim pending receipt of comments by the public. The procedural regulations § 1601.21 (b) and (d) currently provide that the Commission may reconsider a previously issued determination, but when it does reconsider, it need only provide prompt notification of its decision. The Commission is amending its procedural regulations, among other things, to provide for notice of the Commission's intent to reconsider previously issued

determinations of reasonable cause or of dismissals of charges. The revisions provide that the Commission or its designated officer may reconsider a dismissal of a charge under Title VII of the Civil Rights Act of 1964, as amended, at any time and that issuance of a notice of intent to reconsider will always vacate the dismissal and will revoke a previously issued notice of right to sue in certain instances. These revisions apply to charges of discrimination filed by private sector employees and public sector employees. The revisions further provide that the Commission or its designated officer may reconsider a determination finding reasonable cause to believe a charge is true at any time in cases involving private sector employees. However, the Commission or its designated officer will not reconsider a determination of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25. After a failure of conciliation in cases involving a public respondent, the Commission takes no further action and refers the case to the Attorney General.

The Commission amends § 1601.28(d) to reflect the interpretation of § 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, adopted in *Shea v. City of St. Paul*, 601 F.2d 345 (8th Cir. 1979) and *DeMatteis v. Eastman Kodak Company*, 511 F.2d 306, modified 520 F.2d 409 (2d Cir., 1975), which hold that notice of the dismissal of a charge constitutes notice of final administrative action and of the right to sue. Henceforth in all cases where the respondent is a government, governmental agency, or a political subdivision, the notice of dismissal issued by the Commission will include the notice of right to sue. Because the present state of the law threatens the rights of thousands of charging parties to a determination of their rights on the merits, the regulations are being adopted on an interim basis pending receipt of comments.

DATES: Effective July 21, 1980.

Comments on the interim regulations must be received on or before August 20, 1980. The Commission proposes to consider the submissions for a period of at least ten days thereafter before adopting any final regulations.

ADDRESSES: Interested persons are invited to submit written comments regarding the revisions to Marie Wilson, Executive Secretariat, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. Copies of the comments submitted by the public will be