[ORAL ARGUMENT NOT SCHEDULED]

No. 17-5140

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HO-CHUNK, INC., *et al.*,

Plaintiffs-Appellants,

v.

JEFF SESSIONS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs-appellants are Ho-Chunk, Inc., Woodlands Distribution Company, HCI Distribution Company, and Rock River Manufacturing Company. Defendants-appellees are Jefferson B. Sessions, III, in his official capacity as U.S. Attorney General, the U.S. Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and Thomas E. Brandon, in his official capacity as Acting Director of ATF.

No parties have appeared as *amici curiae* at this time.

B. Rulings Under Review

The plaintiffs appeal from the district court's order of May 24, 2017 (Cooper, J.) holding that the recordkeeping requirement of the Contraband Cigarette Trafficking Act applies to the plaintiffs. The district court's memorandum opinion is published at 253 F. Supp. 3d 303.

C. Related Cases

The government is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ William E. Havemann
William E. Havemann

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GLOSSARY

ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
APA	Administrative Procedure Act
CCTA	Contraband Cigarette Trafficking Act
PACT Act	Prevent All Cigarette Trafficking Act

STATEMENT OF JURISDICTION

The district court had jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. The district court granted summary judgment for the defendants on May 24, 2017. Plaintiffs filed a timely notice of appeal on June 6, 2017. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs filed suit seeking a declaration that the recordkeeping requirement of the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2343(c), cannot be enforced against them because they are instrumentalities of an Indian tribal government located in Indian country. The questions presented are:

1. Whether plaintiffs are subject to the CCTA's recordkeeping requirement.
2. Whether the government adopted its position that plaintiffs are subject to the CCTA's recordkeeping requirement in accordance with the Administrative Procedure Act.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The Contraband Cigarette Trafficking Act

Congress enacted the Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2341 *et seq.*, in 1978 in an effort to combat widespread trafficking in untaxed cigarettes.

The CCTA was designed "to provide a timely solution to the serious problem of organized crime and other large scale operations of interstate cigarette bootlegging." S. Rep. 95-962, at 3-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5518, 5518-19. Congress in the CCTA recognized that one common form of cigarette bootlegging involved the "purchase of cigarettes through tax-free outlets"—including "Indian reservations"—followed by the resale of those cigarettes in high-tax jurisdictions. *Id.* at 6. Congress determined that such trafficking of untaxed cigarettes "drain[ed] billions of dollars in tax revenues from state and local governments each year and often serve[d] as a source of illicit financing for organized crime and terrorist organizations." *United States v. Mohamed*, 759 F.3d 798, 803 (7th Cir. 2014).

The CCTA combatted these harms principally by making it a crime for "any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). The CCTA also authorizes the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to "seiz[e] and forfeit[]" all "contraband cigarettes." *Id.* § 2344(c). The Act as amended defines "contraband cigarettes" as "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 . . . [of] payment of cigarette taxes." *Id.* § 2341(2). The CCTA specifies that this definition of "contraband cigarettes" applies to cigarettes in the possession of "any person other than" four enumerated categories of persons. *Id.* Although certain

federal and state governments and their "instrumentalit[ies]" are among the CCTA's exempted categories of persons, *see id.* § 2341(2)(D), Indians and tribal entities are not.

In addition to prohibiting the sale or possession of contraband cigarettes, the CCTA as originally enacted imposed recordkeeping and inspection requirements on persons who sold large quantities of cigarettes. *See* Pub. L. No. 95-575 § 1, 92 Stat. 2463, 2464 (1978). The CCTA's original recordkeeping provision stated that "[a]ny person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction shall maintain" records about the transaction as prescribed by Treasury Department regulations. *Id.* The CCTA's original inspection provision in turn authorized federal authorities to "enter the premises" of businesses subject to the recordkeeping requirement to inspect their records and check their inventories—but only upon the businesses' consent "or pursuant to a duly issued search warrant." *Id.*

2. Application of the CCTA to Indian Tribes

Indians and Indian tribes may sell untaxed cigarettes on their reservations to tribal members for their personal consumption. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480 (1976). But States retain the authority to tax the sale of cigarettes by Indian tribes to non-tribal members, who are ultimately liable for the tax. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980) (a State may "impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation"); *see also Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) ("States have a valid interest

in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations," and "that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere."). Indians and Indian tribes therefore must comply with applicable state cigarette tax laws—including laws requiring proof that cigarette taxes have been prepaid—in sales to non-tribal members.

The CCTA imposes a federal penalty on persons who possess large quantities of cigarettes that lack the requisite proof that state taxes have been prepaid. *See* 18 U.S.C. § 2342(a). The CCTA as enacted did not specify whether that ban on contraband cigarettes applied to Indians and Indian tribes. In a series of decisions beginning in the 1990s, however, the courts of appeals unanimously concluded that the CCTA can be enforced against Indians and Indian tribes. In the first appellate decision to address the question, the Ninth Circuit concluded that the CCTA is a "federal statute of general applicability" that applies "to Indian tribes" as well as "tribal members." *United States v. Baker*, 63 F.3d 1478, 1485-86 (9th Cir. 1995). The Second Circuit followed suit, *see United States v. Morrison*, 686 F.3d 94, 96 (2d Cir. 2012), as have various district courts, *see United States v. Parry*, No. 4:13-cr-00291, 2015 WL 631979, at *6 (W.D. Mo. Feb. 13, 2015). The government is not aware of any decision holding to the contrary.

3. The CCTA Amendments

Congress in 2006 amended the CCTA in several respects relevant to this appeal. First, Congress lowered the threshold number of cigarettes required to trigger the

recordkeeping requirement from 60,000 to 10,000. The CCTA's recordkeeping provision—the provision at issue in this appeal—now states that "[a]ny person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 . . . in a single transaction shall maintain" records about its transactions as prescribed by regulations promulgated by the Attorney General. 18 U.S.C. § 2343(a); *see also* 27 C.F.R. §§ 646.141-143, 646.146-147, 646.150 (Attorney General's implementing regulations).[1]

Second, the 2006 amendments supplemented the CCTA's recordkeeping and inspection provisions with a new reporting provision directed at cigarette delivery sellers. *See* 18 U.S.C. § 2343(b). The reporting provision requires "[a]ny person, except for a tribal government, who engages in a delivery sale, and who ships, sells, or distributes any quantity in excess of 10,000 cigarettes . . . within a single month" to submit a report to the Attorney General, the Treasury Secretary, and relevant state officials, detailing certain information about its transactions. *Id.* § 2343(b), (d). Notably, while the CCTA's recordkeeping provision continues to apply to "[a]ny person," *id.* § 2343(a), Congress applied this new reporting provision to "[a]ny person, *except for a tribal government*," *id.* § 2343(b) (emphasis added).

[1] The CCTA regulations have not yet been amended to reflect the change from 60,000 to 10,000 cigarettes, though the Department of Justice has issued a Notice of Proposed Rulemaking reflecting that change. *See Implementation of the USA PATRIOT Improvement and Reauthorization Act of 2005 Regarding Trafficking in Contraband Cigarettes or Smokeless Tobacco*, Notice of Proposed Rulemaking, 75 Fed. Reg. 44,173 (July 28, 2010).

Third, whereas Congress had previously authorized only the federal government to bring suit to enforce the CCTA, the 2006 amendments authorized state and local governments, as well as any person who holds a cigarette manufacturing permit under the Internal Revenue Code, *see* 26 U.S.C. § 5712, to "bring an action in the United States district courts to prevent and restrain" CCTA violations. 18 U.S.C. § 2346(b)(1). The 2006 amendments further authorized these parties to seek "any other appropriate relief for [CCTA] violations," including "money damages and injunctive relief." *Id.* § 2346(b)(2). The 2006 amendments specified, however, that enforcement actions initiated by state or local governments or private parties may not "be commenced under this paragraph against *an Indian tribe or an Indian in Indian country*." *Id.* § 2346(b)(1) (emphasis added). The amendments stated that "[n]othing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, *or an Indian tribe* against any unconsented lawsuit under this chapter." *Id.* § 2346(b)(2) (emphasis added).

Congress amended the CCTA most recently in 2010 when it passed the Prevent All Cigarette Trafficking Act (PACT Act), Pub. L. No. 111-154, 124 Stat. 1087 (2010). As relevant here, the PACT Act amended the CCTA's inspection provision. While the pre-existing inspection provision allowed ATF to inspect businesses' records and inventories only upon the businesses' consent or pursuant to a judicial warrant, the PACT Act amended the CCTA to authorize "[a]ny officer" of ATF during normal business hours to "enter the premises of any person" described in the CCTA's

recordkeeping or reporting provision for the purpose of inspecting their business records and inventories. 18 U.S.C. § 2343(c)(1). The new inspection provision states that the "district courts of the United States shall have the authority in a civil action under this subsection to compel inspections," *id.* § 2343(c)(2), and imposes a civil penalty of up to $10,000 for noncompliance, *id.* § 2343(c)(3).

B. Prior Proceedings

Plaintiffs are for-profit corporations owned by the Winnebago Tribe, located on the Winnebago Reservation in the State of Nebraska. Ho-Chunk, Inc. was created to foster economic development on the Winnebago Reservation. The three other plaintiffs—HCI Distribution Company, Woodlands Distribution Company, and Rock River Manufacturing Company—are wholly owned subsidiaries of Ho-Chunk engaged in the commercial manufacturing and sale of tobacco products. This brief refers to the appellants collectively as "Ho-Chunk" for ease of reference.

In June 2016, ATF sent letters to the three Ho-Chunk subsidiaries announcing its intent to inspect and copy the companies' business records pursuant to its authority under the CCTA. Ho-Chunk by letter objected to the proposed inspection on the ground that "there is some serious doubt surrounding the applicability of the CCTA and its regulations." J.A. _ (Op. 5). Ho-Chunk agreed to allow the inspection of any records reflecting off-reservation transactions, but urged ATF to cease its demand to inspect the records of on-reservation transactions. ATF responded by reasserting its authority to inspect all records subject to the recordkeeping requirement.

In August 2016, before any inspection took place, Ho-Chunk filed suit seeking a declaration that it was exempt from the CCTA's recordkeeping requirement. Ho-Chunk's brief in support of summary judgment did not dispute that the CCTA's enforcement provisions generally apply on Indian reservations, but argued that the CCTA's recordkeeping provision should be construed to exclude Ho-Chunk because the statute's definition of "State" does not include "Indian country." *See* Dkt. No. 11-3, at 17. In a supplemental filing submitted after summary judgment briefing had been completed, Ho-Chunk presented a new theory, arguing for the first time that it was an instrumentality of a tribal government and that it therefore did not qualify as a "person" for purposes of the CCTA's recordkeeping provision. *See* Dkt. No. 17.

The district court granted summary judgment for ATF. The court first rejected Ho-Chunk's argument that it was not subject to the CCTA's recordkeeping provision because the statute's definition of "State" does not include "Indian country." The court explained that courts of appeals "have unanimously held that [the CCTA's criminal] provisions apply to Indian country," which means that the term "State" has been understood "to *include* tribal territory." J.A. _ (Op. 8). Under Ho-Chunk's contrary theory, the court noted, the CCTA's definition of "State" would include Indian country for certain purposes, but would exclude Indian country for others—an "untenable" violation of the cardinal rule of statutory interpretation that the same term used in the same statute is intended to have the same meaning. J.A. _ (Op. 8). The court proceeded to explain that the CCTA's 2006 amendments "lend additional (and substantial) support

to the reading that the CCTA's recordkeeping rules apply to tribal entities," because Congress in those amendments "chose specifically to relieve Indian tribes from the Act's reporting requirements, but *not* its recordkeeping requirements." J.A. _ (Op. 9).

The district court then rejected Ho-Chunk's alternative argument that instrumentalities of tribal governments do not qualify as "persons" under the CCTA. The court observed that the record did not reveal whether Ho-Chunk was in fact the instrumentality of a tribal government, but concluded that even if Ho-Chunk qualified as such an instrumentality, it was nevertheless a "person." The court noted that the CCTA carves out four exceptions to the class of "person[s]" barred from possessing contraband cigarettes, and that tribal entities are not among those exceptions, even though certain federal and state instrumentalities are. As the court explained, these exceptions show "that Congress knew precisely how to exempt governmental agencies and instrumentalities from the reach of the CCTA, but chose *not* [to] do so with respect to tribal agencies and instrumentalities." J.A. _ (Op. 13). The court went on to note that "the final blow to [Ho-Chunk's] not-a-'person' argument" is the CCTA's reporting requirement, which—unlike the recordkeeping requirement—applies to "[a]ny person, *except for a tribal government*." J.A. _ (Op. 13) (quoting 18 U.S.C. § 2343(b)) (emphasis added). If Congress had intended "person" to exclude tribal entities "that exception would have been unnecessary." J.A. _ (Op. 13).

Ho-Chunk appealed and asked the district court for a stay pending appeal. The court denied the stay request on the ground that Ho-Chunk was unlikely to succeed on

the merits of the appeal, explaining that the CCTA's "text plainly evinces an intent to subject tribal entities to its recordkeeping requirements." J.A. _ (Stay Op. 3). The court also rejected Ho-Chunk's argument that its appeal would become moot if ATF were permitted to inspect Ho-Chunk's records while the appeal was pending. The court reasoned that because Ho-Chunk "sought a declaratory judgment regarding the scope of [its] legal obligations under the CCTA's recordkeeping requirements, not just an exemption from disclosing records in a discrete instance," Ho-Chunk could obtain meaningful relief even if ATF inspected its records during the pendency of the appeal. J.A. _ (Stay Op. 3-4). Ho-Chunk did not seek a stay from this Court.

SUMMARY OF ARGUMENT

I. The district court correctly held that Ho-Chunk must comply with the CCTA's recordkeeping requirement. That requirement is a law of general application imposing recordkeeping obligations on persons who conduct transactions involving more than 10,000 cigarettes. Ho-Chunk does not dispute that it meets the provision's 10,000-cigarette threshold or that it is subject to the CCTA generally. A straightforward application of the statutory text dictates that Ho-Chunk is subject to the recordkeeping requirement.

Ho-Chunk seeks to avoid the requirement by arguing that the CCTA excludes Indian country from its definition of a "State."[2] As an initial matter, nothing about the recordkeeping requirement turns on the territorial reach of a "State," and so this Court need not consider that argument. In any event, Ho-Chunk is wrong that the CCTA's definition of "State" excludes Indian country. Indian reservations are normally deemed to be part of the State in which they are located. *See Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001). Ho-Chunk's request that this Court depart from that normal rule would render other provisions of the CCTA incoherent and would contravene decades of settled precedent enforcing the CCTA's ban on contraband cigarettes (which can only be found in a "State") against Indians in Indian country.

Ho-Chunk also asserts that it is an instrumentality of the Winnebago Tribe, and that such instrumentalities do not qualify as "persons" under the CCTA. It is far from clear that Ho-Chunk is in fact an instrumentality of the Winnebago Tribe, but, even assuming it is, the text and structure of the CCTA make clear that Congress intended tribal entities to qualify as "persons" under the statute. The CCTA's recordkeeping requirement applies to "[a]ny person," 18 U.S.C. § 2343(a), but the statute's distinct reporting requirement applies to "[a]ny person, *except for a tribal government*," *id.* § 2343(b)

[2] This brief uses the statutory term "Indian country," which federal law defines as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," "all dependent Indian communities within the borders of the United States . . . whether within or without the limits of a state," and "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151.

(emphasis added). Exempting tribal governments from the latter provision would have been unnecessary if the term "person" in the CCTA did not include tribal governments to begin with. Furthermore, Congress's decision specifically to exempt federal and state instrumentalities from the category of "persons" subject to the ban on contraband cigarettes underscores that Congress otherwise intended government instrumentalities to qualify as "persons" under the CCTA, and that Congress could have similarly exempted tribal instrumentalities but declined to do so.

II. Ho-Chunk below did not argue that ATF's interpretation of the CCTA's recordkeeping provision violates the procedural requirements of the Administrative Procedure Act (APA). Ho-Chunk's procedural arguments are therefore forfeited on appeal, and this Court should not consider them. Ho-Chunk's appellate brief does not acknowledge the forfeiture, let alone show the "exceptional circumstances" required to justify it.

In any event, the premise of Ho-Chunk's procedural arguments—that ATF changed its position regarding the scope of the CCTA—is incorrect. ATF has always understood the CCTA to apply to Indians in Indian country, including Indian tribes, and has for decades brought prosecutions reflecting that position. Indeed, ATF recently obtained a forfeiture under the CCTA against one of the Ho-Chunk subsidiaries named as a plaintiff in this case. ATF was not required to justify a departure from its policy, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), because no such departure took place. And while ATF only recently undertook to inspect Ho-Chunk's records, these

inspection efforts reflect a change in ATF's statutory authority rather than a change in its interpretation of the CCTA. For three decades, the CCTA authorized ATF to inspect businesses' records only with the businesses' consent or pursuant to a warrant, but Congress in 2010 amended the law to allow ATF to conduct inspections without a warrant. ATF began to exercise that new authority soon thereafter.

Finally, even if this Court were to assume that ATF changed its interpretation of the recordkeeping provision, the APA did not require ATF to accomplish that change though notice-and-comment rulemaking. Only agency "rules" must proceed through notice-and-comment rulemaking, but Ho-Chunk has not identified a rule it seeks to challenge. Even if Ho-Chunk could identify a rule to challenge, any such rule would plainly be an interpretative rule exempt from the APA's notice-and-comment requirement. *See* 5 U.S.C. 553(b)(A). The Supreme Court recently rejected the argument, similar to the one Ho-Chunk presses here, that agencies must undergo notice-and-comment rulemaking where they seek to amend their interpretive rules. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

STANDARD OF REVIEW

This Court reviews the grant of summary judgment for the government de novo. *See Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002).

ARGUMENT

I. HO-CHUNK IS SUBJECT TO THE CCTA'S RECORDKEEPING REQUIREMENT.

Ho-Chunk must comply with the CCTA's recordkeeping provision. That provision states without limitation that "[a]ny person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 . . . in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Attorney General may prescribe by rule or regulation." 18 U.S.C. § 2343(a). Whether a law of general application like the CCTA governs tribal entities is a question of congressional intent. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007); *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053 (9th Cir. 2017). A straightforward application of the statutory text and structure demonstrates that Congress intended the recordkeeping requirement to apply to Ho-Chunk.

Ho-Chunk does not dispute that it meets the recordkeeping provision's numerical threshold. Nor does it contend that it is exempt from other provisions of the CCTA, such as the ban on contraband cigarettes. Instead, Ho-Chunk contends that it need not comply with the recordkeeping requirement because it is not located within a "State" as that term is defined in the CCTA. Ho-Chunk also argues that it is an instrumentality of the Winnebago Tribe and therefore does not qualify as a "person" under the recordkeeping provision. For substantially the reasons stated in the district court's thorough opinion, both arguments are meritless.

A. The Term "State" In The CCTA Encompasses Indian Country.

1. The CCTA's definition of a "State" does not excuse Ho-Chunk from the recordkeeping requirement. As an initial matter, nothing about the CCTA's recordkeeping requirement turns on the territorial reach of a State. The term "State" does not appear in the recordkeeping provision, and nothing about the provision requires defendants to engage in activity within a State. Although the term "state" does appear in the CCTA's implementing regulations, *see* 27 C.F.R. § 646.147, those regulations similarly do not condition the application of the recordkeeping requirement upon activity within a State. This Court therefore need not consider Ho-Chunk's arguments regarding the territorial reach of a "State."

In any event, Ho-Chunk errs in arguing that a "State" under the CCTA excludes Indian country. The ordinary rule is that "an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001). Indeed, because "state laws may be applied to Indians [on their reservations] unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law," *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962), Indian country must be understood to exist within the jurisdiction of a State. The CCTA's definition of a "State," which does not purport to exclude Indian country, is entirely consistent with that ordinary rule. *See* 18 U.S.C. § 2341(4) (defining "State" to mean "a State of the

United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands"); 27 C.F.R. § 646.142 (parroting the statutory definition of "State").

The context in which the CCTA employs the term "State" confirms that States encompass Indian country. The CCTA specifies that "contraband cigarettes" can only be "found" within a "State or locality" with applicable cigarette taxes. 18 U.S.C. § 2341(2). If Ho-Chunk were correct that Indian country is not part of a "State," then the statute's prohibition of contraband cigarettes would *never* apply in Indian country—a proposition that would contravene decades of settled precedent. *See United States v. Morrison*, 686 F.3d 94, 96 (2d Cir. 2012); *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995). In addition, Ho-Chunk's argument would render largely superfluous the CCTA provision exempting "Indian tribe[s]" and "Indian[s] in Indian country" from suit by state and local governments and certain private persons for violating the CCTA. *See* 18 U.S.C. § 2346(b)(1). Congress would not have needed to exempt Indian tribes from such suits if Indian tribes were not subject to the CCTA in the first place.

2. Although Ho-Chunk in its opening brief does not attempt to address these problems, below it contended that its interpretation of "State" applies to the regulations governing the CCTA's recordkeeping provision but not to the CCTA itself. As the district court recognized, this narrower version of Ho-Chunk's argument "is arguably even more audacious" than the broader one, because it would require courts "to apply one definition of 'State' (one that includes Indian country) to the CCTA generally, and another definition of 'State' (one that excludes Indian country) to the regulations that

implement CCTA's recordkeeping provisions." J.A. _ (Op. 7-8). The district court correctly concluded that the CCTA provides no basis for that strained interpretation.

Ho-Chunk on appeal principally argues (Br. 20-21) that construing "State" to encompass Indian country would violate the principle that "states generally do not have jurisdiction over Indian country." But the CCTA's recordkeeping requirement does not subject Indian tribes to state regulation. Rather, it is a federal law subjecting Indians and Indian tribes to federal obligations that are undisputedly within Congress's authority to impose. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("tribal sovereignty is dependent on, and subordinate to . . . the Federal Government"). And while Congress in 2006 authorized state governments to bring suit to enforce the CCTA, Congress protected tribal sovereignty from state regulation by specifying that no state-initiated suit may be brought "against an Indian tribe or an Indian in Indian country." 18 U.S.C. § 2346(b)(1). Congress imposed no similar limitation on federal suits. *See EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001) (Indian tribes do not have "sovereign immunity from suits brought by the federal government"). Ho-Chunk similarly errs (Br. 24) in arguing that enforcing the recordkeeping requirement in Indian country would improperly subject Indian tribes to state taxation. To the contrary, the CCTA specifies that nothing in the statute "shall be construed to affect" state tax laws. 18 U.S.C. § 2345(a).

B. Ho-Chunk Is A "Person" Under The CCTA.

1. Ho-Chunk alternatively contends that it is an instrumentality of a tribal government and that such tribal instrumentalities do not qualify as "persons" under the CCTA. Ho-Chunk's subsidiaries are for-profit corporations engaged in the commercial manufacturing and sale of tobacco products, and it is unclear whether they are in fact tribal instrumentalities. As the district court observed, Ho-Chunk below "appear[ed] to concede that this issue is—at a minimum—a factual dispute precluding summary judgment in [its] favor." J.A. _ (Op. 11). Even assuming that Ho-Chunk is an instrumentality of a tribal government, however, it is still a "person" under the CCTA.

In determining whether Congress intended "persons" to include Indian tribes, this Court looks to congressional intent, applying the traditional rules of statutory construction and considering whether there is a "need to construe the statute narrowly" to protect tribal sovereignty. *San Manuel*, 475 F.3d at 1315; *see also Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810, 812-13 (9th Cir. 2016). Evaluating congressional intent, the courts of appeals have deemed Indian tribes to be "persons" under numerous other federal statutes of general application. *See Great Plains Lending*, 846 F.3d at 1054 (Indian tribes are "persons" under federal consumer protection laws); *Yakama Indian Nation*, 843 F.3d at 813 (Indian tribes are "persons" under the Anti-Injunction Act); *Chickasaw Nation v. United States*, 208 F.3d 871, 878-80 (10th Cir. 2000) (Indian tribes are "persons" under federal statute imposing gambling taxes); *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126,

1134-35 (11th Cir. 1999) (Indian tribes are "persons" subject to the Americans With Disabilities Act).

The CCTA does not define the term "person," but the context in which the statute employs the term leaves no doubt that Congress intended tribal governments to qualify. The CCTA's recordkeeping provision applies without limitation to "[a]ny person" who satisfies the provision's criteria. 18 U.S.C. § 2343(a). In the next subsection of the same statute, Congress specified that the reporting provision applies to "[a]ny person, *except for a tribal government*." *Id.* § 2343(b). Congress thus understood the term "person" in the CCTA to include tribal governments—otherwise, Congress would not have needed to exempt tribal governments from the class of "person[s]" subject to the reporting requirement. Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994), the term "person" has the same meaning throughout the CCTA.

Surrounding provisions of the CCTA underscore that plain-text reading of the term "person." The CCTA bars the possession or sale of "contraband cigarettes," which the statute defines to mean more than 10,000 cigarettes that do not bear the requisite evidence that the applicable state taxes have been paid. 18 U.S.C. § 2341(2). The CCTA specifies that this definition of "contraband cigarettes" applies to cigarettes in the possession of "any *person* other than" four specifically identified categories of persons. *Id.* (emphasis added). Congress declined to create an exception for Indians and tribal entities, and Ho-Chunk accordingly does not dispute that it is subject to the ban

on contraband cigarettes. But Congress did exempt "any person" who is an "*instrumentality of the United States or a State* . . . having possession of such cigarettes in connection with the performance of official duties." *Id.* § 2341(2)(D) (emphasis added). As the district court explained, this exception demonstrates that government instrumentalities may indeed be "person[s]" under the CCTA—"since otherwise there would be no need to specifically except such entities from the definition of 'contraband cigarettes.'" J.A. _ (Op. 13). The exemption also demonstrates "that Congress knew precisely how to exempt governmental agencies and instrumentalities from the reach of the CCTA, but chose *not* do so with respect to tribal agencies and instrumentalities." J.A. _ (Op. 13); *see also Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (holding that Indian land is subject to the Federal Power Act, which "gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians").

Construing the recordkeeping requirement to govern Indian tribal entities advances the primary purpose of the statute—to prevent bootleggers from purchasing large quantities of cigarettes from tax-free jurisdictions such as Indian reservations and reselling them in high-tax jurisdictions. *See* S. Rep. 95-962, at 6. As the district court noted, given that Congress in the CCTA sought "to cut down on cigarette taxation avoidance, it would have made little sense to wholly exempt tribal agencies and instrumentalities from the Act—thus offering cigarette bootlegging organizations a clearly demarcated shelter from enforcement." J.A. _ (Op. 14).

Because the CCTA primarily regulates Ho-Chunk's commercial sale of cigarettes to non-tribal members, moreover, there is no need to construe the statute narrowly to avoid impinging on tribal sovereignty. As this Court has recognized, a tribe's "claim of sovereignty is at its weakest" when the tribe "goes beyond matters of internal self-governance and enters into off-reservation business transaction[s]." *San Manuel*, 475 F.3d at 1312-13. While tribes are free to transact with non-tribal members, this Court explained, tribes are "subject to generally applicable laws" when they do so. *Id.* at 1313 (holding that a tribe-owned casino was subject to the NLRA because the statute regulated the tribe's commercial rather than governmental functions and because most casino patrons were non-tribal members).

2. In arguing that it is not a "person," Ho-Chunk relies primarily on "a stray piece of legislative history and an isolated agency comment." J.A. _ (Op. 11). Ho-Chunk cites (Br. 22) a House conference report suggesting that Congress intended the default Dictionary Act definition of "person" to apply to the CCTA. *See* H.R. Rep. No. 95-1778, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5535, 5538 (Conf. Rep.). Ho-Chunk argues that because the Dictionary Act's definition of "person" normally does not include sovereign entities, the CCTA's definition of "person" should be similarly construed. But the Dictionary Act specifies that its definitions do not apply if "the context indicates otherwise." 1 U.S.C. § 1; *see also Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) (noting that the term "indicates otherwise" in the Dictionary Act should be construed broadly). As the Supreme Court has explained, the "interpretive

presumption that 'person' does not include the sovereign" is "not a hard and fast rule of exclusion," and may be overcome "upon some affirmative showing of statutory intent to the contrary." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000) (quotation marks omitted). Here, context does more than "indicate[]" that Indian tribes are persons under the CCTA. As explained above, the term "person" in the CCTA can only be coherently understood to include tribal governments.

Ho-Chunk additionally cites (Br. 24) a 1980 Federal Register notice in which ATF responded to a comment requesting an exemption to the recordkeeping requirement for entities that sell cigarettes on federal military bases. In its response, ATF explained that it "agrees that government agencies and instrumentalities are exempt from the requirements of this rule." *See Regulations Relating to the Distribution of Cigarettes*, 45 Fed. Reg. 48,609, 48,612 (July 21, 1980). ATF's response, however, referred to *federal* instrumentalities, and did not purport to opine that *tribal* instrumentalities were exempt from the statute's recordkeeping provision. ATF's opinion regarding federal instrumentalities is hardly probative of whether Congress intended to subject Indian tribes to the CCTA's recordkeeping requirement. ATF, moreover, had compelling reasons to distinguish between federal and tribal instrumentalities given that the CCTA itself exempts federal instrumentalities, but not tribal instrumentalities, from the class of "persons" barred from possessing contraband cigarettes. *See* 18 U.S.C. § 2341(2)(D). And even if this Court were to assume that ATF's comment implicitly expressed a view

regarding tribal instrumentalities, the district court correctly observed that an agency comment in the Federal Register is "no match for the plain text of the statute." J.A. _ (Op. 12).

Ho-Chunk invokes (Br. 19) the canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). This Court has explained, however, that this canon "has force only where a statute is ambiguous," and only where the statute was "passed for the benefit of dependent Indian tribes." *El Paso Nat. Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011) (quotation marks omitted). Here, the CCTA unmistakably defines "person" to include Indian tribes; there is therefore no ambiguity for this Court to construe in Ho-Chunk's favor. And the CCTA was enacted not for the benefit of Indian tribes, but to prevent cigarette bootlegging—including by limiting the purchase by non-tribal members of untaxed cigarettes on Indian reservations. The CCTA's regulation of commercial activity directed at non-tribal members simply does not impair tribal sovereignty in a manner that would justify construing the statute to exclude tribal entities. *See San Manuel*, 475 F.3d at 1315.

Ho-Chunk argues (Br. 19-20) that the canon should nevertheless apply because the CCTA "contains exceptions expressly enacted for the benefit of Tribes," such as the provision specifying that no state or private action to enforce the CCTA may be commenced against an Indian tribe. *See* 18 U.S.C. § 2346(b)(1). To the contrary, the fact that Congress deemed it necessary expressly to protect Indian tribes from non-federal

CCTA enforcement actions underscores that Congress did not intend implicitly to render Indian tribes immune from federal enforcement of the CCTA altogether.

Ho-Chunk's argument that it is not a "person" under the CCTA, furthermore, cannot be reconciled with its acknowledgment that it qualifies as a person under other federal laws regulating the tobacco trade. The Rock River Manufacturing Company—one of the Ho-Chunk subsidiaries named as a plaintiff in this suit—is subject to provisions of the Internal Revenue Code regulating the manufacturing and importing of tobacco products by "persons." *See* 26 U.S.C. § 5711 ("Every person, before commencing business as a manufacturer of tobacco products," shall file a bond with the Treasury Department); *id.* § 5712 ("Every person, before commencing business as a manufacturer or importer of tobacco products," shall apply for a permit); *id.* § 5713(a) ("A person shall not engage in business as a manufacturer or importer of tobacco products" without a permit); *id.* § 5703(a) (a "manufacturer or importer of tobacco products" must pay federal excise taxes). Pursuant to these provisions, Rock River obtained the necessary Treasury Department permit, and Ho-Chunk conceded at oral argument below that Rock River pays federal excise taxes.[3] *See* J.A. _ (Tr. 26). These provisions of the Internal Revenue Code, like the CCTA, do not define the term

[3] Because Rock River holds the requisite permit, it is "a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986" for purposes of one of the CCTA's contraband cigarette exceptions, *see* 18 U.S.C. § 2341(2)(A), and is a "person" who Congress in 2006 authorized to "bring an action in the United States district courts [against certain parties] to prevent and restrain violations" of the CCTA, *see* 18 U.S.C. § 2346(b)(1).

"person." *See id.* § 5702. Thus, while Ho-Chunk cannot dispute that it is a "person" under these provisions, *see Yakama Indian Nation*, 843 F.3d at 813, the same arguments that Ho-Chunk makes with respect to the CCTA could equally be made with respect to these provisions. Ho-Chunk has provided no basis for distinguishing between the laws that it concedes it must obey and those from which it claims an exemption.

II. ATF'S ENFORCEMENT OF THE RECORDKEEPING PROVISION AGAINST HO-CHUNK DOES NOT VIOLATE THE APA.

Ho-Chunk dedicates much of its brief to procedural APA arguments raised for the first time on appeal. Proceeding from the premise that ATF changed its position regarding the scope of the recordkeeping provision, Ho-Chunk principally argues (Br. 10) that the alleged policy change was arbitrary and capricious because ATF failed to provide a "detailed justification" for it. Ho-Chunk also asserts (Br. 14) that ATF was required to accomplish this policy change through notice-and-comment rulemaking. The Court should reject both arguments.

A. Ho-Chunk Forfeited Its Procedural Arguments.

As an initial matter, Ho-Chunk forfeited its procedural arguments by failing to raise them below. A claim of right is forfeited "by the failure to make [a] timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 731 (1993). It is "well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Potter v. District of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009). Absent "exceptional circumstances," this

Court will not consider arguments that were not presented to the district court. *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010); *see also Bain v. MJJ Prods., Inc.*, 751 F.3d 642, 649 (D.C. Cir. 2014).

Ho-Chunk did not raise its procedural arguments below. Ho-Chunk's complaint alleged neither that ATF changed its policy in an arbitrary and capricious manner nor that ATF violated the APA's notice-and-comment requirement. Ho-Chunk's district court briefs similarly did not argue that ATF's alleged policy change was arbitrary and capricious, and did not mention notice-and-comment rulemaking at all. Ho-Chunk's argument below was directed entirely to the question "whether the record keeping provisions of the CCTA apply to" Ho-Chunk, *see* Dkt. No. 17, at 2, which was the only question the district court resolved in granting summary judgment for the government.

On appeal, Ho-Chunk's opening brief does not acknowledge that it failed to present its procedural arguments below, let alone identify exceptional circumstances justifying the forfeiture. *See Nemariam v. Fed. Democratic Republic of Eth.*, 491 F.3d 470, 483 (D.C. Cir. 2007) (declining to address forfeited claims because "appellants have offered no explanation for their failure to pursue" those claims). Particularly given that Ho-Chunk already benefitted from an exercise of judicial indulgence regarding an untimely argument, *see* J.A. _ (Op. 11 n.5), Ho-Chunk should not be permitted to press an untimely claim once again.

B. ATF Did Not Change Its Policy.

Ho-Chunk's procedural arguments, in any event, rest on a false premise. ATF has always held the position that Indians in Indian Country—including Indian tribes and tribal instrumentalities—are "person[s]" under the CCTA.

Since the enactment of the CCTA in 1978, the United States has repeatedly brought criminal charges against Indians in Indian country for violating the CCTA. These prosecutions reflect ATF's view that Indian country is part of a "State" and that Indians are "persons" under the CCTA. These prosecutions similarly reflect ATF's view that Indian tribes and tribal entities are "persons" under the statute. In 1994, for example, the government prosecuted two Indians who operated tobacco businesses on an Indian reservation, arguing in its appellate brief that Congress did not exempt the "tribal Indian cigarettes trade from the provisions of the CCTA." Brief for United States at 3, *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), 1994 WL 16059804. The government has never departed from that view, and every court to consider the question has agreed that tribal businesses must comply with the CCTA. *See Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177 (9th Cir. 2002) (upholding application of the CCTA to "a tribally-licensed business of the Yakama Nation"); *United States v. Gord*, 77 F.3d 1192, 1194 (9th Cir. 1996) (per curiam) (holding that even if the tobacco distributor were "a tribal organization, the unstamped cigarettes were contraband under the CCTA").

Thus, ATF has always understood the CCTA's enforcement provisions—which apply only to "persons"—to apply to Indian tribes. Because ATF has not changed positions, ATF's enforcement of the recordkeeping provision against Ho-Chunk does not violate the principle that an agency "ordinarily" must "display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Dillmon v. NTSB*, 588 F.3d 1085, 1089 (D.C. Cir. 2009).

To support its contention that ATF changed its position, Ho-Chunk again cites (Br. 10-11) ATF's Federal Register comment opining that federal instrumentalities on military bases are exempt from the recordkeeping requirement. But, as explained above, that comment regarding federal instrumentalities did not express any opinion regarding tribal instrumentalities. And ATF's history of treating Indian tribal entities as "persons" under other CCTA provisions belies Ho-Chunk's assertion that ATF only recently adopted the position that Indian tribes are persons under the recordkeeping provision.

Ho-Chunk also argues (Br. 8, 11) that ATF's enforcement practice with respect to Ho-Chunk gave rise to a "policy" of non-enforcement of the recordkeeping provision against tribal entities. That argument is both legally and factually incorrect. Legally, even if ATF had opted not to enforce the CCTA against Ho-Chunk, that exercise of enforcement discretion would not give rise to a policy broadly estopping ATF from enforcing the CCTA against tribal entities. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Factually, Ho-Chunk errs in asserting (Br. 6) that ATF never enforced the CCTA against Ho-Chunk or its subsidiaries prior to this litigation. To the contrary,

ATF in 2013 pursued a CCTA enforcement action against HCI Distribution Company—one of the Ho-Chunk subsidiaries named as a plaintiff in this lawsuit. ATF convicted senior employees of the company of violations of the CCTA, and obtained a $300,000 forfeiture from the company in lieu of prosecution.[4]

While ATF did not seek to enforce the CCTA's recordkeeping requirement against Ho-Chunk until now, ATF's efforts to inspect Ho-Chunk's records reflect new statutory authority rather than a new policy. Prior to the enactment of the PACT Act in 2010, ATF could inspect businesses' records and inventories only by consent "or pursuant to a duly issued search warrant." Pub. L. No. 95-575 § 1, 92 Stat. at 2464. Thus, while ATF has always understood Ho-Chunk to be bound to maintain records pursuant to the recordkeeping requirement, only in 2010 did Congress grant ATF authority to inspect those records without first procuring a warrant. ATF sought Ho-Chunk's records relatively quickly after Congress gave it the authority to do so.[5]

[4] *See* Press Release, Department of Justice, *Independence Business Owner, Wichita Attorney among 18 Indicted in $18 Million Conspiracy to Traffic in Contraband Cigarettes* (Aug. 14, 2013), https://www.justice.gov/usao-wdmo/pr/independence-business-owner-wichita-attorney-among-18-indicted-18-million-conspiracy.

[5] Contrary to Ho-Chunk's assertion (Br. 18), because ATF has not changed its view that the recordkeeping requirement applies to Indian tribes, this case does not implicate the Department of Justice's commitment to consult with tribes before amending policies that may affect tribes. *See Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes*, 79 Fed. Reg. 73,905 (Dec. 12, 2014).

C. ATF Was Not Required To Conduct Notice-And-Comment Rulemaking.

Even if this Court were to assume that ATF changed its policy regarding the recordkeeping requirement, the APA did not require the agency to accomplish that change through notice-and-comment rulemaking. Agencies are required to employ notice-and-comment procedures only in adopting "rule[s]," which the APA defines in relevant part as "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Moreover, "[n]ot all 'rules' must be issued through the notice-and-comment process." *Perez v. Mortage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). As relevant here, the APA's notice-and-comment requirement "does not apply . . . to interpretative rules." 5 U.S.C. § 553(b)(A). The "critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Mortgage Bankers*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Because interpretive rules "do not have the force and effect of law," they are "comparatively eas[y]" for agencies to issue. *Id.*

Ho-Chunk has not identified any agency action of "general or particular applicability and future effect" that it contends to be a "rule" compelling notice-and-comment rulemaking. *See* 5 U.S.C. § 551(4). To the extent ATF's interpretation of the CCTA's recordkeeping requirement could be characterized as a rule, moreover, that interpretation is a quintessential interpretive rule exempt from the notice-and-comment

requirement. *See Flytenow, Inc. v. FAA*, 808 F.3d 882, 889 (D.C. Cir. 2015) (agency document deeming litigant subject to provisions of the Federal Aviation Act was "a quintessential interpretative rule"). Ho-Chunk makes no effort to argue otherwise.

Ho-Chunk instead claims (Br. 14-18) that ATF's interpretation of the CCTA should have undergone notice-and-comment rulemaking because ATF's allegedly inconsistent prior view was similarly adopted through notice-and-comment procedures. But, contrary to Ho-Chunk's repeated assertions (Br. 8, 15), ATF's statement in the Federal Register in response to a public comment was not itself a regulation adopted through notice-and-comment rulemaking. And, to the extent that Ho-Chunk suggests that ATF must employ notice-and-comment procedures to adopt an interpretation of the CCTA that departs from the agency's prior interpretation, the Supreme Court recently rejected that argument. *See Mortgage Bankers*, 135 S. Ct. at 1205 (abrogating this Court's precedent requiring notice-and-comment rulemaking to revise prior interpretations of a statute or rule); *see also Flytenow*, 808 F.3d at 889 (recognizing the abrogation). The Supreme Court explained that the "exemption of interpretive rules from the notice-and-comment process is categorical," and that even if an agency's interpretive rule departs from a prior interpretation, the new interpretation need not be adopted through notice-and-comment rulemaking. *Mortgage Bankers*, 135 S. Ct. at 1206.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,838 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ William E. Havemann
William E. Havemann

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ William E. Havemann
William E. Havemann

ADDENDUM

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18 U.S.C. § 2341

Definitions

As used in this chapter—

. . .

(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

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) 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 such cigarettes;

(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; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

. . .

(4) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

18 U.S.C. § 2342

Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 in a single transaction.

18 U.S.C. § 2343

Recordkeeping, reporting, and inspection

(a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 . . . in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Attorney General may prescribe by rule or regulation. The Attorney General may require such person to keep such information as the Attorney General considers appropriate for purposes of enforcement of this chapter, including—

(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.

Such information shall be contained on business records kept in the normal course of business.

(b) Any person, except for a tribal government, who engages in a delivery sale, and who ships, sells, or distributes any quantity in excess of 10,000 cigarettes . . . within a single month, shall submit to the Attorney General, pursuant to rules or regulations prescribed by the Attorney General, a report that sets forth the following:

(1) The person's beginning and ending inventory of cigarettes and cans or packages of smokeless tobacco (in total) for such month.

(2) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person received within such month from each other person (itemized by name and address).

(3) The total quantity of cigarettes and cans or packages of smokeless tobacco that the person distributed within such month to each person (itemized by name and address) other than a retail purchaser.

(c)(1) Any officer of the Bureau of Alcohol, Tobacco, Firearms, and Explosives may, during normal business hours, enter the premises of any person described in subsection (a) or (b) for the purposes of inspecting--

(A) any records or information required to be maintained by the person under this chapter; or

(B) any cigarettes or smokeless tobacco kept or stored by the person at the premises.

(2) The district courts of the United States shall have the authority in a civil action under this subsection to compel inspections authorized by paragraph (1).

(3) Whoever denies access to an officer under paragraph (1), or who fails to comply with an order issued under paragraph (2), shall be subject to a civil penalty in an amount not to exceed $10,000.

(d) Any report required to be submitted under this chapter to the Attorney General shall also be submitted to the Secretary of the Treasury and to the attorneys general and the tax administrators of the States from where the shipments, deliveries, or distributions both originated and concluded.

. . .

18 U.S.C. § 2344

Penalties

(a) Whoever knowingly violates section 2342(a) of this title shall be fined under this title or imprisoned not more than five years, or both.

(b) Whoever knowingly violates any rule or regulation promulgated under section 2343(a) or 2346 of this title or violates section 2342(b) of this title shall be fined under this title or imprisoned not more than three years, or both.

(c) Any contraband cigarettes or contraband smokeless tobacco involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture. The provisions of chapter 46 of title 18 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. Any cigarettes or smokeless tobacco so seized and forfeited shall be either—

(1) destroyed and not resold; or

(2) used for undercover investigative operations for the detection and prosecution of crimes, and then destroyed and not resold.

18 U.S.C. § 2345

Effect on State and local law

(a) Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State or local government to enact and enforce its own cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

(b) Nothing in this chapter shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by a number of State or local governments, through interstate compact or otherwise, to provide for the administration of State or local cigarette tax laws, to provide for the confiscation of cigarettes or smokeless tobacco and other property seized in violation of such laws, and to establish cooperative programs for the administration of such laws.

18 U.S.C. § 2346

Enforcement and regulations

(a) The Attorney General, subject to the provisions of section 2343(a) of this title, shall enforce the provisions of this chapter and may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.

(b)(1) A State, through its attorney general, a local government, through its chief law enforcement officer (or a designee thereof), or any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986, may bring an action in the United States district courts to prevent and restrain violations of this chapter by any person (or by any person controlling such person), except that any person who holds a permit under chapter 52 of the Internal Revenue Code of 1986 may not bring such an action against a State or local government. No civil action may be commenced under this paragraph against an Indian tribe or an Indian in Indian country (as defined in section 1151).

(2) A State, through its attorney general, or a local government, through its chief law enforcement officer (or a designee thereof), may in a civil action under paragraph (1) also obtain any other appropriate relief for violations of this chapter from any person (or by any person controlling such person), including civil penalties, money damages, and injunctive or other equitable relief. Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of a State or local government, or an Indian tribe against any unconsented lawsuit under this chapter, or otherwise to restrict, expand, or modify any sovereign immunity of a State or local government, or an Indian tribe.

(3) The remedies under paragraphs (1) and (2) are in addition to any other remedies under Federal, State, local, or other law.

(4) Nothing in this chapter shall be construed to expand, restrict, or otherwise modify any right of an authorized State official to proceed in State court, or take other enforcement actions, on the basis of an alleged violation of State or other law.

(5) Nothing in this chapter shall be construed to expand, restrict, or otherwise modify any right of an authorized local government official to proceed in State court, or take other enforcement actions, on the basis of an alleged violation of local or other law.