



DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR part 646

[ATF No. 2006R-1F]

RIN 1140-AA31

Implementing PATRIOT Act Improvements: Contraband Cigarettes and Smokeless Tobacco

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) is amending Department of Justice (“Department”) regulations to implement certain provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 (“PATRIOT Improvement Act”) relating to trafficking in contraband cigarettes or smokeless tobacco. This act amended the Contraband Cigarette Trafficking Act (“CCTA”) by, among other things, reducing the threshold amount of cigarettes necessary to trigger jurisdiction under the CCTA from a quantity in excess of 60,000 to a quantity in excess of 10,000; extending the provisions of the CCTA to cover contraband smokeless tobacco; expanding record-keeping requirements; and imposing reporting requirements.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Office of Regulatory Affairs, by email at ORA@atf.gov, by mail at Office of Regulatory Affairs; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives; 99 New York

Avenue, NE; Washington, DC, 20226, or by telephone at 202-648-7070 (this is not a toll-free number); *ATTN: RIN 1140-AA31*

SUPPLEMENTARY INFORMATION:

I. Background

In 1978, the Contraband Cigarette Trafficking Act (“CCTA”), 18 U.S.C. 2341 *et seq.*, was enacted to deter cigarette smuggling between states that had diverse tax rates. The Attorney General has delegated primary responsibility to enforce and administer the CCTA to the Director of ATF (“Director”). *See* 28 CFR 0.130. Accordingly, the Department and ATF have promulgated regulations¹ that implement provisions of the CCTA in 27 CFR part 646.

Since the CCTA was enacted, cigarette smuggling and trafficking has grown in complexity and become a global problem that costs governments throughout the world billions of dollars in lost tax revenue. Criminals smuggle and traffic cigarettes between low-tax and high-tax states and across international borders. ATF’s investigations, Congress, and other sources have established that organized crime and terrorist groups divert legal tobacco products into illegal markets.² Organized crime and terrorist groups use profits derived from cigarette trafficking to finance additional criminal enterprises.

Further, trafficking in contraband tobacco products poses a serious health risk

¹ In Attorney General Order Number 6353–2025, the Attorney General delegated authority to the Director to issue regulations pertaining to matters within ATF’s jurisdiction, including under the National Firearms Act, Gun Control Act, and Title XI of the Organized Crime Control Act. ATF’s jurisdiction also includes the Arms Export Control Act and the CCTA.

² The legislative history of the PATRIOT Improvement Act, Pub. L. No. 109–177, 120 Stat. 192, 221–24 (2006), indicates that the CCTA was amended, and the threshold was lowered from 60,000 to 10,000 cigarettes, in order to prevent criminal organizations and terrorists from funding their activities by purchasing cigarettes in a low-excise tax state and reselling them in a high-excise tax state. 151 Cong. Rec. H6284 (July 21, 2005) (statement of Rep. Coble); *see also United States v. Hammoud*, No. 300-CR-00147-GCM-DSC, 2022 WL 17326071, at *1 (W.D.N.C. Nov. 29, 2022) (explaining how a Hezbollah cell orchestrated a cigarette-trafficking scheme from North Carolina, a low-tax state, to Michigan, a high-tax state, to finance Hezbollah activities); *United States v. Hammoud*, 381 F.3d 316, 325–26 (4th Cir. 2004) (same); Kate Willson, Alain Lallemand & Aamir Latif, *Terrorism and tobacco: Extremists and insurgents turn to tobacco smuggling*, Int’l Consortium of Investigative Journalists (June 29, 2009), <https://www.icij.org/investigations/tobacco-underground/terrorism-and-tobacco/> [<https://perma.cc/LU79-JSGU>].

because selling trafficked tobacco products avoids taxes in the jurisdiction in which the tobacco product is resold. This decreases the cost of those tobacco products and promotes distribution of cheap tobacco, which, in turn, increases tobacco use.³ The impact of this illicit trade on health and other public interests is discussed in the National Cancer Institute’s Monograph 21, “The Economics of Tobacco and Tobacco Control.”⁴ That report concludes that “tax avoidance and tax evasion, especially large-scale smuggling of tobacco products, undermine the effectiveness of tobacco control policies and reduce the health and economic benefits that result from these policies.”⁵ Finally, the sale of contraband products poses a serious financial threat to legitimate manufacturers, wholesalers, and retailers.

II. USA PATRIOT Improvement and Reauthorization Act of 2005

Section 121 of the PATRIOT Improvement Act⁶ made several amendments to the CCTA, 18 U.S.C. 2341 *et seq.*, as discussed below.

A. Section 121(a) — Threshold quantity for treatment as contraband cigarettes

Prior to its amendment, 18 U.S.C. 2342 made it unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes, defined as any quantity in excess of 60,000 cigarettes bearing no evidence that applicable state cigarette taxes had been paid in the state where such cigarettes were found. Section 121(a) of the PATRIOT Improvement Act amended this portion of the CCTA by reducing the number of cigarettes that trigger application of the CCTA to a quantity in excess of 10,000 cigarettes bearing no evidence that applicable state or local

³ The Centers for Disease Control and Prevention (“CDC”) has stated that increasing the price of tobacco products is an effective way to reduce demand and that cigarette smoking in 2018 cost the United States more than \$600 billion, including more than \$240 billion in health care spending. *See* CDC, Economic Trends in Tobacco (Sep. 17, 2024), <https://www.cdc.gov/tobacco/php/data-statistics/economic-trends/index.html> [<https://perma.cc/QS8G-MU73>].

⁴ U.S. National Cancer Institute and World Health Organization. (2016). The economics of tobacco and tobacco control. *NCI Tobacco Control Monograph 21, NIH Publication No. 16-CA-8029A*. <https://cancercontrol.cancer.gov/brp/tcrb/monographs/monograph-21> [<https://perma.cc/TK5B-XEF2>].

⁵ *Id.* at 17.

⁶ Pub. L. No. 109–177, 120 Stat. at 221–24.

taxes had been paid in the state or locality where such cigarettes are found. 120 Stat. at 221.

B. Section 121(b) — Contraband smokeless tobacco

Section 121(b) of the PATRIOT Improvement Act amended the CCTA by extending the CCTA’s provisions to include contraband smokeless tobacco. It defined “smokeless tobacco” as “any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.” 120 Stat. at 221. This amendment also defined “contraband smokeless tobacco” as a quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, possessed by any person other than (1) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 (“IRC”) as a manufacturer of tobacco products or as an export warehouse proprietor, a person operating a customs bonded warehouse pursuant to sections 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311, 1555), or an agent of such person; (2) a common carrier transporting such smokeless tobacco under a proper bill of lading or freight bill that states the quantity, source, and designation of such smokeless tobacco; (3) a person who is licensed or otherwise authorized by the state where such smokeless tobacco is found to engage in the business of selling or distributing tobacco products, and has complied with the accounting, tax, and payment requirements relating to such license or authorization with respect to such smokeless tobacco; or (4) an officer, employee, or 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 smokeless tobacco in connection with the performance of official duties. *Id.* at 221–22.

C. Section 121(c) — Record-keeping, reporting, and inspection

Prior to amendment, the CCTA authorized the Secretary of the Treasury to

prescribe limited regulations concerning record-keeping and inspection requirements for any person who distributed any quantity of cigarettes in excess of 60,000 cigarettes in a single transaction. Section 121(c) of the PATRIOT Improvement Act amended these provisions of the CCTA by authorizing the Attorney General, rather than the Secretary of the Treasury, to prescribe regulations concerning record-keeping requirements, including requirements for retaining such information as the Attorney General considers appropriate for the purposes of CCTA enforcement against persons who ship, sell, or distribute⁷ any quantity in excess of 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco in a single transaction. 120 Stat. at 222.

The act also authorized regulations requiring persons, except for tribal governments, who engage in a delivery sale, and who ship, sell, or distribute any quantity in excess of 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco within a single month, to submit to the Attorney General, pursuant to regulations prescribed by the Attorney General, a report setting forth (1) the person's beginning and ending inventories 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); and (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. *Id.* at 222–23.

Finally, the act added the term “delivery sale,” which means any sale of cigarettes or smokeless tobacco in interstate commerce to a consumer if (a) the consumer submits the order for such sale by means of a telephone or other method of voice transmission, mail, or the internet or other online service, or by any other means where the consumer is

⁷ The definition of “distribute” in the regulations at § 646.143 includes shipping and selling as forms of distributing. As a result, ATF is removing the terms “ship” and “sell” (and variants thereof) in the provisions in this rule to eliminate confusion about which terms apply in which sections.

not in the same physical location as the seller when the purchase or offer of sale is made; or (b) the cigarettes or smokeless tobacco are delivered by use of mails, common carrier, private delivery service, or any other means where the consumer is not in the same physical location as the seller when the consumer obtains physical possession of the cigarettes or smokeless tobacco. *Id.* at 223.

D. Section 121(d) — Disposal or use of forfeited cigarettes and smokeless tobacco

Section 121(d) of the PATRIOT Improvement Act amended the CCTA to state that the provisions of 18 U.S.C. 981 through 987 relating to civil forfeiture extend to any seizure or civil forfeiture of contraband cigarettes or contraband smokeless tobacco involved in any violation of the CCTA. 120 Stat. at 223. Section 121(d) further provided that any cigarettes or smokeless tobacco so seized will either (1) be destroyed and not resold, or (2) be used for undercover investigative operations for the detection and prosecution of crimes, and then destroyed and not resold. *Id.*

E. Section 121(e) — Effect on state and local law

Section 121(e) of the PATRIOT Improvement Act clarified that the CCTA is not intended to affect the concurrent jurisdiction of a state or local government to enact and enforce its own cigarette tax laws; to confiscate cigarettes, smokeless tobacco, or other property seized for violation of such laws; or to provide for penalties for the violation of such laws. 120 Stat. at 223. This section also clarified that the CCTA is not intended to inhibit coordinated law-enforcement efforts by state or local governments. *Id.* The existing regulations do not address these subjects, and ATF did not propose any regulatory amendments in relation to these statutory changes.

F. Section 121(f) — Enforcement

Section 121(f) of the PATRIOT Improvement Act created a new civil cause of action allowing state and local governments and federal tobacco permittees under the IRC to bring actions in federal district court to prevent or restrain CCTA violations. 120 Stat.

at 223–24. In addition, it authorized state and local governments to seek civil penalties, monetary damages, and injunctive or other equitable relief. *Id.* at 224. The existing regulations do not address these subjects, and ATF did not propose any regulatory amendments in relation to these statutory changes.

G. Section 121(g) — Conforming and clerical amendments

Section 121(g) of the PATRIOT Improvement Act made several conforming and clerical amendments to the CCTA, such as changing the title of chapter 114 to read “Trafficking in Contraband Cigarettes and Smokeless Tobacco” and changing the section headings of 18 U.S.C. 2343 and 2345. 120 Stat. at 224.

III. Proposed Rule

On July 28, 2010, the Department, on behalf of ATF, published in the *Federal Register* a notice of proposed rulemaking (“NPRM”), titled “Implementing the USA PATRIOT Improvement and Reauthorization Act of 2005 Regarding Trafficking in Contraband Cigarettes or Smokeless Tobacco (2006R-1P),” 75 FR 44173, which proposed to implement the provisions of section 121 of the PATRIOT Improvement Act relating to trafficking in contraband cigarettes or smokeless tobacco. (RIN 1140-AA31.) The NPRM proposed to amend ATF regulations to comport with section 121 of the PATRIOT Improvement Act through a number of changes.

First, ATF proposed reducing the amount of cigarettes necessary to trigger jurisdiction under the CCTA from a quantity in excess of 60,000 to a quantity in excess of 10,000, per section 121(a) of the PATRIOT Improvement Act. ATF proposed amendments to carry out this change in 27 CFR 646.141 (revising the stated scope of part 646 to reflect the new threshold amount), § 646.143 (revising the definitions of “contraband cigarettes,” “distributor,” and “exempted person” to reflect the new threshold amount), § 646.146 (revising paragraphs (a) and (b)(1) to reflect the new threshold amount), and § 646.147 (revising paragraphs (1) and (2) to reflect the new

threshold amount). 75 FR 44177–78. ATF also proposed to amend § 646.143 by adding a definition for the term “cigarette.” 75 FR 44177. The proposed definition reflected the meaning of the term set forth in the CCTA, as amended.

Second, the PATRIOT Improvement Act extended the CCTA to contraband smokeless tobacco, and ATF proposed to account for this by adding the statutory definitions of the terms “smokeless tobacco” and “contraband smokeless tobacco,” per section 121(b) of the PATRIOT Improvement Act. ATF proposed adding the CCTA’s definitions for both terms to 27 CFR 646.143 to match the statutory definitions. 75 FR 44177. It also proposed amending §§ 646.146 and 147 to add “smokeless tobacco” and “cans or packages of smokeless tobacco” to the list of distributed items covered by the CCTA; and it proposed to amend § 646.154(a) by adding “or contraband smokeless tobacco” after “contraband cigarettes.” 75 FR 44177–78.

Third, to account for the reporting requirements imposed in section 121(c) of the PATRIOT Improvement Act, ATF proposed to add new CCTA requirements regarding contraband smokeless tobacco to 27 CFR 646.143 (amending the definitions of “business premises” and “distributor” and adding definitions of “delivery sale” and “interstate commerce”) and to § 646.146 (revising the section heading to read “Records and Reports” and incorporating the new reporting and record-keeping CCTA requirements). 75 FR 44177–78. The proposed regulatory language was identical to the statutory language regarding such reporting requirements.

Fourth, to implement the requirement of section 121(d) of the PATRIOT Improvement Act that cigarettes and smokeless tobacco be seized and forfeited under the CCTA and be either used in law-enforcement operations or destroyed, ATF proposed regulatory language in 27 CFR 646.155 that was identical to the statutory language. 75 FR 44178–79.

In addition, the NPRM stated that ATF was considering an amendment of the

regulations in § 646.150 concerning distributors' retention of required records. In general, existing § 646.150 provides that each distributor of cigarettes shall retain the records required by §§ 646.146 and 646.147 for three years following the close of the year in which the records are made and shall keep the required records on the distributor's business premises. 75 FR 44175. ATF stated it was considering extending the record retention requirement to five years, thus harmonizing the regulations with the applicable statute of limitations for CCTA violations, which is five years. *See id.* The NPRM solicited comments on this issue.

The comment period for the NPRM closed on October 26, 2010. ATF received ten comments, which were submitted from consumers, industry members, public interest organizations and associations, and a local government agency.

IV. Comment Analysis

A. General comment received in opposition and ATF response

Comment received

One commenter generally opposed the NPRM, stating that reducing the threshold amount of cigarettes necessary to trigger jurisdiction under the CCTA from quantities in excess of 60,000 to quantities in excess of 10,000 “does not address the problem of the extraordinarily high taxation of cigarettes.” The commenter stated that the purpose of the CCTA is to permit prosecution when organized crime becomes involved in the illegal transportation and sale of cigarettes and asserted that decreasing the threshold to 10,000 would lead to prosecuting individuals crossing state borders to buy cigarettes for themselves and their friends.

ATF response

ATF is reducing the threshold amount of cigarettes necessary to trigger jurisdiction under the CCTA to quantities in excess of 10,000 because it is implementing the change made by the PATRIOT Improvement Act. Any further change in the threshold

amount would require legislative action. ATF does not have the authority to reinstate the 60,000-cigarette threshold. ATF also does not have authority to address levels of cigarette taxation imposed by other taxing authorities.

B. Issue-specific comments and ATF responses

Nine comments expressed concerns regarding the proposed regulatory changes or the issue of trafficking in contraband tobacco products. These concerns are addressed below.

1. Scope of 27 CFR 646.141

Comments received

One commenter, a legal association, stated that the proposed revision to the scope of § 646.141 — focusing on a single transaction — is not consistent with 18 U.S.C. 2343(b) and that “[i]t should be expanded to cover persons who ship, sell or distribute cumulatively in excess of 10,000 cigarettes (or their smokeless equivalent) within a single month, where such persons have also made any delivery sales.”

ATF response

ATF concurs with this recommendation, and this final rule revises § 646.141 concerning the scope of part 646, consistent with the statutory language, to provide that the regulations also apply to persons who have made one or more delivery sales of smokeless tobacco and cigarettes, and who ship, sell, or distribute, either in a single transaction or cumulatively, more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco within a single calendar month. The final rule also includes a technical amendment substituting the word “part” for the word “subpart” in the regulatory text.

2. Definition of “cigarette”

The NPRM proposed amending § 646.143 by adding a definition of “cigarette” to reflect the meaning of the term set forth in 18 U.S.C. 2341(1), as amended by the

PATRIOT Improvement Act. This definition includes any roll of tobacco “wrapped in paper or in any substance not containing tobacco” and any roll of tobacco wrapped in any substance containing tobacco that, “because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.” 18 U.S.C. 2341(1)(B).

Comment received

One commenter stated that the final rule should clarify that ATF will define “cigarette” to include tobacco products labeled as “little cigars” or “filtered cigars.” According to the commenter, ATF needs to regularly inform the tobacco industry and others that ATF broadly applies its definition of “cigarette” to reach products labeled as “little cigars” or “filtered cigars” and not as “cigarettes.”

ATF response

The definitions of “cigarette” and “smokeless tobacco” are set by the CCTA, as amended by the PATRIOT Improvement Act, and ATF lacks the authority to alter the statutory definitions. The definition of “cigarette” may reach some tobacco products labeled as “little cigars” or “filtered cigars” if, for example, such products are rolls of tobacco “wrapped in any substance containing tobacco” that, “because of [their] appearance, the type of tobacco used in the filler, or [the] packaging and labeling,” are “likely to be offered to, or purchased by, consumers as a cigarette.” 18 U.S.C. 2341(1)(B). The classification of tobacco products labeled as “little cigars” or “filtered cigars” is a complex issue because of the wide range of products that use these labels. ATF, therefore, declines to determine on a categorical basis that any product labeled as a “little cigar,” or “filtered cigar” is a “cigarette” under this rule. ATF will apply the statutory definition of “cigarette” on a case-by-case basis to determine whether the product at issue falls within that definition. Accordingly, ATF is not adopting the commenter’s suggestion.

3. Definition of “exempted person”

The regulations at 27 CFR 646.143 exempt from the definition of contraband cigarettes those cigarettes possessed by specific persons such as manufacturers and export warehouse proprietors holding permits under chapter 52 of the IRC; persons operating customs bonded warehouses; persons operating within foreign-trade zones (“FTZs”) when the cigarettes have been entered under zone-restricted access or, in respect to foreign cigarettes, have been admitted into the zone but not entered into the United States; common or contract carriers; persons licensed or otherwise authorized by a state to pay tobacco taxes; and federal, state, and local authorities when operating in connection with the performance of official duties.

The NPRM proposed to revise § 646.143 to conform to the PATRIOT Improvement Act amendments by changing the number of cigarettes sold from 60,000 to 10,000 and expanding the scope of part 646 to cover smokeless tobacco. In connection with expanding the regulations to cover smokeless tobacco, ATF proposed adding a new paragraph (b) under the definition of “exempted persons” to include persons handling smokeless tobacco — not just cigarettes. 75 FR 44177–78. ATF intended for the classes of exempted persons in paragraph (b) to mirror the existing list of exemptions for persons distributing cigarettes. However, ATF inadvertently did not include in paragraph (b) the foreign-trade-zone exemption from the current definition of “exempted person.” As a result, ATF is adding that exemption in this final rule to fully align the two provisions. Doing so will ensure that the regulations treat cigarettes and smokeless tobacco in a similar manner, just as the CCTA — as amended by the PATRIOT Improvement Act — treats cigarettes and smokeless tobacco in a similar manner. *Compare* 18 U.S.C. 2341(2)(A)–(D) (setting out exemptions from the definition of “contraband cigarettes”), *with* 18 U.S.C. 2341(7)(A)–(D) (setting out the same exemptions from the definition of “contraband smokeless tobacco”).

Comments received

One commenter stated that ATF's current regulations are inconsistent with the CCTA and that ATF should bring its regulations into line with the act. This commenter was referring to the fact that the exemptions in 18 U.S.C. 2341(2) and 2341(7) — in contrast to ATF's current and proposed definitions of "exempted person" — do not explicitly exempt from the definitions of "contraband cigarette" and "contraband smokeless tobacco" certain quantities of cigarettes and smokeless tobacco held by persons operating in FTZs. The commenter argued that ATF should eliminate the FTZ exemption and stated that disallowing the FTZ exemption is particularly important in light of mounting evidence that FTZs play integral roles in the importation and domestic distribution of contraband cigarettes. The commenter said that an exemption for persons operating in FTZs may threaten the goal of reducing or eliminating contraband trafficking. The commenter provided background information on FTZs, such as zones in Buffalo and Las Vegas, being used as central hubs in schemes to smuggle contraband cigarettes into and throughout the United States. The commenter indicated that large quantities of imported cigarettes — all of them untaxed and unstamped — had been flowing through these FTZs and then into states around the country, where they were then sold in black market transactions. Given this existing abuse of FTZs, the commenter urged ATF to use the proposed rule as an opportunity to eliminate that exemption. Accordingly, the commenter recommended that the definition of "exempted person" in § 646.143 be amended by deleting the exemption for persons operating within an FTZ.

A different commenter raised a separate issue with respect to the definition of "exempted person." This commenter encouraged ATF to clarify that simply having a federal permit under the IRC as a manufacturer of tobacco products, or as an export warehouse proprietor, or being an agent of such a permitted entity, does not mean that any and all cigarettes or smokeless tobacco in the permittee's possession are ineligible to

be classified as contraband tobacco products. The commenter stated that the definition of “exempted person” in § 646.143 should include a manufacturer or export warehouse proprietor that possesses cigarettes and smokeless tobacco that might otherwise qualify as contraband only if the permittee is operating within the legal scope of its permit.

Conversely, the commenter continued, the definition of “exempted person” should exclude a federally permitted manufacturer or export warehouse proprietor if it operates beyond the scope of its legal activities as a permittee. According to the commenter, the proposed rule, taken literally, inaccurately suggested a form of blanket immunity for those manufacturers or export warehouse proprietors that have federal permits.

ATF response

The existing regulations provide “exempted person” status to any person operating within an FTZ when the cigarettes involved have been entered into the zone under zone-restricted status or, with respect to foreign cigarettes, have been admitted into the zone but have not been entered into the United States. Nothing in the PATRIOT Improvement Act amendments to the CCTA indicated an intention to narrow the scope of the existing FTZ exemption or any other exemption. The legislative history similarly does not reflect any concern with continuing to allow this almost 50-year-old existing exemption in the regulations, nor does it indicate that the list of exemptions in the CCTA and PATRIOT Improvement Act was meant to be exhaustive. The existing FTZ exemption has been in the regulations for decades, so Congress was aware of it and could have acted through the PATRIOT Improvement Act amendments to eliminate it; however, Congress did not choose to do so. “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”

Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 846 (1986) (quotation

marks omitted). Here, because Congress “revisit[ed]” the CCTA in the PATRIOT Improvement Act but did not “revise or repeal” ATF’s longstanding exemptions implementing the CCTA, ATF’s existing regulatory exemptions — including the FTZ exemption — accurately reflect congressional intent.

In addition, the NPRM for this rule did not raise for public notice and comment the issue of eliminating the FTZ exemption. Because the FTZ exemption has been in effect for almost 50 years, industry business practices for importing and exporting products have been established with this exemption as part of their operations. Removing the exemption could, depending on any final regulatory language that ATF adopts, cause any unstamped cigarettes and smokeless tobacco within covered FTZ areas to become automatically contraband, which could have significant consequences. In addition, eliminating the exemption would cause tobacco products in customs bonded warehouses (“CBWs”) and FTZs to be treated differently, even though the two effectively serve the same function. That inconsistency could also have significant consequences. Moreover, this inconsistent treatment could undermine the efficacy of the commenter’s proposal to eliminate the FTZ exemption, as any smuggling activity that would have occurred in an FTZ would simply shift to CBWs. Because of these issues and concerns, ATF believes — at the current time — that the question of removing the FTZ exemption would benefit from a greater opportunity for public comment. Therefore, ATF declines to revise this rule to remove the exemption for FTZs. ATF will, however, continue to vigorously carry out its law enforcement responsibilities and address FTZ abuses.

Next, regarding the concerns raised by a different commenter, the PATRIOT Improvement Act amendments to the CCTA did not amend the statutory definitions of “manufacturer” or “export warehouse proprietor.” The CCTA merely references those terms as they are presently defined in the IRC, 26 U.S.C. 5702. As such, ATF does not believe that rulemaking pursuant to the CCTA amendments is an appropriate vehicle to

define the scope of potential criminal activities by manufacturers, export warehouse proprietors, or other exempted parties. ATF does agree with the commenter that the exemptions in the rule do not grant manufacturers the authority to operate beyond what their federal permits allow; however, ATF emphasizes that whether an exempted party under the CCTA is engaged in activities that are beyond the scope of its licensed activities and would therefore constitute illegal activity, aiding and abetting criminal activity, or a conspiracy to engage in criminal activity, is an issue that federal personnel would have to evaluate and prosecute on a case-by-case basis. Such evaluations and investigations are not appropriate subjects for this rulemaking.

Separately, ATF notes the need for a technical amendment to the definition of “Exempted person”; the definition should reference the 1986 version of the IRC, not the 1954 version.

4. Definition of “contraband smokeless tobacco”

The NPRM proposed to define the term “contraband smokeless tobacco” as “any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, or their equivalent, that are in the possession of any person other than an exempted person.” 75 FR 44177.

Comment received

A member of the tobacco industry commented, “[w]hile this regulation tracks the statutory language, its failure to define what constitutes a single-unit consumer-sized can or package may lead to confusion.” The commenter explained that it sells moist snuff in 1.2-ounce cans and 12-ounce tubs that hold as much moist snuff as ten individual cans. The commenter believed that the term “contraband smokeless tobacco” could be clarified by, for example, stating that “single-unit” cans include only 1.2-ounce cans or that a total weight requirement, such as 600 ounces of smokeless tobacco, would subject a person to the requirements of part 646.

ATF response

ATF understands that different types of smokeless tobacco are marketed to consumers in packages of varying sizes. While the commenter referred to a typical “consumer-sized can” of moist snuff, a “consumer-sized can[] or package[]” of another variety of smokeless tobacco could be larger or smaller, and ATF has encountered such variations in its enforcement experiences. A “consumer-sized can” invariably includes a small amount of the product, but ATF does not believe that it is necessary to set a specific size for purposes of implementing the PATRIOT Improvement Act. ATF has not encountered confusion about what constitutes a single-unit consumer-sized can or package of smokeless tobacco in the 20 years since the PATRIOT Improvement Act was passed, and the commenter referred only to the potential for confusion, not actual incidents of confusion. Therefore, ATF believes that the statutory definition reflected in the proposed rule is preferable because it allows enforcement flexibility. Indeed, setting a specific size, such as 1.2 ounces, could allow for gamesmanship in which parties begin selling 1.1- or 1.3-ounce containers that — despite being intended for single-unit consumer sales — would fall outside the scope of the regulations.

5. Impact of the Prevent All Cigarette Trafficking Act of 2009 (“PACT Act”)

The PACT Act, Pub. L. No. 111-154, 124 Stat. 1087, was enacted on March 31, 2010. Section 4 of the PACT Act, which amended the CCTA at 18 U.S.C. 2343(c), expanded ATF’s inspection authority. This provision added to ATF’s already-existing inspection authority by authorizing ATF to enter the business premises of delivery sellers to inspect records and tobacco products stored there, authorized federal district courts to compel such inspections, and imposed a civil penalty not to exceed \$10,000 for denying access for an inspection or failing to comply with a federal district court order compelling such an inspection. 124 Stat. at 1109. The regulation that implements 18 U.S.C. 2343(c) is 27 CFR 646.153.

Comments received

Two industry commenters requested that 27 CFR 646.153 be amended to reflect the changes to the CCTA made by section 4 of the PACT Act.

ATF response

ATF concurs. The provisions of section 4 of the PACT Act that expand ATF's inspection authority are self-executing because section 6(b) of the PACT Act provided that section 4 of that act became effective on the date it was enacted. *See* 124 Stat. at 1110–11. However, ATF believes there is value in having the regulatory language concerning its inspection authority track the corresponding statutory language. Doing so makes the two authorities consistent, thereby reducing confusion, and provides more effective notice to regulated parties. Accordingly, the final rule includes the inspection provision from section 4 of the PACT Act.

6. Reporting requirements under 27 CFR 646.146(b)(1)

The NPRM proposed to implement 18 U.S.C. 2343(b) by amending 27 CFR 646.146(b)(1) to provide that, except for a tribal government, each distributor who engages in a delivery sale, and who ships, sells, or distributes any quantity in excess of 10,000 cigarettes, or smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages or their equivalent, within a single month, must prepare and submit to the Director of ATF the ATF Form 5200.25, Tobacco Inventory and Direct Sales Report. However, ATF has since determined that it would be more efficient for persons to submit reports without using a form because of the varying length of lists that could be submitted and because of developments in digital formats. This final rule accordingly removes references to the form itself but retains the report title and reporting requirements from the NPRM, as discussed in section IV.B.7 of this preamble, below. Paragraphs (i) through (iii) in 27 CFR 646.146(b)(1) continue to specify the information that must be included in the report.

Comments received

Two commenters noted that the NPRM proposed to apply the reporting requirement to “each distributor” who engages in a delivery sale, while the PATRIOT Improvement Act applies the requirement to “each person.” Both commenters contended that the proposed reporting requirement in the rule was narrower in scope than that specified in the statute.

One of the two commenters stated that because the proposed definition of “Distributor” in § 646.143 included persons who distributed more than 10,000 cigarettes, or smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, in a single transaction, the reporting requirement was more limited than Congress intended. The commenter stated that the definition would exclude persons who ship, sell, or distribute in excess of 10,000 cigarettes in a month, but who do not make any single shipment, sale, or distribution over 10,000 cigarettes. The commenter argued that this was not the intent of the statute, and that Congress instead intended to capture persons making delivery sales for which the total monthly volume of all such person’s monthly sales exceeded a certain threshold — i.e., 10,000 cigarettes (or their smokeless equivalent).

According to the two commenters, the term “distributor” should be replaced with “person” wherever it appears in § 646.146(b)(1). In addition, one of the commenters indicated that the final rule should specify that, in determining whether the person meets the threshold of 10,000 cigarettes (or their smokeless equivalent) in one month, the person must add together all shipments, sales, and distributions, regardless of the volume of any single sale, and must count all cigarettes sold by all locations under the person’s common control or ownership.

ATF response

ATF concurs with the comments. Hence, ATF has replaced the term “distributor”

with “person” wherever it appears in § 646.146(b)(1), which covers the reporting requirement, as suggested by the commenters. ATF also concurs with the suggestion to include all locations under common control in the definition of “person.” In light of the fact that many distributors operate from multiple locations, ATF has also revised the definition of “person” in § 646.143 to include all locations under a person’s common control. Therefore, in determining whether the person meets the threshold for the reporting requirements of 10,000 cigarettes (or their smokeless equivalent) in one month, the person must add together all shipments, sales, and distributions,⁸ regardless of volume of any single distribution, and must count all cigarettes and smokeless tobacco sold at all locations under common control of the person.

ATF notes that the definition of “distributor” as included in the NPRM is not affected by this change to substitute “person” for “distributor” in the reporting requirement provisions. ATF is retaining the definition of “distributor” because it remains valid with respect to the record-keeping requirements already in ATF regulations.

7. Implementing 27 CFR 646.146(b)(1)(i)–(iii)

As mentioned above, the NPRM proposed to revise paragraphs (i) through (iii) in § 646.146(b)(1) to specify the information persons are required to include under the new reporting requirement, for which ATF was proposing to develop a new form, ATF Form 5200.25. As noted above, ATF has now decided not to develop a form for this purpose, but these paragraphs of the rule will still set out the same information proposed in the NPRM.

Comments received

The legal association commenter noted that the proposed regulations “merely quote the statute and do not provide any further guidance on the form or timing of the

⁸ As noted in the background section, because the existing definition of “distribute” already includes “ship” and “sell” as distribution types, ATF is modifying the phrases with all three terms in this rule to use solely the term “distributions” (and variants thereof, such as “distribute”).

reports.” The commenter stated that the statute itself omits many details and offered the following comments:

a. The proposed regulations do not specify the required timeframe for making the reports. The commenter suggested that the final regulations specify that the reports be made no later than the 10th calendar day of the following month, which is consistent with the existing requirement in the Jenkins Act, 15 U.S.C. 376.

b. The proposed regulation in 27 CFR 646.146(b)(1)(i) does not specify exactly what must be reported as part of an “inventory.” The commenter suggested that a meaningful inventory must include, at a minimum, the manufacturer and brand family of each product, along with the number of cigarettes or ounces (e.g., Philip Morris, Marlboro, 20,000 cigarettes).

c. The report of cigarettes or smokeless tobacco received should include the manufacturer, brand, and quantity, together with the vendor’s name and address.

d. The report of cigarettes or smokeless tobacco distributed should include the manufacturer, brand, and quantity, together with the name and address of each person to whom the cigarettes or smokeless tobacco were distributed. The commenter noted this requirement would be consistent with the Jenkins Act, which requires a memorandum or invoice including the name, address, brand, and quantity. *See* 15 U.S.C. 376(a)(2).

e. The reports of cigarettes or smokeless tobacco distributed should include all distributions of cigarettes or smokeless tobacco (except for face-to-face retail sales), not just delivery sales (i.e., all shipments from one distributor to another should be included in the reports, even where such distributions do not cross state lines).

f. The CCTA at 18 U.S.C. 2343(b) uses the term “ships, sells, or distributes,” while 18 U.S.C. 2343(b)(3) uses the term “distributed” only. The commenter stated that this difference in terminology should not be interpreted to limit the reporting requirements in section 2343(b), since that section was clearly intended to capture

delivery sales to consumers, and that 27 CFR 646.146(b)(1)(iii) should make this clear in the final rule.

A second commenter concurred with several of the comments described above.

ATF response

ATF agrees with the commenters' suggestions that the timeframe for filing reports should be no later than the 10th calendar day of the following month; that § 646.146(b)(1)(i) should specify what persons must report as part of a cigarette or smokeless tobacco inventory; that § 646.146(b)(1)(i) should also require that the brand name be identified, as well as the number of cigarettes or consumer-sized cans or packages of smokeless tobacco, in conformance with the Jenkins Act (which was previously amended by the PACT Act); that reports of cigarettes or smokeless tobacco under §§ 646.146(b)(1)(ii) and (iii) should identify brands and quantities, together with the name and address of the party from whom the cigarettes were obtained; that, apart from distributions to retail purchasers, the distribution reports prepared by delivery sellers should include all distributions, not just delivery sale distributions; and that the distribution reports required in section 2343(b)(3) should include all dispositions of cigarettes and smokeless tobacco made by a covered person during a given calendar month. However, the existing definition of the term "distribute" is "to sell, ship, issue, give, transfer, or otherwise dispose of," and the existing definition of "disposition" is "movement of cigarettes [modified in this proposed rule to add smokeless tobacco] from a person's business premises, wherever situated, by shipment or other means of distribution." In other words, in the context of these reporting requirements, all dispositions of cigarettes and smokeless tobacco made by a covered person would also all be distributions, and using either term results in the same effect. The final rule has been amended to make these changes.

Section 2343(b) refers to "[a]ny person, except for a tribal government, who

engages in a delivery sale,” and section 2343(b)(3) includes a requirement that such a person prepare reports relevant “to each person (itemized by name and address) other than a retail purchaser.” A person engaged in a delivery sale who “ships, sells, or distributes” pursuant to section 2343(b) must prepare reports in compliance with section 2343(b)(3). As such, all cigarettes and cans or packages of smokeless tobacco that the person distributes (not just those distributed through delivery sales) to persons other than retail purchasers (as now defined in 27 CFR 646.143), must be reported. In other words, engaging in a “delivery sale” as defined in 18 U.S.C. 2343(e) triggers the potential application of the reporting requirements in 18 U.S.C. 2343(b). And those reporting requirements encompass all distributions in which the person engaged — not just those sales that specifically qualify as “delivery sales.”

Concerning the reporting exception for distributions to retail purchasers, ATF notes that the definition of “retail purchaser” it has chosen to adopt — as described below in section IV.B.8 of this preamble — specifies that the term applies as to a specific sale. Hence, a person required to prepare reports under 18 U.S.C. 2343(b) must include the information identified in 27 CFR 646.146(b)(1)(iii) for all non-retail distributions, which include all delivery sales, to a given consumer, even if the same consumer also made in-person purchases during the calendar month and was thereby a retail purchaser as to those specific sales.

8. Terms “retail purchaser” and “tribal government”

Section 2343(b) of the CCTA, as amended by the PATRIOT Improvement Act, provides that 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, or any quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, within a single month, must submit to the Attorney General a report that sets forth specified information, including 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. The proposed regulation that implements section 2343(b) is 27 CFR 646.146(b)(1).

Comments Received

Two commenters noted that the proposed regulations do not include a definition of “retail purchaser.” One of these commenters suggested the following definition:

Retail purchaser — A consumer who purchases cigarettes or smokeless tobacco in a face-to-face transaction whereby the consumer is physically present at the business premises of the person making the sale; makes the order directly to the seller without using a telephone, mail, the internet, or other means of remote communication; and takes possession of the cigarettes or smokeless tobacco directly from the seller rather than having the cigarettes or smokeless tobacco shipped to the consumer by means of mail, common carrier, or private delivery service.

This commenter also noted that the proposed regulations do not include a definition of “tribal government.” The commenter suggested that the term should be defined in the final rule and be limited to entities that are governments of federally recognized tribes published in the *Federal Register* in accordance with 25 U.S.C. 479(a)(1),⁹ and not individual tribal members, persons licensed by the tribe, or other persons selling cigarettes manufactured by tribes or tribal members.

ATF response

ATF concurs with the commenters regarding the definition of “retail purchaser,” and it adopts the definition proposed by the commenter because this definition harmonizes with the definition of “delivery sale” in 18 U.S.C. 2343(e). However, ATF does not agree that the term “tribal government” should be defined in the final rule. This

⁹ Although the commenter referenced 25 U.S.C. 479(a)(1), that section is now codified in 25 U.S.C. 5129. As a result, ATF treats this comment as referring to the latter section.

is a complex issue that is outside the scope of ATF's expertise and is best handled on a case-by-case basis in consultation with the relevant federal agencies, such as the Department of the Interior. (As discussed in section V of this preamble, below (regarding consultations with tribal governments), ATF similarly declines to define "tribal business" as a term in the regulations).

9. Extension of the record retention period

In general, the current regulations at 27 CFR 646.150 provide that each distributor of cigarettes must retain the records required by §§ 646.146 and 646.147 for three years following the close of the year in which the records are made. The distributor must keep the required records on the distributor's business premises. In the proposed rule, ATF advised that it was considering extending the record retention requirement to five years. The proposed amendment would harmonize the regulations with the applicable statute of limitations for CCTA violations, which is five years. Accordingly, ATF solicited and received comments on this issue.

Comments received

One commenter supported an extension of the record retention requirement to five years, stating that "[s]uch an extension should help to maintain records useful for both discovering and prosecuting contraband trafficking" and that "having to keep the records for just two more years, especially in this era of electronic record-keeping, would not unduly burden the tobacco industry businesses."

Another commenter argued that an extension of the record-keeping period would increase the burden on the industry. However, the commenter stated that the additional burden could be substantially mitigated if the required records could be maintained in electronic form. The commenter recommended that in the final rule ATF clarify that any required records may be maintained in electronic form, without the need for regulated companies to retain hard copies of the same records.

ATF response

ATF concurs that the records-retention requirement in the regulation should be extended to five years to comport with the statute of limitations on CCTA prosecutions. ATF also concurs that the required records may be kept in electronic form, and the final regulations have been amended accordingly. As discussed below in section VI.F of this preamble, ATF has also amended the final regulation to account for storage in cloud-based databases. The final rule allows persons to store their records remotely using a server located within the United States or its territories, or, if using a host facility, using one that has a business premises within the United States or its territories and that is subject to U.S. legal process.

10. ATF interaction with the U.S. Food and Drug Administration (“FDA”)

Comment received

One commenter stated that menthol cigarettes are preferred by over 18 million people, or one third of adult cigarette smokers, and that banning such cigarettes would create an enormous demand for contraband menthol cigarettes. According to the commenter, ATF is the agency with the greatest understanding of the dynamics of the contraband market and of the dangers to Americans from illicit cigarette trafficking, and it is incumbent on ATF to provide FDA with information and recommendations regarding the contraband cigarette issue. The commenter said extensive new trafficking opportunities resulting from a menthol ban would adversely affect ATF’s ability to enforce the CCTA.

ATF response

ATF does not believe that the statutory changes to the CCTA under the PATRIOT Improvement Act relate to this issue. The CCTA does not affect ATF’s authority relating to this specific issue, nor does the CCTA affect FDA’s authority under the Family

Smoking Prevention and Tobacco Control Act.¹⁰ ATF and FDA routinely collaborate, share, and exchange investigative information to ensure compliance with federal laws and regulations. For questions regarding the Family Smoking Prevention and Tobacco Control Act, interested parties should contact the FDA's Center for Tobacco Products by phone at 1-877-287-1373 or online at <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/contact-ctp>.

11. Traceable tax stamps

The reporting requirements in 18 U.S.C. 2343(b) (for persons who engage in a delivery sale and who ship, sell, or distribute any quantity of 10,000 cigarettes, or any quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, in a single month) do not apply to tribal governments.

Comment received

One city agency commenter stated that if, because of the statutory exemption, the reporting requirements cannot be imposed on tribal governments, there are other measures that could help combat illegal sales of tobacco products. For example, the commenter stated that the federal government should require that all tobacco products contain one of two traceable stamps: either a tax stamp or a restricted-sale notice stamp that indicates that the product will be sold at a tax-free location such as an Indian reservation, military base, or duty-free shop. Furthermore, any manufacturer or distributor involved in the sale of tax-free tobacco products should be required to track all such tax-free sales and report them to the federal government, which should disclose these sales to the state and local governments in the states and localities in which the sales occur.

ATF response

ATF declines to adopt this suggestion in this rulemaking. The commenter did not

¹⁰ Pub. L. No. 111-31, div. A, 123 Stat. 1776 (2009).

identify a basis in the statutory changes to the CCTA effectuated by the PATRIOT Improvement Act that would authorize issuing regulations that require traceable tax stamps. Accordingly, any such change would be outside the scope of this rulemaking.

12. Regulating other tobacco products

Comment received

According to a city agency commenter, governments have increased taxes on “other tobacco products” (“OTPs”), meaning products other than cigarettes, such as cigarillos or cigars. The commenter suggested that these increased taxes could lead to increased trafficking, as buyers and sellers attempt to avoid the higher taxes. Therefore, the commenter requested that ATF “consider including language which would designate trafficking rules for OTPs such as small and large cigars, cigarillos, and pipe tobacco.”

ATF response

As discussed above in section IV.B.2 of this preamble, the statutory changes to the CCTA effected by the PATRIOT Improvement Act do not expand the coverage of the CCTA to products other than cigarettes or smokeless tobacco, such as small or large cigars, cigarillos, or pipe tobacco. Therefore, making a regulatory change to do so is outside the scope of this rule.

V. Consultation with Tribal Governments in Compliance with Executive Order 13175

Section 3(c) of Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) requires that “[w]hen undertaking to formulate and implement policies that have tribal implications, agencies shall . . . consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian

tribes.” Per Department policy,¹¹ “[c]onsultation is the formal process through which the Department of Justice seeks tribal input regarding the development of new or amended policies, regulations, and legislative actions initiated by the Department.”

Accordingly, on February 24 and 25, 2015, the Department invited the leaders of federally recognized tribes to consult on the proposed rule. The consultation process provided the Department useful feedback from tribes and tribal organizations, including the Winnebago Tribe of Nebraska, the Onondaga Tribe of New York, the Shoshone-Bannock Tribes of Idaho, and the Big Sandy Rancheria (Tribes) of California.

The Winnebago Tribe and the Shoshone-Bannock Tribe consultants noted that section 121(c) of the PATRIOT Improvement Act, amending 18 U.S.C 2343(b), requires that all distributors who engage in delivery sales and who sell in excess of 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco within a single month, except tribal governments, must submit reports to the Attorney General. During the tribal consultation, ATF indicated that, in its view, a business that was wholly owned and operated by a tribal government would fall within this reporting exemption. Both tribes asked for the regulations to define the term “tribal business.”

The amended CCTA does not use the term “tribal business.” ATF does not believe that it is necessary to create and define the term “tribal business” in these regulations or that it is helpful to do so at this time. If any issues arise concerning whether a particular business with a connection to a tribal government has reporting obligations, ATF believes it would be optimal to analyze specific factual situations to ascertain if the specific business is wholly owned and operated by a tribal government and is therefore exempt from the reporting requirements.

The Winnebago Tribe and the Shoshone-Bannock Tribe recommended that

¹¹ DOJ, Policy Statement 0300.01: Tribal Consultation 4 (Nov. 30, 2022), <https://www.justice.gov/d9/2022-12/doj-memorandum-tribal-consultation.pdf> (updating a 2013 policy statement on the implementation of Executive Order 13175) [<https://perma.cc/PUD8-DQD4>].

section 121(e) of the PATRIOT Improvement Act, amending 18 U.S.C. 2345, be amended to include tribal governments and tribal jurisdiction. These statutory provisions relate to the CCTA's effect on state and local laws. Expanding the scope of the statute is beyond ATF's regulatory authority; the changes recommended by the tribes would require congressional action.

The Winnebago Tribe, Shoshone-Bannock Tribe, and Onondaga Tribe recommended that ATF amend section 121(f) to preclude the creation of new civil enforcement actions against tribal governments or wholly owned tribal companies. The statutory language of the CCTA provides that a state, local government, or person who holds an IRC permit to manufacture or import tobacco cannot bring a civil action against "an Indian tribe or an Indian in Indian country (as defined in 18 U.S.C. 1151)." 18 U.S.C. 2346(b)(1). The final rule in no way alters the operation of this provision of the statute. States, local governments, and IRC permit holders will still be barred from bringing new civil enforcement actions against "Indian tribes" and "Indians in Indian country (as defined in 18 U.S.C. 1151)" under the amended CCTA. ATF cannot amend a statute, and thus the requested change is outside the scope of this or other rulemaking.

Big Sandy Rancheria commented that ATF's proposed rule should make clear that business-to-business transactions will not be included in determining the cumulative monthly total that triggers reporting requirements under 18 U.S.C. 2343(b). ATF does not adopt this recommendation. The statute states that any person who engages in a delivery sale and who ships, sells, or distributes "any quantity in excess of 10,000 cigarettes, or any quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, within a single month" is subject to the reporting requirement. The statute does not contain an exemption for business-to-business sales. ATF cannot change a statute. Accordingly, the requested change is outside the scope of this rulemaking. ATF notes that all persons, regardless of whether they are subject to the

reporting requirements of 18 U.S.C. 2343(b), must keep detailed records under section 2343(a) and this final rule's §§ 646.146 and 646.147, subject to inspection by ATF, of all sales or shipments in excess of 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco in a single transaction pursuant to 18 U.S.C. 2343(a).

The Onondaga Tribe objected to Congress lowering the CCTA threshold from 60,000 to 10,000 cigarettes. ATF notes that only Congress can amend statutory language lowering the threshold amount that triggers reporting requirements under the CCTA; ATF cannot do so through rulemaking.

Lastly, tribal governments noted that the PATRIOT Improvement Act amendments to the CCTA and the enactment of the PACT Act of 2009 were roughly contemporaneous and addressed similar subjects; they accordingly argued that the term "consumer" should be defined in these CCTA regulations using the PACT Act definition. However, Congress did not include a definition of "consumer" in the CCTA amendments in the PATRIOT Improvement Act. Instead, Congress used the term only to define the term "delivery sales," which it used in turn only to discuss particular reporting obligations from which it specifically exempted tribal governments. ATF does not see any need to define the term "consumer" under the PATRIOT Improvement Act amendments to the CCTA at this time.

VI. Final Rule

This final rule implements, with modifications, amendments to the regulations at 27 CFR part 646 that were specified in the NPRM published in the *Federal Register* on July 28, 2010, 75 FR 44173. In addition, the final rule is making minor technical amendments to change the word "shall" to "must" and other similar plain writing edits, in accordance with current regulatory conventions. The modifications to the NPRM are each discussed in detail below.

A. Headings

Because smokeless tobacco has been added to the scope of the CCTA by the PATRIOT Improvement Act, this final rule amends the heading of part 646, changing it from “Contraband Cigarettes” to “Contraband Cigarettes and Smokeless Tobacco,” in line with similar changes made in the statute. Likewise, the rule also amends the undesignated heading “Other Provisions Relating to the Distribution of Cigarettes (§ 646.153)” to read “Other Provisions Relating to the Distribution of Cigarettes and Smokeless Tobacco (§ 646.153).” Finally, this rule amends the undesignated center heading “Records” by adding “and Reports” to reflect the reporting requirements of the PATRIOT Improvement Act.

B. Section 646.141

For consistency with 18 U.S.C. 2343(b), this final rule amends the NPRM’s proposed 27 CFR 646.141 to include delivery sales of smokeless tobacco and cigarettes; and shipping, selling, or distributing, either in a single transaction or cumulatively, more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco within a single calendar month. In addition, it incorporates a technical amendment changing the word “subpart” to the word “part” in the text that describes the scope of these rules.

C. Sections 646.143, 646.146(a), 646.146(b), and 646.150

The final rule revises the NPRM’s proposed definition of “exempted person” in § 646.143(b), by including certain persons operating in FTZs within the list of exempted persons for contraband smokeless tobacco. The exemption for operating within an FTZ when the smokeless tobacco involved has been entered into the zone under zone-restricted status or, in respect to foreign smokeless tobacco, has been admitted into the zone but has not been entered into the United States, is the same as the existing exemption for cigarettes and was inadvertently not included in the proposed rule. ATF adds this exemption to the final rule to align the smokeless tobacco exemptions fully with

the FTZ exemption for cigarettes that already exists in the regulations implementing the CCTA.

The final rule removes the NPRM's proposed definition of "interstate commerce" in § 646.143 because including the definition for the entire CCTA goes beyond the scope of this rule and is not necessary. For purposes of the amendments made by the PATRIOT Improvement Act, the term "interstate commerce" has the definition supplied by the act itself at 18 U.S.C. 2343(f).

The final rule revises the definition of "person" in § 646.143 to include all locations under common control of a person. Therefore, in determining whether the person meets the threshold of 10,000 cigarettes (or the smokeless equivalent) in a single month for reporting purposes, the person must add together all shipments, sales, and distributions, regardless of volume of any single sale, shipment, or distribution, and must count all cigarettes and smokeless tobacco sold by all locations under the person's common control.

The final rule also adds to the NPRM's proposed § 646.143 a definition for "retail purchaser" that harmonizes with the definition of "delivery sale" in 18 U.S.C. 2343(e), makes technical amendments to the definition of "exempted person" to track the language in 18 U.S.C. 2341(2)(D), and references the correct 1986 version of the IRC.

In addition, the final rule amends § 646.146(a) and § 646.150 to add that each person who ships, sells, or distributes (which would become only each person who distributes) cigarettes or smokeless tobacco must keep copies of the required documents, which tracks the language in 18 U.S.C. 2343(a). Section 646.146 adds in-line headers to subsections (a) and (b) to identify their topics.

Consistent with two commenters who noted that the NPRM proposed to apply the reporting requirement to "each distributor" who engages in a delivery sale, whereas the statute applies the requirement to "each person," the final rule replaces the NPRM's

proposed use of the term “distributor” with “person” wherever it appears in § 646.146(b)(1).

D. Section 646.146(b)(1)(i)–(iii)

The proposed regulation did not provide guidance on the timing for submission of the information required by the reporting requirements. Therefore, the final rule specifies that the report must be prepared and submitted by the 10th day of the calendar month following the month that is the subject of the report. The final rule also specifies what is to be reported, including the brand name of the cigarettes or smokeless tobacco. In addition, the final rule removes a reference to a new ATF form for the purpose of submitting reports. ATF has determined that it would be more efficient to allow persons to submit reports without being required to use a form, especially due to the highly variable length of lists that persons may need to submit.

E. Section 646.147

This final rule makes a technical amendment to the phrase “more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco” in the NPRM’s proposed § 646.147; this change ensures consistency with § 646.141.

F. Section 646.150 retention period

The final rule extends the record retention requirement in the NPRM’s proposed § 646.150 from three years to five years following the close of the year in which the records are made. This amendment harmonizes the regulations with the applicable statute of limitations for CCTA violations, which is five years. In addition, the final rule clarifies that these records may be maintained in electronic form on the person’s business premises. Further, the final rule permits persons to use domestic remote data storage facilities or a host facility (i.e., cloud-based storage) for the required records, if the entities that control the storage facilities are subject to service of U.S. legal process and have a business premises within the United States or its territories. In addition, persons

required to maintain these records who choose to do so electronically must ensure that they are accessible by ATF on the business premises and are available on request, whether they are in cloud storage or an electronic device physically located at the premises.

This final rule does not apply to Electronic Nicotine Delivery Systems.

VII. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.

Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of agencies quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting public flexibility.

The Office of Management and Budget (“OMB”) determined that the proposed rule was a “significant regulatory action” under section 3(f)(1) of Executive Order 12866 because of facts that applied at the time the proposed rule was published in 2010. Although the factual circumstances have changed, as described below, OMB has reviewed this final rule because of OMB’s determination that the prior NPRM was a “significant regulatory action.”

Most of the provisions in this rule simply incorporate statutory changes to the CCTA effected by the PATRIOT Improvement Act, primarily by modifying record-keeping requirements in the existing regulations to decrease the triggering threshold from 60,000 to 10,000 cigarettes and to include smokeless tobacco. In addition, the rule also implements reporting requirements that ATF originally projected in the NPRM would affect a substantial portion of the tobacco industry. The projected impact of this reporting requirement was the basis for OMB considering the NPRM to be “significant” under

section 3(f) of Executive Order 12866. However, this rule will no longer have that originally projected impact because of intervening changes.

Five years after the PATRIOT Improvement Act was passed, Congress enacted the PACT Act in 2010, which effectively, as a practical matter, eliminated the ability to make lawful “delivery sales” of the sort that would trigger the reporting requirements imposed by the PATRIOT Improvement Act. The PACT Act bans mailing cigarettes and smokeless tobacco; provides that distributing cigarettes and smokeless tobacco must accord with state and local stamping, taxing, and other requirements; and provides that distributors must register with states, follow labeling, age verification, and packaging requirements, and more. In light of the PACT Act’s comprehensive statutory requirements and prohibitions, distributors long ago ceased engaging in delivery sales covered by the PATRIOT Improvement Act’s reporting requirement. ATF has thus determined that the CCTA reporting requirements incorporated into ATF’s regulations via this final rule will have no cost to industry. It is vaguely possible that, at some distant date, one or more distributors might decide to start engaging in delivery sales covered by this requirement despite the PACT Act’s disincentives, but ATF’s experience over the 15 years since the PACT Act has been in effect indicates that this possibility is too speculative for assessing a projected possible economic impact from this final rule’s reporting requirements.

Next, although most portions of this final rule simply incorporate statutory changes to the CCTA effected by the PATRIOT Improvement Act, it is possible this rule could result in a small number of additional distributors being subject to the record-keeping requirements in 27 CFR part 646 because of the decrease in the triggering threshold from 60,000 to 10,000 cigarettes and because the regulations also impose record-keeping requirements for certain shipments, sales, and distributions of smokeless tobacco. ATF has determined this potential increase will likely have a de minimis impact

because distributors already generate such records in the regular course of business and likely will not have to make additional records or entries to comply with the rule.

Furthermore, this de minimis potential increase would be more than offset by the savings resulting from the rule's provisions allowing persons to use electronic records and to use commercial business records they generate in the course of regular business to meet the requirements.

1. Need statement

Since the CCTA was enacted in 1978, cigarette smuggling and trafficking has grown in complexity and become a global problem that costs governments throughout the world billions of dollars in lost tax revenue. ATF's investigations, Congress, and other sources have established that organized crime and terrorist groups divert legal tobacco products into illegal markets. Organized crime and terrorist groups use profits derived from cigarette trafficking, and the more recent market of smokeless tobacco trafficking, to finance additional criminal enterprises. As a result, section 121 of the PATRIOT Improvement Act made several amendments to the CCTA, 18 U.S.C. 2341 *et seq.*, to strengthen the ability to investigate and track cigarette and smokeless tobacco trafficking.

This rulemaking updates ATF's regulations to be consistent with the amendments made by the PATRIOT Improvement Act to the CCTA relating to trafficking in contraband cigarettes and smokeless tobacco and to facilitate enforcing the CCTA.

2. Costs

In this final rule, ATF has largely retained the substance of the regulations proposed by the NPRM, but has made certain modifications, including a modification that allows regulated entities to store records electronically. ATF has adjusted its analysis of the costs imposed by this rule to account for changes in the number of regulated entities since the publication of the NPRM and in response to public comments. In the NPRM, ATF estimated that 3,000 entities would be subject to monthly reporting

requirements; in this final rule, ATF estimates that no entities will be subject to monthly reporting requirements. The decline in the number of entities subject to the reporting requirements is due to the implementation of the PACT Act. Because of this change, ATF estimates that there are no quantified costs associated with the monthly reporting requirements.

In response to public comments, and to incorporate current industry standards in light of advancing technology, ATF has amended the regulation proposed in the NPRM to provide that records in electronic form satisfy the rule's record-keeping requirements. This change is consistent with ATF's enforcement practice in recent years. ATF is codifying the permission to use electronic records in this final rule because industry now almost exclusively uses electronic records.

In addition, the final rule extends the current record-keeping requirement from three to five years. ATF estimates that there are no quantified costs associated with retaining records beyond the existing three-year requirement because no further action or capital will be required to implement the time extension, as all records are electronic and already produced in businesses' ordinary course of operations. Most tobacco industry businesses already maintain sales records and invoices electronically as part of standard business practices and to comply with other requirements, such as for tax purposes or as required by states, and this final rule does not require these entities to generate additional records for ATF record-keeping purposes.

3. Benefits

Although, as discussed above, this rule does not include any quantified benefits, it does generate qualitative benefits. ATF's regulations implementing the CCTA already impose record-keeping requirements for manufacturers and wholesalers who sell more than 60,000 cigarettes in one transaction, enabling ATF to inspect their records and find indications of trafficking and other criminal activities. These requirements increase

public safety and benefit the economy by reducing trafficking, thus impairing terrorism and other criminal activities funded by trafficking. However, the cigarette portion of the tobacco products market has been shrinking over the past 20 years, so the number of sales over 60,000 cigarettes in a single transaction has also diminished, and criminal enterprises have instead increased sales of lower transaction amounts. In addition, the decline in cigarette market share has been offset by a massive increase in market share for smokeless tobacco and an increase in illegal smokeless tobacco trafficking. These changes were a primary reason the PATRIOT Improvement Act added smokeless tobacco to the CCTA, added a requirement for keeping records on smokeless tobacco transactions of at least 500 single-unit consumer-sized cans or packages, and lowered the cigarette sale record-keeping threshold from more than 60,000 cigarettes to more than 10,000 cigarettes in a single transaction. These changes, and the change to the records retention period, permit ATF to inspect more records that aid it in finding traffickers.

This rule benefits the public by conforming ATF regulations with the statutory changes discussed above, thereby reducing confusion and providing clarity to regulated parties by eliminating discrepancies between the two. It also provides additional detail to industry on the scope of the record-keeping requirements, which helps inform regulated parties about their duties.

B. Executive Order 14192

Executive Order 14192 (Unleashing Prosperity Through Deregulation) requires an agency, unless prohibited by law, to identify at least ten existing regulations to be repealed or revised when the agency publicly proposes for notice-and-comment or otherwise promulgates a new regulation that qualifies as an Executive Order 14192 regulatory action (defined in OMB Memorandum M-25-20 as a final significant regulatory action under section 3(f) of Executive Order 12866 that imposes total costs greater than zero). In furtherance of this requirement, section 3(c) of Executive Order

14192 requires that any new incremental costs associated with such new regulations must, to the extent permitted by law, also be offset by eliminating existing costs associated with at least ten prior regulations. However, this final rule is not an Executive Order 14192 regulatory action because it does not impose any more than de minimis regulatory costs.

C. Executive Order 14294

Executive Order 14294 (Fighting Overcriminalization in Federal Regulations) requires agencies promulgating regulations with criminal regulatory offenses potentially subject to criminal enforcement to explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to each element of those offenses. This final rule does not create a criminal regulatory offense and is thus exempt from Executive Order 14294 requirements.

D. Executive Order 13132

This rule will not have substantial direct effects on the states, the relationship between the federal government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Director has determined that this final rule does not impose substantial direct compliance costs on state and local governments, preempt state law, or meaningfully implicate federalism. It thus does not warrant preparing a federalism summary impact statement.

E. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

F. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, (5 U.S.C. 601–612), agencies are required to conduct a regulatory flexibility analysis of any rule subject to notice-and-comment

rulemaking requirements unless the agency head certifies, including a statement of the factual basis, that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include certain small businesses, small not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

Although there might be small entities that distribute sufficient tobacco products to trigger the thresholds for applying the PATRIOT Improvement Act, costs to these small entities would be de minimis because ATF is not requiring businesses to retain records more extensive than those that businesses retain in their normal course of operating, nor is ATF requiring that businesses deviate from their typical practice of storing records electronically. Also, as discussed in section VII.A of this preamble, the reporting requirements described in this rulemaking are obsolete because of the PACT Act, and these requirements accordingly will not affect any businesses, including small ones. Furthermore, because records covered by this rule are businesses' normal commercial records, ATF has already been inspecting them and providing awareness and feedback to businesses for the approximately two decades since the PATRIOT Improvement Act was enacted. Familiarization costs arising from this rule would thus be de minimis as well. Therefore, the Director certifies, after consideration, that this final rule will not have a significant impact on a substantial number of small entities.

F. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not likely to have a significant economic impact on a substantial number of small entities under the Small Business Regulatory Enforcement Fairness Act of 1996, 15 U.S.C. 657 and 5 U.S.C. 601 note, as it neither imposes additional costs nor adds any barriers that would impact small businesses, as described above.

ATF does not anticipate taking enforcement actions against small businesses related to this rule; small businesses generally do not meet the threshold sales level for

shipments, sales, or distributions that would trigger the record-keeping requirements. However, ATF has worked with and will continue to work with small businesses to ensure training, awareness, and compliance by such businesses. In addition, should an enforcement action be brought against a small business, ATF includes in the enforcement process steps that ensure small businesses are able to fully participate in and respond to any enforcement actions, in compliance with the Small Business Regulatory Enforcement Fairness Act.

G. Unfunded Mandates Reform Act of 1995

This rule does not include a federal mandate that might result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, ATF has determined that no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

H. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (“PRA”), 44 U.S.C. 3501–3521, agencies are required to submit to OMB, for review and approval, any information collection requirements a rule creates or any impacts it has on existing information collections. An information collection includes any reporting, record-keeping, monitoring, posting, labeling, or other similar actions an agency requires of the public. *See* 5 CFR 1320.3(c). The NPRM indicated that this rule would necessitate a new information collection under the PRA. The NPRM proposed a new information collection to capture the new reporting requirement proposed in that rule.

In addition, 27 CFR part 646 already includes an information collection in the form of record-keeping requirements, and this rule revises the threshold that triggers those record-keeping requirements, so ATF discusses that record-keeping here. Although those record-keeping requirements pre-date this rule and are not created by it, ATF did

not previously include this record-keeping requirement under an OMB-approved information collection request (“ICR”) because it did not involve a form. However, this was an oversight, which ATF is now correcting by creating a new ICR to cover the existing record-keeping requirement in addition to the reporting requirement.

This ICR will also account for the new thresholds, created by the PATRIOT Improvement Act and implemented by this rule, that trigger the record-keeping requirement at 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco sales in one transaction (instead of only cigarettes at 60,000 in a transaction). Similarly, the ICR will account for the reporting requirement triggered when a person engages in a delivery sale and ships, sells, or distributes at least 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, in a single month. As described in section VII.A.2 of this preamble, these requirements do not result in more than a de minimis hour burden or cost, so the description below of the ICR as impacted by this rule shows a zero-hour burden. This rule changes the threshold for keeping records and the period for retaining them but otherwise makes no change to the record-keeping requirement.

The record-keeping portion of the information collection is associated with §§ 646.146, 646.147, and 646.150, and the reporting portion of the information collection is associated with § 646.146. The information collection is necessary because covered persons are required to maintain records on individual cigarette and smokeless tobacco shipments, sales, or distributions that meet the stated threshold requirements and to submit reports on monthly transaction totals of such sales that meet the stated threshold requirements. This information is required to implement the provisions of the CCTA, as amended by the PATRIOT Improvement Act, regarding trafficking in contraband cigarettes or smokeless tobacco. The likely respondents are businesses.

Title: Cigarettes and Smokeless Tobacco Record-keeping and Reporting

Requirements

OMB Control Number: 1140-[TBD]

Summary of the information collection: Each person who ships, sells, or distributes cigarettes or smokeless tobacco must keep copies of invoices, bills of lading, or other suitable commercial records equivalent thereto on each disposition of more than 10,000 cigarettes or of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, in accordance with the requirements in 27 CFR 646.146(a), 646.147, and 646.150. These records may be maintained in electronic format and must be retained for five years.

In addition, each person, except for a tribal government, who engages in a delivery sale and who ships, sells, or distributes more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, within a single month, must submit a Tobacco Industry and Direct Sales Report (“report”) by the 10th day of the following calendar month, in accordance with requirements in § 646.146(b). The person must include in the report the beginning and ending inventories of cigarettes and cans or packages of smokeless tobacco (in total) for such month, including the brand name and number of cigarettes or ounces of smokeless tobacco; 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), including the brand name of the tobacco products; and the total quantity of cigarettes and cans or packages of smokeless tobacco the person distributed within such month to each person (itemized by name and address) other than a retail purchaser, including the brand name of the tobacco products. The person must submit a copy of each such report to the Director, ATF, and to the attorneys general and the tax administrators of the states from where the shipments, deliveries, or distributions both originated and concluded.

Need for the information: The purpose of the record-keeping and reporting requirements is so that revenue agencies and law enforcement officers can inspect and identify persons who are moving tobacco products into the black market or otherwise violating the law.

Proposed use of the information: ATF will inspect the records for law-enforcement purposes.

Description of the respondents: For record-keeping requirement: Any distributor, as defined in 27 CFR 646.143, is required to maintain this information in commercial dated records for each disposition meeting the statutory threshold as described in § 646.147. For reporting requirement: Any person except a tribal government who engages in a delivery sale is required to report this information for each calendar month in which the person meets the statutory threshold as described in § 646.146(b).

Number of respondents: For record-keeping requirement: 3,309 wholesalers and manufacturers. For reporting requirement: 0 persons.

Frequency of response: For record-keeping requirement: per sales transaction above the threshold described in § 646.147. For reporting requirement: per calendar month in which the person engages in a delivery sale and sells more than the threshold described in § 646.146(b) during that month.

Time burden of response: Burden hours due to rule: 0. The record-keeping requirement involves records that are already kept in the ordinary course of business. In addition, no persons have engaged in delivery sales for more than a decade, and ATF has no basis for anticipating a change in that number in the future, so no persons will trigger the reporting requirement. As a result, ATF assesses the impact from this rule to be 0 hours.

Estimate of total annual time burden: Total annual burden hours due to rule: 0 hours.

I. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804.

Severability

ATF has determined that this rule implements and is fully consistent with governing law. However, in the event any provision of this rule, an amendment or revision made by this rule, or the application of such provision or amendment or revision to any person or circumstance, is held to be invalid or unenforceable by its terms, the remainder of this rule, the amendments or revisions made by this rule, and application of the provisions of the rule to any person or circumstance shall not be affected and shall be construed so as to give them the maximum effect permitted by law.

List of Subjects in 27 CFR part 646

Administrative practice and procedure, Cigars and cigarettes, Excise taxes, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Surety bonds, Tobacco.

Accordingly, for the reasons discussed in the preamble, ATF amends 27 CFR part 646 as follows:

PART 646--CONTRABAND CIGARETTES AND SMOKELESS TOBACCO

1. The authority citation for part 646 continues to read as follows:

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

2. Revise the part heading as set forth above.

3. Revise § 646.141 to read as follows:

§ 646.141 Scope of part.

The regulations in this part relate to delivery sales of smokeless tobacco and cigarettes, and to distributing, either in a single transaction or cumulatively, more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless

tobacco within a single month.

4. Amend § 646.143 by:

a. Revising the definition for “Business premises”;

b. Adding the definition for “Cigarette” in alphabetical order;

c. Revising the definition for “Contraband cigarettes”;

d. Adding the definitions for “Contraband smokeless tobacco” and “Delivery sale” in alphabetical order;

e. Revising the definitions for “Disposition”, “Distributor”, “Exempted person”, and “Person”; and

f. Adding the definitions for “Retail purchaser” and “Smokeless tobacco” in alphabetical order.

The revisions and additions read as follows:

§ 646.143 Meaning of terms.

* * * * *

Business premises. When used with respect to persons who sell cigarettes or smokeless tobacco, the property on which the cigarettes or smokeless tobacco are kept or stored. The business premises include the property where distributors keep their cigarette and smokeless-tobacco records.

Cigarette. A cigarette is:

(1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(2) Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1) of this definition.

* * * * *

Contraband cigarettes. Any quantity of cigarettes in excess of 10,000, if:

(1) The cigarettes bear no evidence that applicable state or local cigarette taxes in the state or locality where such cigarettes are found has been paid;

(2) The state or local government 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

(3) The cigarettes are possessed by any person other than an exempted person.

Contraband smokeless tobacco. Any quantity of smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, or their equivalent, that any person other than an exempted person possesses.

Delivery sale. Any sale of cigarettes or smokeless tobacco in interstate commerce to a consumer if:

(1) The consumer submits the order for such sale by means of a telephone or other method of voice transmission, mail, the internet or other online service, or by any other means in which the consumer is not in the same physical location as the seller when the purchase or sales offer occurs; or

(2) The cigarettes or smokeless tobacco are delivered through mail, common carrier, private delivery service, or any other means in which the consumer is not in the same physical location as the seller when the consumer physically obtains possession of the cigarettes or smokeless tobacco.

Disposition. The movement of cigarettes or smokeless tobacco from a person's business premises, wherever situated, by distribution.

* * * * *

Distributor. Any person who distributes more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco, in a single transaction.

Exempted person. An exempted person is:

(1) With respect to cigarettes in excess of 10,000, any person who is:

(i) 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;

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

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

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

(v) Licensed or otherwise authorized by the state in which the person possesses cigarettes to account for and pay cigarette taxes imposed by that state; and who has complied with the license or authorization's accounting and payment requirements with respect to the cigarettes involved;

(vi) 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) possessing cigarettes in connection with performing official duties; or

(vii) Operating 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 have not been entered into the United States.

(2) With respect to smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, any person who is:

(i) Holding a permit issued pursuant to chapter 52 of the Internal Revenue Code

of 1986 as a tobacco products manufacturer or as an export warehouse proprietor;

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

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

(iv) A common or contract carrier transporting the smokeless tobacco under a proper bill of lading or freight bill that states the smokeless tobacco's quantity, source, and destination;

(v) Licensed or otherwise authorized by the state in which the person possesses smokeless tobacco to account for and pays smokeless tobacco taxes imposed by that state; and who has complied with the license or authorization's accounting and payment requirements with respect to the smokeless tobacco involved;

(vi) An officer, employee, or 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) possessing smokeless tobacco in connection with performing official duties; or

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

Person. Any individual, corporation, company, association, firm, partnership, society, or joint stock company. The term includes within the definition of "person" any business that operates at different locations that function under common control, as well as businesses that conduct commercial tobacco enterprises on tribal land.

Retail purchaser. With reference to a particular cigarettes or smokeless tobacco sale, a consumer who purchases cigarettes or smokeless tobacco in a face-to-face

transaction in which the consumer is physically present at the business premises of the person making the sale; makes the order directly to the seller without using a telephone, mail, the internet, other online service, or other means of remote communication; and who physically obtains possession of the cigarettes or smokeless tobacco in the same physical location as the seller, not by having the cigarettes or smokeless tobacco delivered by mail, common carrier, or private delivery service.

Smokeless tobacco. Any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.

* * * * *

5. Revise the undesignated center heading preceding § 646.146 to read as follows:

Records and Reports

6. Revise § 646.146 to read as follows:

§ 646.146 General record-keeping and reporting requirements.

(a) *Persons subject to record-keeping requirements.* Each person who distributes cigarettes or smokeless tobacco must keep copies of invoices, bills of lading, or other suitable commercial records equivalent thereto relating to each disposition of more than 10,000 cigarettes, or smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages. Dividing a single agreement for the disposition of more than 10,000 cigarettes, or smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, into delivery of smaller components of 10,000 cigarettes or less, or smokeless tobacco of not more than 500 single-unit consumer-sized cans or packages, does not exempt persons from the record-keeping requirements of this part. Such distributors must include the information prescribed in § 646.147 in their commercial disposition records. Records persons generate in the ordinary course of business suffice to satisfy this section.

(b) *Reporting requirements and persons subject to them.* (1) Except for a tribal

government, each person who engages in a delivery sale, and who distributes cigarettes in excess of 10,000, or smokeless tobacco in excess of 500 single-unit consumer-sized cans or packages, or their equivalent, within a single calendar month, must prepare and submit to the Director, ATF, a Tobacco Inventory and Direct Sales Report (“report”), in accordance with instructions on ATF’s website, by the 10th day of the calendar month following the month in which the delivery or distribution occurred. The report must include the following information:

(i) The person’s beginning and ending inventories of cigarettes and cans or packages of smokeless tobacco (in total) for such month, including the cigarettes’ or smokeless tobacco’s manufacturer and brand family names, and the number of cigarettes or ounces of smokeless tobacco inventoried.

(ii) The total quantity of cigarettes and cans or packages of smokeless tobacco — including the cigarettes’ or smokeless tobacco’s manufacturer and brand family names — the person received within such month from each other person (itemized by name and address).

(iii) The total quantity of cigarettes and cans or packages of smokeless tobacco — including the cigarettes’ or smokeless tobacco’s manufacturer and brand family names — that the person disposed of within such month to each person (itemized by name and address) other than a retail purchaser.

(2) Each person described in paragraph (b)(1) of this section must also submit a copy of each completed report to the attorneys general and the tax administrators of the States from where the deliveries or distributions both originated and concluded.

(Approved by the Office of Management and Budget under control number 1140-[TBD])

7. Revise § 646.147 to read as follows:

§ 646.147 Required record-keeping information.

(a) *Distributors who are exempted persons.* Distributors who are exempted

persons as defined in § 646.143 must show the following information in their commercial records:

(1) For each disposition of more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco, to an exempted person; or for each disposition of more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco, to a person who is not an exempted person, which is delivered by the distributor to the recipient's place of business, the distributor must 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 or smokeless tobacco are destined; and

(iii) The quantity of cigarettes or smokeless tobacco disposed of.

(2) For each disposition of more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco, other than the dispositions specified in paragraph (a)(1) of this section, the distributor must 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 or smokeless tobacco;

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

(iv) The quantity of cigarettes or smokeless tobacco disposed of;

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

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

(vii) A declaration by the individual receiving the cigarettes or smokeless tobacco

of the specific purpose for the items (such as personal use, resale, delivery to another person, etc.); and

(viii) A declaration, by the person receiving the cigarettes or smokeless tobacco when acting as an agent, of the name and address of their principal.

(b) *Distributors who are not exempted persons.* Each distributor who is not an exempted person as defined in § 646.143 must show on dated commercial records the information specified in paragraphs (a)(2)(i) through (viii) of this section for each disposition of more than 10,000 cigarettes or 500 single-unit consumer-sized cans or packages of smokeless tobacco.

(Approved by the Office of Management and Budget under control number 1140-[TBD])

8. Amend § 646.150 by revising the section heading and paragraphs (a) and (b)(2) to read as follows:

§ 646.150 Retaining records.

(a) *General.* Each distributor that distributes more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco in a single transaction must retain the records required by §§ 646.146 and 646.147 for five years following the close of the year in which the records are made. Such distributors must keep the required records on their business premises (or otherwise make the records available from the business premises) and may keep them in electronic form. If storing records electronically, the distributors must maintain an electronic record-keeping system, including stored information, on their business premises or remotely, using a server located within the United States or its territories, or, if using a host facility, the facility must have a business premises within the United States or its territories that is subject to U.S. legal process. The distributors must also ensure that ATF can access the electronic records on the premises by request.

(b) * * *

(2) The tobacco products manufacturer will retain the required record for each disposition of more than 10,000 cigarettes, or 500 single-unit consumer-sized cans or packages of smokeless tobacco, from the agent's premises for the full retention period specified in paragraph (a) of this section; and

* * * * *

(Approved by the Office of Management and Budget under control number 1140-[TBD])

9. Revise the undesignated center heading preceding § 646.153 to read as follows:

Other Provisions Relating to Distributing Cigarettes and Smokeless Tobacco

10. Revise § 646.153 to read as follows:

§ 646.153 Authority of appropriate ATF officers to enter business premises.

Any ATF officer may, during normal business hours, enter the business premises of any person described in § 646.146 to inspect the records required under §§ 646.146 and 646.147, or to inspect any cigarettes or smokeless tobacco kept or stored by the person at the premises.

§ 646.154 [Amended]

11. Amend § 646.154(a) by adding the text “or contraband smokeless tobacco” after the text “contraband cigarettes”.

12. Revise § 646.155 to read as follows:

§ 646.155 Forfeitures.

(a) Any contraband cigarettes or contraband smokeless tobacco involved in any violation of the provisions of 18 U.S.C. chapter 114 are subject to seizure and forfeiture. The provisions of 18 U.S.C. chapter 46 relating to civil forfeitures extend to any seizure or civil forfeiture under this section. Any cigarettes or smokeless tobacco so seized and forfeited must be either —

(1) Destroyed and not resold; or

(2) Used for undercover investigative operations for detecting and prosecuting

crimes, and then destroyed and not resold.

(b) Any vessel, vehicle, or aircraft used to transport, carry, convey, conceal, or possess any contraband cigarettes or contraband smokeless tobacco 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 part is subject to seizure and forfeiture pursuant to 49 U.S.C. 80302–03. The provisions of 18 U.S.C. chapter 46 relating to civil forfeitures extend to any seizure or civil forfeiture under this section.

Robert Cekada,

Director.

[FR Doc. 2026-09160 Filed: 5/7/2026 8:45 am; Publication Date: 5/8/2026]