

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by Chairperson Representative Tony Powell at 1:30 p.m. on January 26, 2000 in Room 313-S of the Capitol.

All members were present.

Committee staff present: Theresa Kiernan, Revisor of Statutes  
Russell Mills, Legislative Research  
Mary Galligan, Legislative Research  
Winnie Crapson, Secretary

Conferees appearing before the committee:

Proponents

Tom Palace, Petroleum Marketers and Convenience Store Association

Written testimony

Circular of Bureau of Alcohol, Tobacco and Firearms

Others attending: See attached list.

Chairman Powell announced two items on agenda: hearing on **HB 2670** and consideration of **HB2581**.

Hearing was opened on

**HB 2670, Cigarettes; sales of certain cigarettes restricted.**

Tom Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA), testified in support (Attachment #1). PMCA represents over 360 independent petroleum companies and convenience stores. Mr. Palace referred to cigarettes labeled "for export use only" as "gray market cigarettes." They are produced in the U.S. and exported where independent brokers purchase them and re-import them into the U.S., benefitting from the fact that international wholesale prices may be \$10 a carton less. Although Kansas has not had a major influx of gray market cigarettes, several tobacco retailers have been identified by the tobacco companies as sellers of gray market cigarettes. Mr. Palace provided two packages as examples of gray market cigarettes. These packages do have a Nevada tax stamp.

New federal regulations enacted Jan. 1, 2000 make it illegal to import "for export only" cigarettes for resale regardless of whether all applicable taxes have been paid and labeling requirements met. More than twenty states have enacted or are considering state laws against gray market cigarettes. Chairman Powell asked why a parallel state statute was needed. Mr. Palace stated it would reinforce the federal issue. Enforcement is presently by Alcohol, Tobacco and Firearms Agents. A state law would allow state and local law enforcement to assist ATF.

In response to a question by Representative Cox, Mr. Palace said the ABC is powerless if the product has a tax stamp. Dealers put the tax stamp on repackaged products to make them legal.

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In response to Representative Freeborn's question, Mr. Palace said they are sometimes of the same quality but cigarettes sold outside the U.S. may be more or less strong. Representative Freeborn considers it a public health and tax issue. Mr. Palace said some dealers do put the tax stamp on gray market cigarettes.

Representative Klein said the Revisor provided him the definitions of cigarettes and of tobacco products, which does not include cigarettes. He asked if it was intentional that the proposed language refers only to "cigarettes." Mr. Palace knew of no tobacco products on the gray market. Representative Klein asked for clarification of current law and whether there was objection to adding "tobacco products" to the bill, to read "cigarettes and tobacco products." Mr. Palace stated as of January 1 the penalty is five times the export tax per shipment or \$4,000, whichever is greater.

Representative Vickrey asked if sales on tribal lands are involved. Mr. Palace said they purchase cigarettes from the manufacturers in the U.S. The only enforcement powers on the reservations would be the ATF or FBI. The State has no power even if they purchase gray market cigarettes.

In response to a question by Representative Dahl, Mr. Palace stated there were 20 cigarettes to a package and ten packages to a carton and that it would be illegal to possess more than a carton. Representative Dahl asked about Sec. 3 (u) at line 29, page 5. Theresa Kiernan referred to Sec. 3 (a) on page 3, line 39 saying you cannot have more than 200 cigarettes without the tax stamp. Mary Galligan explained that Sec. 3 (u) makes the cigarette made for export illegal even if it has the required State tax stamp.

Legislative Research provided a Bureau of Alcohol, Tobacco and Firearms Circular "Importation of Previously Exported Tobacco Products and Cigarette Papers and Tubes" (Attachment #2).

There being no further testimony in support or in opposition, the hearing was closed.

Chairman Powell opened consideration of **HB2581, Partial birth abortion.**

Chairman Powell proposed a substitute for **HB 2581** (Attachment #3) representing an effort to end the acrimony and find solution all can agree to. From his discussion with many member they believe the bill should be as simple as possible to solve a loophole in the present partial birth abortion statute—the mental health exception, which clearly has allowed for partial birth abortion taking place. The language is word-for-word that offered in the Governor's bill except for the late term abortions. He believes that if the focus is narrowed just to partial birth abortion, agreement can be reached to stop what he considers to be an abhorrent and terrible procedure which is occurring in our state. The substitute bans all partial birth abortions except for the life of the mother.

It includes a severability clause. If any part of Sec. 1 is struck down by the Court, the whole will be. If subsequent sections are struck down, the language would be severable. Chairman Powell moved the substitute bill (Attachment #3). Representative Vining seconded..

Representative Benlon said she had planned to ask if this discussion could be held over a day. She intends to offer an amendment. Chairman Powell said amendments can be taken up after the substitute has been considered..

Representative Benlon said the substitute continues to use language in lines 14 through 16 which is a possible weakness in the bill.

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Chairman Powell said a term can be defined in the statute. That was done in 1998 and the substitute will not change that in any respect. Ultimately, in the law the definition says what it is considered to mean. He is confident it is a clear definition because it has withstood constitutional scrutiny. The 6<sup>th</sup> Circuit and the 8<sup>th</sup> Circuit struck down partial birth abortion laws which inadvertently banned D&E. This bill specifically exempts that from the definition of partial birth abortion, and he believes it will meet constitutional muster.

Chairman Powell said in response to question by Representative Burroughs, that he believes the definition used should be that in current law and that the courts will be comfortable with that.

Representative Burroughs asked if it was possible to include the term "D&X" to strengthen the bill. Chairman Powell said the decision to be made was whether or not to ban partial birth abortion. The substitute bill will do that. He would like to avoid having a discussion as to how you define partial birth abortion and strongly believes after having reviewed the case law that this substitute would do that. If you perform an abortion that is prohibited by the language in the statute as we define partial birth abortion, it doesn't matter what you call it.

Vote was taken on the substitute for HB2581. The motion carried.

Representative Klein thanked Chairman Powell for having given him the proposed substitute earlier. He believes a problem with the bill is that it is completely getting rid of a health exception and a mental health exception and limiting exception under the partial birth abortion law only to the life of the pregnant woman. From his review of some 6<sup>th</sup> Circuit cases he believes it will not be constitutional. He is not a big fan of this procedure but believes this bill is not going to work. The only specific mental health exception is here. While he wants to fix the inadvertent error that has allowed an acceleration of the partial birth abortions performed in Kansas, he believes it cannot be fixed outside the mental health exception. Those things are going to be decided by the U.S. Supreme Court in July. He proposes an amendment that to put a mental health exception back in the post viability section of the statute.

Rep. Klein moved an amendment to move the mental health exception being deleted over into the post viability exception. Rep. Ruff seconded.

Chairman Powell said he believes there are differences in Circuits with regard to mental health exceptions. The 7<sup>th</sup> Circuit noted in the record that partial birth abortion is never medically necessary. This specifically excepts the D&E procedure. Therefore when any mental health issue is involved, another abortion procedure could easily be used. He said he understands the concerns of Representative Klein but this bill deals with only one abortion procedure that is not medically necessary and is not a frontal assault on a woman's right to an abortion. All other abortions on first and second trimesters would be totally unregulated.

Representative Dahl asked if there are facts to establish that there has been an escalation in partial birth abortions. Representative Klein referred to the report in committee last year from the Kansas Department of Health and Environment from statistics they are required to keep that it is an escalating number. He agreed H&E has not always been required to report partial birth abortions, but there is more history than was thought and there was an understanding that there was a clear mental health exception.

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Representative Benlon said she had an amendment that is similar to that offered by Representative Klein. She agrees that we are not going to shut the door on partial birth abortions unless we look at the entire issue. She does not believe that as a legislator she has the right to tell a woman who finds herself pregnant that she may or may not have an abortion, that a woman should have the right to make a decision to terminate that pregnancy when it does in fact affect her mental health.

Representative Klein said he was concerned about unintended consequences, that there was some discussion about section (a). If for the sake of argument it is overturned, and in a couple of years there are partial birth abortions done in the State, the standard applied would be a post-viability standard and the door is wide open again. He cannot see the future well enough to say whether this is good or bad. He applauds the efforts of those trying to ban this procedure, but every other abortion law is implicated and it will be litigated. He believes if the mental health exception is put back into the bill there would not be much controversy and it would pass.

Rep. Klein moved the amendment.

The motion failed 9-12.

Representative Burroughs asked why the civil penalty was removed. Chairman Powell said he supported the idea of civil penalties but believed this bill should be focused squarely on one issue and to avoid additional issues, the civil remedy section was deleted. He is sure that issue will be debated sometime in the future.

Representative Burroughs said with reference to the statement of the American Medical Association he would offer a substitute motion adding the D&X definition in the bill. Representative Benlon offered for his use the motion she had prepared.

Representative Burroughs moved the amendment (Attachment 4). Representative Benlon seconded.

Representative Gilbert asked if we knew for sure the D&X procedure will not be done. Chairman Powell referred to the language in the amendment. Representative Benlon said the Revisor provided her the definition which was what Representative Vining had used in her testimony. It came from the 7<sup>th</sup> Circuit and she believes it is very clear. Representative Burroughs explained it would include "D&X" and would strike the word "living" before "fetus".

Chairman Powell said this is the AMA definition but part of the problem is that we are dealing with Dr. Tiller in Wichita and that affects his community so much. He can see where if he simply does not do one of these things, then it no longer merits the definition of partial birth abortion. Current law is a bit broader but still is within the term of what partial birth abortion is commonly understood which he thinks is necessary for the bill to be constitutional.

Representative Burroughs withdrew the amendment. Representative Benlon did not agree as seconder and moved the amendment. Rep. Gilbert seconded.

Motion failed 9-12.

Representative Benlon offered another amendment, providing an exception in the case of rape or incest. Representative Benlon moved the amendment (Attachment #5). Representative Peterson seconded.

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Chairman Powell said he appreciated the proposed amendment, but the substitute bill bans only partial birth abortion and it is his understanding these exceptions can easily be dealt with in the first two trimesters.

In response to question of Representative Freeborn, Representative Benlon said there was no reference to a definition of severe fetal abnormalities. She would hope a physician doing a sonogram or other tests would be able to help with that. Representative Freeborn said spina bifida is considered a severe abnormality but she has friends who raised that child who went through computer school and is earning a good income although he was never out of a wheelchair, never walked. This would give the mother the right to choose a perfectly formed child.

Representative Benlon said she was shocked that in discussion on the House floor in 1999 a Representative insinuated someone might encourage abortion if they found out their unborn child had a cleft palate. She definitely believe in the right to choose but can't imagine there would be very many women who would consider using it for those purposes. She said she did not access to any list of "severe fetal abnormalities" that she considered was proper use of this exception but firmly believes that is a decision to be made by the mother and the doctor.

Representative Freeborn said she would oppose this amendment because she believes it is too broad a loophole and she would have to see a definition of what would be considered.

Representative Peterson said she, too, resented the comments made on the floor. If there was the possibility of life beyond two or three months, she did not feel she as a legislator has any right to come between a mother and father and doctor to make such a decision.

Rep. Mayans said a lot of people are very passionate about this issue which he respects. He will oppose the amendment. There can be debate on the floor of the House. He had certain questions about rape and incest and shared the explanation given him by a Roman Catholic Bishop that rape is a terrible crime with a perpetrator and a victim, but the woman again to victimizes herself by having an abortion and creates other victims. Those with severe fetal abnormality born and become citizens and partakers of our great nation. A Roman Catholic sister expressed to him that is a gift from God and an opportunity to love someone who is perhaps not able to love you back. You need that person more than that person needs you because of what you learn from the person with disabilities. We have to keep in mind the ramifications of our decisions when we make exceptions.

Representative Morrison said she was concerned that a sonogram is just a tool and not 100% accurate. Many women were told their child would have a severe abnormality and when they were born they were perfectly fine.

Representative Benlon said in response to Representative Ruff that she liked the idea of using the term "fatal" fetal abnormality (not able to survive outside the womb), but thinks there might be a problem with parameters. She referred to the Statutory language "threatened with severe or life threatening abnormality." The concern with the word "fatal" is, fatal at what point

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Chairman Powell said we have a viability standard that is already covered by current law.

Representative Benlon moved the amendment. It failed 9-12.

Representative Klein said he appreciated the way that this discussion took place on both sides with the major passions kept out of the debate. He urged an open mind and awareness of unintended consequences.

**Rep. Freeborn moved Substitute HB 2581. Rep. Vining: seconded. Substitute HB 2581 passed.**

The Committee adjourned at 3:18 p.m. The next scheduled meeting is January 27.

# HOUSE FEDERAL & STATE AFFAIRS COMMITTEE

## COMMITTEE GUEST LIST

DATE: Jan. 26, 2000

NAME	REPRESENTING
Pete Bodyk	KDOR / ABC
Jakone Cole	Sen. Tyson Intern
Bruce Dimmitt	KFL
Carla Norcott-Mahony	PPKM
D. S. Koch	UST
Steve Keavonky	PMCA
Ron Heik	Hein & Weir, Chfd
Gally Ferguson	Co. Public Health Assoc.
Eric M. Wolf	HEART ASSN.
Bill M. G. G.	KPOA / ABC / FDA
Mary Payne Helbert	KSKJ
Cary Grant	Film Association
Laurie William	Gov. Office
Anne Spiess	Peterson Public Affairs Group
John Hanjin	Wm



Testimony: House Federal and State Affairs Committee  
From: Thomas M. Palace  
Date: January 26, 2000  
RE: Gray Market Cigarette Legislation

Mr. Chairman, and members of the House Federal and State Affairs Committee. My name is Tom Palace, Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas), a statewide trade association representing over 360 independent Kansas Petroleum companies and convenience stores throughout Kansas.

We appreciate the opportunity to appear before you in support of HB 2670.

HB 2670 amends the current tobacco statutes to prohibit the sale of cigarettes that are labeled "for export use only." The term that you will hear me use today in reference to the above mentioned cigarettes is "gray market cigarettes.

Gray market cigarettes are produced in the United States and are exported to foreign markets. Independent brokers purchase them abroad and re-import them into the U.S. Gray market cigarettes benefit from the fact that international wholesale prices may be about \$10 a carton less than domestic prices. The gray market in cigarettes has raised numerous concerns about its negative consequences. The most important is its vulnerability to being manipulated by organized criminals who dominate in cigarette smuggling. This is because the gray market tends to be less tightly regulated than the domestic system used to distribute cigarettes.

Although Kansas has not had a major influx of gray market cigarettes, there have been several tobacco retailers that have been identified by the tobacco companies as sellers of gray market cigarettes. As such, the tobacco companies have rescinded the retailers' advertising contracts. However, as the price of tobacco increases, gray market cigarettes become much more attractive because they are cheaper to buy.

The gray market problem has become so significant that various initiatives have been undertaken to address the issue. These include:

New federal regulations enacted January 1, 2000, that make it illegal to import "for export only" cigarettes and introduce them directly into the domestic U.S. market regardless of whether all the applicable taxes have been paid, and labeling requirements met. Under the proposed new regulations, "for export only" cigarettes re-entering the United States must either go to a manufacturer or be re-exported.

Tobacco companies are canceling tobacco retailer contracts to stop the sale of gray market cigarettes.

Petroleum Marketers and Convenience Store Association of Kansas  
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More than 20 states, either have enacted, or are in the process of enacting, state laws against gray market cigarettes.

The current system under which gray market cigarettes are imported, distributed and sold is far less regulated than the domestic distribution system. Moreover, it does not yield the kind of comprehensive audit trail that ensures compliance in the domestic distribution system. The result: the gray market is much more vulnerable to black market diversion. This is a major concern in other parts of the country but locally the major concerns with regard to gray market cigarettes include:

Reduced states' revenue under the Tobacco Settlement, as payments under the Settlement framework are calculated on the basis of the domestic sales of manufacturers.

Unfair competition for domestic wholesalers and retailers who charge higher prices as a result of the Tobacco Settlement.

Undermines qualitative product standards, like freshness. Concerns have been raised about the manner in which cigarettes outside normal distribution channels are handled ( how long they sit in a warehouse waiting to be shipped).

Consumers confusion because gray market cigarettes are often different from the versions consumed in the United States. Cigarettes are blended to meet the different taste requirements of the individual markets. Packaging is also a concern.

Warning labels that are different from the federally required Surgeon General's messages on all domestic cigarette packages..

Elimination of gray market cigarettes will not be easy. Although there are new federal regulations that make gray market cigarettes illegal, federal enforcement will be limited, especially here in Kansas. Passage of HB 2670 reinforces the federal regulations at the state level whereby the sale of gray market cigarettes will be enforced at the local level. Any person that violates provisions of the Kansas cigarette and tobacco products act, upon conviction can be fined up to \$1,000 or imprisoned for not more than one year, or both.

Mr. Chairman, I appreciate the opportunity to appear before you today, and will stand for any questions you may have.

## 2.2 What is the Gray Market?

There are gray markets in numerous products including perfume, electronic goods, photographic equipment and high-fashion apparel. Gray market retailers and wholesalers take advantage of the fact that the same, or similar, products, may be priced differently in separate markets.

However, the gray market also has its downsides for consumers. One example: such products do not carry factory warranties, a key consideration when buying expensive watches, camera equipment or electronic goods.

With cigarettes, the current gray market focus is on American-made cigarettes intended for foreign markets that are re-imported into the U.S. for domestic consumption.

Gray market cigarettes benefit from the disparity between domestic and international wholesale prices. The reasons for this difference include:

- Exported cigarettes are not subject to the \$4.50-a-carton Tobacco Settlement levy;
- Exported cigarettes do not bear any of the domestic costs for promotion and market support initiatives;
- Manufacturers may lower the price of cigarettes intended for a particular export market in order to be competitive with lower-cost foreign-made cigarettes, including foreign versions of their own brands made under license by independent foreign producers.
- Manufacturers may wish to enter a new market where lower pricing will give them a competitive advantage.
- Currency fluctuations and/or the relative weaknesses of the purchasing power in local economies may necessitate lower price levels.

## 2.3 Root Causes of the Cigarette Gray Market

The underlying cause of the rise in the cigarette gray market are twofold: recent state tax increases, and the \$4.50-a-carton price rise resulting from the 1998 Tobacco Settlement. (While not strictly a tax, the Tobacco Settlement increase exerts the same impact on consumers as a tax, and is regarded for the purpose of this primer as a levy.<sup>4</sup>)

Together, they have created a stronger consumer demand for a cheaper product – even in states, like Florida, with comparatively low levels of state taxation. (Florida has a state tax of \$3.39 a carton, which is just below the 1998 national weighted state average cigarette tax of \$3.46 a carton. The highest state tax in the continental United States is California at \$8.70 a carton.)<sup>5</sup>

Put another way, the state tax increases and the Tobacco Settlement combined to significantly push cigarette prices above the flash point.

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The flash point is a useful benchmark in gauging the impact of incentives to smuggling in a particular jurisdiction. This concept was developed in the 1970s by the Advisory Commission on Intergovernmental Relations (“ACIR”), an agency established by Congress in 1959.<sup>6</sup>

The flash point is the point at which the incentive to smuggle is high enough to entice organized crime to enter the contraband market.

When inflation is taken into account, FIA estimates that the ACIR flash point of \$2.30 a carton in 1985 for inter-state smuggling – involving the evasion of state taxes only – translates into a 1998 flash point of about \$3.48 a carton. The flash point at the international level is higher because greater costs are incurred. Preliminary analysis suggests that the flash point for international smuggling – involving the evasion of federal and state taxes – might be in the range of \$15 a carton.

As the incentive in a particular state begins to exceed a flash point, the point at which organized crime actually starts to enter a contraband market will vary depending on such local factors as the level of risk, operational costs and market opportunities. There may also be a time lag before an organized crime group is able to adjust to the incentive created by a tax increase.

Because it was applied as widely as a federal tax increase, the Tobacco Settlement price rise helped to boost the incentive to smuggle in all 50 states.



# INDUSTRY CIRCULAR

DEPARTMENT OF  
THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

Washington, DC 20226

Number:

Date:

2000-1

October 5, 1999

## IMPORTATION OF PREVIOUSLY EXPORTED TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

Importers of Tobacco Products or Cigarette Papers and Tubes,  
Manufacturers of Tobacco Products or Cigarette Papers and Tubes  
and others concerned:

Purpose. This Industry Circular advises businesses that engage in the importation of tobacco products and cigarette papers and tubes of the restriction and penalty of the Balanced Budget Act of 1997 (Section 9302(h) and (i) of Public Law 105-33, 111 Stat., 672). This circular addresses the importation of these products that were previously exported from the United States.

### 1. Who can import previously exported tobacco products and cigarette papers and tubes?

On or after January 1, 2000, only manufacturers of tobacco products or cigarette papers and tubes or export warehouse proprietors may receive from customs custody tobacco products and cigarette papers and tubes previously exported from the United States. The receipt from Customs Custody must be in bond. This means that on or after January 1, 2000, a business will not be able to remove these previously exported tobacco products and cigarette papers and tubes from customs custody by paying the customs duties and Federal excise tax. Manufacturers of tobacco products or cigarette papers or tubes or export warehouse proprietors must be qualified under Chapter 52 of the Internal Revenue Code (IRC) and must have a bond sufficient to cover the additional Federal excise tax on these previously exported tobacco products and cigarette papers and tubes. [Tobacco products include cigarettes, cigars, pipe tobacco, snuff, chewing tobacco and roll-your-own tobacco.]

Before January 1, 2000, a business may continue to remove previously exported tobacco products and cigarette papers and tubes from customs custody assuming that duty and excise taxes are paid and other requirements for the United States market (for example, Surgeon General's warning) have been met.

### 2. On or after January 1, 2000, what penalties apply to a person who continues to import tobacco products and cigarette papers and tubes that were previously exported from the United States and that are not being shipped in bond to a qualified tobacco products manufacturer or export warehouse proprietor?

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The Balanced Budget Act of 1997 imposes a civil penalty on any person who:

Sells, relands, or receives within the jurisdiction of the United States any tobacco products, including cigarettes, which have been labeled or shipped for exportation under chapter 52 of IRC.

Sells or receives such relanded tobacco products or cigarette papers or tubes.

Aids or abets in such selling, relanding, or receiving.

The civil penalty is in addition to the tax and other penalties under the IRC, including criminal penalties. The civil penalty is at least a \$1,000 fine and subjects to forfeiture the tobacco products and cigarette papers and tubes to the United States. A larger fine may be imposed if the amount of the Federal excise tax on the tobacco products and cigarette papers and tubes is greater than \$200. In addition, any vessel, vehicle or aircraft involved in relanding or removing the tobacco products and cigarette papers and tubes is subject to forfeiture to the United States.

3. Will these penalties apply to a person dealing in tobacco products or cigarette papers and tubes that were lawfully entered into the United States before January 1, 2000?

No. No person will be penalized, as described above, for dealing in previously exported tobacco products and cigarette papers and tubes that are lawfully entered into the United States before January 1, 2000.

Questions. If you have questions about this industry circular, please contact your local Bureau of Alcohol, Tobacco and Firearms (ATF) office, or the Regulations Division, Room 5003, ATF, Washington, DC 20226 (202-927-8210). Also, you may send us an e-mail at alcohol/tobacco@atfhq.atf.treas.gov.

(signed)

John W. Magaw  
Director

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Industry Circular  
 Department of the Treasury  
 Bureau of Alcohol Tobacco and Firearms  
 Washington, DC 20226

Number: 99-2      Date: June 16,  
 1999

**UNLAWFUL TRANSPORTATION,  
 SHIPMENT, OR SALE OF CIGARETTES AND DOMESTIC SALE  
 OF CIGARETTES LABELED FOR EXPORT**

**Manufacturers of Cigarettes,  
 Importers, Export Warehouse Proprietors and  
 Other Persons Who Purchase and Sell Cigarettes**

**PURPOSE.** The Bureau of Alcohol, Tobacco and Firearms (ATF) is issuing this circular to remind all persons of the Federal laws (and penalties) applying to the shipment, sale or possession of cigarettes and to the domestic sales of cigarettes marked for export. Additionally, this circular briefly addresses the sale of cigarettes on Native American tribal reservations.

**BACKGROUND.** Every State imposes some tax on the sale of cigarettes. The liability for these taxes generally arises once the cigarettes enter the jurisdiction of the State. The vast majority of States requires a "tax stamp or imprint" to be placed on packages of cigarettes to demonstrate that the State tax has been paid. Wholesale distributors in the various States are generally responsible for the payment of the State tax and for affixing the tax stamp or imprint.

Recognizing that the range in State cigarette taxes creates a potential for interstate trafficking in cigarettes to avoid State tax, Congress has enacted Federal laws to help ensure the State cigarette taxes are paid. These Federal laws make it unlawful to traffic in cigarettes to avoid State cigarette taxes. Moreover, these laws impose certain record keeping and reporting requirements on persons who ship cigarettes in interstate commerce. Violations of these Federal laws can result in the imposition of a prison term, a monetary fine, or both. These laws are discussed in detail below to ensure that people who are engaged in the interstate sale or shipment of cigarettes are familiar with these requirements. ATF has encountered a number of situations in which cigarettes are being sold or shipped in violation of these Federal laws.

In addition, ATF has received several inquiries regarding the legality of the domestic sale of cigarettes bearing the export mark "U.S. tax exempt for use outside the U.S." Such sales are governed by Federal law. Violations of these Federal laws can result in the imposition of a Federal prison term, a mandatory fine, or both. These laws are discussed in detail below to ensure that people who engage in the domestic sale of cigarettes marked for export are familiar with these requirements.

**CONTRABAND CIGARETTE TRAFFICKING ACT**

The Contraband Cigarette Trafficking Act, which can be found at title 18, United States Code, chapter 114, makes it unlawful for any person, other than an "exempt person," to ship, transport, receive, possess, sell, distribute, or purchase "contraband cigarettes." "Contraband cigarettes" are defined as a quantity of more than 60,000 cigarettes that bear no evidence of the payment of any State cigarette tax imposed by the State where such cigarettes are found. The Contraband Cigarette Trafficking Act applies only to cigarettes found in States that require a stamp or other indicia to be placed on cigarette packages to evidence payment of the tax.

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The following persons are "exempt persons" under the Contraband Cigarette Trafficking Act:

- Any person who holds a Federal permit as a manufacturer of tobacco products or as an export warehouse proprietor.
- Any person operating a customs bonded warehouse under the authority of Federal law.
- Any person who is an agent of a tobacco product manufacturer, an export warehouse proprietor, or a customs bonded warehouse.
- Any person who is a common or contract carrier transporting cigarettes under a proper bill of lading or freight bills which states the quantity, source, and destination of the cigarettes.
- Any person licensed or otherwise authorized by the State in which the person possesses the cigarettes, to account for and pay the cigarette taxes imposed by that State, so long as that person is complying with the accounting and payment requirements relating to his or her license or authorization.
- Any person who is an agent of the United States, an individual State, or a political subdivision of a State who possesses, ships or receives the cigarettes in connection with the performance of his or her official duties.
- Any person operating within a foreign trade zone, established under Federal law, when the cigarettes in question have entered the zone under zone-restricted status. The same exemption applies with respect to foreign imported cigarettes that have been admitted into the zone but have not entered the United States.

The Contraband Cigarette Trafficking Act also requires persons who ship, sell, or distribute more than 60,000 cigarettes in a single transaction to keep certain records about the shipment, receipt, sale, and distribution of such cigarettes. Any person who distributes more than 60,000 cigarettes in a single transaction is required to keep copies of invoices, bills of lading, or other suitable commercial records relating to each distribution of 60,000 cigarettes or more. Dividing a single agreement for the disposition of more than 60,000 cigarettes into multiple deliveries or shipments of smaller components of 60,000 cigarettes or less does not exempt the person from keeping these records.

When an **exempt person/distributor** distributes more than 60,000 cigarettes to another exempt person, **OR**

When an **exempt person/distributor** distributes more than 60,000 cigarettes to a non-exempt person, but **only** where the exempt person/distributor delivers the cigarettes to the non-exempt person's place of business, the distributor's dated commercial records must contain the following information:

- The full name of the purchaser (or recipient if there is no purchaser)
- The street address (including city and state) where the cigarettes are destined

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- The quantity of cigarettes distributed

In all other cases where a distributor (exempt or non-exempt person) distributes more than 60,000 cigarettes, the distributor's dated commercial records must show the following:

- The full name of the purchaser (if any)
- The name, address (including city and state), and signature of the person receiving the cigarettes
- The street address (including city and state) where the cigarettes are destined
- The quantity of cigarettes distributed
- The driver's license number of the individual receiving the cigarettes
- The license number of the vehicle in which the cigarettes are removed from the distributor's business premises
- A declaration by the individual receiving the cigarettes of the specific purpose of receipt (such as personal use, resale, delivery to another person, etc.)
- A declaration by the person receiving the cigarettes of the name and address of his or her principal when acting as an agent

These dated commercial records must be kept on the business premises of the distributor. Generally, distributors must keep these records for three years following the close of the year in which the records were made. The ATF regulations on the Contraband Cigarette Trafficking Act are found at title 27, Code of Federal Regulations, sections 296.141 to 296.155.

A violation of the Contraband Cigarette Trafficking Act, including failure to keep the required records, is a Federal felony. Conviction of these crimes can result in a Federal prison term, a monetary fine, or both. Moreover, persons who aid and abet violations of the Contraband Cigarette Trafficking Act, or persons who conspire with others to violate the Contraband Cigarette Trafficking Act can be imprisoned and/or fined as well. The Federal aiding and abetting statute can be found at title 18, United States Code, section 2 and the Federal conspiracy statute can be found at title 18, United States Code, section 371.

#### JENKINS ACT

The Jenkins Act, which can be found at title 15, United States Code, section 375, applies to certain persons who sell cigarettes or advertise the sale of cigarettes in interstate commerce, including mail order sales and advertisements for such sales. Any person who advertises cigarettes for sale (including on the Internet) or who ships cigarettes into a State to any person other than a cigarette distributor licensed by the State must file a statement with the tobacco tax administrator of that State. The statement must list the seller's name, trade name (if any), and address of all business locations.

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The Jenkins Act also requires a person who ships cigarettes into a State to any person (other than a person licensed by that State as a wholesale or retail distributor) to report these sales to the tobacco tax administrator. This report must be filed no later than the 10<sup>th</sup> calendar day of the month and must contain the following information for shipments made into that State during the previous month:

- The name and address of the person to whom the shipments were made
- The brand of cigarettes shipped
- The quantity of cigarettes shipped

Copies of commercial records can be utilized for this report, so long as the commercial record contains all of the necessary information. This report is not required if the shipment is made to a person who is a licensed wholesale or retail distributor in the State into which the cigarettes are shipped.

A violation of the Jenkins Act can result in a Federal prison term, a monetary fine, or both.

#### DOMESTIC SALE OF CIGARETTES MARKED FOR EXPORT

The Internal Revenue Code of 1986, title 26, United States Code, section 5701 imposes a Federal excise tax on tobacco products manufactured or imported into the United States. This tax does not apply to exported products. Packages of exported products must be marked for export to differentiate them from packages intended for domestic sale. ATF regulations currently permit the re-importation and sale of packages of products marked for export so long as the Federal excise tax and applicable Customs duties are paid when the cigarettes are re-imported.

The Internal Revenue Code has been amended to restrict the re-importation of exported tobacco products. These amendments only permit the re-importation of tobacco products to a Federally licensed manufacturer or a Federally licensed export warehouse proprietor. Tobacco products re-imported to a manufacturer will have to be repackaged to remove the exportation markings before being sold on the domestic market. Tobacco products re-imported to an export warehouse proprietor can only be exported again or transferred to a tobacco product manufacturer. As a result these amendments will make it unlawful to sell tobacco products marked for export on the U.S. domestic market. These amendments become effective January 1, 2000.

Violations of these provisions can be prosecuted as Federal felonies. Convictions can result in a Federal prison term, a monetary fine, or both. In addition, persons who possess Federally untaxed tobacco products can be assessed the full amount of tax due, plus applicable interest and penalties.

#### SALES/PURCHASES INVOLVING NATIVE AMERICAN RESERVATIONS

ATF has recently received several inquiries about cigarette sales and purchases that involve Native American reservations. Sales or shipments of cigarettes from Native American Reservations are **not** exempt from the requirements of the Contraband Cigarette Trafficking Act and the Jenkins Act. Additionally, the application of State taxes and regulatory requirements to sales made on Native American reservations varies depending on the transaction. Accordingly, anytime you engage in transactions involving a Native American Reservation, ATF recommends that you contact your State tobacco tax administrator to determine the extent of your liability for State tobacco tax.

STATE TOBACCO TAX ADMINISTRATORS

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Enclosed with this circular is a listing of State tobacco tax contacts. ATF encourages you to contact those offices if you have any question relating to potential liability for State cigarette taxes, record keeping or reporting requirements.

Alabama (334) 242-9600	Louisiana (504) 925-7652	Oklahoma (405) 521-4104
Alaska (907) 465-3691	Maine (207) 287-4755	Ontario (905) 433-6335
Arizona (602) 542-4023	Maryland (410) 974-5388	Oregon (503) 945-8117
Arkansas (501) 682-7187	Massachusetts (617) 887-5090	Pennsylvania (717) 783-4649
California (916) 327-3276	Michigan (517) 322-6303	Rhode Island (401) 277-6260
Colorado (303) 866-2381	Minnesota (800) 657-3618	South Carolina (803) 737-4867
Connecticut (860) 297-5891	Mississippi (601) 359-1137	South Dakota (605) 773-3311
Delaware (302) 577-3300	Missouri (573) 751-3804	Tennessee (615) 741-2679
District of Columbia (202) 727-6070	Montana (406) 444-1930	Texas (512) 463-3869
Florida (904) 488-3227	Nebraska (402) 471-5676	Utah (801) 297-4671
Georgia (404) 656-4252	Nevada (702) 687-6483	Vermont (802) 828-2310
Hawaii (808) 587-1622	New Hampshire (603) 271-3701	Virginia (703) 591-9222
Idaho (208) 334-7602	New Jersey (609) 984-1225	Washington (360) 753-3226
Illinois (312) 814-1750	New Mexico (505) 827-0762	West Virginia (304) 558-8516
Indiana (317) 232-2199	New York (518) 457-0432	Wisconsin (608) 266-2479

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Iowa  
(515) 281-8023

North Carolina  
(919) 733-1352

Wyoming  
(307) 777-5293

Kansas  
(913) 296-2461

North Dakota  
(701) 328-3471

Kentucky  
(502) 564-5440

Ohio  
(614) 466-6939

**QUESTIONS.** If you have any questions or comments in connection with this industry circular, please do not hesitate to contact ATF's Diversion Branch at 202-927-3580.

/s/

Arthur J. Libertucci  
Assistant Director  
(Alcohol and Tobacco)

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## PROPOSED SUBSTITUTE FOR HOUSE BILL NO. 2581

By Committee on Federal and State Affairs

AN ACT concerning abortion; relating to partial birth abortion; amending K.S.A. 1999 Supp. 65-6721 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1999 Supp. 65-6721 is hereby amended to read as follows: 65-6721. (a) No person shall perform or induce a partial birth abortion on a ~~viable~~ fetus unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine: ~~--(1)--~~ The, in accordance with accepted practices and standards applied by physicians in the same or similar circumstances, that the abortion is necessary to preserve the life of the pregnant woman; ~~--or--~~(2) ~~--a--~~ ~~continuation--of--the pregnancy--will--cause--a--substantial--and--irreversible--impairment--of--a--major--physical--or--mental--function--of--the--pregnant--woman.~~

(b) As used in this section:

(1) "Partial birth abortion" means an abortion procedure which includes the deliberate and intentional evacuation of all or a part of the intracranial contents of a ~~viable~~ fetus prior to removal of such otherwise intact fetus from the body of the pregnant woman.

(2) "Partial birth abortion" shall not include the: (A) Suction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman.

(c) If a physician determines in accordance with the provisions of subsection (a) that a partial birth abortion is necessary and performs a partial birth abortion on the woman, the physician shall report such determination and the reasons for such determination in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and

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environment under K.S.A. 65-445, and amendments thereto or. If the abortion is not performed in a medical care facility, the physician shall report the reasons for such determination in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto. The physician shall retain a copy of the written reports required under this subsection for not less than five years.

(d) A woman upon whom an a partial birth abortion is performed shall not be prosecuted under this section for a conspiracy to violate this section pursuant to K.S.A. 21-3302, and amendments thereto.

(e) Nothing in this section shall be construed to create a right to an abortion. Nothing in this section shall be construed as eliminating the necessity for compliance with the woman's right-to-know act. Notwithstanding any provision of this section, a person shall not perform an abortion that is prohibited by law.

(f) ~~Upon---conviction--of--a--violation--of--this~~ A person convicted of intentionally, knowingly or recklessly violating this section, a person shall be guilty of a severity level 10 person felony.

(g) If any word, clause, phrase or other provision of subsection (a), or the application thereof to any person or circumstance is found unconstitutional, the same is hereby declared to be inseverable.

If any word, clause, phrase or other provision of subsections (b) through (f) of this section or the application thereof to any person or circumstance is found to be unconstitutional, the same are hereby declared to be severable and the other provisions of this section shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this act, and each word, clause, phrase or other provision, with the exception of subsection (a) irrespective of the fact that any one or more

phrases or other provisions be declared unconstitutional.";

Sec. 2. K.S.A. 1999 Supp. 65-6721 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

On page 1, by striking all in lines 14 through 16 and inserting:

"(b) "Partial-birth abortion" means an abortion procedure which includes the: (1) Deliberate dilatation of the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breach; (3) breech extraction of the body excepting the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."

Proposed Amendment to HB 2581

On page 1, by striking all in lines 12 through 43;

On page 2, by striking all in lines 1 through 19 and inserting:

"Section 1. K.S.A. 1999 Supp. 65-6703 is hereby amended to read as follows: 65-6703. (a) No person shall perform or induce an abortion when the fetus is viable unless:

(1) Such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine that: ~~(1)~~ (A) The abortion is necessary to preserve the life of the pregnant woman; or ~~(2)~~ (B) a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman; or

(2) such person is a physician and such physician determines the pregnancy is a result of rape or incest or that the fetus suffers from a severe fetal abnormality.

(b) (1) Except in the case of a medical emergency, prior to performing an abortion upon a woman, the physician shall determine the gestational age of the fetus according to accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances. If the physician determines the gestational age is less than 22 weeks, the physician shall document as part of the medical records of the woman the basis for the determination.

(2) If the physician determines the gestational age of the fetus is 22 or more weeks, prior to performing an abortion upon the woman the physician shall determine if the fetus is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances. In making this determination of viability, the physician shall perform or cause



to be performed such medical examinations and tests as are necessary to make a finding of the gestational age of the fetus and shall enter such findings and determinations of viability in the medical record of the woman.

(3) If the physician determines the gestational age of a fetus is 22 or more weeks, and determines that the fetus is not viable and performs an abortion on the woman, the physician shall report such determinations and the reasons for such determinations in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed in a medical care facility, the physician shall report such determinations and the reasons for such determinations in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

(4) If the physician who is to perform the abortion determines the gestational age of a fetus is 22 or more weeks, and determines that the fetus is viable, both physicians under subsection (a) determine in accordance with the provisions of subsection (a) that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman and the physician performs an abortion on the woman, the physician who performs the abortion shall report such determinations, the reasons for such determinations and the basis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and environment

under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed in a medical care facility, the physician who performs the abortion shall report such determinations, the reasons for such determinations and the basis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible impairment of a major bodily function of the pregnant woman in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

(5) The physician shall retain the medical records required to be kept under paragraphs (1) and (2) of this subsection (b) for not less than five years and shall retain a copy of the written reports required under paragraphs (3) and (4) of this subsection (b) for not less than five years.

(c) A woman upon whom an abortion is performed shall not be prosecuted under this section for a conspiracy to violate this section pursuant to K.S.A. 21-3302, and amendments thereto.

(d) Nothing in this section shall be construed to create a right to an abortion. Notwithstanding any provision of this section, a person shall not perform an abortion that is prohibited by law.

(e) As used in this section, "viable" means that stage of fetal development when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures.

(f) If any provision of this section is held to be invalid or unconstitutional, it shall be conclusively presumed that the legislature would have enacted the remainder of this section without such invalid or unconstitutional provision.

(g) Upon a first conviction of a violation of this section, a person shall be guilty of a class A nonperson misdemeanor. Upon a second or subsequent conviction of a violation of this section, a person shall be guilty of a severity level 10, nonperson felony.

Sec. 2. K.S.A. 1999 Supp. 65-6721 is hereby amended to read as follows: 65-6721. (a) No person shall perform or induce a partial birth abortion on a viable fetus unless:

(1) Such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion and both physicians determine: ~~(1)~~ (A) The abortion is necessary to preserve the life of the pregnant woman; or ~~(2)~~ (B) a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman; or

(2) such person is a physician and such physician determines the pregnancy is a result of rape or incest or that the fetus suffers from a severe abnormality.

(b) As used in this section:

(1) "Partial birth abortion" means an abortion procedure which includes the deliberate and intentional evacuation of all or a part of the intracranial contents of a viable fetus prior to removal of such otherwise intact fetus from the body of the pregnant woman.

(2) "Partial birth abortion" shall not include the: (A) Suction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman.

(c) If a physician determines in accordance with the provisions of subsection (a) that a partial birth abortion is necessary and performs a partial birth abortion on the woman, the physician shall report such determination and the reasons for such determination in writing to the medical ~~care facility~~ in

which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed in a medical care facility, the physician shall report the reasons for such determination in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto. The physician shall retain a copy of the written reports required under this subsection for not less than five years.

(d) A woman upon whom an abortion is performed shall not be prosecuted under this section for a conspiracy to violate this section pursuant to K.S.A. 21-3302, and amendments thereto.

(e) Nothing in this section shall be construed to create a right to an abortion. Notwithstanding any provision of this section, a person shall not perform an abortion that is prohibited by law.

(f) Upon conviction of a violation of this section, a person shall be guilty of a severity level 10 person felony.

Sec. 3. K.S.A. 1999 Supp. 65-6703 and 65-6721 are hereby repealed.";

By renumbering section 7 as section 4;

In the title, in line 9, by striking all following the semicolon and inserting "relating to partial birth abortion; amending K.S.A. 1999 Supp. 65-6703 and 65-6721 and repealing the existing sections.";