

STATE OF OKLAHOMA

2nd Session of the 54th Legislature (2014)

SUBCOMMITTEE RECOMMENDATION
FOR

HOUSE BILL NO. 2361

By: Cox

SUBCOMMITTEE RECOMMENDATION

An Act relating to cigarette tax; amending 68 O.S. 2011, Section 317.8, which relates to actions to prevent or restrain violations; updating statutory citations; prohibiting the mailing, shipping or delivery of cigarettes to persons in this state; providing exceptions for certain types of persons and entities; defining certain terms; making it illegal for a common or contract carrier to knowingly transport cigarettes to nonexempt persons; allowing a certain number of cigarettes to be transported to a home or residence by certain persons; providing penalties for violations; making each illegal shipment or transport a separate violation; providing for deposit of civil penalties in the Attorney General's Evidence Fund; amending 68 O.S. 2011, Section 349.1, which relates to tobacco taxes on noncompact tribes or nations; clarifying statutory citations; prohibiting traders from selling tobacco, cigars or cigarettes to persons under certain age; repealing 68 O.S. 2011, Sections 317.2, 317.3, 317.4, 317.5, as amended by Section 6, Chapter 357, O.S.L. 2012, 317.6 and 317.7 (68 O.S. Supp. 2013, Section 317.5), which relate to the requirements for the shipping and delivery of cigarettes; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

1 SECTION 1. AMENDATORY 68 O.S. 2011, Section 317.8, is
2 amended to read as follows:

3 Section 317.8 The Attorney General or his or her designee, or
4 any person who holds a permit under 26 U.S.C., Section 5712, may
5 bring an action in the appropriate court in the State of Oklahoma to
6 prevent or restrain violations of Section ~~6, 7, 8, 9, 10 or 11~~ 317.1
7 of this ~~act~~ title by any person or any person controlling such
8 person.

9 SECTION 2. NEW LAW A new section of law to be codified
10 in the Oklahoma Statutes as Section 317.9 of Title 68, unless there
11 is created a duplication in numbering, reads as follows:

12 A. No person or entity engaged in the business of selling or
13 distributing cigarettes shall mail, ship or otherwise deliver
14 cigarettes to any person in this state that is not:

15 1. A retailer, distributor or wholesaler of cigarettes licensed
16 by the Oklahoma Tax Commission under Section 304 of Title 68 of the
17 Oklahoma Statutes;

18 2. An export warehouse proprietor pursuant to Chapter 52 of the
19 Internal Revenue Code or the operator of a customs bonded warehouse
20 pursuant to 19 U.S.C., Section 1311 or 1555; or

21 3. A person who is an officer, employee or agent of the United
22 States government, this state or a department, agency,
23 instrumentality or political subdivision of the United States or
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1 this state when the person is acting in accordance with the official
2 duties of the person.

3 B. For purposes of this section, "cigarette" shall have the
4 same definition as that found in Section 600.22 of Title 37 of the
5 Oklahoma Statutes and "distributor", "wholesaler" and "retailer"
6 shall have the same definitions that are found in Section 301 of
7 Title 68 of the Oklahoma Statutes.

8 C. It shall be illegal for any common or contract carrier to
9 knowingly transport cigarettes to any person in this state
10 reasonably believed by the carrier to be a person other than
11 described in paragraph 1, 2 or 3 of subsection A of this section.
12 For purposes of this subsection, cigarettes may be transported to a
13 home or residence in this state by persons other than common and
14 contract carriers in quantities that do not exceed one thousand
15 cigarettes at any one time.

16 D. 1. A person that violates the provisions of subsection A or
17 C of this section shall be subject to:

- 18 a. a civil penalty of Two Thousand Five Hundred Dollars
19 (\$2,500.00) for each violation or Twenty-five Dollars
20 (\$25.00) for each pack of cigarettes shipped or
21 transported, whichever is greater,
22 b. an injunction to restrain a threatened or actual
23 violation of this section,
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1 c. the costs of any investigation conducted by the state
2 related to a violation of this section, and

3 d. attorney fees and costs.

4 2. Any cigarettes that are shipped or transported into this
5 state in violation of this section shall be forfeited to the state
6 and destroyed.

7 3. Each shipment, transport, or attempted shipment or transport
8 of cigarettes or tobacco products in violation of this section shall
9 constitute a separate violation.

10 E. All civil penalties obtained as a result of an action
11 brought under this section shall be deposited into the Attorney
12 General's Evidence Fund.

13 SECTION 3. AMENDATORY 68 O.S. 2011, Section 349.1, is
14 amended to read as follows:

15 Section 349.1 A. Sales of cigarettes and other tobacco
16 products by retailers licensed by noncompacting federally recognized
17 Indian tribes or nations (hereinafter "tribe or nation") shall be
18 subject to the cigarette excise tax imposed by Section 302 et seq.
19 of ~~Title 68 of the Oklahoma Statutes~~ this title and the excise tax
20 on other tobacco products imposed by Section 402 et seq. of ~~Title 68~~
21 ~~of the Oklahoma Statutes~~ this title.

22 B. 1. Members of noncompacting federally recognized Indian
23 tribes or nations may purchase cigarettes and other tobacco
24 products, without payment of Oklahoma cigarette excise tax or

1 Oklahoma other tobacco products excise tax, subject to the following
2 conditions:

- 3 a. the member of the noncompacting federally recognized
4 Indian tribe (hereinafter "purchaser") is purchasing
5 for his or her personal use, and not for sale,
6 transfer or other disposition to another person or
7 entity,
- 8 b. the purchaser is purchasing from a retailer licensed
9 by the federally recognized Indian tribe or nation of
10 which the purchaser is a member,
- 11 c. the licensed retailer of purchaser's federally
12 recognized Indian tribe or nation is located upon
13 "Indian country" of that licensing tribe or nation, as
14 that term is defined by 18 USC §1151(a) and paragraph
15 3 of Section 348.3 348 of Title 68 of the Oklahoma
16 Statutes this title.

17 2. Members of noncompacting federally recognized tribes or
18 nations are not entitled to purchase cigarettes or other tobacco
19 products, free of Oklahoma excise tax, from retailers licensed by
20 any other tribe or nation, compacting or not, but have a right to
21 purchase cigarettes and other tobacco products, free of Oklahoma
22 excise tax, upon the "Indian country" of the tribe or nation of
23 which the purchaser is a member, per the United States Supreme Court
24

1 decision "Oklahoma Tax Commission v. Citizen Band Potawatomi Indian
2 Tribe of Oklahoma", 498 U.S. 505 (1991).

3 C. Cigarettes held for sale to members of a noncompacting tribe
4 or nation by licensed retailers of that tribe or nation, which are
5 located on the "Indian country" of that tribe or nation, as defined
6 by 18 USC §1151(a) and paragraph 3 of Section 348.3 348 of Title 68
7 ~~of the Oklahoma Statutes~~ this title, must bear a stamp issued by the
8 Oklahoma Tax Commission evidencing that cigarettes are purchased
9 free of Oklahoma cigarette excise tax. The following procedures
10 shall apply to said stamps (hereafter, "Native American tax free
11 stamps"):

12 1. The probable demand for Native American tax free stamps for
13 each noncompacting tribe or nation shall be determined by the Tax
14 Commission by ascertaining the total membership in Oklahoma of the
15 tribe or nation from the Bureau of Indian Affairs or other reliable
16 source of public information regarding such membership, and
17 multiplying that number by the percentage of smokers in Oklahoma or
18 in the United States, whichever is greater, based on the most recent
19 data available from the State Department of Health and/or other
20 reliable source of public information. The product of that
21 calculation shall be multiplied by the average yearly consumption of
22 cigarettes by smokers in Oklahoma or the United States, whichever is
23 greater, based on the most recent data available from the State
24 Department of Health and/or other reliable source of public

1 information. The resulting number shall be deemed to constitute the
2 probable demand for Native American tax free stamps of such
3 noncompacting tribe or nation for a calendar year.

4 2. A preliminary determination of probable demand shall be
5 furnished to the governing authorities of each noncompacting tribe
6 or nation which may submit, for consideration by the Tax Commission,
7 any verifiable information in its possession regarding such probable
8 demand, including, but not limited to, a verifiable record of
9 previous sales to tribal members or other statistical evidence.

10 3. After consideration of all verifiable information furnished
11 by a noncompacting tribe or nation pursuant to paragraph 2 of this
12 subsection, the Tax Commission shall make its final determination of
13 probable demand, and furnish such determination to the subject
14 noncompacting tribe or nation and to all Oklahoma-licensed cigarette
15 wholesalers.

16 4. Each calendar year, the Tax Commission shall establish, as
17 to any and all Oklahoma-licensed cigarette wholesalers supplying
18 cigarettes to tribally licensed or owned retailers of each
19 noncompacting tribe or nation an allocation of the probable demand
20 for such tribe or nation, based upon each wholesaler's previous
21 year's reported sales of cigarettes to the tribally licensed or
22 owned retailers of such tribe or nation. In making such allocation,
23 the Tax Commission shall consider such other verifiable information
24 as may be submitted by a licensed wholesaler or such tribe or

1 nation. Upon reaching a final determination of allocation, the Tax
2 Commission shall advise the affected wholesaler and the tribe or
3 nation.

4 5. Oklahoma-licensed wholesalers may request and receive from
5 the Tax Commission, at the beginning of each quarter of the year,
6 their allocated share of Native American tax free stamps for the
7 tribally licensed or owned retailers of each noncompacting tribe or
8 nation. Once a wholesaler has received its allocated share of
9 Native American tax free stamps for the tribally licensed or owned
10 retailers of a noncompacting tribe or nation for the quarter, that
11 wholesaler may not receive any further Native American tax free
12 stamps for tribally licensed or owned retailers of that tribe or
13 nation during the quarter, absent good cause shown by verifiable
14 information submitted by the wholesaler and/or that tribe or nation,
15 which shall be considered and determined by the Tax Commission on a
16 case-by-case basis.

17 6. The Tax Commission is empowered and authorized to promulgate
18 such rules and regulations as, in its discretion, shall be deemed
19 necessary to implement and enforce the provisions of this section.

20 7. The sale of cigarettes bearing the Native American tax-free
21 stamp to a nonmember of the tribe or nation which licensed the
22 tribally owned or licensed retailer shall, in accordance with the
23 United States Supreme Court decision "Oklahoma Tax Commission v.
24 Citizen Band Potawatomi Indian Tribe of Oklahoma", 498 U.S. 505

1 (1991), obligate that tribal retailer for payment of the applicable
2 Oklahoma cigarette excise tax, together with the costs and attorney
3 fees associated with any civil action brought to collect the unpaid
4 Oklahoma cigarette excise tax. Such actions may be instituted in
5 the district court in and for the county in which the tribal
6 retailer is located.

7 D. The Oklahoma excise tax on all tobacco products other than
8 cigarettes (hereafter "other tobacco products") held for sale by
9 Oklahoma-licensed wholesalers shall be paid by the wholesaler and
10 stamps affixed thereto by the wholesaler pursuant to Section 403 of
11 ~~Title 68 of the Oklahoma Statutes~~ this title, including those other
12 tobacco products which may be purchased by members of noncompacting
13 tribes and nations on the "Indian country" of such tribe or nation
14 from a retailer licensed or owned by such tribe or nation. The
15 following procedures shall apply to the tax-free sale of other
16 tobacco products:

17 1. The probable demand for the tax-free consumption of other
18 tobacco products by members of each noncompacting tribe or nation
19 shall be determined by the Tax Commission by ascertaining the total
20 membership in Oklahoma of the tribe or nation from the Bureau of
21 Indian Affairs or other reliable source of public information
22 regarding such membership, and multiplying that number by the
23 percentage of users of such other tobacco products in Oklahoma or
24 the United States, whichever is greater, based on the most recent

1 data available from the State Department of Health and/or other
2 reliable source of public information. The product of that
3 calculation shall be multiplied by the average yearly consumption of
4 users of such other tobacco products in Oklahoma or the United
5 States, whichever is greater, based on the most recent data
6 available from the State Department of Health and/or other reliable
7 source of public information. The resulting number shall be deemed
8 to constitute the probable demand for the tax-free consumption of
9 other tobacco products by members of such noncompacting tribes or
10 nations for a calendar year.

11 2. A preliminary determination of probable demand shall be
12 furnished to the governing authorities of each noncompacting tribe
13 or nation, which may submit, for consideration by the Tax
14 Commission, any verifiable information in its possession regarding
15 such probable demand, including, but not limited to, a verifiable
16 record of previous sales to tribal members or other statistical
17 evidence.

18 3. After consideration of all verifiable information furnished
19 by a noncompacting tribe or nation pursuant to paragraph 2 of this
20 subsection, the Tax Commission shall make its final determination of
21 probable demand and furnish such determination to the subject
22 noncompacting tribe or nation and to all Oklahoma-licensed other
23 tobacco product wholesalers.

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1 4. Each calendar year, the Tax Commission shall establish, as
2 to any and all Oklahoma-licensed other tobacco product wholesalers
3 supplying other tobacco products to the tribally licensed or owned
4 retailers of each noncompacting tribe or nation an allocation of the
5 probable demand for such tribe or nation, based upon each
6 wholesaler's previous year's reported sales of other tobacco
7 products to the tribally licensed or owned retailers of such tribe
8 or nation. In making such allocation, the Tax Commission shall
9 consider such other verifiable information as may be submitted by a
10 licensed wholesaler or such tribe or nation. Upon reaching a final
11 determination of allocation, the Tax Commission shall advise the
12 affected wholesaler and the tribe or nation.

13 5. Oklahoma-licensed wholesalers may request and receive from
14 the Tax Commission, on the 30th of each month, a refund and/or
15 credit for the previous month's tax-free sales of other tobacco
16 products, equal to the lesser of: one twelfth (1/12) of their
17 allocated share of tax-free sales of other tobacco products to the
18 tribally licensed or owned retailers of each noncompacting tribe or
19 nation or verifiable tax-free sales to the licensed or owned tribal
20 retailers of such tribe or nation. Once a wholesaler has received
21 such refund and/or credit for a previous month's tax-free sales to
22 the tribally licensed or owned retailers of each noncompacting tribe
23 or nation, that wholesaler may not receive any further refund and/or
24 credit for said previous month, absent good cause shown by

1 verifiable information submitted by the wholesaler and/or the
2 noncompacting tribe or nation, which shall be considered and
3 determined by the Tax Commission on a case-by-case basis.

4 6. The Tax Commission is empowered and authorized to promulgate
5 such rules and regulations as, in its discretion, shall be deemed
6 necessary to implement and enforce the provisions of this section.

7 7. The tax-free sale of other tobacco products to a nonmember
8 of the noncompacting tribe or nation which licenses the tribally
9 owned or licensed retailer shall, in accordance with the United
10 States Supreme Court decision "Oklahoma Tax Commission v. Citizen
11 Potawatomi Indian Tribe of Oklahoma", 498 U.S. 505 (1991), obligate
12 that tribal retailer for payment of the applicable Oklahoma other
13 tobacco product excise tax, together with the costs and attorney
14 fees associated with any civil action brought to collect the unpaid
15 Oklahoma other tobacco product excise tax. Such actions may be
16 instituted in the district court in and for the county in which the
17 tribal retailer is located.

18 E. The provisions of this section are intended to, and shall be
19 construed to apply only to, sales of cigarettes and other tobacco
20 products on the "Indian country" of noncompacting federally
21 recognized Indian tribes or nations to the members of such tribes or
22 nations. In the event that a noncompacting tribe or nation enters
23 into an agreement with the State of Oklahoma, pursuant to Section
24 346 of ~~Title 68 of the Oklahoma Statutes~~ this title, the terms of

1 such compact shall take precedence over the provisions of this
2 section, which shall have no application to any tribe or nation,
3 while any compact between the State of Oklahoma and that tribe or
4 nation is in force and effect.

5 F. All cigarettes which are sold or held for sale at tribally
6 owned or licensed stores shall have affixed thereto a stamp or
7 stamps evidencing payment or nonpayment of the Oklahoma cigarette
8 excise tax, as required by the provisions in this section.

9 G. It shall be unlawful for any person knowingly to ship,
10 transport, receive, possess, sell, distribute or purchase contraband
11 cigarettes. Any person who engages in shipping, transporting,
12 receiving, possessing, selling, distributing or purchasing
13 contraband cigarettes shall, upon conviction, be guilty of a
14 misdemeanor punishable by a fine of not more than One Thousand
15 Dollars (\$1,000.00). Any person convicted of a second or subsequent
16 violation hereof shall be guilty of a felony and shall be punishable
17 by fine of not more than Five Thousand Dollars (\$5,000.00), by a
18 term of imprisonment in the ~~State Penitentiary~~ custody of the
19 Department of Corrections for not more than two (2) years, or by
20 both such fine and imprisonment.

21 H. Any person who knowingly engages in shipping, transporting,
22 receiving, processing, selling, distributing or purchasing
23 contraband cigarettes shall be subject to the forfeiture of property
24 as is provided by Section 305 of ~~Title 68 of the Oklahoma Statutes~~

1 this title and assessment of penalty as provided thereby and
2 assessment for any delinquent taxes found to be owing.

3 I. Pursuant to 25 C.F.R., Section 140.17, no trader shall sell
4 tobacco, cigars or cigarettes to any Indian or other person under
5 eighteen (18) years of age.

6 SECTION 4. REPEALER 68 O.S. 2011, Sections 317.2, 317.3,
7 317.4, 317.5, as amended by Section 6, Chapter 357, O.S.L. 2012,
8 317.6 and 317.7 (68 O.S. Supp. 2013, Section 317.5), are hereby
9 repealed.

10 SECTION 5. This act shall become effective November 1, 2014.

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12 54-2-10256 GRS 02/20/14
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