



NATIONAL CENTER FOR TOBACCO-FREE KIDS

Statement of Matthew Myers

President

Campaign for Tobacco-Free Kids

Before the U.S. House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual
Property

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Good morning Mr. Chairman, and members of the Committee. My name is Matthew Myers. I am the President of the National Center for Tobacco-Free Kids, a national organization created to protect children from tobacco by raising awareness that tobacco use is a pediatric disease, by changing public policies, and by actively countering the special interest influence of the tobacco industry.

Mr. Chairman, I want to thank you for inviting me to testify on draft legislation by Congressman Green. While we support the concept of providing the State Attorneys General with authority to enforce violations of this Act, regrettably, we must oppose the legislation as drafted.

Current Internet sales of tobacco raise two serious issues: uncontrolled sales to youth and evasion of state sales and tobacco related excise taxes. The twin problems of youth access and tax evasion need to both be addressed, preferably in one bill, but if not in one bill in two bills that contain adequate provisions to make a real difference. This bill as currently drafted does not deal with the problem of sales to young people at all; and it is our assessment that its limited proposal to address the problem of the evasion of state sales and tobacco related excise taxes will be ineffective. If its enactment prevents or forestalls the passage of legislation that effectively addresses these problems, it will do more harm than good. Even worse, it would undermine the longstanding, bipartisan efforts of Congressman Meehan, former Congressman Hansen and others to enact a comprehensive solution by giving the false impression that the problems had been effectively addressed.

There are currently about 200 U.S. websites and 200 foreign-based websites that sell cigarettes to U.S. smokers. Effective safeguards against kids being able to purchase cigarettes via the Internet are almost non-existent. While many Internet websites post notices that sales to persons under 18 are illegal or not allowed, very few do anything at all to make sure such sales do not occur.

Tax evasion via Internet sales of tobacco products is rampant. Internet tobacco prices are much lower than those in regular bricks-and-mortar retail outlets because Internet prices almost never include the taxes charged by retail stores. These low prices make Internet tobacco products attractive to both adult and underage smokers, and help to boost overall smoking levels. In addition, states lose millions of dollars each year in uncollected tax revenues. All of these problems have been compounded by the inadequacy of the enforcement tools available, the most serious of which is caused by the fact that under current law responsibility for paying the state taxes is normally the responsibility of the purchaser rather than the Internet seller.

We have been skeptical about whether these problems can be fully resolved by any action short of a ban such as that imposed recently by the State of New York, but we have endorsed H.R. 5724, the Meehan/Hansen bill introduced in the

last Congress. The Meehan/Hansen bill offered a comprehensive solution to the problems arising from Internet sales of tobacco products by addressing both parts of the problem: youth access and tax evasion. The American Cancer Society, the American Heart Association and the American Lung Association also endorsed H.R. 5724. To protect against Internet sales to youth, H.R. 5724 would have required the verification of age and identity both at the time of sale and the time and place of delivery.

We understand that this Committee wants to focus exclusively on legislation within its jurisdiction that addresses the fact that states are illegally losing millions of tax dollars. To accommodate that desire, we undertook to provide Congressmen Green and Meehan with a draft of such legislation. We strongly urge the Committee to adopt its provisions.

I would now like to outline the seven specific areas in which the legislation offered by Congressman Green fails to meet what we believe are the minimum standards necessary for any effective legislation dealing with Internet tobacco sales.

1. The legislation should apply to all tobacco products, not just cigarettes.

If the legislation applies only to cigarettes it will do nothing to reduce illegal sales and tax evasion over the Internet or through mail order on other tobacco products. By focusing only on cigarettes, the legislation could have the unintended consequence of encouraging use of other tobacco products such as smokeless tobacco. There can be no justification for the different treatment of different tobacco products.

2. The legislation should explicitly impose the burden of either paying or insuring that applicable state taxes are paid on the Internet seller rather than on the purchaser.

State tobacco taxes on tobacco products sold at retail are collected at the distributor level. The products arrive at the retail outlet with a tax stamp already on them and the applicable tobacco related taxes already paid. This enables law enforcement officials to easily monitor compliance and insures that violations will involve a sufficient amount of money to warrant enforcement.

At present Internet sellers based outside the United States and/or on Indian lands pay no state taxes and Internet sellers based in low tax states only pay the tax from the state in which they are based. The responsibility for paying the tax on the tobacco products they sell then falls to the individual consumer/purchaser, making enforcement difficult and costly. Unless the responsibility for paying the tax is clearly and unquestionably switched to the Internet seller, it doesn't matter who is given the authority to enforce the law – it will not happen.

Despite our requests that a provision be added that explicitly switches the responsibility to the Internet seller, the bill before the Committee does not do so. As

written, the draft legislation offered by Congressman Green in Sec. 2(a) only requires that the Internet seller “comply with all the sales tax and use tax and other laws, applicable to the distribution and sale of cigarettes.” This could be interpreted to give states only a federal right of action to enforce existing state laws that apply to Internet sellers. Very few states have laws that explicitly apply to Internet sellers.

Even a broader interpretation would be difficult to implement because states have numerous “sales and use tax and other laws applicable to the sale of cigarettes.” Some apply to manufacturers, distributors, and wholesalers; others apply to retailers, vending machine operators, etc. In most states, state laws place no tobacco tax collection or payment obligations on retailers because these responsibilities are placed on others. If the goal is to require the Internet seller to pay the tax or to insure that it is paid, then the legislation should be explicit on this point. If legislation is ambiguous as to whether the burden to pay the tax falls on the Internet seller or purchaser or some third party, then it will be wholly ineffective in curtailing tax evasion.

3. *The legislation should apply to all remote sales of tobacco products.*

As written, the legislation exempts sales that are not “outside the State or Indian lands where the order is processed.” While the impact is probably unintended, this could be read to exempt sales from Indian lands to consumers outside the Indian reservation but within the same state. This could be a substantial loophole in states with large populations with in-state tribal Internet sellers.

4. *The legislation should include an enforcement mechanism that will assure that the states can actually enforce the legislation and block Internet and mail-order sales of tobacco products for which state taxes have not been paid.*

Internet sellers are often based out of state, on Tribal lands, or even offshore or overseas. Some are fly-by-night operations. Even if this legislation gives states authority to bring civil actions against any person who violates the Act, bringing state lawsuits against distant vendors is an inevitably costly, cumbersome, complicated, and ultimately uncertain enforcement procedure.

To be effective, legislation must require that Internet sellers maintain records of their sales for several years, prohibit anyone from shipping tobacco products into the state who has not registered and give the state the authority to block the delivery of tobacco products who have not complied with the law. The current draft does not adequately include any of these tools.

5. *The Civil Action section of the legislation should provide for civil fines and give the federal government the right to seek civil fines and civil damages.*

As drafted, Sec. 3. entitled “Civil Action” says that a State Attorney General may “obtain appropriate relief, including money damages,” but does not provide for any specific or minimum penalties or fines for violating the provisions of this Act, nor does it include the authority to withdraw a repeat violator’s right to sell tobacco products into the state in the future.

We support the proposal to provide state Attorneys General with the authority to bring civil actions to enforce violations of the law, but it should not at the same time strip the federal government of authority to bring a civil enforcement action and allow the federal government only to seek criminal penalties. As drafted, the federal government would not be allowed to seek any civil or monetary damages or fines from Internet or mail order sellers who break the law. Federal authorities have not to date exercised their current enforcement authority, in part, because individual enforcement cases were deemed to be too small to warrant the effort. If the law imposed the burden to pay the taxes on the Internet seller, rather than the purchaser, federal enforcement could potentially become an important complement to any state enforcement prompted by the Act.

6. *The criminal penalties should be increased beyond the inadequate penalties established in the original Jenkins Act in 1949.*

This legislation provides only a misdemeanor penalty with no minimum fine and a maximum fine too small to have a deterrent effect, along with up to 6 months in jail, or both. These penalties are inadequate. The penalties in the original Jenkins Act failed to deter violators or to encourage federal enforcement of the law and the provisions in the bill now before the Committee will not correct this problem. To be effective, the criminal penalty provisions should make violations of the act a felony, provide for significant, minimum criminal fines, and provide for larger criminal fines and possible imprisonment for flagrant and repeated violations.

7. *The legislation does not require Internet and mail-order sellers to keep any records of their sales and deliveries into a state.*

While the legislation, like the original Jenkin's Act, requires Internet and mail-order sellers to register with state tax administrators and make monthly sales reports to those officials, it does not require them to keep their own records of these sales and deliveries over time. This omission could be a major impediment to enforcement efforts and to the calculation of monetary damages, such as unpaid taxes. A provision should be added to the legislation requiring sellers to maintain specific records for not less than five years.

In sum, this bill addresses a legitimate problem, but does not do so effectively. If the goal is to insure that state tobacco taxes are collected on Internet tobacco sales, the bill as drafted will not accomplish its purpose. We in the public health community are prepared to and would welcome the opportunity to work with the Committee to produce effective legislation that would make a reality of our common goal to reduce tax evasion and eliminate youth access to tobacco products in remote sales of tobacco products.