



June 9, 2020

Ms. Marikae Toye, Co-Chair, Illegal Tobacco Task Force
Massachusetts Department of Revenue
General Counsel's Office, Criminal Investigations Bureau
100 Cambridge St., 8th Floor
Boston, MA 02114

Re: ITTF Questions Relative to OTP and ENDS

Dear Ms. Toye and Members of the Massachusetts Illegal Tobacco Task Force:

On behalf of itself and its wholly-owned subsidiaries, McLane Company, Inc. (McLane) writes relative to questions posed by the Massachusetts Illegal Tobacco Task Force (ITTF) relative to technology available to member agencies for addressing both the taxation of vaping products and the enforcement of the flavored tobacco ban. Specifically, McLane urges the ITTF to avoid any recommendation related to requiring the encrypted tax stamping of so-called Other Tobacco Products (OTP) and electronic nicotine delivery systems (ENDS) until all legal and practical issues associated with the same are addressed. Much like ITTF members' comments at its June 3rd meeting that the ITTF does not seek to re-debate decisions made by the Massachusetts legislature, the Massachusetts legislature considered this specific issue during its deliberations on the fiscal year 2020 budget (i.e. OTP) and Chapter 133 of the Acts of 2019 (i.e. ENDS), expressly rejecting the same both times.

Established in 1894 as a small retail grocer in Cameron, Texas, McLane has grown to become one of the nation's largest distributors/wholesalers serving retail convenience stores and mass-merchants. Distributing grocery and related items from facilities across the nation, McLane is appropriately licensed in all states and the District of Columbia to sell business-to-business products in the cigarette, OTP and ENDS categories. McLane does not sell cigarettes, OTP or ENDS directly to consumers.

McLane appreciates and shares the ITTF's concerns about illicit trade in OTP and ENDS. Sales of untaxed OTP and ENDS violate the law, deprive the Commonwealth of revenue, and often fund organized crime. Diverting OTP and ENDS from lawful wholesale channels also has business impacts for McLane and other legitimate members of the wholesale trade. However, McLane has significant legal, practical, and policy concerns about any technological proposal that requires use of encrypted tax stamping for OTP and ENDS as a condition of sale in the Commonwealth. For purposes of this letter, McLane wishes to highlight two specific examples.

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First, any OTP and ENDS stamping requirement could have untenable legal consequences for the wholesale trade. McLane understands that, in February of 2018, the U.S. Food and Drug Administration (FDA) advised the ITTF that the process of destroying MST manufacturer packaging (i.e. sleeves used to package multiple MST tins), affixing tax stamps to individual MST tins, and repackaging stamped MST tins in their original or new sleeves may transform wholesalers into “tobacco product manufacturers” under the Federal Food, Drug, and Cosmetic, as amended by the Family Smoking Prevention and Tobacco Control Act of 2009, as well as the Comprehensive Smokeless Tobacco Health and Education Act. This status would subject wholesalers of OTP and ENDS sold in the Commonwealth to numerous, burdensome federal requirements specific to each repackaged OTP and ENDS product they distribute. These could include, but would not be limited to:

- Requirements to register distribution facilities as tobacco product manufacturing establishments with, and to submit detailed listings of all products repackaged there to, FDA¹;
- Requirements to submit listings of ingredients, listings of harmful and potentially harmful constituents, and health documents for repackaged products to FDA²;
- Requirements to obtain FDA premarket authorization to distribute any “new tobacco products” created through post-stamping repackaging activities³;
- Requirements to obtain FDA approval of and comply with the terms of a warning label rotation plan for repackaged products⁴; and
- Requirements to ensure compliance with other FDA labeling requirements for sleeves used in repackaging.⁵

FDA has also advised that affixing tax stamps in a manner that obstructs any portion of federally required warning labels would cause the OTP and ENDS product to violate federal law. Thus, depending on the particular product’s package, compliance with any state tax stamping requirement may prove incompatible with and violative of federal law.

Second, today and for the foreseeable future, any OTP and ENDS tax stamping requirement would present significant, unwarranted burdens on the wholesale trade and could actually increase incentives for criminals to engage in illicit trade. For example, technology for automating the process of de-sleeving certain OTP and ENDS products, affixing tax stamps, and re-sleeving them remains unavailable. That manufacturers market OTP and ENDS in a wide variety of packaging types and sizes raises additional questions about whether wholesalers could practically employ the

¹ See 21 U.S.C. § 387e(b), (i).

² See 21 U.S.C. § 387d(a)(1), (3), (4).

³ See 21 U.S.C. § 387j.

⁴ See 15 U.S.C. § 4402(a)(2)(B), (b)(3).

⁵ See 21 U.S.C. § 387c(a).

developmental stamping technology currently under consideration for all products distributed in the Commonwealth. As reported by the ITTF previously, you were only provided information about a “prototype machine”. The absence of a proven, automated solution would force wholesalers to affix stamps manually. Coupled with the Commonwealth’s wholesale-price-based tax rate for OTP and ENDS, implementation of a manual stamping system would prove extremely complex and would require wholesalers to invest significantly in additional human, information technology, and other resources. Wholesalers would then need to pass at least some of these increased costs to their customers, which retailers would likely do as well. Ultimately, an OTP and ENDS stamping requirement would increase retail prices for legitimate products and thereby increase incentives for illicit trade by criminal elements.

During its deliberations on fiscal year 2020 budget and Chapter 133 of the Acts of 2019, the Massachusetts legislature expressly considered and rejected amendments that would have required encrypted tax stamping for OTP and ENDS due to the legal and practical issues it presents. Further, that neither any other state nor the District of Columbia has required tax stamping for OTP and ENDS reflects the significant legal, practical, and policy concerns that such a system presents. McLane strongly encourages the ITTF to pursue other recommendations for addressing the issue of illicit trade in OTP and ENDS in the Commonwealth, including continued increased enforcement in this area. McLane looks forward to further opportunities to discuss these important issues with you and your respective committee members and appreciates your consideration of the foregoing.

Respectfully submitted,



Neftali Garcia
VP, Governmental Affairs