

Illegal Tobacco Task Force Minutes

Meeting Date: March 28, 2018

Meeting Time: 10:30 AM

Meeting Location: 100 Cambridge Street, 2nd floor, Conference Room A

Board Members Present: Kajal Chattopadhyay (Co-Chair), Det. Capt. Steve Fennessy, (Co-Chair), Michael Sweeney, Tom Bocian, Christy Fedor, Amber Villa, Doug Levine

Others: Kathy Bell, Scott Delaney, Molly Slingerland, Mary Elizabeth Barwick, Jon Shaer, Josh Brabazon, Lisa Dell'Anno, Bensen Solivan, Evan Garcia, Blanca Lo, Brenda McConville, Alex Spelman, Michelle McGee

Call to Order:

- Mr. Chattopadhyay called the meeting to order at 10:39 AM and gave a quick recap of the previous meeting and a preview of today's agenda.
- A discussion about the FDA response to the Massachusetts Illegal Tobacco Task Force (Task Force) letter relating to the proposal to require smokeless tobacco to bear a Massachusetts tax stamp was the primary agenda item.
- Task Force members were then called by Mr. Chattopadhyay to review the previous meeting minutes.
 - Mr. Sweeney made a motion to approve the minutes; it was second by Detective Captain Fennessy

Discussion:

- Mr. Chattopadhyay asked if there were any updates to report and announced that the Task Force's legislative proposal (HB4065) is currently in the House Ways and Means Committee. The window for approval is now until July 31st, 2018.
- Mr. Chattopadhyay opened discussion on the FDA response to the Task Force letter relating to the proposal to require smokeless tobacco to bear a Massachusetts tax stamp. He indicated that this would be a participatory discussion among the committee members and a time for all members to voice their opinions and offer input. Mr. Chattopadhyay invited Task Force members from the AGO and DPH to facilitate the discussion.
- Ms. Villa commented that the FDA responses raised several important questions. First, she asked Task Force members if they agreed with the FDA's determination that stampers would be classified as manufacturers and whether or not the Task Force should accept the classification.
- Ms. Fedor agreed with Ms. Villa and suggested asking the FDA for consideration of a different classification for stampers from the FDA.
- Mr. Chattopadhyay asked Ms. Fedor's opinion of how receptive the FDA would be of a request for reconsideration and Ms. Fedor noted that it may be a challenge and may take a considerable length of time. She commented that she had worked with Heather Althouse from the FDA in the past and it would be worth going back to them. She noted that it was a pleasure to work with her.
- Ms. Villa suggested there may be additional obligations required of a stamper if it were to be considered a manufacturer by the FDA's definition of repackaging. However, she noted that the

stampers would not be placing the tobacco into packages that go to consumers and this technical argument may be sufficient to justify a request for a different classification.

- Mr. Sweeney asked the Task Force if they had knowledge about whether other states were in the same situation and perhaps consider inviting other states to seek different classification in a joint letter to the FDA.
- Mr. Chattopadhyay noted that he could obtain a list of other states that are seeking stamping options for smokeless tobacco products and also noted that Massachusetts has been talking about the idea for the greatest length of time.
- Ms. Villa pointed out that we are asking stampers to take off the cellophane wrapping from a canister of smokeless tobacco pucks, stamp and repackage only for transport. She noted that this is no different than what a retailer does when stocking their shelves.
- Mr. Chattopadhyay posed the following question for discussion: What if the Task Force is stuck with the FDA's classification of stampers as manufacturers?
- Mr. Sweeney expressed his concern that such a high burden could be placed on private actors and that it may force stampers to consider getting out of the business. He also highlighted the issue of stampers' worries that they may get in trouble with the federal government or the Commonwealth.
- Ms. Villa commented that stampers would look for guidance from federal agencies but the agencies would be in a situation where they could not provide advice because of their enforcement function in the area on which stampers would be seeking guidance.
- Ms. Fedor agreed with the issue of a high burden being placed on the stampers. She then redirected the discussion back to the bigger issue of seeking reconsideration from the FDA. She suggested perhaps pushing for the FDA to create a new classification.
- Mr. Chattopadhyay agreed with creating this plan of seeking reconsideration and noted that there may be a several month delay but it may be the best option.
- Ms. Villa questioned if other states have found other entities besides stampers to produce a tax tracking product.
- Mr. Chattopadhyay stated that there is alternative RFID technology to track products but that approach has an inherent drawback in that there are no visible stamps on individual products to prove taxes are paid and would not facilitate law enforcement as would a visible tax stamp.
- Ms. Villa & Ms. Fedor discussed puck inventory in a store and noted that smokeless tobacco logs are often kept in cellophane sleeves and only unwrapped when displayed at the front of the store. Would it be feasible and helpful to stamp logs instead of individual pucks?
- Ms. Garcia shared input on actual field inspections. Some stores will have 8-10 pucks in a display rack while a larger store might display up to 100 pucks. An invoice book is required to be kept to track tax compliance. She noted that stamping the logs would not be beneficial as the middle pucks would not be stamped. Moreover, pucks are not stored in logs for a long period of time in a high volume store.
- Mr. Chattopadhyay stated that a stamp on only the 2 end pucks of a log would contribute to the problem of blending legal and illegal products since only some products would be stamped.
- Ms. Villa suggested wording to use with the FDA by focusing on the fact that stampers would not be creating retail packaging that goes to consumers, which might exempt them from being classified as manufacturers.
- Ms. Fedor agreed with this approach and suggested that this may likely illicit a more direct response from the FDA.

- Detective Captain Fennessy noted that “repackaging a product” causes a stamper to be classified as a manufacturer. He suggested that the stampers “re-box” the product versus repackage the product to avoid that classification.
- Ms. Villa noted that retail stores repackage items all the time.
- Mr. Bocian questioned how cigarettes are stamped and sent to retail locations.
- Mr. Chattopadhyay clarified that cigarettes are stamped to order from the distributor and then shipped to the retail location. Therefore they are not repackaged.
- Ms. Garcia discussed the labeling of smokeless tobacco shipping boxes. It is unclear if the warning label is located on the shipping box. Ms. Garcia stated that each shipping box contained one variety of the smokeless tobacco. She offered to bring a shipping box of smokeless tobacco products to a future meeting.
- Mr. Chattopadhyay canvassed Task Force members for their preference whether to push the FDA to reconsider the classification of stampers as manufacturers or, instead, seek a stronger explanation of why stampers are classified as manufacturers.
- Ms. Villa and Ms. Fedor both voiced their preference to hold back on seeking clarification on the the definition of a manufacturer and strategically focus on seeking reconsideration for why stampers would be classified as manufacturers. This would avoid any appearance that the Task Force would consider the acceptance of the FDA’s classification of stampers as manufacturers.
- Mr. Sweeney wondered about the timeline and best method for the Task Force to approach the FDA with its follow-up questions.
- Mr. Chattopadhyay commented that the FDA response may be 3 to 4 months if the original response is used as a rough guide.
- Mr. Levine and Ms. Villa discussed contacting the FDA though a phone call versus email and it was determined that an email correspondence would be the preferred method for tracking purposes.
- Mr. Sweeney suggested reaching out to local engineering students for possible solutions to the stamping issue. He offered to contact various institutions regarding the proposal.
- Mr. Chattopadhyay offered to contact other states who are dealing with the same smokeless tobacco stamping issue and get updates on the status of their discussions.

Other Business:

- Mr. Chattopadhyay thanked everyone for attending and scheduled the next meeting for April 24th, 2018 at 1pm.

Meeting was adjourned at 11:37 AM by Mr. Chattopadhyay.