

# **DAUGHTERS & RYAN, INC.**

Internet/Mail Order Sales of RYO Tobacco

A Position for Differential Treatment from Manufactured Cigarettes

*February, 2005*

## **Supporting Justifications**

1. Inclusion of RYO tobacco in the definition of cigarette is contrary to Federal case and historical precedent. At the Federal level, (i) the TTB (BATF) taxes RYO tobacco differently than cigarettes, and (ii) the Jenkin's Act currently excludes RYO tobacco from the definition of a cigarette.
2. Inclusion of RYO tobacco in the definition of cigarette is contrary to State case and historical precedent. At the State level, (i) RYO tobacco is again taxed at a different rate than cigarettes, and (ii) a different business license (OTP) is required to sell RYO tobacco than to sell manufactured cigarettes at a tobacco shop.
3. Requirements for health warnings on cigarettes are governed by the Federal Cigarette Labeling and Advertising Act, (15 U.S.C., Section 1331). The Division of Advertising Practices, Federal Trade Commission, has established numerous labeling and advertising requirements for potential cigarette manufacturers and importers of cigarettes sold, distributed, or advertised in the United States. Among those of most relevance to this discussion: 1333(a) sets forth the wording of warning labels required for all packaging and advertising, 1333(b)(1) provides the placement and size requirements for the warning labels, 1333(b)(2) sets forth the requirements for warnings in advertising, 1333(b)(3) sets forth the warning requirements for outdoor billboards, and 1333(c)(1) requires that warnings rotate quarterly in both advertising and packaging in accordance with a plan submitted to and approved by the Federal Trade Commission. The Federal Trade Commission does not govern or regulate RYO tobacco, and health warning labels are not required on RYO tobacco packaging.
4. The Department of Health & Human Service requires that certain manufacturers submit to the Office on Smoking and Health (OSH) the list of ingredients added to any cigarette or smokeless tobacco products. This responsibility is a federally mandated requirement under the Comprehensive Smoking Education Act (15 U.S.C., Section 1335) and is administered by the National Center for Chronic Disease Prevention and Health Promotion. The OSH does not govern or regulate RYO tobacco, and a list of added ingredients is not required for RYO tobacco.
5. Manufactured cigarettes are virtually ubiquitous in the consumer marketplace. In contrast, many OTP products (and RYO tobacco products in particular) are only available to responsible adults through the mail order medium. Many consumers will also be unable to provide an official form of government identification. To many American citizens, this situation could be perceived or experienced as racist, elitist and discriminatory. There are also macroeconomic consequences related to restriction of trade and reduced competition (fewer consumer choices) which may be of interest to the Federal Trade Commission.

6. There is a long historical precedent of mail order availability of OTP/RYO tobacco products by responsible adult consumers. Although the number of cigarette smokers has reportedly declined from a high of around 60% in the 1950's to the 20-25% of citizens who continue to smoke today, the total number of tobacco consumers is tens of millions. As a concerned citizen, I would be reluctant to recommend a solution which may risk increasing the number of people who hate America during the current climate of heightened national security. In addition, if we are truly able to strengthen enforcement of the Jenkins' Act for manufactured cigarettes, why not "throw consumers a bone" as an element of compromise? As a point of reference, the RYO segment is currently around 1.7 % of the manufactured cigarette market. We estimate that the percentage could grow to as much as 3% over the next five to ten years (and perhaps to as much as 5% of the cigarette market if some unexpected event or product causes a major market adjustment). Accordingly, the OTP segment is relatively insignificant to the overall smoking problem and if it becomes unlawfully exploited down the road, responsive regulatory measures could be designed to compensate if necessary. I believe a successful and effective (acceptable) tobacco control model would take more measured, less disruptive steps toward the achievement of our ultimate health care goals. (Should we rush quickly to eliminate the rights of free citizens, or could we develop a less invasive mechanism based on education and freedom of choice/rejection)?
7. Special interest groups may have influenced some states to exclude cigars and pipe tobacco from Internet/mail order regulation. This could represent an enforcement dilemma since we believe some manufacturers may abuse the exclusion loophole. Consequently, the program would be of uncertain financial/administrative feasibility because it may be operationally impossible to distinguish small cigars from cigarettes in brown wrappers, and to distinguish between pipe/smoking tobacco from RYO tobacco. I could envision this evolving into a nightmarish scenario for the states.
8. State representatives are vulnerable to influence peddling by special interest groups, as demonstrated by #7 above. The perception by the average citizen may be that some form of bribery was involved and the reputations of some leaders may be impugned.
9. Overregulation by the states will increase the number of tobacco manufacturing companies who I will euphemistically refer to as "renegades." Criminal activity will flourish and some underground activity will likely fund terrorism. (Follow the money).
10. Many otherwise honest and law abiding citizens will not support regulatory efforts and will engage in the newly defined criminal activity. Enforcement issues will be politically sensitive and employment repercussions could result in broader economic consequences.
11. For those companies with the highest ethical intentions, the burden of absolute compliance may be too great for them administratively and financially. I would suspect that many good companies would rather go out of business. Ramifications economically (reduced employment, fewer products and less competition), and socially (individual attitudes and sense of well being) could attenuate achievement of long term goals.