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TO PROTECT INDIAN ARTS AND CRAFTS THROUGH THE IMPROVEMENT OF APPLICABLE CRIMINAL PRO- CEEDINGS, AND FOR OTHER PURPOSES

SEPTEMBER 15, 2008.—Ordered to be printed

Mr. DORGAN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 1255]

The Committee on Indian Affairs, to which was referred the bill (S. 1255), to protect Indian arts and crafts through the improvement of applicable criminal proceedings, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 1255 is to authorize any federal law enforcement officer to conduct an investigation of the sale of any good that is misrepresented as an Indian-produced good or product that occurs on land under the jurisdiction of the federal government. The bill also authorizes the Indian Arts and Crafts Board to refer an alleged offense to any federal law enforcement officer for appropriate investigation. Further, S. 1255 permits a federal law enforcement officer to investigate an alleged offense regardless of whether such officer receives a referral from the Board and revises the requirements for initiating actions for the misrepresentation of Indian-produced goods and products and the penalties for such misrepresentation.

BACKGROUND AND HISTORY

The Indian Arts and Crafts Act of 1990 (P.L. 101-644) is a truth-in-advertising law that prohibits misrepresentation in marketing of Indian arts and crafts products within the United States. The law covers all Indian and Indian-style traditional and contemporary

arts and crafts produced after 1935. Under the law, it is illegal to offer, sell, or display for sale any Indian art or craft product in a manner that falsely suggests it is Indian-made or the product of a particular Indian, Indian Tribe, or Indian arts and crafts organization that resides within the United States. For a first offense under the Act, an individual can face civil or criminal penalties of up to a \$250,000 fine or a 5-year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to \$1,000,000.

A major challenge has been establishing a process to investigate cases brought under the Act as the Indian Arts and Craft Board must rely exclusively on the willingness of other law enforcement agencies to proceed with the investigation of complaints. The law is currently written so that only the Federal Bureau of Investigation (FBI), acting on behalf of the Attorney General, has the authority to investigate and make arrests in cases of suspected Indian art counterfeiters. S. 1255 would amend the law to expand existing federal investigative authority by authorizing other federal investigative bodies, such as the Bureau of Indian Affairs (BIA) Office of Law Enforcement, in addition to the FBI, to investigate cases of misrepresentation of Indian arts and crafts.

Tribal and individual Indian income is derived from the sale of handmade Indian arts and crafts. Yet, millions of dollars are diverted each year from these original artists and Indian tribes by those who reproduce and sell counterfeit Indian goods. Few, if any, criminal prosecutions have been brought in federal court for such violations. Enforcing the criminal law under the Indian Arts and Crafts Act is often delayed due to limited resources in light of other responsibilities of the FBI, including investigating terrorism activity and violent crimes in Indian country. Therefore, expanding the investigative authority to include other federal agencies is intended to promote the active investigation of alleged misconduct.

SUMMARY OF THE AMENDMENT

During an open business meeting on June 19, 2008, the Committee considered and approved an amendment to S. 1255. The amendment altered the scope of the conduct of investigations to alleged violations on all land within the jurisdiction of the United States. In addition, the amendment altered the submission of findings of alleged violations to any federal or State prosecuting authority, rather than just the Attorney General of the United States.

SECTION-BY-SECTION ANALYSIS OF S. 1255

Sec. 1. Short title

Section 1 states that the bill may be cited as the “Indian Arts and Crafts Amendments Act of 2008.”

Sec. 2. Indian Arts and Crafts

Section 2 of the bill expands the powers of the Indian Arts and Crafts Board to pursue or defend violations of the bill by amending 25 U.S.C. § 305d and § 305e.

§ 305d is amended by striking sections (a) and (b) and inserting the following provisions. First, the Act defines federal law enforcement officers and their authority to conduct alleged violations of

the Indian Arts and Crafts Act within the jurisdiction of the United States. S. 1255 defines the process for criminal proceedings through a referral by the Board to a Federal law enforcement officer or by the initiation of an investigation by a federal law enforcement officer without the referral of the Board. As part of the criminal proceedings, the findings of an investigation shall be submitted to a federal prosecuting authority or the Indian Arts and Craft Board. When the Board receives the findings of an investigation, the Board may recommend to the Attorney General that criminal proceedings be opened and the Board may provide support, should that investigation be initiated. In lieu of, or in addition to, any criminal proceedings, the Board may recommend that the Attorney General pursue a civil action.

§ 305e is amended by striking subsection (d), “Definitions,” and replacing it as subsection (a). It changes the definition of “Indian tribes” to be consistent with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) and provides other technical and conforming amendments to the “Definitions” subsection. Subsection (c), entitled “Persons that May Initiate Civil Actions,” in § 305e is struck and replaced as subsection (d), making technical and conforming amendments to the subsection. This subsection clarifies how the Attorney General, the Board, and any Indian Tribe involved in the civil suit may initiate a civil action and recover costs related to attorney’s fees or other costs incurred as a direct result of the activities of the investigation.

In addition, there are a series of other minor technical and conforming amendments to § 305e.

Sec. 3. Misrepresentation of Indian produced goods and products

Section 3 amends 18 U.S.C. § 1159 and reorganizes the structure of penalties that are applied to violations of the law. This section structures the penalties in accordance with the value of the goods that are offered, sold, or displayed for sale in violation of the law. If the applicable good is equal to or greater than \$1,000, for a first violation, an individual will be fined not more than \$250,000, imprisoned for not more than 5 years, or both. A person other than an individual, for example a business, will be fined not more than \$1,000,000 for a first violation. If the applicable good is less than \$1,000 an individual will be fined not more than \$25,000, imprisoned for not more than 1 year, or both. A person other than an individual, such as a business, will be fined not more than \$100,000 for a first violation.

In the case of subsequent violations that person, regardless of the amount in which the applicable goods are offered, sold, or displayed for sale, an individual will be fined and imprisoned for not more than 15 years and a person other than an individual, such as a business, will be fined not more than \$5,000,000.

Section 3 also clarifies the definition of the term “Indian tribe,” for purposes of this section. There are also a number of other technical and conforming amendments to § 1159.

LEGISLATIVE HISTORY

S. 1255 was introduced in the Senate on May 1, 2007, by Senator John McCain (R-Ariz.). S. 1255 was received in the Senate and referred to the Committee on Indian Affairs on May 1, 2007. The

Committee ordered the bill to be reported favorably, with an amendment, on June 19, 2008.

COMMITTEE RECOMMENDATION

On June 19, 2008, the Committee on Indian Affairs convened a business meeting to consider S. 1255, and other measures. During the business meeting, the Committee voted, by a voice vote, to report S. 1255 favorably, with an amendment, to the full Senate with a recommendation that it do pass.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate for S. 1255, as provided by the Congressional Budget Office, is set forth below:

S. 1255—Indian Arts and Crafts Amendments Act of 2007

S. 1255 would allow any federal law enforcement officer to investigate the sale of counterfeit Indian art products, rather than only employees of the Federal Bureau of Investigation as under current law. Based on information from the Department of Justice (DOJ), CBO estimates that the cost of implementing S. 1255 would not be significant because it would not appreciably change the workload of federal law enforcement officers or DOJ attorneys who would prosecute the cases.

S. 1255 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

S. 1255 also would modify the penalties for persons who market or sell counterfeit Indian arts and crafts. Under current law, the maximum penalties are the same for all offenders, regardless of the value of the goods. The bill would reduce the maximum penalties for offenders who market or sell counterfeit items priced at less than \$1,000. Criminal fines are recorded as revenues, deposited into the Crime Victims Fund, and later spent. CBO estimates that enacting S. 1255 could reduce the amount of revenues deposited into the fund and direct spending from the fund, but any such effects would be insignificant.

The CBO staff contacts for this estimate are Leigh Angres and Jeffrey LaFave. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1255 will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

There have been no executive communications received by the Committee with regards to this legislation.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1255, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman). Enactment of S. 1255, as amended, would affect no changes in existing law except the following provisions:

25 U.S.C. § 305d**§ 305d. [Referral for criminal and civil violations; complaints; recommendations] *Criminal Proceedings; Civil Actions***

[(a) The Board may receive complaints of violations of section 1159 of title 18 and refer complaints of such violations to the Federal Bureau of Investigation for appropriate investigation. After reviewing the investigation report, the Board may recommend to the Attorney General of the United States that criminal proceedings be instituted under that section.

[(b) The Board may recommend that the Secretary of the Interior refer the matter to the Attorney General for civil action under section 305e of this title.]

(a) *DEFINITION OF FEDERAL LAW ENFORCEMENT OFFICER.*—*In this section, the term “Federal law enforcement officer” includes a Federal law enforcement officer (as defined in section 115(c) of title 18, United States Code).*

(b) *AUTHORITY TO CONDUCT INVESTIGATIONS.*—*Any Federal law enforcement officer shall have the authority to conduct an investigation relating to an alleged violation of this Act occurring within the jurisdiction of the United States.*

(c) *CRIMINAL PROCEEDINGS.*—

(1) *INVESTIGATION.*—

(A) *IN GENERAL.*—*The Board may refer an alleged violation of section 1159 of title 18, United States Code, to any Federal law enforcement officer for appropriate investigation.*

(B) *REFERRAL NOT REQUIRED.*—*A Federal law enforcement officer may investigate an alleged violation of section 1159 of that title regardless of whether the Federal law enforcement officer receives a referral under subparagraph (A).*

(2) *FINDINGS.*—*The findings of an investigation of an alleged violation of section 1159 of title 18, United States Code, by any Federal department or agency under paragraph (1) (A) shall be submitted to—*

(A) *A Federal or State prosecuting authority; or*

(B) *the Board.*

(3) *RECOMMENDATIONS.*—*On receiving the findings of an investigation under paragraph (2), the Board may—*

(A) *recommend to the Attorney General that criminal proceedings be initiated under section 1159 of title 18, United States Code; and*

(B) provide such support to the Attorney General relating to the criminal proceedings as the Attorney General determines to be appropriate.

(d) CIVIL ACTIONS.—In lieu of, or in addition to, any criminal proceeding under subsection (c), the Board may recommend that the Attorney General initiate a civil action under section 6.

25 U.S.C. § 305e

§ 305e. Cause of action for misrepresentation of Indian produced goods

(a) DEFINITIONS.—In this section:

(1) INDIAN PROJECT.—The term “Indian” means an individual that—

(A) is a member of an Indian tribe; or

(B) is certified as an Indian artisan by an Indian tribe.

(2) INDIAN PRODUCT.—The term “Indian product” has the meaning given the term in any regulation promulgated by the Secretary.

(3) INDIAN TRIBE.—

(A) IN GENERAL.—The term “Indian tribe” has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(B) INCLUSION.—The term “Indian tribe” includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

(i) a State legislature;

(ii) a State commission; or

(iii) another similar organization vested with State legislative tribal recognition authority.

(4) SECRETARY.—The term “Secretary” means the Secretary of the Interior.

[(a)] (b) Injunctive or equitable relief; damages

A person specified in [subsection (c)] subsection (d) of this section may, in a civil action in a court of competent jurisdiction, bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States, to—

(1) obtain injunctive or other equitable relief; and

(2) recover the greater of—

(A) treble damages; or

(B) in the case of each aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization, not less than \$1,000 for each day on which the offer or display for sale or sale continues.

For purposes of paragraph (2)(A), damages shall include any and all gross profits accrued by the defendant as a result of the activities found to violate this subsection.

[(b)] (c) Punitive damages; attorney’s fee

In addition to the relief specified in [subsection (a)] subsection (b) of this section, the court may award punitive damages and the costs of [suit] the civil action and a reasonable attorney’s fee.

[(c) Persons who may initiate civil actions

[(1) A civil action under subsection (a) of this section may be commenced—

[(A) by the Attorney General of the United States upon request of the Secretary of the Interior on behalf of an Indian who is a member of an Indian tribe or on behalf of an Indian tribe or Indian arts and crafts organization;

[(B) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization; or

[(C) by an Indian arts and crafts organization on behalf of itself, or by an Indian on behalf of himself or herself.

[(2) Any amount recovered pursuant to this section shall be paid to the individual Indian, Indian tribe, or Indian arts and crafts organization, except that—

[(A) in the case of paragraph (1)(A), the Attorney General may deduct from the amount recovered—

[(i) the amount for the costs of suit and reasonable attorney's fees awarded pursuant to subsection (b) of this section and deposit the amount of such costs and fees as a reimbursement credited to appropriations currently available to the Attorney General at the time of receipt of the amount recovered; and

[(ii) the amount for the costs of investigation awarded pursuant to subsection (b) of this section and reimburse the Board the amount of such costs incurred as a direct result of Board activities in the suit; and

[(B) in the case of paragraph (1)(B), the amount recovered for the costs of suit and reasonable attorney's fees pursuant to subsection (b) of this section may be deducted from the total amount awarded under subsection (a)(2) of this section.]

(d) *PERSONS THAT MAY INITIATE CIVIL ACTIONS.*—

(1) *IN GENERAL.*—A civil action under subsection (b) may be initiated by—

(A) *the Attorney General, at the request of the Secretary acting on behalf of—*

(i) an Indian tribe;

(ii) an Indian; or

(iii) an Indian arts and crafts organization;

(B) *an Indian tribe, acting on behalf of—*

(i) the Indian tribe;

(ii) a member of that Indian tribe; or

(iii) an Indian arts and crafts organization;

(C) *an Indian; or*

(D) *an Indian arts and crafts organization.*

(2) *DISPOSITION OF AMOUNTS RECOVERED.*—

(A) *IN GENERAL.*—*Except as provided in subparagraph (B), an amount recovered in a civil action under this section shall be paid to the Indian tribe, the Indian, or the Indian arts and crafts organization on the behalf of which the civil action was initiated.*

(B) *EXCEPTIONS.*—

(i) *ATTORNEY GENERAL.*—*In the case of a civil action initiated under paragraph (1)(A), the Attorney General may deduct from the amount—*

(I) *the amount of the cost of the civil action and reasonable attorney’s fees awarded under subsection 2(c), to be deposited in the Treasury and credited to appropriations available to the Attorney General on the date on which the amount is recovered; and*

(II) *the amount of the costs of investigation awarded under subsection (c), to reimburse the Board for the activities of the Board relating to the civil action.*

(ii) *the cost of the civil action; and*

(II) *reasonable attorney’s fees.*

[(d) Definitions

[As used in this section—

[(1) the term “Indian” means any individual who is a member of an Indian tribe; or for the purposes of this section is certified as an Indian artisan by an Indian tribe;

[(2) subject to subsection (f) of this section, the terms “Indian product” and “product of a particular Indian tribe or Indian arts and crafts organization” has the meaning given such term [1] in regulations which may be promulgated by the Secretary of the Interior;

[(3) the term “Indian tribe” means—

[(A) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

[(B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; and

[(4) the term “Indian arts and crafts organization” means any legally established arts and crafts marketing organization composed of members of Indian tribes.

[(e) Severability

[In the event that] (e) SAVINGS PROVISION.—*If any provision of this section is held invalid, it is the intent of Congress that the remaining provisions of this section shall continue in full force and effect.*

(f) Regulations

Not later than 180 days after November 9, 2000, the Board shall promulgate regulations to include in the definition of the term “Indian product” specific examples of such product to provide guidance to Indian artisans as well as to purveyors and consumers of Indian arts and crafts, as defined under this Act.

18 U.S.C. § 1159

§ 1159. Misrepresentation of Indian produced goods and products

(a) It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

[(b) Whoever knowingly violates subsection (a) shall—

[(1) in the case of a first violation, if an individual, be fined not more than \$250,000 or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than \$1,000,000; and

[(2) in the case of subsequent violations, if an individual, be fined not more than \$1,000,000 or imprisoned not more than fifteen years, or both, and, if a person other than an individual, be fined not more than \$5,000,000.]

(b) *PENALTY.*—Any person that knowingly violates subsection (a) shall—

(1) *in the case of a first violation by that person—*

(A) *if the applicable goods are offered or displayed for sale at a total price of \$1,000 or more, or if the applicable goods are sold for a total price of \$1,000 or more—*

(i) *in the case of an individual, be fined not more than \$250,000, imprisoned for not more than 5 years, or both; and*

(ii) *in the case of a person other than an individual, be fined not more than \$1,000,000; and*

(B) *if the applicable goods are offered or displayed for sale at a total price of less than \$1,000, or if the applicable goods are sold for a total price of less than \$1,000—*

(i) *in the case of an individual, be fined not more than \$25,000, imprisoned for not more than 1 year, or both; and*

(ii) *in the case of a person other than an individual, be fined not more than \$100,000; and*

(2) *in the case of a subsequent violation by that person, regardless of the amount for which any good is offered or displayed for sale or sold—*

(A) *in the case of an individual, be fined under this title, imprisoned for not more than 15 years, or both; and*

(B) *in the case of a person other than an individual, be fined not more than \$5,000,000.*

(c) *As used in this section—*

(1) the term “Indian” means any individual who is a member of an Indian tribe, or for the purposes of this section is certified as an Indian artisan by an Indian tribe;

(2) the terms “Indian product” and “product of a particular Indian tribe or Indian arts and crafts organization” has the meaning given such term in regulations which may be promulgated by the Secretary of the Interior;

[(3) the term “Indian tribe” means—

【(A) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

【(B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; and】

(3) *the term “Indian tribe”—*

(A) has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b); and

(B) includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by—

(i) a State legislature;

(ii) a State commission; or

(iii) another similar organization vested with State legislative tribal recognition authority; and”.

(4) the term “Indian arts and crafts organization” means any legally established arts and crafts marketing organization composed of members of Indian tribes.

(d) In the event that any provision of this section is held invalid, it is the intent of Congress that the remaining provisions of this section shall continue in full force and effect.