

EXHIBIT C

SENECA NATION OF INDIANS

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DEPARTMENT OF JUSTICE

April 23, 2010

John W. Bartlett, Tax Regulations Specialist 4
New York State Department of Taxation and Finance
Taxpayer Guidance Division
W.A. Harriman Campus, Building 9
Albany, NY 12227
tax_regulations@tax.state.ny.us

Re: Comments of the Seneca Nation of Indians on Proposed Rule Making I.D. No. TAF-10-10-00004-P, Certification by Cigarette Stamping Agents (NYS Register/March 10, 2010)

Dear Mr. Bartlett:

The Seneca Nation of Indians (the "Nation") submits these comments on the above-referenced proposed rule making by the New York State Department of Taxation and Finance (the "Department"). The Department's proposed rule purports to implement statutory provisions requiring stamping agents to certify their compliance with the New York cigarette tax laws. The Seneca Nation confines its comments to section (f) of the proposed rule, "Sales of cigarettes to Indian nations or tribes and reservation cigarette sellers," which suggests a quota system that would effectively prohibit State-licensed stamping agents from selling non-State stamped cigarettes to Nation-licensed businesses or to the Nation itself in excess of the Department's "probable demand" calculation. While any attempt by the State of New York to tax commerce occurring within the Nation's Territories is repugnant to the Nation's sovereignty and to its treaty-protected "free use and enjoyment" of its lands, the Nation focuses its comments on additional fatal flaws in the Department's proposed rule making.

First, by utterly ignoring the devastating employment, economic, and regulatory impacts of the proposed quota system on reservation retailers and Indian nations throughout New York, the Department has violated several key requirements of the State Administrative Procedures Act (SAPA). Second, the proposed quota system contravenes the Legislature's clear intent with respect to the taxation of cigarettes on qualified Indian reservations, as set forth in N.Y. Tax Law § 471-e, and is therefore *ultra vires* and invalid. Third, the system imposes excessive burdens on tax-exempt Indians and reservation retailers and could well result in the commandeering of

Indian nation governments to administer the quota system for the Department, contrary to well-established federal law. Fourth, the proposed quota system imposes an unsupervised horizontal restraint on output among competing sellers that violates the federal Sherman Act. Fifth, because the system denies reservation retailers the ability to sell non-State stamped cigarettes to tax-exempt out-of-state residents, it is impermissible under the Interstate Commerce and Due Process Clauses of the United States Constitution.

In short, the Department's adoption of the proposed quota system would be arbitrary and capricious, an abuse of discretion, not in accordance with law, and in excess of its jurisdiction. Accordingly, the Seneca Nation requests that the Department withdraw the notice of proposed rule making in its entirety, or at a minimum, revise the proposed rule by deleting section (f). The Nation concurrently submits these comments under separate cover to the Governor's Office of Regulatory Reform, to the Administrative Regulations Review Commission, and to the Commissioners of Labor and Economic Development because the Department's proposed rule making woefully fails to satisfy the criteria with respect to which they review agency activities.

1. The Proposed Rule Making Does Not Comply with the Requirements of SAPA

Pursuant to the State Administrative Procedures Act, the Department must "evaluate the potential impact of the [proposed quota system] on jobs and employment opportunities," N.Y. SAPA § 201-a(2), and must "strive to . . . minimize[] any unnecessary adverse impacts on existing jobs," N.Y. SAPA § 201-a(1). In developing the proposed quota system, the Department must also consider regulatory approaches "designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons . . . directly or indirectly affected by it or upon the economy," N.Y. SAPA § 202-a(1), and must seek to minimize adverse impacts of the rule on small businesses and on public and private interests in rural areas, N.Y. SAPA §§ 202-b(1) and 202-bb(2). The proposed rule making plainly disregards these and other SAPA mandates.

On the rural Territories of the Seneca Nation, approximately 100 licensed retailers, employing approximately 3,000 persons, sell non-State stamped cigarettes to thousands of individual consumers each day. According to a 2005 report by Harvard economist Jonathan Taylor, *The Seneca Nation Economy—Its Foundations, Size and Impact on New York State and the Western New York Region* (2005), this retail economy generates estimated annual gross profits of \$116.9 million—each \$1 of gross profit in turn generates an estimated \$1.67 in New York State gross domestic product, totaling \$195 million. By terminating the supply of cigarettes that supports these small businesses, the proposed quota system would eliminate these economic benefits along with thousands of jobs. In his report, Mr. Taylor discussed in detail several of the adverse impacts that would accompany the adoption of such a system:

Were the Seneca Nation and its tax immunity somehow eliminated, New York would lose the benefits currently derived from Seneca private sector exports to Pennsylvanians, to non-New Yorkers on Interstate 86 and to other out-of-state customers. Export sales would drop to near zero as purchasers would flee to neighboring states with lower taxes. A 2004 study of Seneca retailers found that

more than half of all tobacco sales were exports—exports not likely to exist under the imposition of New York State taxes on Seneca sellers.

Not only would exports cease, but New Yorkers could be expected to import more than they currently do. New York's tax rate of [\$2.75] per pack is substantially higher than Pennsylvania's [\$1.60]. Thus were the Seneca Nation not to exist, not only would Pennsylvanians, for example, cease buying tobacco in New York, but New Yorkers who could practically travel to Pennsylvania would seek to buy cigarettes there more than they do now. . . .

Under current conditions, the value of the foregone state taxes stays in Western New York. It is split between the households of in-state purchasers, who face lower prices than they would otherwise and the households of Seneca entrepreneurs, who sell more volume than they would otherwise. The substantially large number of Seneca tobacco sellers . . . indicates strong price competition within the Seneca Nation, which in turn implies a very substantial share of this value is retained by Western New York buyers not Seneca sellers. Regardless, the vendors who cater to affected Western New Yorker's households (Seneca *and* non-Indian) by selling groceries, drywall, heating oil and [other *taxable* goods and services] currently benefit directly from the Seneca private sector's activity—export and otherwise.

The Department utterly ignores these impacts. Without any analysis or explanation, the Department asserts that “[a] Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities.” It is impossible to square this statement with reality. A Job Impact Statement is unquestionably required here, and the Department should consult with the Commissioners of Labor and Economic Development regarding the substantial adverse job impacts of the proposed quota system.

Further, the Department's Regulatory Impact Statement, Regulatory Flexibility Analysis, and Rural Flexibility Analysis uniformly fail to consider the economic and regulatory impacts of the system on Seneca retailers and other reservation cigarette sellers (indeed, the Department made no attempt to solicit the input of these persons as required by SAPA) and on the Seneca Nation and other Indian nations. The Nation, for example, comprehensively regulates the importation and sale of non-State cigarettes on its Territories and imposes a fee on those cigarettes that supports essential government services. The Department's statements and analyses likewise fail to meaningfully consider the costs imposed by the proposed quota system, or to consider alternatives to the system that would minimize adverse economic impacts on the rural businesses engaged in the well-regulated cigarette trade on the Nation's Territories.

The Department's SAPA violations invalidate the proposed rule making. *See, e.g., Medical Soc'y of New York, Inc. v. Levin*, 185 Misc. 2d 536 (N.Y. County 2000), *aff'd*, 280 A.D.2d 309 (1st Dep't 2001). Prior to proposing any system to tax cigarettes on sovereign Indian territory, the Department must conduct a comprehensive analysis regarding the net economic, employment, and tax impacts of that course of action, and in doing so, should request information and assistance from other state agencies, and from the affected Indian Nations, their retailers and their citizens.

2. The Proposed Quota System is *Ultra Vires* and Invalid

The Department purports to implement N.Y. Tax Law § 471(4) and language in N.Y. Tax Law § 471(1) providing that a tax is imposed on all cigarettes except under circumstances where the state is “without power” to tax. The Legislature, however, has already crafted a mechanism, N.Y. Tax Law § 471-e, to govern the taxation and stamping of cigarettes sold on qualified Indian reservations, and through that provision has directed that any taxation of such cigarettes shall be accomplished in conjunction with the provision by the Department to “Indian nations and tribes within this state [of] Indian tax exemption coupons.” N.Y. Tax Law § 471-e(1)(b). Companion bills before the Senate and Assembly, S.6985A and A.10128A, would reaffirm the Department’s statutory obligation to implement the cigarette tax via the § 471-e coupon system. Moreover, the New York Courts have held in *Cayuga Indian Nation of New York v. Gould*, 66 A.D.3d 100 (4th Dep’t 2009), *leave to appeal granted*, 66 A.D.3d 1502, and in *Day Wholesale, Inc. v. New York*, Index No. 2006/7668 (Erie County Sup. Ct. Jan. 27, 2009), that § 471-e exclusively controls the taxation of reservation-bound cigarettes. The Department’s proposed quota system ignores the Legislature’s mandate and nullifies § 471-e in its entirety. The system usurps legislative intent, exceeds the Department’s authority, and is therefore *ultra vires* and invalid. *See, e.g., Campagna v. Shaffer*, 73 N.Y.2d 237, 242-43 (1989) (“It is . . . axiomatic . . . that an administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature. An agency cannot by its regulations effect its vision of societal policy choices . . . , and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer.”).

3. The Proposed Quota System Unlawfully Interferes with the Rights of the Seneca Nation, Nation-Licensed Retailers, and Nation Members

Nation members possess the undisputed right under federal law to purchase tax-exempt cigarettes on the Nation’s Territories, and Seneca retailers must therefore possess tax-exempt cigarettes. The Department, however, does not address whether or how its proposed quota would be allocated among (1) 75 State-licensed stamping agents, (2) 18 Nation-licensed stamping agents that import non-State stamped cigarettes, (3) 100 Nation-licensed retailers, (4) thousands of Nation-member purchasers, and (5) dozens of brands of cigarettes. Because a single State-licensed stamping agent may sell the entire quota to a single Nation-licensed stamping agent, who in turn may sell the entire quota to a single retailer, all Nation members may be compelled to travel to a single location to purchase tax-exempt cigarettes, whatever brand they might be. The proposed quota system makes it virtually impossible for each Seneca retailer to acquire a sufficient quantity and variety of non-State stamped cigarettes to meet the legitimate demands of tax-exempt customers who may choose to patronize that business.

Nor can the Department rely on the Nation to bring some order to the chaos that its proposed system would create. The Department, of course, possesses no legal authority to compel the Nation to adopt or create a regulatory program to administer and allocate the Department’s quota among Seneca stamping agents, retailers, and members. Any such obligation arising out of the proposed quota system would not be a “minimal burden[] reasonably tailored to the collection of valid taxes from non-Indians,” *New York State Dep’t of Taxation &*

Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73 (1994). The proposed quota system would instead “stultify tribal economies,” *id.* at 77, and infringe upon core Nation interests, including the Nation’s right “to make [its] own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220 (1959). The proposed quota system therefore runs flatly counter to federal law.

4. The Proposed Quota System Violates the Sherman Act

By strictly limiting the number of non-State stamped cigarettes that competing State-licensed stamping agents may sell to Indian nations and reservation cigarette sellers, the proposed quota system creates a horizontal restraint on trade. This extreme market manipulation would foster anti-competitive practices such as price-gouging by those persons who control the cigarette quota at any point in the chain of distribution. Such a private agreement among stamping agents to restrict output would *per se* violate the Sherman Act, 15 U.S.C. § 1. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 225 (2d Cir. 2004). The Department’s proposed quota system likewise violates the Sherman Act because the Department provides for no active supervision of the pricing and other conduct of stamping agents and other businesses under the anti-competitive market structure that the system creates.

5. The Proposed Quota System Unconstitutionally Precludes Reservation Retailers from Selling Non-State Stamped Cigarettes to Tax-Exempt Out-of-State Residents

The Department concedes that out-of-state residents, who must remit cigarette tax to their own state of residence, are not subject to New York cigarette tax, 20 N.Y.C.R.R. § 76.1(a)(1) (“The tax on cigarettes possessed for sale is not required to be paid on cigarettes sold . . . to out-of-state purchasers.”). The proposed quota system, however, precludes reservation retailers from acquiring non-State stamped cigarettes from State-licensed stamping agents to support these tax-exempt sales, notwithstanding that the Department noted the necessity of “an Indian export decal system relating to out-of-state sales” in its March 16, 2006 Advisory Opinion, TSB-A-06(2)M. As the Department indeed recognizes, *see* 20 N.Y.C.R.R. § 76.3(a), the Interstate Commerce and Due Process Clauses of the United States Constitution strictly limit the State’s authority to tax out-of-state residents or to effectively bar reservation retailers from making interstate sales. *See generally Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993). The proposed quota system fails to heed these constitutional mandates.

For the foregoing reasons, and without waiving any rights or remedies available under federal, state, or Nation law, the Seneca Nation of Indians requests that the Department withdraw the notice of proposed rule making or revise the proposed rule by deleting section (f).

Sincerely,


Robert Odawi Porter
Senior Policy Advisor and Counsel

Cc: Amelia F. Stern, Counsel
Governor's Office of Regulatory Reform
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Administrative Regulations Review Commission
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Albany, NY 12247

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Dennis Mullen, Commissioner of Economic Development
Empire State Development Corporation
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Re: The Seneca Nation of Indians' Comments on Proposed Rule Making I.D. No. TAF-10-10-00004-P, Certification by Cigarette Stamping Agents (NYS Register/March 10, 2010)

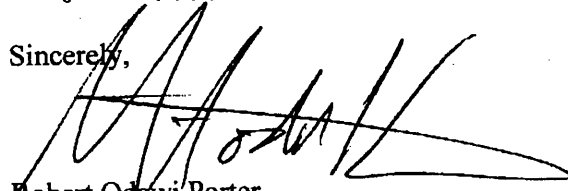
Dear Commissioners Gardner and Mullen:

Please find enclosed the comments of the Seneca Nation of Indians (the "Nation") on the above-referenced proposed rule making by the New York State Department of Taxation and Finance (the "Department"), which purports to implement the requirement in N.Y. Tax Law § 471(4) that State-licensed stamping agents certify their compliance with the New York cigarette tax laws. Also enclosed for your reference is a copy of the notice of proposed rule making published in the New York State Register on March 10, 2010. The Department proposes a quota system that would prohibit stamping agents from selling non-State stamped cigarettes to Nation-licensed businesses or to the Nation itself in excess of the Department's own "probable demand" calculation.

Pursuant to the State Administrative Procedures Act (SAPA), § 201-a(3), the Commissioners of Labor and Economic Development may review the Job Impact Statement prepared by the Department and advise it on the potential impact of the proposed quota system on jobs and employment opportunities. As set forth in the Nation's comments, the Department inexplicably fails to prepare a complete Job Impact Statement, instead asserting without analysis that the rule "would have no adverse impact on jobs and employment opportunities." On the Nation's Territories alone, however, the proposed quota system would seek to terminate a retail cigarette economy that supports 100 Seneca businesses and 1,000 jobs, and a full Job Impact

Statement is unquestionably required. The Seneca Nation therefore requests that the Commissioners of Labor and Economic Development notify the Department that "additional evaluation of the potential impact of [the proposed quota system] on jobs and employment opportunities is needed to assist in the minimization of any unnecessary adverse impacts . . . on jobs or employment opportunities." N.Y. SAPA § 201-a(3)(b).

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert Odawi Porter', written over a horizontal line.

Robert Odawi Porter
Senior Policy Advisor and Counsel

Cc: John W. Bartlett, Tax Regulations Specialist 4
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Governor's Office of Regulatory Reform
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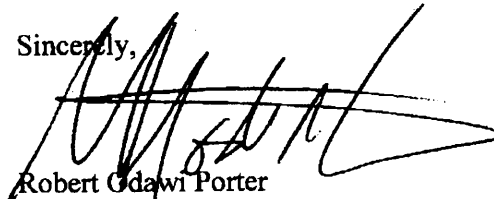
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Executive Order 20 requires the Governor's Office of Regulatory Reform (GORR) to review agency materials for compliance with numerous criteria, including that the proposed rule is clearly within the authority delegated by law; is consistent with and necessary to achieve a specific legislative purpose; does not unnecessarily duplicate or exceed existing federal or state statutes; is consistent with existing state statutes and rules; will produce public benefits that will outweigh the costs, if any, imposed on affected parties; gives preference to the least costly, least burdensome regulatory requirements necessary to accomplish legislative and administrative objectives; is based upon the best economic information that can reasonably and affordably be obtained; and favors market-oriented solutions over command-and-control regulation. GORR

must also determine whether an agency has complied with the requirements of the State Administrative Procedures Act (SAPA) by preparing a Job Impact Statement, Regulatory Impact Statement, Regulatory Flexibility Analysis, and Rural Flexibility Analysis.

For the reasons set forth in the Nation's comments, the Nation submits that the Department's proposed rule making utterly fails to satisfy these criteria and SAPA requirements—the proposed quota system contravenes the clear legislative mandate of N.Y. Tax Law § 471-e, ignores the devastating economic and employment impacts that the proposed quota system would have on rural reservation cigarette retailers and Indian nations throughout New York, and violates federal constitutional, statutory, and common law. The Seneca Nation therefore requests that GORR notify the Department that it may not adopt the proposed rule, specifically section (f), "Sales of cigarettes to Indian nations or tribes and reservation cigarette sellers," and that it must undertake additional analyses, including a cost-benefit analysis regarding net economic, employment, tax, and other impacts, before proposing any system to tax cigarettes on sovereign Indian territory.

Sincerely,



Robert Odawi Porter
Senior Policy Advisor and Counsel

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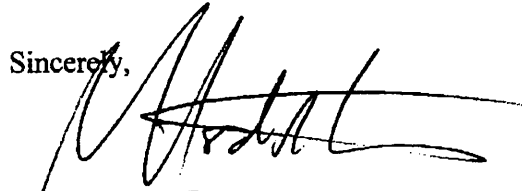
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The Administrative Regulations Review Commission (ARRC) is charged with reviewing proposed regulations for compliance with legislative intent, economic impacts, and other impacts on affected parties. For the reasons set forth in the Nation's comments, the Nation submits that the Department's proposed rule making utterly fails to satisfy these criteria—the proposed quota system contravenes the clear legislative mandate of N.Y. Tax Law § 471-e and ignores the devastating economic and employment impacts that the proposed quota system would have on reservation cigarette retailers and Indian nations throughout New York. The Seneca Nation therefore requests that ARRC notify the Department that it must withdraw the notice of proposed rule making in its entirety or revise the proposed rule by deleting section (f), "Sales of cigarettes to Indian nations or tribes and reservation cigarette sellers." ARRC should also notify the Department that before proposing any system to tax cigarettes on sovereign Indian territory, it

must conduct a comprehensive analysis regarding the net economic, employment, tax, and other impacts of that course of action.

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