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## INTRODUCTION

“Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3159 (2010) (quotation omitted). The PACT Act is unprecedented in the annals of American legislation in at least two ways. First, it completely bans the mailing of a product that is lawful in all 50 states and is not dangerous to the mail or mail carriers. Second, it authorizes (in fact, requires) states to impose state excise taxes on nonresident sellers who lack minimum contacts with the taxing state. *Red Earth, L.L.C. v. United States*, 728 F. Supp. 2d 238, 259 (W.D.N.Y. 2010) (preliminarily enjoining the PACT Act’s “unprecedented” taxation provisions).<sup>1</sup>

Robert Gordon, a member of the Seneca Nation, filed this lawsuit to enjoin enforcement of those provisions of the PACT Act. The undisputed record in this case shows that its enforcement will destroy Mr. Gordon’s business. But Mr. Gordon is not the only small business owner in jeopardy. More than one hundred other Seneca-owned businesses, and several thousand employees, will have their livelihood destroyed by the enforcement of this unconstitutional legislation. Indeed, the Act has already wreaked considerable damage on the economy of the Seneca Nation.

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<sup>1</sup> Cases holding that states may tax tobacco sales on Indian reservations *contained within their borders* are obviously inapposite here, despite the government’s implication to the contrary. *See* Mot. to Dismiss 5–6 (citing *Dep’t of Tax and Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976)). In other words, this case does not involve a situation where Indians were “market[ing] an exemption from state taxation” to their *in-state customers*. *Milhelm Attea*, 512 U.S. at 72. Rather, it involves the PACT Act’s unprecedented attempt to impose state taxes on remote sellers *in interstate transactions*—transactions for which states previously taxed only *resident buyers*. *See infra* Part I.B. The imposition of state taxes on remote sellers who lack minimum contacts is equally unconstitutional regardless of whether the remote seller is a reservation Indian or a non-Indian citizen of a foreign state.

The government's brief offers many arguments in support of the Act's constitutionality, but none of them are ultimately persuasive. *First*, the Act's mailing ban is not rationally related to increasing tax collection and decreasing underage smoking. Other provisions of the Act do that directly. It is not rational to ban the mailing of age-verified, tax-prepaid shipments, yet that is what the Act does. Such legislative overkill strongly suggests that the Act was passed to benefit Big Tobacco and convenience store outlets—but singling out certain businesses for special economic treatment is not a legitimate government purpose. *Second*, the government cannot overcome the fact that this legislation authorizes the states to subject Mr. Gordon, and other remote sellers of tobacco products like him, to their taxing authority, *even where the sellers have no minimum contacts with the state*. Supreme Court precedent makes clear that Congress lacks the authority to set aside obligations imposed by the Due Process Clause. The government's argument on this point suggests that any small business that operates a website is now subject to every taxing regime in the nation. This position ignores both existing case law and common sense. *Third*, the Act violates the Tenth Amendment by forcing states to collect their excise taxes on tobacco from sellers before the sale of the product, even though existing state law imposes the tax *on buyers* and does not require advance collection. Congress cannot commandeer the states in such a manner.

The PACT Act's enforcement should be enjoined and the government's motion to dismiss denied.

### **FACTS**

The facts underlying this dispute are set forth in Mr. Gordon's Renewed Application for a Preliminary Injunction. Renewed Appl., Dkt. No. 16, at 5–10. The following paragraphs are intended to provide the Court with additional facts, particularly in light of two declarations submitted with this brief, one from the Seneca Nation and one from the Seneca Free Trade

Association (“SFTA”). These two declarations detail the effect that the PACT Act has had on the Seneca Nation and its people.

The Seneca, like many American Indian tribes, have faced serious challenges. Over the past two centuries, the Seneca have been robbed of the vast majority of their treaty-protected lands through the actions of both government actors and private citizens, which has caused long-term economic deprivations unheard of in most of the United States. Porter Decl. ¶ 4–5.<sup>2</sup> In 1990, the President of the Seneca Nation reported to Congress that unemployment in the Nation was over 40 percent. *Id.* Ten years later, the 2000 census reported that the average income in the Seneca Nation’s territories was \$12,300, barely half the state average. *Id.*

Mr. Gordon is not the only member of the Seneca Nation who relies on selling tobacco products to make a living. Before the PACT Act was signed into law, there were more than 100 licensed cigarette retailers operating within the Seneca Territories, employing more than 3,000 people. Porter Decl. ¶ 6; Jemison Decl. ¶ 13. For comparison, the Seneca Nation has only 8,000 enrolled members. Moll Decl. ¶ 8. Sales made by Seneca-owned businesses represented approximately 80 percent of the mail-order and Internet sales in the United States. Porter Decl. ¶ 18. The tobacco trade was the Seneca Nation’s predominant source of private-sector employment, Moll Decl. ¶ 29, and thus a vital part of the Seneca economy. Porter Decl. ¶ 6.

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<sup>2</sup> Citations to “Gordon Decl.” refer to Mr. Gordon’s Declaration in support of his initial Application for a Temporary Restraining Order and Preliminary Injunction. *Gordon v. Holder*, 10-cv-01092, Dkt. No. # 1-1 (D.D.C. June 28, 2010). Citations to “Moll Decl.” and “M. Gordon Decl. 2010” refer respectively to the Declarations of Thomas Moll and Marcia Gordon in support of that same initial Application. *Gordon v. Holder*, 10-cv-01092, Dkt. Nos. 1-2, 1-3 (June 28, 2010). Citations to “M. Gordon Decl. 2011” refer to the Second Declaration of Marcia Gordon, filed with Mr. Gordon’s renewed Application. *Gordon v. Holder*, 10-cv-01092, Dkt. No. 16-1 (Apr. 20, 2011). Citations to “Porter Decl.” and “Jemison Decl.” refer to the Declarations of Robert Odawi Porter and Richard Jemison, respectively, in support of this combined Reply and Opposition.

The tobacco trade is also a critical source of revenue for the Seneca Nation's government. *See id.* ¶¶ 8, 15. Before the PACT Act was signed into law, the Seneca Nation received in excess of \$14,500,000 annually through fees imposed by the Nation on tobacco commerce. *Id.* ¶ 15. The Nation used these revenues to fund essential government programs, including emergency management, higher education and language programs, and its Health Care Incentive Program, which reduces long-term health care costs by providing financial rewards to Nation members who lose weight and maintain a healthy lifestyle. *Id.* ¶¶ 15, 17.

Consumers also benefited from the Seneca Nation's manufacture and sale of tobacco products. The Seneca sell a wide variety of cigarette brands, including many Seneca-made tobacco products that are not widely available elsewhere. *Jemison Decl.* ¶ 23. Seneca-owned brands made up a significant amount of pre-PACT Act sales by Seneca tobacco retailers. *Id.* These brands provided a lower-priced alternative to the premium brands sold by Big Tobacco.

Now, however, it will be impossible for Mr. Gordon and nearly all other Seneca tobacco retailers to continue to operate. The Seneca Nation is located in a relatively isolated area in upstate New York, and there are no alternative couriers available with the same delivery scope as the U.S. mail. *Jemison Decl.* ¶ 14. Mr. Gordon and the Seneca Free Trade Association have investigated other shipping options, but have identified no practical alternatives. *M. Gordon Decl.* 2011 ¶ 3; *Jemison Decl.* ¶ 14.

No business can survive if it cannot deliver its products. The Nation estimates that 60 Seneca-licensed tobacco sellers have already closed their doors as a result of the PACT Act, with more to come. *Porter Decl.* ¶ 16. The SFTA estimates that the PACT Act will eventually cost more than 3,000 jobs in the Seneca territories. *Moll Decl.* ¶¶ 34–45. In addition to flooding the Seneca Territories with unemployed workers, this will have a significant adverse impact on the

broader economy of Western New York. *See Red Earth L.L.C. v. United States*, 728 F. Supp. 2d 238, 259 (W.D.N.Y. 2010) (irreparable harm and public interest factors favored preliminary injunction of PACT Act to prevent harm to Seneca plaintiffs and the regional economy).

The Seneca Nation's government has also suffered from the PACT Act's destruction of the Seneca tobacco industry. Over the last year, the Nation's revenues from tobacco stamps have dropped by more than 50 percent. *See Porter Decl.* ¶ 15. As a result, the Nation has cancelled essential government services and has scaled back others. *Id.* ¶ 17. The Seneca Nation's Health Care Incentive Program will be discontinued after 2011 due to lack of resources resulting from the PACT Act. *Id.* The PACT Act has also dashed the Nation's hopes of establishing a Seneca Academy to provide culturally-appropriate education alternatives to the Nation's youth. *Id.* The Act has also caused increased demand for social services such as unemployment benefits and food stamps. *Jemison Decl.* ¶ 20.

As discussed below, the government's brief suggests that Mr. Gordon and other Seneca Nation members are illegal tobacco traffickers. The facts belie this argument. The Seneca Nation has undertaken significant efforts to prevent underage smoking and illegal trafficking. The Seneca Nation's Import-Export Law and Import-Export Regulations (collectively, "IEL") require that all cigarette packages distributed by Seneca retailers bear a unique, numbered Seneca Nation stamp with advanced security features. *Porter Decl.* ¶ 7. The Nation further prohibits the sale of cigarettes to minors, the wholesale conveyance of cigarettes to non-Indians for purposes of resale off the reservation, and the sale of cigarettes to any person outside of the Territories in a manner that has been determined to violate federal law. *Id.* ¶ 9.

In its efforts to combat the illegal trafficking of cigarettes, the Seneca Nation has frequently cooperated with federal and state agencies, including the Postal Service, the New

York State Department of Taxation and Finance, and the ATF. Porter Decl. ¶¶ 10–14. The Seneca Nation’s Import-Export Commission routinely shares confidential information with the ATF and has undertaken several joint investigative and law enforcement actions with U.S. and state officials. *Id.* ¶ 11. For example, in June 2007, the Commission seized more than 60,000 cartons of unstamped cigarettes from a Seneca tobacco retailer, and later cooperated with the ATF in its investigation. *Id.* ¶ 12. In April 2008, a joint investigation by the Nation, the ATF, and the New York State Department of Taxation and Finance led to the seizure of massive quantities of unstamped cigarettes that were being illegally imported through the Nation’s territories. *Id.* ¶ 13. The ATF has informed the Seneca Nation that its law enforcement activities and cooperation with the ATF have largely eliminated the Territories as a source of contraband cigarette trafficking. *Id.* ¶ 14.

### **ARGUMENT**

The PACT Act’s unprecedented attempt to destroy small businesses that compete with Big Tobacco and chain convenience stores cannot stand. The Act’s complete ban on mailing a lawful product that poses no danger to mail carriers or the mail is a first in our Nation’s history. Further, the Act’s taxation provisions violate the Due Process Clause and the Tenth Amendment. Because Mr. Gordon has satisfied his burden in seeking a preliminary injunction, the Court should enjoin the government from enforcing this unconstitutional legislation, as well as deny the government’s motion to dismiss.

#### **I. MR. GORDON HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS**

There is a substantial likelihood that Mr. Gordon will prevail on at least three of his constitutional claims—any one of which is sufficient to satisfy the likelihood-of-success prong. First, the PACT Act’s mailing ban, 18 U.S.C. § 1716, violates Mr. Gordon’s due process and

equal protection rights by arbitrarily and irrationally banning the mailing of lawful tobacco products. Second, as the court in *Red Earth* held, there is a substantial likelihood that the tax prepayment requirement, 15 U.S.C. § 376a(d), violates the Due Process Clause by requiring nonresident retailers to pay state and local taxes without regard to whether they have minimum contacts with the forum. 728 F. Supp. 2d at 247–52. Third, the tax-related sections, 15 U.S.C. §§ 376a(a)(3)-(4), 376a(d), unconstitutionally commandeer state tax officials to alter their own taxation laws and implement a federally-imposed taxation scheme for collecting prepaid excise taxes on remote sellers.

**A. The PACT Act’s Mailing Ban Violates the Fifth Amendment’s Equal Protection and Due Process Components**

To pass constitutional muster, all agree that the mailing ban must be rationally related to a legitimate government interest. Even under rational basis review, however, “[t]he absence of precedent for the legislation is itself instructive” and “discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quotation omitted). It is thus significant that the government does not dispute the unprecedented nature of the Act’s ban on mailing a product that is lawful in all 50 states and is not dangerous to mail carriers or the mail. Accordingly, this novel ban ought to be subjected to the same searching brand of rational-basis review applied by the Supreme Court in *Romer*.

The government principally argues that the mailing ban survives rational basis review for one reason: it will prevent the interstate flow of “untaxed” cigarettes. Preventing “untaxed” cigarettes will supposedly reduce illegal trafficking, force consumers into brick-and-mortar outlets with higher prices, and thereby discourage teenage smoking. *Id.* at 8–9.

The government's tax-enforcement argument depends on a fictional world in which the mailing ban is the only provision in the PACT Act. In this imaginary world, the ban no doubt would be rationally related to tax enforcement. But the government's world is not the real world. In the real world, a separate provision of the Act expressly requires delivery sellers to pay all applicable taxes in the jurisdiction of delivery. 15 U.S.C. § 376a(a)(3). Indeed, the Act requires delivery sellers to pay such taxes *before* shipping an order, *id.* § 376a(d), or face a felony charge. *Id.* § 377. These provisions eliminate any so-called "tax discount" that Internet retailers previously possessed and thus secure the legislature's goal of preventing "untaxed" cigarettes from flowing in interstate commerce.<sup>3</sup> In light of the Act's criminalization of selling "untaxed" cigarettes, a blanket ban on using the U.S. mails to sell tobacco products *on which taxes must have been paid already* is not rationally tailored to enhancing tax enforcement. To the contrary, the mailing ban's "sheer breadth is so discontinuous with the [tax-enhancement] reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632 (1996).

Even if there were a rational relationship between the mailing ban and any tax-collection interest, the government's contention that it can ban a product from interstate shipment merely because buyers evade state taxes is frightening in its implications. It is amazing that the government does not dispute that this rationale would allow it to ban the mailing of *any* item

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<sup>3</sup> The government cites legislative history stating that remote sellers have been successful at "eluding traditional enforcement measures" by making their deliveries through the mail. Mot. to Dismiss at 10. But this pre-PACT Act statement does not support the argument that a complete mailing ban is rationally related to the asserted governmental interests when other provisions of the Act dramatically enhance those "traditional enforcement measures" by requiring the prepayment of state taxes and age verification. For example, while some mail-order sellers previously failed to comply with the Jenkins Act's requirement to provide lists of purchasers to purchasers' home states, *see* Mot. to Dismiss at 4, this concern is directly eliminated by the Act's provisions requiring sellers to prepay state excise taxes (and by separate provisions that strengthen the Jenkins Act significantly).

purchased on the Internet, since buyers regularly fail to pay sales taxes on Internet purchases.

Renewed Appl. at 19–20. Of course, the Court need not reach that question because the PACT Act’s mailing ban is not rationally related to tax enhancement in light of its separate provisions requiring sellers to prepay taxes in the state of delivery.

The government’s “trafficking” and “terrorism” rationales are entirely derivative of its tax-enforcement rationale. *See* Mot. to Dismiss at 9. As the government notes, cigarette smuggling is profitable only because of the “price differentials between taxed and untaxed cigarettes.” *Id.* And the government’s “terrorism” rationale depends entirely on profits made by selling untaxed cigarettes. *See id.* Because the tax provisions of the PACT Act already eliminate this supposed price differential, the “trafficking” and “terrorism” rationales cannot constitutionally justify this ban.

Finally, the “youth smoking” rationale does not support the PACT Act’s mailing ban. Mot. to Dismiss at 10. First, like the trafficking and terrorism reasons, this rationale is largely derivative of the tax-enforcement rationale, relying on the existence of “a cheap supply of ‘tax-free’ cigarettes,” which allegedly increases demand and allows adult purchasers to supply young smokers more cheaply. *Id.* at 11. The PACT Act’s tax provisions already eliminate this “cheap supply of ‘tax-free’ cigarettes.” *See supra*. More to the point, the PACT Act directly requires sellers to verify the ages of their customers (as Mr. Gordon always has) and to comply with state age-verification laws. 15 U.S.C. §§ 376a(b)(4), 376(e). There is no age-related rational basis for banning tobacco shipments for which age verification is already mandated. The imposition of a total mailing ban to accomplish a purpose that other provisions of the Act already achieve is the epitome of legislative irrationality. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985) (invalidating under rational basis review the requirement that a home for the

mentally handicapped obtain a special-use permit where home's compliance with City's zoning ordinance fully ensured protection of City's legitimate interests). The fact that prior to the PACT Act some Internet retailers allegedly failed to verify customers' ages, *see* Motion to Dismiss at 10,<sup>4</sup> does not provide a rational basis for completely banning the shipment of tobacco in an Act that also makes age verification mandatory and makes a violation of this provision a felony.<sup>5</sup>

The government provides no authority to dispute that only a "small portion"—at most 6 percent—of underage tobacco sales occur online or through the mail, while most occur at retail stores.<sup>6</sup> *See* Mot. to Dismiss at 11; Renewed Appl. at 18 n. 9. The mailing ban thus has no impact on 94 percent of tobacco sales to underage smokers, which are made by brick-and-mortar retailers, but bankrupts Internet retailers who comply with the Act's age-verification and tax-prepayment requirements. Such a targeted effect suggests irrational government motives. "A

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<sup>4</sup> The government's studies on teen smoking all date from long before the PACT Act was signed into law, and thus do not reflect the effects of the PACT Act's age-verification and taxation requirements. Mot. to Dismiss at 10. Indeed, before the PACT Act, there was no generally applicable requirement that interstate sellers verify the age of their customers. The government also fails to address the considerable evidence that brick-and-mortar sales are a far larger and less secure source of teen smoking than online sales. *See* Renewed Appl. at 18 n. 9.

<sup>5</sup> That New York's ban on direct shipment of cigarettes survived a dormant Commerce Clause challenge does not mean that the Act's nationwide mailing ban is rationally related to tax enforcement or underage smoking prevention. *See* Mot. to Dismiss at 12, *citing Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003). Indeed, New York at that time did not collect taxes on cigarettes sold from other states over the Internet. *Brown & Williamson*, 320 F.3d at 207. The PACT Act, however, expressly allows—indeed requires—states to collect such taxes now, thus completely removing any tax-enforcement basis for a total ban on interstate shipments of tobacco. Likewise, prior to the PACT Act, state age-verification laws were often preempted by federal law that did not require age verification. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368–69, 371–72 (2008). The PACT Act, however, contains age-verification requirements of its own. Thus, while New York's pre-PACT Act direct-shipment ban arguably advanced legitimate interests, the PACT Act's nationwide mailing ban does not.

<sup>6</sup> The government's cited studies either present statistics on teen smoking in general, regardless of purchasing source, or discuss how many teens, in absolute numbers, have *ever* purchased a cigarette online. The government makes no attempt to challenge the conclusion of the studies in Mr. Gordon's Application, which show that at most 6 percent of underage tobacco sales occur online or through the mail. *See* Renewed Appl. at 18 n. 9.

court applying rational-basis review . . . must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” *Kelo v. City of New London*, 545 U.S. 469, 491 (2005).

The government’s response, that Congress has “plenary power” over the mails, is no answer. Mot. Dismiss at 8, *citing United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989).<sup>7</sup> Congress has constitutional authority to control the mails as one of its enumerated powers. *See Barry*, 888 F.2d at 1095 (citing U.S. Const. art. 1, § 8). But this authority does not allow Congress to violate the Constitution when regulating the mails. *See USPS v. Council of Greenburgh Civic Ass’ns.*, 453 U.S. 114, 126 (1981) (“However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution.”); *cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 305 (1992) (“[W]hile Congress has *plenary power* to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does *not* similarly have the power to authorize violations of the Due Process Clause.”) (emphasis added) (citation omitted)). Courts have repeatedly held the Postal Service to account for regulations that violate the Constitution. *See, e.g., Initiative & Referendum Inst. v. USPS*, 417 F.3d 1299, 1313 (D.C. Cir. 2005) (Postal Service regulation barring solicitation of signatures on USPS property unconstitutional if applied to a public forum); *Hiatt v. United States*, 415 F.2d 664, 667 (5th Cir. 1969) (rejecting proposition that mailing power overrode limitations in Bill of Rights, and holding unconstitutional federal statute

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<sup>7</sup> In making this argument, the government also mischaracterizes the *Red Earth* action as “raising essentially the same claims as the present case.” Mot. to Dismiss at 8. In fact, as the government later recognizes, *see id.* at 12 n. 6, the *Red Earth* plaintiff challenged the mailing ban only on the basis that it exempted sales made within Alaska and Hawaii. *Red Earth*, 728 F. Supp. 2d at 257.

prohibiting use of mails to distribute information about divorces). Congress's power to define "mailable matter" is not somehow exempt from other constitutional restraints. Indeed, in *Tollett v. United States*, the Eighth Circuit struck down a federal statute defining envelopes bearing visible defamatory material as nonmailable, holding that the statute violated the First Amendment. 485 F.2d 1087, 1088–91 & n. 1 (8th Cir. 1973). Because the PACT Act's mailing ban also violates constitutional constraints, Congress's "plenary power" to regulate the mails cannot save it.

Finally, the government asks this Court to ignore evidence showing that the mailing ban was motivated in significant part by a desire to protect Big Tobacco and chain convenience stores from competition by Indian Internet retailers and instead accept Congress's stated purpose, pretextual or not. Mot. to Dismiss at 13, *citing FCC v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993). *Beach Communications* has nothing to do with the issue here. Even though the legislature's *actual* motive need not provide the rational basis that the Constitution requires, the statute must nevertheless have *some* rational basis. It is this rational basis that the PACT Act lacks. Courts are not required to accept the legislature's pretextual justifications for statutes motivated by an illegitimate governmental purpose, such as economic protectionism. *Craigsmiles v. Giles*, 312 F.3d 220, 227–28 (6th Cir. 2002) (invalidating under rational-basis review state law requiring sellers of caskets to attend mortician school). Indeed, the Supreme Court "ha[s] repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224 (collecting cases). Such "simple economic protectionism" is subject to a "virtually *per se* rule of invalidity." *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978).

**B. The PACT Act Violates Due Process by Subjecting Nonresidents to the Taxing Jurisdiction of State and Local Governments without Regard to Minimum Contacts**

The PACT Act is also unconstitutional because it purports to authorize states to tax out-of-state sellers without requiring that the sellers have minimum contacts with the taxing states.

The PACT Act requires delivery sellers like Mr. Gordon to pay all state excise taxes before shipping any tobacco products. 15 U.S.C. § 376a(a)(3)-(4) & (d). The Due Process Clause, however, prohibits states from taxing remote sellers unless they satisfy a three-part test for “minimum contacts” with the state. *Quill*, 504 U.S. at 307–08; Renewed Appl. 23. Therefore, as the district court in *Red Earth* held, the Act is inconsistent with the restrictions of the Due Process Clause and must be enjoined. *Red Earth*, 728 F. Supp. 2d at 251–52.

The government maintains that “‘minimum contacts’ concerns are satisfied when a delivery seller engages in a congressionally regulated transaction anywhere in the United States.” Mot. to Dismiss 15. Thus, according to the government, Congress can authorize a state to impose a tax that would violate the Due Process Clause under *Quill* if it had been unilaterally imposed by a state. That argument has already been rejected by the D.C. Circuit in this very case, when it declared that “*Quill*’s analytical approach is instructive.” *Gordon v. Holder*, 632 F.3d 722, 726 (D.C. Cir. 2011). *Quill* instructs that “while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, *it does not similarly have the power to authorize violations of the Due Process Clause.*” 504 U.S. at 305 (emphasis added). Applying this guidance, the D.C. Circuit held that “[t]he government’s suggestion that there can be no Due Process violation when Congress authorizes state levies based on minimum contacts collapses the Due Process and Commerce Clause aspects of Gordon’s claims.” *Gordon*, 632 F.3d at 725.

Despite this clear guidance from the D.C. Circuit, the government asks this Court to ignore *Quill* because Congress authorized state taxation of remote sellers in the PACT Act. But if the government's theory is correct, *Quill* (and *Gordon I*) would be rendered a dead letter. The government says Congress does not violate the Due Process clause whenever Congress authorizes states to tax a "congressionally regulated transaction"—even if the tax would indisputably violate the Due Process Clause if unilaterally imposed by the state. If that is the law, the Supreme Court was speaking empty words when it said Congress "does not . . . have the power to authorize violations of the Due Process Clause" because any tax authorized by Congress (i.e., a tax on a "congressionally regulated transaction") could not violate the Due Process Clause. *Quill*, 504 U.S. at 305. That circular position has already been rejected and should be laid to rest once and for all.

None of the government's cited authority holds that Congress can authorize state taxation of remote sellers who lack minimum contacts with the taxing state. Although the government argues that federal laws requiring sellers to comply with local law are "commonplace," Motion to Dismiss at 15, none of the government's examples includes a federal requirement that a remote seller *pay taxes* in a state with which it lacks minimum contacts. *Id.* at 15–16. And neither of the government's ancient cases endorse federal laws imposing state *taxation* upon remote sellers (and in any event both predate the Supreme Court's articulation of the minimum-contacts requirement of the Due Process Clause in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)). See Mot. to Dismiss at 16–17 (citing *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326 (1917); *Ky. Whip & Collar Co. v. Ill. Cent. Ry. Co.*, 299 U.S. 334, 343 (1937)). The reason why Congress has never imposed such a requirement is simple: The Due Process clause prohibits such state taxation, as *Quill* makes perfectly clear.

The government next contends that Mr. Gordon in fact *has* minimum contacts with the states because he “purposefully avails himself of the benefits of the economic markets of the states into which he sells tobacco products.” Mot. to Dismiss at 18. To begin with, the government’s argument improperly conflates the minimum contacts test for *taxing jurisdiction* applied by *Quill* with the minimum contacts test for *personal jurisdiction*. See *Adventure Commc’ns, Inc. v. Ky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (noting that the standards for taxation, judicial, and legislative jurisdiction may not be identical, and citing *Quill* as the appropriate standard for evaluating a state’s attempt to tax). Under *Quill*, (i) the remote seller must “purposefully direct[] its activities” at the state; (ii) “the magnitude of those contacts” must be such as to permit imposition of the tax; *and* (iii) the tax must be “related to the benefits [the remote seller] receives from access to the State.” 504 U.S. at 308. The government makes no serious attempt to analyze the second or third elements of the *Quill* test, and it cannot dispute that Gordon’s operations fall far short of the magnitude and use of state services found in *Quill*.<sup>8</sup>

The government argues that Mr. Gordon has minimum contacts with all 50 states simply because he operates a website. Mot. to Dismiss at 19. This is not enough even for personal jurisdiction, much less taxing jurisdiction. The D.C. Circuit has explained that “personal

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<sup>8</sup> As to *Quill*’s third requirement, the government states only that “the success of [Mr. Gordon’s business] model” should be “the measure of [his] contacts with and benefits received from the states into which he sells his products.” Mot. to Dismiss at 19, *citing* Compl. ¶ 71. But *Quill* and its progeny do not hold that merely making isolated sales into a state satisfies the third element. Rather, the question “is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return.” *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dept. of Revenue*, 553 U.S. 16, 24–25 (2008). Thus, before a state can tax a remote seller, *the state itself* must provide some benefit to the remote seller that is related to the level of taxation. The PACT Act, however, unconstitutionally taxes remote sellers who use no state services precisely the same as in-state retailers who make use of state services on a daily basis.

jurisdiction surely cannot be based solely on the ability of District residents to access the defendants' websites, for this does not by itself show any persistent course of conduct by the defendants in the District." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000); *see also Be2 L.L.C. v. Ivanov*, No. 10-2980, 2011 WL 1565490 at \*4 (7th Cir. Apr. 6, 2011) (no minimum contacts where website had 20 registered customers in Illinois, because defendant did not "target the forum state's market"). The D.C. Circuit's opinion in *Gorman v. Ameritrade Holding Corp.*, cited by the *Gordon* panel, reinforces this rule. 293 F.3d 506, 512 (D.C. Cir. 2002). In *Gorman*, the court held that Ameritrade might be subject to personal jurisdiction in the District of Columbia because it concededly engaged in numerous and continuous transactions with District residents through its interactive website. *Gorman*, 293 F.3d at 511-13. In doing so, the court made clear that Ameritrade's maintenance of an Internet site did not give rise to "automatic" jurisdiction or even alter the jurisdictional analysis. *See id.* at 511, 513. Rather, jurisdiction would depend on the frequency and volume of Ameritrade's transactions with its District customers. *Id.* That reasoning squarely applies here. Mr. Gordon is not subject to taxation in all 50 states merely because he operates a website—much less a *passive* website far different from the interactive website in *Gorman*. Rather, the Due Process Clause protects him from state taxation except where his contacts with the jurisdiction satisfy *Quill*'s minimum contacts standard. The PACT Act's fatal flaw is to subject Mr. Gordon to state taxation without requiring such a level of contacts.

The government also suggests that a single sale into a jurisdiction can create sufficient contacts for personal jurisdiction when transacted through a website. Mot. to Dismiss at 19–20, *citing Chloe v. Queen Bee of Beverly Hills, L.L.C.*, 616 F.3d 158 (2d Cir. 2010). Even if this were true for personal jurisdiction, no court has ever held it sufficient for taxing jurisdiction. In

any event, the government mischaracterizes *Chloe*. Far from relying solely on a “single sale” through a website, as the government suggests, the *Chloe* court specifically held that “the relevant minimum contacts between Queen Bee and New York include [] more than fifty sales of designer handbags into New York and are not limited to the narrow subset of one sale that involved a Chloe handbag.” *Id.* at 167. It was these “extensive business contacts with New York customers” that created minimum contacts. *Id.* at 166–67.

Furthermore, the website in *Chloe* was an “interactive” website that not only offered products to New York consumers but permitted New York consumers to purchase such bags online and facilitated shipment into New York. *Id.* at 166. By contrast, Mr. Gordon’s website is now simply a passive online catalog that lists prices and gives a phone number. M. Gordon Decl. 2011 ¶ 11; *see also Red Earth L.L.C. v. United States*, 728 F. Supp. 2d at 249 (noting distinction for due process purposes between “active” websites and passive websites that are “akin to a virtual mail order catalog, available for interested customers . . . if they specifically seek out that website by doing an Internet search, but with no ability to consummate the purchase over the internet.”). The government cites no case where personal jurisdiction—much less taxing jurisdiction—was asserted over a remote seller merely because purchasers accessed a *passive* website. Yet that is exactly what the PACT Act purports to authorize with respect to Mr. Gordon.

Moreover, the law is clear that occasional sales transacted through even an *interactive* website will *not* create sufficient contacts for personal jurisdiction in the state of delivery. *See Be2*, 2011 WL 1565490, at \*4 (twenty users of internet dating service in Illinois insufficient to create minimum contacts); *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 813 (D. Md. 2004) (two Internet sales to forum residents insufficient because “sales to forum

residents must be more than ‘isolated’ occurrences for the assertion of jurisdiction to satisfy the requirements of due process”); *iAccess Inc. v. WEBcard Tech., Inc.*, 182 F. Supp. 2d 1183, 1189 (D. Utah 2002) (one Internet sale insufficient); *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1266 (N.D. Ala. 2000) (forum state minor’s single purchase of beer over moderately interactive website insufficient). Asserting taxation jurisdiction based upon a single website sale would also be inconsistent with *Quill*’s careful analysis of the “magnitude” of the remote seller’s solicitation and sales into the forum state. *Quill*, 504 U.S. at 308. If a single sale were enough, this analysis would have been unnecessary.

The government contends that Mr. Gordon is asking the court to “speculate about ‘hypothetical’ or ‘imaginary’ cases” in which he might not have sufficient contacts in a state. Mot. to Dismiss at 14 n.7. Yet, the government offers no evidence to contradict the record here that Mr. Gordon lacks minimum contacts with other states. Mr. Gordon has no physical presence outside of New York, and owns no facilities or equipment outside of New York. M. Gordon Decl. 2011 ¶ 9. His employees do no work in other states, and his company vehicles do not deliver cigarettes to other states. *Id.* ¶ 10. Nor does he use the services or benefits of foreign states, including police and fire protection. *Id.* ¶ 12. And there are several states—and many local jurisdictions—into which Mr. Gordon has never made a single sale. *Id.* ¶ 13. As a result, in many (if not all) states Mr. Gordon has no minimum contacts that could support taxing jurisdiction under *Quill*’s three-part test. Merely operating a passive website and selling tobacco via mail order does not satisfy *Quill*’s minimum contacts test. 504 U.S. at 301-02 (reaffirming

*Bellas Hess* rule that mail-order sales alone do not support taxing jurisdiction).<sup>9</sup> Nevertheless, the PACT Act requires him to prepay state taxes on even a single sale into all jurisdictions.

**C. The PACT Act Unconstitutionally Commandeers States to Implement a Federally-Mandated Taxation Scheme**

The government does not dispute that the Act would unconstitutionally commandeer state officials if it required states to alter their internal taxation laws and change their tax-collection mechanisms. Instead, the government argues that (1) Mr. Gordon lacks standing to bring his commandeering claim, and (2) the Act does not alter existing state law by requiring delivery sellers to pre-pay state excise taxes regardless of whether state law imposes those taxes on the seller. Mot. to Dismiss at 27–28.

The government’s standing argument is now foreclosed. Relying on a single sentence from a 1939 Supreme Court case, the government asserts that a private individual cannot bring a Tenth Amendment challenge. Mot. to Dismiss at 27, citing *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144 (1939)) (“TVA”). On June 16, 2011, the Supreme Court explicitly rejected this argument. *Bond v. United States*, 564 U.S. \_\_\_, No. 09-1227, 2011 WL 2369334 (June 16, 2011). In *Bond*, the Court considered whether an individual could object to the constitutionality of a statute on Tenth Amendment grounds. *Id.* at \*3. Reasoning that “[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable,” the Court held that she could bring such a claim. *Id.* at \*8. In so holding, the Court specifically rejected the very language from TVA that remains the government’s only support here, holding that it was “neither controlling nor instructive on the issue of standing as that term is now defined and applied.” *Id.* at \*6.

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<sup>9</sup> A passive website does not involve purposeful targeting of customers in any particular state, unlike the “deluge of catalogs” or “phalanx of drummers” referenced by *Quill*. 504 U.S. at 308.

The *Bond* Court also rejected the government’s argument here that the Tenth Amendment claim at issue in *Bond* is somehow “materially different” from a “sovereignty-based claim,” such as a commandeering claim. Mot. to Dismiss at 28 n. 10. In *Bond*, the government argued that Bond’s standing was limited to her enumerated powers argument, and that she would not have standing had she argued that the statute “interfere[d] with a specific aspect of state sovereignty.” *Bond*, 2011 WL 2369334 at \*9. The Court rejected this characterization, explaining that Bond had raised sovereignty-based arguments as well. *Id.* The Court held that Bond nevertheless had standing to raise these arguments, reasoning that “[t]here is no basis to support the Government’s proposed distinction” and that “[t]he principles of limited national powers and state sovereignty are intertwined.” *Id.*<sup>10</sup>

*Bond* thus dooms the government’s standing argument. Mr. Gordon has standing to bring this claim because the PACT Act threatens him with certain economic injury: If his commandeering challenge fails, he will be subject to state taxes that he otherwise would not have to pay. This threatened economic injury is a quintessential injury-in-fact.

The government’s second argument fares no better. The government does not dispute that, prior to the PACT Act, state laws imposed excise taxes upon the resident *buyer* in interstate transactions, or allowed the remote seller to collect taxes from the buyer and then remit them to the state. *See* Renewed Appl. at 27–28. The Act changes that. It commandeers state officials by requiring *the delivery seller* to pay—and the state to collect—all delivery-state excise taxes in advance of the sale, even when state law imposes the tax on the buyer or does not require pre-payment. The Act requires delivery sellers to prepay “any cigarette or smokeless tobacco excise

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<sup>10</sup> Whether the states supported the PACT Act is irrelevant to Mr. Gordon’s commandeering claim. *See New York v. United States*, 505 U.S. 144, 182 (1992) (“Where Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”).

tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered.” 15 U.S.C. § 376a(d)(1)(A) (emphasis added). The government would insert words into the statute to require only pre-payment of excise taxes that are “imposed by the state [on the seller].” But the statute does not say that. Rather, it requires sellers to pay “*any . . . tax that is imposed.*” The Act thus purports to shift a state’s taxation burden from the buyer to the seller in an interstate tobacco transaction.

The Act confirms that it intends to rewrite state law by requiring delivery sellers to pay state taxes “*as if* the delivery sales occurred entirely with the [taxing state].” 15 U.S.C. § 376a(a)(3) (emphasis added); *accord* Mot. to Dismiss 27 (noting the Act requires remote sellers to comply with state tax laws “*just as if* they were physically located in the state”). But interstate delivery sales by definition *do not* “occur entirely within the [taxing state],” and thus states have not traditionally imposed their excise taxes on *sellers* in *interstate* transactions. Congress has now ordered states to pretend that interstate sales occur entirely within a state such that the incidence of the tax now falls on the seller (just as it would in a genuinely intrastate transaction). Congress cannot commandeer states to treat remote sellers “as if” they are in-state sellers and force states to create a new tax-collection mechanism for those remote sellers.<sup>11</sup>

Regardless of its alleged tax-enhancement goals, Congress may not “commandeer state governments into the service of federal regulatory purposes” by requiring states to implement a federally-mandated tax-collection regime.<sup>12</sup> *New York*, 505 U.S. at 175; *accord Printz v. United*

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<sup>11</sup> The structure of the tax provision conclusively confirms this reading. Section 376a(a)(3)(A) expressly requires each delivery seller to “comply with” the excise tax regime in the delivery state. But § 376a(a)(4) imposes an additional requirement: the delivery seller must *also* comply with “the tax collection requirements set forth in subsection (d),” referring to the requirement to pre-pay all excise taxes regardless of where state law places the taxation burden.

<sup>12</sup> The PACT Act, unlike the Jenkins Act, does not merely facilitate the application of existing state law, but purports to expand existing state taxation to a new class of previously untaxed

*States*, 521 U.S. 898, 926–30 (1997). The PACT Act exceeds Congress’s enumerated powers because it commandeers states to implement a federally preferred taxation scheme that is not in accord with existing state law. In so doing, it violates the Tenth Amendment and must be invalidated.

## **II. ENFORCEMENT OF THE PACT ACT WOULD IRREPARABLY HARM MR. GORDON**

The government does not dispute that, as a direct result of the PACT Act, Mr. Gordon has lost 95 percent of his business, fired 16 of his 22 employees, and is currently operating at a loss. M. Gordon Decl. 2011 ¶¶ 4–5. Mr. Gordon has thus established considerable irreparable injury: both the loss of his business and a deprivation of his constitutional rights. Therefore, that factor should weigh strongly in support of injunctive relief. *See Red Earth*, 728 F. Supp. 2d at 244 (addressing challenge to PACT Act and holding that “plaintiffs have easily satisfied their burden of showing a threat of irreparable injury if injunctive relief is not granted”). The government’s primary argument is that Mr. Gordon’s supposed delay in filing his Application “belie[s] his claim of irreparable injury.” Mot. to Dismiss at 30. This argument is not only foreclosed by the D.C. Circuit’s clear holding in *Gordon I*, but also contrary to the uncontested record.

The government’s “delay” argument completely ignores the D.C. Circuit’s holding that Mr. Gordon’s filing was *not late*. *Gordon*, 632 F.3d at 724. The D.C. Circuit was very clear: “At the time of Mr. Gordon’s filing, the statute had yet to go into effect. A motion seeking to enjoin a statute’s enforcement before the statute may legally be enforced is timely—or at least not late—by definition.” *Id.* The court went on to explain that, if Mr. Gordon’s filing *had* been

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sellers. The government’s citation to *McGrath* is thus inapposite—the Jenkins Act was upheld because it merely facilitated the collection of state taxes that were already imposed on buyers. *See Consumer Mail Order Ass’n v. McGrath*, 94 F. Supp. 705 (D.D.C. 1950), *aff’d*, 340 U.S. 925 (1951).

untimely, “which it was not,” *id.* at 724, that hypothetical delay might be part of an irreparable harm analysis. *Id.* The government’s “delay” argument is thus foreclosed.

The government’s remaining arguments are no more successful. First, the government seeks to convert its loss in *Red Earth* into a win by arguing that *Red Earth*’s preliminary injunction of the Act’s tax requirements precludes any irreparable harm from those provisions. Mot. to Dismiss at 30–31. By the government’s logic, two courts would never be able to enjoin the same statute or conduct, because the decision in the first case would always remove the irreparable harm in the second. *But see United States v. Roach*, 947 F. Supp. 872 (E.D. Pa. 1996) (granting injunction against abortion protestors despite existence of two prior injunctions). This makes no sense, particularly where (as here) the preliminary injunction has been appealed and argued and could be lifted by the Second Circuit at any moment.

The government further proposes several “alternative” means by which Mr. Gordon could supposedly eliminate the crippling harm he is suffering as a result of the PACT Act. Mot. to Dismiss at 31–33. The government does not support these alternatives with evidence.<sup>13</sup> As a result, the uncontradicted record shows that Mr. Gordon has been “unable to find a practical means of delivering” his products, that his current delivery service takes four weeks to deliver a package and will deliver to only select areas of six states, and that this service is significantly more expensive than the Postal Service. M. Gordon Decl. 2011 ¶ 3; *see also* Jemison Decl. ¶ 14 (“[W]e explored many delivery alternatives and have found none that can practically replace the USPS.”). It also shows that Mr. Gordon is currently suffering a near-total loss of his business as

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<sup>13</sup> Likewise, there is no evidentiary support for the government’s suggestion that Mr. Gordon is operating his business in violation of the Jenkins Act, and the legality or applicability of that Act is not at issue in this case. For its part, the government has traditionally declined to apply the Jenkins Act to reservation Indians. *See* Jemison Decl. ¶ 17. The government’s evidence-free “guilty until proven innocent” approach to the Jenkins Act cannot negate the undisputed evidence that Mr. Gordon will suffer irreparable harm from the enforcement of the PACT Act.

a result of the mailing ban. *Id.* ¶¶ 3–4. The idea that Mr. Gordon is simply ignoring existing alternatives is belied by the record and contrary to common sense. It is further contradicted by the fact that scores of businesses and thousands of employees are presently being eliminated by the PACT Act—something that all concerned would surely avoid if there were any real alternative.<sup>14</sup>

Finally, the government ignores the fact that “the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal citation omitted); *accord Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (“Although a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.”) (citation omitted); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, at 161 (2d ed. 1995) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). Because Mr. Gordon has shown a substantial likelihood of success on his constitutional claims, he does not need to show further injury to meet the “irreparable harm” factor.

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<sup>14</sup> The government further asserts that Mr. Gordon could survive the tax provisions by “simply partner[ing] with multi-state wholesalers” to “drop-ship” pre-stamped cigarettes directly to consumers.” Mot. to Dismiss at 31 n. 11. Even if that were so, it would not ameliorate the irreparable harm stemming from the mailing ban. And in any event, the government has declined to provide evidence that such multi-state wholesalers exist in New York or that such an arrangement would be possible. There is certainly no evidence thereof in *Seneca Nation of Indians v. Cuomo*, which involved transactions taking place entirely in New York. \_\_\_ F.3d \_\_\_, No. 10-4265, 2011 WL 1745008, at \*10 (2d Cir. May 9, 2011). Mr. Gordon cannot prove a negative, but he and the Seneca Free Trade Association have explored these options and have concluded that these supposed alternatives are not feasible. Jemison Decl. ¶ 15.

### III. THE PUBLIC INTEREST SUPPORTS ENJOINING ENFORCEMENT OF THE PACT ACT

The government has not contested that the public interest factor also weighs in support of injunctive relief because an injunction would serve the public's interest in avoiding enforcement of unconstitutional laws. *See O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). That interest is especially important here, where "Congressional expansion of state and local taxing schemes—as mandated under the PACT Act—is unprecedented." *Red Earth*, 728 F. Supp. 2d at 259–60 (holding that "the public interest favors staying enforcement of a sweeping and unprecedented congressional mandate").<sup>15</sup>

Instead of addressing this argument, the government suggests that this Court is bound by Congress's determination of the public interest. Mot. to Dismiss at 29–30. If this were true, courts would never be able to enjoin an act of Congress. *But see O'Donnell*, 963 F.2d at 429 (enjoining Minority Contracting Act and holding that "issuance of a preliminary injunction would serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications"); *Moser v. FCC*, 811 F. Supp. 541, 546 (D. Or. 1992) (enjoining enforcement of anti-telemarketing act, despite claim that Congress was serving strong public interest in curtailing telemarketing abuses, because loss of first amendment freedoms and 70 percent of business income tilted balance of hardships in plaintiffs' favor).

The government's cases are not to the contrary. The first, *United States v. Oakland Cannabis Buyers' Cooperative*, involved a (non-constitutional) challenge to a district court's injunction under its statutory authority to enjoin violations of the Controlled Substances Act.

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<sup>15</sup> The government does not appear to contest Mr. Gordon's showing that enjoining the enforcement of the PACT Act would not substantially injure the Defendants or other parties. Renewed Appl. at 34–35.

532 U.S. 483, 496 (2001). The Court held that the district court was not permitted to use its statutory authority under that act to refuse to enforce the act on the basis that the “public interest” weighed against it. *Id.* at 498.<sup>16</sup> In the second case relied on by the government, *Able v. United States*, the Second Circuit merely held that a party challenging the constitutionality of a congressional act must prove a “substantial likelihood of success” rather than a lower standard. 44 F.3d 128, 131–32 (2d Cir. 1995). The court did not consider the “public interest” as an independent factor, but instead rejected the plaintiffs’ argument that the public interest required a lower standard for likelihood of success on the merits. *Id.* Neither of these cases suggests that the Court should blindly accept Congress’s assessment of the public interest in weighing a constitutional challenge to the Act.

Even if the public interest did not weigh against the enforcement of unconstitutional laws, the public would still have a strong interest in the plight of the Seneca Nation. The government does not dispute that the PACT Act is destroying the Seneca Nation’s economy and the economy of the surrounding areas. As a result, the public interest favors an injunction because of the “severe economic consequence[s] likely to befall [] members of the Western New York community” as a result of the PACT ACT. *Red Earth*, 728 F. Supp. 2d at 259. As the *Red Earth* court explained, most remote tobacco retailers are likely to shut down their businesses as a result of the PACT Act. *Id.* As a result, the Seneca Nation—already struggling—has been devastated by the loss of its primary source of private-sector employment. See pp. 3–5, *supra*. Sixty of just over 100 licensed cigarettes retailers have closed their doors since the PACT Act came into effect, with the remaining retailers at risk of doing the same. Porter Decl. ¶¶ 6, 16. The SFTA

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<sup>16</sup> To the extent the government implies that *Oakland* case is relevant because it “vacat[ed] a preliminary injunction,” Mot. to Dismiss at 29, the government is simply wrong. *Oakland* actually reinstated the district court’s injunction by reversing the Ninth Circuit’s decision lifting the injunction. 532 U.S. at 499.

has predicted that the PACT Act will eventually result in the loss of more than 3,000 jobs on the Seneca Territories. Moll Decl. ¶ 45.

Because the Seneca Nation's government depends significantly on revenue from its regulation of tobacco commerce, the PACT Act has also disrupted essential government services. *See* Porter Decl. ¶¶ 15–17. Over the past twelve months, the Nation has received less than half of its usual \$14,500,000 in revenue from the sale of tobacco stamps, resulting in significantly reduced funding for vital government functions such as healthcare, emergency management and education. *Id.* Some programs have been cancelled entirely. The Nation's Health Care Incentive Program, which incentivizes healthy living choices among the Nation's members, will be discontinued after 2011 due to lack of resources resulting from the PACT Act. *Id.* ¶ 17. The Nation has also been forced to delay the construction of a Seneca Academy dedicated to the cultural education of its children while it searches for other revenue sources. *Id.*

In sum, "implementation of the PACT Act, particularly the denial of access to the Postal Service, has already crippled the Nation's highly regulated tobacco economy, which is vital to employment and economic activity within the Territories and throughout Western New York. The economic damage which has already been suffered will become irreversible if immediate injunctive relief is not granted." Porter Decl. ¶ 20; *see also* Jemison Decl. ¶ 16. The public interest favors granting such relief.

### **CONCLUSION**

For the foregoing reasons, the Court should grant a preliminary injunction against the enforcement of the PACT Act, and deny the government's Motion to Dismiss.

Dated: June 20, 2011

Respectfully submitted:

/s/ Sara E. Kropf

R. Stan Mortenson (D.C. Bar No. 114678)  
Sara E. Kropf (D.C. Bar. No. 481501)  
Richard P. Sobiecki (D.C. Bar No. 500163)  
Vernon A.A. Cassin III (D.C. Bar No.  
998743)  
BAKER BOTTS L.L.P.  
1299 Pennsylvania Ave. NW  
Washington, DC 20004  
(202) 639-7700

Aaron M. Streett  
BAKER BOTTS L.L.P.  
One Shell Plaza  
910 Louisiana Street  
Houston, TX 77002-4995  
(713) 229-1855

*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 2011, Mr. Gordon's combined Reply in Support of his Application for a Preliminary Injunction and Opposition to the government's Motion to Dismiss was filed by ECF with the Clerk of the Court, and that a copy was served on the following counsel of record via ECF:

Gerald Kell (DC Bar No. 929125)  
Senior Trial Counsel  
Civil Division, Office of Consumer Litigation  
P.O. Box 386  
Washington, D.C. 20044  
(202) 514-1586  
(202) 514-8742 (fax)  
Email: [gerald.kell@usdoj.gov](mailto:gerald.kell@usdoj.gov)

/s/ Sara E. Kropf

Sara E. Kropf

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X  
ROBERT GORDON,

Plaintiff,

Civil Action No. 10-1092 (HHK)

-against-

**DECLARATION OF  
ROBERT ODAWI PORTER**

ERIC HOLDER, et al.,

Defendants.

-----X

ROBERT ODAWI PORTER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the duly elected President of the Seneca Nation of Indians (the "Nation"), which exercises the sovereign powers of self-government and jurisdiction over the Allegany, Cattaraugus, Oil Spring, Niagara Falls, and Buffalo Creek Territories in Western New York (collectively, "the Territories"). I am also an attorney duly admitted to practice law in the District of Columbia. This declaration is submitted in support of the application for injunctive relief filed by the Plaintiff, Robert Gordon. As President of the Seneca Nation, I am familiar with the PACT Act and its effect on the Nation.

2. I have personal knowledge of the facts contained in this declaration.

3. Robert Gordon, the Plaintiff in this action, is an enrolled citizen of the Seneca Nation.

4. At the heart of the Seneca Nation's interest in this case is its right to the "free use and enjoyment" of its Territories, guaranteed by the United States in the Treaty of Canandaigua, art. 3, Nov. 11, 1794, 7 Stat. 44, 45. Over the past two centuries, the Nation has been deprived of the vast majority of its treaty-protected lands through the coercion and fraud of both governmental

actors and private citizens, and without the protections solemnly promised by the United States through treaty and statute. *See e.g., Seneca Nation of Indians v. United States*, 28 Indian Cl. Comm’n 12, 15-16, 24, 29, 32 (1972) (discussing the Nation’s relinquishment of 4,030,325 acres to Robert Morris in 1797, and its cession of over 100,000 acres to the Ogden Land Company in 1823 and 1826); *Banner v. United States*, 238 F.3d 1348,1351 (Fed. Cir. 2001) (finding that in 1890, Congress compelled the Nation to renew approximately 3,000 99-year leases with non-Indians on the Allegany Territory for an unconscionably low average fixed annual rent of between \$1 and \$10); S. Rep. No. 101-511, at 36-37 (1990) (in the 1960s, the United States deprived the Nation of approximately 10,000 acres of its Allegany Territory through the construction of the Kinzua Dam).

5. These deprivations have significantly and adversely impacted socioeconomic conditions within the Seneca Nation’s Territories. For example, when Congress passed the Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774-1774h—in which both Congress and the State of New York sought “to promote economic self-sufficiency for the Seneca Nation and its members,” 25 U.S.C. § 1774(b)(6)—then-Nation President Dennis Lay testified that the Nation’s “long term needs” included “economic development and job creation, essential to address an unemployment rate of over 40%” and “land acquisition, which is necessary to address a critical land shortage.” S. Rep. No. 101-511, at 14-15. Ten years later, according to the 2000 census, the average income of Indians living in the Nation’s Territories (\$12,300) continued to lag far behind, and was barely one-half, that of all New Yorkers.

6. Prior to the enactment of the PACT Act, the Seneca Nation tobacco economy was a vital source of economic activity and employment for Nation citizens, and one that helped improve socioeconomic conditions within the Territories and throughout Western New York.

More than 100 licensed cigarette retailers operated within the territories and these businesses employed approximately 3,000 people.

7. Pursuant to its sovereign authority, the Seneca Nation has enacted a comprehensive cigarette stamping, regulatory and law enforcement program that governs the importation, exportation and sale of all cigarettes in the Territories—the Seneca Nation of Indians Import-Export Law and Import-Export Regulations (collectively, “IEL”). All members of the SFTA who are tobacco stamping agents, wholesalers or retailers on Seneca Territory, including Robert Gordon, are bound by the IEL. A true and correct copy of the IEL is attached to this declaration as **Exhibit “A.”** The Seneca Nation of Indians Import-Export Commission (“Commission”) oversees the implementation and enforcement of the IEL. Under the IEL, only Nation-licensed stamping agents or the Commission itself may import cigarettes into the Territories. Those cigarettes must then be affixed with a unique, numbered Seneca Nation stamp with six separate security features (watermark, chemical reagent, variable image, variable color, microprint, and embedded magnetic symbol) prior to their distribution to Nation-licensed retailers, including the Seneca Nation itself. These Nation security features are state-of-the-art. Stamping agents must submit a detailed monthly report to the Commission showing the quantity, brand, type, number, retail destination, date of stamping and stamp lot number of all cigarettes they import and distribute.

8. The Nation imposes an administrative fee of seventy-five cents on each carton of cigarettes imported into the Territories. These revenues are dedicated to Seneca Nation health and education programs.

9. Any cigarettes that are found within the Territories that do not bear a Seneca Nation stamp are contraband and are subject to seizure and forfeiture, with limited exceptions. All

cigarette retailers on the Territories must be licensed. The IEL further prohibits the sale of cigarettes to minors, the sale of cigarettes below the Nation's minimum pricing structure, the wholesale conveyance of cigarettes to non-Indians for purposes of off-reservation resale, and the sale of cigarettes to any person outside of the Nation's Territories in a manner that has been determined to violate federal law. The Nation is unwavering in its commitment to ensuring that its tobacco economy plays no role in organized crime or in funding terrorist organizations.

10. In the course of developing, implementing, and enforcing the IEL, the Nation has established a cooperative government-to-government relationship with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), which enforces the federal Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341-2346 ("CCTA"), to combat illegal cigarette trafficking on the Territories. When the Nation first adopted the IEL, Nation officials (including Council Chairman Richard Nephew, Councilor J.C. Seneca, and then-President's Counsel Martin Seneca) met with representatives of the ATF and the United States Attorney for the Western District of New York (including Assistant United States Attorney Richard Kaufman, ATF Regional Counsel Jeff Cohen, and ATF Special Agent Steve Dickey) to explain the goals of the Nation's self-regulation and to request the support of the United States. From those initial meetings has developed a cooperative working relationship that the Nation believes is consistent with, if not required by, its treaty partnership with the United States.

11. As a significant aspect of their cooperative relationship, the Commission and the ATF have routinely shared confidential information and have together undertaken several investigative and law enforcement actions, leading to prosecutions under the IEL and the CCTA. The Nation has also worked with the State of New York Department of Taxation and Finance ("Department"), the United States Postal Service, and local law enforcement officials.

12. In June 2007, the Commission seized more than 60,000 cartons of non-Seneca stamped cigarettes with an estimated value of approximately \$1.5 million from Daniel Post d/b/a Post Smokes. Approximately one week later, Nation officials (including the persons identified above and other Nation representatives) met with ATF representatives and the two sovereigns committed to work together on contraband cigarette investigations. Upon the ATF's invitation, the Nation attended the Contraband Tobacco Information Sharing Summit in August 2007, a meeting of United States, Canadian, state, provincial and local law enforcement officials to discuss cooperative efforts to combat regional contraband cigarette trafficking.

13. An early example of the value of the cooperative relationship forged between the Nation and the ATF came in April, 2008, when a joint investigation by the Nation, the ATF, and the Department led to the seizure of massive quantities of non-State stamped, non-Seneca stamped cigarettes being diverted by a non-Indian company known as Gutlove & Shirvint through the Nation's Territories to the Peace Pipe Smoke Shop on the Poospatuck Reservation, in violation of the IEL and the CCTA. The Council of the Seneca Nation of Indians revoked Gutlove & Shirvint's license to do business in the Territories, enjoined it from doing business with any Nation-licensed business, and imposed substantial civil penalties upon it.

14. The ATF has indicated to Nation representatives that the Nation's regulatory and law enforcement activities and cooperation with the ATF have largely eliminated the Nation's Territories as a source of contraband cigarette trafficking, and has publicly acknowledged that the Nation's self-regulation has made the ATF's job easier. In June, 2008, the Nation met with senior ATF officials (including Audrey Stucko, Deputy Assistant Director for the Office of Enforcement Programs and Services) to further discuss their relationship. On May 12, 2009, during a visit by ATF representatives to the offices of the Import-Export Commission to witness

the Commission's stamping activities, the ATF, through Special Agent in Charge Ronald B. Turk, presented the Nation with a letter that states in part:

On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), New York Field Division, please accept my gratitude for the assistance and support recently provided by the Seneca Nation of Indians to help curtail illegal cigarette trafficking.

As a result of the Seneca Nation's cooperative efforts with ATF, several investigations into illicit cigarette trafficking have been initiated and are now being prosecuted. The assistance provided thus far has been invaluable, and we recognize the efforts made by the Seneca Nation to curtail illegal cigarette distribution.

A true and correct copy of this letter is attached to this declaration as **Exhibit "B."**

15. Between October 1, 2007, and September 30, 2008 (FY 2008), the Nation received in excess of \$14,500,000 in fees generated through the sale of the Nation's state-of-the-art tobacco stamp to stamping agents under the IEL. Between October 1, 2008 and September 30, 2009 (FY2009), the last full fiscal year of the Nation before the PACT Act was adopted, the Seneca Nation received just under \$15,500,000. During these fiscal years, the Nation used these revenues to cover the costs of IEL program administration, emergency management programming, the Health Care Incentive Program, community center expenses, higher education and language programs, an orthodontics program, and other tribal youth programming. In the last twelve months, however, the Nation has only received \$6,846,000 in such fees, resulting in significantly reduced funding being available to support those vital governmental programs.

16. The PACT Act has had a disastrous impact on the Nation's already fragile economy, with sixty (60) licensed businesses having closed their operations. Several more are in danger of shutting down as well. Each of these represents Seneca families that are adversely impacted by the PACT Act.

17. Seneca government services have been scaled back as a result of the revenue reductions. For example, the Seneca Nation's Health Care Incentive Program (a program that provides financial rewards to Nation citizens who lose weight and maintain a healthy lifestyle, and which would lead to an anticipated reduction in long term health care costs to the Nation, as a result of the improved health of its citizens) will be discontinued after 2011 due to lack of resources resulting from the PACT Act. Furthermore, with the decrease in revenues generated through the IEL stamping program, the Nation's efforts at establishing Seneca Academy, as a means of providing culturally appropriate educational opportunities to the Nation's youth, have been delayed while the Nation searches for other revenue sources that might become available.

18. The Seneca Nation of Indians vigorously opposed the PACT Act and pursued reasonable political options to prevent its passage. Congress, however, refused to afford the Nation and other Indian tribes and nations a legislative hearing on the potential impacts of the Act in Indian country, notwithstanding that the ATF informed the Nation that its tobacco economy represents approximately 80% of the mail order and internet cigarette sales potentially affected by the Act.

19. Only after the Act's passage did the United States agree to consult with the Seneca Nation regarding the Act's potential impact on the activities of Nation-licensed retailers and regarding the implementation and enforcement of the Act on the Nation's Territories. Nation officials traveled to Washington, D.C. and met on June 8, 2010, with United States Department of Justice and ATF officials, including Executive Assistant Director of the ATF William Hoover and Associate ATF Chief Counsel Barry Orlow. This meeting was coordinated by Tracy Toulou of the Department of Justice Office of Tribal Justice. The Department of Justice and ATF officials in attendance seemed genuinely surprised by the degree of legal complexity of the

issues surrounding the implementation and enforcement of the Act in Indian country, and conceded their lack of familiarity with federal Indian law and the limitations that body of law imposes on state and local jurisdiction in Indian country (a body of law that Congress expressly preserved in the Act). At the meeting, the United States indicated that the “ink was not dry” on the Act, that it would consider accommodations for Nation-licensed retailers to ease implementation of the Act, and that the Nation should not “worry” about prosecutions commencing immediately upon the Act’s effective date while regulations were in development and a complete response to Indian Country concerns was developed.

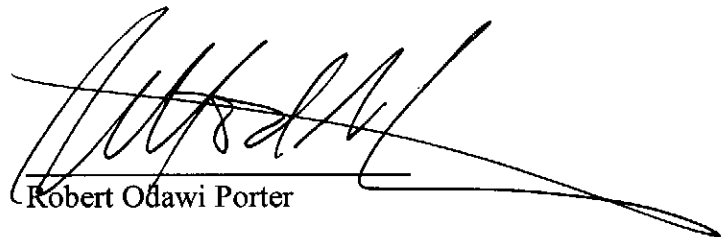
The Department of Justice and the ATF also invited the Seneca Nation to submit written comments by June 18, 2010, on a proposed interim rule implementing the PACT Act. The Nation provided detailed comments, a true and correct copy of which are attached to this declaration as **Exhibit “C.”** In its comments, the Nation emphasized the tremendous legal uncertainty created by the provisions of the Act purporting to extend state and local cigarette tax and sales laws into the Nation’s Territories in the face of the provisions of the Act expressly preserving all existing treaty, statutory, and common law limitations on the application of such laws to Indians in Indian country. Indeed, it is in good faith reliance upon this latter body of law that the Nation’s tobacco economy has developed and that the Seneca Nation and the ATF have taken their regulatory actions.

20. In the twelve months since the Nation provided these comments to the ATF, the Nation (which has demonstrated its firm commitment to combating unlawful cigarette trafficking and to resolving issues through government-to-government cooperation) has sought through additional written correspondence and face-to-face meetings with federal officials to bring clarity to the inherently vague legal landscape created by the PACT Act. Although ATF’s consultation

with Indian nations regarding the implementation of the Act in Indian country is ongoing, premature implementation of the PACT Act, particularly the denial of access to the U.S. Postal Service, has already crippled the Nation's highly regulated tobacco economy, which is vital to employment and economic activity within the Territories and throughout Western New York. The economic damage which has already been suffered will become irreversible if immediate injunctive relief is not granted. Businesses have folded, leaving many Seneca Nation citizens unemployed. As a result of the implementation of the PACT Act, the Nation's citizens are now threatened with felony criminal and substantial civil penalties, resulting in untold interference with the Nation's treaty-protected right of self-government.

For the reasons stated above, I submit this declaration and respectfully request that Plaintiff's motion for an injunction be granted in its entirety so that the important constitutional issues raised herein can be considered before the Plaintiff, Mr. Gordon, other similarly situated Seneca tobacco sellers and the sovereignty of the Seneca Nation suffer further irreparable harm.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 17<sup>th</sup> day of June, 2011, on the Allegany Territory, Seneca Nation.

  
Robert Odawi Porter

# EXHIBIT A

SENECA NATION OF INDIANS  
IMPORT-EXPORT LAW



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ARTICLE 1. GENERAL PROVISIONS

Section 1.1.	Statement of Policy
Section 1.2.	Findings
Section 1.3.	Purpose
Section 1.4.	Definitions
Section 1.5.	Importation Generally
Section 1.6.	Import Fee on Tobacco Products
Section 1.7.	Import Stamps on Tobacco Products
Section 1.8.	Import Fee on Petroleum Products
Section 1.9.	Exportation Generally
Section 1.10.	Export Fee on Tobacco Products
Section 1.11.	Export Stamps on Tobacco Products
Section 1.12.	Reserved [Export Fee on Motor Fuel]
Section 1.13.	Minimum Retail Pricing
Section 1.14.	On-Territory Manufactured Tobacco Products Generally
Section 1.15.	Manufacturing Fee Imposed
Section 1.16.	Manufacturing Stamps
Section 1.17-A.	Fire Safe Cigarettes
Section 1.17-B.	Certification and Product Change
Section 1.17-C.	Marking of Cigarette Packaging
Section 1.18.	Prohibited Transactions
Section 1.19.	Enforcement
Section 1.20.	Defense Obligation
Section 1.21.	Fee Allocation

ARTICLE 2. IMPORT-EXPORT COMMISSION

Section 2.1.	Establishment
Section 2.2.	Duties
Section 2.3.	Powers; Penalties; Procedures
Section 2.4.	Stamps, Stamping Agents and Licensed Petroleum Importers
Section 2.5.	Membership
Section 2.6.	Officers
Section 2.7.	Meetings; Quorum; Bylaws
Section 2.8.	Recourse

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Section 1.1. *Statement of Policy.*

The Seneca Nation of Indians seeks to exercise its inherent and treaty-protected rights of self-determination and the "free use and enjoyment" of its lands to promote the prosperity of the Seneca People now living and for those living seven generations to come. To achieve this goal, the Nation Council states that it shall be official Nation policy to vigorously protect and defend the economic rights of the Nation and its people within Nation territory against all foreign and domestic threats. Such protection and defense shall extend to the regulation of all goods and services sold or provided within Nation territory, including, but not limited to, the retail sale of petroleum and tobacco products.

Section 1.2. *Findings.*

The Council finds and declares that --

- a. The sale of petroleum and tobacco products by the Nation generates significant governmental revenue necessary for the delivery of essential governmental services to the Seneca people;
- b. The sale of petroleum and tobacco products by the Nation and its people generates sufficient revenue to sustain hundreds of public and private sector jobs and is a significant contributor to the Nation and regional economies;

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c. The Nation's Canandaigua Treaty with the United States of 1794 protects the "free use and enjoyment" of the Nation's territory and thus allows for the free trade of all goods within Nation territory;

d. The Nation's Buffalo Creek Treaty with the United States of 1842 protects Nation lands and commerce taking place within such lands from the application of New York State taxes; and

e. By virtue of its geographic position the Nation from time to time is subject to the economic, legal, and political influences of neighboring foreign governments, including the United States, Canada, and the State of New York, and thus must engage in whatever means necessary to protect its economic and political sovereignty from actions taken by those governments.

Section 1.3. *Purpose.*

The purpose of this law is to protect Nation territorial integrity through the regulation of goods imported and exported into and from Nation territory and to generate revenue to conduct essential governmental functions.

Section 1.4. *Definitions.*

a. "*Bonded agent*" shall mean a duly licensed stamping agent who has provided a security deposit or bond.<sup>1</sup>

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b. “*Commission*” shall mean the Nation Import-Export Commission established in Article 2 of this Law;

c. “*Family*” shall mean individuals who are related to other individuals as parents, children, sisters, brothers, aunts, uncles, or first cousins.

d. “*Determined*” or “*Determination*” shall mean that the legal question at issue has been finally resolved by a court of competent jurisdiction through the means of a full and complete trial that has reached a formal verdict and that all rights to appeal have either been exhausted or waived. The entering into a plea agreement or a plea of nolo contendere or equivalent shall not necessarily constitute a Determination for the purposes of this law.<sup>2</sup>

e. “*Export*” shall mean the exportation from Nation territory of any goods originally imported into Nation territory by any wholesaler.

f. “*Exporter*” shall mean a business engaged in the wholesale exportation of goods from Nation territory for purposes of resale.

g. “*Goods*” shall mean all goods and products, including petroleum products and tobacco products, that may be sold at retail sale.

h. “*Import*” shall mean the wholesale importation of any goods into Nation territory for purposes of resale.

i. “*Importer*” shall mean a business engaged in the wholesale importation of goods into Nation territory for purposes of resale.

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j. “*Manufacturer*” shall mean any person who manufactures tobacco products within the exterior boundaries of the Territories.<sup>3</sup>

k. “*Member*” shall mean an enrolled member of the Nation.

l. “*On-territory manufactured product*” or “*Manufactured Product*” shall mean tobacco products manufactured entirely within the exterior boundaries of the Seneca Nation Territory.<sup>4</sup>

m. “*Person*” shall mean any member or non-member individual, corporation, firm, organization, or association, who or which is engaged in any business, trade, occupation, or profession or renders or furnishes any service for profit or livelihood, but not individuals working for said persons as employees.

n. “*Point of sale*” shall mean the physical location at which the actual transaction or exchange takes place.<sup>5</sup>

o. “*Premium Brands*” shall mean that class of tobacco products generally identified and accepted as such and which includes but is not limited to brands manufactured by Phillip Morris, RJ Reynolds, Liggett, Lorillard, and others.<sup>6</sup>

p. “*Retailer*” shall mean a business engaged in the retail sale and distribution of goods to the general public.

q. “*Petroleum products*” shall mean gasoline of any grade used as a fuel for automobiles, diesel fuel, and any motor fuel blended with either of said products.

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r. *"Tobacco products"* shall mean cigarettes, cigars, snuff, chewing tobacco, pipe tobacco, and any other related tobacco product.

s. *"Wholesaler"* shall mean a business engaged in the wholesale sale and distribution of goods for resale purposes.

Section 1.5. *Importation Generally.*

a. Goods may freely be imported into Nation territory without the imposition of any fee except for petroleum and tobacco products.

b. No person shall import petroleum or tobacco products into Nation territory unless he shall have a valid Nation business license.

Section 1.6. *Import Fee on Tobacco Products.*

a. There is imposed a fee on all tobacco products imported into Nation territory. Said fee shall be imposed in accordance with the following schedule:

cigarettes	\$0.00375 per cigarette <sup>7</sup> (\$0.75 per 10 pack carton)
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cigars, smokeless and pipe tobacco [reserved]

b. The import fee on tobacco products shall be paid by any importer or wholesaler of tobacco products, including any Nation enterprise, prior to or within forty-eight (48) hours of importation into Nation territory. Said fee shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer. No credit account shall be established on behalf of any importer of tobacco products.

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A duly licensed stamping agent may elect to hold unstamped product in a secure location and pay the import fee prior to resale, only if said stamping agent shall have first posted a bond of \$100,000.00 issued to the Nation or shall have provided a security deposit in the amount of \$11,250.00, payable to the Nation. In the case of a security deposit, said deposit shall be held in an interest bearing account and shall not be co-mingled with any other Nation accounts or funds. Any unstamped product held by a stamping agent pursuant to this section shall be kept in a secure area separate and apart from stamped product held by the Agent. In the event that an agent is determined to have violated this Law, his or her license shall be revoked and said bond or security deposit shall be forfeited with said proceeds being added to the other funds generated by the collection of the fees pursuant to this Law.<sup>8</sup>

c. The import fee may be changed by Council upon the recommendation of the Commission in the event that (i) the financial condition of the Nation's government deteriorates significantly, as may be certified by the Treasurer; (ii) the financial condition of the licensed retail businesses within the Nation deteriorates significantly, as may be certified by the Seneca Free Trade Association or equivalent organization, (iii) the United States of America or the States of New York, Pennsylvania change their taxes, surcharges, fees or minimum prices associated with petroleum or tobacco products; or (iv) upon the joint certification of the Import Export Commission and the Seneca Free Trade Association that a change in any fee imposed by this Law is necessary.<sup>9</sup>

Section 1.7. *Import Stamps on Tobacco Products.*

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a. Evidence that the import fee on tobacco products has been paid shall be reflected by the affixation of an import stamp upon every pack of cigarettes, every cigar, and every package of smokeless or pipe tobacco imported into Nation territory.

b. Import stamps shall be affixed by either the Commission or its licensed agent(s).

c. The Commission is authorized to employ such people, establish such facilities, and purchase or lease such equipment, as may be necessary to properly affix Nation import stamps.

d. The Commission is authorized to issue a license to any qualified importer or wholesaler, subject to Council approval, to serve as an agent for purposes of affixing Nation import stamps. The applicant for a stamping license shall demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner and otherwise be capable of asserting sufficient control over said stamps to avoid fraud and misuse. A licensed stamping agent shall obtain from the Commission the quantity of import stamps it may deem necessary upon the payment of the import fee. The Commission shall ensure that all stamps allocated to a licensed stamping agent shall be accounted for on no less than a monthly basis and that all requisite fees have been paid to the Nation. Reports must be received by the Commission by the 15<sup>th</sup> of the month following the month for which the report is filed. In the event that the 15<sup>th</sup> falls on a date on which the Commission's offices are closed (e.g. holiday or a weekend) the report shall be due on the following Monday. Failure to remit or otherwise account for the appropriate import fee associated with an agent's allocation of import stamps shall be grounds for revocation of the agent's stamping

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license. The Commission shall assign such on-site inspectors as may be necessary to ensure the compliance of any licensed stamping agent with the provisions of this Law.<sup>10</sup>

e. Tobacco products that do not carry a Nation import stamp may not be imported into Nation territory unless to be delivered to a licensed stamping agent who shall affix such import stamps within forty-eight (48) hours of importation or in the case of a stamping agent who receives and stores unstamped product pursuant to Section 1.6(b), the requisite stamps shall be affixed prior to resale. This section shall not prohibit a duly licensed stamping agent with an exclusive buy arrangement from selling or delivering unstamped product carried exclusively by that agent directly to another duly Nation licensed stamping agent without affixation of an import stamp. Any tobacco products found in Nation territory without a Nation import stamp shall be deemed contraband and shall be subject to confiscation.<sup>11</sup>

f. It shall be illegal for a duly licensed stamping agent to affix Nation import stamps to any package of tobacco product or products for which the stamp of another jurisdiction has already been affixed.<sup>12</sup>

Section 1.8. *Import Fee on Petroleum Products.*<sup>13</sup>

a. There is imposed a fee on all Petroleum Products imported into Nation territory. Said fee shall be imposed in accordance with the following schedule:

Gasoline	\$0.03 per U.S. Gallon <sup>14</sup>
Diesel Fuel	\$0.03 per U.S. Gallon

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b. The import fee on Petroleum Products shall be paid by a licensed motor fuel importer on a monthly basis. Return and payment for imported petroleum shall be due on the 15<sup>th</sup> of each month, and shall cover the proceeding calendar month. Said fee shall be paid to the Nation by certified check, cashier's check, money order or wire transfer. Failure to remit payment and file any return when due may result in the imposition of penalties, or suspension or revocation of an importer's license.<sup>15</sup>

c. The import fee may be changed by Council upon the recommendation of the Commission in the event that (i) the financial condition of the Nation's government deteriorates significantly, as may be certified by the Treasurer; (ii) the financial condition of the licensed retail businesses within the Nation deteriorates significantly, as may be certified by the Seneca Free Trade Association or equivalent organization, (iii) the United States of America or the States of New York, Pennsylvania change their taxes, surcharges, fees or minimum prices associated with petroleum or tobacco products; or (iv) upon the joint certification of the Import Export Commission and the Seneca Free Trade Association that a change in any fee imposed by this Law is necessary.<sup>16</sup>

d. Petroleum Products on which the import fee has not been paid may not be imported into Nation territory unless delivered by a Nation licensed motor fuel importer, who shall pay such import fee in accordance with the provisions of this Law. Any Petroleum Products found in or delivered to Nation territory in violation of this law shall be subject to confiscation.<sup>17</sup>

e. Payment of the import fee on Petroleum Products shall be in the form and manner proscribed by the Commission by regulation.

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Section 1.9. *Exportation Generally.*<sup>18</sup>

a. Goods may be freely exported from Nation territory without the imposition of any fee except for petroleum and tobacco products.

b. No person shall export tobacco products from Nation territory unless he shall have a valid Nation business license.

Section 1.10. *Export Fee on Tobacco Products.*<sup>19</sup>

a. There shall be imposed a fee on qualified tobacco products exported from Nation territory. Said fee shall be imposed in accordance with the following schedule:

9,800 or more cigarettes	\$0.05 per cigarette
(49 or more cartons)	(\$10.00 per carton)
cigars, smokeless and pipe tobacco	[reserved]

b. The export fee on tobacco products shall be paid by the exporter of tobacco products prior to exportation from Nation territory. Said fee shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer. No credit account shall be established on behalf of any exporter of tobacco products.

c. A duly licensed stamping agent may export Tobacco products on an exempt basis without payment of the export fee or affixation of an export stamp, where:

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- i. The tobacco products are destined for delivery to a person who is licensed to receive unstamped tobacco products in accordance with the laws of the jurisdiction in which they are located, provided however, that prior to the product leaving the Agent's facility, it must first be stamped with the stamp required by the jurisdiction for which the product is destined for delivery; or
- ii. The tobacco products are destined for delivery to a federally recognized Indian nation, or a duly licensed wholesaler located within the territory of a federally recognized Indian nation, who is authorized to receive tobacco products, pursuant to the laws of the Indian nation in which they are located, provided that, all product destined for delivery under this subsection must first have a Nation import stamp applied prior to leaving the Agent's facility, unless the nation to which the product is being delivered otherwise requires that the product be stamped with the stamp of the destination nation.<sup>20</sup>

Section 1.11. *Export Stamps on Tobacco Products.*<sup>21</sup>

- a. Evidence that the export fee on tobacco products has been paid shall be reflected by the affixation of an export stamp upon every pack of cigarettes, every cigar, and every package of smokeless or pipe tobacco exported from Nation territory.
- b. Export stamps shall be affixed by either the Commission or its licensed agent(s).
- c. The Commission is authorized to employ such people, establish such facilities, and

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purchase or lease such equipment, as may be necessary to properly affix Nation export stamps.

d. The Commission is authorized to issue a license to any qualified exporter or wholesaler, subject to Council approval, to serve as an agent for purposes of affixing Nation export stamps. The applicant for a stamping license shall demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner and otherwise be capable of asserting sufficient control over said stamps to avoid fraud and misuse. A licensed stamping agent shall obtain from the Commission the quantity of export stamps it may deem necessary upon payment of the export fee. The Commission shall ensure that all stamps allocated to a licensed stamping agent shall be accounted for on no less than a monthly basis and that all requisite fees have been paid to the Nation. Failure to remit or otherwise account for the appropriate export fee associated with an agent's allocation of export stamps shall be grounds for revocation of the agent's stamping license.

e. Qualified tobacco products that do not carry a Nation export stamp may not be exported from Nation territory.

Section 1.12. *Reserved [Export Fee on Motor Fuel].*

Section 1.13. *Minimum Retail Pricing.*<sup>22</sup>

a. The Commission may establish a minimum price for tobacco products sold within the Nation's Territories. Minimum prices established pursuant to this Section shall be within 10% of the minimum pricing schedule recommended to the Commission by the Seneca Free Trade Association

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or equivalent organization. The recommendations of the Free Trade Association or equivalent association shall be provided to the Commission on a quarterly basis, no less than twenty (20) days prior to the start of the quarter for which the recommended minimum pricing levels are to be effective.

b. No cigarettes shall be sold at retail in Nation territory below the prescribed minimum price. Willful retail sale below the minimum price shall constitute a violation of this ordinance and is grounds for suspension or revocation of a Business license in accordance with the provisions of this law.

c. The minimum retail price may be changed by the Commission on an emergency basis, upon the submission of revised pricing recommendations by the Seneca Free Trade Association or equivalent organization, in conjunction with a certification as to the change in market conditions necessitating such change.

d. The Commission may establish a minimum wholesale price for tobacco products sold within the Nation's Territories. Minimum wholesale prices established pursuant to this Section of the minimum pricing schedule shall be set by the Commission.

e. No tobacco products shall be sold at wholesale in Nation territory below the prescribed minimum price. Willful wholesale sale below the minimum price shall constitute a violation of this ordinance and is grounds for suspension or revocation of a Wholesale or IEC license in accordance with the provisions of this law.

f. The minimum wholesale price may be changed by the Commission on an

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emergency basis.<sup>23</sup>

Section 1.14. *On-Territory Manufactured Tobacco Products Generally.*<sup>24</sup>

a. All tobacco products manufactured on Nation territory shall be subject to a manufacturing fee as follows:

i. On-territory manufactured product \$6.00 per case.

b. No person shall manufacture tobacco products on Nation territory unless he or she shall hold a valid Nation business license.

Section 1.15. *Manufacturing Fee Imposed.*<sup>25</sup>

a. The manufacturing fee shall be assessed on the finished product at a rate of \$6.00 per 60-carton case. Said fee shall be paid by the stamping agent who receives product for resale, and shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer.

i. Manufactured Product that is for retail sale within the Nation's Territories shall be exempt from the manufacturing fee.

b. The manufacturing fee may be changed by the Council upon written recommendation from the Commission, based on factors such as the price of raw tobacco, changes in the financial condition of the Nation, or changes in the assessments of tobacco products in other jurisdictions which may impact the Nation market, or upon any other reasonable basis.

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Section 1.16. *Manufacturing Stamps.*<sup>26</sup>

a. Exemption from the manufacturing fee for manufactured product to be sold on Territory shall be evidenced by a stamp or other marking to be determined by the Commission. In the case of manufacturing stamps, said stamps may only be affixed by any Nation licensed stamping agent. Payment of the manufacturing fee for product which is exported shall be evidenced by the manufacturer's submission of a manufacturing report in such form as the Commission may determine. Manufactured product may only be exported without the affixation of a Nation manufacturing stamp where:

i. The tobacco products are destined for delivery to a person who is licensed to receive unstamped tobacco products in accordance with the laws of the jurisdiction in which they are located; or

ii. The tobacco products are destined for delivery to a federally recognized Indian nation, or a duly licensed wholesaler located within the territory of a federally recognized Indian nation, who is authorized to receive unstamped tobacco products, pursuant to the laws of the Indian nation in which they are located.

b. Qualified manufactured products destined for retail sale within the Nation's Territories that do not carry a Nation manufacturing stamp or other evidence that they are exempt from imposition of the manufacturing fee shall be deemed contraband and shall be subject to confiscation.

c. A duly licensed manufacturer may obtain a license to be a stamping agent provided

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that he or she otherwise meets all of the licensing requirements set forth herein.

Section 1.17-A *Fire Safe Cigarettes*<sup>27</sup>

**[Pursuant to Council Resolution CN: R-04-17-10-15, the provisions of Section 1.17-A through 1.17-C have been suspended indefinitely.]**<sup>28</sup>

a. No cigarettes may be imported, sold or offered for sale in the Nation's Territories unless the cigarettes have been tested in accordance with the test method and meet the performance standard specified in this section, a written certification has been filed by the manufacturer with the Commission in accordance with section 1.17-B of this Act, and the cigarettes have been marked in accordance with section 1.17-C of this Act.

(1) Testing of cigarettes shall be conducted in accordance with the American Society of Testing and Materials ("ASTM") standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes."

(2) Testing shall be conducted on 10 layers of filter paper.

(3) No more than 25 percent of the cigarettes tested in a test trial in accordance with this section shall exhibit full-length burns. Forty replicate tests shall comprise a complete test trial for each cigarette tested.

(4) The performance standard required by this section shall only be applied to a complete test trial.

(5) Written certifications shall be based upon testing conducted by a laboratory that has been accredited pursuant to standard ISO/IEC 17025 of the International Organization for Standardization ("ISO"), or other comparable accreditation standard required by the Commission.

(6) Laboratories conducting testing in accordance with this section shall implement a

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quality control and quality assurance program that includes a procedure that will determine the repeatability of the testing results. The repeatability value shall be no greater than 0.19.

(7) This section does not require additional testing if cigarettes are tested consistent with this Section for any other purpose.

(8) Testing performed or sponsored by the Commission to determine a cigarette's compliance with the performance standard required shall be conducted in accordance with this section.

b. Each cigarette listed in a certification submitted pursuant to section 1.17-B of this Act that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard set forth in this section shall have at least two nominally identical bands on the paper surrounding the tobacco column. At least one complete band shall be located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there shall be at least two bands fully located at least 15 millimeters from the lighting end and 10 millimeters from the filter end of the tobacco column, or 10 millimeters from the labeled end of the tobacco column for non-filtered cigarettes.

c. A manufacturer of a cigarette that the Commission determines cannot be tested in accordance with the test method prescribed in paragraph (1) of subsection (a) of this section shall propose a test method and performance standard for the cigarette to the Commission. Upon approval of the proposed test method and a determination by the Commission that the performance standard proposed by the manufacturer is equivalent to the performance standard prescribed in subsection a.3 of this section, the manufacturer may employ such test method and performance standard to certify

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such cigarette pursuant to section 1.17-C of this Act.

d. Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes offered for sale for a period of three years, and shall make copies of these reports available to the Commission upon written request. Any manufacturer who fails to make copies of these reports available within sixty days of receiving a written request shall be subject to a civil penalty not to exceed \$250 for each day after the sixtieth day that the manufacturer does not make such copies available, or possible suspension or revocation of the manufacturer's Nation business license.

Section 1.17-B

*Certification and Product Change*

a. Each manufacturer shall submit the Commission a written certification attesting that:

(1) each cigarette listed in the certification has been tested in accordance with section 1.17-A of this Act; and

(2) each cigarette listed in the certification meets the performance standard set forth in section 1.17-A.

b. Each cigarette listed in the certification shall be described with the following information:

- (1) brand, or trade name on the package;
- (2) style, such as light or ultra light;
- (3) length in millimeters;
- (4) circumference in millimeters;
- (5) flavor, such as menthol or chocolate, if applicable;
- (6) filter or non-filter;
- (7) package description, such as soft pack or box;

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- (8) marking pursuant to section 1.17-C of this Act;
- (9) the name, address and telephone number of the laboratory, if different than the manufacturer that conducted the test; and
- (10) the date that the testing occurred.

c. Each cigarette certified under this section shall be re-certified every three years.

d. For each cigarette listed in a certification, a manufacturer shall pay to the Commission a \$250 fee. The Commission is authorized to annually adjust this fee to ensure it defrays the actual costs of the processing, testing, enforcement and oversight activities required by this Act.

e. If a manufacturer has certified a cigarette pursuant to this section, and thereafter makes any change to such cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards required by this Act, that cigarette shall not be sold or offered for sale within the Nation until the manufacturer retests the cigarette in accordance with the testing standards set forth in section 1.17-A of this Act and maintains records of that retesting as required by section 1.17-A of this Act. Any altered cigarette which does not meet the performance standard set forth in Section 1.17-A of this Act may not be sold within the Nation.

Section 1.17-C

*Marking of Cigarette Packaging*

a. Cigarettes that are certified by a manufacturer in accordance with section 1.17-B of this Act shall be marked to indicate compliance with the requirements of section 1.17-A of this Act.

The marking shall be in eight point type or larger and consist of:

- (1) Modification of the product UPC Code to include a visible mark printed at or around the area of the UPC Code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the UPC; or

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(2) Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved or embossed upon the cigarette package or cellophane wrap; or

(3) Printed, stamped, engraved or embossed text that indicates that the cigarettes meet the standards of this Act.

b. A manufacturer shall use only one marking, and shall apply this marking uniformly for all packages, including but not limited to packs, cartons, and cases, and brands marketed by that manufacturer, and shall notify the Commission as to the marking that is selected.

c. Prior to the certification of any cigarette, a manufacturer shall present its proposed marking to the Commission for approval. Upon receipt of the request, the Commission shall approve or disapprove the marking offered within 20 days. Proposed markings shall be deemed approved if the Commission fails to act within 20 business days of receiving a request for approval. A manufacturer may elect to utilize a safe-harbor marking, by ensuring that the letters "FSC," which signifies Fire Standards Compliant appear on the cigarette package in 8 point type or larger and such letters are permanently printed, stamped, engraved or embossed on the package at or near the UPC code.

e. No manufacturer shall modify its approved marking unless the modification has been approved by the Commission in accordance with this section.

Section 1.18. *Prohibited Transactions.*

a. No wholesaler or retailer of tobacco products shall sell such products to any person under the age of eighteen (18).

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b. No importer shall sell or otherwise distribute any tobacco products bearing a Nation import stamp to any person other than a licensed Nation wholesaler or retailer.

c. No retailer shall sell or otherwise distribute tobacco products bearing a Nation import stamp to any person outside of Nation territory in a manner that has been Determined to violate the laws of the jurisdiction of the point of sale or applicable federal law.<sup>29</sup>

d. No wholesaler or retailer shall engage in a mail order sale transaction to any individual in a manner that does not require both the signature of the recipient to complete delivery and written confirmation of delivery. Proof of signature and delivery shall be kept on file for a period of one (1) year from the date of the individual's last purchase and shall be made available to the Commission upon request.<sup>30</sup>

Section 1.19. *Enforcement.*

a. The powers of the Commission to carry out the provisions of this Law shall be as set forth in Section 2.3.

b. The Commission is authorized to employ such inspectors, investigators, auditors, agents, and staff as may be necessary to ensure compliance with this Law.

c. The Marshals and Commission agents, acting at the direction of the Commission or the President, shall have such authority as may be necessary to carry out the provisions of this Law, including but not limited to the authority to inspect shipments of goods into Nation territory, to intercept illegal shipments of goods into Nation territory and to seize any vehicles or equipment that

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may be used in the course of such illegal activity.

Section 1.20. *Defense Obligation.*

Should any licensed wholesaler or retailer be subjected to the process of foreign governments as a direct result of its compliance with specific provisions of this Law, the Nation shall take any and all necessary and prudent measures to protect and defend such licensee's compliance with this Law, including but not limited to intervening in said process. Only the Nation shall have the authority to defend the provisions of this Law.

Section 1.21. *Fee Allocation.*

Fees generated in accordance with the provisions of this Law shall first be applied to the costs of administration. All fees received in excess of said costs shall be allocated by the Council in the following manner:

Health, Education and Welfare	50%
Incentive Programs <sup>31</sup>	50%

ARTICLE 2. IMPORT-EXPORT COMMISSION

Section 2.1. *Establishment.*

There is established an Import-Export Commission for purposes of ensuring compliance with the provisions of this Law.

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Section 2.2. *Duties.*

The Commission shall:

- a. in conjunction with the President, Treasurer, and Marshals, ensure compliance with the provisions of this Law;
- b. establish such rules and regulations as may be necessary to carry out the provisions of this Law; and
- c. perform such other duties as may be defined by law.

Section 2.3. *Powers; Penalties; Procedures.*<sup>32</sup>

- a. The Commission shall have such power to:
  - i. permanently revoke the license of any stamping agent, wholesaler or retailer who has twice been determined to be in violation of this Law;
  - ii. suspend, for a period not longer than thirty (30) days, the license of any wholesaler or retailer determined to be in violation of this Law, such period ultimately to be based upon the severity of the violation;
  - iii. suspend ex parte, for a period not longer than seventy-two hours, the license of any stamping agent, wholesaler or retailer believed, upon preliminary investigation, to be in gross violation of this Law; and
  - iv. perform its duties and ensure compliance with the provisions of this Law.

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b. Prior to the effective date of this Law, the Commission shall develop and issue procedures for determining violations of this Law. No stamping agent, wholesaler or retailer shall have its license revoked without a hearing before the Commission in which the alleged violator shall have the right to appear, with counsel at his or her own expense if deemed necessary, and present arguments on his or her behalf.

Section 2.4. *Stamps, Stamping Agents and Licensed Petroleum Importers.*

a. The Commission shall prescribe, prepare and furnish stamps as may be necessary to evidence the payment of the import, export or manufacturing fees on tobacco products imposed by this Law.<sup>33</sup> The Commission shall provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. The Commission shall make provision for the allocation of such stamps and may license such agent(s) for the purpose of affixing such stamps as set forth in this Law.

b. The Commission may license wholesalers of tobacco products as agents to buy and affix import, export or manufacturing stamps.<sup>34</sup> Each agent authorized to affix such stamps shall at all times provide complete access to an authorized Commission employee who shall provide regulatory oversight to ensure that the stamping activities of the agent are in full compliance with this Law. The fee for filing such application for a stamping agent's license shall be one thousand dollars (\$1,000.00) per year.

c. Each stamping agent licensed to affix stamps pursuant to this Law must provide the

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Commission, on a monthly basis, a written report which details the following information: (i) the quantity, brand and type of product stamped; (ii) the location to which the product was delivered and the date on which it was shipped; (iii) the lot numbers of the stamps affixed to the tobacco products delivered, and (iv) the brand and amount of unstamped tobacco products held by the Stamping Agent pursuant to Section 1.6(b) at the end of the month.<sup>35</sup> The Commission shall have authority to conduct on-site inspections as need be to ensure compliance with this Law.

d. The Commission may license petroleum wholesalers as licensed importers of Petroleum Products pursuant to the provisions of this Law. Each licensed importer shall at all times provide complete access to authorized Commission employees, in order to provide regulatory oversight and to ensure that the importer's activities are in full compliance with this Law. The fee for filing a petroleum importer's license shall be one thousand dollars (\$1,000.00) per year. Each licensed petroleum importer shall timely file such reports in the form and manner as may be proscribed by the Commission by regulation.<sup>36</sup>

Section 2.5. *Membership.*

a. The Commission shall have nine (9) members who shall be appointed by Council.

b. All Commissioners shall be Nation members. Family may not serve together on the Commission. Commission members shall be "public officials" for purposes of the Nation's Ethics Law.<sup>37</sup>

c. One (1) Commissioner shall serve as the Chair of the Commission. The Chair may not be an owner of a licensed tobacco or petroleum business or have an economic or family interest

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associated with a licensed or petroleum business.<sup>38</sup>

d. Two (2) Commissioners shall be from the Allegany Territory and two (2) Commissioners shall be from the Cattaraugus Territory. Members appointed under this subsection may not be an owner of a retail business or have an economic or family interest associated with a retail business.

e. Two (2) Commissioners shall be appointed by the licensed businesses from each of the Allegany and Cattaraugus Territories at a meeting of the licensed businesses of each territory called for that purpose. The Clerk shall conduct such meeting with at least one weeks' written notice to all licensed businesses. Each licensed business shall have one vote, *provided*, that an owner of more than one business shall have only one vote. The Clerk shall certify to Council the names of the Commissioners so selected to serve on the Commission.

f. The Nation's Council shall appoint two (2) Councillors to the Commission. One (1) Commissioner shall be from the Allegany Territory and one (1) shall be from the Cattaraugus Territory. Members appointed under this subsection may not be an owner of a retail business. Commissioners appointed pursuant to this Section shall serve at the pleasure of the Nation's Council, *provided*, that their terms shall automatically expire upon the expiration of their term as Councillor.

g. Commissioners shall serve for a term of three years and until his or her successor has been duly confirmed or until his or her death, resignation or removal. Notwithstanding the foregoing, the initial Commission shall be comprised of two Commissioners with one year terms, two Commissioners with two year terms and three Commissioners with three year terms (which shall

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include the Chair). Initial terms shall be determined by the Commissioners by lot at the first Commission meeting.

- h. Commissioners shall receive a stipend of \$500.00 per month.<sup>39</sup>
- i. Commissioners may be removed by the appointing authority at any time for cause.

Any Commissioner missing three consecutive meetings, without the prior approval of the Chair, shall be deemed automatically removed.

Section 2.6. *Officers.*

The Commission shall have a Chair, a Vice-Chair, a Secretary and such other officers that it may establish from time to time. The Chair, Vice-Chair and Secretary shall be selected annually by the Commission membership and shall hold office until his or her successor has been duly selected. The Chair and Vice-Chair shall not be from the same Territory. Commission officers may be removed by the membership of the Commission whenever in their judgment the best interests of the Commission would be served.<sup>40</sup>

Section 2.7. *Meetings; Quorum; Bylaws.*

- a. The Commission shall meet at least monthly upon one week public notice.
- b. Five Commission members shall be necessary in order to constitute a quorum for the transaction of business.<sup>41</sup>
- c. The vote of five (5) Commissioners at a meeting at which a quorum has been met

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shall be necessary to constitute an official act.<sup>42</sup>

d. All meetings of the Commission shall be open to Nation members only, *provided*, that non-members who have business before the Commission or whose employment necessitates their attendance may attend.<sup>43</sup>

e. The Commission shall have authority to adopt bylaws not inconsistent with this Law.

Section 2.8. *Recourse.*

a. Commission action that is arbitrary and capricious shall be subject to judicial review in the Nation's Courts.

b. Nothing contained in this Law shall establish a cause of action in any United States federal or state court or constitute a waiver of the sovereign immunity of the Nation.

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AMENDMENTS

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1. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  2. This term was added pursuant to amendment enacted by Council on December 9, 2006.
  3. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  4. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  5. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  6. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  7. The import fee on cigarettes was lowered from \$0.01 per cigarette pursuant to amendment enacted by Council on December 9, 2006.
  8. The second paragraph of subsection 1.6(b) was added pursuant to amendment enacted by Council on April 14, 2007.
  9. This Subsection was amended by Council on November 10, 2007 to add Part (iv).
  10. This subsection was amended by Council on March 14, 2009, to add a deadline for the filing of relevant reports.
  11. The first sentence of subsection 1.7(e) was amended by Council on April 14, 2007 by adding the text beginning "or in the case . . ."
  12. This subsection 1.7(f) was added pursuant to amendment enacted by Council on April 14, 2007.
  13. This section was added pursuant to amendment enacted by Council on April 14, 2007. It shall not take effect until June 1, 2007.
  14. The Import Fee for both Gasoline and Diesel Fuel was changed to \$0.03 per U.S. Gallon by Council action on December 8, 2007.
  15. This section was amended by Council on November 10, 2007, so as to change the reporting requirement to once monthly.
  16. This Subsection was amended by Council on November 10, 2007 to add Part (iv).
  17. This section was amended by Council on November 10, 2007 to change "wholesaler/distributor" to "importer".

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18. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission.
19. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission. On April 14, 2007, Council lifted the suspension and directed the Commission and the Department of Justice to develop regulations.
20. This section was amended by Council on January 10, 2009, in order to clarify exempt export.
21. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission.
22. This section was added pursuant to amendment enacted by Council on April 14, 2007.
23. Subsections d, e and f were added pursuant to amendment enacted by Council on January 10, 2009.
24. This section was added pursuant to amendment enacted by Council on April 14, 2007.
25. This section was added pursuant to amendment enacted by Council on April 14, 2007.
26. This section was added pursuant to amendment enacted by Council on April 14, 2007.
27. This section was added pursuant to amendment enacted by Council on March 14, 2007. With respect to the importation of fire-safe cigarettes, this section shall take effect on September 1, 2009. With respect to the sale of fire-safe cigarettes, this section shall take effect on December 1, 2009.
28. The fire-safe cigarette provisions set forth in Section 1.17-A through 1.17-C were suspended indefinitely by the Nation's Council on April 17, 2010.
29. This subsection was amended by Council on December 9, 2006. The previous text read as follows: "No retailer shall sell or otherwise distribute tobacco products bearing a Nation import stamp through the mail or by common carrier to any person outside of Nation territory if such transaction would constitute a violation of any United States federal or state law where the purchaser is located."
30. This section was added pursuant to amendment enacted by Council on May 10, 2008.
31. This phrase was amended by Council on January 12, 2008 by deleting the words "Supplemental Annuity" and replacing it with "Incentive Programs."
32. This section was amended by Council on April 14, 2007 to add the words "stamping agent" where indicated.
33. This sentence was amended by Council on April 14, 2007 by adding "manufacturing" to the types of fees administered by the Commission.
34. This sentence was amended by Council on April 14, 2007 by adding "manufacturing" to the types of fees administered by the Commission.

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35. This sentence was amended by Council on April 14, 2007 to change reporting from weekly to monthly and to add subsection (iv).
36. This Section 2.4 was amended by Council on November 10, 2007 to add "and Licensed Petroleum Importers" to the Section title and a new Subsection 2.4.d..
37. Subsections a. and b. of this section were amended by Council on December 9, 2006 by removing the prohibition against elected officials serving on the Commission and increasing the number of Commissioners to nine (9).
38. This subsection was amended by Council on March 13, 2010, separating the Chairperson duties from that of the full-time CEO of the department.
39. This subsection was amended by Council on December 9, 2006 by reducing the Commissioner's stipend from \$1,000.00 per month to \$50.00 per meeting. It was further amended on April 14, 2007 by increasing the stipend to \$500 per month. It was further amended on March 13, 2010, to remove the salary for the Chairperson, consistent with the separation of the Chairperson and CEO duties.
40. This subsection was amended by Council on March 13, 2010, to reflect that the Chairperson shall be elected by the Commission, rather than appointed by Council.
41. This subsection was amended by Council on January 13, 2007 by increasing the quorum from four to five.
42. This subsection was amended by Council on January 13, 2007 by increasing the vote required to do business from four to five.
43. This section was amended by Council on April 14, 2007 to clarify that Commission meetings are open to Nation members only.

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## IMPORT – EXPORT REGULATIONS



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### REG - 1 STATEMENT OF PURPOSE

1.1 The purpose of these regulations is to implement and ensure compliance with the provisions of the Import-Export Law of the Seneca Nation of Indians (*Import-Export Law (IEL) 6/14/06*). The expressed legislative purpose is to provide procedural enhancements to aid enforcement and to carry out the provisions of the IEL and thereby safeguard the Nation in its free use and enjoyment of its land; to protect Nation territorial integrity and to generate revenue to conduct essential government functions. (*IEL Art. 1, §1.1, 1.3*)

### REG - 2 DEFINITIONS

2.1 “Brand” means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, menthol, lights, kings, and 100s, and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, or recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

2.2 “Cigarette” means any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any substance or material other than tobacco.

2.3 “Commission” means the Import-Export Commission of the Nation.

2.4 “Damaged Stamp” means a stamp required pursuant to the Import Export Law of which 75% or more of the stamp is incapable of being applied to a package of tobacco product.

2.5 “Person” shall mean any member or non-member individual and shall not include a corporation, firm, organization or association.

2.6 “Fiscal agent” means any person or persons designated by the Commission to receive stamps from the manufacturer, sell cigarette fee stamps to licensed stamping agents and to make other decisions regarding the fiscal administration of the IEL.

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2.7 “Manufacturer” means an individual or company who manufactures tobacco products in a facility wholly located on Nation Territory.

2.8 “Nation Territory” means real property located within the boundaries of the Seneca Nation of Indians’ reservations or within the Nation’s jurisdiction. For purposes of these regulations, only that part of any building or structure, that may span the boundaries of the territories and into another jurisdiction, which is actually and physically located within the external boundaries of the Cattaraugus or Allegheny reservations shall be deemed on Nation territory.

2.9 “Separate warehousing facility” means a warehouse, storehouse or other commercial building or group of buildings, wherein cigarettes are received, stored and distributed and the agent’s day to day business is conducted. Such a warehousing facility must be separate and distinct from any other person’s facilities and shall not include a mere enclosure within a larger facility, nor a means of transportation (i.e. truck or van).

2.10 “Stamp or cigarette stamp” means any adhesive stamp, metered stamp, heat transfer stamp or other form of evidence of payment of the import or export fee as prescribed by the Commission.

2.11 “Stamping agent” means any person who is authorized and licensed to affix fee stamps to packages or other containers of cigarettes pursuant to the IEL.

2.12 “Units sold” means the number of individual cigarettes sold in Nation territory whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question, as measured by fees collected by the Nation on packs.

2.13 “Wholesale dealer” means any Nation licensed wholesaler who sells cigarettes in Nation territory to retail dealers or to other persons for purposes of resale.

### **REG - 3 LICENSING OF STAMPING AGENTS, QUALIFICATIONS, DENIAL OF APPLICATION, APPEAL, RENEWAL OF LICENSE**

3.1 All stamping agents of the Nation shall be licensed by the Commission subject to Council approval.

3.2 No person may purchase, possess or affix such stamps evidencing the payment of the Nation fee unless such person has been granted and publicly displays, in the person’s place of business, a license as a Seneca Nation Cigarette Stamping Agent.

3.3 No person may possess unstamped cigarettes within Nation territory, without establishing to the satisfaction of the Commission that such cigarettes are not subject to the fee.

3.4 Stamping Agent licenses shall be valid for one (1) year from the date of issue and are not assignable.

As Adopted – November 10, 2007

3.5 In order to qualify for consideration to be a licensed stamping agent, the applicant(s) must:

- a. Complete an application for a license as a cigarette stamping agent.
- b. Submit the annual non-refundable application fee of \$1,000.
- c. Have a minimum net worth of \$250,000 as evidenced by a balance sheet.
- d. Provide current financial statements for the most recent quarter.
- e. Be 21 years or older.
- f. Provide proof of availability of a secure, separate warehousing facility, through a copy of a valid deed or lease agreement and provide a detailed description of such facility which shall have a secure area separate and apart from any other business that may be conducted from said facility.
- g. Hold a valid and current Nation wholesale license.
- h. Be in good standing with any applicable Nation laws, rules or regulations.
- i. Be willing to submit to a background check which may include a criminal check, credit reports or other financial reports of the applicant or applicant's company.
  1. Applicant shall submit an authorization for release of information on forms prescribed by the Commission.
- j. Demonstrate that he or she will have a direct buy status, and provide the approximate amount of product expected to be stamped and sold.
- k. Demonstrate capability to assert control over stamps to avoid fraud and misuse.
- l. Demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner.
- m. Covenant to abide by the IEL, these regulations and any other applicable Nation law.

3.6 The Commission shall act upon a complete application within thirty (30) business days, and shall notify the applicant, in writing, within five additional (5) days of the determination being reached.

3.7 The Commission may refuse to issue a license where it is determined that:

- a. Any lawful fee imposed under the IEL or any other Nation law has not been paid in full.
- b. The applicant has been convicted of, or entered a plea of guilty or *Nolo Contendere* to any felony under federal law.
- c. The wholesale or stamping agent license of the applicant was previously revoked or suspended.
- d. The applicant held a controlling ownership in an entity which has violated any of the provisions set forth in the IEL or in these regulations.
- e. The results of the background check or credit check are below acceptable standards and cannot otherwise be overcome.
- f. There exists any other evidence which might indicate a propensity to violate the IEL or any other applicable Nation law.

As Adopted – November 10, 2007

3.8 An applicant may appeal a denial of an application to the Nation's Courts, which shall not disturb the Commission's determination unless the Nation's Court finds that the Commission acted arbitrarily and capriciously upon the presentation of sufficient evidence.

3.9 A licensed stamping agent may renew his or her license by submitting written notice to the Commission, 30 days prior to the expiration date of their current license.

- a. The Commission shall send out renewal notices to licensees at least 90 days prior to the expiration of their current license.
- b. If written notice of intent to renew is not given as required, and there has been no other response to the renewal notice sent by the Commission, the license will expire as provided.
- c. Upon the expiration of one's license, all unused stamps must be turned in to the Commission in accordance with procedures below, all Certificates of license must be turned in and the agent shall immediately cease operations as a stamping agent of the Nation.

3.10 The agent will submit a renewal application, with a \$1,000 renewal fee, and will certify that there are no material changes as represented on the original application or will explain what has changed. He or she will also certify full compliance with the IEL, that there are no violations of the IEL or any other applicable Nation law and that there are no outstanding fees.

- a. Any changes in circumstances will be further reviewed by the Commission and may serve as a basis to deny a renewal application.
- b. Upon approval of the license renewal or refusal to renew the license, the Commission shall notify the agent of its determination and require the surrender to the Commission of the agent's existing certificates or license as a stamping agent.
- c. Upon issuance of a renewed license, the Commission shall issue to the agent a new distinctively colored Certificate of License. An agent may operate upon notification of approval of a license renewal from the time existing certificates are surrendered until the time that the new certificates are issued which shall not be more than 30 business days from the determination of renewal or refusal to renew.

3.11 The Commission may limit the maximum number of or place a moratorium on the number of stamping agent licenses to be issued, subject to Council approval.

3.12 A licensed stamping agent may voluntarily relinquish his or her license and immediately upon doing so, must turn in all unused stamps to the Commission along with a final report as required by the IEL.

As Adopted – November 10, 2007

3.13 A licensed stamping agent ceases to be an importer by reason of discontinuance, sale or transfer of the agent's business; the agent shall notify the IEC in writing no less than five (5) days after the discontinuance, sale or transfer takes effect. The notice shall include the name and address of the purchaser or successor, if any. The agent shall, within ten (10) days of the discontinuance, sale or transfer, submit a final report and payment as required by the IEL. In the event that the agent does not re-commence importation of tobacco products within thirty (30) days of providing notice to the Commission, the agent shall relinquish his or her stamping agent license and cease all activities as a stamping agent.

#### **REG - 4 ACQUISITION OF STAMPS BY THE COMMISSION**

4.1 The Nation may enter into contracts necessary for the manufacture of stamps which shall be in such forms, denominations or quantities as the Commission deems necessary for the payment of the fee on the possession of cigarettes.

- a. The Commission shall ensure that a sufficient number of stamps are available for purchase and such stamps shall be readily distinguishable from each other.
- b. The Commission may, from time to time, as often as it deems advisable, provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design.

4.2 The Commission shall designate a fiscal agent who shall be responsible for purchasing stamps from the manufacturer.

- a. Cigarette stamps manufactured for use by the Nation shall be delivered only to the designated fiscal agent for the purpose of making authorized sales of such stamps to licensed cigarette agents.

4.3 Purchase of stamps shall be done in accordance with the Nation's Procurement Policy.

4.4 The Commission shall use generally acceptable practices to ensure accurate records are kept of stamps received from the manufacturer.

4.5 The Commission shall keep a log to record the number of stamps sold, the agent sold to, for distribution to which business, and the numerical series or batch number.

4.6 The Commission shall provide for a safe and secure location in which to hold stamps pending sale to licensed stamping agents.

4.7 No person, other than a duly appointed fiscal agent, may sell or offer for sale any cigarette fee stamps.

As Adopted – November 10, 2007

**REG - 5 SALE OF STAMPS TO LICENSED AGENTS**

5.1 Only stamps prescribed and furnished by the Commission may be used to evidence payment of fees due under the IEL.

5.2 Stamps shall be prepared in denominations as set forth in the IEL and which represent the standard number of cigarettes per pack for sale in Nation territory. Packages in excess of a standard amount shall carry the requisite number of stamps.

5.3 Licensed cigarette stamping agents must place an order for stamps directly with the Commission Office and must adhere to any applicable administrative terms and conditions, including use of the order form prescribed by the Commission.

5.4 Payment for such stamps must be made in advance to the Nation's Fiscal Department, by certified check, cashier's check, money order or by direct wire transfer and in accordance with any other administrative requirements of the Nation's Fiscal Department.

5.5 Once proper payment is received and processed by the Fiscal Department, a confirmation of payment will be forwarded to the Commission Office which shall then authorize the release of the appropriate number of stamps to the licensed stamping agent or representative.

- a. Stamps will not be released to anyone other than a licensed stamping agent or two (2) other pre-approved representatives whose approval shall be evidenced by a notarized statement from the licensed stamping agent placed on file with the Commission. Such statement shall also indemnify and hold harmless the Nation for any negligence on the part of said representatives.

**REG - 6 AFFIXATION OF STAMPS**

6.1 Every licensed stamping agent must affix to each package of cigarettes, approved Nation stamps as evidence that proper fees have been paid to the Nation.

6.2 Stamps must be affixed to individual packages of cigarettes, as distinguished from cartons or other larger containers.

6.3 Stamps must be affixed to the bottoms of such packages so as to be clearly visible to purchasers.

6.4 The Commission may prescribe the machinery, equipment or other means by which cigarette stamps are affixed.

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**REG - 7      REPORTING REQUIREMENTS OF STAMPING AGENTS**

7.1            Stamping agents are required to submit weekly reports, on or before the first business day of the week immediately following the week for which the report is submitted and shall provide the following information on a form prescribed by the Commission.

- a. the quantity, brand of products stamped, which shall coincide with the “safe list”;
- b. name of Nation licensed retailer who purchased the product;
- c. the location to which the product was delivered and the date on which it was shipped;
- d. the lot numbers of the stamps affixed to the tobacco products delivered

7.2            Stamping agents shall also submit a monthly report or reconciliation form, of product and stamp inventory on a form prescribed by the Commission.

7.3            The stamping agent shall maintain, and make available to the Commission upon request, all invoices and documentation of sales and any other information relied upon in reporting to the Commission, for a period of five years.

7.4            The Commission may require a stamping agent to submit any additional information, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to a determination of compliance with the IEL.

**REG - 8      GENERATION OF LIST OF PRODUCTS ACCEPTABLE FOR SALE IN NATION TERRITORY**

8.1            In order to facilitate the implementation of the IEL, the Commission may generate a “safe list” of products or brands of cigarettes that may be sold in Nation Territory. This list shall be created from information submitted to the Commission by Nation licensed wholesalers on a form prescribed by the Commission.

8.2            An initial list shall be generated within thirty (30) days of the implementation of these regulations by the Commission. Thereafter, the list may be updated as needed by the submission of additional information by the wholesalers.

**REG - 9      REFUNDS OR CREDITS FOR STAMPS**

9.1            Stamping agents may submit a claim for a refund of or credit for fees paid for stamps spoiled by improper fixation, or for a refund of stamps unused at the expiration of one’s license, or under any other circumstance the Commission deems necessary and in the best interest of the Nation.

9.2            Any stamps spoiled by improper fixation must be returned to the Commission within thirty (30) days for a refund of any fees duly paid. A claim must be submitted on a form prescribed by the Commission with sufficient supporting documentation as required by the Commission.

As Adopted – November 10, 2007

9.3 The Commission shall keep an accurate and up to date accounting of all refunds and credits issued.

**REG – 10 LICENSING OF PETROLEUM WHOLESALERS, QUALIFICATIONS, DENIAL OF APPLICATION, APPEAL, RENEWAL OF LICENSE**

10.1 All motor fuel importers of the Nation shall be licensed by the Commission subject to Council approval.

10.2 No person may import motor fuel onto the Nation's Territories unless the person has been granted and publicly displays, in the person's place of business, a license as a Seneca Nation Motor Fuel Importer.

10.3. Motor Fuel Import licenses shall be valid for one (1) year from the date of issue and are not assignable.

10.4 In order to qualify for consideration to be a licensed motor fuel importer, the applicant(s) must:

- a. Post a surety bond or other security deposit sufficient to cover 110% of the licensee's average import fees for a two month period.
- b. Submit the annual non-refundable application fee of \$1,000.
- c. Be 21 years or older.
- d. Hold a valid and current Nation wholesale license.
- e. Be in good standing with any applicable Nation laws, rules or regulations. and
- f. Covenant to abide by the IEL, these regulations and any other applicable Nation law.

10.6 The Commission shall act upon a complete application within thirty (30) business days, and shall notify the applicant, in writing, within five additional (5) days of the determination being reached. The applicant must be present and appear before the Commission for his or her application to be considered.

10.7 The Commission may refuse to issue a motor fuel importer's license where it is determined that:

- g. Any lawful fee imposed under the IEL or any other Nation law has not been paid in full.
- h. The applicant has been convicted of, or entered a plea of guilty or *Nolo Contendere* to any felony under federal law.
- i. The any license awarded to the applicant under the IEL was previously revoked or suspended.
- j. The applicant held a controlling ownership in an entity which has violated any of the provisions set forth in the IEL or in these regulations.
- k. The results of the background check or credit check are below acceptable standards and cannot otherwise be overcome.

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- I. There exists any other evidence which might indicate a propensity to violate the IEL or any other applicable Nation law.

10.8 An applicant may appeal a denial of an application to the Nation's Courts, which shall not disturb the Commission's determination unless the Nation's Court finds that the Commission acted arbitrarily and capriciously upon the presentation of sufficient evidence.

10.9 A licensed motor fuel importer may renew his or her license by submitting written notice to the Commission, 30 days prior to the expiration date of their current license.

- a. The Commission shall send out renewal notices to licensees at least 90 days prior to the expiration of their current license.
- b. If written notice of intent to renew is not given as required, and there has been no other response to the renewal notice sent by the Commission, the license will expire as provided.
- c. Upon the expiration of one's license, all Certificates of license must be turned in and the individual shall immediately cease operations as a motor fuel importer.

10.10 The motor fuel importer will submit a renewal application, with a \$1,000 renewal fee, and will certify that there are no material changes as represented on the original application or will explain what has changed. He or she will also certify full compliance with the IEL, that there are no violations of the IEL or any other applicable Nation law and that there are no outstanding fees.

- a. Any changes in circumstances will be further reviewed by the Commission and may serve as a basis to deny a renewal application.
- b. Upon approval of the license renewal or refusal to renew the license, the Commission shall notify the importer of its determination and require the surrender to the Commission of the importer's existing certificates or license as a motor fuel importer.
- c. Upon issuance of a renewed license, the Commission shall issue to the agent a new distinctively colored Certificate of License. A motor fuel importer may operate upon notification of approval of a license renewal from the time existing certificates are surrendered until the time that the new certificates are issued which shall not be more than 30 business days from the determination of renewal or refusal to renew.

10.11 The Commission may limit the maximum number of or place a moratorium on the number of motor fuel importer licenses to be issued, subject to Council approval.

10.12 A licensed motor fuel importer may voluntarily relinquish his or her license and immediately upon doing so, submit a final report and payment as required by the IEL and cease all activities as a motor fuel importer.

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10.13 A licensed motor fuel importer ceases to be an importer by reason of discontinuance, sale or transfer of the importer's business; the importer shall notify the IEC in writing no less than five (5) days after the discontinuance, sale or transfer takes effect. The notice shall include the name and address of the purchaser or successor, if any. The importer shall, within ten (10) days of the discontinuance, sale or transfer, submit a final report and payment as required by the IEL. In the event that the importer does not re-commence motor fuel importation within thirty (30) days of providing notice to the Commission, the importer shall relinquish his or her motor fuel import and cease all activities as a motor fuel importer.

## **REG - 11 REPORTING REQUIREMENTS OF LICENSED PETROLEUM IMPORTERS**

11.1 Licensed importers are required to submit monthly reports, on or before the 15<sup>th</sup> day of each month (or the next business day should the 15<sup>th</sup> fall on a holiday or weekend) and shall provide the following information on a form prescribed by the Commission.

- a. The number of gallons of fuels used or delivered by the importer within the Nation's Territories for the preceding month, which shall be identified in net or gross terms, as such amounts are measured in the supporting paperwork obtained upon acquisition of the fuel at the rack;
- b. Name of Nation licensed retailer who purchased the product; and
- c. Copies of the monthly exporter's report of receipts and disbursements for each state from which the distributor has pulled fuel from.

11.2 The motor fuel importer shall also pay any motor fuel import fees due by the deadline imposed pursuant to Reg. 11.1. Payment shall be made by cashier's check, money order or wire transfer. Fees shall be calculated based upon the amounts set forth on the return required by Section 11.1 of these Regulations. Import fees not paid by the due date shall be subject to a 25% penalty.

11.3 The motor fuel importer shall maintain, and make available to the Commission upon request, all invoices and documentation of sales and any other information relied upon in reporting to the Commission, for a period of two years.

11.4 The Commission may require a licensed importer to submit any additional information, as is necessary to a determination of compliance with the IEL.

11.5 Failure to comply with the reporting and payment provisions required pursuant to this Reg. 11, may result in suspension or revocation of the importer's license in accordance with the provisions of the IEL and these Regulations. In the event that enforcement action is necessary, the Commission may seek payment import fees due, as well as any administrative costs or expenses relating to the enforcement action, against the security provided pursuant to Section 10.4.a.

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## **REG - 12 REVOCATION, SUSPENSION, HEARING AND REINSTATEMENT**

12.1 The Commission may revoke or suspend the license of a stamping agent wholesaler or retailer upon a determination that the licensee failed to comply with the provisions of the IEL or these Rules and Regulations. (*IEL Art. 2, § 2.3*)

12.2 Inspectors shall routinely examine and inspect all businesses expected to comply with the IEL and upon the suspicion of any wrongdoing, will institute a formal investigation which shall be thoroughly researched and documented using both written reports and if necessary, digital images or other photographs.

12.3 Inspectors may enter the place of business or employment of any licensee for the purpose of such investigations at any time and may require the licensee to submit such reports as he deems necessary to monitor compliance with the requirements of the IEL, these regulations, or any other applicable rule or order.

12.4 If there is a reasonable suspicion that a violation of the IEL may have occurred, the Inspector shall commence a formal investigation. Upon completion of a formal investigation, the inspector shall submit a written investigative report to the Commission detailing his or her findings, shall state whether and what violation has allegedly occurred, and shall make himself or herself available to testify at a hearing if necessary.

## **REG - 13 HEARING PROCEDURE**

13.1 Upon receipt of an investigative report, the Commission shall give the licensee written notice of a hearing to revoke or suspend its license, which hearing shall be conducted in accordance with procedures set forth below.

13.2 Notice of the proposed suspension or revocation shall be personally served on the licensee no less than twenty (20) days prior to the hearing. The notice shall set forth facts and circumstances on which the proposed suspension or revocation is predicated, the date, time and place of the hearing, and shall inform the licensee of his or her right to appear and present evidence on his or her behalf. The licensee may elect to have counsel present at the hearing at his or her own expense.

13.3 All Hearings shall be closed to the public and shall be recorded, transcribed and certified by the Secretary of the Commission as a true and correct record of the hearing. The rules of evidence pertaining to trials or hearings in the Nation's courts shall not apply to hearings before the Commission.

13.4 The Commission shall commence each Hearing by asking the licensee to admit or deny the allegations set forth in the Notice of Violation. If the licensee admits the allegations, (s)he shall be provided with an opportunity to explain any factors alleged to be in mitigation and/or any other matters that the licensee deems relevant to the Commission's determination of the matter. If the licensee denies any such allegations, the Commission shall take testimony under oath from representatives of the Commission, the Nation, take testimony under oath from

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the licensee and/or his or her counsel, and from any other witnesses it shall deem necessary in order to formulate a full and fair presentation of the facts and circumstances upon which the alleged violation is predicated. The Secretary of the Commission shall administer the oaths.

13.5 The Chair of the Commission shall conduct all hearings; if the Chair cannot be available, he or she shall appoint one of the other Commissioners in his or her place.

13.6 The Commission shall render a decision within five (5) business days and shall forward a Notice of Decision which shall cite the violation; set forth the facts and circumstances on which the suspension or revocation is predicated; set forth the prescribed penalty of revocation or suspension; and give the licensee notice of the right to appeal to the Peacemaker's Court.

#### **REG - 14 REVOCATION AND SUSPENSION**

14.1 Any person whose license has been revoked may apply at the expiration of sixty days for a reinstatement of his or her license. The license may be reinstated if it appears to the satisfaction of the Commission that the licensee will comply with the IEL and these regulations.

14.2 In the case of a first violation only, a plea or settlement agreement with the Commission will be treated as a violation for purposes of this section and a violation must stand after all appeals have been exhausted for such violation to count toward the required two violations for permanent revocation.

14.3 Immediately upon the suspension of a license, all stamps currently in the agent's possession shall be forfeited to the Commission for holding and the agent shall be prohibited from conducting any business for the specified period of time.

- a. The Commission may reissue (sell) the forfeited stamps to other licensed agents in good standing, may retain them to return to the suspended agent once their suspension period is up, may dispose of them, or may make any other use of them deemed appropriate by the fiscal agent

#### **REG - 15 EX PARTE SUSPENSION AND SPECIAL HEARING**

15.1 A license may be suspended *ex parte* by the Chairperson of the Commission, upon preliminary investigation, for gross violations of the IEL, which may include but are not limited to:

- a. Failure to submit a weekly or a monthly report for more than two (2) consecutive reporting periods;
- b. The affixation of any stamps wherein the requisite fee was not paid to the Nation; the sale of any unstamped cigarettes;
- c. An agent's knowingly assisting another person in violating the provisions of the Import-Export Law or these Rules and regulations.

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- d. An agent committing fraud in his or her operations or in the procurement of his or her stamping agent license, including counterfeiting or other attempts to defraud the Nation.
- e. Conviction of a felony.
- f. The importation into Nation territory of tobacco products in excess of six hundred (600) cartons of cigarettes or petroleum products in excess of one thousand (1,000) gallons in violation of the Nation's *Import-Export Law*.
- g. Any other act or omission which the Commission determines substantially jeopardizes the financial welfare or sovereign status of the Nation.

15.2 The preliminary investigation must be conducted in good faith by a duly appointed IEC Inspector and must result in enough evidence to form a reasonable belief that a violation has occurred.

- a. Written notice of the results of a preliminary investigation must be provided to a quorum of the Commission within 48 hours of such preliminary investigation being completed.

15.3 Within 24 hours of receipt of preliminary investigation report, the Commission shall make a finding of no cause or if there is cause to believe a violation has occurred, shall issue an order directing the immediate suspension of the license for no longer than 72 hours and further directing that an additional investigation be completed with a report provided to the Commission within 48 hours.

- a. The Commission shall then have twenty-four (24) hours to both determine whether the additional report provides a sufficient basis to believe a violation has occurred and to schedule a Special Hearing if necessary.
- b. If the Commission decides there is not a sufficient basis to believe a violation has occurred then the matter will be dismissed without prejudice and the suspension shall be lifted.
- c. If the Commission decides there is a sufficient basis to believe a violation has occurred, the licensee in question will be given a Notice of Violation and a Special Hearing will be held, within the same twenty four (24) hour period noted above, and wherein the licensee will be afforded the opportunity to appear before the Commission and present arguments on his behalf.
- d. The Special Hearing will be conducted in accordance with procedures detailed above.
- e. In the event that the Commission fails to act on the determination of the Chairperson, the Chairperson's determination shall be deemed a final agency action for purposes of appeal.

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- f. Appeal from a decision rendered at a Special Hearing shall be to the Peacemaker's Court and shall be conducted in accordance with all applicable rules and regulations of said Court.

## **REG - 16 SEIZURES OF CONTRABAND PRODUCT**

16.1 Any cigarettes that have been sold, offered for sale, or possessed for sale in Nation territory in violation of the IEL or these regulations, shall be deemed contraband.

16.2 Except as otherwise provided in these regulations, Contraband cigarettes may be subject to seizure and forfeiture as provided in these regulations and may be sold at auction within 30 days. Sale at auction shall not relieve the individual or entity from paying the fee otherwise imposed under the import-export law, provided however that the individual or entity shall receive a credit against any fees owed equal to the amount realized by the sale. Should Contraband product not be sold at auction, it must be destroyed in accordance with environmentally sound procedures.

16.3 Cigarettes that are determined not to constitute contraband product shall be returned to the owner within twenty-four hours. Return of product shall be accomplished by making the product available for pick-up at the Commission's storage facility. The Commission shall have no obligation to deliver seized product to an individual or entity's place of business.

16.4 Contraband cigarettes may be seized by Nation law enforcement officers and by duly authorized agents of the Import Export Commission who have probable cause to believe that the cigarettes are unstamped cigarettes or cigarettes described in section 16.1.

### **16.5 Hearing Procedures for Seized Goods**

- a. In the event that contraband goods are seized, the IEC Inspector or Nation Law enforcement officer shall issue a citation to the individual alleged to have violated the Import Export Law, or these regulations, which shall set forth:
  - i. the name, address, date of birth and phone number of the violator
  - ii. the section of the Import Export Law or Regulations alleged to have been violated
  - iii. the Location of the violation; and
  - iv. an appearance date and time for a hearing before the Commission Chair for the purpose of determining whether or not a violation of the Import Export Law or Regulations has occurred, which shall not be less than 72 hours or two business days (whichever is longer) from the date and time of the citation.

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- b. In the event that goods are seized, the licensee may elect an expedited hearing process as follows, which shall be in lieu of the hearing procedure provide for pursuant to Sections 13 and 15:

- i. the Chairperson of the Commission shall hold a hearing within 48 hours of the seizure taking place. The purpose of the hearing shall be to determine whether or not a violation of the Import Export Law or Regulations has taken place. The Chairperson shall issue a written determination within 24 hours of the hearing taking place.

- c. The determination of the Chairperson may be appealed to an appeals panel comprised of three (3) Commissioners, by providing written notice of intent to appeal to any member of the appeals panel. The appeals panel shall act on the appeal within 48 hours of receipt of the notice of appeal. In the event that the appeals panel fails to act, the Chairperson's determination shall be considered a final action for purposes of appeal to the Nation's Peacemaker's Court, in accordance with Section 2.8 of the Import Export Law.

16.6 Storage of Seized Goods.

- a. The Commission shall make appropriate space available to house products that have been seized pursuant to the IEL to ensure their safekeeping and to promote their maximum shelf life.
- b. Seized product shall be inventoried and cataloged prior to being stored. All items of seized inventory shall be clearly labeled with the following: (i) the date, time and location of the seizure, (ii) the name and address of the owner (if known) and (iii) the citation number.
- c. Each individual's or entity's seized goods shall be kept segregated from other seized goods, so as to prevent co-mingling of seized product.

16.7 Exceptions. The following cigarettes shall not be subject to seizure:

- a. Unstamped cigarettes in the possession of a licensed stamping agent.
- b. Unstamped cigarettes in the course of transit from outside of the Nation's Territory and consigned to a licensed stamping agent or destined for delivery to a licensed stamping agent.
- c. Unstamped cigarettes in a quantity of 2 cartons or less in the possession of an individual who is not a licensed stamping agent.
- d. Cigarettes that are manufactured at facilities located within the boundaries of the Nation's Territories.

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**REG - 17 SEVERABILITY**

17.1 If for any circumstance, a provision(s) or section(s) of these regulations are held invalid by the appropriate court of jurisdiction, the remainder of these regulations and other provisions or sections will not be affected in the application and enforceability of these regulations.

**REG – 18 AMENDMENTS**

18.1 These regulations may be recommended for amendment at any regular meeting of the Import-Export Commission, at which quorum is present, by a 2/3 vote of those members present, provided such proposed amendment(s) shall have been presented in writing at the previous regular meeting, and a copy forwarded to all absent members at least ten (10) days prior to the meeting at which the vote will be taken. Any recommended amendments shall not take effect until such amendments are approved by the Nation's Council.

# EXHIBIT B



**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives  
241 37<sup>th</sup> Street, 3<sup>rd</sup> floor  
Brooklyn, NY 11232

May 12, 2009

[www.atf.gov](http://www.atf.gov)

Seneca Nation of Indians  
3644 Administration Drive  
Salamanca, Seneca Nation 14779

Dear Seneca Nation of Indians,

On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), New York Field Division, please accept my gratitude for the assistance and support recently provided by the Seneca Nation of Indians to help curtail illegal cigarette trafficking.

As a result of the Seneca Nation's cooperative efforts with ATF, several investigations into illicit cigarette trafficking have been initiated and are now being prosecuted. The assistance provided thus far has been invaluable, and we recognize the efforts made by the Seneca Nation to curtail illegal cigarette distribution.

Future cooperation concerning illicit cigarette and tobacco distribution over the Internet, phones, and mail not in compliance with the Jenkins Act remains a goal for us to achieve. We will also continue to work closely with you on this and other matters and value the relationships that have been established.

We at ATF believe that the Seneca Nation is taking the right steps towards ensuring the lawful operations of Seneca members involved in tobacco distribution and we look forward to our continued cooperative efforts.

Ronald B. Turk  
Special Agent in Charge

# EXHIBIT C



**COMMENTS OF  
THE SENECA NATION OF INDIANS  
ON  
THE IMPLEMENTATION OF  
THE PREVENT ALL CIGARETTE TRAFFICKING ACT OF  
2009 ("PACT ACT"), PUB. L. 111-154,  
AND PROPOSED INTERIM RULE ATF 19I**

**\* \* \***

**RESPONSE TO  
THE UNITED STATES DEPARTMENT OF JUSTICE  
BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES  
MAY 19, 2010 REQUEST FOR INPUT  
PURSUANT TO EXECUTIVE ORDER 13175 REQUIRING  
CONSULTATION AND COORDINATION WITH  
INDIAN TRIBAL GOVERNMENTS**

**JUNE 18, 2010**

COMMENTS OF THE SENECA NATION OF INDIANS  
JUNE 18, 2010

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**PART I**

**ORAL COMMENTS  
BY  
RICHARD E. NEPHEW,  
SENECA NATION OF INDIANS  
COUNCIL CHAIRMAN AND CO-CHAIR OF  
THE FOREIGN RELATIONS COMMITTEE  
  
PRESENTED BEFORE THE BATFE ON  
JUNE 8, 2010**

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Introduction.

Good morning. My name is Richard E. Nephew, Chairman of the Seneca Nation of Indians Legislative Council. I am here today on behalf of the Seneca Nation to comment on your proposed interim rule to implement the PACT Act. This is tragic day for the Seneca Nation. It is tragic because the PACT Act reflects a targeted effort by the United States government to destroy a significant economic opportunity for our nation and to give power over Indian nations to state governments. We are also greatly disappointed because of the way we have been treated throughout the development of the PACT Act. Despite promises of consultation and openness, we have not been given the opportunity to discuss our mutual differences and attempt to resolve them.

In three weeks, the PACT Act will take effect. We have been told by your Agency that Seneca licensed businesses generate 80% of the sales of cigarettes sold through the mails in the United States. These mail order cigarette sales produce revenues for our Nation that funds important health and education programs for our people, and produce thousands of jobs for Indians and non-Indians alike, with an economic impact on the Western New York economy that we estimate at close to \$100 million.

The PACT Act is the culmination of a concerted effort by the United States government, the 50 states, anti-smoking organizations, and the largest cigarette company in the world to destroy the cigarette mail order businesses operated by our people. We have been demonized by these interests as promoters of terrorism, and sellers of cigarettes to children with no substantial evidence from the BATFE to support these assertions. In our view, we have been targeted for economic destruction by the very government that pledged to us in 1794 that it would protect us from harm and further economic destruction.

To add insult to injury, we have been denied the opportunity to resolve our differences throughout the process of PACT Act development. We have had meetings with Members of Congress with no meaningful effect. We have asked for meetings with the White House and have been largely ignored. We have asked for hearings on the impact of this legislation on the Seneca Nation and the rest of Indian Country but have been refused. Now, with only days to go before the PACT Act is to take effect, we are given the opportunity to be heard by the very Agency whose responsibility it is to enforce the law, not to change it. As we sit here today, it is clear to us that the Administration's policy of consultation with American Indian nations and tribes is a sham, something to be invoked as a policy of last resort in an effort to pacify us and facilitate the delivery of bad medicine.

While you may not find these observations useful in developing your enforcement response, the story surrounding the effect of the PACT ACT on the Seneca Nation, our Nation's economic impact on the United States, and our struggle to survive has not been told, and so I would like to share this additional information with you for the historical record.

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I. The Seneca Nation, Our Treaty Rights, and Our Economic History.

The Seneca people have lived in what is now Western New York State for nearly 1000 years. We are a historic member of the Six Nations of the *Haudenosaunee* Confederacy which at one time exercised authority over nearly thirty-five million acres of land stretching from what is now the Northeastern United States, west to the Mississippi River and south to North Carolina.<sup>1</sup> For many years, we lived in peace with your British forebears until your conflict with the Crown unsettled the peace and brought war to our lands. In 1779, General George Washington sent armies led by General Sullivan into our territory to kill our people, destroy our settlements, and burn our crops in an effort to eliminate us as a military threat to the United States. Since that time, we have referred to the American president as *Hanodaganyas*, or the Town Destroyer.

Despite this early conflict, we eventually came to live in peace with the American people. In 1794, we and the other Six Nations of the *Haudenosaunee* entered into a treaty of peace and protection at Canandaigua that served as a significant basis for the survival of our nations and yours.<sup>2</sup> The Canandaigua Treaty was a true treaty of peace, entered into when the United States was small, weak, and poor. Some have said that when the treaty was signed, the United States military doubled in size because it meant that our warriors joined with your soldiers to protect our common homeland. We first did that in the war against Great Britain in 1812 and our warriors have done so in every American war up to the present.

The Canandaigua Treaty is special for another reason. It makes a promise to the Seneca Nation and the other Six Nations unlike any other Indian treaty. It not only provides that the United States will recognize title to our lands, but it also provides that we will be recognized in the “*free use and enjoyment*” of those lands.<sup>3</sup> This means that the United States recognizes that our lands belong to us in fee simple ownership, and that no other government has the right to interfere in how we use those lands without our consent. It is for this reason that neither the United States nor the State of New York has authority over us, our lands, or the commerce taking place on our lands.

Despite the simplicity and clarity of this promise, the United States has too often violated its terms and left us to suffer at the hands of others, particularly land speculators and New York State officials. In 1797, largely due to the predatory actions of the New York State government and its trespassing citizens, the Seneca Nation lost title to most of our aboriginal lands.<sup>4</sup> In 1838, we nearly lost all of our remaining aboriginal lands as the result of the corrupt Buffalo Creek removal treaty.

But the United States has often lived up to its treaty promise to help us. To regain our Allegany and Cattaraugus Territories, the United States approved the Buffalo Creek Compromise

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<sup>1</sup> See *Banner v. United States*, 238 F.3d 1348, 1350 (Fed. Cir. 2001)

<sup>2</sup> See Treaty between the Six Nations and the United States of America, Nov. 11, 1794, 7 Stat. 44.

<sup>3</sup> See *id.* Article III.

<sup>4</sup> See generally Laurence M. Hauptman, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE (1999); see also Agreement between Robert Morris and the Seneca Nation of Indians, Sept. 15, 1797, 7 Stat. 601.

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Treaty of 1842<sup>5</sup> and made specific promises to us to protect our lands from future interference. Article 9 of that Treaty provides that the United States will

protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession, *from all taxes, and assessments for roads, highways, or any other purpose* until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

Combined with the language of the Canandaigua Treaty, what this language means to us is that no outside government, including the United States, has any authority to tax or regulate us, our lands, or interfere with our government without our consent. We have always interpreted our treaty rights this way and we will fight to uphold those rights now and forever.

It is too easily forgotten that the loss of our lands was the loss of our national wealth and began a period of economic deprivation in which our people have suffered for nearly 200 years. While American society prospered, our lives were disrupted and our society nearly destroyed. Somehow, our people have survived these continued threats to our existence. As recently as 1965, the United States violated the express terms of the Canandaigua Treaty when it seized 10,000 acres of our Allegany Territory for a reservoir for the Kinzua Dam. Just like Sullivan's March of 1779, the American government once again burned our homes and forcefully relocated our people to satisfy its selfish interests.

In recent years, our Nation has begun to rebuild itself from the ashes of this devastation. Our nearly 8,000 citizens live on or near our five territories in Western New York State. Our government employs over 1,200 people who provide a wide range of services to our people, including comprehensive health care, education, and public safety. Our economy has grown considerably in the last two decades, reflecting governmental revenue from gaming and retail sales of gasoline and tobacco products, as well as revenues from our emerging private sector economy. In 2007, economist Jonathan Taylor calculated that the Seneca Nation's economy had a \$1.1 billion economic impact on the Western New York economy, reflecting aggregate employment of approximately 6,300 people.<sup>6</sup> According to Buffalo Business First, the Seneca Nation and our enterprises is the fifth largest employer in Western New York.

## II. The Seneca Nation's Import-Export Law and Partnership with BATFE.

As the Nation's tobacco trade has grown over the years, we have realized that the general societal outlook towards tobacco products has changed. Public health advocates and governments at all levels have become more concerned about the effects of cigarette smoking. The Seneca Nation is aware of these changes and we, too, share the same policy considerations. To that end, the Nation has adopted measures to ensure greater controls over cigarette

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<sup>5</sup> See Treaty between the Seneca Nation of Indians and the United States of America, May 20, 1842, 7 Stat. 586.

<sup>6</sup> Jonathan Taylor, THE SENECA NATION ECONOMY – ITS FOUNDATIONS, SIZE AND IMPACT ON NEW YORK STATE AND THE WESTERN NEW YORK REGION (2007).

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importation, sale, and export in our territories that we know to be more effective than many states.

In 2006, the Nation's Council enacted our Import-Export Law. This Law established strict controls on the flow of tobacco products into and out of the Nation's territory. The Council has authorized only a few wholesalers to import tobacco products, and these wholesalers – called stamping agents – must affix the Nation's own encrypted and coded stamp to every pack of cigarettes sold in our territory. The Nation receives an administrative fee of 75 cents per carton, which is used specifically for health and education programs. Imported cigarettes must be stamped within 48 hours of importation. Once the cigarettes are stamped, they can then be sold to Nation-licensed retailers. Any exports are subject to higher fees and also must be stamped.

Nation licensed retailers are also subject to important restrictions on sales. Sales must be consistent with a minimum pricing structure, which governs the sale of all approved brands within the Nation's territories. Sales to minors are prohibited and sales cannot exceed 49 cartons per transaction, which comports with the Federal Cigarette Contraband Trafficking Act that sets the maximum allowable limit on the number of unstamped cigarettes that an individual may possess at 50 cartons. Retailers are prohibited from making any sales where it has been determined that such sales are prohibited.

The Import-Export Law is enforced by the Nation's Import-Export Commission. The Commission is responsible for issuing cigarette stamps and ensuring compliance by all wholesalers and retailers. Since administration of the Law began, the Commission has been involved in several different enforcement actions taken that resulted in the imposition of significant fines and consequences for those involved. These enforcement efforts have occurred in coordination with such agencies as the BATFE, the U.S. Postal Service, local law enforcement, and even the New York State Department of Taxation & Finance (DTF).

Since our Import-Export Law was enacted, the Nation has worked most closely with the BATFE. Because the United States is our treaty partner, we believed this was the most natural alliance in our joint effort to regulate the sale of tobacco products. We are proud of our efforts to date and that we have been favorably recognized for our efforts by the BATFE as a result.

In a letter dated May 12, 2009, the ATF Special Agent in Charge for New York stated :

On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), New York Field Division, please accept my gratitude for the assistance and support recently provided by the Seneca Nation of Indians to help curtail illegal cigarette trafficking.

As a result of the Seneca Nation's cooperative efforts with ATF, several investigations into illicit cigarette trafficking have been initiated and are now being prosecuted. The assistance provided thus far has been invaluable, and we

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recognize the efforts made by the Seneca Nation to curtail illegal cigarette distribution.<sup>7</sup>

Because the Nation believes that tobacco products must be comprehensively regulated by all responsible governments, we support any and all enforcement coordination efforts with other governments that are directed toward that important goal.

Unfortunately, the sponsors of the PACT Act and the White House never gave us the opportunity to be respected as a responsible, self-regulating tribal government. We do not sell cigarettes to children and we do not support terrorism. We have simply developed an economy and provided jobs for our people based upon the sale of a lawful commodity that non-Indians have long profited from. Had we been given the opportunity for meaningful consultation and negotiation, I am confident we could have found common ground that would have not required the sacrifice of thousands of jobs and the Nation's private sector economy.

III. Impact of the PACT Act on the Seneca Nation.

Despite the lofty purposes for which the PACT Act was developed, there should be no mistaking the true purpose of this legislation. Destroying mail order cigarette sales will not result in one less cigarette being sold. But it will eliminate the ability of consumers across the United States to purchase reasonably priced cigarettes and force them to purchase premium brands manufactured by Philip Morris and other major tobacco companies. Make no mistake. The PACT Act is nothing more than a money grab by Big Tobacco to expand its market share. It could better be called the "Marlboro Protection Act of 2010."

In enacting the PACT Act, the Congress purported to include protections in the legislation that would preclude the expansion of state power over Indian country. But the PACT Act could be interpreted by state governments to tip the balance in their favor by allowing unprecedented information regarding tribal tobacco sales as well as the authority to bring civil actions against violators. Moreover, it is unknown to what extent that the PACT Act will destabilize existing state-tribal compacts for those who have them and future compact negotiations and litigation. All of this could have been evaluated more carefully had the Congress had the decency to conduct a hearing on the implications of the PACT Act in Indian Country.

There should be no question that the PACT Act is about expanding state power into Indian Country and ensuring that Indian nations who dare to crawl out of the ash heap of economic devastation maintain our position at the bottom of America's economic hierarchy.

The effect of the PACT Act on the Seneca Nation is particularly severe and we have no doubt that the Seneca Nation and Seneca mail order businesses were targeted for destruction. If fully implemented, the PACT Act would have the effect of making Seneca territory the only place in the United States where it is impossible to either mail or ship cigarettes. This is because

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<sup>7</sup> Letter from Ronald B. Turk, New York Field Division Special Agent in Charge, U.S. Bureau of Alcohol, Tobacco, Firearms & Explosives to the Seneca Nation of Indians, May 12, 2009.

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the PACT Act sponsors, working closely with New York State officials, incorporated discontinuance agreements that preclude common carriers from shipping cigarettes from our territory. The ultimate effect of the PACT Act, as determined by the Seneca Free Trade Association, will be the elimination of nearly 3,000 mail order related jobs within the Nation and the surrounding area.

It is a testament to the fortitude of the Seneca people that our mail order tobacco businesses became so successful. It took seven years and the efforts of the entire United States government, the 50 states, and the largest tobacco company in the world to finally find a way to destroy them.

From a Seneca perspective, this is Sullivan's March and the Kinzua Dam all over again. Once again, we had something that America wanted. Once again, America ignored its treaty obligations to protect us. And once again, America took unilateral action to attack our Nation to satisfy the greed of its big corporations and itself.

Conclusion.

In conclusion, I want to be clear that I realize your job at BATFE is to enforce the law, not make it. But I believe that your oaths of office require you to uphold all of the laws of the United States as you go about fulfilling your duties, including respect for and protection of our treaty rights. Section 5(a)(3-4) of the PACT Act requires proper respect for Indian treaty rights.

We accept that it is the sovereign right of the United States to enact this legislation. But the Seneca Nation also has the right to define the scope of our jurisdiction and to interpret the scope of our treaty relationship as well. We interpret our treaties with the United States as the words clearly state, as we understand them, and within the context of history. We will not litigate our treaty rights in your courts, no more than you would consent to the jurisdiction of our courts to litigate matters affecting your interests. While we respect your right to pass this law, we cannot reconcile its purported effect with the requirements under the Canandaigua Treaty that we would be respected in the "free use and enjoyment" of our lands.

I have a difficult time imagining how you will be able to enforce this law against our people. The only way I can see that it is possible is through some kind of "racial profiling," where Indians with too many packages at the post office are presumed to be selling cigarettes and thus become targets for prosecution. While Big Tobacco surely has no qualms with such an approach, it is shameful to imagine that the United States would go to such lengths to line the pockets of these corporations and the state governments.

We are in serious disagreement with you regarding the enforcement of the PACT Act within the Seneca Nation. But, as we always have, we are committed to reasonable efforts to resolve our differences through diplomatic dialogue. Given the short time period that you have allowed, we are able to do so at your earliest convenience. We will also take the liberty of expanding upon my comments today in writing by the indicated deadline.

I would like to thank you for the opportunity to present this information to your Agency today. If you or others have any questions at this time, I would be glad to try and answer them.

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**PART II**

**WRITTEN COMMENTS  
BY  
ROBERT ODAWI PORTER,  
SENECA NATION OF INDIANS  
SENIOR POLICY ADVISOR AND COUNSEL**

**JUNE 18, 2010**

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### Introduction

The Seneca Nation of Indians submits these written comments on proposed interim rule ATF 19I and the various provisions of the PACT Act enumerated in the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, May 19, 2010 letter to Indian nations and tribes pursuant to Executive Order 13175. Any interim, proposed, or final regulations adopted by the Department and the BATFE to implement and enforce the PACT Act must be consistent with the intent of the Congress and with existing constitutional mandates.

As set forth below, the language of the Act raises several significant legal questions regarding the application and enforcement of its provisions against Indian nations, their citizens, and in Indian country. Under the PACT Act, the Congress expressly preserved all existing federal common law and treaty limitations on state and local authority in Indian country, and the Department's and the BATFE's implementation of the Act's provisions must defend, not defile, Indian nation sovereignty and Indian nation economies.

It is therefore imperative that the Department and the BATFE delay the issuance of any interim rule, the compilation of a "List of unregistered or noncompliant delivery sellers," and the enforcement of the Act pending full consideration of these and other legal questions via formal notice and comment rulemaking. Further, in the face of the thousands of jobs, scores of small businesses, and approximately \$100 million in economic activity supported by the Seneca tobacco economy alone, the Department must conduct a full analysis under the Regulatory Flexibility Act.

I. Registration and reporting requirements regarding certain sales of tobacco products included in Section 2 of the Act, codified at 15 U.S.C. § 376(a).

The Department's regulations (proposed 27 C.F.R. § 647.146(a)) should confirm the Congress' intent that the amended Jenkins Act registration and reporting requirements, codified at 15 U.S.C. § 376(a), apply to delivery sellers and to other entities transferring or shipping cigarettes to consumers, not to cigarette manufacturers, importers, distributors, and wholesalers. As set forth expressly in 15 U.S.C. § 376(a)(2), each memorandum and invoice submitted by a registrant to state, local, and tribal tobacco tax administrators ("covering each and every shipment of cigarettes made during the previous calendar month into such State") must include "the name, address, and phone number of the person delivering the shipment to the recipient *on behalf of the delivery seller*." (emphasis added).

The Congress' unambiguous language reflects its intent that this reporting (and the related registration) requirement applies only to shipments from delivery sellers to consumers, not to shipments by upstream manufacturers, importers, distributors, or wholesalers. The record-keeping requirements set forth in 15 U.S.C. § 376A(c), which incorporates 15 U.S.C. § 376(a)(2) by reference, apply exclusively to delivery sellers and further confirm this conclusion. Of course, the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2343, *already* imposes record-keeping and reporting requirements with respect to shipments by manufacturers, importers, distributors, and wholesalers. Nothing in the PACT Act or its legislative history indicates that the Congress intended to subject those entities to another reporting regime.

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Furthermore, the cornerstone of the enforcement of the PACT Act amendments to the Jenkins Act is the “list of *delivery sellers* of cigarettes or smokeless tobacco that have not registered with the Attorney General of the United States pursuant to section 376(a),” 15 U.S.C. § 376A(e)(1) (emphasis added), and the civil penalties applicable to “*delivery seller[s], . . . common carrier[s] or other delivery service[s]*,” 15 U.S.C. § 377(b)(1) (emphasis added). The Congress deliberately chose to exclude manufacturers, importers, distributors, and wholesalers from this enforcement program. It is therefore apparent that the Congress’ reference to “[a]ny person who sells, transfers, or ships for profit cigarettes in interstate commerce,” 15 U.S.C. § 376(a), refers only to delivery sellers and other entities transferring or shipping cigarettes to consumers. The Department’s regulations should reflect this Congressional intent.

II. Requirements for certain delivery sales included in Section 2A of the Act, codified at 15 U.S.C. § 376A.

The Department’s regulations (proposed 27 C.F.R. § 647.150(a)) should reiterate the Congress’ determination that those provisions of the PACT Act that require delivery sellers to comply with state and local laws imposing “excise taxes . . . licensing and tax-stamping requirements . . . [and] other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco,” 15 U.S.C. § 376A(a)(3), *see also* 15 U.S.C. § 376A(d), are limited by the body of federal law (and in many case state law) establishing that state and local officials lack jurisdiction or authority over Indian tribes and nations and their members and enterprises in Indian country.

Nothing in this Act . . . shall be construed to amend, modify, or otherwise affect . . . any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country . . . [or] any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . .

15 U.S.C. § 375, *see* Historical and Statutory Notes (Exclusions Regarding Indian Tribes and Tribal Matters, Pub.L. 111-154, § 5, Mar. 31, 2010, 124 Stat. 1109).

This body of law provides that state and local governments may impose on reservation retailers only “minimal burdens reasonably tailored” to the collection of cigarette tax from non-Indians, *Dept. of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994), and affirmatively prohibits the application of many regulatory requirements. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-81, 483 (1976) (affirming district court’s judgment that Montana may not “require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer’s license,” 392 F. Supp. 1297, 1307 (D. Mont. 1975)); *Oklahoma Tax Comm’n v. Bruner*, 815 P.2d 667, 669-70 (Okla. 1991) (state lacks authority to impose license and permit requirements on Indian cigarette retailer).

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Accordingly, the Department should confirm that §§ 376A(a)(3) and 376A(d) are substantially constrained by existing limitations on state and local jurisdiction over delivery sellers in Indian country.

III. Requirements in Section 2A of the Act, codified at 15 U.S.C. § 376A(e), for creation and publication of a list of delivery sellers of cigarettes and smokeless tobacco who have not complied with the Act.

The Department's regulations (proposed 27 C.F.R. § 647.150(e)) should clarify that the Attorney General of the United States may only include a delivery seller on the "List of unregistered or noncompliant delivery sellers," 15 U.S.C. § 376A(e), on the basis of acts or omissions occurring *after* the effective date of the PACT Act, June 29, 2010. That is, a person's violation or alleged violation of the Jenkins Act *prior* to the effective date of the PACT Act (at a time when a "delivery seller" did not in fact exist) is not grounds for inclusion on the list, and state, local, and tribal governments may not, pursuant to 15 U.S.C. §§ 376A(e)(1)(D) and 376A(e)(6), identify a delivery seller for inclusion on the list based in whole or in part upon acts or omissions occurring prior to June 29, 2010.

The Department's regulations must also establish evidentiary standards for any state, local, or tribal government identifying delivery sellers for purposes of inclusion on the list of unregistered or noncompliant delivery sellers. A government should be required to produce specific documentary evidence demonstrating that a delivery seller (1) "offers for sale or makes sales of cigarettes or smokeless tobacco in or into the State, locality, or tribal land" and (2) "has failed to register with or make reports to the respective tax administrator as required by [the PACT] Act, or that has been in a legal proceeding to have otherwise failed to comply with this Act." 15 U.S.C. § 376A(e)(6)(A)(i). The Attorney General should not include on the list any delivery seller identified by a state, local, or tribal government in the absence of such evidence.

Finally, the Seneca Nation is an independent sovereign nation and respectfully submits that it (like all other sovereign Indian nations and tribes) may not be compelled to provide information to the Attorney General, as suggested by 15 U.S.C. § 376A(e)(6). If the Seneca Nation chooses to provide information to the Attorney General regarding delivery sellers, common carriers, and other persons delivering cigarettes or smokeless tobacco within the Nation's sovereign Territory, it will do so on a voluntary basis only, pursuant to its government-to-government relationship with the United States.

IV. The requirement in Section 2A of the Act, codified at 15 U.S.C. § 376A(e)(1)(E), that the Attorney General provide an opportunity for delivery sellers to challenge their placement on any list of non-compliant delivery sellers described in 3, above.

The Department's regulations (proposed 27 C.F.R. § 647.150(e)(iii)) must ensure that a delivery seller's opportunity to challenge, pursuant to 15 U.S.C. § 376A(e)(1)(E)(iii), its potential inclusion on the list of unregistered or noncompliant delivery sellers is meaningful and satisfies procedural due process. To fulfill this constitutional requirement and the Congress' mandate that the Attorney General "use reasonable procedures to ensure maximum possible

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accuracy,” 15 U.S.C. § 376A(e)(1)(E)(i), the Department should provide a hearing to a delivery seller *prior* to the compilation and distribution of any list identifying that seller to avoid the significant risk of an erroneous deprivation of the delivery seller’s constitutionally-protected interests. The Attorney General must distribute the list to “common carriers and other persons who deliver small packages to consumers in interstate commerce, including the United States Postal Service,” 15 U.S.C. § 376A(e)(1)(A)(i), but need only update the list “once every 4 months,” 15 U.S.C. § 376A(e)(1)(C). And, although the Attorney General must promptly notify federal, state, local, and tribal authorities if “the [alleged] basis for including a delivery seller on this list is inaccurate, based on incomplete information, or cannot be verified,” 15 U.S.C. § 376A(e)(1)(E)(v), he need not notify common carriers and other delivery services. Thus, unless a delivery seller has the opportunity to be heard *prior* to its inclusion on the list, an erroneously-identified seller would suffer the devastating loss of its constitutionally-protected livelihood and reputation for at a minimum several months pending the distribution of a corrected list.

V. The prohibition in Section 2A of the Act on certain deliveries by persons on the non-compliant list. 15 U.S.C. § 376A(e)(1)(F).

The Seneca Nation has no preliminary comments on this provision, but reserves the right to comment further on specific regulations proposed by the Department.

VI. Record-keeping requirements for persons who sell, transfer, ship, or advertise or offer for sale cigarettes or smokeless tobacco products pursuant to Section 2 of the Act, codified at 15 U.S.C. §§ 376(a)(2) and 376A(c).

The Department’s regulations (proposed 27 C.F.R. § 647.150(c)(3)) should reiterate the Congress’ recognition that existing federal and state law may strictly limit access to the records of delivery sellers in Indian country by “tobacco tax administrators of the States, [by] local governments and Indian tribes that apply local or tribal taxes on cigarettes or smokeless tobacco, [by] the attorneys general of the States, [by] the chief law enforcement officers of the local governments and Indian tribes.” 15 U.S.C. § 376A(c)(3). As discussed above in the Seneca Nation’s comments to provision two, Congress explicitly provided that the PACT Act does not “amend, modify, or otherwise affect” the body of federal and state law that precludes state and local jurisdiction (or the jurisdiction of non-resident Indian tribes) over Indian tribes and nations and their members and enterprises in Indian country.

For example, as a matter of New York law, state officials may not access or inspect the records of delivery sellers in Indian country:

Because of tribal immunity . . . State auditors cannot go on the reservations to examine the retailers’ records. Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel production of their books and records for the purpose of assessing taxes.

*New York Ass’n of Convenience Stores v. Urbach*, 275 A.D.2d 520, 522 (N.Y. App. Div. 2000), *leave to appeal denied*, 756 N.E.2d 78 (N.Y. 2001), *cert. denied*, 534 U.S. 1056 (2001). The Department should therefore confirm that the general “access” for state, local, and non-resident

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tribal officials authorized by 15 U.S.C. § 376A(c)(3) does not apply to Indian delivery sellers in Indian country.

The Department must also implement 15 U.S.C. § 376A(c)(3), "Access for officials," in a manner that conforms the statute to the mandates of the Fourth Amendment, which prohibits unreasonable searches and seizures and protects a person's expectation of privacy in commercial property, including with respect to administrative and regulatory inspections. *See New York v. Burger*, 482 U.S. 691, 699-700 (1987). Even if the Congress may authorize such access to delivery sellers' records without a warrant, which the Seneca Nation does not concede, 15 U.S.C. § 376A(c)(3) utterly fails to impose any limitations on the discretion of state, local, and tribal tax administrators and law enforcement officials, and to provide delivery sellers any notice, as to when, why, and how often such access may be requested. *See Burger*, 482 U.S. at 702-03. In the face of these well-established constitutional requirements, and to prevent state and local officials from targeting Indian nation and tribal tobacco economies for harassment, it is imperative that the Department regulations carefully define the circumstances under which such officials may request access to the records of delivery sellers under 15 U.S.C. § 376A(c)(3). For example, a state or local official should be permitted to request access to a delivery seller's records only if he or she has probable cause to believe that the seller has sold or shipped cigarettes or smokeless tobacco to a consumer within the official's state or locality in violation of the PACT Act.

VII. Penalties included in Section 3 of the Act, codified at 15 U.S.C. § 377.

The Department's regulations (proposed 27 C.F.R. § 647.156(a)) should confirm that an Indian nation or tribal enterprises that enjoys the privileges and immunities of the nation or tribe, including its sovereign immunity, is a "tribal government" for purposes of 25 U.S.C. § 377(a)(2).

VIII. Regulatory Flexibility Act Analysis and Small Business Regulatory Enforcement Fainess Act.

In proposed interim rule ATF 19I, the Department erroneously asserts (without any analysis) that "this rule will not have a significant economic impact on a substantial number of small entities, including small businesses." As discussed above in Part I of the comments of the Seneca Nation of Indians, the Seneca mail order tobacco economy supports approximately 100 small businesses on the Nation's Territories employing an estimated 3,000 persons—these businesses contribute approximately \$100 million annually to the Western New York economy. Although regrettably Congress chose to ignore these facts, the Department may not and must therefore prepare a Regulatory Flexibility Act analysis. Similarly, by devastating the Seneca tobacco economy and the interstate cigarette market that it sustains, the proposed interim rule will result in an annual effect on the economy of \$100 million or more and significant adverse effects on competition and employment for purposes of the Small Business Regulatory Enforcement Act.

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**IX. The Administrative Precedent of the Western Hemisphere Travel Initiative.**

As the Department and BATFE consider an implementing regulatory strategy, there is a recent administrative precedent from the Department of Homeland Security ("DHS") that highlights how federal agencies can accommodate both federal statutory mandates and treaty-protected tribal sovereignty if they choose to do so.

The Western Hemisphere Travel Initiative ("WHTI") was established by the Intelligence Reform and Terrorism Prevention Act of 2004 which was enacted by Congress as a post-9/11 measure to improve national and border security. WHTI established a firm deadline by which individuals traveling into the United States would be required to carry U.S. passports or acceptable passport alternatives. Acceptable passport alternatives included so-called "enhanced" state driver's licenses, which contain encrypted elements to allow for facilitated and more secure border crossing.

Many Indian nations and tribes, the Seneca Nation included, have recognized rights to "pass freely" across the U.S.- Canadian border pursuant to the Jay Treaty of Amity, Commerce and Navigation of 1794, as well as having citizens living on both sides of the border. To facilitate addressing these unique considerations, DHS engaged in a formal notice and comment process by which it invited comments from Indian nations and tribes regarding WHTI's impact. The Nation, and other Indian nations with its citizens living on both sides of the border, expressed great concern about the impact of a U.S. passport requirement on existing Jay Treaty rights. DHS listened, and issued regulations that established a new category of acceptable passport alternative documents – "enhanced tribal cards" – that would be issued by tribal governments and recognized by the United States to accommodate tribal concerns.

WHTI established a firm date of June 1, 2009 for passport compliance. To date, DHS has not complied with that deadline. Instead, the Department has taken two important actions. First, it issued clear written guidance *prior* to the WHTI compliance deadline that non-compliance tribal identification documents would still be usable for border crossing. And second, it began to work cooperatively with affected Indian nations to develop agreements governing the creation and issuance of ETCs by tribal governments and the recognition of those documents by U.S. Customs and Border Protection. The Seneca Nation was the third Indian nation in the United States to enter into such an agreement with CBP and is now working on the corresponding technical agreement. *See Memorandum of Understanding between the Seneca Nation of Indians and the U.S. Department of Homeland Security Customs and Border Protection*, Sept. 10, 2009. At some point in the near future, both governments acknowledge that the Nation's ETC will take effect and replace the Nation's existing identification cards being used for border crossing purposes. When that happens, DHS will have been able to satisfy its statutory obligation under WHTI.

The DHS/WHTI experience reveals that it is not only possible, but mutually beneficial, for federal agencies to work cooperatively with Indian nations to achieve federal policy objectives reflected in legislation. Indian nations are sovereigns, and no sovereign government has the right to tell another sovereign government what to do. However, where mutual interests

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align, cooperative approaches that are disconnected from artificial deadlines are the best way to move forward in fulfilling federal statutory requirements.

The Department and BATFE would be well served to heed the experience of the Department of Homeland Security in its implementation of the PACT Act. Most importantly, if the Department anticipates implementing the PACT Act through such a cooperative process, written notice of its willingness to do so should be issued prior to June 29, 2010. Given that the PACT Act carries with it felony criminal penalties for non-compliance, clear guidance regarding the BATFE's enforcement policy should be understood throughout Indian Country prior to the Act's effective date.

Conclusion.

In the face of these important legal issues, which are critical to the sovereignty, treaties, and tobacco economy of the Seneca Nation of Indians, it would be inappropriate for the Department and the BATFE to adopt proposed interim rule ATF 19I or to otherwise enforce the Act on an interim basis. The Department and the BATFE must fully address each of these issues to protect, as the Congress intended, Indian nations and their members and enterprises from interference and unauthorized enforcement actions by rogue state and local officials.

The Seneca Nation of Indians therefore urges the Department and the BATFE to delay the issuance of any interim rule, to delay any enforcement action under the Act, to conduct the required Regulatory Flexibility Act analysis, and to initiate a formal notice and comment rulemaking with respect to their development of regulations to implement and enforce the PACT Act.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

-----X  
ROBERT GORDON.

Plaintiff,

Civil Action No. 10-1092 (HHK)

-against-

**DECLARATION OF  
RICHARD JEMISON**

ERIC HOLDER, et al.,

Defendants.

-----X

RICHARD JEMISON, of full age, being duly sworn according to law, upon his oath  
deposes and says:

1. I am the Chairman of the Seneca Free Trade Association (the "SFTA") and I  
make this affidavit in support of the Application of Plaintiff Robert Gordon for a Preliminary  
Injunction in the above-referenced matter. I am also an enrolled member of the Seneca Nation.

2. I have been the Chairman of the SFTA since 2010. As Chairman of the SFTA, I  
have personal knowledge concerning the facts and background relevant to this matter. My duties  
as Chairman include: I preside over all meetings of the SFTA's Board of Directors and over all  
meetings of the general membership. It is also the Chairman's duty to prepare an annual budget  
and to perform specific duties which the SFTA's board of Directors may place upon myself and  
to discharge other duties as ordinarily pertain to the office of Chairman.

3. On June 14, 2006, the Seneca Nation of Indians Tribal Council created the Seneca  
Free Trade Association by adopting the "Non-Profit Charter of the Seneca Free Trade  
Association."

4. On June 4, 2007, the SFTA adopted the “By-Laws of the Seneca Free Trade Association.”

5. The SFTA was created to, among other things, actively promote, attract, encourage and develop economically sound commerce and industry within and around the Territories of the Seneca Nation of Indians.

6. The SFTA is a cooperative association comprising individuals and businesses licensed by the Seneca Nation of Indians.

7. By virtue of its Charter and By-Laws, the SFTA is authorized by the Seneca Nation of Indians to: (1) engage in advocacy efforts which are designed to protect and defend the right of Seneca Free Trade Association Members to engage in treaty-protected commerce within, from and around the Territories of the Seneca Nation of Indians and (2) oppose any attempt by any foreign government to illegally extend regulatory authority to activities conducted upon or from the Territories of the Seneca Nation of Indians.

8. The SFTA has closely followed the PACT Act and its effects on the Seneca Nation. The SFTA has filed a challenge to the PACT Act in the Western District of New York, which has been consolidated with the *Red Earth* case. *Seneca Free Trade Association v. Holder*, 10-cv-550A (W.D.N.Y. filed July 1, 2010).

9. Robert Gordon, the Plaintiff in this action, is an enrolled member of the Seneca Nation as well as a member of the SFTA.

10. Over the past two centuries the Seneca Nation has been deprived of the vast majority of its treaty-protected lands and been deprived of the protections promised by the United States through treaty and statute.

11. These injustices have led to high rates of unemployment and other inequitable conditions which have significantly and adversely impacted socioeconomic conditions within the Seneca Nation's Territories. For example, according to the 2000 census, the average income of Indians living in the Nation's territories (\$12,300) continued to lag far behind, and was barely one-half that of all New Yorkers (\$23,400).

12. Prior to the enactment of the PACT Act, the Seneca Nation tobacco economy was a vital source of economic activity and employment for Nation members, and one that helped improve socioeconomic conditions within the Territories and throughout Western New York.

13. More than 100 licensed cigarette retailers operated within the territories and these businesses employed thousands of people.

14. The Seneca Nation is located in a relatively isolated area in upstate New York and is dependent on the U.S. mail to conduct its business activities. Because the commercial shippers, such as FedEx and UPS have voluntarily agreed not to ship tobacco, there are no alternative couriers with the same delivery scope as the U.S. mail to ship tobacco products. After the PACT Act came into effect, we explored many delivery alternatives and have found none that can practically replace the USPS. Alternative carriers are also much slower than the USPS in delivering packages to their destinations. The impact of the PACT Act's mailing ban is to destroy the Seneca tobacco industry and thus to cripple the Seneca economy.

15. The SFTA has also explored the possibility of complying with the PACT Act's taxation provisions should those provisions come into effect. The SFTA has concluded that it is not feasible for its members to become licensed stamping agents for the 550 state and local jurisdictions that tax tobacco products, or even a significant proportion of those jurisdictions.

The SFTA has also concluded that there are no “multi-state wholesalers” in the area through which its members can ship products to a significant proportion of these jurisdictions.

16. Pursuant to its sovereign authority, the Seneca Nation has enacted a comprehensive cigarette stamping, regulatory and law enforcement program that governs the importation, exportation and sale of all cigarettes in the Territories--the Seneca Nation of Indians Import-Export Law and Import-Export Regulations (collectively, “IEL”). All members of the SFTA, including Robert Gordon, are bound by the IEL. A true and correct copy of the IEL is annexed hereto as **Exhibit “A.”** The Nation is unwavering in its commitment to ensuring that its tobacco economy plays no role in organized crime or in funding terrorist organizations. To my knowledge, no member of the SFTA is involved in such activities.

17. The application of the Jenkins Act to sales on the Seneca territories has been hotly disputed. Traditionally, the federal and state governments have not enforced the Jenkins Act against Indians on their territories.

18. Before the PACT Act, the Seneca Nation’s economy was based largely on the tobacco trade.

19. The PACT Act has had a disastrous impact on the Nation’s already fragile economy. Seneca owned businesses have closed, and the percentage in unemployment has increased.

20. The devastating impact of PACT Act on the Seneca economy has resulted in an increased demand for social services such as unemployment benefits and food stamps. Seneca government services have been cut or scaled back as a result of the fiscal crisis. For example, it has been announced that the Seneca Nation’s Health Care Incentive Program will be discontinued after 2011 due to lack of resources resulting from the PACT Act. We have been

advised that the Seneca Nation is considering a substantial increase in the stamping fee to compensate for the severe revenue losses. However, if enacted this is likely to further cripple the Seneca tobacco business without addressing the shortfall since a higher stamping fee on non-existent purchases will not yield additional revenue.

21. The Seneca Nation had utilized revenue from cigarette licensing fees to maintain a fund used to further the health, education and welfare of the Seneca Nation. That fund has shrunk considerably as a result of the PACT Act.

22. If the PACT Act remains in effect, the Seneca Nation's economy, people and fiscal stability will most certainly be damaged even further. More businesses will close, unemployment will increase even more and there will be more unemployment and a greater need for public assistance. Estimates of further damage to the Seneca Nation's economy, people and fiscal stability will be devastating. This will result in economic devastation to the Seneca people.

23. The Seneca Nation sells a variety of brands of cigarettes, including many Seneca-made tobacco products that are not widely available elsewhere. A significant amount of pre-PACT Act sales by Seneca tobacco retailers came from Seneca-owned brands. The SFTA believes that the PACT Act was passed due to lobbying efforts of powerful groups such as Big Tobacco (which is threatened by sales and competition from Seneca owned brands), and the convenience store owners (who are threatened by internet sales and who are more likely to sell to minors or sell contraband cigarettes than Seneca sellers). In the SFTA's view, the PACT Act's true purpose is to eliminate competition from the Seneca tobacco sellers and Seneca internet sellers and will only benefit these groups – Big Tobacco and convenience store owners—as well as overseas traders such as Russian sellers. These groups will be benefitted at the expense of the

less powerful Seneca Indians who have historically been the victim of discrimination from the United States government.

24. The original inhabitants of this continent traded in tobacco for generations prior to Columbus; it is part of our inherent right to "free use and enjoyment" of our Sovereign Territories.

25. Article III of the Treaty of November 11, 1794 (otherwise known as the "Treaty of Canandaigua") memorialized peace and friendship between the Seneca People and the United States of America and established that the United States of America will recognize and not interfere with the Seneca People in the free use and enjoyment of their Territories.

26. Article IX of the Treaty of May 20, 1842 (otherwise known as the "Buffalo Creek Treaty") between the Seneca People and the United States of America requires the United States of America to protect the Territories of the Seneca Nation of Indians and the Seneca People from Taxes.

27. For the reasons stated above, on behalf of the Seneca Free Trade Association, I submit this affidavit and respectfully request that Plaintiff's motion for an injunction be granted in its entirety.

Dated: June 20, 2011  
Irving, New York

I declared under penalty of perjury that the foregoing is true and correct  
Executed on June 20, 2011

  
RICHARD JEMISON

# EXHIBIT A

SENECA NATION OF INDIANS  
IMPORT-EXPORT LAW



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ARTICLE 1. GENERAL PROVISIONS

Section 1.1.	Statement of Policy
Section 1.2.	Findings
Section 1.3.	Purpose
Section 1.4.	Definitions
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Section 1.20.	Defense Obligation
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ARTICLE 2. IMPORT-EXPORT COMMISSION

Section 2.1.	Establishment
Section 2.2.	Duties
Section 2.3.	Powers; Penalties; Procedures
Section 2.4.	Stamps, Stamping Agents and Licensed Petroleum Importers
Section 2.5.	Membership
Section 2.6.	Officers
Section 2.7.	Meetings; Quorum; Bylaws
Section 2.8.	Recourse

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Section 1.1. *Statement of Policy.*

The Seneca Nation of Indians seeks to exercise its inherent and treaty-protected rights of self-determination and the “free use and enjoyment” of its lands to promote the prosperity of the Seneca People now living and for those living seven generations to come. To achieve this goal, the Nation Council states that it shall be official Nation policy to vigorously protect and defend the economic rights of the Nation and its people within Nation territory against all foreign and domestic threats. Such protection and defense shall extend to the regulation of all goods and services sold or provided within Nation territory, including, but not limited to, the retail sale of petroleum and tobacco products.

Section 1.2. *Findings.*

The Council finds and declares that --

- a. The sale of petroleum and tobacco products by the Nation generates significant governmental revenue necessary for the delivery of essential governmental services to the Seneca people;
- b. The sale of petroleum and tobacco products by the Nation and its people generates sufficient revenue to sustain hundreds of public and private sector jobs and is a significant contributor to the Nation and regional economies;

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c. The Nation's Canandaigua Treaty with the United States of 1794 protects the "free use and enjoyment" of the Nation's territory and thus allows for the free trade of all goods within Nation territory;

d. The Nation's Buffalo Creek Treaty with the United States of 1842 protects Nation lands and commerce taking place within such lands from the application of New York State taxes; and

e. By virtue of its geographic position the Nation from time to time is subject to the economic, legal, and political influences of neighboring foreign governments, including the United States, Canada, and the State of New York, and thus must engage in whatever means necessary to protect its economic and political sovereignty from actions taken by those governments.

Section 1.3. *Purpose.*

The purpose of this law is to protect Nation territorial integrity through the regulation of goods imported and exported into and from Nation territory and to generate revenue to conduct essential governmental functions.

Section 1.4. *Definitions.*

a. "*Bonded agent*" shall mean a duly licensed stamping agent who has provided a security deposit or bond.<sup>1</sup>

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b. “*Commission*” shall mean the Nation Import-Export Commission established in Article 2 of this Law;

c. “*Family*” shall mean individuals who are related to other individuals as parents, children, sisters, brothers, aunts, uncles, or first cousins.

d. “*Determined*” or “*Determination*” shall mean that the legal question at issue has been finally resolved by a court of competent jurisdiction through the means of a full and complete trial that has reached a formal verdict and that all rights to appeal have either been exhausted or waived. The entering into a plea agreement or a plea of nolo contendere or equivalent shall not necessarily constitute a Determination for the purposes of this law.<sup>2</sup>

e. “*Export*” shall mean the exportation from Nation territory of any goods originally imported into Nation territory by any wholesaler.

f. “*Exporter*” shall mean a business engaged in the wholesale exportation of goods from Nation territory for purposes of resale.

g. “*Goods*” shall mean all goods and products, including petroleum products and tobacco products, that may be sold at retail sale.

h. “*Import*” shall mean the wholesale importation of any goods into Nation territory for purposes of resale.

i. “*Importer*” shall mean a business engaged in the wholesale importation of goods into Nation territory for purposes of resale.

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j. “*Manufacturer*” shall mean any person who manufactures tobacco products within the exterior boundaries of the Territories.<sup>3</sup>

k. “*Member*” shall mean an enrolled member of the Nation.

l. “*On-territory manufactured product*” or “*Manufactured Product*” shall mean tobacco products manufactured entirely within the exterior boundaries of the Seneca Nation Territory.<sup>4</sup>

m. “*Person*” shall mean any member or non-member individual, corporation, firm, organization, or association, who or which is engaged in any business, trade, occupation, or profession or renders or furnishes any service for profit or livelihood, but not individuals working for said persons as employees.

n. “*Point of sale*” shall mean the physical location at which the actual transaction or exchange takes place.<sup>5</sup>

o. “*Premium Brands*” shall mean that class of tobacco products generally identified and accepted as such and which includes but is not limited to brands manufactured by Phillip Morris, RJ Reynolds, Liggett, Lorillard, and others.<sup>6</sup>

p. “*Retailer*” shall mean a business engaged in the retail sale and distribution of goods to the general public.

q. “*Petroleum products*” shall mean gasoline of any grade used as a fuel for automobiles, diesel fuel, and any motor fuel blended with either of said products.

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r. *"Tobacco products"* shall mean cigarettes, cigars, snuff, chewing tobacco, pipe tobacco, and any other related tobacco product.

s. *"Wholesaler"* shall mean a business engaged in the wholesale sale and distribution of goods for resale purposes.

Section 1.5. *Importation Generally.*

a. Goods may freely be imported into Nation territory without the imposition of any fee except for petroleum and tobacco products.

b. No person shall import petroleum or tobacco products into Nation territory unless he shall have a valid Nation business license.

Section 1.6. *Import Fee on Tobacco Products.*

a. There is imposed a fee on all tobacco products imported into Nation territory. Said fee shall be imposed in accordance with the following schedule:

cigarettes	\$0.00375 per cigarette <sup>7</sup> (\$0.75 per 10 pack carton)
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cigars, smokeless and pipe tobacco [reserved]

b. The import fee on tobacco products shall be paid by any importer or wholesaler of tobacco products, including any Nation enterprise, prior to or within forty-eight (48) hours of importation into Nation territory. Said fee shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer. No credit account shall be established on behalf of any importer of tobacco products.

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A duly licensed stamping agent may elect to hold unstamped product in a secure location and pay the import fee prior to resale, only if said stamping agent shall have first posted a bond of \$100,000.00 issued to the Nation or shall have provided a security deposit in the amount of \$11,250.00, payable to the Nation. In the case of a security deposit, said deposit shall be held in an interest bearing account and shall not be co-mingled with any other Nation accounts or funds. Any unstamped product held by a stamping agent pursuant to this section shall be kept in a secure area separate and apart from stamped product held by the Agent. In the event that an agent is determined to have violated this Law, his or her license shall be revoked and said bond or security deposit shall be forfeited with said proceeds being added to the other funds generated by the collection of the fees pursuant to this Law.<sup>8</sup>

c. The import fee may be changed by Council upon the recommendation of the Commission in the event that (i) the financial condition of the Nation's government deteriorates significantly, as may be certified by the Treasurer; (ii) the financial condition of the licensed retail businesses within the Nation deteriorates significantly, as may be certified by the Seneca Free Trade Association or equivalent organization, (iii) the United States of America or the States of New York, Pennsylvania change their taxes, surcharges, fees or minimum prices associated with petroleum or tobacco products; or (iv) upon the joint certification of the Import Export Commission and the Seneca Free Trade Association that a change in any fee imposed by this Law is necessary.<sup>9</sup>

Section 1.7. *Import Stamps on Tobacco Products.*

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a. Evidence that the import fee on tobacco products has been paid shall be reflected by the affixation of an import stamp upon every pack of cigarettes, every cigar, and every package of smokeless or pipe tobacco imported into Nation territory.

b. Import stamps shall be affixed by either the Commission or its licensed agent(s).

c. The Commission is authorized to employ such people, establish such facilities, and purchase or lease such equipment, as may be necessary to properly affix Nation import stamps.

d. The Commission is authorized to issue a license to any qualified importer or wholesaler, subject to Council approval, to serve as an agent for purposes of affixing Nation import stamps. The applicant for a stamping license shall demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner and otherwise be capable of asserting sufficient control over said stamps to avoid fraud and misuse. A licensed stamping agent shall obtain from the Commission the quantity of import stamps it may deem necessary upon the payment of the import fee. The Commission shall ensure that all stamps allocated to a licensed stamping agent shall be accounted for on no less than a monthly basis and that all requisite fees have been paid to the Nation. Reports must be received by the Commission by the 15<sup>th</sup> of the month following the month for which the report is filed. In the event that the 15<sup>th</sup> falls on a date on which the Commission's offices are closed (e.g. holiday or a weekend) the report shall be due on the following Monday. Failure to remit or otherwise account for the appropriate import fee associated with an agent's allocation of import stamps shall be grounds for revocation of the agent's stamping

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license. The Commission shall assign such on-site inspectors as may be necessary to ensure the compliance of any licensed stamping agent with the provisions of this Law.<sup>10</sup>

e. Tobacco products that do not carry a Nation import stamp may not be imported into Nation territory unless to be delivered to a licensed stamping agent who shall affix such import stamps within forty-eight (48) hours of importation or in the case of a stamping agent who receives and stores unstamped product pursuant to Section 1.6(b), the requisite stamps shall be affixed prior to resale. This section shall not prohibit a duly licensed stamping agent with an exclusive buy arrangement from selling or delivering unstamped product carried exclusively by that agent directly to another duly Nation licensed stamping agent without affixation of an import stamp. Any tobacco products found in Nation territory without a Nation import stamp shall be deemed contraband and shall be subject to confiscation.<sup>11</sup>

f. It shall be illegal for a duly licensed stamping agent to affix Nation import stamps to any package of tobacco product or products for which the stamp of another jurisdiction has already been affixed.<sup>12</sup>

Section 1.8. *Import Fee on Petroleum Products.*<sup>13</sup>

a. There is imposed a fee on all Petroleum Products imported into Nation territory. Said fee shall be imposed in accordance with the following schedule:

Gasoline	\$0.03 per U.S. Gallon <sup>14</sup>
Diesel Fuel	\$0.03 per U.S. Gallon

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b. The import fee on Petroleum Products shall be paid by a licensed motor fuel importer on a monthly basis. Return and payment for imported petroleum shall be due on the 15<sup>th</sup> of each month, and shall cover the proceeding calendar month. Said fee shall be paid to the Nation by certified check, cashier's check, money order or wire transfer. Failure to remit payment and file any return when due may result in the imposition of penalties, or suspension or revocation of an importer's license.<sup>15</sup>

c. The import fee may be changed by Council upon the recommendation of the Commission in the event that (i) the financial condition of the Nation's government deteriorates significantly, as may be certified by the Treasurer; (ii) the financial condition of the licensed retail businesses within the Nation deteriorates significantly, as may be certified by the Seneca Free Trade Association or equivalent organization, (iii) the United States of America or the States of New York, Pennsylvania change their taxes, surcharges, fees or minimum prices associated with petroleum or tobacco products; or (iv) upon the joint certification of the Import Export Commission and the Seneca Free Trade Association that a change in any fee imposed by this Law is necessary.<sup>16</sup>

d. Petroleum Products on which the import fee has not been paid may not be imported into Nation territory unless delivered by a Nation licensed motor fuel importer, who shall pay such import fee in accordance with the provisions of this Law. Any Petroleum Products found in or delivered to Nation territory in violation of this law shall be subject to confiscation.<sup>17</sup>

e. Payment of the import fee on Petroleum Products shall be in the form and manner proscribed by the Commission by regulation.

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Section 1.9. *Exportation Generally.*<sup>18</sup>

a. Goods may be freely exported from Nation territory without the imposition of any fee except for petroleum and tobacco products.

b. No person shall export tobacco products from Nation territory unless he shall have a valid Nation business license.

Section 1.10. *Export Fee on Tobacco Products.*<sup>19</sup>

a. There shall be imposed a fee on qualified tobacco products exported from Nation territory. Said fee shall be imposed in accordance with the following schedule:

9,800 or more cigarettes	\$0.05 per cigarette
(49 or more cartons)	(\$10.00 per carton)
cigars, smokeless and pipe tobacco	[reserved]

b. The export fee on tobacco products shall be paid by the exporter of tobacco products prior to exportation from Nation territory. Said fee shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer. No credit account shall be established on behalf of any exporter of tobacco products.

c. A duly licensed stamping agent may export Tobacco products on an exempt basis without payment of the export fee or affixation of an export stamp, where:

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- i. The tobacco products are destined for delivery to a person who is licensed to receive unstamped tobacco products in accordance with the laws of the jurisdiction in which they are located, provided however, that prior to the product leaving the Agent's facility, it must first be stamped with the stamp required by the jurisdiction for which the product is destined for delivery; or
- ii. The tobacco products are destined for delivery to a federally recognized Indian nation, or a duly licensed wholesaler located within the territory of a federally recognized Indian nation, who is authorized to receive tobacco products, pursuant to the laws of the Indian nation in which they are located, provided that, all product destined for delivery under this subsection must first have a Nation import stamp applied prior to leaving the Agent's facility, unless the nation to which the product is being delivered otherwise requires that the product be stamped with the stamp of the destination nation.<sup>20</sup>

Section 1.11. *Export Stamps on Tobacco Products.*<sup>21</sup>

- a. Evidence that the export fee on tobacco products has been paid shall be reflected by the affixation of an export stamp upon every pack of cigarettes, every cigar, and every package of smokeless or pipe tobacco exported from Nation territory.
- b. Export stamps shall be affixed by either the Commission or its licensed agent(s).
- c. The Commission is authorized to employ such people, establish such facilities, and

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purchase or lease such equipment, as may be necessary to properly affix Nation export stamps.

d. The Commission is authorized to issue a license to any qualified exporter or wholesaler, subject to Council approval, to serve as an agent for purposes of affixing Nation export stamps. The applicant for a stamping license shall demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner and otherwise be capable of asserting sufficient control over said stamps to avoid fraud and misuse. A licensed stamping agent shall obtain from the Commission the quantity of export stamps it may deem necessary upon payment of the export fee. The Commission shall ensure that all stamps allocated to a licensed stamping agent shall be accounted for on no less than a monthly basis and that all requisite fees have been paid to the Nation. Failure to remit or otherwise account for the appropriate export fee associated with an agent's allocation of export stamps shall be grounds for revocation of the agent's stamping license.

e. Qualified tobacco products that do not carry a Nation export stamp may not be exported from Nation territory.

Section 1.12. *Reserved [Export Fee on Motor Fuel].*

Section 1.13. *Minimum Retail Pricing.*<sup>22</sup>

a. The Commission may establish a minimum price for tobacco products sold within the Nation's Territories. Minimum prices established pursuant to this Section shall be within 10% of the minimum pricing schedule recommended to the Commission by the Seneca Free Trade Association

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or equivalent organization. The recommendations of the Free Trade Association or equivalent association shall be provided to the Commission on a quarterly basis, no less than twenty (20) days prior to the start of the quarter for which the recommended minimum pricing levels are to be effective.

b. No cigarettes shall be sold at retail in Nation territory below the prescribed minimum price. Willful retail sale below the minimum price shall constitute a violation of this ordinance and is grounds for suspension or revocation of a Business license in accordance with the provisions of this law.

c. The minimum retail price may be changed by the Commission on an emergency basis, upon the submission of revised pricing recommendations by the Seneca Free Trade Association or equivalent organization, in conjunction with a certification as to the change in market conditions necessitating such change.

d. The Commission may establish a minimum wholesale price for tobacco products sold within the Nation's Territories. Minimum wholesale prices established pursuant to this Section of the minimum pricing schedule shall be set by the Commission.

e. No tobacco products shall be sold at wholesale in Nation territory below the prescribed minimum price. Willful wholesale sale below the minimum price shall constitute a violation of this ordinance and is grounds for suspension or revocation of a Wholesale or IEC license in accordance with the provisions of this law.

f. The minimum wholesale price may be changed by the Commission on an

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emergency basis.<sup>23</sup>

Section 1.14. *On-Territory Manufactured Tobacco Products Generally.*<sup>24</sup>

a. All tobacco products manufactured on Nation territory shall be subject to a manufacturing fee as follows:

i. On-territory manufactured product \$6.00 per case.

b. No person shall manufacture tobacco products on Nation territory unless he or she shall hold a valid Nation business license.

Section 1.15. *Manufacturing Fee Imposed.*<sup>25</sup>

a. The manufacturing fee shall be assessed on the finished product at a rate of \$6.00 per 60-carton case. Said fee shall be paid by the stamping agent who receives product for resale, and shall be paid to the Nation by certified check, cashier's check, money order or by wire transfer.

i. Manufactured Product that is for retail sale within the Nation's Territories shall be exempt from the manufacturing fee.

b. The manufacturing fee may be changed by the Council upon written recommendation from the Commission, based on factors such as the price of raw tobacco, changes in the financial condition of the Nation, or changes in the assessments of tobacco products in other jurisdictions which may impact the Nation market, or upon any other reasonable basis.

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Section 1.16. *Manufacturing Stamps.*<sup>26</sup>

a. Exemption from the manufacturing fee for manufactured product to be sold on Territory shall be evidenced by a stamp or other marking to be determined by the Commission. In the case of manufacturing stamps, said stamps may only be affixed by any Nation licensed stamping agent. Payment of the manufacturing fee for product which is exported shall be evidenced by the manufacturer's submission of a manufacturing report in such form as the Commission may determine. Manufactured product may only be exported without the affixation of a Nation manufacturing stamp where:

i. The tobacco products are destined for delivery to a person who is licensed to receive unstamped tobacco products in accordance with the laws of the jurisdiction in which they are located; or

ii. The tobacco products are destined for delivery to a federally recognized Indian nation, or a duly licensed wholesaler located within the territory of a federally recognized Indian nation, who is authorized to receive unstamped tobacco products, pursuant to the laws of the Indian nation in which they are located.

b. Qualified manufactured products destined for retail sale within the Nation's Territories that do not carry a Nation manufacturing stamp or other evidence that they are exempt from imposition of the manufacturing fee shall be deemed contraband and shall be subject to confiscation.

c. A duly licensed manufacturer may obtain a license to be a stamping agent provided

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that he or she otherwise meets all of the licensing requirements set forth herein.

Section 1.17-A *Fire Safe Cigarettes*<sup>27</sup>

**[Pursuant to Council Resolution CN: R-04-17-10-15, the provisions of Section 1.17-A through 1.17-C have been suspended indefinitely.]**<sup>28</sup>

a. No cigarettes may be imported, sold or offered for sale in the Nation's Territories unless the cigarettes have been tested in accordance with the test method and meet the performance standard specified in this section, a written certification has been filed by the manufacturer with the Commission in accordance with section 1.17-B of this Act, and the cigarettes have been marked in accordance with section 1.17-C of this Act.

(1) Testing of cigarettes shall be conducted in accordance with the American Society of Testing and Materials ("ASTM") standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes."

(2) Testing shall be conducted on 10 layers of filter paper.

(3) No more than 25 percent of the cigarettes tested in a test trial in accordance with this section shall exhibit full-length burns. Forty replicate tests shall comprise a complete test trial for each cigarette tested.

(4) The performance standard required by this section shall only be applied to a complete test trial.

(5) Written certifications shall be based upon testing conducted by a laboratory that has been accredited pursuant to standard ISO/IEC 17025 of the International Organization for Standardization ("ISO"), or other comparable accreditation standard required by the Commission.

(6) Laboratories conducting testing in accordance with this section shall implement a

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quality control and quality assurance program that includes a procedure that will determine the repeatability of the testing results. The repeatability value shall be no greater than 0.19.

(7) This section does not require additional testing if cigarettes are tested consistent with this Section for any other purpose.

(8) Testing performed or sponsored by the Commission to determine a cigarette's compliance with the performance standard required shall be conducted in accordance with this section.

b. Each cigarette listed in a certification submitted pursuant to section 1.17-B of this Act that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard set forth in this section shall have at least two nominally identical bands on the paper surrounding the tobacco column. At least one complete band shall be located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there shall be at least two bands fully located at least 15 millimeters from the lighting end and 10 millimeters from the filter end of the tobacco column, or 10 millimeters from the labeled end of the tobacco column for non-filtered cigarettes.

c. A manufacturer of a cigarette that the Commission determines cannot be tested in accordance with the test method prescribed in paragraph (1) of subsection (a) of this section shall propose a test method and performance standard for the cigarette to the Commission. Upon approval of the proposed test method and a determination by the Commission that the performance standard proposed by the manufacturer is equivalent to the performance standard prescribed in subsection a.3 of this section, the manufacturer may employ such test method and performance standard to certify

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such cigarette pursuant to section 1.17-C of this Act.

d. Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes offered for sale for a period of three years, and shall make copies of these reports available to the Commission upon written request. Any manufacturer who fails to make copies of these reports available within sixty days of receiving a written request shall be subject to a civil penalty not to exceed \$250 for each day after the sixtieth day that the manufacturer does not make such copies available, or possible suspension or revocation of the manufacturer's Nation business license.

Section 1.17-B

*Certification and Product Change*

a. Each manufacturer shall submit the Commission a written certification attesting that:

(1) each cigarette listed in the certification has been tested in accordance with section 1.17-A of this Act; and

(2) each cigarette listed in the certification meets the performance standard set forth in section 1.17-A.

b. Each cigarette listed in the certification shall be described with the following information:

- (1) brand, or trade name on the package;
- (2) style, such as light or ultra light;
- (3) length in millimeters;
- (4) circumference in millimeters;
- (5) flavor, such as menthol or chocolate, if applicable;
- (6) filter or non-filter;
- (7) package description, such as soft pack or box;

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- (8) marking pursuant to section 1.17-C of this Act;
- (9) the name, address and telephone number of the laboratory, if different than the manufacturer that conducted the test; and
- (10) the date that the testing occurred.

c. Each cigarette certified under this section shall be re-certified every three years.

d. For each cigarette listed in a certification, a manufacturer shall pay to the Commission a \$250 fee. The Commission is authorized to annually adjust this fee to ensure it defrays the actual costs of the processing, testing, enforcement and oversight activities required by this Act.

e. If a manufacturer has certified a cigarette pursuant to this section, and thereafter makes any change to such cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards required by this Act, that cigarette shall not be sold or offered for sale within the Nation until the manufacturer retests the cigarette in accordance with the testing standards set forth in section 1.17-A of this Act and maintains records of that retesting as required by section 1.17-A of this Act. Any altered cigarette which does not meet the performance standard set forth in Section 1.17-A of this Act may not be sold within the Nation.

Section 1.17-C

*Marking of Cigarette Packaging*

a. Cigarettes that are certified by a manufacturer in accordance with section 1.17-B of this Act shall be marked to indicate compliance with the requirements of section 1.17-A of this Act.

The marking shall be in eight point type or larger and consist of:

- (1) Modification of the product UPC Code to include a visible mark printed at or around the area of the UPC Code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the UPC; or

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(2) Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved or embossed upon the cigarette package or cellophane wrap; or

(3) Printed, stamped, engraved or embossed text that indicates that the cigarettes meet the standards of this Act.

b. A manufacturer shall use only one marking, and shall apply this marking uniformly for all packages, including but not limited to packs, cartons, and cases, and brands marketed by that manufacturer, and shall notify the Commission as to the marking that is selected.

c. Prior to the certification of any cigarette, a manufacturer shall present its proposed marking to the Commission for approval. Upon receipt of the request, the Commission shall approve or disapprove the marking offered within 20 days. Proposed markings shall be deemed approved if the Commission fails to act within 20 business days of receiving a request for approval. A manufacturer may elect to utilize a safe-harbor marking, by ensuring that the letters "FSC," which signifies Fire Standards Compliant appear on the cigarette package in 8 point type or larger and such letters are permanently printed, stamped, engraved or embossed on the package at or near the UPC code.

e. No manufacturer shall modify its approved marking unless the modification has been approved by the Commission in accordance with this section.

Section 1.18. *Prohibited Transactions.*

a. No wholesaler or retailer of tobacco products shall sell such products to any person under the age of eighteen (18).

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b. No importer shall sell or otherwise distribute any tobacco products bearing a Nation import stamp to any person other than a licensed Nation wholesaler or retailer.

c. No retailer shall sell or otherwise distribute tobacco products bearing a Nation import stamp to any person outside of Nation territory in a manner that has been Determined to violate the laws of the jurisdiction of the point of sale or applicable federal law.<sup>29</sup>

d. No wholesaler or retailer shall engage in a mail order sale transaction to any individual in a manner that does not require both the signature of the recipient to complete delivery and written confirmation of delivery. Proof of signature and delivery shall be kept on file for a period of one (1) year from the date of the individual's last purchase and shall be made available to the Commission upon request.<sup>30</sup>

Section 1.19. *Enforcement.*

a. The powers of the Commission to carry out the provisions of this Law shall be as set forth in Section 2.3.

b. The Commission is authorized to employ such inspectors, investigators, auditors, agents, and staff as may be necessary to ensure compliance with this Law.

c. The Marshals and Commission agents, acting at the direction of the Commission or the President, shall have such authority as may be necessary to carry out the provisions of this Law, including but not limited to the authority to inspect shipments of goods into Nation territory, to intercept illegal shipments of goods into Nation territory and to seize any vehicles or equipment that

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may be used in the course of such illegal activity.

Section 1.20. *Defense Obligation.*

Should any licensed wholesaler or retailer be subjected to the process of foreign governments as a direct result of its compliance with specific provisions of this Law, the Nation shall take any and all necessary and prudent measures to protect and defend such licensee's compliance with this Law, including but not limited to intervening in said process. Only the Nation shall have the authority to defend the provisions of this Law.

Section 1.21. *Fee Allocation.*

Fees generated in accordance with the provisions of this Law shall first be applied to the costs of administration. All fees received in excess of said costs shall be allocated by the Council in the following manner:

Health, Education and Welfare	50%
Incentive Programs <sup>31</sup>	50%

ARTICLE 2. IMPORT-EXPORT COMMISSION

Section 2.1. *Establishment.*

There is established an Import-Export Commission for purposes of ensuring compliance with the provisions of this Law.

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Section 2.2. *Duties.*

The Commission shall:

- a. in conjunction with the President, Treasurer, and Marshals, ensure compliance with the provisions of this Law;
- b. establish such rules and regulations as may be necessary to carry out the provisions of this Law; and
- c. perform such other duties as may be defined by law.

Section 2.3. *Powers; Penalties; Procedures.*<sup>32</sup>

- a. The Commission shall have such power to:
  - i. permanently revoke the license of any stamping agent, wholesaler or retailer who has twice been determined to be in violation of this Law;
  - ii. suspend, for a period not longer than thirty (30) days, the license of any wholesaler or retailer determined to be in violation of this Law, such period ultimately to be based upon the severity of the violation;
  - iii. suspend ex parte, for a period not longer than seventy-two hours, the license of any stamping agent, wholesaler or retailer believed, upon preliminary investigation, to be in gross violation of this Law; and
  - iv. perform its duties and ensure compliance with the provisions of this Law.

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b. Prior to the effective date of this Law, the Commission shall develop and issue procedures for determining violations of this Law. No stamping agent, wholesaler or retailer shall have its license revoked without a hearing before the Commission in which the alleged violator shall have the right to appear, with counsel at his or her own expense if deemed necessary, and present arguments on his or her behalf.

Section 2.4. *Stamps, Stamping Agents and Licensed Petroleum Importers.*

a. The Commission shall prescribe, prepare and furnish stamps as may be necessary to evidence the payment of the import, export or manufacturing fees on tobacco products imposed by this Law.<sup>33</sup> The Commission shall provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design. The Commission shall make provision for the allocation of such stamps and may license such agent(s) for the purpose of affixing such stamps as set forth in this Law.

b. The Commission may license wholesalers of tobacco products as agents to buy and affix import, export or manufacturing stamps.<sup>34</sup> Each agent authorized to affix such stamps shall at all times provide complete access to an authorized Commission employee who shall provide regulatory oversight to ensure that the stamping activities of the agent are in full compliance with this Law. The fee for filing such application for a stamping agent's license shall be one thousand dollars (\$1,000.00) per year.

c. Each stamping agent licensed to affix stamps pursuant to this Law must provide the

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Commission, on a monthly basis, a written report which details the following information: (i) the quantity, brand and type of product stamped; (ii) the location to which the product was delivered and the date on which it was shipped; (iii) the lot numbers of the stamps affixed to the tobacco products delivered, and (iv) the brand and amount of unstamped tobacco products held by the Stamping Agent pursuant to Section 1.6(b) at the end of the month.<sup>35</sup> The Commission shall have authority to conduct on-site inspections as need be to ensure compliance with this Law.

d. The Commission may license petroleum wholesalers as licensed importers of Petroleum Products pursuant to the provisions of this Law. Each licensed importer shall at all times provide complete access to authorized Commission employees, in order to provide regulatory oversight and to ensure that the importer's activities are in full compliance with this Law. The fee for filing a petroleum importer's license shall be one thousand dollars (\$1,000.00) per year. Each licensed petroleum importer shall timely file such reports in the form and manner as may be proscribed by the Commission by regulation.<sup>36</sup>

Section 2.5. *Membership.*

a. The Commission shall have nine (9) members who shall be appointed by Council.

b. All Commissioners shall be Nation members. Family may not serve together on the Commission. Commission members shall be "public officials" for purposes of the Nation's Ethics Law.<sup>37</sup>

c. One (1) Commissioner shall serve as the Chair of the Commission. The Chair may not be an owner of a licensed tobacco or petroleum business or have an economic or family interest

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associated with a licensed or petroleum business.<sup>38</sup>

d. Two (2) Commissioners shall be from the Allegany Territory and two (2) Commissioners shall be from the Cattaraugus Territory. Members appointed under this subsection may not be an owner of a retail business or have an economic or family interest associated with a retail business.

e. Two (2) Commissioners shall be appointed by the licensed businesses from each of the Allegany and Cattaraugus Territories at a meeting of the licensed businesses of each territory called for that purpose. The Clerk shall conduct such meeting with at least one weeks' written notice to all licensed businesses. Each licensed business shall have one vote, *provided*, that an owner of more than one business shall have only one vote. The Clerk shall certify to Council the names of the Commissioners so selected to serve on the Commission.

f. The Nation's Council shall appoint two (2) Councillors to the Commission. One (1) Commissioner shall be from the Allegany Territory and one (1) shall be from the Cattaraugus Territory. Members appointed under this subsection may not be an owner of a retail business. Commissioners appointed pursuant to this Section shall serve at the pleasure of the Nation's Council, *provided*, that their terms shall automatically expire upon the expiration of their term as Councillor.

g. Commissioners shall serve for a term of three years and until his or her successor has been duly confirmed or until his or her death, resignation or removal. Notwithstanding the foregoing, the initial Commission shall be comprised of two Commissioners with one year terms, two Commissioners with two year terms and three Commissioners with three year terms (which shall

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include the Chair). Initial terms shall be determined by the Commissioners by lot at the first Commission meeting.

h. Commissioners shall receive a stipend of \$500.00 per month.<sup>39</sup>

i. Commissioners may be removed by the appointing authority at any time for cause.

Any Commissioner missing three consecutive meetings, without the prior approval of the Chair, shall be deemed automatically removed.

Section 2.6. *Officers.*

The Commission shall have a Chair, a Vice-Chair, a Secretary and such other officers that it may establish from time to time. The Chair, Vice-Chair and Secretary shall be selected annually by the Commission membership and shall hold office until his or her successor has been duly selected. The Chair and Vice-Chair shall not be from the same Territory. Commission officers may be removed by the membership of the Commission whenever in their judgment the best interests of the Commission would be served.<sup>40</sup>

Section 2.7. *Meetings; Quorum; Bylaws.*

a. The Commission shall meet at least monthly upon one week public notice.

b. Five Commission members shall be necessary in order to constitute a quorum for the transaction of business.<sup>41</sup>

c. The vote of five (5) Commissioners at a meeting at which a quorum has been met

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shall be necessary to constitute an official act.<sup>42</sup>

d. All meetings of the Commission shall be open to Nation members only, *provided*, that non-members who have business before the Commission or whose employment necessitates their attendance may attend.<sup>43</sup>

e. The Commission shall have authority to adopt bylaws not inconsistent with this Law.

Section 2.8. *Recourse.*

a. Commission action that is arbitrary and capricious shall be subject to judicial review in the Nation's Courts.

b. Nothing contained in this Law shall establish a cause of action in any United States federal or state court or constitute a waiver of the sovereign immunity of the Nation.

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AMENDMENTS

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1. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  2. This term was added pursuant to amendment enacted by Council on December 9, 2006.
  3. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  4. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  5. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  6. This term was added pursuant to amendment enacted by Council on April 14, 2007.
  7. The import fee on cigarettes was lowered from \$0.01 per cigarette pursuant to amendment enacted by Council on December 9, 2006.
  8. The second paragraph of subsection 1.6(b) was added pursuant to amendment enacted by Council on April 14, 2007.
  9. This Subsection was amended by Council on November 10, 2007 to add Part (iv).
  10. This subsection was amended by Council on March 14, 2009, to add a deadline for the filing of relevant reports.
  11. The first sentence of subsection 1.7(e) was amended by Council on April 14, 2007 by adding the text beginning "or in the case . . ."
  12. This subsection 1.7(f) was added pursuant to amendment enacted by Council on April 14, 2007.
  13. This section was added pursuant to amendment enacted by Council on April 14, 2007. It shall not take effect until June 1, 2007.
  14. The Import Fee for both Gasoline and Diesel Fuel was changed to \$0.03 per U.S. Gallon by Council action on December 8, 2007.
  15. This section was amended by Council on November 10, 2007, so as to change the reporting requirement to once monthly.
  16. This Subsection was amended by Council on November 10, 2007 to add Part (iv).
  17. This section was amended by Council on November 10, 2007 to change "wholesaler/distributor" to "importer".

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18. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission.
19. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission. On April 14, 2007, Council lifted the suspension and directed the Commission and the Department of Justice to develop regulations.
20. This section was amended by Council on January 10, 2009, in order to clarify exempt export.
21. This section was suspended by Council on December 9, 2006 pending the development of export stamps and implementing regulations by the Commission.
22. This section was added pursuant to amendment enacted by Council on April 14, 2007.
23. Subsections d, e and f were added pursuant to amendment enacted by Council on January 10, 2009.
24. This section was added pursuant to amendment enacted by Council on April 14, 2007.
25. This section was added pursuant to amendment enacted by Council on April 14, 2007.
26. This section was added pursuant to amendment enacted by Council on April 14, 2007.
27. This section was added pursuant to amendment enacted by Council on March 14, 2007. With respect to the importation of fire-safe cigarettes, this section shall take effect on September 1, 2009. With respect to the sale of fire-safe cigarettes, this section shall take effect on December 1, 2009.
28. The fire-safe cigarette provisions set forth in Section 1.17-A through 1.17-C were suspended indefinitely by the Nation's Council on April 17, 2010.
29. This subsection was amended by Council on December 9, 2006. The previous text read as follows: "No retailer shall sell or otherwise distribute tobacco products bearing a Nation import stamp through the mail or by common carrier to any person outside of Nation territory if such transaction would constitute a violation of any United States federal or state law where the purchaser is located."
30. This section was added pursuant to amendment enacted by Council on May 10, 2008.
31. This phrase was amended by Council on January 12, 2008 by deleting the words "Supplemental Annuity" and replacing it with "Incentive Programs."
32. This section was amended by Council on April 14, 2007 to add the words "stamping agent" where indicated.
33. This sentence was amended by Council on April 14, 2007 by adding "manufacturing" to the types of fees administered by the Commission.
34. This sentence was amended by Council on April 14, 2007 by adding "manufacturing" to the types of fees administered by the Commission.

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35. This sentence was amended by Council on April 14, 2007 to change reporting from weekly to monthly and to add subsection (iv).
36. This Section 2.4 was amended by Council on November 10, 2007 to add "and Licensed Petroleum Importers" to the Section title and a new Subsection 2.4.d..
37. Subsections a. and b. of this section were amended by Council on December 9, 2006 by removing the prohibition against elected officials serving on the Commission and increasing the number of Commissioners to nine (9).
38. This subsection was amended by Council on March 13, 2010, separating the Chairperson duties from that of the full-time CEO of the department.
39. This subsection was amended by Council on December 9, 2006 by reducing the Commissioner's stipend from \$1,000.00 per month to \$50.00 per meeting. It was further amended on April 14, 2007 by increasing the stipend to \$500 per month. It was further amended on March 13, 2010, to remove the salary for the Chairperson, consistent with the separation of the Chairperson and CEO duties.
40. This subsection was amended by Council on March 13, 2010, to reflect that the Chairperson shall be elected by the Commission, rather than appointed by Council.
41. This subsection was amended by Council on January 13, 2007 by increasing the quorum from four to five.
42. This subsection was amended by Council on January 13, 2007 by increasing the vote required to do business from four to five.
43. This section was amended by Council on April 14, 2007 to clarify that Commission meetings are open to Nation members only.

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## IMPORT – EXPORT REGULATIONS



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### REG - 1 STATEMENT OF PURPOSE

1.1 The purpose of these regulations is to implement and ensure compliance with the provisions of the Import-Export Law of the Seneca Nation of Indians (*Import-Export Law (IEL) 6/14/06*). The expressed legislative purpose is to provide procedural enhancements to aid enforcement and to carry out the provisions of the IEL and thereby safeguard the Nation in its free use and enjoyment of its land; to protect Nation territorial integrity and to generate revenue to conduct essential government functions. (*IEL Art. 1, §1.1, 1.3*)

### REG - 2 DEFINITIONS

2.1 “Brand” means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, menthol, lights, kings, and 100s, and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, or recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

2.2 “Cigarette” means any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any substance or material other than tobacco.

2.3 “Commission” means the Import-Export Commission of the Nation.

2.4 “Damaged Stamp” means a stamp required pursuant to the Import Export Law of which 75% or more of the stamp is incapable of being applied to a package of tobacco product.

2.5 “Person” shall mean any member or non-member individual and shall not include a corporation, firm, organization or association.

2.6 “Fiscal agent” means any person or persons designated by the Commission to receive stamps from the manufacturer, sell cigarette fee stamps to licensed stamping agents and to make other decisions regarding the fiscal administration of the IEL.

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2.7 “Manufacturer” means an individual or company who manufactures tobacco products in a facility wholly located on Nation Territory.

2.8 “Nation Territory” means real property located within the boundaries of the Seneca Nation of Indians’ reservations or within the Nation’s jurisdiction. For purposes of these regulations, only that part of any building or structure, that may span the boundaries of the territories and into another jurisdiction, which is actually and physically located within the external boundaries of the Cattaraugus or Allegheny reservations shall be deemed on Nation territory.

2.9 “Separate warehousing facility” means a warehouse, storehouse or other commercial building or group of buildings, wherein cigarettes are received, stored and distributed and the agent’s day to day business is conducted. Such a warehousing facility must be separate and distinct from any other person’s facilities and shall not include a mere enclosure within a larger facility, nor a means of transportation (i.e. truck or van).

2.10 “Stamp or cigarette stamp” means any adhesive stamp, metered stamp, heat transfer stamp or other form of evidence of payment of the import or export fee as prescribed by the Commission.

2.11 “Stamping agent” means any person who is authorized and licensed to affix fee stamps to packages or other containers of cigarettes pursuant to the IEL.

2.12 “Units sold” means the number of individual cigarettes sold in Nation territory whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question, as measured by fees collected by the Nation on packs.

2.13 “Wholesale dealer” means any Nation licensed wholesaler who sells cigarettes in Nation territory to retail dealers or to other persons for purposes of resale.

### **REG - 3 LICENSING OF STAMPING AGENTS, QUALIFICATIONS, DENIAL OF APPLICATION, APPEAL, RENEWAL OF LICENSE**

3.1 All stamping agents of the Nation shall be licensed by the Commission subject to Council approval.

3.2 No person may purchase, possess or affix such stamps evidencing the payment of the Nation fee unless such person has been granted and publicly displays, in the person’s place of business, a license as a Seneca Nation Cigarette Stamping Agent.

3.3 No person may possess unstamped cigarettes within Nation territory, without establishing to the satisfaction of the Commission that such cigarettes are not subject to the fee.

3.4 Stamping Agent licenses shall be valid for one (1) year from the date of issue and are not assignable.

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3.5 In order to qualify for consideration to be a licensed stamping agent, the applicant(s) must:

- a. Complete an application for a license as a cigarette stamping agent.
- b. Submit the annual non-refundable application fee of \$1,000.
- c. Have a minimum net worth of \$250,000 as evidenced by a balance sheet.
- d. Provide current financial statements for the most recent quarter.
- e. Be 21 years or older.
- f. Provide proof of availability of a secure, separate warehousing facility, through a copy of a valid deed or lease agreement and provide a detailed description of such facility which shall have a secure area separate and apart from any other business that may be conducted from said facility.
- g. Hold a valid and current Nation wholesale license.
- h. Be in good standing with any applicable Nation laws, rules or regulations.
- i. Be willing to submit to a background check which may include a criminal check, credit reports or other financial reports of the applicant or applicant's company.
  1. Applicant shall submit an authorization for release of information on forms prescribed by the Commission.
- j. Demonstrate that he or she will have a direct buy status, and provide the approximate amount of product expected to be stamped and sold.
- k. Demonstrate capability to assert control over stamps to avoid fraud and misuse.
- l. Demonstrate the operational capacity to affix stamps on tobacco products in an efficient and expeditious manner.
- m. Covenant to abide by the IEL, these regulations and any other applicable Nation law.

3.6 The Commission shall act upon a complete application within thirty (30) business days, and shall notify the applicant, in writing, within five additional (5) days of the determination being reached.

3.7 The Commission may refuse to issue a license where it is determined that:

- a. Any lawful fee imposed under the IEL or any other Nation law has not been paid in full.
- b. The applicant has been convicted of, or entered a plea of guilty or *Nolo Contendere* to any felony under federal law.
- c. The wholesale or stamping agent license of the applicant was previously revoked or suspended.
- d. The applicant held a controlling ownership in an entity which has violated any of the provisions set forth in the IEL or in these regulations.
- e. The results of the background check or credit check are below acceptable standards and cannot otherwise be overcome.
- f. There exists any other evidence which might indicate a propensity to violate the IEL or any other applicable Nation law.

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3.8 An applicant may appeal a denial of an application to the Nation's Courts, which shall not disturb the Commission's determination unless the Nation's Court finds that the Commission acted arbitrarily and capriciously upon the presentation of sufficient evidence.

3.9 A licensed stamping agent may renew his or her license by submitting written notice to the Commission, 30 days prior to the expiration date of their current license.

- a. The Commission shall send out renewal notices to licensees at least 90 days prior to the expiration of their current license.
- b. If written notice of intent to renew is not given as required, and there has been no other response to the renewal notice sent by the Commission, the license will expire as provided.
- c. Upon the expiration of one's license, all unused stamps must be turned in to the Commission in accordance with procedures below, all Certificates of license must be turned in and the agent shall immediately cease operations as a stamping agent of the Nation.

3.10 The agent will submit a renewal application, with a \$1,000 renewal fee, and will certify that there are no material changes as represented on the original application or will explain what has changed. He or she will also certify full compliance with the IEL, that there are no violations of the IEL or any other applicable Nation law and that there are no outstanding fees.

- a. Any changes in circumstances will be further reviewed by the Commission and may serve as a basis to deny a renewal application.
- b. Upon approval of the license renewal or refusal to renew the license, the Commission shall notify the agent of its determination and require the surrender to the Commission of the agent's existing certificates or license as a stamping agent.
- c. Upon issuance of a renewed license, the Commission shall issue to the agent a new distinctively colored Certificate of License. An agent may operate upon notification of approval of a license renewal from the time existing certificates are surrendered until the time that the new certificates are issued which shall not be more than 30 business days from the determination of renewal or refusal to renew.

3.11 The Commission may limit the maximum number of or place a moratorium on the number of stamping agent licenses to be issued, subject to Council approval.

3.12 A licensed stamping agent may voluntarily relinquish his or her license and immediately upon doing so, must turn in all unused stamps to the Commission along with a final report as required by the IEL.

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3.13 A licensed stamping agent ceases to be an importer by reason of discontinuance, sale or transfer of the agent's business; the agent shall notify the IEC in writing no less than five (5) days after the discontinuance, sale or transfer takes effect. The notice shall include the name and address of the purchaser or successor, if any. The agent shall, within ten (10) days of the discontinuance, sale or transfer, submit a final report and payment as required by the IEL. In the event that the agent does not re-commence importation of tobacco products within thirty (30) days of providing notice to the Commission, the agent shall relinquish his or her stamping agent license and cease all activities as a stamping agent.

#### **REG - 4 ACQUISITION OF STAMPS BY THE COMMISSION**

4.1 The Nation may enter into contracts necessary for the manufacture of stamps which shall be in such forms, denominations or quantities as the Commission deems necessary for the payment of the fee on the possession of cigarettes.

- a. The Commission shall ensure that a sufficient number of stamps are available for purchase and such stamps shall be readily distinguishable from each other.
- b. The Commission may, from time to time, as often as it deems advisable, provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design.

4.2 The Commission shall designate a fiscal agent who shall be responsible for purchasing stamps from the manufacturer.

- a. Cigarette stamps manufactured for use by the Nation shall be delivered only to the designated fiscal agent for the purpose of making authorized sales of such stamps to licensed cigarette agents.

4.3 Purchase of stamps shall be done in accordance with the Nation's Procurement Policy.

4.4 The Commission shall use generally acceptable practices to ensure accurate records are kept of stamps received from the manufacturer.

4.5 The Commission shall keep a log to record the number of stamps sold, the agent sold to, for distribution to which business, and the numerical series or batch number.

4.6 The Commission shall provide for a safe and secure location in which to hold stamps pending sale to licensed stamping agents.

4.7 No person, other than a duly appointed fiscal agent, may sell or offer for sale any cigarette fee stamps.

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**REG - 5 SALE OF STAMPS TO LICENSED AGENTS**

5.1 Only stamps prescribed and furnished by the Commission may be used to evidence payment of fees due under the IEL.

5.2 Stamps shall be prepared in denominations as set forth in the IEL and which represent the standard number of cigarettes per pack for sale in Nation territory. Packages in excess of a standard amount shall carry the requisite number of stamps.

5.3 Licensed cigarette stamping agents must place an order for stamps directly with the Commission Office and must adhere to any applicable administrative terms and conditions, including use of the order form prescribed by the Commission.

5.4 Payment for such stamps must be made in advance to the Nation's Fiscal Department, by certified check, cashier's check, money order or by direct wire transfer and in accordance with any other administrative requirements of the Nation's Fiscal Department.

5.5 Once proper payment is received and processed by the Fiscal Department, a confirmation of payment will be forwarded to the Commission Office which shall then authorize the release of the appropriate number of stamps to the licensed stamping agent or representative.

- a. Stamps will not be released to anyone other than a licensed stamping agent or two (2) other pre-approved representatives whose approval shall be evidenced by a notarized statement from the licensed stamping agent placed on file with the Commission. Such statement shall also indemnify and hold harmless the Nation for any negligence on the part of said representatives.

**REG - 6 AFFIXATION OF STAMPS**

6.1 Every licensed stamping agent must affix to each package of cigarettes, approved Nation stamps as evidence that proper fees have been paid to the Nation.

6.2 Stamps must be affixed to individual packages of cigarettes, as distinguished from cartons or other larger containers.

6.3 Stamps must be affixed to the bottoms of such packages so as to be clearly visible to purchasers.

6.4 The Commission may prescribe the machinery, equipment or other means by which cigarette stamps are affixed.

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## **REG - 7      REPORTING REQUIREMENTS OF STAMPING AGENTS**

7.1            Stamping agents are required to submit weekly reports, on or before the first business day of the week immediately following the week for which the report is submitted and shall provide the following information on a form prescribed by the Commission.

- a. the quantity, brand of products stamped, which shall coincide with the “safe list”;
- b. name of Nation licensed retailer who purchased the product;
- c. the location to which the product was delivered and the date on which it was shipped;
- d. the lot numbers of the stamps affixed to the tobacco products delivered

7.2            Stamping agents shall also submit a monthly report or reconciliation form, of product and stamp inventory on a form prescribed by the Commission.

7.3            The stamping agent shall maintain, and make available to the Commission upon request, all invoices and documentation of sales and any other information relied upon in reporting to the Commission, for a period of five years.

7.4            The Commission may require a stamping agent to submit any additional information, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to a determination of compliance with the IEL.

## **REG - 8      GENERATION OF LIST OF PRODUCTS ACCEPTABLE FOR SALE IN NATION TERRITORY**

8.1            In order to facilitate the implementation of the IEL, the Commission may generate a “safe list” of products or brands of cigarettes that may be sold in Nation Territory. This list shall be created from information submitted to the Commission by Nation licensed wholesalers on a form prescribed by the Commission.

8.2            An initial list shall be generated within thirty (30) days of the implementation of these regulations by the Commission. Thereafter, the list may be updated as needed by the submission of additional information by the wholesalers.

## **REG - 9      REFUNDS OR CREDITS FOR STAMPS**

9.1            Stamping agents may submit a claim for a refund of or credit for fees paid for stamps spoiled by improper fixation, or for a refund of stamps unused at the expiration of one’s license, or under any other circumstance the Commission deems necessary and in the best interest of the Nation.

9.2            Any stamps spoiled by improper fixation must be returned to the Commission within thirty (30) days for a refund of any fees duly paid. A claim must be submitted on a form prescribed by the Commission with sufficient supporting documentation as required by the Commission.

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9.3 The Commission shall keep an accurate and up to date accounting of all refunds and credits issued.

**REG – 10 LICENSING OF PETROLEUM WHOLESALERS, QUALIFICATIONS, DENIAL OF APPLICATION, APPEAL, RENEWAL OF LICENSE**

10.1 All motor fuel importers of the Nation shall be licensed by the Commission subject to Council approval.

10.2 No person may import motor fuel onto the Nation's Territories unless the person has been granted and publicly displays, in the person's place of business, a license as a Seneca Nation Motor Fuel Importer.

10.3. Motor Fuel Import licenses shall be valid for one (1) year from the date of issue and are not assignable.

10.4 In order to qualify for consideration to be a licensed motor fuel importer, the applicant(s) must:

- a. Post a surety bond or other security deposit sufficient to cover 110% of the licensee's average import fees for a two month period.
- b. Submit the annual non-refundable application fee of \$1,000.
- c. Be 21 years or older.
- d. Hold a valid and current Nation wholesale license.
- e. Be in good standing with any applicable Nation laws, rules or regulations. and
- f. Covenant to abide by the IEL, these regulations and any other applicable Nation law.

10.6 The Commission shall act upon a complete application within thirty (30) business days, and shall notify the applicant, in writing, within five additional (5) days of the determination being reached. The applicant must be present and appear before the Commission for his or her application to be considered.

10.7 The Commission may refuse to issue a motor fuel importer's license where it is determined that:

- g. Any lawful fee imposed under the IEL or any other Nation law has not been paid in full.
- h. The applicant has been convicted of, or entered a plea of guilty or *Nolo Contendere* to any felony under federal law.
- i. The any license awarded to the applicant under the IEL was previously revoked or suspended.
- j. The applicant held a controlling ownership in an entity which has violated any of the provisions set forth in the IEL or in these regulations.
- k. The results of the background check or credit check are below acceptable standards and cannot otherwise be overcome.

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- I. There exists any other evidence which might indicate a propensity to violate the IEL or any other applicable Nation law.

10.8 An applicant may appeal a denial of an application to the Nation's Courts, which shall not disturb the Commission's determination unless the Nation's Court finds that the Commission acted arbitrarily and capriciously upon the presentation of sufficient evidence.

10.9 A licensed motor fuel importer may renew his or her license by submitting written notice to the Commission, 30 days prior to the expiration date of their current license.

- a. The Commission shall send out renewal notices to licensees at least 90 days prior to the expiration of their current license.
- b. If written notice of intent to renew is not given as required, and there has been no other response to the renewal notice sent by the Commission, the license will expire as provided.
- c. Upon the expiration of one's license, all Certificates of license must be turned in and the individual shall immediately cease operations as a motor fuel importer.

10.10 The motor fuel importer will submit a renewal application, with a \$1,000 renewal fee, and will certify that there are no material changes as represented on the original application or will explain what has changed. He or she will also certify full compliance with the IEL, that there are no violations of the IEL or any other applicable Nation law and that there are no outstanding fees.

- a. Any changes in circumstances will be further reviewed by the Commission and may serve as a basis to deny a renewal application.
- b. Upon approval of the license renewal or refusal to renew the license, the Commission shall notify the importer of its determination and require the surrender to the Commission of the importer's existing certificates or license as a motor fuel importer.
- c. Upon issuance of a renewed license, the Commission shall issue to the agent a new distinctively colored Certificate of License. A motor fuel importer may operate upon notification of approval of a license renewal from the time existing certificates are surrendered until the time that the new certificates are issued which shall not be more than 30 business days from the determination of renewal or refusal to renew.

10.11 The Commission may limit the maximum number of or place a moratorium on the number of motor fuel importer licenses to be issued, subject to Council approval.

10.12 A licensed motor fuel importer may voluntarily relinquish his or her license and immediately upon doing so, submit a final report and payment as required by the IEL and cease all activities as a motor fuel importer.

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10.13 A licensed motor fuel importer ceases to be an importer by reason of discontinuance, sale or transfer of the importer's business; the importer shall notify the IEC in writing no less than five (5) days after the discontinuance, sale or transfer takes effect. The notice shall include the name and address of the purchaser or successor, if any. The importer shall, within ten (10) days of the discontinuance, sale or transfer, submit a final report and payment as required by the IEL. In the event that the importer does not re-commence motor fuel importation within thirty (30) days of providing notice to the Commission, the importer shall relinquish his or her motor fuel import and cease all activities as a motor fuel importer.

## **REG - 11 REPORTING REQUIREMENTS OF LICENSED PETROLEUM IMPORTERS**

11.1 Licensed importers are required to submit monthly reports, on or before the 15<sup>th</sup> day of each month (or the next business day should the 15<sup>th</sup> fall on a holiday or weekend) and shall provide the following information on a form prescribed by the Commission.

- a. The number of gallons of fuels used or delivered by the importer within the Nation's Territories for the preceding month, which shall be identified in net or gross terms, as such amounts are measured in the supporting paperwork obtained upon acquisition of the fuel at the rack;
- b. Name of Nation licensed retailer who purchased the product; and
- c. Copies of the monthly exporter's report of receipts and disbursements for each state from which the distributor has pulled fuel from.

11.2 The motor fuel importer shall also pay any motor fuel import fees due by the deadline imposed pursuant to Reg. 11.1. Payment shall be made by cashier's check, money order or wire transfer. Fees shall be calculated based upon the amounts set forth on the return required by Section 11.1 of these Regulations. Import fees not paid by the due date shall be subject to a 25% penalty.

11.3 The motor fuel importer shall maintain, and make available to the Commission upon request, all invoices and documentation of sales and any other information relied upon in reporting to the Commission, for a period of two years.

11.4 The Commission may require a licensed importer to submit any additional information, as is necessary to a determination of compliance with the IEL.

11.5 Failure to comply with the reporting and payment provisions required pursuant to this Reg. 11, may result in suspension or revocation of the importer's license in accordance with the provisions of the IEL and these Regulations. In the event that enforcement action is necessary, the Commission may seek payment import fees due, as well as any administrative costs or expenses relating to the enforcement action, against the security provided pursuant to Section 10.4.a.

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## **REG - 12 REVOCATION, SUSPENSION, HEARING AND REINSTATEMENT**

12.1 The Commission may revoke or suspend the license of a stamping agent wholesaler or retailer upon a determination that the licensee failed to comply with the provisions of the IEL or these Rules and Regulations. (*IEL Art. 2, § 2.3*)

12.2 Inspectors shall routinely examine and inspect all businesses expected to comply with the IEL and upon the suspicion of any wrongdoing, will institute a formal investigation which shall be thoroughly researched and documented using both written reports and if necessary, digital images or other photographs.

12.3 Inspectors may enter the place of business or employment of any licensee for the purpose of such investigations at any time and may require the licensee to submit such reports as he deems necessary to monitor compliance with the requirements of the IEL, these regulations, or any other applicable rule or order.

12.4 If there is a reasonable suspicion that a violation of the IEL may have occurred, the Inspector shall commence a formal investigation. Upon completion of a formal investigation, the inspector shall submit a written investigative report to the Commission detailing his or her findings, shall state whether and what violation has allegedly occurred, and shall make himself or herself available to testify at a hearing if necessary.

## **REG - 13 HEARING PROCEDURE**

13.1 Upon receipt of an investigative report, the Commission shall give the licensee written notice of a hearing to revoke or suspend its license, which hearing shall be conducted in accordance with procedures set forth below.

13.2 Notice of the proposed suspension or revocation shall be personally served on the licensee no less than twenty (20) days prior to the hearing. The notice shall set forth facts and circumstances on which the proposed suspension or revocation is predicated, the date, time and place of the hearing, and shall inform the licensee of his or her right to appear and present evidence on his or her behalf. The licensee may elect to have counsel present at the hearing at his or her own expense.

13.3 All Hearings shall be closed to the public and shall be recorded, transcribed and certified by the Secretary of the Commission as a true and correct record of the hearing. The rules of evidence pertaining to trials or hearings in the Nation's courts shall not apply to hearings before the Commission.

13.4 The Commission shall commence each Hearing by asking the licensee to admit or deny the allegations set forth in the Notice of Violation. If the licensee admits the allegations, (s)he shall be provided with an opportunity to explain any factors alleged to be in mitigation and/or any other matters that the licensee deems relevant to the Commission's determination of the matter. If the licensee denies any such allegations, the Commission shall take testimony under oath from representatives of the Commission, the Nation, take testimony under oath from

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the licensee and/or his or her counsel, and from any other witnesses it shall deem necessary in order to formulate a full and fair presentation of the facts and circumstances upon which the alleged violation is predicated. The Secretary of the Commission shall administer the oaths.

13.5 The Chair of the Commission shall conduct all hearings; if the Chair cannot be available, he or she shall appoint one of the other Commissioners in his or her place.

13.6 The Commission shall render a decision within five (5) business days and shall forward a Notice of Decision which shall cite the violation; set forth the facts and circumstances on which the suspension or revocation is predicated; set forth the prescribed penalty of revocation or suspension; and give the licensee notice of the right to appeal to the Peacemaker's Court.

#### **REG - 14 REVOCATION AND SUSPENSION**

14.1 Any person whose license has been revoked may apply at the expiration of sixty days for a reinstatement of his or her license. The license may be reinstated if it appears to the satisfaction of the Commission that the licensee will comply with the IEL and these regulations.

14.2 In the case of a first violation only, a plea or settlement agreement with the Commission will be treated as a violation for purposes of this section and a violation must stand after all appeals have been exhausted for such violation to count toward the required two violations for permanent revocation.

14.3 Immediately upon the suspension of a license, all stamps currently in the agent's possession shall be forfeited to the Commission for holding and the agent shall be prohibited from conducting any business for the specified period of time.

- a. The Commission may reissue (sell) the forfeited stamps to other licensed agents in good standing, may retain them to return to the suspended agent once their suspension period is up, may dispose of them, or may make any other use of them deemed appropriate by the fiscal agent

#### **REG - 15 EX PARTE SUSPENSION AND SPECIAL HEARING**

15.1 A license may be suspended *ex parte* by the Chairperson of the Commission, upon preliminary investigation, for gross violations of the IEL, which may include but are not limited to:

- a. Failure to submit a weekly or a monthly report for more than two (2) consecutive reporting periods;
- b. The affixation of any stamps wherein the requisite fee was not paid to the Nation; the sale of any unstamped cigarettes;
- c. An agent's knowingly assisting another person in violating the provisions of the Import-Export Law or these Rules and regulations.

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- d. An agent committing fraud in his or her operations or in the procurement of his or her stamping agent license, including counterfeiting or other attempts to defraud the Nation.
- e. Conviction of a felony.
- f. The importation into Nation territory of tobacco products in excess of six hundred (600) cartons of cigarettes or petroleum products in excess of one thousand (1,000) gallons in violation of the Nation's *Import-Export Law*.
- g. Any other act or omission which the Commission determines substantially jeopardizes the financial welfare or sovereign status of the Nation.

15.2 The preliminary investigation must be conducted in good faith by a duly appointed IEC Inspector and must result in enough evidence to form a reasonable belief that a violation has occurred.

- a. Written notice of the results of a preliminary investigation must be provided to a quorum of the Commission within 48 hours of such preliminary investigation being completed.

15.3 Within 24 hours of receipt of preliminary investigation report, the Commission shall make a finding of no cause or if there is cause to believe a violation has occurred, shall issue an order directing the immediate suspension of the license for no longer than 72 hours and further directing that an additional investigation be completed with a report provided to the Commission within 48 hours.

- a. The Commission shall then have twenty-four (24) hours to both determine whether the additional report provides a sufficient basis to believe a violation has occurred and to schedule a Special Hearing if necessary.
- b. If the Commission decides there is not a sufficient basis to believe a violation has occurred then the matter will be dismissed without prejudice and the suspension shall be lifted.
- c. If the Commission decides there is a sufficient basis to believe a violation has occurred, the licensee in question will be given a Notice of Violation and a Special Hearing will be held, within the same twenty four (24) hour period noted above, and wherein the licensee will be afforded the opportunity to appear before the Commission and present arguments on his behalf.
- d. The Special Hearing will be conducted in accordance with procedures detailed above.
- e. In the event that the Commission fails to act on the determination of the Chairperson, the Chairperson's determination shall be deemed a final agency action for purposes of appeal.

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- f. Appeal from a decision rendered at a Special Hearing shall be to the Peacemaker's Court and shall be conducted in accordance with all applicable rules and regulations of said Court.

## **REG - 16 SEIZURES OF CONTRABAND PRODUCT**

16.1 Any cigarettes that have been sold, offered for sale, or possessed for sale in Nation territory in violation of the IEL or these regulations, shall be deemed contraband.

16.2 Except as otherwise provided in these regulations, Contraband cigarettes may be subject to seizure and forfeiture as provided in these regulations and may be sold at auction within 30 days. Sale at auction shall not relieve the individual or entity from paying the fee otherwise imposed under the import-export law, provided however that the individual or entity shall receive a credit against any fees owed equal to the amount realized by the sale. Should Contraband product not be sold at auction, it must be destroyed in accordance with environmentally sound procedures.

16.3 Cigarettes that are determined not to constitute contraband product shall be returned to the owner within twenty-four hours. Return of product shall be accomplished by making the product available for pick-up at the Commission's storage facility. The Commission shall have no obligation to deliver seized product to an individual or entity's place of business.

16.4 Contraband cigarettes may be seized by Nation law enforcement officers and by duly authorized agents of the Import Export Commission who have probable cause to believe that the cigarettes are unstamped cigarettes or cigarettes described in section 16.1.

### **16.5 Hearing Procedures for Seized Goods**

- a. In the event that contraband goods are seized, the IEC Inspector or Nation Law enforcement officer shall issue a citation to the individual alleged to have violated the Import Export Law, or these regulations, which shall set forth:
  - i. the name, address, date of birth and phone number of the violator
  - ii. the section of the Import Export Law or Regulations alleged to have been violated
  - iii. the Location of the violation; and
  - iv. an appearance date and time for a hearing before the Commission Chair for the purpose of determining whether or not a violation of the Import Export Law or Regulations has occurred, which shall not be less than 72 hours or two business days (whichever is longer) from the date and time of the citation.

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- b. In the event that goods are seized, the licensee may elect an expedited hearing process as follows, which shall be in lieu of the hearing procedure provide for pursuant to Sections 13 and 15:

- i. the Chairperson of the Commission shall hold a hearing within 48 hours of the seizure taking place. The purpose of the hearing shall be to determine whether or not a violation of the Import Export Law or Regulations has taken place. The Chairperson shall issue a written determination within 24 hours of the hearing taking place.

- c. The determination of the Chairperson may be appealed to an appeals panel comprised of three (3) Commissioners, by providing written notice of intent to appeal to any member of the appeals panel. The appeals panel shall act on the appeal within 48 hours of receipt of the notice of appeal. In the event that the appeals panel fails to act, the Chairperson's determination shall be considered a final action for purposes of appeal to the Nation's Peacemaker's Court, in accordance with Section 2.8 of the Import Export Law.

16.6 Storage of Seized Goods.

- a. The Commission shall make appropriate space available to house products that have been seized pursuant to the IEL to ensure their safekeeping and to promote their maximum shelf life.
- b. Seized product shall be inventoried and cataloged prior to being stored. All items of seized inventory shall be clearly labeled with the following: (i) the date, time and location of the seizure, (ii) the name and address of the owner (if known) and (iii) the citation number.
- c. Each individual's or entity's seized goods shall be kept segregated from other seized goods, so as to prevent co-mingling of seized product.

16.7 Exceptions. The following cigarettes shall not be subject to seizure:

- a. Unstamped cigarettes in the possession of a licensed stamping agent.
- b. Unstamped cigarettes in the course of transit from outside of the Nation's Territory and consigned to a licensed stamping agent or destined for delivery to a licensed stamping agent.
- c. Unstamped cigarettes in a quantity of 2 cartons or less in the possession of an individual who is not a licensed stamping agent.
- d. Cigarettes that are manufactured at facilities located within the boundaries of the Nation's Territories.

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**REG - 17 SEVERABILITY**

17.1 If for any circumstance, a provision(s) or section(s) of these regulations are held invalid by the appropriate court of jurisdiction, the remainder of these regulations and other provisions or sections will not be affected in the application and enforceability of these regulations.

**REG - 18 AMENDMENTS**

18.1 These regulations may be recommended for amendment at any regular meeting of the Import-Export Commission, at which quorum is present, by a 2/3 vote of those members present, provided such proposed amendment(s) shall have been presented in writing at the previous regular meeting, and a copy forwarded to all absent members at least ten (10) days prior to the meeting at which the vote will be taken. Any recommended amendments shall not take effect until such amendments are approved by the Nation's Council.