



# THE SENECA NATION OF INDIANS

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December 29, 2011

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Re: The Seneca Nation of Indians' Response to the BATFE's Request for Tribal Input on Interpretive Guidance Regarding the PACT Act

Dear Mr. Ficareta:

The Seneca Nation of Indians ("Seneca Nation" or "Nation") submits these comments in response to the November 15, 2011 letter of Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice, and the accompanying Request for Tribal Input on Interpretative Guidance, inviting Indian nations to consult with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") regarding the implementation of the Prevent All Cigarette Trafficking Act of 2009, Pub. L. 111-154 ("PACT Act" or "Act"), in Indian country. To be sure, the Department's notice to engage in meaningful consultation pursuant to President Obama's November 5, 2009 Tribal Consultation Memorandum and Executive Order 13175 is long overdue. It is likewise indefensible that it has taken the Department more than 18 months since the passage of the Act to recognize that Congress expressly preserved in Section 5 all existing limitations on state authority over Indians, Indian commerce, and Indian country. The Department's failures, compounded by the BATFE's erroneous guidance in its November 18, 2010 Tribal Consultation Process letter and in the Frequently Asked Questions (FAQs) currently available on its website (updated April 25, 2011), have subjected Indian nations and their citizens to the very legal peril that Congress sought to prevent.

The Seneca Nation nevertheless welcomes the Department's invitation to consult and its commitment to implement the PACT Act in a manner that fulfills Congressional intent by honoring the Nation's treaty-protected sovereignty and immunity from state taxation and regulation. To summarize the Nation's comments: (1) the BATFE should publish an appropriate Interpretive Rule that sets forth its interpretation of key provisions of the Act; (2) commerce between two points in Indian country is not "interstate commerce" under the Act; (3) state and

local laws do not generally apply to Indian businesses pursuant to the Act's delivery seller requirements, 15 U.S.C. § 376a, or for purposes of determining whether those businesses are "lawfully operating" under the Act; and (4) persons other than delivery sellers are not subject to the registration and reporting requirements in 15 U.S.C. § 376(a). More specifically with respect to (3), in the absence of a controlling decision issued by a court of competent jurisdiction upholding the application of the specific state or local law at issue to Indians, the Department, the BATFE, and state and local governments must presume as a matter of law (i) that an Indian manufacturer, distributor, wholesaler, or retailer in Indian country is "lawfully operating" so long as it is operating in compliance with the laws of the Indian nation with jurisdiction over it; and (ii) that an Indian delivery seller is not required to comply with state and local laws pursuant to § 376a. Pending the publication of the Interpretive Rule, the Nation also requests (5) that the BATFE revise the erroneous FAQs on its website (attached to this letter is a proposed revision of those FAQs), and withdraw its erroneous November 18, 2010 letter. These comments supplement, but do not replace, the Nation's prior comments dated June 18, 2010, February 14, 2011, and July 6, 2011.

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Each of the issues with respect to which the BATFE has requested the views of the Seneca and other Indian nations turns upon Congress's unequivocal preservation in the PACT Act of Indian nations' federally-protected sovereignty and immunity from state interference. The Seneca Nation, and the other Nations of the historic Iroquois Confederacy, for example, secured the right to the "free use and enjoyment" of their Territories without disturbance in the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794). Federal common law is consistent with this solemn treaty promise—"the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)), and "from the very first days of our Government, the Federal Government has been permitting the Indians largely to govern themselves, free from state interference," *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965). From these bedrock principles has developed a substantial body of law, discussed in detail below and summarized in the words of the foremost commentator:

A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.

...

Indian conduct was left exclusively [in the United States Constitution] to tribal governments in the absence of congressional legislation specifically limiting tribal authority or extending state authority. *Consequently, Indian activities and property in Indian country are ordinarily immune from state taxes and regulations.*

*Cohen's Handbook of Federal Indian Law* § 6.03[1][a], at 520-21 (2005 ed.) (emphasis added); see generally *McClanahan*, 411 U.S. at 170-71 ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.").

Although the PACT Act “is unprecedented” in its “expansion of state and local taxing schemes,” *Red Earth LLC v. United States*, 728 F. Supp. 2d 238, 259 (W.D.N.Y. 2010), *aff’d* 657 F.3d 138 (2d Cir. 2011), “that would otherwise be inapplicable to out-of-state vendors,” *id.* at 246, Congress provided that this expansion would not extend into Indian country. In Section 5 of the Act, Congress expressly preserved all existing limitations under federal and state law on state and local authority and jurisdiction over Indian nations and their citizens, Indian commerce, and Indian country:

Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect . . . (3) 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; (4) 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; or (5) any State or local government authority to bring enforcement actions against persons located in Indian country.

15 U.S.C. § 375, *see* Historical and Statutory Notes (Exclusions Regarding Indian Tribes and Tribal Matters, Pub. L. 111-154, § 5(a)(3)-(5), Mar. 31, 2010). Congress, moreover, recognized that the Act’s unprecedented expansion of state authority would run headlong into this body of Indian law, and *chose to resolve those conflicts uniformly in favor of Indian sovereignty and the immunity of Indian nations and their citizens from state regulation*. Congress accordingly provided in Section 5(e) that “[a]ny ambiguity between the language of [Section 5] or its application and any other provisions of this Act shall be resolved in favor of this section.”<sup>1</sup>

These core principles must control the BATFE’s interpretation of each of the issues discussed below and the substance of its Interpretive Rule. Under no circumstances may the BATFE (or any other government authority) construe the Act in a manner that expands state jurisdiction in Indian country at the expense of existing limitations under federal and state law. Nor may the BATFE shirk its obligations under Section 5 by imposing upon Indian nations and their citizens the burden to raise their federally-protected rights “as an affirmative defense to . . . enforcement of the PACT Act,” as the BATFE suggested in its November 18, 2010 letter. This would present Indian businesses the Hobson’s choice between (1) subjecting their lawful business activities to unprecedented and unauthorized state regulation, and (2) assuming the risk of incurring substantial civil and criminal penalties for noncompliance with the Act. *Cf. Red Earth LLC*, 657 F.3d at 146 (quoting 728 F. Supp. 2d at 259) (“Inaction by the court would . . . confront delivery sellers with ‘the Hobson’s choice of ceasing what they believe to be lawful business activities, or continuing to engage in those activities while facing the threat of criminal

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<sup>1</sup> This provision reiterates the common law rule that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

prosecution if they are wrong.’’). It is therefore imperative that the BATFE provide clear guidance in its Interpretive Rule to ensure that state and local governments do not apply the Act in a manner contrary to Congressional intent and established law.

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1. The BATFE Should Publish a Formal Interpretive Rule that Is Consistent with the Plain Language of the PACT Act and with Congressional Intent

The Seneca Nation supports the BATFE’s publication of an Interpretive Rule in the Federal Register that recognizes the full import of the Act’s clear language protecting Indian country and Indian commerce from unprecedented state interference. Such a rule, which would advise the public of the BATFE’s interpretation of the Act, would not be required to go through notice and comment rulemaking. The BATFE, however, should not publish an Interpretive Rule that repeats the same legal errors contained in its November 18, 2010 letter and in the currently available FAQs. Such a rule would be inconsistent with the plain language of the Act and with Congressional intent, would be arbitrary and capricious and not in accordance with law, and would not survive judicial scrutiny. The publication of such a rule would only foster litigation challenging the rule, as well as litigation arising from unauthorized enforcement actions predicated upon the erroneous rule. Therefore, if the BATFE continues to have questions regarding the proper interpretation of the Act following its review of the Nation’s comments and the consultation on December 14, 2011, the Nation urges the BATFE to engage in further consultation with Indian nations to resolve those questions.

2. Commerce between Two Points in Indian Country Is Not “Interstate Commerce” for Purposes of the PACT Act

The BATFE erroneously concluded in its November 2010 letter (and repeated that error in the FAQs) that the Act’s definition of “interstate commerce” includes “sales within and between Indian country.” The BATFE’s bald statement that “as defined by statute, intrastate transportation between two separate reservations would be in interstate commerce,” finds no support in the text of the Act. The Act defines interstate commerce as “commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.” 15 U.S.C. § 375(9)(a). This definition clearly treats a “State” and “Indian country” as distinct geographical and jurisdictional concepts—consistent with Section 5’s reference to the existing body of law that limits state jurisdiction in Indian country—and the Act indeed defines those terms separately. *See* 15 U.S.C. § 375(7), (11). Interstate commerce thus includes commerce between a point *outside* of Indian country and a point *inside* of Indian country or commerce between two points *outside* of Indian country that is routed *through* Indian country—this is “commerce between a State and any place outside the State” (which “place” may be Indian country), “commerce between a State and any Indian country in the State,” or “commerce between points in the same State . . . through any Indian country.” Interstate commerce *does not*, however, include commerce *within* a single Indian nation territory or *between* Indian nation territories—this is not “commerce between a State and any Indian country

in the State,” “commerce between a State and any place outside the State,” or “commerce between points in the same State . . . through any Indian country.”<sup>2</sup>

The PACT Act’s definition of “interstate commerce” is thus carefully crafted to exclude two specific categories of commerce: (1) purely intrastate commerce that is not routed through another state or through Indian country; and (2) commerce between two points in Indian country. Congress’ exclusion of intrastate and Indian commerce is firmly grounded in constitutional law—the Constitution reserves to the states paramount jurisdiction over intrastate commerce, and reserves to the federal government and Indian nations paramount jurisdiction over Indian commerce. As the Supreme Court has observed, “the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (“When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable.”); *Ward v. New York*, 291 F. Supp. 2d 188, 207 (W.D.N.Y. 2003) (concluding that Seneca cigarette retailers were “likely to succeed on the merits of their claim that [N.Y. Pub. Health Law § 1399-ll] is unconstitutional insofar as it restricts the shipment or transportation of cigarettes from a tribe member on the reservation to another tribe member on the reservation”). Exercising this power through the Indian Trader Statutes, 25 U.S.C. §§ 261-264, Congress “has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.” *Central Machinery Co. v. Arizona Tax Comm’n*, 448 U.S. 160, 166 (1980) (citation omitted).

Given Congress’ plenary constitutional authority over Indian commerce, and its unequivocal mandate in Section 5 that the Act may not be construed to expand state authority over Indian nations and their citizens, it is clear why Congress excluded commerce within a single Indian nation territory and commerce between Indian nation territories from the definition of “interstate commerce.” Had Congress provided otherwise, by defining interstate commerce to include “commerce within or between Indian country,” it would have subjected commerce occurring *exclusively between Indian nations and exclusively in Indian country to unprecedented state oversight and regulation*, contrary to a substantial body of federal Indian law and the intent of Section 5. *Cf. Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction . . .”). Both the plain language of the Act and Congressional intent thus demonstrate that commerce between two points in Indian country is

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<sup>2</sup> The plain meaning of “through” is “movement into at one side point and out the other,” or “passage from one end or boundary to another.” Merriam-Webster’s Collegiate Dictionary (11th ed. 2003). Thus, interstate commerce includes commerce between New York City and the City of Buffalo that is routed through Seneca Territory, but does not include commerce within or between Seneca Territories or between Seneca Territory and the Territory of another Nation of the historic Iroquois Confederacy.

not “interstate commerce.” Moreover, in the event that the BATFE believes the definition of interstate commerce is ambiguous, Section 5(e) compels that the BATFE resolve that conflict in favor of this construction and principles of Indian sovereignty.

3. State and Local Laws Do Not Apply to Indian Delivery Sellers under § 376a or to Determine Whether Indian Businesses Are “Lawfully Operating” in the Absence of a Controlling Court Decision to the Contrary

Clear interpretive guidance from the BATFE regarding the extent to which state and local laws may be applied to Indian nations and their citizens under the Act is critical for two reasons. First, as suggested by the Department’s Request for Tribal Input, “any sale by a manufacturer or wholesaler to a wholesaler or retailer that is not ‘lawfully operating’ . . . would be construed to be a delivery sale subject to the provisions of section 376a and other applicable PACT Act provisions.” Second, although 15 U.S.C. § 376a(a)(3) requires delivery sellers to comply with “all” state and local laws “generally applicable to sales of cigarettes or smokeless tobacco,” including 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 ,” this mandate is subject to Section 5’s explicit prohibition on the expansion of state and local jurisdiction in Indian country. As demonstrated below, the BATFE may reconcile these provisions through a concrete legal standard that provides certainty to all interested parties and that fulfills Congressional intent.

A. Section 5 of the Act Preserves the Rule that Indian Nations and Their Citizens Are Not Subject to State and Local Regulation and Precludes the Application of Such Laws to Indian Businesses under § 376a and Other Provisions of the Act

The Seneca Nation remains perplexed and gravely troubled by the Department’s failure to respect the unequivocal language of Section 5 and the cardinal principles of federal Indian law. In its November 18, 2010 letter, the BATFE went so far as to claim that “[a] tribal license, in and of itself, does not exempt an entity from the requirements associated with delivery sales *unless State law allows tribal licenses in lieu of a State license.*” (emphasis added). Nearly 75 years ago, however, the United States recognized that states do not possess authority to subject Indians in Indian country to state licensing requirements. In a May 8, 1940 opinion, cited with approval in *Warren Trading Post Co.*, 380 U.S. at 690 & n.15, the Department of Interior explained that “[t]raders on Indian reservations who are non-Indians are . . . required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations . . . . *Traders who are themselves Indians are not subject to the State laws whether they deal with Indians or non-Indians.*” 57 I.D. at 126 (emphasis added). The Supreme Court and lower courts have accordingly held that states may not compel Indian businesses to obtain state licenses. *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). State agencies routinely recognize this rule—the Commissioner of the New York State Department of Taxation and Finance, for example, conceded in an October 13, 2000 letter to the St. Regis Mohawk Tribe that “Indian retailers or Indian wholesalers located on reservations are not required to be licensed by New York State.”

Because Section 5 expressly preserves this body of law, state and local licensing requirements may not be extended to Indian delivery sellers in Indian country pursuant to § 376a(a)(3). Similarly, although § 376a(c)(3) purports to authorize state and local tobacco tax administrators and law enforcement officials to access the business records of delivery sellers, those persons lack such authority with respect to Indian delivery sellers. As the New York Courts have recognized, the Seneca Nation’s treaty-protected right to the “free use and enjoyment” of its Territories includes the right to exclude state officials—“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); *see also, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (“[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.”). The Indian Trader Statutes, moreover, preempt state and local laws that purport to regulate the brands, quantity, or price of cigarettes sold by Indian delivery sellers. *See generally Dept. of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 75 (1994) (citing 25 U.S.C. § 261). It is imperative that the BATFE’s Interpretive Rule confirm that the application of state and local laws to Indian delivery sellers pursuant to § 376a, and the determination of whether Indian businesses are “lawfully operating” for purposes of the Act, are constrained by these and other rules that follow from the bedrock principles discussed above.<sup>3</sup>

The federal courts, moreover, have repeatedly held that Indian nation governments, concurrent with Congress, have the sovereign authority to regulate Indians and Indian commerce in their Territories. An Indian nation’s right of self-government includes the power “to control economic activity within its jurisdiction.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983) (outlining the powerful federal policies that preclude state interference with the right of self-government). Accordingly, “tribes have authority to prescribe the conduct of their members, . . . create economic policies, and tax economic activities within their territories,” *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011), and possess “a strong interest as . . . sovereign[s] in regulating economic activity involving [their] own members within [their] own

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<sup>3</sup> For example, to the extent the legal incidence of a state tax falls on cigarette retailers, that tax is *per se* invalid as applied to Indian delivery sellers, notwithstanding § 376a(a)(3)(A) and (d)(1). *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (“If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”).

territory,” *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002). The Seneca Nation exercises this sovereign authority by comprehensively regulating all businesses participating in its tobacco economy pursuant to the Seneca Nation of Indians Import-Export Law, Business Licensing Ordinance, and Business Code. The BATFE’s suggestion that Seneca manufacturers, wholesalers, and retailers might not be “lawfully operating” unless they obtain a state license and comply with other state laws is completely at odds with this body of law and “would completely ‘disturb and disarrange’ . . . the comprehensive scheme” adopted by the Nation to regulate the tobacco economy within its Territories. *New Mexico*, 462 U.S. at 338 (citation omitted).

B. The Supreme Court Has Carved Out a Narrow Exception that Permits States to Impose on Indian Retailers Minimal Burdens to Collect Tax on Sales of Non-Native Cigarettes to Non-Indians

The Supreme Court has held that states may impose on Indian retailers that sell non-native manufactured cigarettes “minimal burdens reasonably tailored to the collection of valid taxes from non-Indians,” in the absence of applicable treaty rights. *Milhelm Attea*, 512 U.S. at 73. Specifically, the Court has upheld the “simple expedient” of “requir[ing] the Indian proprietor simply to add the tax to the sales price,” *Moe*, 425 U.S. at 482-83, and related recordkeeping requirements to distinguish between taxable and nontaxable transactions, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159-60 (1980). The *Milhelm Attea* Court noted that a state may impose these burdens only with respect to non-native manufactured cigarettes, not cigarettes manufactured by Indian nations and their citizens. 512 U.S. at 73 (explaining that a tax on cigarettes manufactured by non-Indians “stand[s] on a markedly different footing from a tax imposed . . . on value generated on the reservation by activities involving the Tribes”) (citation omitted); *see also New Mexico*, 462 U.S. at 341 & n.26 (explaining that the *Colville* decision pertains to the taxation of “goods not manufactured by the tribe or its members”).

The Supreme Court, however, has never suggested that states may subject Indian retailers to “all” state and local laws “generally applicable to sales of cigarettes or smokeless tobacco,” including 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), which unquestionably constitute far more than “minimal burdens” narrowly tailored to the collection of taxes from non-Indians. Indeed, one federal court has already observed, without addressing the constraints imposed by Section 5 on the application of the Act to Indians, that “[c]ompliance with the plethora of state and local laws now made applicable under the PACT Act far exceeds the ‘minimal burden’ approved of by the Supreme Court.” *Red Earth LLC*, 728 F. Supp. 2d at 252. The Supreme Court, moreover, has *never* held that states may regulate *in any respect* the activities of Indian manufacturers, wholesalers, and retailers that do business exclusively with other Indian businesses in Indian country.

C. Indian Businesses Operating in Compliance with Indian Nation Law Must Be

Presumed to Be “Lawfully Operating” for Purposes of the Act in the Absence of a Controlling Court Decision Upholding the Specific State Law at Issue

In its Request for Tribal Input, the Department raises the valid question as to how its Interpretive Rule should address the fact that “the Supreme Court has declined to impose a bright line rule that would govern all conflicts between tribal sovereignty and states’ power to enact legislation affecting residents within their borders, *see Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994).” The Department thus asks “how its guidance should address the question whether certain entities operating in Indian country must meet all state requirements in order to be ‘lawfully operating’ for purposes of section 376a.” The Nation respectfully submits that the answer to this question is clear. First, the body of law discussed above unequivocally provides that states do *not* possess jurisdiction to compel Indian businesses to “meet all state requirements,” including licensing requirements. Rather, states may only assert jurisdiction over Indians in Indian country in “exceptional circumstances.” *New Mexico*, 462 U.S. at 331-32. Under controlling federal law, states may *at most* extend to Indian delivery sellers pursuant to § 376a the minimal burdens of collecting and remitting taxes, affixing tax stamps, and keeping related records *with respect to sales of non-native manufactured cigarettes to non-Indians*. Second, to the extent any conflict exists between the extension of state and local laws to Indian nations and their citizens under § 376a or other provisions of the Act on the one hand, and principles of federal and state law that limit state and local jurisdiction over Indian country on the other, that conflict must be resolved in favor of the latter pursuant to Section 5(e).

Accordingly, while the Supreme Court may have declined to impose a bright line rule in its precedents, Congress has resolved that ambiguity in the context of the PACT Act. In the absence of a controlling decision issued by a court of competent jurisdiction upholding the application of the specific state or local law at issue to Indians, the Department, the BATFE, and state and local governments must presume as a matter of law (i) that an Indian manufacturer, distributor, wholesaler, or retailer in Indian country is “lawfully operating” so long as it is operating in compliance with the laws of the Indian nation with jurisdiction over it; and (ii) that an Indian delivery seller is not required to comply with state and local laws pursuant to § 376a. For example, if an Indian delivery seller is duly-licensed by an Indian nation and otherwise operating in compliance with that nation’s laws, then it is “lawfully operating” for purposes of the Act regardless of whether it also possesses a state or local license, the businesses from which it acquires cigarettes may not be deemed to be delivery sellers on that basis, and it is not subject to civil or criminal penalties on that basis. The BATFE must provide this clear guidance to fulfill Congressional intent, to uphold the federally-protected rights of Indian nations and their citizens, and to protect law-abiding businesses from the threat of substantial civil and criminal penalties under the Act.

4. The Registration and Reporting Requirements in 15 U.S.C. § 376(a) Are Only Applicable to Delivery Sellers

The November 2010 letter and the FAQs also misconstrue the scope of the PACT Act’s amendments to the Jenkins Act’s registration and reporting requirements, 15 U.S.C. § 376(a).

The purpose of the Act of course is to regulate those businesses selling cigarettes to consumers by internet, mail order, and telephone, and to ensure the collection of tax and proper age verification for those sales. The Act thus reflects Congress' intent that the registration and reporting requirements apply *only to delivery sellers* and other entities transferring or shipping cigarettes to individual consumers, not to cigarette manufacturers, 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 pervious calendar month into such State") must include "the name, address, and phone number of the person delivering the [cigarette] shipment to the recipient *on behalf of the delivery seller.*" (emphases added). This language contemplates that each shipment reported (and it is upon such shipments that registration under § 376(a)(1) is premised) *must* be a shipment initiated by a delivery seller. This language thus does not contemplate registration or reporting by manufacturers, distributors, and wholesalers, which are not delivery sellers. Nor does § 376(c), which contemplates that the information reported pursuant to § 376(a) shall be used for "the collection of any taxes owed" by delivery sellers.

The Act's record-keeping requirement, which incorporates this reporting requirement by reference, also applies exclusively to delivery sellers—it does not apply to manufacturers, distributors, or wholesalers. *See* 15 U.S.C. § 376a(c). (The Contraband Cigarette Trafficking Act *already* imposes record-keeping and reporting requirements with respect to shipments by manufacturers, distributors, and wholesalers, *see* 18 U.S.C. § 2343; 27 C.F.R. § 646.146, .147, and nowhere in the legislative history of the PACT Act does Congress express any intent to subject those entities to yet another reporting regime.) Finally, the cornerstone of the enforcement of the PACT 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) (emphases added), and the Act's civil penalties apply only to "*delivery seller[s]*, . . . common carrier[s] or other delivery service[s]." 15 U.S.C. § 377(b)(1) (emphasis added). There is no blacklist or civil penalties for unregistered or non-compliant manufacturers, distributors, and wholesalers. That Congress deliberately chose to exclude these entities from this enforcement program confirms the conclusion that Congress intended the Act's registration and reporting requirements to apply only to delivery sellers and others shipping cigarettes directly to individual consumers.

5. The BATFE Should Immediately Revise the Erroneous FAQs and Withdraw Its Erroneous November 18, 2010 Letter

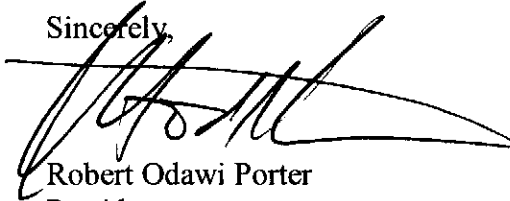
Until the BATFE publishes an appropriate Interpretive Rule, it is imperative that the BATFE provide accurate interim guidance for federal officials, state and local governments, and Indian nations and their citizens regarding the implementation of the Act in Indian country. The FAQs currently available on the BATFE website (updated April 25, 2011) contain numerous errors of law. Attached to this letter is a proposed revision of the FAQs that accurately addresses each of the issues canvassed above. The Nation requests that the BATFE replace the FAQs with this revision. For the sake of clarity, the BATFE should also formally withdraw its November 18, 2010 Tribal Consultation Process Letter, which also contains numerous errors of law.

The Nation also requests that the BATFE share the Department's List of Unregistered and Non-Compliant Delivery Sellers with interested Indian nation governments. In its November 18, 2010 letter, the BATFE acknowledged that the Act authorizes it to provide the list to "any other person" that it determines "can promote the effective enforcement" of the Jenkins Act, and pledged that "the list will be made available to interested tribal governments." Indeed, Congress recognized that Indian nations are co-equal sovereigns for purposes of the implementation and enforcement of the Act. The Seneca Nation, however, has not received any of the lists that it understands the Department has produced. The Nation therefore requests that the BATFE honor its pledge and provide the Nation with copies of all lists produced to date as well as all future lists.

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Through the exercise of its treaty-protected right to the "free use and enjoyment" of its Territories and the vigorous pursuit of self-determination and economic self-sufficiency, the Seneca Nation and its citizens have developed a well-regulated private sector tobacco economy that supports thousands of jobs and millions of dollars of economic activity in Western New York. Congress carefully crafted Section 5 of the PACT Act to prevent unprecedented state and local interference with this economy, including the Nation's trade with other Indian nations in cigarettes manufactured by federally-licensed entities owned and operated by Seneca citizens. To date, however, the BATFE has utterly ignored the Act's plain language, the express will of Congress, and 200 years of federal Indian law by purporting to affirmatively expand state authority over Indians, Indian commerce, and Indian country through its interpretation of the Act. The BATFE's consultation efforts, moreover, have been woefully inadequate. The Nation nevertheless welcomes the BATFE's change in course and is optimistic that these comments and the consultation meeting in Washington, D.C. on December 14, 2011 will provide the foundation for a new analysis that respects Congressional intent and Indian sovereignty.

Sincerely,



Robert Odawi Porter  
President  
Seneca Nation of Indians

## **SENECA NATION OF INDIANS' PROPOSED REVISIONS<sup>1</sup>** **ATF FAQ (UPDATED April 25, 2011)**

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ATF's Alcohol and Tobacco Diversion Division has created the following Frequently Asked Questions (FAQ) to provide information and guidance on the PACT Act. ATF will periodically update the FAQ with new questions and answers as they arise. Readers can submit additional questions to [PACTActQuestions@ATF.GOV](mailto:PACTActQuestions@ATF.GOV).

### **What is the PACT Act?**

On June 29, 2010, the Prevent All Cigarette Trafficking Act (PACT Act) went into effect. The law amends the Jenkins Act, 15 U.S.C. Chapter 10A, which governs the collection of taxes on, and trafficking in, cigarettes and smokeless tobacco. The PACT Act revised definitions in the Jenkins Act, provided new requirements for registration, reporting, and recordkeeping, and increased penalties for criminal violations. The PACT Act also amends the Contraband Cigarette Trafficking Act, 18 U.S. C. Chapter 114, by providing ATF with additional inspection authority. The PACT Act generally bans the mailing of cigarettes: **this provision is enforced by the U.S. Postal Service**. The PACT Act also provides new delivery requirements and establishes a noncompliant delivery seller list, with prohibition on deliveries. The Act expands requirements for delivery (non-store/Internet/mail order) sales of cigarettes by requiring each delivery seller, with respect to delivery sales into a specific state and place, to (1) include on the bill of lading for the shipping package containing cigarettes or smokeless tobacco a clear and conspicuous statement that Federal law requires the payment of all applicable excise and sales taxes and compliance with applicable licensing and tax-stamping obligations; and (2) make records of all delivery sales accessible to the Attorney General.

The Act requires ATF to compile a list of noncompliant delivery sellers of cigarettes and smokeless tobacco and to distribute the list to State attorneys general, State tax administrators, common carriers and other couriers, including the U.S. Postal Service.

### **What tobacco products are covered under the PACT Act?**

Cigarettes, roll-your-own tobacco, and smokeless tobacco are covered. Cigars are excluded.

### **What is a Delivery Sale?**

Any sale of cigarettes or smokeless tobacco to a consumer if –

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<sup>1</sup> Proposed deletions are shown in strikethrough format. Proposed additions are shown in underline format.

(A) the consumer orders by telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

(B) the cigarettes or smokeless tobacco products are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

**What is a common carrier?**

Any person (other than a local messenger service or the U.S. Postal Service) that holds itself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise (regardless of whether the person actually operates the vessel, vehicle, or aircraft by which the transportation is provided) between a port or place and a port or place in the United States.

**What is a consumer?**

A consumer is any person who purchases cigarettes or smokeless tobacco. This does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.

**What is lawfully operating?**

A person is lawfully operating who complies with applicable Federal, State, or Indian nation or tribal laws. For example, an Indian retailer or distributor operating in Indian country is lawfully operating where it is licensed by the Indian nation or tribe with jurisdiction over it.

**What is interstate commerce?**

The term “interstate commerce” includes commerce between any place in a State and any place outside of that State, commerce between a State and Indian Country in the State, or commerce between points in the same State but through any place outside of the State or through any Indian Country. The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States.

**Does selling and transporting tobacco from one Native American reservation or territory to another Native American reservation or territory qualify as interstate commerce?**

~~Yes, even if the sale and transportation occurred within the same State.~~ No. The definition of interstate commerce does not include sales within or between Indian reservations, whether located in the same state or in different states. The definition does include, however, commerce between an Indian reservation and a place that is not located on an Indian reservation.

**Did ATF consult with the Native American community concerning the PACT Act?**

Yes. ATF is still in the process of complying with the Executive Order and Presidential Memorandum that requires formal consultation with Indian nations and tribes. ATF received comments from Tribal Governments and their representatives during a preliminary consultation process, including a consultation meeting held on June 8, 2010. ATF also received written comments in response to ATF's open letters to tribal leaders. ATF's response to these comments, "Implementation of the Prevent All Cigarette Trafficking Act of 2009 (PACT Act) Tribal Consultation Process" is posted on the ATF website, <http://atf.gov/alcohol-tobacco/>. ATF is continuing to consult with Indian nations and tribes with respect to the implementation of the Act in Indian country and its impact on tribal sovereignty.

**Is ATF going to publish regulations regarding PACT Act?**

At this time, no. ATF has deemed that the PACT Act is primarily self-executing and is providing information through open letters and this FAQ. However, ATF reserves the right to issue regulations and will invite comments through Tribal consultation prior to implementation as warranted.

**~~Are the PACT Act and the Jenkins Act (as initially enacted and as amended by the PACT Act) applicable to Native Americans and do these laws purport to set forth legal requirements that infringe upon the inherent sovereignty of Native Americans and violate treaties between the Tribes and the United States?~~**

~~It is ATF's position that the Jenkins Act and the PACT Act apply equally to all persons, including Native Americans, absent a specific statutory exemption (which is not present in the PACT Act) or a treaty right. To the extent that any tax immunity issues (such as treaty rights, tax compact provisions, and common law principles) are raised as an affirmative defense to ATF's enforcement of the PACT Act, ATF will consult with Department of Justice Officials to evaluate these issues as appropriate.~~

**Does the PACT ACT protect Native American sovereignty, treaty rights, tax immunities, and other Federal and State law limitations on State jurisdiction over Native Americans and their lands?**

Yes. Congress included a special provision in the PACT Act, Section 5, which ensures that the provisions of the Act are not construed in a manner that modifies or affects existing limitations under Federal and State law, including common law and treaties, on State and local authority and jurisdiction over Indian nations and their members, Indian commerce, and Indian country.

**Do all of the provisions of the PACT Act apply equally to Native American delivery sellers and to non-Native American delivery sellers?**

No, because of Section 5. For example, although 15 U.S.C. § 376a(a)(3) requires delivery sellers as a general matter to comply with all State and local laws imposing licensing, tax-stamping, and other legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco, under existing common law, States lack authority to require Indian nations and their members to comply with State licensing requirements. Likewise, although 15 U.S.C. § 376a(c)(3) authorizes State and local tobacco tax administrators as a general matter to access the business records of delivery sellers, those officials lack such authority under common law with respect to Indian businesses in Indian country.

**What should State and local government officials do when they are unsure whether particular provisions of the PACT Act may be applied to Native Americans?**

Section 5(e) requires that these government officials resolve any ambiguity regarding the application of the provisions of the Act to Native Americans or their enforcement authority in favor of protecting tribal sovereignty, treaty rights, tax immunities, and other limitations on State jurisdiction over Native Americans and their lands. Government officials may also contact ATF with any questions regarding the application of the Act to Native Americans.

## REGISTERING

**Who has to register?**

Any person delivery seller who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce, whereby such cigarettes or smokeless tobacco are shipped into a State, locality, or Indian country of an Indian tribe taxing the sale or use of cigarettes or smokeless tobacco or who advertises or offers cigarettes or smokeless tobacco for such sale, transfer, or shipment.

**Are Native American ~~wholesalers, distributors, and~~ delivery sellers included in the persons required to register?**

Yes.

**Are international ~~wholesalers, distributors, and~~ delivery sellers required to register?**

Yes, if they are transferring, selling, or shipping cigarettes or smokeless tobacco for profit in interstate commerce, or if they advertise that they do.

**If a person delivery seller ships into, or advertises in, several States, are they required to register in each of those States?**

Yes. Any ~~person~~ delivery seller who sells, transfers, or ships cigarettes or smokeless tobacco for profit in interstate commerce is required to register with every State into which they ship or advertise.

~~**Does a Native American wholesaler, distributor, or delivery seller have to register if they are only transferring, selling, or shipping for profit cigarettes or smokeless tobacco to other Native American wholesalers, distributors or delivery sellers?**~~

~~Yes.~~

**Who do I register with?**

Register with ATF (form available at <http://atf.gov/forms/alcohol-tobacco/>) and with the tobacco tax administrators of the State and place into which such shipment is made or in which such advertisement or offer is disseminated.

**What happens if I don't register?**

Delivery sellers are placed on the PACT Act noncompliant list and may face criminal and civil penalties. (See the Noncompliant and Penalties section for more information.)

## RECORD KEEPING

**What records are delivery sellers required to keep?**

Each delivery seller must keep a record of any delivery sale, including a copy of every invoice covering shipments of cigarettes or smokeless tobacco. The record must include the name and address of the person to whom the shipment was made; the brand and the quantity of tobacco delivered; and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller. The records must be organized by State and, within the State, by the city or town and by zip code into which the delivery sale was made.

**How long do I have to retain my records?**

Records of a delivery sale shall be kept until the end of the 4th full calendar year that begins after the date of the delivery sale.

**Who can ask to see my records on delivery sales?**

Delivery sales records shall be made available to tobacco tax administrators of the States, to local governments and Indian tribes that apply local or tribal taxes on cigarettes or smokeless tobacco, to the attorneys general of the States, to the chief law enforcement officers of the local governments and Indian tribes, and to ATF (on behalf of the Attorney General of the United States).

## REPORTING

### **Who has to report delivery sales to the States?**

All delivery sellers of interstate shipments, including delivery sellers operating on Native American reservations, must report delivery sales.

### **What needs to be reported and when?**

By the 10th of each calendar month, delivery sellers must file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice for every shipment of cigarettes or smokeless tobacco made during the previous calendar month into that State. Each memorandum or invoice must include the name and address of the person to whom the shipment was made; the brand and quantity of tobacco in the shipment; and the name, address, and phone number of the person delivering the shipment to the recipient on behalf of the delivery seller. All invoice or memoranda information relating to specific customers must be organized by city or town and by zip code. Copies of the memorandum or invoice must be sent to the tobacco tax administrators and chief law enforcement officers of the local governments and Indian tribes operating within the borders of the State that apply their own local or tribal taxes on cigarettes or smokeless tobacco.

### **What happens if I don't submit the required invoices?**

You are placed on the PACT Act noncompliant list and may face criminal and civil penalties. (See the Noncompliant and Penalties section for more information.)

### **Are Native American wholesalers, distributors, or delivery sellers required to report interstate shipments of tobacco products to the receiving State tax administrator if the receiving party is another Native American wholesaler, distributor, or delivery seller?**

Yes.

### **Are international wholesalers, distributors, or delivery sellers required to report shipments of tobacco products?**

Yes, if they are transferring, selling, or shipping cigarettes or smokeless tobacco in interstate commerce for profit, they need to meet the same monthly reporting requirements as domestic wholesalers, distributors, or delivery sellers.

## DELIVERY OF CIGARETTES AND SMOKELESS TOBACCO

### **Can I mail cigarettes through the U.S. Postal Service?**

See the U.S. Postal Service website for more information:

<http://www.usps.com/pactact/welcome.htm>

**Can delivery sellers ship or deliver cigarettes or smokeless tobacco to a consumer if the applicable excise taxes have not been paid in the consumer's State prior to the delivery of cigarettes?**

No delivery seller may sell or deliver to any consumer, or tender to any common carrier or other delivery service, any cigarettes or smokeless tobacco pursuant to a delivery sale unless, in advance of the sale, delivery, or tender –

(A) any cigarette or smokeless tobacco excise tax that is imposed by the State in which the cigarettes or smokeless tobacco are to be delivered has been paid to the State;

(B) any cigarette or smokeless tobacco excise tax that is imposed by the local government of the place in which the cigarettes or smokeless tobacco are to be delivered has been paid to the local government; and

(C) any required stamps or other indicia that the excise tax has been paid are properly affixed or applied to the cigarettes or smokeless tobacco.

**What markings must I place on packages for delivery sales?**

For any shipping package containing cigarettes or smokeless tobacco, the delivery seller shall include on the bill of lading, if any, and on the outside of the shipping package, on the same surface as the delivery address, the following statement: "CIGARETTES/SMOKELESS TOBACCO: FEDERAL LAW REQUIRES THE PAYMENT OF ALL APPLICABLE EXCISE TAXES, AND COMPLIANCE WITH APPLICABLE LICENSING AND TAX-STAMPING OBLIGATIONS".

**Does the PACT Act apply to sales taxes?**

No.

**Is there a weight restriction for delivery sales?**

A delivery seller shall not sell, offer for sale, deliver, or cause to be delivered in any single sale or single delivery any cigarettes or smokeless tobacco weighing more than 10 pounds.

**Are there age restriction requirements for delivery sale shipments?**

The purchaser placing the delivery sale order, or an adult who is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery, must sign to accept delivery of the shipping container at the delivery address; and the person who signs to accept delivery of the shipping container must provide proof, in the form of a valid, government-issued identification bearing a photograph

of the individual, that the person is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery. The delivery seller shall not accept a delivery sale order from a person without obtaining the full name, birth date, and residential address of that person; and verifying the information through the use of a commercially available database or aggregate of databases, consisting primarily of data from government sources, that are regularly used by government and businesses for the purpose of age and identity verification and authentication, to ensure that the purchaser is at least the minimum age required for the legal sale or purchase of tobacco products, as determined by the applicable law at the place of delivery.

## PACT ACT NONCOMPLIANT LIST

### **What can get a delivery seller placed on the noncompliant list?**

- Failing to register with ATF or with the tobacco tax administrators of the State and place into which such shipment is made or in which an advertisement or offer is disseminated.
- Failing to properly report delivery sales to the tobacco tax administrator of the required States.
- Failing to properly mark cigarette or smokeless tobacco shipments to consumers.
- Failing to follow age verification restrictions and regulations.
- Failing to follow any other aspect of the PACT Act.

### **What does it mean if a delivery seller is on the noncompliant list?**

No person who receives the noncompliant list and no person who delivers cigarettes or smokeless tobacco to consumers, shall knowingly complete, cause to be completed, or complete its portion of a delivery of any package for any person whose name and address are on the list.

### **Who gets a copy of the noncompliant list?**

The attorney general and tax administrator of every State; common carriers and other persons that deliver small packages to consumers in interstate commerce, including the U.S. Postal Service; and any other person that ATF determines can promote the effective enforcement of the PACT Act, including Indian nation and tribal governments.

### **Who can place delivery sellers on the noncompliant list?**

ATF maintains the noncompliant list. ATF will place delivery sellers on the noncompliant list based on internal information and evidence provided by any State, local, or tribal government.

### **Will I be notified that I am being placed on the noncompliant list?**

At least 14 days before including a delivery seller on the list, ATF will make a reasonable attempt to send notice to the delivery seller by letter, electronic mail, or other means that the delivery seller is being placed on the list, and cite the relevant provisions of this Act and the specific reasons for which the delivery seller is being placed on the list

### **Can I appeal my placement on the noncompliant list?**

Delivery sellers may file a written challenge to their placement on the noncompliant list. Such challenges should explain why the delivery seller is in compliance with the PACT Act and/or why the delivery seller should not remain on the non-compliant list. The challenge should be mailed to:

**ATF  
99 New York Ave., NE  
Mail Stop 7-S-233  
Washington, DC 20226  
ATTN: CHIEF ATDD**

ATF will investigate each challenge by contacting the relevant Federal, State, tribal, and local law enforcement officials, and provide the specific findings and results of the investigation to the delivery seller not later than 30 days after the date on which the challenge is made. If ATF determines that the basis for including a delivery seller on the list is inaccurate, based on incomplete information, or cannot be verified, the delivery seller will be removed from the noncompliant list.

## **PENALTIES**

### **What are the penalties for violating the PACT Act?**

In general, whoever knowingly violates the PACT Act shall be imprisoned for not more than 3 years, fined under title 18, United States Code, or both.

Common carriers are prohibited from transporting cigarettes and smokeless tobacco for delivery sellers who are on the noncompliant list.

Common carriers or independent delivery services, or employees of common carriers or independent delivery services who knowingly violate the PACT Act are subject to criminal penalties

Violators of the PACT Act shall be subject to a civil penalty in an amount not to exceed –

- (A) in the case of a delivery seller, the greater of –
  - (i) \$ 5,000 in the case of the first violation, or \$10,000 for any other violation; or
  - (ii) for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation.

(B) in the case of a common carrier or other delivery service, \$2,500 in the case of a first violation, or \$ 5,000 for any violation within 1 year of a prior violation.

A civil penalty may be imposed in addition to a criminal penalty and any other damages, equitable relief, or injunctive relief awarded by the court, including the payment of any unpaid taxes to the appropriate Federal, State, local, or tribal governments.

**Can I be charged with other offenses in conjunction with PACT Act offenses?**

Yes. Conduct which violates the PACT ACT may also constitute violations of other Federal or State criminal, civil, or tax laws.

**Can I appeal any civil fines?**

Yes. If a delivery seller or common carrier desires reconsideration after receipt of a notice of imposition of a civil fine, the delivery seller or common carrier must mail, within 15 days after receipt of the notice of imposition of a civil fine, a formal written request to:

**ATF  
99 New York Ave., NE  
Mail Stop 7-S-233  
Washington, DC 20226  
ATTN: CHIEF ATDD**

The request should include documentation detailing the factual basis for the reconsideration request. ATF will issue a written final decision within 30 days after receipt of the reconsideration request that includes a brief summary of the findings and conclusions on which the decision was based.