



Legislation Text

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AN ACT AMENDING TITLE 68, CHAPTER 5, SECTION 71 OF THE CHEROKEE NATION CODE ANNOTATED

BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This Legislative Act shall be titled as the "Tobacco Tax Compact between the State of Oklahoma and the Cherokee Nation Act of 2024" and codified at Title 68, Chapter 5, Section 71 of the Cherokee Nation Code Annotated ("CNCA").

Section 2. Purpose

The purpose of the Act is to codify a compact between the Cherokee Nation and the State of Oklahoma for the mutual benefit of both sovereign governments. In recognition of the sovereign authority of the Cherokee Nation to exercise powers of self-government, this law authorizes the Principal Chief to approve a compact and to take any necessary action to implement the requirements of its provisions in accordance with this Act.

Section 3. Legislative History

LA 03-92

LA 44-03

LA 07-04

LA 28-08

LA 30-13

Section 4. Substantive Provisions

The provisions contained in Title 68, Chapter 5, Section 71 are hereby repealed in their entirety, and replaced as follows:

CHAPTER 5

§ 71. Short title

This Act shall be known and may be cited as the “Cherokee Nation/State Tobacco Tax Compact Act of 2024.”

TOBACCO TAX COMPACT BETWEEN THE STATE OF OKLAHOMA AND THE CHEROKEE NATION

ARTICLE I

PURPOSE AND INTENT OF PARTIES

WHEREAS, the Cherokee Nation (hereinafter referred to as “Nation”), is a federally recognized Indian tribe with inherent sovereign powers of self-government, as secured by and under federal law;

WHEREAS, the State of Oklahoma (hereinafter referred to as “State”) is an independent, sovereign state within the United States of America possessed of full powers of state government;

WHEREAS, both the State and the Nation recognize that federal law designates each a sovereign with dominion over their respective governments, territories, and citizens; and that entry into this Compact is not intended nor shall it be construed to cause the sovereignty of either to be diminished; instead, entry into this Compact is intended to provide for the perpetuation, as modified herein, of a longstanding and mutually beneficial resolution of differences as between the Nation and State that arise under federal law and relate to their respective tax powers;

WHEREAS, the United States Supreme Court has affirmed Tribal nations possess the inherent sovereign rights to self-government, which rights include the authority to, among other things, offer the retail sale of tobacco products to a Tribal nation's citizens within their jurisdiction free from State taxation;

WHEREAS, the United States Supreme Court has likewise affirmed Oklahoma tax law applies to retail sales of tobacco products by Tribal nations to non- citizens of the Nation within their jurisdiction, though enforcement of such tax law may be limited by Tribal sovereign immunity;

WHEREAS, the Nation operates several licensed tobacco product retail points of sale, which are located on lands held in trust by the United States for the Nation's benefit or restricted allotments;

WHEREAS, both the State and the Nation recognize the financial, cultural, educational and economic contributions of each sovereign;

WHEREAS, Article 6, Section 8 of the Oklahoma Constitution vests in the Governor of the State of Oklahoma certain authority, to wit:

The Governor shall cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States, and he shall be a conservator of the peace throughout the State.

WHEREAS, the Oklahoma Legislature enacted section 346 of title 68 of the Oklahoma Statutes which provides, in part, that the Oklahoma Governor is authorized to enter cigarette and tobacco compacts with Tribal nations on behalf of the State of Oklahoma;

WHEREAS, the State and Nation recognize and affirm that intergovernmental compacting has provided an effective means for avoiding legal disputes;

WHEREAS, the State and Nation, in a spirit of intergovernmental comity, desire to build on prior compacting work to form a new tobacco products compact;

WHEREAS, in that spirit, the State and Nation have framed this compact (i) to memorialize their agreement respecting Tribal retail sales of tobacco products occurring at premises located on lands held in trust by the United States for the Nation or restricted allotments held by the Nation or citizens of the Nation; and (ii) without prejudice to either party's legal position regarding jurisdictional or other matters that may arise outside of those lands.

ARTICLE II

TERMS OF TAXATION ON SALE OF TOBACCO PRODUCTS

NOW, THEREFORE, the Cherokee Nation, by and through its Principal Chief, Chuck Hoskin Jr., and the State of Oklahoma, by and through its Governor, J. Kevin Stitt, do hereby enter into this Compact, the terms of such Compact to commence on January 1, 2024, for the mutual benefit of the Nation and the State, to-wit:

1. The provisions of this Compact shall establish and govern the Nation's remittance of payments in lieu of tax to the State relating to the Nation's retail sales of cigarettes and other tobacco products at premises located on lands that (i) the United States holds in trust for the benefit of the Nation or (ii) are restricted allotments held by the Nation or a citizen of the Nation. For purposes of this Compact, such lands shall hereinafter be referred to as the "Compact Jurisdiction," when such retail sales are made by (a) businesses owned by the Nation, (b) licensees who are citizens of the Nation, or (c) businesses licensed by the Nation in which the majority interest is owned by the Nation or citizens of the Nation, provided that nothing herein shall prohibit the Nation from enacting any laws and/or regulations regarding the retail sale, use, or possession of cigarettes and other tobacco products that would not be in conflict with the provisions set forth herein. The entities or groups described in clauses (a), (b), and (c) of this paragraph shall be collectively referred to as the "Retailers" or individually as a "Retailer."
 - a. The Parties enter this Compact to establish an enforceable intergovernmental agreement without waiver or prejudice to either's rights and immunities under law except as provided expressly herein and, in such instances, solely for purposes of ensuring implementation of and compliance with this Compact's terms. No provision of this Compact shall be deemed an admission relevant to any matter outside of its express terms, nor shall any of those terms be invoked for any purpose not relating to the Nation's or the Retailers' retail sale of tobacco products within the Compact Jurisdiction.
 - b. Nothing contained herein shall impair the ability of the Oklahoma Tax Commission to

regulate cigarette manufacturers, importers, wholesalers, distributors, distributing agents, jobbers, or warehousemen (“Wholesalers”); *provided*, that the implementation of such regulation shall not be exercised in a manner that interferes with the rights of the Nation, under this Compact.

2. The Nation agrees to:

- a. Purchase and to require Retailers to purchase cigarettes and tobacco products for sale within the Compact Jurisdiction only from Wholesalers who are duly licensed by the State of Oklahoma and agree to allow verification of sales to state officials on a timely basis;
- b. Maintain and provide the State with a current list of all (i) Nation’s Retailers which sell cigarettes and tobacco products within the Compact Jurisdiction and (ii) Wholesalers from which the Nation or its Retailers purchases cigarette and tobacco products for such sale; and
- c. Furnish to the Oklahoma Tax Commission the following information with respect to each of the Nation’s Retailers selling cigarettes and tobacco products within the Compact Jurisdiction:
 - i. The owners’ name(s) and address(es);
 - ii. A list of any tax-related permits held;
 - iii. Documentation or certification that each Retailer is located within the Compact Jurisdiction, such as trust land documentation;
 - iv. The location of offices and business records;
 - v. A copy of any reports by any Wholesalers to the Nation or Retailers documenting all sales of cigarettes and other tobacco products within the Compact Jurisdiction;
 - vi. An annual list of all Wholesalers providing Retailers within the Compact Jurisdiction with cigarettes or tobacco products; and

purposes, to a court in response to a subpoena or other court order, for the State's collection of taxes or manufacturer's escrow payments and related actions, or to enforce the provisions of this Compact through arbitration or court action, shall not constitute a breach of this paragraph.

6. In lieu of any tax, the State and Nation agree that the Nation or Retailers within the Compact Jurisdiction will make an indirect Compact Payment, as described herein, relating to all sales of cigarettes and tobacco products by the Nation or Retailers within the Compact Jurisdiction. The State and Nation agree that the Compact Payment will be made without reference to the Tribal citizenship or non-citizenship status of the cigarette and tobacco products' ultimate purchasing consumer.
7. The Compact Payment for cigarette sales by the Nation or Retailers within the Compact Jurisdiction, which shall mean and include the sale of all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes, shall be equal to one hundred percent (100%) of all State taxes in effect at the time of sale and otherwise applicable to the general sale of such product. The State and Nation agree that the Compact Payment shall be collected and distributed pursuant to ¶¶ 10, 11, and 13 of this Compact in accord with the following:
 - a. State Portion: The State shall receive fifty percent (50%) of all Compact Payment collected on cigarettes.
 - b. Tribal portion: The Nation shall receive fifty percent (50%) of all Compact Payment collected on cigarettes.
8. The Compact Payment for other tobacco product sales by the Nation or Retailers within the Compact Jurisdiction, which shall mean the sale of any cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including Cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared, as well as any other articles or products made of tobacco or substitute therefor, shall be one-hundred percent (100%) of all State taxes in effect at the time of sale and otherwise applicable to the general sale of such product. The State and Nation agree that the Compact Payment shall be collected and distributed pursuant to ¶¶ 10, 11, and 13 of this Compact in accord with the following:
 - a. State Portion: The State shall receive fifty percent (50%) of all Compact Payment collected on other tobacco products.

- b. Tribal Portion: The Nation shall receive fifty percent (50%) of all Compact Payment collected on other tobacco products.

9. The State shall use the State Portion of collected Compact Payment in accord with Oklahoma law, and the Nation shall use the Tribal Portion of collected Compact Payment at its exclusive discretion.

10. In dividing monies pursuant to ¶ 7 and ¶ 8, all fees, administrative costs, and/or processing expenses shall be paid out of the State's share.

11. The Nation or Retailers will make the Compact Payment to the Wholesaler when they purchase cigarette and tobacco products for resale within the Compact Jurisdiction, which payment the Wholesaler will remit to the State in accord with ¶ 12. As provided in section 346 of title 68 of the Oklahoma Statutes, as in effect at the time this Compact is formed, and in consideration of the Nation or Retailers' making of such Compact Payment and agreement the Wholesaler shall remit such payment to the Oklahoma Tax Commission, the sales to and by the Nation or Retailers of cigarettes and other tobacco products within the Compact Jurisdiction shall be exempt from any sales and excise taxes imposed by Title 68 of the Oklahoma Statutes.

12. The State requires, and the Nation and Retailers authorize, all Wholesalers licensed by the State and selling cigarettes or tobacco products to the Nation and Retailers to:
 - a. Provide sufficient documentation to the Nation and to the Oklahoma Tax Commission to demonstrate that the appropriate Compact Payments have been remitted. Such documentation shall be maintained by the Wholesalers for a period of at least five (5) years following distribution or sale of cigarettes or other tobacco products. If any Wholesaler selling cigarettes or tobacco products to the Nation or Retailers for sale within the Compact Jurisdiction fails to properly collect and remit the Compact Payment, the State may take necessary enforcement measures to ensure compliance with this paragraph by the Wholesaler, including, but not limited to, entry and inspection of tobacco-related records of the Wholesaler which are held within and/or without the Compact Jurisdiction.

 - b. The making of the Compact Payment on cigarettes shall be evidenced by use of a single joint stamp, sometimes known as the "unity rate" stamp, which Oklahoma licensed Wholesalers shall purchase from the Oklahoma Tax Commission and affix to packs of cigarettes sold to the Nation. The State shall bear the cost of affixing the single joint/unity rate stamp unless there is a mutual agreement otherwise. The Compact Payment shall be collected by the Oklahoma Tax Commission, by the sale of the single joint/unity rate stamp to Wholesalers.

13. The Oklahoma Tax Commission shall rebate to the Nation the Tribal Portion of the Compact Payment receipts not yet distributed to the Nation not later than thirty (30) days after the end of each calendar month.

14. The State shall notify the Nation in writing when a distribution is to be withheld and/or reduced and must state the reasons therefor, justifications for which shall be-

a. Interference by the Nation in the collection of Compact Payment receipts; and

b. Receipt of duly authorized Court or Arbitration orders to withhold or enjoin payment.

Provided, that the State shall not make any unreasonable withholding or reduction of any rebate amount to which the Nation is entitled under this Compact.

15. The Nation agrees that the Compact Payment and Tribal Portion thereof, as provided for in this Compact, applies only to the Nation or Retailers' retail sales of cigarettes and/or other tobacco products to the consumer within the Compact Jurisdiction. Except for transfers between facilities owned by Nation or Retailers within the Compact Jurisdiction, the Nation agrees it and Retailers will not sell or otherwise transfer cigarettes and/or other tobacco products stamped with the tax stamp authorized under this Compact to anyone other than the consumer at Retailers located in the Compact Jurisdiction, including sales or transfers to other retailers outside the Nation's jurisdiction.

16. The State and Nation further stipulate and agree that:

a. unstamped cigarettes, counterfeited stamped cigarettes, mutilated stamped cigarettes, tobacco products and brands not approved (as reflected by publication on the Oklahoma Attorney General Website), and cigarettes and tobacco products on which a Compact Payment is required to be paid pursuant to this Compact and which has not been paid, are contraband within the Compact Jurisdiction.

b. the Nation shall prohibit the possession or use of cigarette rolling vending machines for commercial purposes, which prohibition shall be at least as stringent as, 68 O.S. § 380, and apply to all persons, businesses, and/or other entities subject to the Nation's jurisdiction.

17. Within the Compact Jurisdiction, the Nation agrees not to itself or to allow Retailers to sell,

distribute, transport, solicit sales for, or in any manner deal with cigarette brands and tobacco products of a manufacturer who does not fully comply with the requirements of 37 Okla. Stat. §§ 600.21 through 600.23 and 68 Okla. Stat. §§ 360.1 through 360.9, and will only deal in tobacco products of complying manufacturers, as evidenced by the placement of the manufacturer's name and its product brands on the list of complying manufacturers and brands maintained on the Oklahoma Attorney General's website.

ARTICLE III GENERAL PROVISIONS

18. In the event of any dispute over the interpretation or performance of this Compact while it is in effect, the following shall provide the parties' sole means of recourse and remedy as against each other:
- a. The goal of the parties shall be to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim. Representatives of the Nation and State shall meet within thirty (30) days of receipt of notice in an effort to resolve the dispute;
 - b. Subject to the limitation set forth in paragraph (c) of this ¶ 18, either party may seek arbitration of the dispute, which arbitration shall proceed in accord with rules that substantially comport with the rules of the American Arbitration Association (AAA). Such arbitration shall be conducted by a single arbitrator who will be selected by the parties; *provided*, that if the parties cannot agree on a single arbitrator, then each party will pick one (1) arbitrator, and those two (2) arbitrators shall select a third; the arbitration will then be conducted by these three (3) arbitrators. The remedies available through arbitration are limited to injunctive and/or declaratory relief for the enforcement of the provisions of this Compact. The parties' consent to the jurisdiction of such arbitration forum for such limited purposes and no other, and each waives immunity solely and exclusively with respect thereto. The parties further agree that any arbitral award issued pursuant to proceedings initiated under this section will be enforceable in a court of proper jurisdiction, for which purposes both consent to suit in federal district court having proper venue; *provided*, that the State does not consent to suit in tribal court, and the Nation does not consent to suit in state court. The expenses of arbitration shall be borne equally by the parties.
 - c. For purposes of this dispute resolution mechanism, each party hereto agrees that it shall not assert, directly or indirectly, any immunity to any action filed in accord with this ¶ 18 and agrees, furthermore, not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver; *provided*, that nothing herein shall be construed to authorize a money judgment, other than to fulfill a party's obligation

hereunder, or for damages for a party's failure to comply with an arbitration decision requiring the payment of monies.

19. This agreement shall remain in effect until December 31, 2034, and shall renew for a successive ten (10) year term on that date and each ten (10) years thereafter unless the Nation or the State provides written notice to the other within one hundred eighty (180) days prior to the occurrence of such date of its intent not to participate further in the Compact. If the Nation or the State provide such notice, the agreement shall not renew and shall terminate at the end of the ten (10) year term then in existence. Nothing in this Compact shall prevent the parties by mutual written agreement from modifying or otherwise terminating this agreement; *provided*, that any mutually agreed-to modification or termination shall not affect rights to performance, including payment, collection, and rebate of Compact Payment under ¶¶ 7 and 8, accruing prior to such modification or termination.
20. Nothing in this Compact shall be deemed to authorize the State or Nation to regulate the other's government or to interfere in any way with the other's election of its governmental officers. This Compact shall not alter tribal, federal, or state civil adjudicatory or criminal jurisdiction.
21. Neither party shall be deemed the drafter of this Compact in the event of any action to interpret its terms. Therefore, the rule of construction that in the case of ambiguity, the ambiguity is construed against the author is not applicable. Furthermore, any rule of construction of ambiguities either in favor of or against a State or Tribal government entity is not applicable to this Compact.
22. Notice shall be by United States mail, postage prepaid. Any notice required hereunder to the State shall be delivered to the Governor of the State of Oklahoma at 2300 N. Lincoln Blvd., Room 212 Oklahoma City, Oklahoma 73105-4890. Notification by the State shall be made by the Governor or designee in writing to the Principal Chief of the Cherokee Nation at P.O. Box 948, Tahlequah, Oklahoma 74465. Notification by the State and Nation shall also be filed with the Office of the Oklahoma Secretary of State.
23. The effective date of this Compact shall be March 1, 2024, when fully executed by all parties.
24. In consideration hereof, the State and Nation each waive and hold the other harmless with respect to any claim or potential claim of breach, known or unknown, relating to the other party's performance or nonperformance under their prior Tobacco Tax Compact.
25. This Compact comprises the entirety of the agreement between the parties hereto on this subject matter. Any and all prior or contemporaneous representations, predictions, warranties or other inducements, however denominated, are merged within the terms of this Compact, and shall not survive its execution. There are no representations, promises, predictions, warranties, inducements or other agreements, however denominated, between the parties other than as set forth herein. This

Compact may not be amended or modified except by written agreement, approved and executed by the parties hereto.

Section 5. Express preservation

The provisions of this Act shall in no way affect any associated existing tax or rebate rates. The same are hereby expressly preserved and shall remain in effect for the new Compact Term unless otherwise altered by the laws of the Cherokee Nation.

Section 6. Provisions as cumulative

The provisions of this act shall be cumulative to existing law except where any term of this act or compact shall supersede provisions of the previous compact or law approved by LA 03-92; LA 44-03; LA 07-04, LA 28-08, and LA-30-13.

Section 7. Severability

The provisions of this act are severable and if any part of the provisions hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Section 8. Effective Date/Emergency Declared

It being immediately necessary for the welfare of the Cherokee Nation, the Council hereby declares that an emergency exists, by reason whereof this Act shall take effect and be in full force upon its passage and approval.

Section 9. Self-Help Contributions

To the extent that this Act involves programs or services to citizens of the Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.

