



## Memorandum

**TO:** Legislative Operating Committee (LOC)  
**FROM:** Patricia Garvey, Oneida Law Office *PG*  
**DATE:** August 1, 2016  
**RE:** Vendor Licensing Law Amendments: Public Meeting Comment Review

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On July 21, 2016 a public meeting was held regarding amendments to the Vendor Licensing law. The public meeting notice stated that these amendments would:

- Remove references to the non-existent License Commission and instead allow Department decisions to be appealed to the Judiciary.
- Remove various procedural requirements from the law and authorize the Licensing Department to promulgate rules or SOPs instead.
- Remove fees from the law and provide the Oneida Licensing Department rulemaking authority to promulgate a fee schedule by rule.
- Delete the listed exemptions and deferments from the licensing/fee requirements (except for services/products provided by another federally recognized tribe or another government, and allow the Department to promulgate rules that establish additional exemptions and deferments.

This memorandum is submitted as a review of the public comments received during the public comment period which ended on July 28, 2016. No comments were received during the public meeting, however written comments were submitted. The public meeting draft with comments, as well as the transcript of the public meeting and written comments received, are attached for your review.

### **Comment 1. Definition of “Business Entity”**

**Sherrole Benton:** The definition of a "business entity" is so broad that includes both natural and artificial persons. I believe this statement conflicts with the statement on line 89 (Section 56.6-1) where license fees will be based upon the "revenue as generated by the business entity with the Nation."

If the proposed license fees, only apply to those business entities that produce revenue with the Oneida Nation and there are implied exemptions to these fees, than my concerns may be alleviated.

However, considering past interpretations of conflicting statements in other mandates, policies, motions, etc., I gather that there aren't any implied exemptions for "business entities" that don't produce revenue with the Oneida Nation.

### *Response.*

Ms. Benton's comment is with the definition of “Business Entity” as being overbroad and the law fails to provide a provision for implied exemptions for entities that don't produce revenue. The definition of “Business Entity” states “[t]he term “entity” is intended to be as broad and encompassing as possible to ensure the jurisdiction of this law.” By design the law is as broad as

possible to ensure jurisdiction. The term is also consistent with other Laws of the Oneida Nation. **See:** Oneida Indian Preference Law. In addition, the term does not list implied exceptions but again this is by design. One of the purposes of the amendments to the Vendor Licensing Law is to allow the Department to promulgate rules that establish additional exemptions and deferments therefore exemptions do not need to be listed in the definition. The definition of “Business entity” is also consistent with the definition of “Vendor’s license” which “means a license issued by the Department to a business entity that provides a service for, or that does business with the Nation.”

There are no recommended changes based on this comment

## **Comment 2. Vendor Information**

**Sherrole Benton (written):** I'm opposed with making all information from any vendor available to any request from anyone. As a buyer for the Oneida Nation Arts Program, my requests for vendor licenses on behalf of our contractors or interns includes information on a W-9 Tax Form and banking information on Direct Deposit forms for check releases, payments, honorariums, and etc.

There is nothing in this section that states the Oneida Nation and/or Vendor Department would hold confidential and financial information in a secure and confidential manner and withhold that information from any and all requests from entities that don't have a valid reason and/or explicit permission from the vendors to see that information or have copies of it. On a side note, I also have concerns with how many times those same documents (W -9 tax forms and direct deposit banking forms) are forwarded via email to other tribal departments and tribal employees and how many computers those confidential documents are on.

### *Response*

Ms. Benton is concerned that the Law makes all information from any vendor available to any request from anyone, and wants the Law to state that confidential and financial information will be held in a secure and confidential manner, withheld from requestors that don't have a valid reason and/or explicit permission from the vendors to access such information.

The specific language of 56.4-2 states “All information given for the purpose of receiving a vendor’s license is:

- (a) Subject to a request for information and available for public inspection as provided in applicable laws and rules of the Nation.

Requests for information are governed by the Open Records and Open Meetings Law. Section 7.4-1 of that law lists various types of records which are to be kept confidential, and exempt from inspection and copying, including:

- (b) Information that, if disclosed, would constitute an unreasonable invasion of personal privacy, unless the disclosure is consented to in writing by the subject of the information.
- (e) Trade secrets and commercial or financial information obtained from a person or business, or such information belonging to the Tribe where the trade secrets or information are proprietary, privileged, or confidential, or where disclosure of the trade secrets or information may cause competitive harm. Nothing contained in this paragraph shall be construed to prevent a person or business from consenting to disclosure.

These Open Records and Open Meetings Law appears to cover most of the issues the commenter was concerned with. Further – the Department would not only be subject to the limitations set out by the Open Records and Open Meetings law, but also by various other Tribal laws and policies, including:

- Section 3.4-8 of the Code of Ethics: “Program personnel shall protect the privileged information to which they have access in the course of official duties and be prudent in the use of information acquired in the course of their duties. Further, they should not use confidential information for any personal gain or in a manner which would be detrimental to the welfare of the employer.”
- Section 1-2 of the Conflict of Interest Policy: The Oneida Tribe asserts its proprietary rights to client lists, trade secrets and any other confidential data generated, developed or commissioned for the Oneida Tribe in the course of an employee’s duties and responsibilities and that all employees, and prospective employees, be made aware of their obligation to uphold such rights.
- The Personnel Policies and Procedures, Section V. D.2.c.I.c., which penalizes employees for “unauthorized disclosure of confidential information or records”

In short, there are several other Tribal laws and policies which already set out requirements that protect information submitted by vendors. An example of a Tribal law that specifically addresses vendor information is the Oneida Indian Preference Law. Section 57.6-8 of the Indian Preference Law states:

*Open Records.* In accordance with the Open Records and Open Meetings law, general, non-proprietary and non-private information provided for the purposes of acquiring certification shall be considered open records and available for public inspection. Provided further, that all information given for purposes of receiving certification, including financial information, is subject to internal audit of the Tribe.

This is a policy call to specifically include exceptions however no change is recommended. As noted above, exceptions were excluded from the Law to give the Department the opportunity to promulgate rules that establish additional exemption and deferments.

### **Comment 3. Determining levels of Adequate Insurance Coverage**

**Sherrole Benton (written):** I’m opposed to the allowing the Vendor Department to have sole discretion on determining levels of adequate insurance coverage and whether insurance is required for vendors in all cases. It should be left to Oneida Risk Management to determine whether a vendor requires insurance coverage and what the adequate level would be for each vendor as stated in the current law.

#### *Response*

Ms Benton disagrees with the Department having sole discretion to determine the levels of insurance a vendor should carry. The current law states: “insurance verification must be provided to the agent before the vendor’s license is issued, the licensing agent will forward the information to Oneida Risk Management for approval; if the applicant/entity has inadequate insurance coverage, the vendor’s license will not be issued.” **56.5-1(b)(4)**. Draft 4 of the amended law states: “All business entities shall obtain and maintain adequate insurance coverage, as determined by the Department.” **56.5-1(a)**.

Ms Benton is correct in that the amended law does not contain any checks and balances for determining what insurance is “adequate”. An alternative is to provide a blanket amount for all vendors and include the requirement in the application. The application for Indian preference requires a \$1million dollar policy naming the Nation as the insured. The language in 56.5-1(b)(4) could be changed to: “All business entities shall obtain and maintain insurance coverage. The department could establish a process through an internal SOP, or by Rule, for determining whether an applicant has adequate insurance coverage and whether Risk Management would need to be part of the process.

#### **Comment 4. External Revenue Transfer**

Sherrole Benton (written): I'm concerned with the amount of external revenue generated by the vendor fees.

The proposed amendments on line 94-96 (Section 56.6-2 Fees for Licensure) states the Vendor Department would transfer 50% of revenue collected from vendor fees to the Trust Department to be placed in the Elder Per Capita Fund.

In 2015, the Vendor Department had a total budget of\$148,911.00 dollars and their external revenue generated from vendor fees was \$183,255.00 dollars. In the proposed amendments, the Vendor Department states, they would only keep 50% of the external revenue generation in vendor fees and transfer the balance to the Trust Dept.

I suggest the Vendor Department keep 100% of the revenue generated from vendor fees in their own budget and use the revenue to 1.) off set Tribal Contribution to the Department, and 2.) add budget line items to use the revenue for professional development of the Vendor Department staff/employees, or for hiring additional or part time staff.

There's always room for improvement in some areas. The excess revenues generated from vendor fees could be used for travel, tuition, and related expenses for the Vendor Dept. staff/employees to seek additional training, education, continuing education units, workshops or refresher courses on such subjects as: Vendor Management, Financial and Banking regulations or confidentiality, Data Management, Supply Management, or other relevant educational programs from educational institutions within the State of Wisconsin.

#### *Response*

Ms. Benton wants the amount generated from vendor fees to be retained by the vendor department to off-set tribal contributions. The current law and the amended law require transfer of 50% of the vendor fee to the Trust Department to be placed in the Elder Per Capita Fund.

This is a policy call as budget and revenue allocation are not typically included in laws. According to the figures included in Ms. Benton’s analysis, the vendor fees collected in 2015 were \$183,255.00 and the budget for the department was \$148,911.00. Allowing the Department to retain the balance would be an increase in the budget by \$34,344.00.

The provision for transfer to the Elder Per Capita Fund could remain as is in the law or deleted altogether or amended to read: “56.6-2. The Department shall retain the fees collected in accordance with this law to off-set the Tribal contribution necessary for Department operations.” This amendment would give the Department unfettered discretion to determine how to spend the increased budget amount. As mentioned, this is a policy call.

## **Comment 5**

**Sherrole Benton (written):** My fourth concern is about the proposed removal the Section 56.10-1 "Exempt Status" in the current law for some vendors who currently aren't required to pay licensing fees. The Oneida Nation Arts Program contracts artistic and creative persons, from professional artists to interns. They perform and/or teach the subjects in the creative arts in five categories of art including: music, performing arts, fine art, literature, film/photography, and arts & crafts including traditional and contemporary arts. We also issue honorariums to some individuals who provide services to the Art Program or win prizes in various artistic creative endeavors.

Our independent contractors/consultants, artists, teachers, and interns aren't producing revenue with the Oneida Nation, and most cases wouldn't be required to have insurance to cover the activities and/or services they perform.

I urge the LRO to retain the list of types of vendor that fall in the categories listed in the "Exempt Status and Deferments" section of the current Oneida Vendor Licensing law. I also believe retaining the emergency deferments of license fee payments is important, especially for Social Service, Health Care programs, and/or when emergency hazardous situations arise for the prompt delivery of service to clients or the local community. In addition, tribal members who receive stipends, including elected officials of tribal boards, committees, and commissions, ought to be exempt from vendor fees.

### *Response*

Ms. Benton wants the list of entities that are exempt from paying the vendor licensing fee to remain in the law. In addition, Ms. Benton requests the one-time deferment of paying the vendor licensing fee for up to 30 days in emergency situations to remain in the law.

The list of exceptions was removed from the law and a new provision was added which authorized the Department to promulgate rules that establish additional exemptions and deferments from the licensing/fee requirements. The Department may promulgate rules creating any exemptions/deferments as may be necessary, following the rulemaking process. By enabling the Department to establish rules governing these matters, the Department can create or remove exemptions/deferments as may be necessary, without it being necessary to amend the law each time.

This is a policy call, but no change is recommended.

## **Comment 6 - Rulemaking Authority**

### **Sherrole Benton (written)**

My next concern is on lines 118-119 of the (Section 56.8-2) where it states and infers that the Department will have to sole authority to establish additional exemptions and deferments from the licensing or fee requirements. My fear is that the Department may make rash and arbitrary decisions about exemptions and deferments or sudden changes without notifying the buyers employed with the Oneida Nation or the vendors who hold or apply for vendor licenses. I urge the LRO to build in some checks and balances into this section of the proposed amendments to ensure that the list of exemption categories and deferments is fair, announced in a public and/or inter-departmental manner, and that public hearings be held when changes are being made to the categories of exemptions and deferments.

*Response*

Ms. Benton is requesting the LRO to put in place checks and balances over the Department's authority to establish exemption/deferment categories through the rulemaking process. Ms Benton is concerned the Department may make rash and arbitrary decisions without notifying the affected parties.

In the amended draft 5 the affected section is 56.8-2 which states: "The Department may promulgate rules that establish additional exemptions and deferments from the licensing or fee requirements of this law."

Through the rulemaking process, all rules are required to be promulgated through a process which requires the Department to publish notice in the Kalihwisaks and on the Tribal website; conduct a public meeting, hold open a public comment period, and to review and consider all public comments received. Further, the rule cannot be adopted until the Department has prepared and submitted a comprehensive list of information to the LOC, including a financial impact statement, which must include statements from all potentially affected entities, identifying how they would be financially affected by the change. The checks and balances requested by Ms. Benton are already in place in the Administrative Rulemaking Law.

There are no recommended changes regarding this comment.

**Conclusion**

There were written comments provided during the public comment period, which the LOC should consider and may incorporate if determined appropriate.