

REGULATORY IMPACT STATEMENT

DEPARTMENT OF TAXATION AND FINANCE

1. Statutory authority: Tax Law, sections 171, subdivision First; 471, subdivisions (1), (4), and (5); 471-e; 475 (not subdivided); and Part D of Chapter 134 of the Laws of 2010. Section 171, subdivision First provides general authority for the Commissioner of Taxation and Finance to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and the performance of his or her duties under the Tax Law. Part D of Chapter 134 of the Laws of 2010, enacted June 21, 2010, and generally applicable beginning September 1, 2010, amended sections 471(1) and 471-e and added section 471(5) to the Tax Law to set forth a dual system for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the use or consumption of the nations or tribes and their members up to their probable demand. As amended by Chapter 136 of the Laws of 2010, section 11 of Part D provided that, within 60 days after the effective date, the department "shall promulgate any rules and regulations and take any other actions necessary to fully implement the provisions of subdivision 5 of section 471 and section 471-e of the tax law" Section 471(1), as amended by Chapter 134, imposes the tax on cigarettes, including all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians, and provides for a dual system to ensure that adequate quantities of stamped but tax-exempt cigarettes are available for purchase by the nation or tribe and its members for their use or consumption based on their probable demand. Section 471-e, as amended by Chapter 134, establishes the "Indian tax exemption coupon system" which Indian nations or tribes may elect to participate in to obtain such tax-exempt cigarettes. Section 471(5), as added by Chapter 134, provides that for any year that this election is not made, the "prior approval" system will be used. Section 471(4) provides that cigarette stamping agents must provide their suppliers and the department with a certification, under penalty of perjury, that cigarettes will not be resold in violation of Article 20 of the Tax Law, which imposes the

cigarette tax. Section 475 authorizes the Commissioner specifically to administer the tax on cigarettes imposed under Article 20 of the Tax Law.

2. Legislative objective: The rule is being proposed pursuant to such authority to administer statutory amendments made by Part D of Chapter 134 of the Laws of 2010 and to take regulatory action to help enable the department to better ensure compliance with the provisions contained in Article 20 of the Tax Law that call for the imposition of cigarette taxes as well as sales of sufficient quantities of untaxed cigarettes for the use or consumption of Indian nations or tribes and their members up to their probable demand. The rule provides specifics concerning the methodology for the statutorily required calculation of probable demand for cigarettes by qualified Indians and the Indian nations or tribes. The rule also provides procedures for the agent certification process required by section 471(4) of the Tax Law.

3. Needs and benefits: This rule is necessary in connection with the implementation of recently enacted legislation concerning sales of cigarettes on Indian reservations on and after September 1, 2010. The rule details the dual statutory system that provides for adequate quantities of stamped but tax-exempt cigarettes to be available for the use or consumption of Indian nations or tribes and their members based on their probable demand. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law. For any year that such election is not made, the prior approval system established in section 471(5) of the Tax Law will be used. Under the prior approval system New York State licensed cigarette stamping agents and wholesale dealers may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers with the prior approval of the Tax Department. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems. The probable demand for tax-exempt use by the Indian nations or tribes and their members is set based on Census data and federal consumption figures. For purposes of this calculation for the twelve-month period beginning September

1, 2010, that is contained in the rule, these figures are derived from the United States Department of Agriculture, Economic Research Service.

The rule also provides procedures to be followed for the agent certification process required by section 471(4) of the Tax Law, such as certification signature and swearing requirements, as well as the time periods covered by the certification.

4. Costs: (a) Costs to regulated parties. The rule applies to approximately 73 New York State licensed cigarette stamping agents and approximately 265 New York State licensed wholesale dealers (including the licensed cigarette agents). Although the implementation of the statutory amendments requiring the use of a dual system to provide adequate quantities of stamped tax-exempt cigarettes to Indian nations and tribes and those requiring the certification of stamping agents will have fiscal consequences in terms of collection and payment of taxes that are already due under the Tax Law, the consequences are the result of the statute imposing the taxes. There is no tax liability impact for the implementation of and continuing compliance with this rule. Requirements for both the use of the dual system and the agent certification process are statutory. The provisions of the rule regarding the calculation of probable demand merely provide greater specificity to the calculation required by the statute, and the provisions regarding agent certification merely set forth procedures to comply with the statute. Any agents or wholesale dealers that make sales involving Indian reservations are required to use the prior approval system as to the amount of stamped untaxed cigarettes that they may sell to an Indian nation or tribe or reservation cigarette seller on its reservation if the nation or tribe has not timely elected to participate in the Indian tax exemption coupon system. The act of obtaining prior approval from the Tax Department by agents or wholesale dealers under the prior approval system required by statute is simple and accomplished electronically, resulting in minimal administrative costs.

(b) Costs to the State and its local governments including this agency. The costs of obtaining and providing the coupons, processing refunds, developing forms that stamping agents are required to file, and

issuing the technical memorandum to explain the rule are all attributable to the implementation of the statutory changes. There will be minimal administrative costs to the department associated with granting prior approval to agents and wholesale dealers to sell stamped untaxed cigarettes to Indian nations or tribes and reservation cigarette sellers. Although the implementation of the statutory amendments regarding the dual system for ensuring adequate quantities of stamped tax-exempt cigarettes to Indian nations or tribes and the certification of stamping agents will have fiscal consequences in terms of collection and payment of taxes that are already due under the Tax Law, the consequences are the result of the statute imposing the taxes. The rule itself does not have any State or local fiscal consequences apart from the statutory amendments.

(c) Information and methodology. This analysis is based on review of the rule and statutory requirements and discussions among personnel from the Department's Office of Tax Policy Analysis, Office of Counsel, Office of Tax Enforcement, and the Office of Budget and Management Analysis, including the Management Analysis and Project Services Bureau.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule does not impose any additional reporting or paperwork requirements on agents or wholesale dealers making sales of untaxed cigarettes to an Indian nation or tribe, a reservation cigarette seller, or any other person on a reservation.

7. Duplication: There are no relevant rules or other legal requirements of the federal or state governments in effect that duplicate, overlap, or conflict with this rule.

8. Alternatives: There are no alternatives to the statutory dual system that provides for adequate quantities of stamped tax-exempt cigarettes to be available for purchase for the use or consumption of Indian nations or tribes and their members based on their probable demand. This rule introduces a probable demand formula developed by the department to estimate the demand for cigarettes by Indian nations or tribes and their

members. The formula uses federal data because it is the most reliable and consistent source of information regarding cigarette demand. It is noted that the methodology was previously published in the March 10, 2010, issue of the State Register in the department's proposed rule making number TAF-10-10-00004-P, upon which public comments were invited. A medical doctor submitted comments on the proposed rule making stating that the method of computing probable demand of cigarettes by the Indian nations or tribes and their members resulted in a calculation that is too high. The doctor suggested that, rather than basing the calculation on federal data, a survey should be commissioned every five years. The department believes that the rule's reference to widely available federal per capita data is appropriate, and the methodology will "leave ample room for legitimately tax-exempt sales" consistent with *Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc.* (512 US 61, 75-76).

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: There is no time frame necessary for compliance with the provisions of the rule. The rule was previously adopted as an emergency measure that took effect on June 22, 2010, and applies to all cigarettes sold on Indian reservations on and after September 1, 2010, in the manner provided in Part D of Chapter 134 of the Laws of 2010. This emergency readoption of the rule merely ensures that its provisions remain effective until it can be adopted as a permanent rule.