

REGULATORY FLEXIBILITY ANALYSIS
FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS
DEPARTMENT OF TAXATION AND FINANCE

1. Effect of rule: The rule will apply to the approximately 73 New York State licensed cigarette stamping agents and the approximately 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents), some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule does not distinguish between different business sizes and applies to all stamping agents and wholesale dealers in the same manner, regardless of the size of the business operation. Under the statute, agents or wholesale dealers that make sales involving Indian reservations will be required to use either a prior approval system pursuant to section 471(5) of the Tax Law, or, with respect to Indian nations or tribes that timely elect, the Indian tax exemption coupon system under section 471-e of the Tax Law, to determine the amount of stamped untaxed cigarettes they may sell to an Indian nation or tribe or reservation cigarette seller on its reservation. Approximately 10 agents currently make sales involving Indian reservations. The amount of stamped untaxed cigarettes under either system is determined based upon the probable demand of the qualified Indians on the nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand.

The agent certification process described by the rule is applicable to all agents pursuant to section 471(4) of the Tax Law.

2. Compliance requirements: The rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or compliance requirements on local governments.

The rule took effect on June 22, 2010, the date that the Notice of Emergency Adoption was filed, and applies to all cigarettes sold on or after September 1, 2010. Any evidence related to probable demand that the Indian nations or tribes submit by July 31 will be taken into consideration prior to the period beginning September 1. The Indian nations or tribes may elect by August 15 to participate in the Indian tax exemption coupon system. With respect to an Indian nation or tribe that so elects, agents or wholesale dealers will use the Indian tax exemption coupon system to determine the amount of stamped untaxed cigarettes that may be sold to the Indian nation or tribe or reservation cigarette sellers on the reservation. For any Indian nation or tribe that does not make such election, agents or wholesale dealers that make sales involving that nation's or tribe's reservation will be required to use the prior approval system as to the amount of stamped untaxed cigarettes that they may sell to the Indian nation or tribe or reservation cigarette sellers on its reservation. The act of obtaining prior approval from the Tax Department under this system will be simple.

Section 471(4) of the Tax Law provides that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Tax Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule provides further guidance pertaining to certification requirements.

3. Professional services: The rule imposes no requirements for professional services upon small businesses or local governments. However, an affected stamping agent may decide to use professional services, in addition to those it may already employ to prepare its tax returns, to comply with the certification paperwork required pursuant to the statute and set forth in the rule.

4. Compliance costs: There are no compliance costs to local governments as a result of this rule.

The rule applies to approximately 73 New York State licensed cigarette stamping agents and 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents). There will be no tax

liability impact for the implementation of and continuing compliance with this rule. Any agents or wholesale dealers that make sales involving Indian reservations will be required to obtain prior approval from the Tax Department for their sales of untaxed packages of cigarettes involving Indian reservations when the reservation's Indian nation or tribe has not timely elected to participate in the Indian tax exemption coupon system. The act of obtaining such prior approval by agents or wholesale dealers under the prior approval system required by statute will be simple and result in minimal administrative costs.

The requirement for agents to provide the certification to their suppliers and to the department is statutory.

5. Economic and Technological Feasibility: The rule does not impose any economic or technological compliance burdens on small businesses or local governments

6. Minimizing adverse impact: 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. While there are no alternatives to this dual statutory system, the rule provides specifics concerning the methodology for the statutorily required calculation of probable demand. The 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 rulemaking number TAF-10-10-00004-P, upon which public comments were invited. A medical doctor submitted comments on the proposed rulemaking 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).

This rule also relates to the statutory requirement that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. In this regard the rule provides further guidance pertaining to certification requirements.

7. Small business and local government participation: The following organizations were sent a copy of the rule and are being given an opportunity to participate in the rule's development: the New York State Association of Wholesale Marketers and Distributors; the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. In addition, a copy of the rule was sent to all New York State licensed cigarette stamping agents and wholesale dealers.