REGULATORY IMPACT STATEMENT

DEPARTMENT OF TAXATION AND FINANCE

1. Statutory authority: Tax Law, sections 171, First; 1116(b)(1); 1142(1) and (8); and 1250 (not subdivided) and L. 2008, Ch. 57, Part KK-1. Section 171, First provides for the Commissioner of Taxation and Finance to make reasonable rules, consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Section 1116(b)(1), amended by Part KK-1 of Chapter 57 of the Laws of 2008 ("Part KK-1"), provides limitations on the exemptions for sales by certain exempt organizations. Sections 1142(1) and (8) of Article 28 and section 1250 of Article 29 of the Tax Law provide for the adoption of rules that are appropriate to carry out and jointly administer the New York State and local sales and compensating use taxes imposed by and pursuant to the authority of these Articles.

2. Legislative objectives: This rule is proposed pursuant to the above authority to update the sales and use tax regulations and provide the department's interpretations regarding the sales tax on sales by certain exempt organizations. The rule updates the regulations to reflect Part KK-1, which requires certain exempt organizations to collect sales tax on additional sales, including collecting tax on sales at online stores as they would if the organizations were operating brick-and-mortar stores.

3. Needs and benefits: This rule updates the regulations. Part KK-1 amended section 1116(b)(1) of the Tax Law to expand the existing "shop or store" provision so that certain additional sales of tangible personal property and services are subject to sales tax when sold by organizations that are otherwise exempt from tax pursuant to sections 1116(a)(4), (5), and (6) of the Tax Law. These provisions exempt religious, charitable, scientific, testing for public safety, literary, and educational organizations; organizations that foster national or international amateur sports competition; organizations for the prevention of cruelty to children or animals;

veterans' posts and organizations; and Indian nations or tribes (collectively referred to as “exempt organizations”). Generally, retail sales of tangible personal property from shops or stores operated by these exempt organizations have historically been subject to tax. Sections 529.7(i), 529.8(k), and 529.9(d) of the regulations are being amended to reflect the additional sales made taxable by Part KK-1, which include sales of consumer utility services and services to real property; remote sales (*e.g.*, sales over the Internet) of tangible personal property if made with a degree of regularity, frequency, and continuity; and leases and rentals of tangible personal property, whether or not made at a shop or store. The rule also provides that if an exempt organization operates a shop or store and sells similar items of tangible personal property by any other means (*e.g.*, over the Internet, by mail order, door-to-door, or at auction), those other sales are considered to be made by the shop or store. Because the new legislation applies to remote auction sales, this rule provides guidance regarding when both remote and traditional auction sales are considered to be made with a degree of regularity, frequency, and continuity, as provided in Part KK-1 and the department’s existing regulations. The rule also makes editorial and technical changes to the affected regulations. This rule harmonizes the regulations with current law and provides guidance with respect to other taxable sales made by exempt organizations.

4. Costs: (a) Costs to regulated parties. There are limited costs to exempt organizations for the implementation of and continuing compliance with this rule. Three aspects of the rule itself will result in a total estimated increase in state and local sales tax revenue in the amount of $2.6 million annually, beginning with the 2009-2010 fiscal year. Consequently, exempt organizations will incur costs associated with collecting this tax from their customers and remitting it to the department.

The first aspect provides that if an exempt organization operates a shop or store and makes other sales of similar taxable items, sales tax must be collected on these other sales. Because the majority of these sales are taxable pursuant to Part KK-1, the resulting sales tax revenue attributable to this rule should be minimal and is accounted for as auction sales in the estimate below. Any costs associated with collecting this tax should also be minimal because these organizations are already operating shops or stores and should be in compliance with the Tax Law.

The second aspect provides, in general, that traditional auction sales by an exempt organization are subject to tax if the organization holds three or more auction events (as described in the rule) during a calendar year. In this case, the sales would be considered made with a degree of regularity, frequency, and continuity. Data from sales tax returns does not provide information about auction sales by exempt organizations. Thus, this estimate is based on indirect sources and the expertise of department personnel whose responsibilities encompass exempt organization activities. The National Center for Charitable Statistics, in conjunction with the Urban Institute, has compiled data that includes the financial information of tax-exempt organizations in New York. The data is culled from Internal Revenue Service Form 990, which is filed by organizations that are exempt from federal tax and includes information related to their revenues. These organizations do not necessarily parallel the exempt organizations affected by this rule; however, Form 990 is the best available data regarding sources of exempt organization revenue. New York "net special events income" and "inventory sales and other income," as reported, totaled $888 million in 2006. The department estimated that approximately 10%, or $88 million, was derived from traditional auction sales, but that only 75%, or $67 million, of those sales were taxable. The department believes the most common auction pattern is for an exempt organization to have a spring and/or a fall fund-raising auction and that only one-third of auction sales come from organizations that hold more than two auctions per year. This results in approximately $22 million in taxable sales from organizations having more than two auctions a year. Under the rule, if more than two auctions are planned in a calendar year, tax must be collected for all taxable sales, including those during the first two auctions. Therefore, most of the $22 million would come from organizations that know they will be having more than two events, making all of their auction sales taxable. However, there will be a small portion of that $22 million attributable to organizations that had not planned a third auction. For those organizations, only sales made at the third and subsequent auctions are taxable. These sales were accounted for by reducing the $22 million by 5% to $20.8 million. Applying an average combined state and local sales tax rate of 8% resulted in an estimated increase in tax of approximately $1.6 million. Exempt organizations would incur routine costs of registering for sales tax purposes, if not already registered, collecting this tax from their customers, and filing returns.

The last aspect concerns traditional auctions held at commercial auction houses or at other auction premises. There is no available data on auctions of this nature. However, anecdotal evidence suggests that the amount of sales at these auctions is minimal. The department estimated that not more than $12.5 million of taxable property would be subject to tax under this aspect of the rule, resulting in an increase in revenue of approximately $1 million (average combined rate of 8%). Exempt organizations would incur costs associated with collecting this tax and filing returns.

It is noted that while these exempt organizations become liable for the tax at issue, the tax is collected from their customers by the organizations as trustees for the state and local governments imposing tax.

The department estimates that it should take an exempt organization that is not registered about 2 hours to learn its new responsibilities and to file Form DTF-17, *Application to Register for a Sales Tax Certificate of Authority*. Once registered, the organization must collect tax from customers, maintain accurate sales records, file returns, and remit tax due. (Most exempt organizations currently maintain records for other purposes.) Depending upon the extent of sales, the department estimates it should average about 5 hours per sales-tax quarter to accomplish these tasks. Assuming an hourly rate of $29 an hour, the average cost to comply with this rule for the first time would be approximately $200. After registration, the quarterly cost of compliance would be approximately $145.

(b) Costs to the state and its local governments including this agency. There are no costs to the state or its local governments for the implementation and continuing administration of this rule. To the extent that any exempt organizations are required to collect tax based on the interpretations in this rule alone, this agency will incur minimal costs associated with registering these organizations for sales tax purposes, processing their tax returns, and collecting tax due.

(c) Information and methodology. The information and methodology are described above and additionally are based on discussions among personnel from the department's Office of Tax Policy Analysis, Management Analysis and Project Services Bureau, Office of Budget and Management Analysis, and Office of Counsel.

5. Local government mandates: None.

6. Paperwork: Among other responsibilities, the Tax Law requires "persons required to collect tax" (Tax Law, section 1131[1]) to register for sales tax purpose, keep records, file returns, and pay over to the department sales tax collected from customers. For tax exempt organizations affected by Part KK-1, this rule imposes no requirements beyond those required by law. To the extent that any exempt organizations are required to collect tax based on the interpretations in this rule alone, such organizations must meet their statutory responsibilities.

7. Duplication: None.

8. Alternatives: No alternatives were considered for those nondiscretionary provisions of the rule that simply reflect Part KK-1. In developing this rule, the department reached out to 23 organizations, as mentioned in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and the Rural Area Flexibility Analysis filed with this rule. No comments were received. The department considered whether to continue its current non-taxable approaches to collateral sales by exempt organizations that operate shops or stores and to traditional auction sales by these organizations. However, in the interest of consistent treatment, the department did not consider this viable. In addressing auction sales, the department also considered the need to quantify "sales… made with a degree of regularity, frequency, and continuity." While this phrase is

new to Part KK-1, it is a long-standing regulatory concept that has traditionally been determined based on the facts and circumstances of each situation. However, because the department has not previously issued general guidance on auction sales by exempt organizations, the department concluded that some guidance was appropriate. The three-or-more threshold prescribed by the rule is considered by the department to be reasonable, while still affording exempt organizations some latitude to conduct their fund-raising auctions without being responsible for the collection of tax.

9. Federal standards: This rule does not exceed any minimum standards of the federal government.

10. Compliance schedule: Part KK-1, as reflected in the rule, became effective on September 1, 2008. On August 11, 2008, the department published TSB-M-08(5)S, *Tax Law Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations Effective September 1, 2008*, to provide guidance with respect to the new legislation. Exempt organizations should currently be in compliance with these provisions. This rule will take effect on January 1, 2009, giving exempt organizations time to comply. Once this rule has been adopted and published in the *State Register*, the department intends to issue further guidance on taxable sales by exempt organizations.