

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

1. Effect of rule: There are 73 licensed cigarettes agents; approximately 265 licensed wholesale dealers (including the licensed cigarette agents), 103 of which are strictly vending machine operators; and approximately 22,000 licensed retail dealers (including approximately 4,500 that have multiple locations), some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act, which will be affected by this rule.

2. Compliance requirements: Part D of Chapter 134 of the Laws of 2010, requires all agents, wholesale dealers and retail dealers, including small businesses, to pay an amount of tax on all cigarettes possessed for sale in New York State and unaffixed cigarette tax stamps in inventory as of the close of business on June 30, 2010, based on the increased rate of tax. This amount of tax due must be paid by September 20, 2010. The rule, which has been adopted as an emergency measure, provides that returns must be filed by September 20, 2010, showing the quantity of all cigarettes and unaffixed stamps as of the June 30, 2010, close of business inventory. The rule provides procedures relating to the tax on the inventory, including rules for the physical inventory of cigarettes in vending machines.

3. Professional services: The rule itself imposes no requirements for professional services upon regulated parties that are small businesses. Depending on the nature or volume of a taxpayer's inventory of cigarettes and/or unaffixed tax stamps, a taxpayer may deem it necessary to employ additional professional services in order to comply with the provisions of the floor tax imposed by the statute.

4. Compliance costs: Section 5 of Part D of Chapter 134 of the Laws of 2010 increased the tax on cigarettes imposed by Article 20 from \$2.75 to \$4.35 for each 20 cigarettes or fraction thereof. While there will

be no additional costs imposed on state or local governments, including the department, by the rule, the statutory amendments necessitate some form changes. The impact of the statutory increase in cigarette tax, which is ultimately borne by consumers, depends on the volumes involved. There is no tax liability impact on regulated parties that are small businesses, for the implementation of and continuing compliance with the rule as the increased cigarette tax reflected in the rule and the tax on the inventory based on the increased rate of tax are imposed by statute. Regulated parties that are small businesses needed to conduct an inventory of the cigarettes and any unaffixed cigarette tax stamps as of the close of business on June 30, 2010. Based on this inventory, returns are required to be filed and any additional tax on this inventory based on the increased cigarette tax will need to be paid. This is necessitated by section 13 of Part D of Chapter 134 of the Laws of 2010, which imposes a tax on such inventory and sets the payment date.

Amendments to reflect the increased rate of cigarette tax in section 74.3 of the regulations, relating to the commissions allowed to cigarette agents, will affect commissions allowed. The current percentage rates and related threshold for determining commissions are not amended by the rule and will apply to the increased rate of cigarette tax. As a result of the statutory increase, annual stamping agent commissions (which are set by regulation and are paid out as a fraction of the applicable tax rate) will increase by approximately \$850,000 in the first full year of the increase. Smaller agents will likely receive the benefits of the commission rate applying to the increased tax for a longer period through the calendar year than larger agents because the commission rate is higher for amounts up to a specified dollar amount.

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 majority of the amendments made by the rule are a direct result of statutory changes. An alternative to amending section 74.3 of the regulations as is done by the rule would have been to reduce the rates of commissions allowed to agents in order to maintain the same amount of commission

per stamp. Retaining the rate of commissions and applying that rate to the higher amount of tax results in an increase in the commissions on a per stamp basis. This is consistent with the handling of commissions for previous rate increases. Section 79.2 of the regulations provides for taking a physical inventory of all cigarettes possessed in the State as of close of business on June 30, 2010. Subdivision (b) of section 79.2 provides for estimating of vending machines that cannot be physically inventoried of close of business on June 30, 2010, rather than requiring each vending machine in the state to be physically inventoried. Allowing commissions to increase and providing an alternative for physical inventorying of each vending machine in the state will have a positive impact on regulated parties that are small businesses.

7. Small business and local government participation: The following organizations have been given an opportunity to participate in the rule's development: the Association of Towns of New York State; Empire State Development, Division of Small Business; the National Federation of Independent Businesses; the New York Association of Convenience Stores; the New York State Association Counties; the New York Conference of Mayors and Municipal Officials; the New York State Department of State, Office of Coastal, Local Government, and Community Sustainability; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York State Association of Wholesale Marketers and Distributors.