

RURAL AREA FLEXIBILITY ANALYSIS

DEPARTMENT OF TAXATION AND FINANCE

1. Types and estimated numbers of rural areas: 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 agents), some of which are located in rural areas as defined by section 102(10) of the State Administrative Procedure Act. Some of the Indian reservations are located in rural areas. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile). The rule affects all stamping agents and wholesale dealers in the same way; it does not distinguish between stamping agents and wholesale dealers located in rural, suburban, or metropolitan areas of this State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: 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 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.

The rule does not require professional services. 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. The rule does not impose any requirements on public entities in rural areas.

3. Costs: There are no variations in costs for public or private concerns in rural areas. The regulated parties to which this rule is applicable are approximately 73 New York State licensed cigarette stamping agents and approximately 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents). With regard to the affected agents or wholesale dealers located in rural areas or elsewhere, 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 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.

4. Minimizing adverse impact: The rule does not distinguish between cigarette stamping agents and wholesale dealers located in rural areas and those located elsewhere. 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.

5. Rural area 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. These organizations include members in rural areas. In addition, a copy of the rule was sent to all New York State Indian nations or tribes and all New York State licensed cigarette stamping agents and wholesale dealers, some of which are located in rural areas.