

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, section 471, and section 475 of the Tax Law, the First Deputy Commissioner of Taxation and Finance, being duly authorized to act due to the vacancy in the office of the Commissioner of Taxation and Finance, hereby proposes to make and adopt the following amendment to the Cigarette Tax Regulations, as published in Article 1 of Subchapter I of Chapter I of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. A new section 74.6 is added to such regulations to read as follows:

74.6 Agent certification (Tax Law sections 471(1) and (4))

(a) “General.” (1) Pursuant to section 471(4) of the Tax Law, no person, including but not limited to a tobacco product manufacturer, may sell unstamped packages of cigarettes to any agent until the person selling the unstamped packages of cigarettes (the supplier) receives a certification from such agent purchasing the unstamped packages of cigarettes certifying, in good faith and under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for resale in or into New York State will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(2) Before an agent may purchase unstamped packages of cigarettes for resale in or into New York State, the agent must provide to the supplier and to the department, in good faith, a certification, under penalty of perjury, that none of the unstamped packages of cigarettes the agent purchases from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law.

(b) “Contents of certification.” The certification required by section 471(4) of the Tax Law shall provide, under penalty of perjury, that none of the unstamped packages of cigarettes the agent will purchase for

resale in or into New York State from the supplier will be resold by the agent in violation of the terms of Article 20 of the Tax Law or in violation of any rule or regulation adopted pursuant to Article 20. The certification must specifically provide that:

- (1) the agent will not resell unstamped packages of cigarettes in or into New York State, except as specifically authorized by law;
 - (2) the agent will not affix stamps to packages of cigarettes unless the certifications provided for in section 1399-pp of the Public Health Law pursuant to section 480-b of the Tax Law have been provided by the cigarette manufacturer;
 - (3) the agent will not affix stamps to packages of cigarettes that have not been certified by the cigarette manufacturer and marked as provided for in section 156-c of the Executive Law pursuant to section 480-b of the Tax Law;
 - (4) the certification applies to each of the agent's purchases for the entire period covered by the certification;
 - (5) the agent will only make sales of untaxed packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with subdivision (f) of this section.
- (c) "List of suppliers." Certifications filed with the department must include a list of suppliers from whom the agent will purchase or otherwise acquire unstamped packages of cigarettes.
- (d) "Period covered by the certification."
- (1) The certification must be filed with the supplier and with the department prior to the first purchase of unstamped packages of cigarettes by the agent from the supplier on or after the date this rule first applies.
 - (2) An amended certification and list of suppliers must be filed with the department before the first purchase of unstamped packages of cigarettes from a supplier not listed on the current certification.

(3) The agent will be required to provide a new certification to each supplier and to the department each year on or before the date prescribed by the department.

(e) "Certification signature requirements." (1) The proprietor must sign the certification on behalf of a proprietorship; a general partner must sign the certification on behalf of a partnership; and the president, vice president, treasurer, assistant treasurer, chief accounting officer, or other officer duly authorized must sign on behalf of a corporation.

(2) The certification must be sworn to or affirmed:

(i) before a New York State notary public or any other person authorized by section 298 of the Real Property Law if the certification is sworn to or affirmed in New York State, or

(ii) before any officer authorized by, and in the manner described in, section 299 of the Real Property Law if the certification is sworn to or affirmed outside New York State. The proof of authority of the officer issuing the oath or witnessing the affirmation must meet the requirements of section 299-a of the Real Property Law.

(f) "Sales of cigarettes to Indian nations or tribes and reservation cigarette sellers."

(1) In order to ensure an adequate quantity of cigarettes on qualified reservations that may be purchased by an Indian nation or tribe for its official use or by qualified Indians on their qualified reservations without payment of taxes, the Indian nation or tribe or reservation cigarette seller shall be entitled to purchase up to a certain number of untaxed packages of cigarettes, as determined pursuant to this subdivision.

(2) The amount of untaxed packages of cigarettes for each Indian nation or tribe shall be an amount determined by the department 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.

(i) Probable demand shall be determined by reference to, among other data, the United States average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year,

multiplied by the number of qualified Indians for each such affected Indian nation or tribe. Each September, the department will determine the annual amount of untaxed packages of cigarettes for each of the Indian nations or tribes for the forthcoming twelve-month period beginning December 1. The annual amount of untaxed packages of cigarettes will be determined using a probable demand methodology as follows: (A) the most recent U.S. Census data on tribal populations in New York State is obtained and then increased by ten percent for each Indian nation or tribe to allow for potential undercounting in Census enumeration and for nation or tribal use and (B) each Indian nation's or tribe's adjusted population is then multiplied by average annual per capita consumption amounts, as produced annually by the federal government, for cigarettes. The estimated annual consumption amounts for each Indian nation or tribe are then prorated to quarterly periods for each of the four quarters beginning with the first day of December, March, June, and September. The quarterly consumption amounts are then rounded upward to accommodate cases of 300 packs of 20 cigarettes. Using the methodology above for the twelve-month period beginning December 1, 2009, the quarterly amounts of untaxed packages of cigarettes for each of the Indian nations or tribes for any quarterly period during which these provisions apply are calculated in the table below. As indicated in subparagraph (ii) of this paragraph, these amounts are subject to adjustment based on evidence provided by the Indian nations or tribes as to their actual consumption amounts for these periods.

Indian Nation or Tribe:	NYS Population (2000 census)	Quarterly Cigarette Amount (Packs)
Cayuga	947	20,100
Oneida	1,473	31,200
Onondaga	2,866	60,600
Poospatuck (Unkechaug)	376	8,100
Seneca (Allegany, Cattaraugus, Oil Springs)	7,967	168,600
Shinnecock	1,915	40,500
St. Regis Mohawk	13,784	291,600
Tonawanda Band of Senecas	256	5,700
Tuscarora	1,025	21,900
Total	30,610	648,300

(ii) In making a determination of probable demand, the department shall take into consideration any evidence submitted by the recognized governing body of an Indian nation or tribe relating to such probable demand (e.g., a verifiable record of previous sales to qualified Indians or other statistical evidence) and/or relating to the amount needed for such nation's or tribe's official use. In the case of the annual determination made by the department in September, any such evidence submitted by October 31 will be taken into consideration and any adjustments will be made prior to the twelve-month period beginning December 1 to which the determination relates.

(iii) The department shall publish on its Web site the amount of untaxed packages of cigarettes that may be sold for each Indian nation or tribe during each quarter.

(3) Agents must report to the department sales of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a qualified reservation. Such report must be made within 24 hours of such sales (regardless of whether such time period ends on a Saturday, Sunday, or public holiday) and in a manner as prescribed by the department. From these reports, the department will determine

and publish information on its Web site concerning the remaining amount of cigarettes that may be sold during the quarter with respect to each Indian nation or tribe without exceeding the amount determined pursuant to paragraph (2) of this subdivision.

(4) Before selling any amount of untaxed packages of cigarettes to an Indian nation or tribe, a reservation cigarette seller or any other person on a qualified reservation, agents must exercise due diligence in determining that the sale of such untaxed packages of cigarettes will not cause the total amount of untaxed packages of cigarettes to exceed the amount determined pursuant to paragraph (2) of this subdivision. Specifically, agents must ascertain from the information published by the department pursuant to paragraph (3) of this subdivision that the untaxed packages of cigarettes may be sold without exceeding the amount of untaxed packages of cigarettes determined pursuant to this subdivision or, if the system set forth in section 471-e of the Tax Law is in effect, such sales must be made in accordance with such system.

(5) The sale by an agent of untaxed packages of cigarettes in excess of the amount determined pursuant to paragraph (2) of this subdivision constitutes a violation of the terms of Article 20 of the Tax Law.

(6) If any provision contained in this section, or the application thereof, shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this section, but shall be confined to the particular provision directly involved in the controversy in which such judgment shall have been rendered, and the applicability of such provision to persons not parties to the controversy in which such judgment shall have been rendered, or to other circumstances, shall not be affected thereby.

Section 2. This rule shall take effect on the date that the Notice of Adoption is published in the State Register and shall apply to tax periods commencing with the first quarter, as described in this rule, beginning after such date. The department shall consider any evidence relating to probable demand submitted prior to the effective date of the rule by the recognized governing body of an Indian nation or tribe and shall make the

determination of probable demand for the initial quarterly period or periods to which the rule applies as soon as practicable following the effective date and prior to the initial quarterly period to which the rule applies.

Dated: Albany, New York
February 23, 2010

Jamie Woodward
Acting Commissioner and Executive Deputy
Commissioner of Taxation and Finance