

# PROPOSED RULEMAKING

## DEPARTMENT OF REVENUE

[61 PA. CODE CH. 71]

### Master Settlement Agreement

The Department of Revenue (Department), under authority contained in section 3 of the Tobacco Settlement Agreement Act (35 P. S. § 5673), in the definition of the term "units sold" and in section 6 of the Fiscal Code (72 P. S. § 6), proposes to amend Chapter 71 (relating to general provisions) by adding §§ 71.31—71.33 (relating to definitions; additional cigarette stamping agent responsibilities; and tobacco product manufacturer responsibilities) to read as set forth in Annex A.

#### *Purpose of Regulation*

These proposed regulations provide guidance to cigarette stamping agents, tobacco product manufacturers and nonparticipating tobacco product manufacturers with regard to the Tobacco Settlement Agreement Act (35 P. S. §§ 5671—5675) (act).

#### *Explanation of Regulatory Requirements*

Section 71.31 defines several terms for use in the section and §§ 71.32 and 71.33. Section 71.32 sets forth cigarette stamping agent report requirements as necessitated by the act. Section 71.33 sets forth the tobacco product manufacturer responsibilities as established in the act.

#### *Affected Parties*

Cigarette stamping agents and tobacco product manufacturers will be affected by the regulations.

#### *Fiscal Impact*

The Department has determined that the proposed regulations will have no significant fiscal impact on the Commonwealth. Costs to the Department to implement the requirements of the act will include one or two clerical positions and one systems analyst, as well as related equipment and supplies.

#### *Paperwork*

The proposed regulations will not require significant additional paperwork for the public or the Commonwealth. Any additional paperwork and recordkeeping requirements are the result of the provisions of the act.

#### *Effectiveness/Sunset Date*

The proposed regulations will become effective upon final publication in the *Pennsylvania Bulletin*. The regulations are scheduled for review within 5 years of final publication. No sunset date has been assigned.

#### *Contact Person*

Interested persons are invited to submit in writing any comments, suggestions or objections regarding the proposed regulations to Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061, within 30 days after the date of the publication of this notice in the *Pennsylvania Bulletin*.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 4, 2001, the Department submit-

ted a copy of these proposed regulations to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Finance. In addition to submitting the proposed regulations, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed regulations, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed regulations to which an objection has been made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulations, by the Department, the General Assembly and the Governor of objections raised.

LARRY P. WILLIAMS,  
*Secretary*

**Fiscal Note:** 15-416. (1) General Fund; (2) Implementing Year 2000-01 is \$129,000; (3) 1st Succeeding Year 2001-02 is \$119,000; 3rd Succeeding Year 2003-04 is \$124,000; 4th Succeeding Year 2004-05 is \$124,000; 5th Succeeding Year 2005-06 is \$124,000; (4) 1999-00 Program—\$131.267 million; 1998-99 Program—\$119.089 million; 1997-98 Program—\$108.106 million; General Government Operations; (8) recommends adoption.

#### Annex A

#### TITLE 61. REVENUE

#### PART I. DEPARTMENT OF REVENUE

#### Subpart B. GENERAL FUND REVENUES

#### ARTICLE III. CIGARETTE AND BEVERAGE TAXES

#### CHAPTER 71. GENERAL PROVISIONS

#### GENERAL

#### MASTER SETTLEMENT AGREEMENT

#### § 71.31. Definitions.

The following words and terms, when used in this section and §§ 71.32 and 71.33 (relating to additional cigarette stamping agent responsibilities; and tobacco product manufacturer responsibilities), have the following meanings, unless the context clearly indicates otherwise:

*Affiliate*—A person who, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more.

*Cigarette*—A product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains any of the following:

(i) A roll of tobacco wrapped in paper or in any substance not containing tobacco.

(ii) Tobacco, in any form, that is functional in the product, which, because of its appearance, the type of

tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

(iii) A roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (i).

(iv) A roll-your-own, which means any tobacco which, because of its appearance, type, packaging or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this subparagraph, 0.09 ounces of roll-your-own tobacco shall constitute one individual cigarette.

*Nonparticipating tobacco product manufacturer*—A tobacco product manufacturer who does not participate in the Master Settlement Agreement (published at 30 Pa.B. 5619 (October 28, 2000)) entered into on November 23, 1998, by the Commonwealth and leading United States tobacco product manufacturers in the action entitled *Commonwealth v. Philip Morris Inc., et al.*, Philadelphia County, April term, No. 97-2443, January 13, 1999, 40 Pa. D. & C. 4th 225 (1999).

*Qualified escrow fund*—An escrow arrangement with a Federally chartered or State-chartered financial institution that has no affiliation with any tobacco product manufacturer and has assets of at least \$1 billion in which the escrow arrangement:

(i) Requires that the financial institution hold the principal of the escrowed funds for the benefit of releasing parties.

(ii) Prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the principal of the funds except as consistent with section 4 of the Tobacco Settlement Agreement Act (35 P. S. § 5674).

*Tobacco product manufacturer*—

(i) A person that after June 22, 2000, directly and not exclusively through any affiliate does one of the following:

(A) Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where the importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to the cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of the cigarettes does not market or advertise the cigarettes in the United States).

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States.

(C) Becomes a successor of a person described in clause (A) or (B).

(ii) The term does not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls under subparagraph (i)(A), (B) or (C).

*Units sold*—The number of individual cigarettes sold in this Commonwealth by the applicable tobacco product manufacturer during the year in question, as measured

by taxes collected by the Commonwealth on packs, or roll-your-own tobacco containers, bearing the tax stamp of the Commonwealth required under section 1215 of the TRC (72 P. S. § 8215).

#### **§ 71.32. Additional cigarette stamping agent responsibilities.**

(a) The Tobacco Settlement Agreement Act (35 P. S. §§ 5671—5675), requires that the Department collect and maintain data relating to the number of Pennsylvania State Cigarette Excise Tax stamps affixed to packages of cigarettes. As part of the monthly cigarette tax report required by § 71.9(a) (relating to cigarette stamping agent report requirements), every licensed cigarette stamping agent shall complete and attach to the report a schedule, in the form as is prescribed by the Department, to account for and reconcile the number of Pennsylvania Cigarette Excise Tax stamps affixed to packages of cigarettes by the agent during the monthly period covered by the associated cigarette tax report. The schedule shall contain the following information:

(1) A listing of the name and address of each nonparticipating tobacco product manufacturer from which the cigarette stamping agent made direct purchases of packages of cigarettes that were actually manufactured by the manufacturer, and the number of Pennsylvania Cigarette Excise Tax stamps affixed to the packages of cigarettes purchased from each manufacturer.

(2) A listing of the name and address of all suppliers, other than nonparticipating tobacco product manufacturers, from which the cigarette stamping agent made purchases of cigarettes, including cigarettes purchased from one tobacco product manufacturer that were actually manufactured by another manufacturer. This listing shall include all purchases of cigarettes made by the cigarette stamping agent during the month, other than directly from the actual manufacturer of the cigarettes.

(3) For each individual supplier listed under paragraphs (1) and (2), a listing of all brands of cigarettes purchased from the supplier and the number of Pennsylvania Cigarette Excise Tax stamps affixed to cigarette packages by the cigarette stamping agent with respect to each brand.

(4) For each brand of cigarettes listed for each supplier under paragraph (3), the following additional information, if known:

(i) The name and address of the tobacco product manufacturer of the cigarettes.

(ii) The name and address of the person or entity first responsible for the cigarettes being designated or identified for sale in the United States.

(b) Every cigarette stamping agent shall keep complete and accurate records of cigarettes sold and shall preserve and keep for 4 years all invoices, bills of lading, sales records, copies of bills of sale, inventory at the close of each period for which a report is required and other pertinent papers and documents relating to the manufacture, purchase, sale or disposition of cigarettes.

(c) The books, records, other papers and documents that are required to be kept shall be made available in the English language, and shall, at all times during the usual business hours of the day, be subject to inspection by the authorized agents and employees of the Office of Attorney General or the Department of Revenue.

(d) A monthly report that is not accompanied by the schedule prescribed by this section shall be considered

incomplete. Extensions of time for filing purposes may be granted at the discretion of the Department.

(e) The failure of a licensed cigarette stamping agent to comply with this section by not furnishing the schedule required by subsection (a), or by not furnishing complete and accurate information as required by the schedule, shall be deemed a violation of section 1276(a) of the TRC (72 P.S. § 8276(a)) and the agent's license shall be subject to suspension or revocation under section 1276(b) of the TRC.

**§ 71.33. Tobacco product manufacturer responsibilities.**

(a) A tobacco product manufacturer engaged in the activity of selling cigarettes in this Commonwealth (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after June 22, 2000, shall do one of the following:

(1) Become a participating manufacturer and adhere to the terms and provisions of the Master Settlement Agreement.

(2) Establish and contribute to a qualified escrow fund. If this provision is selected, the manufacturer shall:

(i) Certify to the Office of Attorney General, by April 15, 2001, or April 15 following the calendar year of activity, that a qualified escrow fund was established and provide the Office of Attorney General with a copy of the escrow agreement signed by the tobacco product manufacturer and financial institution.

(ii) Make a payment to the qualified escrow fund by April 15th of the year following the year in question according to the following base amounts which shall be adjusted for inflation each year under the formula in Exhibit C of the Master Settlement Agreement:

(A) June 22, 2000 through December 31, 2000: \$0.0104712 per unit sold.

(B) 2001 and 2002: \$0.0136125 per unit sold.

(C) 2003 through 2006: \$0.0167539 per unit sold.

(D) 2007 and each year thereafter: \$0.0188482 per unit sold.

(E) The Office of Attorney General will provide the adjusted figures to known nonparticipating tobacco product manufacturers by March of each year.

(iii) Certify to the Office of Attorney General by April 15th of each year the applicable number of units sold in this Commonwealth during the prior calendar year and the amount deposited in the qualified escrow fund. Verification of the deposit shall be evidenced by a statement from the financial institution.

(b) Every nonparticipating tobacco product manufacturer shall keep complete and accurate records of cigarettes sold and shall preserve and keep for 4 years all invoices, bills of lading, sales records, copies of bills of sale, inventory at the close of each period for which a report is required and other pertinent papers and documents relating to the manufacture, purchase, sale or disposition of cigarettes.

(c) The books, records, other papers and documents that are required to be kept shall be made available in the English language, and shall, at all times during the usual business hours of the day, be subject to inspection by the authorized agents and employees of the Office of Attorney General or the Department of Revenue.

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