

State of Nebraska

Nebraska Department of Revenue

NOTICE is given that the Nebraska Department of Revenue will hold a regulation hearing pursuant to Neb. Rev. Stat. § 84-907 on September 30, 2021, beginning at 10:00 A.M., at the Nebraska State Office Building, 301 Centennial Mall South, Room Lower-Level A. The purpose of this hearing is to take testimony and receive into evidence any documentation concerning the adoption, repeal, and amendment of regulations within Title 316 of the Nebraska Administrative Code as identified below.

The proposed changes (1) amend Title 316, Neb. Admin. Code Ch. 57, Cigarette Tax to (a) modernize and simplify language; eliminate redundancies; and add or amend definitions due to the enactment of LB 397 (2019) and DOR guidance; (b) require electronic filing; (c) repeal regulations on minimum pricing; (d) narrow the Native American tribal member exemption to reflect federal law and Neb. Rev. Stat. § 77-2602.05; and (e) move to this chapter a regulation requiring quarterly payments by tobacco products manufacturers; and (2) repeal outright Title 316, Neb. Admin. Code, Ch. 58, Tobacco Product Manufacturers in its entirety because the regulations largely repeat statutory language.

Title 316, Ch. 57, Cigarette Tax

The following regulations are amended:

REG-57-001 DEFINITIONS
REG-57-002 APPLICATION FOR PERMIT TO AFFIX AUTHORIZED TAX STAMPS
REG-57-003 PURCHASE AND SALE OF AUTHORIZED TAX STAMPS
REG-57-005 AFFIXING AUTHORIZED TAX STAMPS.
REG-57-006 INSPECTION OF AUTHORIZED TAX STAMPS.
REG-57-007 INSPECTION OF RETAIL AND VENDING MACHINE DISPLAYS
REG-57-008. REPORTS
REG-57-010 ~~FILING~~PETITION FOR APPROVAL OF A LOWER COST
REG-57-019 EXEMPTION FOR NATIVE AMERICAN INDIANS
REG-57-021 TOBACCO PRODUCT MANUFACTURERS; REQUIREMENT OF QUARTERLY PAYMENTS.

The following regulations are repealed outright:

REG-57-009 CARTAGE COST.
REG-57-011 MEETING COMPETITION
REG-57-012 OFFERS OF CIGARETTE SALES
REG-57-013 INTENT TO INJURE COMPETITION
REG-57-014 OFFERS OF MERCHANDISE COMBINED WITH CIGARETTES
REG-57-015 OFFERS OF PREMIUM COUPONS
REG-57-016 COUPONS FOR A REDUCTION IN PRICE

REG-57-017 CASE DISCOUNTS GIVEN TO WHOLESALERS OR RETAILERS
REG-57-018 SHELF PAYMENTS TO RETAILERS BY MANUFACTURERS
REG-57-020 MINIMUM SELLING PRICE

Title 316, Ch. 58, Tobacco Product Manufacturers

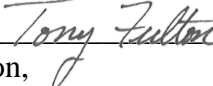
The following regulations are repealed outright:

REG-58-001 STATEMENT OF PURPOSE
REG-58-002 DEFINITIONS
REG-58-003 MANUFACTURER'S CERTIFICATION
REG-58-004 DIRECTORY OF CIGARETTES APPROVED FOR SALE IN NEBRASKA
REG-58-005 REQUIREMENT OF QUARTERLY PAYMENTS
REG-58-006 REPORTING REQUIREMENTS OF STAMPING AGENTS
REG-58-007 REVOCATION, SUSPENSION OR ADMINISTRATIVE PENALTY FOR STAMPING AGENT
REG-58-008 SEIZURE OF CONTRABAND CIGARETTES

A complete copy of the regulations and the descriptions of fiscal impact are available in the office of the Tax Commissioner, 301 Centennial Mall South, Lincoln, NE, Second Floor, or may be viewed at the websites for the Nebraska Department of Revenue www.revenue.nebraska.gov or the Secretary of State (www.sos.ne.gov).

The opportunity to be heard will be offered to any interested person upon written request to Tony Fulton, Tax Commissioner, Nebraska Department of Revenue, PO Box 94818, Lincoln, NE 68509. Unscheduled testimony will be heard following the scheduled testimony at the hearing. Any interested party may submit a written statement by 5:00 PM on September 30, 2021, to be made part of the record. Individuals requiring physical or sensory accommodations, please contact the Nebraska Department of Revenue at 301 Centennial Mall South, Lincoln, NE 68509 or by calling 402-471-2971 or TDD 402-471-5740, no later than September 23, 2021.

Dated this 25th day of August, 2021



Tony Fulton,
Tax Commissioner

PRELIMINARY FISCAL IMPACT STATEMENT

Agency: Revenue	
Title: 316	Prepared by: Jeneé Saffold
Chapter: 57	Date prepared: April 5, 2021
Subject: Cigarette Tax Regulations	Telephone: (402) 471-5924

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(X)	(X)	(X)
Increased Costs	()	()	()
Decreased Costs	()	()	()
Increased Revenue	()	()	()
Decreased Revenue	()	()	()
Indeterminable	()	()	()

Provide an Estimated Cost & Description of Impact:

State Agency:

Political
Subdivision:

Regulated
Public:

If indeterminable, explain why:

Closer conformity to federal law to narrow the exemption for cigarette sales to Native American Indians in Reg-57-019 is required by Neb. Rev. Stat. § 77-2602.05, the Non-Participating Manufacturer Adjustment Settlement Agreement, and the Attorney General's Office. There may be an indeterminable increase in the General and Cash Funds due to this narrowing of the exemption.

PRELIMINARY FISCAL IMPACT STATEMENT

Agency: Revenue	
Title: 316	Prepared by: Jeneé Saffold
Chapter: 58	Date prepared: June 9, 2020
Subject: Tobacco Product Manufacturers Regulations	Telephone: (402) 471-5924

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(X)	(X)	(X)
Increased Costs	()	()	()
Decreased Costs	()	()	()
Increased Revenue	()	()	()
Decreased Revenue	()	()	()
Indeterminable	()	()	()

Provide an Estimated Cost & Description of Impact:

State Agency:

Political
Subdivision:

Regulated
Public:

If indeterminable, explain why:

NEBRASKA DEPARTMENT OF REVENUE

CIGARETTE TAX REGULATIONS

Title 316, Neb. Admin. Code Ch. 57 §§ 001-003, 005, 006, 008, 010, 019, and 021 are amended.
Title 316, Neb. Admin. Code §§ 009, and 011 to 018 and 020 are repealed.

REG-57-001 DEFINITIONS

~~001.01 Authorized tax stamps shall mean any devices, stamps, labels, or prints manufactured, printed, or made as prescribed by the Tax Commissioner and includes decalcomania tax stamps.~~

~~001.02 Ordinary business hours shall include those hours in which the retailer or wholesaler makes available cigarettes for sale to purchasers.~~

~~001.03 Package shall mean a container in which individual cigarettes are wrapped or boxed. A container in which packages of cigarettes are wrapped or boxed is not included in the term package for the purpose of determining those containers to which the tax stamp is to be applied.~~

~~001.03(A) A container, in which less than twenty cigarettes are wrapped or boxed, is considered a package of cigarettes for Nebraska cigarette tax purposes and is subject to the Nebraska cigarette tax.~~

~~001.04 Vending machine shall mean any coin-operated mechanical device or contrivance used for the automatic sale, dispensation, or merchandising of cigarettes in their original package.~~

~~001.05 Cancellation of tax stamps shall mean affixation of the stamp so that it cannot be transferred to another package. A tax stamp that has been securely attached so that it may not be removed is considered to have been canceled.~~

~~001.06 A manufacturer is any person or business who manufactures, assembles, fabricates, or produces cigarettes from raw materials for sale to licensed cigarette wholesalers or other persons.~~

001.01 The definitions found in Neb. Rev. Stat. §§ 69-2702, 69-2705, and 77-2601 apply to these regulations.

001.02 In addition to the definitions found in Neb. Rev. Stat. §§ 69-2702, 69-2705, and 77-2601 the following definitions apply.

001.03 Authorized tax stamps means any devices, stamps, labels, or prints manufactured, printed, or made as prescribed by the Tax Commissioner and includes decalcomania tax stamps.

001.04 Cancellation of tax stamps means affixing the stamp so that it cannot be transferred to another package. A tax stamp that has been securely attached so that it may not be removed without tearing it is considered to have been canceled.

001.05 Cigarette has the same meaning as in Neb. Rev. Stat. § 77-2601(5).

001.05(A) A tobacco product labeled as anything other than a cigarette or not bearing a label is a cigarette if the product meets two or more of the following criteria:

001.05(A)(1) A pack contains 20 to 25 sticks;

001.05(A)(2) A carton contains eight or ten packs;

001.05(A)(3) The stick length is 2¾ inches to 5 inches and stick diameter is equal or less than 8.20 millimeters;

001.05(A)(4) The product is sold in soft packs, hard packs, flip-top boxes, or clamshell packages; or

001.05(A)(5) The product is sold with a cigarette-type filter.

001.05(B) A tobacco product labeled as anything other than a cigarette, or not bearing a label, including, but not limited to certain little cigars, certain filtered and non-filtered little cigars, and certain flavored little cigars that either:

001.05(B)(1) Meets the criteria that requires the manufacturer or importer to be responsible for reporting and paying the federal excise tax on the tobacco product reports in accordance with 26 U.S.C. §§ 5701(a) and 5702(a); or

001.05(B)(2) Meets all of the following criteria-

001.05(B)(2)(a) The tobacco product is wrapped in leaf tobacco, or reconstituted sheet tobacco that is approximately two thirds or more tobacco which did not in the reconstitution process lose its tobacco character (e.g., taste, aroma, identifiable chemical components) and is of a color consistent with that of the natural leaf tobaccos traditionally used as a wrapper for cigars.

001.05(B)(2)(b) The tobacco product filler is substantially of tobaccos unlike those in ordinary cigarettes, does not have any added flavorings which would cause the tobaccos to have the taste or aroma generally attributed to cigarettes, and does not contain flue-cured or aromatic (Oriental) tobaccos.

001.05(B)(2)(c) The package for a tobacco product to be offered as a cigar declares it to be a cigar (e.g., "small cigar," "filtered cigar," "flavored cigar," or "little cigar") in direct conjunction with, parallel to, and in substantially the same conspicuousness of type and background as the brand name of the tobacco product each time the brand name appears on the package, and all marketing materials and advertising clearly present the product to the consumer as a cigar without contrary representations or implications that the product is a cigarette.

001.05(C) The exception from the definition of cigarette provided in § 001.05(B) does not apply to tobacco products produced or distributed by any manufacturer or importer the Nebraska Attorney General deems to pose an elevated risk for noncompliance under Neb. Rev. Stat. § 69-2707.01(3)(a) to (h).

001.06 Complete readable authorized tax stamp means a stamp that can be identified as a Nebraska cigarette stamp bearing a legible 5 digit stamp number or two thirds of the tax stamp.

001.07 DOR means the Nebraska Department of Revenue.

REG-57-002 APPLICATION FOR PERMIT TO AFFIX AUTHORIZED TAX STAMPS

002.01 Application for an annual Nebraska Wholesale Cigarette Dealer's Permit shall Stamping Agent's License will be made to the Nebraska Department of Revenue DOR on forms furnished by the Department DOR.

002.02 The ~~applying wholesale cigarette dealer~~ person applying for a Stamping Agent's License (applicant) will include with the application, a fee of \$500.00 and shall furnish, with the application, proof that the ~~dealer~~ applicant has obtained a municipal or county permit as a wholesale dealer in accordance with section Neb. Rev. Stat. § 28-1420 of the Nebraska Revised Statutes. An applicant for a Nonresident Stamping Agent's License will also provide a letter of acceptance by a registered agent for service or process.

002.03 If the application is approved, the ~~wholesale cigarette dealer~~ must furnish a corporate surety bond which is conditioned to faithfully comply with all revenue laws pertaining to the sale and use of cigarettes. Such bond must be furnished before the permit will be issued and may accompany the application. Such bond shall be for \$1,000.00 unless the Tax Commissioner shall require a larger amount.

002.04 The ~~annual Nebraska Wholesale Cigarette Dealer's Permit~~ shall run from January 1 to December 31.

REG-57-003. PURCHASE AND SALE OF AUTHORIZED TAX STAMPS

003.01 Only ~~wholesale dealers~~ stamping agents holding a valid Nebraska ~~Wholesale Cigarette Dealer's Permit~~ Stamping Agent's License may purchase and/or affix authorized tax stamps.

003.02 ~~Such wholesale cigarette dealers shall~~ Stamping agents will purchase from the ~~Department of Revenue~~ authorized tax stamps ~~from DOR~~. Payment must be made at the time of purchase. ~~Deferred payments are not permitted and payment must be in the form of either certified check, cashier's check, bank draft, or bank money order.~~

003.03 ~~For packages of 20 or fewer cigarettes and for packages containing more than 20 cigarettes, tax~~ Authorized tax stamps may be purchased only in ~~units~~ quantities as prescribed by the ~~Nebraska Department of Revenue~~ DOR.

003.04 ~~Wholesale cigarette dealers~~ Stamping agents purchasing authorized tax stamps are permitted to purchase ~~such~~ authorized tax stamps at a discount of ~~one and eighty-five hundredths percent (1.85%)~~ as a commission for affixing ~~such~~ authorized tax stamps.

003.05 ~~Every wholesale cigarette dealer~~ Stamping agents who violate any of the provisions of sections Neb. Rev. Stat. §§ 77-2601 through 77-2622 of the ~~Nebraska Revised Statutes~~ or any stamping agent who violates any provision of ~~section~~ Neb. Rev. Stat. § 69-2708 of the ~~Nebraska Revised Statutes~~ or any rules and regulations adopted by the ~~Department of Revenue~~ DOR, including failure to timely file the required reports, may be subject to a penalty not to exceed ~~one thousand dollars~~ \$1,000 and have ~~its~~ their license or discount privileges suspended or revoked.

003.06 Stamping agents are subject to a penalty not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000 for affixing an authorized tax stamp to a package of cigarettes not included in the directory.

REG-57-005. AFFIXING AUTHORIZED TAX STAMPS.

005.01 Authorized tax stamps of the proper denomination are to be affixed to each individual package of cigarettes ~~in such manner as to~~ so that they adhere securely in accordance with the instructions of the manufacturer of the stamps. ~~If packages of cigarettes are wrapped in, or covered by, some substance to which the tax stamps do not readily adhere, such wrapper or covering must be roughened or treated so that the tax stamps will adhere securely thereto.~~

005.02 Authorized tax stamps are to be affixed ~~only to the bottom end of each package of twenty (20) or more cigarettes.~~

005.03 ~~Authorized tax stamps of the proper denomination are to be affixed to the lid or top of flat, round, or other nonstandard packages of cigarettes in such manner as to assure the destruction of the stamp when the package is opened~~ and so that the stamp is visibly revealed when the cigarettes are displayed.

005.04~~03~~ Authorized tax stamps are not to be affixed to the carton, case, or container of cigarettes, other than the individual package.

005.05~~04~~ ~~When~~ Within 48 hours after a duly licensed ~~wholesale cigarette dealer~~ stamping agent opens an original, sealed, manufacturer's shipping container or case of cigarettes in order to affix Nebraska authorized tax stamps or the tax stamps or impressions of any other state, all packages of cigarettes in the container or case are to be stamped in one continuous operation.

005.06~~05~~ Duly licensed ~~wholesale cigarette dealers~~ stamping agents may not have in their possession packages of cigarettes, other than those in the original, sealed, manufacturer's shipping container or case to which authorized tax stamps or tax stamps or impressions of any other state have not been affixed.

005.07~~06~~ Authorized tax stamps must be canceled prior to the time of sale by the ~~wholesale dealer~~ stamping agent. ~~Cancellation of tax stamps is made when the stamp is affixed so it may not be removed without tearing it.~~

REG-57-006. INSPECTION OF AUTHORIZED TAX STAMPS.

006.01 When the Tax Commissioner's ~~or his or her~~ duly authorized agents or representatives shall ~~find~~ identify packages of cigarettes on which one complete readable authorized tax stamp cannot be found on each package, ~~he or she shall direct the wholesale cigarette dealer~~ stamping agent responsible for the stamping and distribution of ~~such the~~ cigarettes to must take immediate corrective action ~~to correct such conditions~~. If such correction is not made by ~~the wholesale cigarette dealer, the Tax Commissioner may suspend or revoke the wholesale cigarette dealer's privilege to affix tax stamps to packages of cigarettes.~~ The applicable stamping agent or retailer may be subject to appropriate penalties.

006.02 This regulation does not limit in any way the penalties provided by statute for actions by any person with intent to defraud the state or evade the provisions of the state cigarette tax laws.

REG-57-007 INSPECTION OF RETAIL AND VENDING MACHINE DISPLAYS

007.01 All packages of cigarettes are to be arranged in display cases, display counters, or cigarette racks so as to visibly reveal the authorized tax stamp if such arrangement is feasible ~~with the type of display case, display counter, or cigarette rack that is being used.~~ Any person who owns or uses a display case, display counter, or cigarette rack ~~which that is so constructed so that it is not feasible to arrange the cigarette packages contained therein in a manner to visibly reveal the authorized tax stamp , upon oral request of the Tax Commissioner or his or her authorized agent and without any additional notice,~~ is required to unlock or open any and all such cases, counters, or racks for a complete examination and inspection of the cigarette packages upon request of an authorized DOR agent. ~~therein for the purpose of ascertaining that the packages bear authorized tax stamps.~~

007.02 All packages of cigarettes are to be packed in cigarette vending machines in such a manner that, if any packages are visible while in the machine, the tax stamps ~~must be are clearly visible to the public and to the Tax Commissioner or his or her authorized agent.~~ This paragraph will in no way limit the inspection of the interior of the vending machine by the Tax Commissioner or his or her authorized agent if such inspection is required of the owner or operator of the machine.

007.03 Any person who owns or operates a cigarette vending machine ~~which that is so constructed so that any packages of cigarettes it contains are not visible to the public, upon oral request of the Tax Commissioner or his or her authorized agent and without any additional notice,~~ is required to unlock and open any and all such machines owned or operated for a complete examination and inspection of the cigarette packages ~~therein for the purpose of ascertaining that the packages bear authorized tax stamps.~~

007.04 If any such vending machine is located on premises not owned or controlled by the owner or operator of the vending machine located thereon, access to the interior of ~~such the machine must be provided at all reasonable times during ordinary business hours to the Tax Commissioner or his or her authorized agent for the purpose of examining and inspecting the cigarette packages therein to ascertaining if that the packages bear authorized tax stamps.~~

REG-57-008. REPORTS

008.01 Every person, firm, or association receiving cigarettes subject to a tax ~~on the use thereof~~ from sources within or ~~from sources~~ outside the boundaries of Nebraska, upon which the tax has not been paid, ~~shall~~ must pay ~~such the~~ tax and make a report of the receipt of ~~such~~ untaxed cigarettes to the ~~Nebraska Department of Revenue~~ DOR on or before the ~~tenth~~ 15th day of each month for cigarettes received during the preceding month. ~~Such~~ These reports ~~shall~~ will state the quantity of cigarettes received (~~number of packages~~), listed by brand name, date, ~~amount paid~~, and from whom received.

008.02 Every licensed ~~wholesale cigarette dealer and stamping agent as defined in Reg-58-002.08~~ must file monthly reports ~~upon forms~~ electronically in the format authorized by the ~~Nebraska Department of Revenue~~ DOR. The reports must be filed on or before the ~~tenth~~ 15th day of each month for business conducted during the preceding month and provide information as required by DOR the Tax Commissioner. ~~See Reg-58-006 for other monthly reporting requirements.~~ The report ~~shall be~~ is considered timely filed if properly addressed to the ~~Nebraska Department of Revenue and postmarked on or before the tenth~~ electronically submitted to DOR by 11:59 p.m. on the 15th day of each month. If the ~~tenth~~ 15th day of the month falls on a Saturday, Sunday, or approved holiday, the next day not a Saturday, Sunday, or approved holiday shall be the final timely filing date.

008.03 If the tax is not paid and the required report is not received on or before the ~~tenth~~ 15th day of the month following the month in which the unstamped cigarettes were received, the report ~~shall be deemed~~ is delinquent and a penalty of 25% of the tax due will be added to the tax liability, together with interest at the rate specified in ~~section~~ Neb. Rev. Stat. § 45-104.02 of the ~~Nebraska Revised Statutes~~, from the due date of the return to the date payment is received.

008.04 ~~Monthly reports shall be mailed to the Department of Revenue, P.O. Box 94818, Lincoln, Nebraska 68509-4818.~~

008.05 Records supporting deductions claimed on the monthly reports must be retained by the ~~wholesaler~~ stamping agent, unless required by the Tax Commissioner to attach ~~such~~ supporting documentation to the monthly reports. These records ~~shall~~ include:

008.054(A) Copies of tax reports made to other states by a Nebraska ~~wholesale cigarette dealers~~ stamping agent for cigarettes retailed outside Nebraska;

008.054(B) Invoices to manufacturers for damaged merchandise returned to the factory for credit; and

008.054(C) Memo invoices for transfers of cigarettes from one ~~wholesaler~~ stamping agent to another, or from one ~~wholesaler~~ stamping agent to a factory representative for transfer of unstamped cigarettes.

008.065 When sales are made for delivery into other states where there is not a state tax report to support these sales, ~~it shall be necessary that each wholesaler~~ stamping agent must execute a standard exemption form for each such transaction which shows (a) the date of sale, (b) the name and address of the consignee, and (c) the number of cigarettes sold.
Wholesalers

008.06 Stamping agents located outside ~~the State of~~ Nebraska will be required to submit a report of Nebraska stamped cigarettes sold to Nebraska retailers. ~~Such~~ The report shall will include (a) the date of the sale, (b) the name and address of the retailer, and (c) the number of ~~cartons~~ cigarettes sold. They may also be required, upon request, to furnish copies of tax reports made to other states ~~as sales~~ that show sales made into Nebraska.

~~008.07~~ 008.07 When stamped cigarettes are returned to the factory manufacturer, an invoice must be ~~written charging the factory with~~ prepared by the stamping agent describing the product and the number of packages returned. The ~~affidavit executed by the manufacturer~~ must execute an affidavit that (a) indicates the number of stamped or unstamped packages received, (b) indicates the number of packages received bearing authorized tax stamps, and (c) ~~attests to the destroying thereof~~ that the packages were destroyed.

008.08 Any cigarette tax shortage, evidenced by the entries and calculations on each monthly cigarette tax report, must be paid for by separate ~~check~~ electronic payment attached to when the applicable tax report is filed. The discount as described in Reg-57-003.04 is not allowed on shortages. Any tax shortage discovered by ~~the Nebraska Department of Revenue DOR,~~ upon ~~office~~ audit of each tax report, will be billed currently to the licensee and ~~such licensee stamping agent, who must electronically~~ will remit by certified check, cashier's check, bank draft, or bank money order the amount of ~~such~~ the shortage ~~by return mail~~. The ~~licensee stamping agent~~ is not permitted to average-out any monthly shortage with any other month ~~which that~~ shows that more authorized tax stamps were used than the number of cigarettes which were recorded as taxable.

~~REG-57-009. CARTAGE COST.~~

~~009.01 If a wholesaler is also a retailer, then the cost to the wholesaler for those cigarettes which he or she subsequently sells at retail shall have added thereto the cartage cost of the cigarettes.~~

~~009.02 If a retailer performs any part of the cartage, then the cartage cost shall be added to the retailer's cost of doing business. The cartage cost shall be deemed to be three-quarters of one percent of the basic cost of the cigarettes to the wholesaler in the absence of filing with the Nebraska Department of Revenue satisfactory proof of lesser or higher cost. Such cartage cost shall be added to the retailer's cost of the cigarettes before adding the retailer's cost of doing business.~~

REG-57-010 FILING PETITION FOR APPROVAL OF A LOWER COST

010.01 Any wholesaler making wholesale sales of cigarettes to licensed Nebraska retailers or any retailer making retail sales of cigarettes in Nebraska who desires to prove that ~~his or her~~ the cost of doing business in Nebraska is less than the statutory presumptive cost of doing business computed according to the Unfair Cigarette Sales Act ~~shall~~ may submit a petition for approval of a lower cost along with actual cost data to the DOR State Tax Commissioner. The statutory presumptive cost of doing business ~~must be~~ is used in determining cigarette sales prices until approval has been granted by the ~~State~~ Tax Commissioner to sell at a lower cost.

010.02 ~~Petition~~ The petition for approval of a lower cost ~~shall~~ must include the following cost information:

010.02(A) Any person making sales of cigarettes in Nebraska for more than a ~~twelve (12)~~ month period ~~shall~~ will submit actual cost data for the ~~twelve (12)~~ month period ending no more than 90 days prior to the submission of the petition, and actual cost data for each of the petitioner's locations ~~desiring that intend~~ to sell cigarettes at less than their the statutory presumptive cost of doing business.

010.02(B) Any person making sales of cigarettes in Nebraska for less than a ~~twelve (12)~~ month period ~~shall~~ will submit actual cost data for the period beginning with the start of business and ending no more than 90 days prior to the date submission of the petition of for approval of a lower cost was submitted for each of the petitioner's locations ~~desiring to sell cigarettes at less than his or her statutory presumptive cost of doing business~~. In addition, the petitioner will submit an explanation ~~must be submitted with the petition~~ of any expected differences between the petitioner's actual cost data and the costs for the remaining months of the initial ~~twelve (12)~~ month period of operations.

010.03 Upon ~~receipt of~~ receiving the petition for approval of a lower cost and actual cost data, the ~~State Tax Commissioner shall~~, will do one of the following within 45 days:

010.03(A) Approve the petition ~~of a lower cost~~;

010.03(B) Request additional cost data or an explanation of the previously submitted information. ~~Any requested information shall be submitted as directed by the Department of Revenue;~~

010.03(C) Schedule the matter for hearing ~~which shall be set~~ at least 20 days, but not more than 60 days, ~~from~~ after the date of mailing ~~by certified mail~~ of the hearing notice. ~~The hearing notice may require that the petitioner provide specified documents to the Department of Revenue prior to or at the hearing; or~~

010.03(D) Return as incomplete any petition for approval ~~of a lower cost~~ and actual cost data that does not contain the necessary information ~~as required in Reg-57-010.10 and Reg-57-010.11.~~

010.04 ~~The Department of Revenue shall~~ DOR must notify the petitioner of the Tax Commissioner's determination within 45 days after the hearing ~~of the State Tax Commissioner's determination~~. Any order of approval ~~shall contain an expiration date and will include~~ the percentage of cost of doing business as determined by the ~~Department of Revenue~~ DOR for the petitioner's specific location.

010.04(A) The percentage of cost of doing business shall must be used by the petitioner ~~in~~ when establishing the minimum selling price for cigarettes that are to be sold at a specific location.

010.04(B) The initial order of approval shall will also contain an expiration date not to exceed 18 months from the date of the ~~order of~~ approval. The expiration date should coincide with the petitioner's calendar or fiscal year end. Each subsequent order of approval shall ~~not~~ cannot exceed ~~twelve (12)~~ additional months. ~~Actual cost data and supporting documentation for each subsequent must be submitted sixty (60) day period prior to the expiration date of the order.~~

010.05 Any information or evidence filed pursuant to this regulation shall be treated as is confidential and shall not be disclosed by the State Tax Commissioner, or his or her employees or agents, except for administrative review at a hearing for the purpose of providing the petitioner an opportunity to explain or answer any questions concerning the cost information submitted, or for the furnishing of the information to other states who allow similar privileges to the Tax Commissioner. The actual cost data to be submitted shall (1) be based on cost of goods sold, (2) contain the petitioner's basic cost of cigarettes sold for the specific location, (3) set forth each specific total direct cost, overhead cost, and expense paid or incurred, and (4) set forth the basis used to allocate each overhead cost and expense item in the purchase and sale of cigarettes in Nebraska. The total dollar amount of each overhead cost and expense item to be allocated must be set forth and followed by a showing of its 100% allocation.

010.06 When submitting actual cost data, the petitioner must provide supporting documentation such as, but not limited to:

010.06(A) A written explanation of any difference between the petitioner's overall cost of doing business from his or her cigarette cost of doing business for the specific location that is engaged in the business of selling cigarettes at wholesale to licensed Nebraska retailers or making sales of cigarettes at retail in this state;

010.06(B) A copy of one cigarette purchase invoice from each cigarette manufacturer or wholesaler for every month of the period of analysis;

010.06(C) Copies of the latest filed federal income tax returns including Schedule A and all attachments;

010.06(D) Schedule K-1 (Form 1065);

010.06(E) Form 4562;

010.06(F) Latest available income statements;

010.06(G) Latest available annual reports; and

010.06(H) Any other financial statements or information necessary to substantiate the actual cost data.

~~010.06 Persons selling cigarettes in Nebraska who desire to submit a petition for approval of lower cost must follow the criteria set forth in Reg-57-010.06A through Reg-57-010.06C for their particular business operations to determine whether they are acting in the capacity of a wholesaler, retailer, or wholesaler and retailer of cigarettes and whether Reg-57-010.07, Reg-57-010.08, or Reg-57-010.09 must be used in determining their presumptive cost of doing business. A person may be acting in more than one capacity during the same time period. Such a person will have to use a different method of determining the presumptive cost of doing business for the cigarettes sold in each capacity.~~

~~010.06A A person who purchases unstamped cigarettes from a cigarette manufacturer or another wholesaler and sells stamped cigarettes for resale is a wholesaler and must determine his or her cost of doing business as prescribed in Reg-57-010.07. The terms sell at wholesale, sale at wholesale, and wholesale sales include the transfer of title of cigarettes to a retailer or wholesaler for the purpose of resale.~~

~~010.06B A person who purchases unstamped cigarettes from a cigarette manufacturer and sells stamped cigarettes to a purchaser for consumption or use and not for resale is a retailer and must determine his or her cost of doing business as prescribed in Reg-57-010.09.~~

~~010.06C A person who purchases stamped cigarettes from a wholesaler and sells cigarettes to a purchaser for consumption or use is a retailer and must determine his or her cost of doing business as prescribed in Reg-57-010.08.~~

~~010.07 The following guidelines shall be used by wholesalers who purchase unstamped cigarettes from a cigarette manufacturer or another wholesaler and sell cigarettes to a retailer.~~

~~010.07A Cost to the wholesaler shall mean the basic cost as defined in Reg-57-010.12E plus the cost of doing business by the wholesaler as evidenced by the accounting standards and methods regularly employed on a consistent basis by the wholesaler in his or her allocation of overhead costs and expenses paid or incurred for the purpose of determining accounting income in accordance with generally accepted accounting principles and standards. All revenues and expenses paid or incurred shall be properly matched for the analysis period for the petitioner's total operations.~~

~~010.07B Costs of doing business shall include, but are not limited to, all direct costs, e.g., inbound freight charges, labor costs to affix tax indicia, cost of equipment to affix hand stamps, glue, rental and maintenance expenses for the cigarette tax stamping equipment, state and local cigarette licenses, and indirect overhead costs and expenses paid or incurred, such as pre-opening expenses; management fees; labor costs (including salaries of executives and officers); rents; depreciation; selling costs; maintenance expenses; interest expenses; delivery costs; all types of licenses; all types of taxes; insurance; advertising; and any district, central, regional, and administrative and operational expenses.~~

~~010.07C All indirect overhead costs and expenses paid or incurred by each of the petitioner's specific locations filing a petition of lower cost shall be fully allocated as required by Reg-57-010.07A.~~

~~010.07D All district, central, and regional pre-opening, administrative, and operational overhead costs and expenses paid or incurred shall be fully allocated in accordance with Reg-57-010.07A.~~

~~010.07E Prior to the Department of Revenue's approval of a petition for a lower cost, or after the expiration of an approved petition, the cost of doing business by the wholesaler making the sale shall be presumed to be four percent (4%) of the basic cost of cigarettes to the wholesaler, plus cartage to the retail outlet if performed or paid by the wholesaler, which cartage cost, in the absence of filing a petition for approval of a lower cost, shall be presumed to be three quarters of one percent (3/4 of 1%) of the basic cost of cigarettes to the wholesaler.~~

~~010.08 The following guidelines shall be used by retailers who purchase stamped cigarettes and sell cigarettes at retail.~~

~~010.08A Cost to the retailer shall mean the basic cost as defined in Reg-57-010.12E plus the cost of doing business by the retailer as evidenced by the accounting standards and methods regularly employed on a consistent basis by the retailer in his or her allocation of overhead costs and expenses paid or incurred for the purpose of determining accounting income in accordance with generally accepted accounting principles and standards. All revenues and expenses paid or incurred shall be properly matched for the analysis period for the petitioner's total operations.~~

~~010.08B Costs of doing business shall include, but are not limited to, all direct costs, e.g., inbound freight charges, state and local cigarette licenses, and indirect overhead costs and expenses paid or incurred, such as pre-opening expenses; management fees; labor costs (including salaries of executives and officers); rents; depreciation; selling costs; maintenance expenses; interest expenses; delivery costs; all types of licenses; all types of taxes; insurance; advertising; and any central and regional administrative expenses.~~

~~010.08C All indirect overhead costs and expenses paid or incurred by each of the petitioner's specific locations shall be fully allocated as required by Reg-57-010.08A.~~

~~010.08D All district, central, and regional pre-opening, administrative, and operational overhead costs and expenses paid or incurred shall be fully allocated in accordance with Reg-57-010.08A.~~

~~010.08E Prior to the Department's approval of a petition for a lower cost, or after the expiration of an approved petition, the cost of doing business by the retailer shall be presumed to be eight percent (8%) of the basic cost of cigarettes to the retailer.~~

~~010.09 The following guidelines shall be used by retailers who buy unstamped cigarettes from a cigarette manufacturer and sell cigarettes at retail.~~

~~010.09A Any retailer who purchases unstamped cigarettes from a manufacturer at a price which is approximately the same as the price normally and usually charged for purchases in wholesale quantities, shall, in determining the cost to the retailer, add to the basic cost of cigarettes as defined in Reg-57-010.12E the cost of doing business by the retailer and the cost of doing business by the wholesaler.~~

~~010.09B Costs of doing business shall include, but are not limited to, all direct costs, e.g., inbound freight charges, labor costs to affix tax indicia, cost of equipment to affix hand stamps, glue, rental and maintenance agreement expenses for the cigarette tax stamping equipment, state and local cigarette licenses, and indirect overhead costs and expenses paid or incurred, such as pre-opening expenses; management fees; labor costs (including salaries of executives and officers); rents ; depreciation; selling costs; maintenance expenses; interest expenses; delivery costs; all types of licenses; all types of taxes; insurance; advertising; and any central and regional administrative expenses.~~

~~010.09C All indirect overhead costs and expenses paid or incurred by each of the petitioner's specific locations shall be fully allocated as required by Reg-57-010.09A.~~

~~010.09D All district, central, and regional pre-opening, administrative, and operational overhead costs and expenses paid or incurred shall be fully allocated in accordance with Reg-57-010.09A.~~

~~010.09E Prior to the Department's approval of a petition for a lower cost, or after the expiration of an approved petition, the cost of doing business by such retailer for purchases from a manufacturer shall be presumed to be 12.32% of the basic cost of cigarettes to such retailer.~~

~~010.10 The actual cost data to be submitted shall (1) be based on cost of goods sold, (2) contain the petitioner's basic cost of cigarettes sold for the specific location, (3) set forth each specific total direct cost, overhead cost, and expense paid or incurred, and (4) set forth the basis used to allocate each overhead cost and expense item in the purchase and sale of cigarettes in Nebraska. The total dollar amount of each overhead cost and expense item to be allocated must be set forth and followed by a showing of its one-hundred percent (100%) allocation.~~

~~WHOLESALE or RETAILER COST of DOING BUSINESS For THE SPECIFIC LOCATION PERIOD of ANALYSIS BEGINNING _____, AND ENDING _____.~~

~~BASIC _____ COST _____ DETERMINATION:
Total invoice cost of all cigarettes sold in Nebraska for the period of analysis \$
Less: total manufacturer's cash discounts for prompt payment allowed on the purchase of cigarettes _____ sold in _____ Nebraska \$
Net invoice cost of cigarettes sold in Nebraska \$
Plus: Nebraska cigarette tax on cigarettes sold in Nebraska \$
Total basic cost of cigarettes sold in Nebraska \$~~

~~COST _____ of _____ DOING _____ BUSINESS
A. Direct costs associated with the purchase and sale of cigarettes in Nebraska for the analysis period \$
B. All indirect costs that are allocated, broken down by name or nature of cost in the analysis period.
The total amount to be allocated must be shown. \$
Total direct and indirect overhead costs \$
Percentage of cost of doing business (total direct and indirect costs divided by basic cost) %~~

~~010.11 When submitting actual cost data, as required by Reg-57-010.10, the petitioner shall provide supporting documentation such as, but not limited to:~~

~~010.11A A written explanation of any difference between the petitioner's overall cost of doing business from his or her cigarette cost of doing business for the specific location that is engaged in the business of selling cigarettes at wholesale to licensed Nebraska retailers or making sales of cigarettes at retail in this state;~~

~~010.11B A copy of one cigarette purchase invoice from each cigarette manufacturer or wholesaler for every month of the period of analysis;~~

~~010.11C Copies of the latest filed federal income tax returns including Schedule A and all attachments;~~

~~010.11D Schedule K-1 (Form 1065);~~

~~010.11E Form 4562;~~

~~010.11F Latest available income statements;~~

~~010.11G Latest available annual reports; and~~

~~010.11H Any other financial statements or information necessary to substantiate the actual cost data.~~

~~010.12 Definitions as defined in the Unfair Cigarette Sales Act in section 59-1502 of the Nebraska Revised Statutes.~~

~~010.12A Wholesaler shall mean any person who:~~

~~010.12A(1) Purchases cigarettes directly from the manufacturer;~~

~~010.12A(2) Purchases cigarettes from any other person who purchases from the manufacturer with the intent to acquire such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purpose of resale only;~~

~~010.12A(3) Services retail outlets by the maintenance of an established place of business for the purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.~~

~~010.12B Retailer shall mean any person, including a wholesaler, who operates a store, stand, booth, or concession for the purpose of making sales of cigarettes at retail including sales through vending machines.~~

~~010.12C Sell at retail, sale at retail, and retail sales shall mean any transfer of cigarettes for a valuable consideration, made in the ordinary course of trade or usual conduct of the seller's business, including sales through vending machines, to the purchaser for ultimate consumption or use.~~

~~010.12D Sell at wholesale, sale at wholesale, and wholesale sale shall mean any bona fide transfer of title to cigarettes for a valuable consideration made in the ordinary course of trade or in the usual conduct of the wholesaler's business, to a retailer for the purpose of resale.~~

~~010.12E Basic cost shall mean the invoice cost of cigarettes to the retailer or wholesaler, or the replacement cost of cigarettes to the wholesaler or retailer in the last quantity purchased, whichever is lower, less all trade discounts and the normal discount for cash afforded for prompt payment, excluding any special, extraordinary, or anticipatory discounts for payment within a shorter period of time than the prompt payment date required for eligibility for the normal discount for cash, and to which shall be added the full value of all stamps which may be required by any cigarette tax act and ordinance of any municipality of that state in effect or enacted at a later date, if the cigarette tax has not already been included by the cigarette manufacturer in its list price.~~

~~010.12F Trade discounts shall mean those price reductions which are offered by a cigarette manufacturer and represent a reduction in the list price of the item being purchased.~~

~~010.12G Cash discounts shall mean those price reductions which are offered by a cigarette manufacturer and represent an inducement to the purchaser to encourage prompt payment.~~

REG-57-011 MEETING COMPETITION

011.01 ~~Prior to offering cigarettes for sale at a lower price to meet competition pursuant to Section 59-1509, R.R.S. 1943, the wholesaler or retailer must ascertain from the Tax Commissioner whether the competitor has made a filing proving a lower cost in accordance with Reg-57-010.~~

011.02 ~~Upon affirmation, the wholesaler or retailer may presume the validity of the competitor's lower price until a determination otherwise has been made by the Tax Commissioner.~~

~~(Section 59-1509, R.R.S. 1943. September 15, 1975.)~~

REG-57-012 OFFERS OF CIGARETTE SALES

012.01 ~~Wholesalers, retailers, and other persons are prohibited from advertising, offering to sell or selling at retail or wholesale cigarettes at less than cost to such wholesaler or retailer, or offering or giving a rebate in price or concession of any kind in connection with the sale of cigarettes unless such rebate in price or concession is given by the wholesaler or retailer in the same ratio with respect to all other merchandise as to which such rebate or concession may lawfully be given which is sold by such wholesaler or retailer in the ordinary course of his trade or business. The term "other persons" includes cigarette manufacturers. Manufacturers who, with intent to injure competition among the retailers or wholesalers of this state, offer cigarettes for sale at retail or wholesale at less than cost to such retailer or wholesaler, are in violation of the Unfair Cigarette Sales Act.~~

~~(Sections 59-1503, 59-1514, and 59-1502(1), R.R.S. 1943. September 15, 1975.)~~

~~REG-57-013 INTENT TO INJURE COMPETITION~~

~~013.01 A sale, offer of sale or advertisement by a retailer, wholesaler, or other person, of cigarettes at less than cost or an offer of a rebate or concession for the sale of cigarettes or a promotional offer made by cigarette manufacturers for any purpose which is made available to retailers or wholesalers on a localized basis, is prima facie evidence of an intent to injure competition under Section 59-1503(1), R.R.S. 1943. Manufacturers may overcome this presumption of an intent to injure competition among retailers or wholesalers by showing to the satisfaction of the Tax Commissioner that such offer was made available to every retailer or wholesaler, whose method of making sales would allow them to participate in the promotion. Manufacturers must submit to the Tax Commissioner a written explanation of the promotion within a reasonable time prior to the promotion and agree to furnish proof that the promotion was offered to each eligible retailer or wholesaler, if the Tax Commissioner should so request. If the offer was not made available to every retailer or wholesaler within a reasonable time for the retailer or wholesaler to accept the offer, then the presumption is that the manufacturer attempted to injure competition among retailers or wholesalers by only presenting the offer to some of the retailers or wholesalers and such offer is prohibited. All promotions must be offered on a state-wide basis and must have the Tax Commissioner's approval prior to being offered.~~

~~(Sections 59-1503 and 54-1506, R.R.S. 1943. December 4, 1984.)~~

~~REG-57-014 OFFERS OF MERCHANDISE COMBINED WITH CIGARETTES~~

~~014.01 No wholesaler, retailer, or other person may offer, with intent to injure competition among the wholesalers or retailers of this state, a combined package of cigarettes and other merchandise including cigarettes, at a price less than the combined costs of the cigarettes and merchandise. The wholesale or retail selling price of such combined package must equal or exceed the total of the invoiced cost of the cigarettes, including the cost of doing business, all applicable cigarette taxes, and the invoiced cost of the merchandise including the cost of doing business in relation to that merchandise. None of these three factors may be reduced by any payment by another person, a refund, or a credit memo.~~

~~014.02 A manufacturer may offer combined packages of cigarettes and merchandise, including cigarettes, at a reduced invoice price by overcoming the presumption of intent to injure competition between retailers or wholesalers in this state. If the manufacturer shows, under Reg-57-013, that the combination offer is made available to all the retailers or wholesalers in the state, then the presumption is overcome.~~

~~(Sections 59-1503, 59-1506, and 59-1511, R.R.S. 1943. May 11, 1982.)~~

~~REG-57-015 OFFERS OF PREMIUM COUPONS~~

~~015.01 A premium coupon attached by a wholesaler or retailer to cartons or packages of cigarettes is a concession given for the purchase of cigarettes and is prohibited by Section 59-1503, R.R.S. 1943. A premium coupon is a coupon which is redeemable by the purchaser for merchandise, cash, trading stamps, or anything of value.~~

~~015.02 Premium coupons may be attached by manufacturers to cigarette cartons or packages if such cartons and packages are made available to all retailers and wholesalers in the state without preference. If a manufacturer does not make such premium coupons available to all wholesalers or retailers, then the manufacturer has not overcome the presumption of intent to injure competition among the retailers and wholesalers of this state.~~

~~(Sections 59-1503 and 59-1514, R.R.S. 1943. September 15, 1975.)~~

REG-57-016 COUPONS FOR A REDUCTION IN PRICE

016.01 Coupons may not reduce the selling price of cigarettes to below the retailer's cost as computed in section 59-1504 of the Nebraska Revised Statutes. A retail store coupon is a coupon offered by a retailer by which the price of any container of cigarettes is reduced by presenting the coupon to the retailer who has issued it. A retail store coupon is in effect a discount by the store and reduces the selling price to the purchaser of the cigarettes. If the price is reduced below the retailer's cost by the coupon, then the coupon offer is prohibited. If the coupon is given by a retailer upon the purchase of cigarettes and later redeemed by the retailer, such redemption is a concession or rebate and is prohibited.

016.02 A manufacturer's coupon is a coupon offered by the manufacturer to the public by which the price of any container of cigarettes is reduced by presentation of the coupon. A manufacturer's coupon is a separately negotiable document. Price reduction stickers or coupons that are not redeemable by the participating retailer are prohibited. Such coupons which reduce the selling price of cigarettes below the retailer's cost or which are a rebate or concession for the purchase of the cigarettes are prohibited if such coupon is offered with the intent to injure competition among the retailers and wholesalers of this state. The manufacturer may overcome the presumption of intent to injure competition if the manufacturer fulfills the requirements of Reg-57-013 and shows that the coupon is redeemable by all retailers choosing to participate in the offer, that the manufacturer will give the same rebate or concession regardless from which retailer the cigarettes were obtained, and that the coupon will be invalid if used by the retailer in the retailer's advertising.

016.03 Any retailer participating in a buy-down promotion may use promotional signs and displays to advertise the value of a cigarette manufacturer's buy-down amount or the selling price of the cigarettes after allowance for the buy-down amount, provided the promotional signs and displays identify the full retail selling price prior to the buy-down amount. The promotional signs and displays must also state that the sales tax is computed on the full retail selling price prior to the allowance for the buy-down amount. Advertising the selling price net of the buy-down amount is permissible even when the buy-down amount reduces the sales price below the minimum retail selling price.

016.04 Retailers accepting a manufacturer's coupon as part of the selling price of a package of cigarettes must compute the applicable sales tax on the full selling price before deduction for the coupon.

(Sections 59-1503 and 59-1514, R.R.S. 2004. March 7, 2006.)

~~REG-57-017 CASE DISCOUNTS GIVEN TO WHOLESALERS OR RETAILERS~~

~~017.01 Cash discounts given to wholesalers or retailers by manufacturers or given to retailers by wholesalers for prompt payment of invoices reduce the invoice cost of cigarettes to the wholesaler or retailer and may be reflected in a lower purchase price. If the purpose of such discounts is not to entice the purchaser to purchase from a particular seller but rather to encourage prompt payment of invoices, there is no presumed intent to injure competition by such action.~~

~~(Sections 59-1504(1) and 59-1505, R.R.S. 1943. May 14, 1994.)~~

~~REG-57-018 SHELF PAYMENTS TO RETAILERS BY MANUFACTURERS~~

~~018.01 Payments made or credits given to a retailer for promotional purposes including shelf payments are not to be considered in determining the cost of cigarettes to the retailer, nor can such payments or credits be used to increase the approved buy-down promotion or to extend a designated promotion period.~~

~~(Section 59-1511(2) R.R.S. 2004. March 7, 2006.)~~

REG-57-019 EXEMPTION FOR NATIVE AMERICAN INDIANS

019.01 Any sale of cigarettes ~~to a Native American Indian~~ to a Native American Indian where title and possession are taken within ~~the boundaries of an Indian Reservation~~ the Indian country of the tribe of which the Native American Indian is an enrolled member in Nebraska is exempt from tax.

019.02 Retailers making exempt sales of cigarettes ~~sales~~ may receive a credit for the cigarette tax by filing a Nebraska Credit Computation for Cigarettes Sold to Native American Indian Tribal Members in Indian Country, Form 68. To support the credit, the retailer must distinguish on ~~his or her~~ its cigarette sales records the exempt sales to Native American Indians from the nonexempt sales.

019.03 A claim for credit of cigarette tax must be made to the licensed wholesale distributor on the ~~Nebraska Credit Computation for Cigarettes and Tobacco Products Sold to Native American Reservation Indians~~, Form 68.

019.04 If a licensed wholesale dealer ~~that is not also licensed as a stamping agent~~ and receives a Form 68 from a retail customer, ~~then~~ the wholesale dealer may submit the Form 68 to the licensed stamping agent from which it purchases stamped cigarettes.

019.0405 Licensed ~~wholesale distributors~~ stamping agents receive credit for the cigarette tax paid by submitting the completed Form 68 with a subsequent Nebraska Cigarette Purchase Order for Stamps and Impressions.

REG-57-020 MINIMUM SELLING PRICE

~~020.01 A change in the list price of cigarettes by a manufacturer or a change in the Nebraska cigarette tax rate must be followed by a change in the minimum selling price charged by wholesalers and retailers.~~

~~020.02 Any change in the minimum selling price of cigarettes becomes effective the same date as the manufacturer's change or the Nebraska cigarette tax rate change.~~

~~020.03 Each step in the minimum pricing calculation must be computed to the tenth of a cent and the result rounded to the next higher cent.~~

~~(Sections 59-1514 and 59-1518, R.R.S. 1943. May 14, 1994.)~~

REG-57-021. TOBACCO PRODUCT MANUFACTURERS; REQUIREMENT OF QUARTERLY PAYMENTS.

021.01 Nonparticipating manufacturers must make escrow payments owed under Neb. Rev. Stat. § 69-2703(2) in quarterly installments.

021.02 Nonparticipating manufacturers must submit written proof of the deposit, such as a copy of the bank deposit slip or bank account statement, to the Attorney General's office within 10 days after the quarterly deposit deadline.

021.03 Upon the request of the Tax Commissioner, nonparticipating manufacturers must submit proof of the number of units sold in Nebraska during the calendar quarter at issue and such other information as may be required to determine the adequacy of the amount of the quarterly payment.

021.04 A nonparticipating manufacturer that fails to fully and timely make the required quarterly payment will be removed from the directory.

TITLE 316 NEBRASKA ADMINISTRATIVE CODE, CHAPTER 58
NEBRASKA DEPARTMENT OF REVENUE
Tobacco Product Manufacturers Regulations

Title 316 Neb. Admin. Code, Ch. 58, Sections 001, 002, 003, 004, 005, 006, 007, and 008 are repealed.

REG-58-001. Statement of Purpose.

~~001.01~~ The purpose of these regulations is to implement and obtain compliance with the provisions of Neb. Rev. Stat §§69-2704 to 69-2710 (R.S. Supp., 2003). The expressed legislative purpose is to provide procedural enhancements to aid enforcement of §69-2702 and §69-2703 and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health.

REG-58-002. Definitions.

~~002.01~~ Brand family means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors, including, but not limited to, menthol, lights, kings, and 100s, and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, or recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

~~002.02~~ Cigarette means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (a) any roll of tobacco wrapped in paper or in any substance not containing tobacco; (b) 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; or (c) any 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 clause (a) of this paragraph.

~~002.02(A)~~ The term cigarette includes roll-your-own tobacco (i.e., 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 definition, nine-hundredths of an ounce of roll-your-own tobacco shall constitute one individual cigarette.

~~002.03~~ Master Settlement Agreement means the settlement agreement entered into on November 23, 1998, between the state and specific United States tobacco manufacturers and related documents to such agreement.

~~002.04~~ Nonparticipating manufacturer means any tobacco product manufacturer that is not a participating manufacturer.

~~002.05~~ Participating manufacturer has the same meaning as in section II(jj) of the Master Settlement Agreement. Generally, Participating Manufacturer means a Tobacco Product Manufacturer that is or becomes a signatory to the Master Settlement Agreement.

~~002.06~~ Qualified escrow fund means an escrow arrangement with a federally or state-chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer that places such funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with subdivision (2)(b) of §69-2703.

~~002.07~~ Qualified escrow agreement means an escrow agreement that has been reviewed and approved by the Attorney General or submitted to the Attorney General for review.

~~002.08~~ Stamping agent means a person that is authorized to affix tax stamps to packages or other containers of cigarettes under §77-2603, licensed wholesaler, or any person that is required to pay the other tobacco products tax imposed pursuant to §77-4008 on roll-your-own cigarettes.

~~002.09~~ Tax Commissioner means the Tax Commissioner of the State of Nebraska.

~~002.10~~ Tobacco product manufacturer means an entity that after April 29, 1999, directly and not exclusively through any affiliate:

~~002.10(A)~~ Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except when such 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 such 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 such cigarettes does not market or advertise such cigarettes in the United States);

~~002.10(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; or,

~~002.10(C)~~ Becomes a successor of an entity described in 002.10A or 002.10B.

~~002.10(D)~~ The term tobacco product manufacturer does not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within 002.10A through 002.10C.

~~002.11~~ Units sold means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question, as measured by excise taxes collected by the state on packs or the weight of roll-your-own tobacco containers.

~~002.11(A) Units sold for roll-your-own tobacco is the total weight of the tobacco sold in ounces divided by nine-hundredths of an ounce.~~

REG-58-003. Manufacturer's Certification.

~~003.01 Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall annually execute and deliver a certification to the Tax Commissioner and the Attorney General.~~

~~003.01(A) The certification shall be on a form prescribed by the Tax Commissioner. The form will be available on the Nebraska Department of Revenue website.~~

~~003.01(B) The certification shall be delivered no later than April 30 of each year.~~

~~003.01(C) The certification shall be updated with a supplemental certification as required by 003.06.~~

~~003.02 Every participating manufacturer must certify under penalty of perjury that, as of the date of the certification, that it is a participating manufacturer. It shall include in its certification a list of its brand families.~~

~~003.02(A) A participating manufacturer shall not include a brand family in its certification unless it affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year in the volume and shares determined pursuant to the Master Settlement Agreement.~~

~~003.03 Every nonparticipating manufacturer shall certify, under penalty of perjury that, as of the date of the certification, such manufacturer is in full compliance with §69-2703(2) and these regulations, and has made all quarterly installment payments required by Reg-58-005, and shall include in its certification the following information:~~

~~003.03(A) A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year. A list of the brand families that were sold in the state during the current year. The list shall include the name of any of its brand families sold in the state during the current or preceding calendar years that is no longer being sold in the state as of the date of the certification. Additionally, the list shall identify, by name and address, any other manufacturer in the preceding calendar year of any brand family listed.~~

~~003.03(A)(1) A brand family should not be included in the list unless the nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of §69-2703(2), which establishes the obligation to make escrow deposits.~~

~~003.03(B) A statement that the nonparticipating manufacturer has established and continues to maintain a qualified escrow fund pursuant to a qualified escrow agreement. The date of approval of or submission to the Attorney General should be included.~~

~~003.03(B)(1) A statement including the name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established a~~

qualified escrow fund; the account number of such fund and any sub-account number for the State of Nebraska; the amount deposited in the fund for cigarettes sold in the state during the preceding calendar year; the dates and amount of each such deposit, along with a copy of a deposit slip, account statement or a letter signed by an officer of the financial institution verifying the deposit, the amounts and dates of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to §69-2703(2).

~~003.03(C)~~ A statement that the nonparticipating manufacturer, unless it is a resident of this state, is either registered to do business in Nebraska as a corporation or business entity, or has appointed an agent for service of process located in the United States on whom all process and any action or proceeding against the nonparticipating manufacturer concerning or arising out of the enforcement of §§ 69-2703 through 69-2710 may be served in any manner authorized by law. Said agent for service of process must be appointed and continually engaged without interruption.

~~003.03(C)(1)~~ The nonparticipating manufacturer shall provide the name, address, telephone number of such agent to the Tax Commissioner and Attorney General, along with a written acceptance of the appointment and availability of the agent.

~~003.03(D)~~ The nonparticipating manufacturer shall consent to be sued in the district courts of the State of Nebraska for purposes of the state (i) enforcing any provision of sections 69-2703 to 69-2710 and any rules and regulations adopted and promulgated thereunder or (ii) bringing a released claim as defined in section 69-2702.

~~003.04~~ Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years unless otherwise required by law to maintain them for a greater period of time.

~~003.05~~ The Tax Commissioner or Attorney General may require a tobacco product manufacturer to submit any additional information, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to a determination of whether a manufacturer is in compliance with §69-2704 through § 69-2710.

~~003.06~~ A supplemental certification shall be required in the following situations.

~~003.06(A)~~ The list of brand families shall be updated by the tobacco product manufacturer thirty calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Tax Commissioner and the Attorney General.

~~003.06(B)~~ The nonparticipating manufacturer shall provide notice to the Tax Commissioner and Attorney General thirty calendar days prior to termination of the authority of an agent and shall further provide satisfactory proof of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the Tax Commissioner and Attorney General of the termination within five calendar days and shall include satisfactory proof of the appointment of a new agent.

~~003.07~~ The supplemental certification shall include the following information:

~~03.07(A)~~ For supplemental certifications required under 003.06A , the name and address of the tobacco product manufacturer with a list of the names of any new brand families being sold and the names of any brand families no longer being sold.

~~003.07(B)~~ For supplemental certifications required under 003.06B , the name and address of the nonparticipating tobacco product manufacturer with a statement of the termination of the authority of the registered agent and the effective date of said termination, along with a statement of the appointment of a new registered agent, including said agents name, address, and phone number. Attached to the supplemental certification shall be a signed statement by the new registered agent showing acceptance of its appointment as a registered agent and the effective date thereof.

REG-58-004. Directory of Cigarettes Approved for Sale in Nebraska.

~~004.01~~ The Tax Commissioner shall develop, maintain, and make public a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of §69-2706(1) and all brand families that are listed in such certifications.

~~004.02~~ The Tax Commissioner shall not include or retain in the directory the following:

~~004.02(A)~~ The name or brand families of any tobacco product manufacturer that has failed to provide the required certification or whose certification the Tax Commissioner determines is not in compliance with the requirements of § 69-2706(1) unless the Tax Commissioner determines that such noncompliance has been cured to the Tax Commissioner's satisfaction.

~~004.02(B)~~ The name or brand families of any tobacco product manufacturer if the Attorney General recommends and notifies the Tax Commissioner who concludes, in the case of a nonparticipating manufacturer, that either (1) any escrow payment required pursuant to §69-2703(2) or §69-2708(4) for any period for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been submitted for approval or approved by the Attorney General or (2) any outstanding final judgment, including interest thereon, for violations of §69-2703, has not been fully satisfied for such brand family and such manufacturer.

~~004.03~~ The Tax Commissioner shall update the directory no later than May 15 of each year to reflect certifications made or on before April 30 of that year. The Tax Commissioner shall continuously update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformance with §§69-2704 to 69-2710.

~~004.04~~ The directory shall be made available by the Tax Commissioner for public inspection or published on its internet website.

~~004.05~~ It shall be unlawful for any person to affix a Nebraska tax stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included

~~in the directory or to sell, offer, or possess for sale in this state cigarettes of a tobacco product manufacturer or brand family not included in the directory.~~

~~004.06 Tobacco product manufacturers shall be notified in writing of a decision made by the Tax Commissioner not to include a tobacco product manufacturer in the Directory.~~

~~004.06(A) If the Tax Commissioner determines that a tobacco product manufacturer or a brand family shall not be included in the Directory, the tobacco product manufacturer may seek a review of such determination by requesting a contested case before the Tax Commissioner under the Administrative Procedure Act.~~

~~004.06(A)(1) A contested case may be initiated by filing a petition in writing in the office of the Tax Commissioner which shall:~~

~~004.06(A)(1)(a) Identify the petitioner;~~

~~004.06(A)(1)(b) Identify and attach a copy of the Tax Commissioner's determination being contested;~~

~~004.06(A)(1)(c) Set forth an explanation in detail regarding petitioner's claim of compliance with §69-2706, §69-2707(1), §69-2703 and any applicable regulations and attach copies of all documentation supporting such claim;~~

~~004.06(A)(1)(d) Set forth the relief to which petitioner claims to be entitled.~~

~~004.06(A)(2) The petition shall be filed within thirty calendar days after the date of the Tax Commissioner's written determination that the manufacturer shall not be included in the directory.~~

~~004.06(A)(3) The hearing shall be conducted pursuant to the procedures set forth in the Administrative Procedure Act, except as specifically modified herein. A hearing for inclusion in the directory shall be held within 60 days after the filing of the petition. However, upon written agreement of the parties, the hearing may be concluded at a date beyond the expiration of the 60-day period. Discovery shall proceed as in the rules of civil procedure, except a written response shall be required within 20 days after service of a discovery request. The hearing shall determine whether the tobacco product manufacturer is in compliance with §§69-2703 through 69-2710 and whether the manufacturer should be listed in the directory. The burden of proof shall be on the petitioner.~~

~~004.06(A)(4) The Tax Commissioner's final decision in a proceeding for inclusion in the Directory shall be rendered within 30 days after conclusion of the hearing and served upon the petitioner as set forth in the Administrative Procedure Act.~~

~~004.06(A)(5) The Tax Commissioner's final decision may be appealed as set forth in the Administrative Procedure Act.~~

~~004.07 The Tax Commissioner shall give a tobacco product manufacturer 30 days written notice of the Tax Commissioner's intention to remove the manufacturer or a brand family from the directory for noncompliance with §§69-2703 through 69-2710. This notice shall also be posted in the directory.~~

~~004.07(A) The tobacco product manufacturer may seek judicial review of this notice of removal and if a temporary injunction is obtained within the 30 day period, the manufacturer or brand family shall remain on the directory unless and until a judicial order is obtained dissolving the injunction. Absent an injunction being entered by a court of competent jurisdiction, the Tax Commissioner shall remove the tobacco product manufacturer or brand family from the directory 30 days after the notice is sent unless the Tax Commissioner determines that the manufacturer is no longer out of compliance with the provisions of §§69-2703 through 69-2710.~~

~~004.07(B) The Tax Commissioner shall provide notice, electronically or by other practicable means at the discretion of the Tax Commissioner, of the removal of a tobacco products manufacturer or brand family from the directory to the stamping agents. Stamping agents must provide and update as necessary an electronic mail address to the Tax Commissioner in order to receive any notification under §§69-2704 through 69-2710.~~

~~004.07(C) A stamping agent shall provide reasonable written or electronic notice to its customers for a brand family regarding any notice it receives from the Tax Commissioner of the removal of a tobacco product manufacturer or a brand family from the directory. The stamping agent shall give its customers a 7 day period from the date of its service of the notice for the customer's return of cigarettes that have been removed from the directory.~~

~~004.08 A tobacco product manufacturer or brand family removed from the directory may thereafter be restored to the directory upon the determination of the Tax Commissioner that it has met all of the requirements of §§69-2703 through 69-2710.~~

~~004.08(A) A tobacco product manufacturer or brand family removed from the directory shall not thereafter be restored unless and until it has refunded to the stamping agents all money to which the stamping agents establish that they are entitled under § 69-2706(2)(d).~~

~~004.08(B) The Tax Commissioner's determination not to include the tobacco product manufacturer in the directory for failure to make such payments to the stamping agents shall be given to the manufacturer in writing pursuant to the provisions of and be subject to the procedures set forth above.~~

REG-58-005. Requirement of Quarterly Payments.

~~005.01 A nonparticipating manufacturer is required to make the escrow payments owed under §69-2703(2) in quarterly installments when any of the sales covered by such deposits are made under any of the circumstances enumerated in paragraph 005.02.~~

~~005.02 The circumstances under which escrow payments shall be required to be made in quarterly payments include any one of the following:~~

~~005.02(A) Such quarterly installments are required by a nonparticipating manufacturer through the end of the calendar year following the year in which the nonparticipating manufacturer is first listed or is relisted on the directory established by §69-2706(2).~~

~~005.02(B) Such quarterly installments are required by a nonparticipating manufacturer if such manufacturer has failed to make a complete and timely escrow deposit for any calendar year as required by §69-2703, or for any quarter as required by §69-2708.~~

~~005.02(C) Such quarterly installments are required by a nonparticipating manufacturer if such manufacturer has failed to fully pay a judgment, including civil penalties, ordered under §69-2703 or §69-2709.~~

~~005.03 When required, quarterly installment payments shall be made into the manufacturer's qualified escrow account, established pursuant to an escrow agreement approved or submitted for approval to the Attorney General, on or before the date which is thirty days after the end of the calendar quarter.~~

~~005.04 The manufacturer required to make quarterly payments shall submit written proof of the deposit, such as a copy of the bank deposit slip or bank account statement, to the Attorney General's office within 10 days after the quarterly deposit deadline.~~

~~005.05 Upon the request of the Tax Commissioner, the manufacturer required to make quarterly payments shall promptly submit proof of the number of units sold in the State of Nebraska during the calendar quarter at issue and such other information as may be required to determine the adequacy of the amount of the quarterly installment.~~

~~005.06 A tobacco product manufacturer required to make a quarterly installment payment into escrow that fails to fully and timely make such deposit shall be removed from the Directory, pursuant to the procedures set forth Reg-58-004.07.~~

REG-58-006. Reporting Requirements of Stamping Agents.

~~006.01 Stamping agents are required to submit monthly reports, on or before the 10th day of the month, to the Tax Commissioner which list, by brand family, the total number of cigarettes for which the stamping agent affixed stamps or, in the case of roll-your-own tobacco, the equivalent stick count, or otherwise paid the tax due during the previous calendar month, and the supplier from whom the stamping agent purchased the cigarettes.~~

~~006.02 The stamping agent shall maintain, and make available to the Tax Commissioner upon request, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Tax Commissioner for a period of five years.~~

~~006.03 The Tax Commissioner or Attorney General may require a stamping agent to submit any additional information, including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to a determination of compliance with §69-2704 through §69-1710.~~

REG-58-007. Revocation, Suspension or Administrative Penalty for Stamping Agent.

~~007.01 The Tax Commissioner may revoke or suspend the license of a stamping agent.~~

~~007.02 The Tax Commissioner may revoke or suspend the license of a stamping agent upon a determination that the stamping agent either affixed a Nebraska stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not~~

included in the directory, or sold, offered or possessed for sale in this state cigarettes of a tobacco product manufacturer or brand family intended for sale in this state not included in the directory, as prohibited by §69-2706(3).

~~007.02(A) The stamping agent shall be given written notice of a hearing to revoke or suspend its license as described in the Administrative Procedure Act.~~

~~007.02(B) The hearing shall be conducted pursuant to the procedures set forth in the Administrative Procedure Act.~~

~~007.02(C) Upon a finding that the stamping agent violated the provisions of §69-2706(3), the Tax Commissioner may revoke or suspend the license of any stamping agent. Additionally, for each violation of §69-2706(3), the Tax Commissioner may impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars. The determination shall be served on the licensee and an appeal therefrom may be taken as set forth in the Administrative Procedure Act.~~

~~007.02(C)(1) No person whose license has been revoked shall sell cigarettes during the period of suspension or revocation.~~

~~007.02(C)(2) Any person whose license has been revoked may apply at the expiration of sixty days for a reinstatement of his or her license. The license may be reinstated if it appears to the satisfaction of the Tax Commissioner that the licensee will comply with §§77-2601 to 77-2622 and regulations adopted under such sections.~~

~~007.03 The Tax Commissioner may revoke or suspend the license of a stamping agent for failure to file required reports as described hereinafter.~~

~~007.03(A) The Tax Commissioner may suspend or revoke the license of a wholesale dealer paying the tax under §77-2603 for failure to make and file the monthly report required above. The procedures and penalties described in above shall be applicable, except the civil penalty provision set forth therein shall not apply.~~

~~007.03(B) The Tax Commissioner may suspend or revoke the license of a first owner of tobacco products paying the tax under §77-4008 on roll-your-own tobacco for failure to make and file the monthly report required above. Notice and hearing shall be provided as set forth in §77-4019. An appeal from the determination of the Tax Commissioner shall proceed as set forth in the Administrative Procedure Act. The Tax Commissioner may restore the license pursuant to the provisions of §77-4013.~~

REG-58-008. Seizure of Contraband Cigarettes.

~~008.01 Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of §69-2706 and Reg-58-004.05 shall be deemed contraband under §77-2620. Such cigarettes shall be subject to seizure and forfeiture as provided in §77-2620, except that all such cigarettes so seized and forfeited shall be destroyed and not resold.~~