

State of Louisiana
Department of Revenue

JOHN BEL EDWARDS
Governor



KEVIN J. RICHARD, CPA
Secretary

January 6, 2023

Via e-mail (return receipt requested) to:

The Honorable Stuart J. Bishop
Chairman of the House Committee on Ways and Means
P.O. Box 94062
Baton Rouge, Louisiana 70804
apa.h-wm@legis.la.gov

The Honorable R.L. "Bret" Allain, II
Chairman of the Senate Committee on Revenue & Fiscal Affairs
P.O. Box 94183
Baton Rouge, Louisiana 70804
apa.s-r&f@legis.la.gov

Re: Proposed Regulation LAC 61:I.5105 *Articles and Products Made of Tobacco and Tobacco Substitutes*

Chairman Bishop and Chairman Allain:

On November 1, 2022, a copy of the *Notice of Intent* issued by the Department of Revenue ("Department") for promulgation of the regulation LAC 61:I.5105, *Articles and Products Made of Tobacco and Tobacco Substitutes* was sent to your committee for review. The purpose of this regulation is to provide guidance regarding the taxability of products made with nicotine extract or synthetic nicotine and tobacco substitutes. The proposed regulation provides guidance by clarifying the phrases, "articles and products made of tobacco" and "tobacco substitute" used in the definition of smokeless tobacco provided in Louisiana Revised Statute 47:842(15). The proposed regulation reflects current policy of the Department of Revenue.

The *Notice of Intent* was published in the November 2022 issue of the *Louisiana Register*. A public hearing was held in the LaSalle Building on Wednesday, December 28, 2022. No one attended the public hearing and no oral comments were received. Written comments were received by one interested party as noted below.

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Written Comments

Department response to comments from Mark C. Triplett in Attachment 1:

Comment 1: It is important to note that the definition of “cigars”, “cigarettes”, “smoking tobacco”, “smokeless tobacco”, describe and list kinds and forms of tobacco. The common element in each item described and listed in the definition of these products is tobacco, products made of tobacco and products made wholly or in part of tobacco. There is no mention of the word nicotine in the definition of “Tobacco Products” and in fact, nicotine is not mentioned until the definition of “vapor products and electronic cigarettes” which are defined as a product containing nicotine then specifies that it “employ a heating element, power source, electronic circuit, or other electronic, chemical or mechanical means”.

Response 1: The Department agrees that the definitions of “cigars”, “cigarettes”, “smoking tobacco”, and “smokeless tobacco” in LA R.S. 47:842 include lists of various kinds and forms of tobacco. “Tobacco Products” is not a term that is defined in LA R.S. 47:842 or elsewhere in Title 47; reference to any such definition is misplaced. Further, the definition of “smokeless tobacco” includes “articles and products made of tobacco, or a tobacco substitute”. Products made with nicotine extracted from tobacco plants are considered products made of tobacco and thus, meet the definition of smokeless tobacco. Additionally, Merriam-Webster defines a *substitute* as a “thing that takes the place or function of another”. Products made with nicotine extracted from tobacco or synthetic nicotine are designed, marketed and intended to take the place or function of traditional tobacco products. Like cigarettes, smoking tobacco and other smokeless tobacco products, these products are kept behind the store counter and may only be purchased by person 21 years of age or older. In that regard, such products are considered a tobacco substitute and thus, meet the definition of smokeless tobacco. The legislature “cannot possibly enact and re-enact detailed laws to cover every situation during rapidly changing times.” *Krielow v. Louisiana Dep’t of Agric. & Forestry*, 2013-1106 (La. 10/15/13), 125 So. 3d 384, 389. By granting rulemaking authority, the legislature has conferred upon the Department the authority and responsibility to “fill in the details”. *Id.*

Comment 2: The scope of the tax levied in RS §47:841 through RS§47:868 is limited to those products defined described and listed in §47:842 (2), (3), (15), (16), (20). Any products outside these definitions cannot be subject to the tax levied in §47:841 of Title 47.

Response 2: The Department agrees that the tobacco tax is limited to products which meet the definitions set forth in LA R.S. 47:842. However, the definitions are not limited to the illustrative lists provided in LA R.S. 47:842 (2), (3), (15), (16), and (20). Any list of products included in these definitions are not exclusive. As stated previously, it has long been recognized that the legislature “cannot possibly enact and re-enact detailed laws to cover every situation during rapidly changing times.” *Krielow v. Louisiana Dep’t of Agric. & Forestry*, 2013-1106 (La. 10/15/13), 125 So. 3d 384, 389.

Comment 3: The scope of the tax cannot be extended to any nicotine, nicotine product or product containing nicotine **that does not contain tobacco** like tomatoes, potatoes, cauliflower, eggplants, alfalfa, e-cigarettes, e-liquids, nicotine lozenges and gum (Nicorette), nicotine pouches (ZYN and ON), nicotine patches (NicoDerm). All these products contain nicotine. But,

they are not captured within the scope of the definitions listed above. They simply do not contain tobacco.

Response 3: The Department disagrees that the presence of tobacco plant material is required for a product to be subject to the Louisiana tobacco tax. The definition of “smokeless tobacco” includes “articles and products made of tobacco, or a tobacco substitute”. Products made with nicotine extracted from tobacco plants are considered products made of tobacco and thus, meet the definition of smokeless tobacco. Additionally, nicotine products or products containing nicotine may be considered tobacco substitutes and as such, fall within the scope of smokeless tobacco. Tomatoes, potatoes, cauliflower, eggplants, alfalfa, and smoking cessation products are not designed, marketed and intended to serve as a substitute to traditional tobacco products. E-cigarettes and e-liquids have been isolated as a separate form of tobacco in order that a distinct tax rate can be applied to these products.

Comment 4: ZYN and ON are both Tobacco Free Nicotine Pouches, **they do not** “employ a heating element, power source, electronic circuit, or other electronic, chemical or mechanical means”. Therefore, they fall outside the definition of “Vapor Products.”

Response 4: The Department understands that ZYN and ON nicotine pouches do not contain tobacco leaf. And, the Department agrees that ZYN and ON nicotine pouches are not considered vapor products as defined in LA R.S. 47:842(20). This regulation does not relate to vapor products.

Comment 5: ZYN and ON are both Tobacco Free Nicotine Pouches, they do not contain any tobacco. ZYN and ON and the nicotine they contain are also missing from a long list of tobacco substitutes available to be consumed in the context of Bidis and Spliffs and can also be infused in cannabis products like Damiana, Kratom, Kanna, Lavender, Rosemary, Hops, Catnip, Greengo, Skullcap, and Sage. All proclaim to be nicotine free.

Response 5: The Department understands that ZYN and ON nicotine pouches do not contain tobacco leaf or other plant material. Further, there is no definition or list of tobacco substitutes in the Louisiana tobacco tax laws. The products listed in Comment 5 do not come from the Louisiana tobacco tax laws and the inclusion or exclusion of nicotine pouches from any such list is not reflective of Louisiana law.

Comment 6: ZYN and ON are clearly definable in a family of products called “Nicotine Products” (not defined in §47:842). In fact, the products defined described and listed in §47:842 (2), (3), (15), (16), (20), could easily be defined as a subset of “Nicotine Products”.

Response 6: The Department agrees that “nicotine products” is not a defined term within the Louisiana tobacco tax laws. Nor is that term used in the LA R.S. 47:841 et seq. Regardless, whether or not ZYN and ON or any other category of products defined in LA R.S. 47:842 could be defined as “nicotine products” is irrelevant to the proposed regulation.

No changes will be made to the text of the proposed rule before it is finalized. This report is being made in accordance with R.S. 47:968(D)(1)(b) of the Administrative Procedure Act.

Unless otherwise directed, the proposed amendment will be submitted for publication as a final rule in the February 2023 edition of the *Louisiana Register*.

Should you have any questions or need additional information, please contact me at (225) 219-2700.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. J. Richard', with a stylized flourish at the end.

Kevin J. Richard, CPA
Secretary

cc: The Honorable Patrick Page Cortez, President of the Senate, apa.senatepresident@legis.la.gov
Office of the State Register, Reg.Submission@la.gov