

CALIFORNIA DEPARTMENT OF JUSTICE
TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL
CHAPTER 16. Master Settlement Agreement, Tobacco
SUPPLEMENT TO INITIAL STATEMENT OF REASONS

This supplement to the Initial Statement of Reasons (ISOR) provides additional information regarding the purpose and necessity of the proposed regulations and forms.

IV. Specific Purpose and Necessity of Each Section

In 1998, 46 states entered into the Tobacco Master Settlement Agreement (“MSA”) with signatory tobacco manufacturing companies to settle certain claims arising out of the sale, advertising, and consumption of certain tobacco products. The states first settled with the Original Participating Manufacturers (“OPMs”), followed by the Subsequent Participating Manufacturers (“SPMs”), who are collectively both Participating Manufacturers (“PMs”) under the MSA in the United States. (Health & Saf. Code, § 104555, subd. (e).)

Health and Safety Code sections 104555 through 104557 (“Reserve Fund Statute”) impose escrow deposit and reserve fund requirements on tobacco product manufacturers that are not party to the MSA (Nonparticipating Manufacturers (“NPMs”).)

Revenue and Taxation Code section 30165.1 (“Directory Statute”) requires the Department of Justice (“Department”) to publish and maintain a list of the PMs and NPMs and their cigarette and roll-your-own tobacco (“RYO”) brand styles (both cigarettes and RYO are hereafter together “Cigarettes”) eligible to be included on the California tobacco directory (“California Tobacco Directory.”) The Directory Statute prohibits California sales of Cigarettes that are not listed on the California Tobacco Directory. In order to have their eligibility for listing on the California Tobacco Directory evaluated, tobacco product manufacturers have been obligated to provide the Department with annual certifications, quarterly reports, and other information regarding compliance with the Directory Statute, the Reserve Fund Statute, and the MSA since approximately 2004.

Despite continued restructuring in the California and U.S. Cigarette markets, most of the Department’s Tobacco Directory forms have not been updated since 2012. Thus, the Department seeks to revise six Tobacco Directory forms and the implementing regulations.

Health and Safety Code section 104557 requires Non-Participating Manufacturers seeking to sell tobacco products in California to join the MSA or make deposits in a qualified escrow account annually. Revenue and Taxation Code section 30165.1, subdivision (h), authorizes the Attorney General to require such escrow deposits be made on a quarterly, rather than annual, basis. The Directory Statute requirement is consistent with comparable practice in other jurisdictions: most MSA states require NPMs to deposit escrow quarterly, and all current on-Directory NPMs

deposit escrow quarterly in the State. The proposed mandatory quarterly escrow requirement in the regulations and forms below establishes uniform requirements for all NPMs, eliminating uncertainty created when NPMs are subject to different rules and timelines. Furthermore, receipt of quarterly escrow deposits enables the Department to better monitor NPM compliance with Health and Safety Code section 104557.

Under the Reserve Fund Statute, PMs certify annual payments based on national volumes and NPMs deposit escrow based on their volumes of Units Sold in each state. To monitor and enforce compliance with the Reserve Fund Statute and Directory Statute, the Department thus invests time and resources to identify the source(s) of Cigarettes entering its national and state markets and the manufacturer(s) associated with each brand style. When off-Directory Cigarettes are found in California, the Department generally assesses their source and determines whether such Cigarettes are otherwise contraband under federal or State law. Thus, pursuant to section 30165.1, subdivision (b)(1) of the Directory Statute, Directory applicants are being asked to provide “a complete list” of their Cigarette brands.

JUS-TOB1

Since 2004, California has required tobacco product manufacturers wishing to be listed on the California Tobacco Directory to submit certifications providing background and sales information. Previously, PMs and NPMs each completed some sections, but not all, of the JUS-TOB1. The Department seeks to improve clarity and avoid confusion by having PMs answer all of the questions in the JUS-TOB1. Similarly, NPMs will now answer all of the questions in the JUS-TOB5.

The JUS-TOB1 continues to require applicants to specify their certification type and to certify that they have carefully reviewed specified documents, understand that the form is signed under penalty, must be updated for specified reasons, and must be complete and legible. These requirements are necessary to establish that the applicant is submitting the certification with full knowledge of all applicable laws.

As in Part I of the prior JUS-TOB1, Part II of the revised JUS-TOB1 requires the applicant to provide their name, telephone number, email address, and mailing address. It also includes a field for the applicant to identify the name of their attorney. This new field accounts for common errors in historical practice, as many applicants have needed to supplement their submissions under the prior forms after listing only their attorney.

Part III of the revised JUS-TOB1 form requires the applicant to certify and attach a complete and accurate brand list. The brand list implements Revenue and Taxation Code section 30165.1, subdivision (b)(1), which requires a Cigarette brand be listed on the Tobacco Directory before it can be sold in the State, and facilitates and assists the Department’s enforcement of the Directory Statute and Reserve Fund Statute. The revised JUS-TOB1 also simplifies user submissions. Previously, PMs identified their brands to the Department in multiple places (including the JUS-TOB1 and the JUS-TOB15) using paper forms. As updated, PMs may now confirm their brand list using a spreadsheet (JUS-TOB8) to their Directory certification. This change improves the

clarity, efficiency, and processing of Tobacco Directory certifications for both the Department and many Directory applicants.

The Legislature expressly provided the Department with statutory authority to require Directory applicants provide “a complete list” of their Cigarette brands manufactured during the past twelve months, updated with supplemental certifications 30 days prior to any brand changes. (Rev. & Tax., § 30165.1, subd. (b)(1).) Applicants may then designate a subset of such Cigarette brands which they seek to list on the California Tobacco Directory. (*Ibid.*) As explained above, accurate compendia of manufacturers and brands is necessary to the Department’s monitoring of the State Cigarette market, as California law restricts the sale of certain Cigarette brands even when manufactured by on-Directory tobacco product manufacturers, prohibits tobacco product manufacturers and all other persons from selling off-Directory Cigarettes in California, and imposes supplemental obligations and penalties on persons who fail to make escrow deposits on such off-Directory Cigarettes. (Rev. & Tax., § 30165.1, subd. (e); Health & Saf., § 104557, subd. (c).) Part III requests 12 month brand fabrication data to align with the annual certification cycle required by the Directory Statute.

The MSA and the Reserve Fund Statute restrict which persons may certify themselves as the manufacturer of any particular Cigarette brand. Part IV therefore requires an applicant to provide manufacturing information about its Cigarettes. As explained above, this information is often necessary for the Department to determine or confirm which tobacco product manufacturer fabricated, distributed, or sold a Cigarette into the market. As before, the JUS-TOB1 continues to gather information regarding the fabricator of Cigarettes and its state and federal manufacturing and/or importer licensing information. (See sections I.7, II.2, II.3, IV.3 of JUS-TOB1 (Rev. 2012).) The form is revised to account for the increased use of contract manufacturing or fabrication agreements among tobacco product manufacturers. The proposed form, as revised, thus requires applicants to affirmatively disclose fabrication agreements, whether a factory has relocated, whether the applicant is sharing fabrication equipment with other entities, and whether other entities are making the Cigarette brands at issue. Part IV requests 60 month fabrication data to align with the historically-observed movement of product through the distribution chain.

Part V requires the applicant to provide importing information about its tobacco products sold in the State. PM’s MSA payments are calculated in part based upon their federal excise tax paid volumes and some PMs have exclusive importer requirements under the MSA. Part V requests 12 month importer data to align with the annual certification cycle.

Currently, the JUS-TOB1, JUS-TOB9, JUS-TOB10, and JUS-TOB11 forms require those PMs that have not waived any claim to sovereign immunity to post a \$50,000 surety bond. Part IV of revised JUS-TOB1 regroups information and simplifies the relevant reporting, requiring applicants to clearly designate whether they will continue to post a surety bond and the exhibit number, bond amount, bond company, and that a continuing bond remains in place.

The Prevent All Cigarette Trafficking Act, 15 U.S.C. §§ 375-378 (“PACT Act”) imposes a federal requirement that entities report certain Cigarette shipments into or within the State. These PACT Act reports provide information relevant to the assessment of State excise taxes and the brands of Cigarettes entering the State. Part VII requires the applicant to disclose whether they

are compliant with the registration and reporting requirements in California under the PACT Act. In response to public comments, the Department revised Section VII to remove three questions relating to compliance with the federal Prevent All Cigarette Trafficking Act (PACT Act), United States Code, title 15, sections 375 through 378. This change is made to complete the rulemaking and to allow the Department additional time to consider whether to amend the form in the future to request the information.

Part VIII requires the applicant to provide information relating to the payment of federal excise taxes. The Department is authorized to gather this information under section 30165.2 of the Revenue and Taxation Code. This information is relevant to evaluating compliance with the payment provisions of the MSA as well as enforcement of the Directory Statute and Reserve Fund Statute.

Cigarettes are among the leading causes of fires and burns in California and the United States. As such, the California Cigarette Fire Safety and Firefighter Protection Act (“FSC Act”) (Health & Saf. Code, §§ 14950-14959) requires manufactures to produce, test, and certify in California that their Cigarettes meet designated performance standards regarding their propensity to burn while not being actively smoked. Under the FSC Act, it is unlawful for manufacturers, distributors, wholesalers, retailers, or other persons to sell or offer for sale Cigarettes that do not meet the FSC Act standards. For over a decade, the Department has gathered FSC Act certifications from PMs and NPMs to assess compliance with the FSC Act in California. The revised forms consolidate this assessment into the Directory forms: Part IX of the JUS-TOB1 continues to require applicant to submit their FSC Act certifications with their JUS-TOB1.

To assist in the identification of counterfeit and contraband products in the market, and because federal laws require manufacturers to mark and disclose the manufacturer or federal excise taxpayer on the cartons and packs, the Department has historically required that tobacco product manufacturers submit Cigarette product packaging as part of the Directory certification process. Section X of the revised JUS-TOB1 replaces the prior requirement that applicants submit physical packaging of all certified products with a less costly and burdensome requirement allowing manufacturers to submit digital copies of updated packaging instead.

Section XI requires Cigarette manufactures to submit their Federal Trade Commission rotation plans to the Department. This information is relevant to confirming the fabricator of the Cigarettes and the size and scope of the applicant’s Cigarette sales in California and the United States to assess compliance with Directory Statute and payment provisions of the MSA.

Since the Department last revised its forms, the United States Food and Drug Administration (“FDA”) has declared some tobacco product manufacturers’ Cigarettes to be unlawful for sale anywhere in the United States. Currently, the Department’s forms do not inform tobacco product manufacturers how or when they should relay the FDA’s decisions to the Department. Therefore, Section XII of revised JUS-TOB1 gathers information regarding FDA compliance. The Department considers such declarations highly time-sensitive and significant to Directory listing. In light of comparable provisions of records made previously to the Department, Section XII requests any such declarations be provided within five days of receipt.

Section XIII continues the current process of gathering Health and Human Services submissions in section V.3 of the prior form. Applicants attach their submissions to Health and Human Services. Now, the Department gathers Health and Human Services submissions from PMs because they can help confirm who made the Cigarettes being certified.

Section XIV consolidates questions currently split among sections III.4 and VI of the prior version of the JUS-TOB1. As consolidated and revised, these questions gather additional information regarding compliance with the Directory Statute. The questions are designed to assess Tobacco Directory eligibility as well as compliance with other State Cigarette laws. As part of the rule making process, Department is required to evaluate whether the proposed form changes impact small businesses. Thus, question I of section XIV collects information regarding the tobacco product manufacturers' past three years' worth of gross receipts to assist the Department's review regarding any small business impact. In March 2021, in response to public comments, the Department revised Sections XIV.F and XIV.G relating to withdrawn or denied certifications so that it applies prospectively. This change is necessary to allow applicants time to implement processes that will track this data.

Each year, Directory applicants submit certifications with voluminous exhibits and Department staff spend time and resources looking through stacks of paper or opening electronic submitted exhibits to locate particular records. As such, the JUS-TOB1 form requires applicants to designate their exhibits with letters and prepare an index. Exhibits that are submitted electronically must designate their exhibits by letter and name. Paper exhibits must be designated by letter and separated with bottom tabs. Section XV explains the requirements used by the Department to compile a complete and accurate record.

Form JUS-TOB1 continues to be signed under penalty of perjury. The necessity for a signature under penalty of perjury is to impress upon applicants the seriousness and importance of signing the form, to attest to the accuracy and completeness of the information submitted, and to deter misrepresentations and submission of false information.

The proposed revision to the JUS-TOB1 originally noticed in 2020 changed the term "entities" to "persons" to clearly communicate that inquires seek responses regarding individuals as well as business entities.

The JUS-TOB1 revision originally noticed by the Department also used the term Affiliate," which was defined as

a Person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another Person, as defined by Health and Safety Code section 104556(b),

seeking to ascertain all of the applicant's Cigarettes intended for sale in the United States as well domestically produced Cigarettes that will be exported out of the country. In response to public comments, the term Affiliate was narrowed and redefined in March 2021, to "Domestic Affiliate," which was defined as,

a Person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another Person that Fabricates, sells, or distributes any Cigarettes sold to consumers in the United States.

In response to additional public comments regarding the scope of this term, in March 2022, the Department made further changes to the JUS-TOB1 and JUS-TOB5. The Department added one new question (IV.H in the JUS-TOB1 and VII.H in the JUS-TOB5) that asks whether multiple locations fabricate the same brand of Cigarettes for sale in the United States. The revised question gathers the relevant information regarding the source of identified Cigarettes without requiring either the previously-noticed “Affiliate” or “Domestic Affiliate” terms. As such, the definition and references to Affiliate and Domestic Affiliate have been removed from the proposed revisions to the JUS-TOB1 and JUS-TOB5.

Since 2004, the Department has examined which certification inquiries are most responsive to industry trends and has updated the Department’s forms as necessary. The Department’s revised JUS-TOB1 form updates the 2012 version to enhance the Department’s ability to efficiently assess Directory Statute compliance. Stakeholders requested that the Department streamline the process, gather as much information as practical electronically, and not annually gather information that is readily available from other sources. As noted above, significant portions of the prior JUS-TOB1 form were addressed to persons who are no longer asked to complete the revised form, and questions previously directed to both PMs and NPMs on the JUS-TOB1 form have been revised, relocated to other forms, or deleted due to duplication. As a result, the JUS-TOB1 last revised in 2012 will be repealed and replaced consistent with the foregoing.

JUS-TOB3

The Department’s JUS-TOB3 form continues to be used by NPMs to certify their quarterly escrow deposits. The proposed Form JUS-TOB3 (Rev. 09/2020) revisions will make it easier to understand and use; help the NPM assess whether a supplemental certification for listing on the California Tobacco Directory is required; and confirm the NPM’s current escrow agent, escrow agreement, and minimum qualified escrow principal on deposit.

NPMs deposit tobacco escrow based upon their California volumes of Units Sold (which is defined by section 104557(j) of the Reserve Fund Statute based upon the Escrow Rate (which is defined, set, and increased annually by section 104557(a)) for each sales year. (Health & Saf. Code, § 104557.)

Parts 1 and 2 of the revised JUS-TOB3 continue to gather the name and contact information of the NPM, the sales year, quarter, and volume of Units Sold certified by the NPM, applicable Escrow Rate, and amount of tobacco escrow deposited. Previously, this identification information was spread over several sections in JUS-TOB3. Now, the NPM identifies itself in Part 1 and certifies its volume of Units Sold and the associated escrow deposit in Part 2. This change makes the form easier for the Department and NPMs to use. Because a ground for releasing tobacco escrow from escrow turns on the date of deposit, the revised JUS-TOB3 form asks the NPM to confirm the deposit date. (Health & Saf. Code, § 104557, subd. (b)(3).)

In addition to obtaining the information previously obtained in Part 4 of the JUS-TOB3 form, Part 3 of the revised JUS-TOB3 asks NPMs to confirm the date they last executed California's Approved Tobacco Escrow Agreement and whether anyone has modified or amended the agreement since that time to confirm compliance with the requirements of the Department's JUS-TOB6 form regarding amendments

Part of 4 of the JUS-TOB3 continues to ask for the amount of tobacco escrow on deposit for the benefit of California and incorporates the Minimum Qualified Escrow Fund Principal On-Deposit term from the JUS-TOB6 form.

Under the Directory Statute, NPMs must supplement their annual certification 30 days prior to seeking modify their Tobacco Directory listing. (Rev. & Tax Code, § 30165.1, subd. (a).) Thus, Part 5 of the revised JUS-TOB adds questions to assess whether NPM compliant with the Directory Statute and the information provided to the department remains current and accurate.

Form JUS-TOB3 continues to be signed and notarized.

JUS-TOB4

Form JUS-TOB4 continues to be used by NPMs to identify their distributors (as defined by Directory Statute section 30165.1(a)(4)) that sold their Cigarettes in California within each quarter of each sales year. The proposed Form JUS-TOB4 (Rev. 09/2020) revisions will make it easier to understand and use, collect data electronically, and require NPMs to identify and document sales in California they contend are not Units Sold. The change permits the Department to gather material information uniformly from the NPMs, which reduces the time and expense necessary for the Department to process and review submissions.

As before, the JUS-TOB4 collects the identity of the NPM, the quarter reported, whether the report is original or amended, the volume of Units Sold certified during the quarter, the brand family names at issue, and whether the Cigarette is Roll-Your-Own Tobacco (which was previously indicated by "product type"), and the name and title of the person that prepared the report. Instead of using a .pdf, the revised JUS-TOB4 uses the Excel format to improve and expedite processing for both the Department and NPMs.

JUS-TOB4 reporting is updated to conform with common recordkeeping practice for tobacco product manufacturers. Previously, NPM certified their Cigarette sales volumes by Brand Family and by quarter without itemizing the sales by distributor. Both NPMs and the Department generally track and apportion NPMs sales by distributor. The revised form also addresses common identification errors in submissions by separating distributor name and dba information into separate columns. Several California Cigarette distributors have both a licensee name that appears on the license issued by California Tax and Fee Administration ("CDTFA") and a "doing business as" name. NPMs and other entities often use both names interchangeably. Thus, in columns B, C, and D of the revised JUS-TOB4 form, the Department collects the name, address, and unique distributor license number issued by CDTFA to accurately gather data relevant to Directory Statute and Reserve Fund Statute monitoring and enforcement. The Department uses columns H-K of the revised JUS-TOB4 to enforce the Directory Statute and

Reserve Fund Statute by requiring NPMs to certify their volumes of Units Sold by Distributor and whether they contend any Cigarettes sold in California are not Units Sold and the source of the information that respondent certified to the Department.

JUS-TOB5

As explained above, like many other states, the Department now uses separate NPM and PM certifications to improve clarity regarding the questions that NPMs and PMs must answer.

The Department reiterates the grounds stated above regarding the revised JUS-TOB1. As reflected below, most of the questions in the JUS-TOB1 and JUS-TOB5 are the same.

Revised JUS-TOB1 part	Corresponding part of revised JUS-TOB5
I – Certification Type	I
II – Applicant	III
III – Brands	IV modified to address escrow due on Units Sold by NPMs under the Reserve Fund Statute instead of MSA payments by NPM
IV – Fabrication	VII
V – Importer	VIII with cross references for forms JUS-TOB12, JUS-TOB13, and JUS-TOB14 which are used by NPM importers
VI – Surety Bond	IX which addresses the grounds that require NPMs to post a surety bond pursuant to Revenue and Taxation code section 30165.1(c)(4).
VII – PACT Act	X
VIII – Federal Excise Tax	XI
IX – Cigarette Fire Safety	XII
X – Packaging or Labeling	XIII
XI – FTC Rotation Plan	XIV
XII – FDA Compliance	XV
XIII – DHHS Compliance	XVI
XIV – Additional Questions	XVII with modified questions H and I to inquire regarding the NPMs escrow compliance in other states
XV – Exhibits	XVIII
XVI – Signature	XIX

Under the Directory Statute, NPMs may be required to designate a registered agent for service in California. (Rev. & Tax., § 30165.1, subd. (b)(3)(A).) This requirement designates the person who can accept service in the event of a legal dispute. As such, revised part III of JUS-TOB5 inquires whether an NPM must appoint a registered agent under, and, if so, instructs the NPM to excuse and attach the Department’s JUS-TOB2 form.

Under the tobacco Master Settlement Agreement, PM payment obligations are based on national, rather than state-by-state sales. Under the Directory statute, which considers MSA compliance with respect to PMs, state-to-state shipments are of lesser import. In contrast, NPM payment obligations are based on in-state Units Sold, and are therefore heavily dependent on state-by-state sales information. As originally amended, the Department included a series of questions related to interstate reporting under federal Prevent All Cigarette Trafficking Act (PACT Act), United States Code, title 15, sections 375 through 378. In response to public comments, the Department removed these questions from the PM reporting requirements. This change is made to complete the rulemaking and to allow the Department additional time to consider whether to amend the form in the future to request the information. As amended, these questions are retained with respect to the NPM reporting requirements. As such, sections X.C to X.F of the proposed JUS-TOB5 form assess compliance with the PACT Act that generally apply more often to NPMs. In March 2021, the Department also revised Section X of Form JUS-TOB5 to incorporate the term “Indian Country” as defined in the PACT Act. Under the Directory Statute, NPMs may not be listed on the California Tobacco Directory unless they are compliant with the Reserve Fund Statute. (Rev. & Tax., § 30165.1, subd. (b)(3)(C).) Sections V and VI of the revised JUS-TOB5 require NPMs to disclose and confirm such compliance, the amount of escrow due and deposited for the prior sales year, the dates and retention of deposits of tobacco escrow previously deposited into qualified escrow account governed by California’s Approved Tobacco Escrow Agreement, attach and update the JUS-TOB7 form which documents whether an NPM knows in which states their Cigarettes were sold, in which volumes, and whether their total sales among the states corresponds to the volume of Cigarettes produced by NPM during that year to assess compliance with the Directory Statute and Reserve Fund Statute.

Since 2004, the Department has examined which certification inquiries are most responsive to industry trends and has updated the Department’s forms as necessary. The Department’s revised JUS-TOB5 form updates the 2012 version to enhance the Department’s ability to efficiently assess Directory Statute and Escrow Statute compliance. Stakeholders requested that the Department streamline the process, gather as much information as practical electronically, and not annually gather information that is readily available from other sources. As noted above, portions of the prior JUS-TOB1 form were addressed to persons who are no longer asked to complete the revised JUS-TOB5 form, and questions previously directed to both PMs and NPMs on the JUS-TOB1 form have been revised, relocated to other forms, or deleted due to duplication.

As explained above, the Department’s proposed revisions to the JUS-TOB5 form updates the 2012 version to better assess compliance with the Directory Statute and Escrow Statute. The Department removed all of the prior text from the 2004 revision of the JUS-TOB5 on the ground that the information is duplicative of other forms, regulations, and information-gathering efforts by the Department. Based upon the grounds above, the Department will repeal the 2012 version of the 2012 JUS-TOB5.

JUS-TOB7

The proposed JUS-TOB7 form is new.

The Department's proposed new JUS-TOB7 (Rev. 09/2020) form requires NPMs to apportion their Cigarette sales by state and indicate the number of Cigarettes upon which they deposited tobacco escrow or tobacco equity fee. Unlike PMs, which make MSA payments based upon their national sales. NPMs deposit escrow or equity fee in states based upon their sales volumes in each state during a particular year. The NPMs possess, track, and monitor the data at issue. Using the JUS-TOB7, the Department requires the NPM to disclose where they contend their Cigarettes were sold during the prior as well as their escrow compliance in California and other states to evaluate compliance with California's Directory Statute and Escrow Statute.

JUS-TOB8 (Rev. 11/2021)

Previously, California Cigarette distributors used the JUS-TOB8 to request notices regarding changes to the California Tobacco Directory. This request process has been made obsolete by information sharing between the Department and CDTFE, as well as advancements in electronic communications. As such, the Department has not received a JUS-TOB8 form for many years. Therefore, the Department has proposed replacement of the JUS-TOB8 form on the ground that the previous form solicited information duplicative of other forms, regulations, and information-gathering efforts by the Department.

The Legislature expressly granted the Department with the statutory authority to require all Directory applicants to provide "a complete list" of their Cigarette brands during the past twelve months, updated with supplemental certifications 30 days prior to any brand changes. (Rev. & Tax., § 30165.1, subd. (b)(1).) Currently, California uses form JUS-TOB15 to gather brand family information, including but not limited to brand style names and UPC codes using paper forms. Because the current JUS-TOB15 form collects a significant amount of detailed information using .pdfs, the Department, several NPMs, and several PMs have requested the Department gather the information in a format more compatible with industry record-keeping, including using a spreadsheet program like Excel.

In 2020, the complete brand list was noticed as a revised JUS-TOB15 form. The Department recently determined that the originally proposed revision to the JUS-TOB8 is not necessary at this time. Therefore, for ease of reference and to eliminate a gap in the Department's form numbers, the Department proposes to revise the Brand List originally noticed as a new JUS-TOB15 be renumbered and substituted as a replacement form JUS-TOB8.

Section 999.10 [Amend]

The Department modified the regulations to promote clarity and ease of use. For example, when NPMs must use the JUS-TOB3 form was previously addressed in sections 999.10, 999.11, 999.14, 999.16, 999.19, and 999.20. Now, when NPMs must submit the revised JUS-TOB3 form is addressed in section 999.10(c) only and the duplicative and unused references were removed.

Quarterly Escrow Deposits

Proposed Section 999.10 requires all NPMs to deposit tobacco escrow quarterly. Health and Safety Code section 104557 requires NPMs to deposit escrow based upon their Cigarette sales in

California that are Units Sold. Revenue and Taxation Code section 30165.1, subdivision (h) authorizes the Attorney General to require escrow deposits be made on a quarterly rather than annual basis. All NPMs listed on the California Tobacco Directory already deposit tobacco escrow quarterly in California and most other states. Like most states, California uses quarterly certification with the Reserve Fund Statute and Directory Statute to better monitor NPM compliance with Reserve Fund Statute throughout the year. Otherwise, tobacco escrow associated with Units Sold during January and March of a year is not collected until April of the following year. This requirement establishes uniform requirements for all NPMs and thus eliminates uncertainty.

Subdivision (a); Quarterly Escrow Deposits

Current regulations set out conditions under which NPM could be required to deposit on a more-than-annual basis in section 999.20. To conform with the revised regulation requiring quarterly escrow deposits of all NPMs, the Department will remove a non-applicable sentence in the fourth paragraph of section 999.10(a) and repeal section 999.20.

Subdivision (b)

Existing subdivision (b)(1), revised subdivisions (b)(3) to subdivision (b)(6) and (b)(9) to subdivision (b)(37), new subdivisions (b)(2)-(4)

The Department has made several non-substantive changes to the definitions, including but not limited to: that CDTFA, not the State Board of Equalization, now administers state Cigarette taxes for the State; the Directory established by the Directory Statute has been commonly known and referred to as the Directory, Tobacco Directory, and California Tobacco Directory for many years; the Tobacco Directory lists Cigarettes by brand styles, which are commonly known and understood subsets of the already defined term brand families; and that pursuant to Health and Safety Code section 104556(d) Roll-Your-Own tobacco (“RYO”) are Cigarettes under the Directory Statute and Reserve Fund Statute with a statutory conversion rate of 0.09 ounces of RYO equals one Cigarette under the Reserve Fund Statute. (Health & Saf. Code § 14956(d).)

Revised subdivisions (b)(5) and (6) to subdivisions (b)(28) and (b)(31) and new subdivisions (b)(5), (11), (27), (29), (30), (32)

The updated definitions reflect that NPMs are commonly known and referred to as NPMs.

The PMs are the entities that joined the MSA. The first entities that joined the MSA are the OPMs. Later, the SPMs joined the MSA. There continue to be both OPMs and SPMs under the MSA, collectively referred to as the PMs. The Directory Statute requires both OPMs and SPM to certify compliance with the Directory Statute to the Department, which defines and refers to them as PMs. (Rev. & Tax Code, § 30165.1, subd. (a)(7).) Moreover, certification requirements under the Directory Statute and regulations are and remain materially the same for both OPMs and SPMs. But, unlike the Directory Statute it implements, prior section (b)(6) only mentions OPMs--not SPMs or PMs. Thus, subdivision (31) clarifies that the Directory certification process and use of the JUS-TOB1 form applies to all PMs.

New subdivisions (b)(4), (28), and (29) clarify that PMs certify Directory compliance using the JUS-TOB1 form and NPMs certify using the JUS-TOB5 form.

Definitions for several applicable statutes, including PACT Act, California Cigarette Fire Safety and Firefighter Protection Act, and MSA were added in subdivisions (b)(11), (27), (30). The PACT Act and California Cigarette Fire Safety and Firefighter Protection Act are the commonly used and understood names of laws that are and have been used during the Department's Tobacco Directory certification process for many years.

All of the changes to the text and non-substantive and improve clarity and ease of reference.

New subdivisions (b)(7), (35), and (39)

Under the Reserve Fund Statute, the Department collects escrow based on the volume of Units Sold each calendar year. The Escrow Rate established and set by Health and Safety Code section 104557 includes an annual inflation adjustment; therefore, each calendar year has a different Escrow Rate.

The Department collects escrow quarterly, with the quarters ending in March, June, September, and December of each calendar year. The term "Quarters" is added in subdivision (b)(35) to clarify and explain the quarters at issue.

Twenty-five years after each deposit date, NPMs may seek with withdraw escrow principal from escrow. (Health & Saf. Code § 104557, subd. (b)(3).) The term "Deposit Date" is added in subdivision (b)(39) to assist enforcement of the Directory Statute and Reserve Fund Statute in subdivision (b)(4).

Under the MSA and the Reserve Fund Statute, the determination of certain obligations runs during the calendar year but some of the obligations themselves occur in the following year. To capture this concept, usual industry practice is to use the "Sales Year" as the relevant point of reference. The revised definitions codify this term to assist enforcement of the Directory Statute and Reserve Fund Statute in subdivision (b)(4).

Revised subdivision (b)(14) to subdivision (b)(40) and new subdivisions (b)(9), (10), (26), and (34)

The Department has collected escrow from NPMs based upon their volumes of Units Sold using the Escrow Rate set out in Health and Safety Code section 104557(a)(2). This "Escrow Rate," varies over time, but has consistently referred to the amount determined subject to this statutory mechanism. The term "Escrow Rate" is defined in subdivision (b)(10).

Escrow Agents, as described by Health and Safety Code section 104556(f), have and continue to hold qualified escrow funds principal in qualified escrow funds under the Directory Statute. Subdivision (b)(9) incorporates the term "Escrow Agent."

In 2019, the Department amended section 999.12 and form JUS-TOB6 to clarify how escrow agents hold escrow fund principal. Escrow deposits are recorded on ledgers maintained by the escrow agents. In subdivisions (b)(26) and (34), the Department has included the definitions

Ledger and Qualified Escrow Principal from the Department's JUS-TOB6 form because those terms are used in the Department's revised JUS-TOB3 form.

All of the revisions are non-substantive and/or incorporate commonly used and understood terms to improve clarity and reference.

New subdivisions (b)(12)-(25)

The proposed text of subdivisions (b)(12)-(25) identifies the Department's fourteen tobacco forms by name and number for clarity and reference

Reordered subdivisions (b)(2), (4), (7), (8), (10), (11), (12) to subdivisions (b)(1), (8), (33), (36), (38), (40), (41).

In order to effectuate the changes above, subdivision (b)(2) was reordered to (b)(1). Subdivision (b)(4) was reordered to (b)(8). Subdivision (b)(7) was reordered to (b)(33). Subdivision (b)(8) was reordered to (b)(36). Subdivision (b)(10) was reordered to (b)(38) Subdivision (b)(11) was reordered to (b)(40). Subdivision (b)(12) was reordered to (b)(41).

Revised subdivision (c)

Currently, all NPMs deposit escrow quarterly on their volumes of Units Sold in California during each Sales Year, which begins on January 1 of each year under Health and Safety Code section 104557(a)(2). As explained above, the Department's quarterly escrow requirement is now set forth in subdivision (c). Prior references to annual escrow deposits were removed from subdivision (b) and section 999.20.

Currently, section 999.20 states that quarterly escrow deposits and the associated JUS-TOB3 and JUS-TOB4 forms are due on April 21, July 20, October 21, and January 21. NPMs have requested the Department standardize the deposit dates and provide a few days to gather the deposit information before preparing and submitting their JUS-TOB3 and JUS-TOB4 forms

First, the Department's revised tobacco regulations confirms that escrow continues to be due on January 1, April 21, October 21, but moves the deposit dates from section 999.20 to section 999.21. Second, the deadline for second quarter escrow moves back one day from July 20 to July 21 so the Department's regulations uniformly require escrow deposits on the 21st day after each quarter ends. Finally, the revised Regulation provides NPMs with an additional nine days to prepare the JUS-TOB3 and JUS-TOB4 certifications and submit them to the Department. This allows the Department to collect and verify escrow deposits within the month they are due, but the Department's regulations no longer require the NPM to both deposit escrow and certify on the same date.

Originally, the Department used the JUS-TOB3 form to remind NPMs about the existence of the Tobacco Directory and their obligation to comply with the Directory Statute and Reserve Fund Statute. The Department affixed stamps to the JUS-TOB3 and mailed the forms back to NPMs, who were required to send them to each of their distributors. Over the years, the technology used by the Department and industry regarding the California Tobacco Directory evolved. Now, the Department regularly and actively monitors the Directory compliance of California Cigarette

distributors and wholesalers, who electronically monitor the Department's Directory website and notices. As such, the Department has not required manufacturers to send processed JUS-TOB3 forms to their distributors for several years on the ground that it is unnecessary and the outreach provided by revised JUS-TOB4 results in more effective communications between the manufacturers and distributors and the Department with better data regarding Escrow and Directory Statute compliance.

Section 999.11 [Repeal]

Subdivision (a)

The proposed regulations repeal subdivision (a). The proposed amendments to section 999.14 identify that the Department uses the JUS-TOB3 and JUS-TOB4 forms to certify compliance with the Escrow Statute.

Subdivision (b)

The proposed regulations repeal subdivision (b). Subdivision (b) specified requirements relating to annual certifications made with deposits into qualified escrow funds. As deposits must be made quarterly under amended Section 999.10, this provision is no longer necessary.

Section 999.14 [Amend]

Section 999.14 has historically addressed two different requests by NPMs for releases of escrow under the escrow Statute. NPMs may make a Units Sold adjustment request, which requires identification and counting of actual Cigarettes sold in California; not the Escrow Rate. Alternately, the NPMs may make an Escrow Rate adjustment request, whereby the NPM requests the Department review whether the Escrow Rate used during a specific sales year complied with Health and Safety Code section 104557(b)(2). Despite being co-listed in the Regulations, the information and review required by the Department to process these requests has always been different.

Currently, section 999.14 does not clarify the differences between Units Sold adjustment requests and Escrow Rate adjustment requests. The proposed regulations amend 999.14 to identify the two different processes, and revises and reorganizes existing text to provide clarity.

Revised subdivision (a)

As explained above, current section 999.14 does not distinguish between Escrow Rate adjustment requests and Units Sold adjustment requests. It is necessary to distinguish between these two types of requests because each request requires different supporting documentation. Therefore, the Department has relocated and revised the text in current subdivision (a) into revised subdivisions (c) and (d).

Revised subdivision (c) and repeal of prior subdivision (d)

When an NPM contends that the Department has misidentified the Units Sold by the NPM as part of a Units Sold adjustment request, the NPM must identify and document which distributors distributed its Cigarettes, by distributor, brand family, and year, and must provide supporting

documentation. The submitted information, along with other source data used in the annual Units Sold process, allows the Department to determine the number of Cigarettes sold and relevant information with respect to the Units Sold adjustment request. This requirement continues in revised subdivision (d).

An Escrow Rate adjustment request turns on the Escrow Rate required by Health and Safety Code section 104557. Currently, the text of section 999.14 requires NPMs making an Escrow Rate adjustment request to itemize their sales within the State and provide the Department with the data used by the Independent Auditor under the MSA. As revised, the Department will no longer require the NPM to provide Independent Auditor data or sales invoices to process an Escrow Rate adjustment request. Instead, the revised regulation requires a clear explanation of the NPM's contentions regarding the Escrow Rate used by the Department in support of its claim that it is authorized to seek a release under the Escrow Statute. Thus, revised subdivision (c) consolidates the requirements for an Escrow Rate adjustment into subdivision (c); the requirements for a Units Sold adjustment request were moved to new subdivision (d) to improve clarity and reference; and the previously unused and now unnecessary request to gather Independent Auditor data from NPMs was removed.

Subdivision 999.16 [Amended]

As required by Revenue and Tax Code section 30165.1, subdivision (b), the Department maintains a Directory of tobacco product manufacturers that have provided specified certifications to the State, and their respective Brand families. PMs must certify that they have made all required undisputed payments under the MSA. (Rev. & Tax Code, § 30165.1, subd. (a).) NPMs must certify that they are in full compliance with their escrow deposit obligations under Health and Safety Code sections 104555-104558, including any payments required by Revenue and Tax Code section 30165.1 and implementing regulations. (*Ibid.*)

Subdivision (b) [new]

Subdivision (b) lists the documents a PM must submit to be included on the Tobacco Directory: JUS-TOB1, TOB8, TOB9, TOB10, TOB11, and TOB14.

The JUS-TOB1 (PM Certification) is necessary because it implements the certification requirement in Revenue and Taxation Code section 30165.1 subdivision (a) by specifying the certificates and supporting documentation required for listing on the tobacco directory. This existing requirement has moved from subdivision (a)(1).

The JUS-TOB8 is necessary to list information about the brand of tobacco products sold by tobacco manufacturers. This form is referenced in existing Section 999.29, but is included here again for ease of reference.

The JUS-TOB9, TOB10 and TOB11 are necessary because they permit the State to file a legal action against listed PMs for failing to comply with the MSA, related tobacco statutes, and these regulations, including the conditions for listing in the Directory. These forms are also referenced in existing Section 999.24 but are included again here for ease of reference.

The JUS-TOB14 is necessary to provide a financial guarantee that a listed tobacco manufacturers comply with their payment obligations under the MSA or Health and Safety Code section 10455-104558. This form is also referenced in existing Section 999.26, but is included here again for ease of reference.

Subdivision (c) [new]

Subdivision (c) lists the documents an NPM must submit to be included on the Tobacco Directory. Existing regulations combine the certification requirements for PMs and NPMs seeking listing on the Tobacco Directory. These proposed regulations separately describe the filing requirements for PMs and NPMs. The change is necessary to avoid confusion as some of the certification requirements are different for PMs and NPMs. NPMs seeking listing on the Tobacco Directory must submit the following documentation: JUS-TOB2, TOB5, TOB6, TOB7, TOB8, TOB9, TOB10, TOB11, TOB12, TOB13, TOB 14.

The JUS-TOB2 is necessary because it designates the person who can accept service of process for the listed NPM in the event of a legal dispute.

The JUS-TOB5 (NPM Certification) is necessary because it implements the certification requirement in Revenue and Taxation Code section 30165.1, subdivision (a) by specifying the forms and supporting documentation required for listing on the Tobacco Directory. PMs and NPMs currently use the JUS-TOB1 to comply with this certification requirement as required by existing subdivision (b)(1). Like several other MSA states, California now requires separate forms for PMs and NPMs. The payment provisions under the Directory Statute for PMs turn on PM nationwide sales volumes, but NPMs must identify and track their volumes of Units Sold in California and each of the other MSA states. By reorganizing and consolidating the JUS-TOB forms, including JUS-TOB1, the Department's revised forms are easier to use and understand.

The JUS-TOB6 is necessary as supporting documentation because it describes how NPMs and escrow agents must maintain track escrow deposits in compliance with these Directory Statute.

The JUS-TOB7 is necessary as supporting documentation because it provides information on the number of Units Sold, which affects the amount NPMs must deposit in escrow.

As explained above, the JUS-TOB8 is necessary to list information about the brand of tobacco products sold by tobacco manufacturers. This form is referenced in existing Section 999.29, but is included here again for each of reference.

The JUS-TOB9, TOB10 and TOB11 are necessary because it permits the State to file a legal action against listed tobacco manufactures for failing to comply with the MSA, related tobacco statutes, and these regulations, including the conditions for listing in the director. These forms are also referenced in existing Section 999.24 but are included again here for ease of reference.

The JUS TOB12 and TOB13 are necessary because some NPMs are located outside the United States therefore must designate an importer located in the United States that will be responsible for complying with the NPM's escrow deposit obligations. These forms are also referenced in Section 999.25, but are included here for ease of reference.

The JUS-TOB14 is necessary for tobacco companies that do not waive sovereign immunity to provide a financial guarantee that a listed tobacco manufacturers comply with their payment obligations under the MSA or Health and Safety Code section 10455-104558. This form is referenced in Section 999.26, but is included here again for ease of reference.

Section 999.19 [Amended]

Subdivision (a)(1)

Consistent with subdivisions (c)(3) and (c)(5) of the Directory Statute, the Department requires NPMs to send their distributors Tobacco Directory approval letters, removal notices, or other Tobacco Directory notices issued by the Department. To monitor compliance with this obligations, the Department’s proposed edits to section 999.19 to require distributors and wholesalers to maintain copies of such Tobacco Directory approval letters, removal notices, or other Directory Notices for a period of five years. This requirement is necessary to provide a record in the event such distributors contend an NPM did not provide the required notice. The proposed amendments remove the requirement that distributors retain stamped JUS-TOB3 forms or the copies of JUS-TOB1 forms submitted to the Department on the ground that the Department already possesses the records at issue and no longer requires copies of these documents be sent to distributors.

Subdivision (a)(2)

This provision was amended to delete the term “RYO” because, as revised, that term now falls within the definition of Cigarette in 999.10, subdivision (b)(5).

Section 999.24 [Amended]

As explained above, under the proposed amendments to Section 999.24, tobacco product manufactures will continue to provide the Department with a brand list, but the format of such brand list will be updated to reflect improvements in technology and departmental recordkeeping. The Department will now use a digital submission to make it easier to populate, resubmit each year, and process for both the Department and tobacco product manufacturers. Under subdivision (e) of Revenue and Taxation section 30165.1, the Department requires manufacturers to provide a complete list of their brands manufactured in the United States or imported for sale in the United States. In order to satisfy their obligation under the Directory Statute, each PM or NPM seeking listing on the California Tobacco Directory provides the Department with a complete brand list and designates their importers. Because of the registration requirements imposed on tobacco product manufacturers, it is not necessary for all importers to complete a JUS-TOB8 at this time.