

**CALIFORNIA DEPARTMENT OF JUSTICE**

**TITLE 11. LAW**

**DIVISION 1. ATTORNEY GENERAL**

**CHAPTER 16. MASTER SETTLEMENT AGREEMENT, TOBACCO**

**CHAPTER 16.5 FIRE STANDARD COMPLIANT CIGARETTES**

**INITIAL STATEMENT OF REASONS**

**PROBLEM STATEMENT**

**A. Fire Safety Act**

The California Cigarette Fire Safety and Firefighter Protection Act (“Fire Safety Act”) (Health & Saf. Code, §§ 14950-14959) governs the ignition propensity of cigarettes sold in California. Fire Standard Compliant (“FSC”) cigarettes are engineered to go out when not actively smoked. Conversely, non-FSC cigarettes may stay lit when not in active use and thus present a serious fire risk. Since 2007, cigarettes cannot be sold in California unless the manufacturer certified that their cigarettes are designed, produced, and tested to meet a nationwide performance standard regarding their propensity to burn while not being actively smoked, and marked to show compliance with Fire Safety Act requirements. (Health & Saf. Code, §§ 14950-14959.) There is no federal law regulating the ignition propensity of cigarettes. Instead, this nationwide safety measure is maintained by each state having passed and continuing to administer a FSC program that is substantially the same as California’s. In 2018, California amended the Fire Safety Act to make all non-FSC cigarettes contraband per se. (Health & Saf. Code, § 14957.)

In 2022, Assembly Bill 1742 amended the Fire Safety Act to transition the administration of the State’s FSC cigarette program from the State Fire Marshal to the Department, effective January 1, 2023. (Health & Saf. Code, §§ 14951(d), 14953.) Moreover, Assembly Bill 1742 makes Fire Safety Act compliance a requirement for cigarettes to be eligible for listing on the California tobacco directory, which is administered and maintained by the Department. It is unlawful for Cigarettes to be sold, offered for sale, or possessed for sale in California if they are not listed on the Department’s tobacco directory. (Rev. & Tax Code, § 30165.1, subd. (e).) Cigarette manufacturers must file annual certifications to remain listed on the Department’s tobacco directory. (Rev. & Tax. Code, § 30165.1, subd. (c)(3).)

To administer the Fire Safety Act, the Department requires regulations and forms for processing Fire Safety Act certifications. New section 999.30 of new Chapter 16.5, Division 1, of Title 11 of the California Code of Regulations will set forth the Fire Safety Act regulation and new form JUS-TOB15 and the revised JUS-TOB8 form will be the Fire Safety Act forms.

**B. Tobacco Escrow Agreement**

In 1998, 46 states entered into the Tobacco Master Settlement Agreement (“MSA”) with the largest tobacco manufacturers in the United States to settle certain claims against manufacturers arising out of the sale, advertising, and consumption of certain tobacco products.

(Health & Saf. Code, § 104555, subd. (e).) Tobacco manufacturers that have elected not to join the MSA are Non-Participating Manufacturers (“NPMs”).

NPMs must deposit funds into qualified escrow accounts governed by state law based upon their sales of cigarettes and roll-your-own tobacco (“RYO”) in California. Unless specific conditions are satisfied, NPMs are statutorily prohibited from accessing or using the principal on deposit in the tobacco escrow accounts for 25 years. (Health & Saf. Code, § 104557, subd. (b).) NPMs and their escrow banks must complete a Department approved escrow agreement and ensure that the funds are held and monitored in compliance with California law. (Rev. & Tax. Code, § 30165.1, subd. (c)(2)(a).) The Department is responsible for establishing and updating California’s tobacco escrow agreement. (Rev. & Tax. Code, § 30165.1, subs. (b)(3)(D), (c)(2)(A), and (o).)

In 2019, the Department amended California Code of Regulations, Chapter 16, section 999.12 and the Approved Tobacco Escrow Agreement, JUS-TOB6 (Rev. 5/2019), which is incorporated by reference into section 999.12. The Department sought to clarify that the aggregate Face Value (as defined by section 2.G of the Approved Tobacco Escrow Agreement) of the Permitted Investments (as defined by section 2.O) and the aggregate Cost Basis (as defined by section 2.D) of the Permitted Investments in an NPM’s California Subaccount must be equal to or greater than the Minimum Qualified Escrow Principal On-Deposit (as defined by section 2.K). Generally, this means that the aggregate Cost Basis (also known as the purchase value) and Face Value (also known as maturity value) of the Permitted Investments shall not be lower than the Minimum Qualified Escrow Principal On-Deposit. Section 4.C of the Approved Tobacco Escrow Agreement states the applicable requirement. (Approved Tobacco Escrow Agreement, section 4.C.)

Consistent with the 2019 standard above, the first sentence of the Section 4.D should state:

*Whenever the aggregate Face Value of the QEF Sub-Account or the aggregate Cost Basis of the QEF Sub-Account is less than the Minimum QEF Principal On-Deposit for a QEF Sub-Account, the Escrow Agent shall deem the QEF Sub-Account non-compliant.*

The Department confirms the 2019 guidance to NPMs and escrow agents by revising the first sentence of section 4.D with the text above.

Based upon the change above, California Code of Regulations, Chapter 16, sections 999.10(b)(17) and 999.12(a) will be updated to reflect that the revision date of the Approved Tobacco Escrow Agreement, JUS-TOB6 has changed from 2019 to 2023.

## **BENEFITS ANTICIPATED FROM REGULATORY ACTION**

The Fire Safety Act limits the ignition propensity of cigarettes to avoid serious harm to the public’s health and safety and general welfare caused by fires. To promote efficiency for California, the State transitioned administration of the Fire Safety Act program to the Department. Until 2023, manufacturers sent their Fire Safety Act submissions to both the State Fire Marshal and the Department.

Now only one state agency will receive and process Fire Safety Act certifications. The Department will also use electronic processing to further promote efficiency and reduce costs. While tobacco manufacturers will have some limited costs associated with reviewing the Department's forms and the costs associated with populating their first JUS-TOB8 with data from their last FSC tests, the Department anticipates that tobacco manufacturers will ultimately reduce costs by submitting both Fire Safety Act and tobacco directory compliance forms to only one California agency.

The Health and Safety Code requires NPMs to deposit tobacco escrow on their Units Sold of cigarettes in California as a source of recovery for potential litigation regarding the health impacts or marketing of the cigarettes. (Health & Saf. Code, § 104557.) California law requires that the tobacco escrow funds be governed by an escrow agreement approved by the Department. (Rev. & Tax. Code, § 30165.1, subd. (b)(3)(B)(2) & (c)(2)(A).) This rulemaking process clarifies the fund balance rules for tobacco escrow by making a technical change to the Approved Tobacco Escrow Agreement.

## **SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION**

### **A. Fire Safety Act**

#### **Chapter 16.5**

#### **Section 999.30**

##### Subdivision (a)

In subdivision (a) of section 999.30, the Department seeks to adopt six definitions.

##### Subdivision (a)(1) and (2)

Subdivision (a)(1) and (a)(2) define "FSC Cigarette" and "FSC Manufacturer" to distinguish those terms from Cigarette in existing regulation section 999.10(b)(6) and from "NPM" or "PM" in existing regulation section 999.10(b)(28) and (b)(31). Under the Fire Safety Act, cigarette manufacturers shall certify Fire Safety Act compliance to the Department. (Health & Saf. Code, § 14957.) Since 2004, Cigarette manufacturers have certified California tobacco directory compliance to the Department. Currently, all of the Department's tobacco regulations concern California tobacco directory compliance and include definitions for the terms "Cigarettes" and "Manufacturers" based upon the scope and purpose of the tobacco directory. The Fire Safety Act and cigarette directory law have different statutory definitions for both cigarettes and manufacturers. For example, roll-your-own tobacco ("RYO") is not a cigarette under the Fire Safety Act. (Health & Saf. Code, § 14950, subd. (b)(1).) Conversely, RYO is a cigarette under the California tobacco directory law. (Health & Saf. Code, §§ 104556, subd. (d), 14950, subd. (b)(1); Rev. & Tax Code, § 30165.1, subd. (a)(4).) Similarly, the definitions of "Manufacturer" under the Fire Safety Act and "Tobacco product manufacturer" under the tobacco directory are not identical. (Health & Saf. Code, §§ 104556, subd. (i), 14950, subd. (b)(4); (Rev. & Tax Code, § 30165.1, subd. (a)(11).)

### Subdivision (a)(3)-(6)

The Fire Safety Act concerns the testing, marking, and certification of cigarettes by manufacturers regarding the ignition propensity of the cigarettes. As such, the remaining definitions are the “FSC Marking” and “FSC Testing” definitions from the Fire Safety Act and the designation of the Department’s JUS-TOB8 and JUS-TOB15 forms as the Department’s primary Fire Safety Act certification forms in subdivisions (a)(3)-(6) of section 999.30. These definitions were necessary to provide clarity regarding the information required by the JUS-TOB8 and JUS-TOB15 forms.

### Subdivision (b)

In subdivision (b)(1), the Department explains that forms JUS-TOB8 and JUS-TOB15 are both used for Fire Safety Act certifications. Fire Safety Act certifications expire on three-year cycles and may be submitted separately from directory submissions to the Department. In contrast, California tobacco directory certifications are submitted and expire annually. (Rev. & Tax Code, § 30165.1, subds. (b), (c)(4).) Therefore, the Department is adopting the new JUS-TOB15 form to accept and process the Fire Safety Act certifications. As further explained below, the new JUS-TOB15 form requires applicants to identify themselves, provide contact information, disclose their Fire Safety Act testing method, confirm their California tobacco directory status, and provide their Fire Safety Act testing and marking certifications as required by the Fire Safety Act.

To the extent practical, the Department already collects certain information about cigarettes, such as brand name, brand style, and manufacturer in an electronic format using the Department’s JUS-TOB8 form. The Fire Safety Act requires cigarette manufacturers to certify the flavor, filter type, pack type, and length and circumference of their cigarettes to the Department under the Fire Safety Act. (Health & Saf. Code, § 14953, subd. (b).) This Fire Safety Act data can and should be gathered electronically to maximize efficiency and reduce departmental processing time. Therefore, the Department is revising the JUS-TOB8 form to collect information the Department is expressly authorized to receive under the Fire Safety Act in columns P through T. Cigarette manufacturers track whether and when they last certified and tested their cigarettes under the Fire Safety Act, and the Department will now gather this information in columns U and V of form JUS-TOB8 to contemporaneously assess compliance with both the Fire Safety Act and California tobacco directory.

Subdivisions (b)(2) and (b)(3) discuss the required information that must be submitted on the forms and require manufacturers to disclose off-directory Fire Safety Act certifications to the Department on the JUS-TOB8 and JUS-TOB15 forms. As of 2023, cigarette manufacturers must submit both Fire Safety Act and tobacco directory certifications to the Department. Manufacturers may certify Fire Safety Act compliance independently from tobacco directory compliance. But cigarettes cannot be listed on the California tobacco directory if they are not also Fire Safety Act compliant. (Rev. & Tax Code, § 30165.1, subd. (c)(3).)

In subdivision (b)(4), the Department explains that manufacturers may submit their Fire Safety Act certifications to the Department. The Department will accept Fire Safety Act certifications

by both mail and email. The Department chose mail and email submission methods because they are both common methods that the manufacturers already use to submit documents to the Department and both methods have minimal fiscal impact on the Department and manufacturers since both methods are routine and standard processes.

The Department's proposed JUS-TOB 15 requires applicants to certify compliance with the record retention requirements in Health and Safety Code section 14952, subdivision (f). Subdivision (b)(5) explains the record retention requirements of the Fire Safety Act and the Department's ability to obtain the records to ensure compliance with the requirement in Health and Safety Code section 14952, subdivision (b) that no more than 25 percent of the cigarettes tested exhibit full-length burns.

#### Subdivision (c)

In subdivision (c), the Department explains when Fire Safety Act certifications are due.

Subdivision (c)(1) explains cigarettes may not be sold, offered for sale, or possessed for sale unless the manufacturer complies with the Fire Safety Act. (Health & Saf. Code, § 14951.)

Subdivision (c)(2) confirms that Fire Safety Act certifications expire after three years under the Fire Safety Act. (Health & Saf. Code, § 14953, subd. (c).)

The Fire Safety Act does not expressly state how often cigarettes must be retested under the Fire Safety Act. (Health & Saf. Code, § 14953.) All 50 states share a model law governing the ignition propensity of cigarettes substantially similar to the Fire Safety Act. Those laws also require testing as well as recertification every three years, but they do not expressly define the testing interval. Most states interpret their similar Fire Safety Act laws as requiring new FSC test results every three or four years. (See. E.g., AZ ST § 37-1403, subd. (c); CT ST § 29-418, IL ST CH 425 § 8/30, subd. (c); MD BUS REG § 16-603, subd. (d); NM ST § 57-2B-4, subd. (d); NV ST § 477.194, subd. (4); OH ST § 3739.09; OK ADC § 265:40-1-5; TN ST § 68-102-503.)

Alternatively, some states permit manufacturers to attest that their cigarettes still extinguish at least as well as the last time their ignition propensity was tested. (See. E.g., OR ADC 837-035-0200, subd. (3); MI ADC R 29.462, subd. (3), WI ST 167.35.)

The second method does not require independent laboratories to evaluate the manufacturer's unverified contentions regarding the flammability of previously tested products. One manufacturer objects to the three-year testing cycle on the ground that it shortens the three-year certification cycle of the Fire Safety Act by several months. Thus, in subdivision (c)(3), the Department clarifies that Fire Safety Act tests expire after four years. This regulation ensures that manufactures eventually retest whether their cigarettes are FSC compliant without shortening the three-year certification cycle of the Fire Safety Act.

## **Form JUS-TOB8**

Currently, the Department uses form JUS-TOB8 to collect cigarette data in an electronic format. The Fire Safety Act requires cigarette manufacturers to certify the flavor, filter type, pack type, and length and circumference of their cigarettes to the Department. (Health & Saf. Code, § 14953, subd. (b).) The JUS-TOB8 will be amended to also gather the required Fire Safety Act data in the same electronic format. Applicants will provide that information electronically using form JUS-TOB8 to maximize efficiency and reduce departmental processing time. Moreover, the revised JUS-TOB8 will streamline the Department's efforts to identify non-FSC cigarettes. (Rev. & Tax Code, § 30165.1, subd. (c)(3).)

Under the Fire Safety Act, manufacturers shall certify the flavor of their cigarette to the Department. (Health & Saf. Code, § 14953, subd. (b)(5).) To allow the manufacturers to submit and certify this required information, in column P, manufacturers will indicate with "Tobacco," "Menthol," or "Other" whether any of the brand styles of cigarettes listed by applicant in column F contain a constituent that imparts a characterizing flavor, with characterizing flavor and constituents having the same meaning as subparts (a)(1) and (a)(2) of Health and Safety Code section 104559.5. "Tobacco" is used to reflect cigarettes that do not impart a characterizing flavor other than tobacco. "Menthol" is used to describe cigarettes with the charactering flavor menthol. "Other" is used to describe cigarettes that impart a characterizing flavor other than tobacco or menthol.

Under the Fire Safety Act, manufacturers shall certify to the Department whether their cigarettes are filtered. (Health & Saf. Code, § 14953, subd. (b)(6).) To allow the manufacturers to submit and certify this required information, in column Q, manufacturers will indicate "with filter" or "non-filter" to certify whether their cigarettes are filtered.

Under the Fire Safety Act, manufacturers shall certify their pack type to the Department. (Health & Saf. Code, § 14953, subd. (b)(7).) To allow the manufacturers to submit and certify this required information, in column R, manufacturers will indicate their pack type with "Hard Pack," "Soft Pack," or "Other."

Under the Fire Safety Act, manufacturers shall certify the length and circumference of their cigarettes. (Health & Saf. Code, § 14953, subds. (b)(3)-(4).) To allow the manufacturers to submit and certify this required information, in columns S and T, manufacturers provide the average length and circumference of their cigarettes in millimeters.

Fire Safety Act certifications expire every three years. (Health & Saf. Code, § 14953, subd. (c).) As such, to allow the manufacturers to submit and certify this required information, in column U, manufacturers will provide the date of their last Fire Safety Act certification to California, or otherwise report RYO or if they never FSC certified a Brand Style to California, to assist the Department's monitoring of compliance with the Fire Safety Act and tobacco directory.

Under section (c)(3) of regulation 999.30 of this rulemaking, Fire Safety Act test results expire after four years. As such, to allow the manufacturers to submit and certify this required information, in column V, manufacturers provide the date of their last Fire Safety Act test or

otherwise report RYO or if they never FSC Tested a Brand Style to California, to assist the Department's monitoring of compliance with the Fire Safety Act and tobacco directory.

### **Form JUS-TOB15**

The Department proposes adopting JUS-TOB15 as a Fire Safety Act certification form. This form will replace the State Fire Marshal's Application for Certification form.

Similar to the State Fire Marshal's form, Part I of JUS-TOB15 requires the applicant to provide their name, telephone number, email address, and mailing address. This permits the Department to contact applicants, which is necessary because sometimes the Department has questions about the information submitted. The State Fire Marshal's Application also required this information.

Part II requires the applicant to provide their laboratory's name, telephone number, email address, and mailing address. The Department can use this information to verify that the manufacturer used a valid laboratory that conducts the required testing methods under the Fire Safety Act. The Fire Safety Act requires that the cigarettes be tested with either the ASTM E2187-04 test cited in Fire Safety Act or an alternate test that satisfies the testing requirement of the Fire Safety Act. (Health & Saf. Code, § 14952.) As such, Part II requires applicants to designate whether they are using ASTM E2187-04 or an alternate test. If the applicant selects an alternate test, the applicant shall describe the alternate testing process. This information is necessary for the Department to determine whether the FSC Cigarettes have been tested by valid laboratories using valid testing methods and to ensure compliance with the Fire Safety Act. The State Fire Marshal's form had required applicants to include similar information by attaching a copy of the laboratory test results.

Similar to the State Marshal's form, in Part III, the applicants provide the Department the flavor, filter type, pack type, and length and circumference of their cigarettes as expressly required by the Fire Safety Act. (Health & Saf. Code, § 14953, subd. (b).) The Fire Safety Act does not define "flavor." To conform across statutes, the Department's Fire Safety Act uses section 104559.5 of the Health and Safety Code. The Department and manufactures currently use an electronic form, the JUS-TOB8, to submit, sort, and organize cigarette data digitally at the brand style level. The flavor, filter type, pack type, and length and circumference data required by the Fire Safety Act are submitted at the brand style level and can be submitted, processed, and stored digitally. Instead of creating a new Fire Safety Act spreadsheet with largely duplicative fields, the Department is promoting efficiency and reducing processing time by modifying the JUS-TOB8 to incorporate the Fire Safety Act data into existing digital submissions and processing. Thus, in part III, applicants confirm they have populated and attached a JUS-TOB8 to their JUS-TOB15.

In Part IV, applicants shall clarify whether they or their cigarettes are listed on the tobacco directory. The Department processes both tobacco directory and Fire Safety Act certifications, and non-FSC cigarettes are not eligible for listing on the tobacco directory. (Rev. & Tax Code, § 30165.1, subd. (c)(3).) Part IV provides clarity and expedites the processing of both Fire Safety Act and tobacco directory certifications by the Department.

Similar to the State Marshal's form, in Part V, the applicants shall certify compliance with the testing and record keeping requirements of the Fire Safety Act. (Health & Saf. Code, § 14952.) The Department chose to require the manufacturer's authorized agent to attest to these requirements in order to emphasize their importance and ensure that the manufacturer is aware of these requirements. Part V also requires applicants to certify compliance with the record retention requirements in Health and Safety Code section 14952, subdivision (f). This certification is necessary to ensure compliance with the requirement that no more than 25 percent of the cigarettes tested exhibit full-length burns.

In Part VI, the applicants shall certify compliance with the marking requirements of the Fire Safety Act as required by the Fire Safety Act. (Health & Saf. Code, § 14954.) Part VI requires applicants to clarify whether the markings were already provided to the Department or are instead attached to the certification. This certification helps the Department track the status of the submission and promote efficiencies by avoiding duplication where the markings may have already been provided.

Part VII requires a signature under the penalty of perjury, including a declaration that the information submitted is true, correct, accurate and complete. The necessity for a signature under the 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 submissions of false information. The State Fire Marshal's form had required a certification that the information submitted is true and accurate.

Similar to the State Fire Marshal Form, Part VII requires the applicant's signature to be notarized. The notary requirement helps the Department confirm that the individual who signed the form is an authorized agent of the manufacturer because the Department can rely on the notary certification that the individual's identity was verified and is who they say they are.

## **B. Revised Approved Tobacco Escrow Agreement**

### **Section 999.10**

Subdivision (b)(17) of Section 999.10 defines form JUS-TOB6 as the Department's Approved Tobacco Escrow Agreement, defines JUS-TOB8 as the Department's Brand List form, and incorporates the forms by reference. Currently, the definitions include older revision dates that would need to be updated to reflect this rulemaking's changes to the forms.

The Department also made non-substantive changes by deleting referenced subdivisions and replacing statutory string citations in the Note and Reference section authority.

### **Section 999.12**

Section 999.12 incorporates the JUS-TOB6 form by reference. As such, there are four instances where the revision date must be updated from 2019 to 2023 to reflect this rulemaking's changes to the form.



The Department also made non-substantive changes by deleting referenced subdivisions and replacing statutory string citations in the Note and Reference section authority.

### **Form JUS-TOB6**

The Office of the Attorney General is responsible for establishing and updating California's tobacco escrow agreement. (Rev. & Tax. Code, § 30165.1, subs. (b)(3)(D), (c)(2)(A), and (o).) The Department seeks to clarify operation of the fund balance rules by updating the JUS-TOB6 form.

NPMs must deposit funds into qualified escrow funds governed by the JUS-TOB6. Escrow agents and NPMs shall monitor account balances to ensure that the Minimum QEF Principal on Deposit is equal to or higher than the Face Value and Cost Basis of the permitted investments.

The current language needs to be deleted because it states that if one of these situations is not met, then the escrow account is non-compliant. As such, the first sentence of the Section 4.D of the Approved Tobacco Escrow Agreement should state:

*Whenever the aggregate Face Value of the QEF Sub-Account or the aggregate Cost Basis of the QEF Sub-Account is less than the Minimum QEF Principal On-Deposit for a QEF Sub-Account, the Escrow Agent shall deem the QEF Sub-Account non-compliant.*

The form is updated to ensure the Minimum QEF Principal on Deposit is equal to or higher than the Face Value and Cost Basis of the permitted investments, and that the funds remain available and are not deemed non-compliant.

Finally, the footer of the JUS-TOB6 was non-substantively revised to update the revision date.

### **ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

The Department concludes:

(1) The proposal will not likely create or eliminate jobs within California. The approximately 30 cigarette manufacturers that certify under the Fire Safety Act have been obligated since 2007 to produce and test their cigarettes so that they extinguish when they are not being actively smoked. Those obligations are unaltered by the proposal. Instead, California law now requires the manufacturers to submit Fire Safety Act certifications to only the Department. The Department anticipates that approximately 30 cigarette manufacturers will each spend approximately \$1,000 reviewing the new regulation and forms and entering data they already possess from their most recent FSC tests into the JUS-TOB8 form. Until 2022, the manufacturers submitted their Fire Safety Act certifications to both the State Fire Marshal and the Department using often voluminous paper submissions. Under this proposal, the manufacturers will submit certifications to only the Department, which they may submit electronically.

In addition, NPMs and their escrow banks have a one-time cost of approximately \$1,000 to review the Approved Tobacco Escrow Agreement. In 2019, no NPMs left or joined the California cigarette market based upon the initial rulemaking and execution of the Approved Tobacco Agreement. Therefore, it is unlikely this proposal will either create or eliminate any jobs in California.

(2) The proposal will not likely create new businesses or eliminate existing businesses within the state. As explained above, approximately 30 cigarette manufacturers have been obligated to certify Fire Safety Act since 2007. This rulemaking may cost those manufacturers approximately \$1,000 to implement's the Legislature's requirement that the Department administer the Fire Safety Act. That cost is unlikely to increase, reduce, or otherwise alter the size or scope of the cigarette business in California.

Since 2004, approximately 60 NPMs and 10 escrow agents have been required to use the tobacco escrow agreement approved by the Department. Since 2019, they have completed and submitted the Approved Tobacco Escrow Agreement. In 2019, no manufacturers joined or exited the California market based upon the major revision to California's tobacco escrow agreement. Here, approximately 60 NPMs and 10 escrow agents will have a cost of approximately \$1,000 to review only a technical change to the Approved Tobacco Escrow Agreement and complete the revised form.

Most of the businesses impacted by this proposal do not bear both costs. Only seven NPMs must complete the Approved Tobacco Escrow Agreement and certify their Fire Safety Act compliance to California. The NPMs with \$2,000 costs are equally unlikely to exit or otherwise alter their presence in the California market based upon this absorbable amount.

(3) The proposal will not likely result in the expansion of businesses currently doing business within the state because as explained above, approximately 30 cigarette manufacturers have been obligated to certify Fire Safety Act since 2007. This rulemaking may cost those manufacturers approximately \$1,000 to implement's the Legislature's requirement that the Department administer the Fire Safety Act. That cost is unlikely to increase, reduce, or otherwise alter the size or scope of the cigarette business in California.

Since 2004, approximately 60 NPMs and 10 escrow agents have been required to use the tobacco escrow agreement approved by the Department. Since 2019, they have completed and submitted the Approved Tobacco Escrow Agreement. In 2019, no manufacturers joined or exited the California market based upon the major revision to California's tobacco escrow agreement. Here, approximately 60 NPMs and 10 escrow agents will have a cost of approximately \$1,000 to review only a technical change to the Approved Tobacco Escrow Agreement and complete the revised form.

Most of the businesses impacted by this proposal do not bear both costs. Only seven NPMs must complete the Approved Tobacco Escrow Agreement and certify their Fire Safety Act compliance to California. The NPMs with \$2,000 costs are unlikely to exit or otherwise alter their presence in the California market based upon this absorbable amount.

The Department also concludes that:

(1) The proposal would benefit the health and welfare of California residents. The Fire Safety Act limits the ignition propensity of cigarettes to avoid serious harm to the public, health and safety, and general welfare caused by fires. To promote efficiency for California, the State transitioned administration of the Fire Safety Act program to the Department. Until 2023, manufacturers sent their Fire Safety Act submissions to both the State Fire Marshal and the Department.

Moreover, the Health and Safety Code requires NPMs to deposit tobacco escrow funds based on their Units Sold of cigarettes in California. These funds are a source of recovery for potential litigation regarding the health impacts or marketing of cigarettes. (Health & Saf. Code, § 104557.) California law requires the tobacco escrow be governed by an escrow agreement approved by the Department. (Rev. & Tax. Code, § 30165.1, subd. (b)(3)(B)(2) & (c)(2)(A).) This rulemaking process clarifies the fund balance rules for tobacco escrow by making a technical change to the Approved Tobacco Escrow Agreement.

(2) The proposal would benefit worker safety because the Fire Safety Act limits the ignition propensity of cigarettes thereby avoiding unsafe workplace situations caused by fires. To promote efficiency for California, the State transitioned administration of the Fire Safety Act program to the Department. Until 2023, manufacturers sent their Fire Safety Act submissions to both the State Fire Marshal and the Department.

(3) The proposal would benefit the state's environment because the Fire Safety Act limits the ignition propensity of cigarettes thereby avoiding fires caused by cigarettes, and their environmental impacts.

**TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON**

State Fire Marshal's Application for Certification form.

**EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Department has made an initial determination that the proposed action would not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

All 50 states have passed and continue to administer a FSC program that is substantially the same as California's Fire Safety Act. The 46 states that entered into the MSA all require state-approved tobacco escrow agreements. As such, the regulatory requirements at issue are either nationwide or essentially nationwide.

Other than the seven NPMs that will incur the costs of reviewing and implementing the revisions to both the Fire Safety Act and the Approved Tobacco Escrow Agreement, all of the companies impacted by this proposal will spend approximately \$1,000 to review and implement the new

regulation and forms. The seven NPMs impacted by both aspects of this proposal will spend approximately \$2,000.

Based upon the companies' significant and ongoing commitments to the California market, the \$2,000 and \$1,000 costs are nominal for these companies and should not impact the size or scope of their businesses operations in California. As such, the Department has made an initial determination that the proposed action will not impact the ability of these business to compete with business in other states or how those businesses currently operate in California.

**REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

The Department finds that no reasonable alternatives were presented to, or considered by, the Department that would lessen any adverse impact on small business.

**REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASON FOR REJECTING THOSE ALTERNATIVES**

The Department finds that no alternatives were presented to, or considered by, the Department that would be more effective in carrying out the purpose of these proposed regulations or would be as effective and less burdensome to affected private persons than these proposed regulations.

**Performance Standard as Alternative:**

The proposed regulations do not mandate the use of specific technologies or equipment. Since 2007, the Fire Safety Act requires cigarette manufacturers to use either the ASTM E2187-04 test cited in Fire Safety Act or an alternate test that satisfies the testing requirement of the Fire Safety Act. (Health & Saf. Code, § 14952.) As explained above, this is a nationwide requirement for cigarette manufacturers based upon all states enacting the same requirement. This proposed action does not modify or impact any performance standard in the Fire Safety Act. Instead, the proposed action changes which California agency receives and processes Fire Safety Act certifications based upon a change in the law. As such, Part II of the new JUS-TOB15 form still permits applicants to designate whether they are using ASTM E2187-04 or an alternate test as required by the Fire Safety Act.

The proposed regulation mandates the use of a form to comply with the Fire Safety Act. The purpose of the form is to promote compliance and uniformity in information obtained from all cigarette manufacturers.