

NOTICE OF PROPOSED RULEMAKING

Title 11. DEPARTMENT OF JUSTICE Notice to be Published on September 6, 2019

Notice is hereby given that the Department of Justice (“Department”) proposes to make permanent the emergency repeal of sections 999.12 and 999.13 of chapter 16, division 1, of title 11 of the California Code of Regulations, including the form escrow agreement incorporated therein, and the emergency adoption of section 999.12, including the Approved Tobacco Escrow Agreement, JUS-TOB6 (Rev. 5/2019), which is incorporated by reference therein, after considering all comments, objections, and recommendations regarding the proposed action.

Public Hearing

No public hearing is scheduled. Any interested person or their duly authorized representative may request, in writing, a public hearing pursuant to section 11346.8, subdivision (a), of the Government Code. The request for hearing must be received by the Department’s contact person designated below no later than 15 days prior to the close of the written comment period.

Written Comment Period

Any interested person or their duly authorized representative may submit written comments relevant to the proposed regulatory action. Written comment must be received by the Department by October 21, 2019.

Only comments received by that time will be considered. Written comments must be submitted to:

Barry Alves
Department of Justice
Tobacco Litigation and Enforcement Section
P.O. Box 944255
Sacramento, California 94244-2550
Email: barry.alves@doj.ca.gov

Authority and Reference Citations

Authority: Section 30165.1, Revenue and Taxation Code; Section 104557, Health and Safety Code.

Reference: Section 30165.1, Revenue and Taxation Code; Sections 104556 and 104557, Health and Safety Code.

Informative Digest / Policy Statement Overview

Section 999.12

The prior version of this regulation has been repealed, and a new version has been adopted by the emergency rulemaking. This regulation applies to Non-Participating Manufacturers (“NPMs”) which must establish and maintain tobacco escrow accounts for the benefit of California and other releasing parties under the MSA pursuant to Health and Safety Code sections 104555-104557, and the financial institutions that serve as escrow agents for NPMs with tobacco escrow accounts for the benefit of California.

Section 999.12 explains the requirements for establishing and maintaining a qualified tobacco escrow account and incorporates a new version of the escrow agreement. California’s Approved Tobacco Escrow Agreement JUS-TOB6 (Rev. 5/2019) (“Approved Tobacco Escrow Agreement”) ensures that NPMs and escrow banks properly hold, track, and monitor tobacco escrow funds on deposit for the benefit of California.. Section 999.12 provides that other than filing blank spaces and checking boxes, no deviation, amendments, or other changes to California’s Approved Tobacco Escrow Agreement shall be permitted without the prior written approval of the Attorney General.

Section 999.13

The prior version of section 999.13 has been repealed by the emergency rulemaking and its operative terms have been consolidated into section 999.12.

Anticipated Benefits:

This rulemaking action protects the public health and welfare by providing clear guidance to NPMs and escrow banks to ensure successful compliance with the law. The revised definitions of principal and interest will prevent NPMs from prematurely accessing escrow funds. The agreement clarifies and improves provisions regarding the procedures for account ledgers, NPMs that fail to appoint successor agents after their escrow bank resigns, and reports to California. Furthermore, the terms and conditions in Approved Tobacco Escrow Agreement were reorganized, consolidated, and edited to make it much easier to interpret, understand, and reference.

Forms and Standards Incorporated by Reference

California Approved Tobacco Escrow Agreement, JUS-TOB6 (Rev. 5/2019) is incorporated by reference into the new version of Section 999.12.

Summary of Existing Laws and Regulations Related Directly to the Proposed Rulemaking

NPMs must deposit funds into qualified escrow funds governed by state law based upon their sales of cigarettes and 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 twenty-five years. (Health & Saf. Code, §104557, subd. (b).) NPMs and their escrow banks must execute a California Attorney General approved escrow agreement and

ensure the funds are held and monitored in compliance with California law. (Rev. & Tax. Code, § 30165.1, subd. (c)(2)(a).)

The Office of the Attorney General is responsible for establishing and updating California's tobacco escrow agreement. (Rev. & Tax. Code, § 30165.1, subdivisions (b)(3)(D) and (o).) Title 11 of the California Code of Regulations, Chapter 16, section 999.12 govern tobacco escrow accounts and the Approved Tobacco Escrow Agreement.

The permanent adoption of section 999.12, including the Approved Tobacco Escrow Agreement, address several issues that emerged after California's last revision of the regulation and escrow agreement. The revised definitions of principal and interest will prevent NPMs from prematurely accessing escrow funds. The agreement clarifies and improves provisions regarding the procedures for account ledgers, NPMs that fail to appoint successor agents after their escrow bank resigns, and reports to California. Furthermore, the terms and conditions in Approved Tobacco Escrow Agreement were reorganized, consolidated, and edited to make it much easier to interpret, understand, and reference.

Evaluation of the Proposed Regulation for Consistency and Compatibility with Existing State Regulations

The Department has performed an evaluation of whether section 999.12 and the Approved Tobacco Escrow Agreement are inconsistent or incompatible with existing state regulations and determined that the regulation is not inconsistent or incompatible with existing state regulations. Section 999.12 and the Approved Tobacco Escrow Agreement are the only regulation and forms for California that establish whether a tobacco escrow account constitutes a qualified escrow fund.

Mandate on Local Agencies or School Districts

No mandates or other impacts are imposed on any local agencies or school districts.

Significant Statewide Adverse Economic Impact Directly Affecting Business

The Department has determined that the proposed regulation will not have a significant, statewide, adverse impact affecting business. All of the tobacco companies and escrow banks addressed by these revisions currently have tobacco escrow accounts and tobacco escrow agreements.

Cost Estimates / Impact of Regulatory Action

The Department has assessed the potential for significant statewide adverse impact that might result from the proposed emergency action and has determined:

- There will be no costs or savings to local agencies or school districts;
- There will be no costs or savings in federal funding to the State;
- There will be no effect on housing costs.

- There will be no costs or savings to any state agency.

The Department anticipates that the regulations will require approximately fifty NPMs to each spend approximately \$1,500 reviewing the new regulation and executing the Approved Tobacco Escrow Agreement. Moreover, the Department anticipates that approximately eight to ten escrow banks will each spend approximately \$2,500 reviewing and executing several Approved Tobacco Escrow Agreements with NPMs.

At least quarterly, the escrow bank shall provide the Department with a bank statement that clearly reflects the deposits and withdrawals by the NPM, the manner in which all escrow principal is invested, including the face value, cost basis, and market value of each investment, a description of each investment including the CUSIP number, its date of purchase and maturity date. Annually, the escrow agent shall: (1) provide the Department with a ledger reflecting the minimum amount of escrow principal on deposit for California and all deposits, withdrawals, and other transactions since, at least, the NPM's first deposit with the escrow agent; or (2) confirm that it intends to reasonably rely upon the ledger prepared by the Department.

Small Business Determination:

The Department has determined that the proposed regulations affect small business.

Results of the Economic Impact Assessment

The Department concludes it is unlikely the proposed regulation will affect: (1) the creation or elimination of any jobs within California; (2) the creation of new businesses or the elimination of existing businesses within California; and (3) the expansion of businesses currently doing business within California. For additional benefit analysis, please see, Informative Digest/Policy Statement Overview under heading the titled, "Anticipated Benefits".

The regulation will benefit the public by ensuring that NPMs and escrow banks properly hold, track, and monitor tobacco escrow funds on deposit for the benefit of California.

Consideration of Alternatives

In accordance with Government Code section 11346.5(a)(13), the Department must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Contact Person

Inquiries concerning the proposed administrative action may be directed to:

Barry Alves
Department of Justice
Tobacco Litigation and Enforcement Section

1300 I Street, P.O. Box 944255
Sacramento, California 94244-2550
Email: barry.alves@doj.ca.gov.
Telephone: (916) 210-7838

Questions regarding procedure, comments, or the substance of the proposed action should be addressed to the above contact person. In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Debra Berry
Department of Justice
Tobacco Litigation and Enforcement Section
1300 I Street, P.O. Box 944255
Sacramento, California 94244-2550
Email: Debra.Berry@doj.ca.gov
Telephone: (916) 210-7799

Availability of Statement of Reasons, Text of Proposed Regulations, and Rulemaking File

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the express terms of the regulations, the Initial Statement of Reasons, any information upon which the proposed rulemaking is based on, and an economic impact assessment contained in the Initial Statement of Reasons. Copies may be obtained by contacting the name, address or phone number listed above.

Availability of Changed or Modified Text

After considering all timely and relevant comments received, the Department may adopt the proposed regulation substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days and accept written comments before adopting the regulation. Copies of any modified text will be available on the Department's website at <https://oag.ca.gov/tobacco/directory/regulations>.

Availability of the Final Statement of Reasons

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Barry Alves.

Availability of Documents on the Internet

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout format, as well as the Final Statement of Reasons once completed, can be accessed through the Department's website at <https://oag.ca.gov/tobacco/directory/regulations>.