

SUPPLEMENTAL STATEMENT OF REASONS (SSOR)

PROPOSED ADOPTION OF REGULATIONS PURSUANT TO PROPOSITION 56, THE CALIFORNIA HEALTHCARE, RESEARCH AND PREVENTION TOBACCO TAX ACT OF 2016, REV. & TAX. CODE, §§ 30130.50 – 30130.57

I. INTRODUCTION

In November 2016, California voters approved Proposition 56, the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 (the Act). (Codified at Rev. & Tax. Code, §§ 30130.50 – 30130.57.) This measure increased the excise tax rate on tobacco products for the purpose of reducing smoking and thus reducing mortality, disease, healthcare costs, loss of productivity, and other adverse impacts of smoking. The Act also established the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund (the Fund) and designated the distribution of revenues from the Fund. (Rev. & Tax. Code, §§ 30130.53, 30130.55, 30130.57.)

Among other designations of tax revenues, the Act provides \$30,000,000 each year to the Department of Justice/Office of the Attorney General (DOJ) to be distributed to local law enforcement agencies to support and hire front-line law enforcement peace officers for certain programs. (Rev. & Tax. Code, § 30130.57, subd. (e)(1).) These programs include, but are not limited to, enforcement of state and local laws related to the illegal sales and marketing of tobacco to minors and increasing investigative activities and compliance checks to reduce illegal sales of cigarettes and tobacco products to minors and youth. (*Ibid.*)

On January 12, 2018, DOJ published proposed regulations, which were later open for public comment and DOJ held a public hearing on February 28, 2018. DOJ received no comments.

DOJ also issued requests for proposals from eligible local agencies and awarded grants amounting to approximately \$37,500,000 to 71 agencies. On September 4, 2018, DOJ issued another request for proposals with the goal of awarding an additional \$28,500,000 to eligible applicants. As a result of DOJ's grant-making experience since the time the proposed regulations were drafted, DOJ now seeks to make minor changes to the proposed regulations. All of the proposed revisions are sufficiently-related to the original regulations; most are not substantial, and one may be considered substantial in that it materially expands appellate rights. As a result, DOJ submits revised proposed regulations for an additional 15-day public comment period. This SSOR is submitted in addition to the ISOR and identifies and discusses only the proposed revisions to the regulations as initially proposed.

II. PROBLEM THE REVISIONS TO THE PROPOSED REGULATIONS ARE INTENDED TO ADDRESS

Since drafting and publishing the proposed regulations, DOJ has benefitted from the experience of issuing requests for proposals for the Tobacco Grant Program, publicizing the Program, reviewing over one hundred applications, awarding grants to 71 different agencies, encumbering

and disbursing funds, and setting in place procedures for training, ethics, and performance evaluation. DOJ has also reviewed audits performed by the California State Auditor and has communicated with numerous individuals and institutions in relation to the Tobacco Grant Program. As a result of all of these activities, DOJ seeks to improve the operation of the Program by proposing minor but valuable revisions to the proposed regulations. These proposed modifications are set forth below.

III. SPECIFIC PURPOSE, NECESSITY, ADMINISTRATIVE REQUIREMENT OR OTHER CONDITION OR CIRCUMSTANCE THAT REVISION TO PROPOSED REGULATIONS ARE INTENDED TO ADDRESS (SECTION-BY-SECTION ANALYSIS)

§ 999.300. Applicability and Scope.

(a) This Chapter shall be known as the Department of Justice regulations adopted pursuant to Proposition 56, the Healthcare, Research and Prevention Tobacco Tax Act of 2016, or the DOJ Proposition 56 Tobacco Grant Program regulations.

...

This non-substantial revision reflects the name by which the grant program has become known during the course of 2018 and is intended to avoid the likelihood that as time passes fewer people will have an independent recollection of Proposition 56 or its subject matter and therefore will not recognize DOJ's grant program.

§ 999.301. Definitions.

(a) For purposes of this chapter, the following definitions apply:

...

(3) Administrative Review. A review of an Application for completeness, timeliness and eligibility.

...

(5) Application. A formal request, usually in the form of a Proposal, by a Local Law Enforcement Agency to receive a Grant from the Department from the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund.

...

(19) Inspection Data. Information regarding inspection, licensing or enforcement activity by a Recipient under the terms of the Grant, including but not limited to information about retail violations, citations, communications, surveys and inspections. Inspection Data includes information regarding such activities whether or not a violation was found or a citation issued. A Request for Proposals or Grant Agreement may contain further information about what constitutes Inspection Data, how it is to be gathered and retained by a Recipient, and how it is to be reported to the Department.

...

(b) This section does not preclude the Department from establishing additional definitions in a Request for Proposals, application form or instructions for an application form. Additional definitions shall not be inconsistent with this section.

The non-substantial revision in (a)(3) is to include “timeliness” as an additional element of the administrative review process. Timeliness was not an explicit factor in the initial proposed regulations. Applicants will benefit from this clarification by being more completely informed as to when DOJ will make a determination about timeliness of applications.

The non-substantial revision in (a)(5) is a clarification regarding the relationship between a Proposal, submitted in response to a Request for Proposals, and an Application to DOJ for a Tobacco Grant.

The non-substantial revisions in (a)(19) indicate that the scope of Inspection Data includes information about licensing and that the details about what constitute Inspection Data may be disclosed by DOJ in a Request for Proposals. During the course of meetings with local stakeholders DOJ was informed that licensing data is an important element of the enforcement of tobacco-related ordinances, laws and policies, and therefore seeks to make explicit that licensing data is included. These changes will benefit applicants because they will be better-informed prior to submission of an Application about the reporting obligations.

The deletion in (b) of reference to an application form or instructions is to ensure that any forms used are fully consistent with the regulations and to reflect the fact that DOJ has not published and does not utilize an application form for the Tobacco Grant Program.

§ 999.302. Request for Proposals.

(a) The Department shall issue Requests for Proposals for the grant program.

(b) At a minimum, a Request for Proposals shall include information about the following:

(1) Name of the grant program.

(2) Source of funding or authority for the grant program.

(3) Approximate amount of available funding.

~~(4) Minimum and/or maximum grant amount that may be requested.~~

~~(5) Pre-award process schedule, including but not limited to the approximate date awards are expected to be announced.~~

~~(6) Method(s) to submit an Application.~~

~~(7) Deadline to submit an Application.~~

(7) The merits review panelists.

(8) The rubric used by the merits review panel to score the Applications.

(9) Grant Duration.

(10) Other information to assist an applicant in submitting a complete application.

The deletion of (b)(4) is an insubstantial change that will provide DOJ with greater flexibility and remove an artificial constraint. Potential applicants for DOJ Tobacco Grants range in size vastly, by population size, geographical size, number of tobacco retailers, and other measures.

Thus while a RFP may specify a minimum or maximum amount, DOJ will not be required to set a maximum or minimum for every RFP.

The addition of (b)(7) & (8) will require DOJ to provide additional information about the process whereby grants are awarded. Information about the merits review panelists will promote transparency. Information about the scoring rubric will provide applicants with guidance about how to respond to the various elements of a Request for Proposals.

§ 999.303. Eligibility, Applications, and Joint Applications.

(a) Any Local Law Enforcement Agency in California is eligible to submit an Application in response to a Request for Proposals.

(b) Applications shall be consistent with the Act, these regulations, and the Request for Proposals.

(c) The Department may include document templates and examples, answers to frequently asked questions, examples of prior awards, ~~an application form, instructions for an application form,~~ and other documents, as part of a Request for Proposals.

The non-substantial changes in (c) arise from feedback received by DOJ from recent applicants for Tobacco Grant funding as to the type of information that is helpful to be included in a Request for Proposals. The revision therefore provides for specific types of documents that may be included within a Request for Proposals. Reference to an application form or instructions was deleted to ensure that any forms used are fully consistent with the regulations and to reflect the fact that DOJ has not published and does not utilize an application form for the Tobacco Grant Program.

§ 999.306. Disqualification.

(a) Applications that do not meet the Application Requirements and Eligibility Criteria as set forth in these regulations and the Request for Proposals ~~may~~ shall be disqualified.

(b) Bases for disqualification include the following:

(1) The applicant or one of the applicants is not Eligible.

(2) The Application includes activities with dates outside the Grant Duration period.

(3) The funding amount requested is less than the minimum award amount allowable or exceeds the maximum award amount allowable, if applicable.

(4) The Application is incomplete, including an Application with one or more unanswered questions on an application form, without a complete Proposal, or with missing, blank, or unreadable attachments.

(5) The Application includes Unallowable Costs.

(6) The Application was submitted after the submission period ended.

(c) The Department shall notify applicants of disqualification and the reason(s) for disqualification.

(d) An applicant may appeal disqualification of its Application.

(e) An applicant that successfully appeals disqualification may amend its Application.

(f) An applicant may request the Department to be permitted to amend its Application.

(g) The Department may, with the assent of an applicant, cure a defective Application that would otherwise be disqualified.

(h) The remedy for an appeal that is successful in whole or in part may, at the Department's discretion, be provided either during the current or the subsequent fiscal year.

The non-substantial change in (a), replacing “may” with “shall,” is likely to reduce uncertainty for applicants and prohibits DOJ from disqualifying one application but not another for the same reason.

The addition of (h) will enhance the efficacy of the grant program both for DOJ and all grant Recipients. One of the major goals of the grant program is to award, encumber and distribute all available funds promptly so that they may be disbursed during the current fiscal year and utilized during the full time period of the grant. The effect of even one appeal could be to stall this process until that appeal is finally resolved. This delay would have an adverse effect on all other Recipients and thus on the ability of DOJ to meet the goals of Proposition 56. The effect of the revision is to preserve the efficient encumbrance and distribution of funds to all other Recipients while giving unsuccessful applicants notice that, even if successful on appeal, they may not receive funds until the following fiscal year when the Department has received additional funding.

§ 999.307. Merits Review.

(a) Applications that satisfy the Administrative Review shall be reviewed by a merits review panel according to evaluation criteria set forth in the regulations and Request for Proposals. The purposes of the Merits Review are to evaluate the merits of each Application that satisfies Administrative Review and make recommendations as to whether or not to award grants and for what amounts.

(b) The merits review panel shall apply the evaluation criteria for awards and ~~may~~ shall include consideration of the following elements as they relate to the purposes and requirements set forth in the Act, regulations, and Request for Proposals:

(1) The extent to which the proposed activities fulfill the purposes, priorities and requirements of the grant program.

(2) The relevance, effectiveness, feasibility, efficiency, Performance Measures, and impact of the proposed activities.

(3) The capacity of the applicant to comply with all the terms and conditions as proposed in the Application and to administer a Grant successfully.

(c) For each Application that the merits review panel recommends be awarded a Grant, the panel shall also make a recommendation as to the amount of funding, based on the factors set forth in the regulations and Request for Proposals.

(d) The merits review panel shall provide its recommendations as to approval or denial of Applications, and as to the amount of funding for successful Applications, to the Attorney General or designee.

The minor change in (b) is calculated to ensure that the merits review panel applies the requisite criteria consistently to all Applications.

§ 999.309. Recommendation for Funding.

(a) The merits review panel shall make a funding recommendation for each Application, other than those that were disqualified or denied, based on the following criteria:

(1) Amount of available funding.

(2) Amount of funding requested.

(3) The merits of the Application under the evaluative criteria set forth in the regulations.

(4) The Department's program, enforcement and research priorities, if any.

(5) Indicia of support for the Application from local stakeholders including, for example, tobacco control and prevention programs; public health, health and human services, or environmental health departments; local lead agencies; community or youth organizations; and local elected officials.

(6) Indicia of the likely benefits of the scale of operations.

(7) Indicia that the funds granted will not be used to Supplant existing state or local funds used for the same purpose.

(8) Other factors in accordance with grant program requirements as set forth in the Request for Proposals.

(b) Recommendations of Grant awards, denials, and funding, will be submitted to the Attorney General or designee for final approval.

(c) Awards, denials and funding decisions by the Attorney General or designee may be appealed.
~~are final and not subject to appeal.~~

The non-substantial addition in (a)(8) is made to ensure that DOJ informs potential applicants in the Request for Proposals as to DOJ's priorities and the requirements of the grant program.

The change to (c) is substantial in that it expands appellate rights to allow an appeal of a merits determination. This expansion of rights may benefit unsuccessful applicants and will tend to ensure that decisions about the merits of any application are proper, fair, consistent and not based on misunderstanding or miscommunication.

§ 999.310. Merits Reviewers.

(a) Merits reviewers shall have experience, qualifications and expertise that qualifies them to perform technical and substantive reviews of the Applications, and may include subject matter experts designated by the Department and individuals not employed by the Department.

(b) The Attorney General or designee shall select the merits reviewers.

(c) No merits reviewer may review an Application submitted by an agency that employs or contracts with that merits reviewer, employs or contracts with a member of that individual's family, has had an employment or contractual relationship with the agency within the previous twelve months, or has charged or prosecuted that individual or a member of that individual's family within the previous twelve months.

(d) Information about the members of the merits review panel shall be included in the Request for Proposals.

(e) The merits review panelists shall receive instruction regarding scoring the merits of Applications prior to reviewing any Application and shall follow the scoring rubric.

(f) Each member of the merits review panel shall make a written declaration regarding confidentiality and impartiality, and declaring no conflict of interest, prior to reviewing any Application.
(g) A merits review panel shall have two or more members.

The non-substantial addition in (d) is intended to enhance transparency and confidence in the grantmaking process. Applicants will be informed, in the Request for Proposals, about whom will make the merits-based recommendations to the Attorney General.

This non-substantial addition in (e) is intended to ensure that merits review panelists score each Application consistently, accurately and completely, by requiring that they receive instruction. This provision will maintain the quality of the grantmaking program.

The non-substantial addition in (f) is intended to ensure that members of the merits review panel are impartial and are seen to be impartial, and to ensure that application materials will remain confidential while they are under review. This provision will maintain the quality of the grantmaking program.

§ 999.337. Appeals.

(a) Actions that may be appealed include:

- (1) Disqualification of an Application.
- (2) Imposition of Additional Conditions.
- (3) Suspension or Termination of a Grant Agreement.
- (4) Delay of payment.
- (5) Denial of an Application in whole or in part.

(b) Appeals must be in writing, postmarked within 30 calendar days of the date of the notification of the action, and mailed or emailed to the Department at the address provided in the Request for Proposals.

(c) An appeal shall include:

- (1) A copy of the notification or other communication from the Department.
- (2) The name of the applicant or Recipient, as applicable.
- (3) The Grant Agreement, Application or other identification number, if applicable.
- (4) The title of the Application or Grant Agreement.
- (5) The reasons the action by the Department should not be imposed, including any documentation to support the appeal.
- (6) The signature of the authorized representative of the appellant.

(d) Appeals not postmarked or electronically transmitted in a timely fashion will be denied.

(e) The action or actions specified in the notification shall remain in effect while the appeal is under review.

(f) The Department shall issue a decision on the appeal no later than 60 calendar days from the date the appeal is received, unless notice is provided in writing to the appellant that the decision will be issued at a later date.

(g) A successful appeal may be remedied either during the course of the current funding cycle or in a subsequent funding cycle that may be during the course of the following fiscal year.

(h) The Attorney General, or designee of the Attorney General who is employed by the Department, shall make the final decision regarding all appeals that meet the requirements of this section.

The addition of (a)(5) is a substantial change because it provides for additional rights. The revised provision allows for an appeal of the denial or partial denial of an application on the merits. Under the initial proposed regulation only an administrative review determination could be appealed. This revision will provide a meaningful right to appeal, may benefit unsuccessful applicants, and will tend to ensure that all parts of the grantmaking process are fair and consistent.

The non-substantial change in (f) increases the time frame for DOJ to decide appeals from 30 to 60 days. This will tend to ensure that every appeal receives careful consideration, and takes into account the likelihood that appeals will be filed during the same time period that DOJ will be seeking to encumber and distribute funds to successful applicants.

The non-substantial addition of (g) allows DOJ to provide a remedy for a successful appeal either in the current or the following fiscal year. The reason to provide for this flexibility is to ensure that all of the funds otherwise awarded may be encumbered and distributed to grantees without delay while an appeal by an unsuccessful applicant is heard and resolved. This will promote efficient use of funds during the fiscal year for which they are awarded.

The non-substantial addition of (h) sets forth a requirement that for appeals the Attorney General is the final decision maker. This provision will facilitate the operation of the grant program by making it clear that, as with other decisions regarding the merits of grant applications, the Attorney General is the final arbiter. The provision will also improve the operation and efficacy of the program by permitting the Attorney General to designate this review and decision to another individual with DOJ.

IV. BENEFITS ANTICIPATED FROM REVISIONS TO REGULATORY ACTION

DOJ has made an initial determination that the proposed revisions to the regulations will not significantly alter any of the benefits to California residents that are described in the ISOR. Rather, they will enhance the functionality of the grantmaking process in small but valuable ways. The most important of these are to expand the right of an unsuccessful applicant to appeal a denial or partial denial, to require DOJ to provide more information about the merits review panel and the scoring rubric, to require reviewers to sign an ethics declaration, to require that reviewers are trained, and to remove provisions that may have had the effect of encouraging the use of unapproved application forms.

V. REGULATIONS MANDATED BY FEDERAL LAW

None of the revisions to the proposed regulations are identical to corresponding federal regulations.

VI. ECONOMIC IMPACT ASSESSMENT (EIA)

Creation or Elimination of California Jobs:

DOJ has determined that the proposed revisions to the initial proposed regulations will not eliminate jobs and are not expected to create jobs in California. The proposed revised regulations do not regulate California businesses or jobs. Rather, they govern the distribution of state funds to local government agencies. It is possible that local agencies will hire individuals to perform certain funded activities, but this is not required.

Creation, Elimination or Expansion of California Businesses:

DOJ has determined that the proposed revisions to the initial proposed regulations will not create new, eliminate existing, or expand existing businesses within California. The proposed revised regulations do not regulate California businesses. Rather, they govern the distribution of state funds to local law enforcement agencies.

VII. TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS

In addition to the activities described in the ISOR, DOJ staff have benefitted from the experience of grantmaking and administration since the time the proposed regulations were first published. Since January 2018, DOJ staff have issued three Requests for Proposals, conducted two administrative reviews of applications and two merits reviews, awarded, encumbered and distributed approximately \$37.5 million to 71 different local agencies, and communicated with numerous individuals employed by cities, counties, health departments, school districts, police agencies, sheriff's departments, public health departments, environmental health departments, legal offices, universities, legislatures, state agencies, and non-profit agencies, about all aspects of the Tobacco Grant Program. DOJ staff have also reviewed audits by the California State Auditor.

VIII. REASONABLE ALTERNATIVES TO THE REVISIONS TO THE PROPOSED REGULATORY ACTION THAT WOULD BE LESS BURDENSOME AND EQUALLY EFFECTIVE IN ACHIEVING THE PURPOSES OF THE ACT BEING IMPLEMENTED

DOJ considered reasonable alternatives to the proposed revisions, in particular those that might be less burdensome yet equally effective. (See Gov. Code, § 11346.2, subd. (b)(4)(A).) The only burden that DOJ is aware of that might arise from the revision is that an applicant that prevails on appeal may not receive a remedy during the current fiscal year. Rather, the outcome of a successful appeal may be implemented in the following fiscal year. This is, arguably, not a burden at all because no applicant could reasonably rely on receipt of an award during a particular fiscal year merely because it submitted a Proposal. However, any burden or inconvenience that may be suffered is vastly outweighed by the benefit to DOJ and every other Grantee. If the remedy was mandated for the current fiscal year the effect would be to freeze all other awards until the appeal was resolved, and then to reapportion all awards.

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

DOJ has made an initial determination that the proposed revisions to the regulations will not have an adverse economic impact on small businesses in California, for the same reasons stated in the ISOR.

X. MANDATES OR PRESCRIPTIVE STANDARDS

The proposed revisions to the regulations do not mandate the use of any specific technology or equipment, or prescribe a specific standard.

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

DOJ has made an initial determination that the revisions to the proposed regulations will not have an adverse economic impact on businesses or jobs in California, for the same reasons stated in the ISOR.