

CALIFORNIA DEPARTMENT OF JUSTICE

**TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL
CHAPTER 16. MASTER SETTLEMENT AGREEMENT, TOBACCO
CHAPTER 16.5 FIRE STANDARD COMPLIANT CIGARETTES**

NOTICE OF PROPOSED RULEMAKING

Notice published July 21, 2023

The Department of Justice (Department) proposes to adopt section 999.30 of new Chapter 16.5, Division 1, of Title 11 of the California Code of Regulations and revisions to forms JUS-TOB8 and JUS-TOB15 to implement Assembly Bill 1742, which requires the Department to administer the California Cigarette Fire Safety and Firefighter Protection Act (“Fire Safety Act”) (Health & Saf. Code, §§ 14950-14959.) Furthermore, the Department proposes to amend sections 999.10 and 999.12 of Chapter 16, Division 1, of Title 11 of the California Code of Regulations and the Approved Tobacco Escrow Agreement form JUS-TOB6.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed regulatory action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person or their authorized representative may submit written comments relevant to the proposed regulatory action. The written comment period closes on September 5, 2023 at 5:00 p.m. Only written comments received by that time will be considered. Please submit written comments to:

Department of Justice
Barry Alves
Department of Justice
Tobacco Unit
1300 I Street Sacramento, Suite 125
Sacramento, CA 95814
regulations@doj.ca.gov

NOTE: Written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

AUTHORITY AND REFERENCE

Authority: Section 30165.1, Revenue and Taxation Code; Sections 14950, 14951, 14952, 14953, 14954, 14955, 14956, 14957, 14958, 14959 and 104555, 104556, 104557, Health and Safety Code.

Reference: Section 30165.1, Revenue and Taxation Code; Sections 14950, 14951, 14952, 14953, 14954, 14955, 14956, 14957, 14958, 14959 and 104555, 104556, 104557, Health and Safety Code; Section 22979, Business and Professions Code

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations:

A. Fire Safety Act

The 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 elect 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.

On June 19, 2023, the Office of Administrative Law approved the emergency revision to the Approved Tobacco Escrow Agreement and the revisions to the regulations updating the revision date. The Department seeks to make those changes permanent.

Effect of the Proposed Rulemaking:

The rulemaking will implement the Legislature's requirement that administration of the Fire Safety Act program move from the State Fire Marshal to the Department. Section 999.30 will be the Department's Fire Safety Act regulation. The amended JUS-TOB15 form will be the Department's primary Fire Safety Act form and the JUS-TOB8 form will be amended to gather supplemental product data required by the Fire Safety Act in an electronic format, which will reduce processing time and promote efficiency.

Section 4.D of the Approved Tobacco Escrow Agreement will be amended to make a technical change. Sections 999.10 and 999.12 will be updated to reflect the revision date of the Approved Tobacco Escrow Agreement.

Anticipated Benefits of the Proposed Regulations:

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 from the State Fire Marshal to the Department. Until 2023, manufacturers sent their Fire Safety Act forms 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 incur some limited costs associated with reviewing the Department's forms and the costs associated with completing the JUS-TOB8 form in an electronic format with data from their most recent FSC tests, the Department anticipates that tobacco manufacturers will ultimately reduce costs by submitting 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 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.

Comparable Federal Regulations:

There are no existing federal regulations or statutes comparable to these proposed regulations.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Department has determined that the proposed regulations are not inconsistent or incompatible with existing state regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that these are the only regulations that concern the ignition propensity of cigarettes or the accounting rules that NPMs and escrow banks shall follow regarding the tobacco escrow funds on deposit for the benefit of California.

Forms Incorporated by Reference:

Form number JUS-TOB6 titled APPROVED TOBACCO ESCROW AGREEMENT was revised in February 2023 and is referenced in sections 999.10, 999.12, and 999.16.

Form number JUS-TOB8 titled BRAND LIST was revised in February 2023 and is referenced in sections 999.10, 999.16, and 999.30, and in JUS-TOB15, the FIRE STANDARD COMPLIANT (“FSC”) CERTIFICATION.

Form number JUS-TOB15 was created in February 2023, is titled FIRE STANDARD COMPLIANT (“FSC”) CERTIFICATION, and is referenced in section 999.30.

Other Statutory Requirements:

None.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department’s Initial Determinations:

Mandate on local agencies or school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other non-discretionary costs or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Cost impacts on representative person or business:

The Department anticipates the revised escrow agreement will require approximately 60 NPMs and 10 banks to each spend approximately \$1,000 reviewing the new regulation and completing the revised Approved Tobacco Escrow Agreement.

The Fire Safety Act requires approximately 30 cigarette manufacturers to test, mark, and certify that their cigarettes extinguish when they are not being actively smoked. In 2022, Assembly Bill 1742 modified the Fire Safety Act to move the FSC program to the Department. The Department anticipates that approximately 30 cigarette manufacturers will spend approximately \$1,000 reviewing the new regulation, the revised JUS-TOB8 form, and the new JUS-TOB15 form, and entering data they already possess from their most recent FSC tests into the JUS-TOB8 form's electronic format. The substance of the reporting requirement is unchanged. Thereafter, the Department anticipates the manufacturers' Fire Safety Act certification costs will be neutral or lower than current levels based upon the efficiency and reduced processing time associated with electronic reporting.

The seven NPMs listed on the Department's tobacco directory will complete the revised Approved Tobacco Escrow Agreement and continue to certify under the Fire Safety Act. The remaining cigarette manufacturers and banks will only be impacted by a portion of this rulemaking.

Significant effect on housing costs: None.

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

Results of the Economic Impact Assessment (EIA):

The Department concludes that the proposal is unlikely to: (1) create or eliminate jobs within the state; (2) create new businesses or eliminate existing businesses within the state; or (3) result in the expansion of businesses currently doing business within the state.

The Department also concludes that:

(1) The proposal would benefit the health and welfare of California residents by improving the administration of the Fire Safety Act, which limits the ignition propensity of cigarettes to avoid the harms caused by fires. Moreover, this proposal clarifies the fund balance rules for tobacco escrow with a technical change to the Approved Tobacco Escrow Agreement. Under the Health and Safety Code, NPMs must 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.)

(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.

Business report requirement:

Approximately 30 cigarette manufacturers continue to be obligated to test, mark, and certify cigarettes under the Fire Safety Act based upon the fire risk posed by their products. The Department's rulemaking requires manufacturers to submit FSC certifications to the Department, not the State Fire Marshal. This change is based upon Assembly Bill 1742, which amended the Fire Safety Act to transition the administration of the State's FSC cigarette program to the Department, effective January 1, 2023. (Health & Saf. Code, §§ 14951(d), 14953.) The new JUS-TOB15 form will be the Department's primary Fire Safety Act form and the revised JUS-TOB8 form will be amended to gather supplemental product data required by the Fire Safety Act in an electronic format to reduce processing time and promote efficiency.

Section 4.D of the Approved Tobacco Escrow Agreement will be amended to make a technical change. Except for executing the agreement, the Approved Tobacco Escrow Agreement does not impose any new reporting requirements.

Small business determination: The Department has determined that the proposed action affects small businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or 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.

The Department has determined that the proposed regulations and forms are the most effective way to administer the Fire Safety Act and tobacco escrow deposits. Until 2023, manufacturers submitted their Fire Safety Act forms to both the State Fire Marshal and the Department. Now only one State agency will receive and process Fire Safety Act certification forms. The Department will also use electronic processing to further promote efficiency and reduce costs. Moreover, the Department clarifies the fund balance rules for tobacco escrow with a technical change to the Approved Tobacco Escrow Agreement.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Department of Justice
Barry Alves
Tobacco Unit
1300 I Street Sacramento, Suite 125
Sacramento, CA 95814
(916) 210-7838
regulations@doj.ca.gov

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:

Department of Justice
James Hart
Tobacco Unit
1300 I Street Sacramento, Suite 125
Sacramento, CA 95814
(916) 210-7806
regulations@doj.ca.gov

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 upon request to the contact person above. As of the date this Notice of Proposed Rulemaking (Notice) is published in the Notice Register, the rulemaking file consists of this Notice, the Text of Proposed Regulations (the “express terms” of the regulations), the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based. The text of this Notice, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department’s website at <https://oag.ca.gov/tobacco/directory/regulations>. Please refer to the contact information listed above to obtain copies of these documents.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the Department analyzes all timely and relevant comments received during the 45-day public comment period, the Department will either adopt these regulations substantially as described in this notice or make modifications based on the comments. 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 before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the name and address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, a copy of the Final Statement of Reasons will be available on the Department's website at <https://oag.ca.gov/tobacco/directory/regulations>. Please refer to the contact information included above to obtain a written copy of the Final Statement of Reasons.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Rulemaking, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department's website at <https://oag.ca.gov/tobacco/directory/regulations>.