

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

UPDATE TO INITIAL STATEMENT OF REASONS AND SUPPLEMENT TO INITIAL STATEMENT OF REASONS

After publication of the Initial Statement of Reasons, the Department published a Supplement to Initial Statement of Reasons on March 8, 2022. The Supplement to Initial Statement of Reasons describes the changes and grounds for the changes to the amended regulations and revised forms JUS-TOB1 (Rev. 11/2021), JUS-TOB3 (Rev. 11/2021), JUS-TOB4 (Rev. 11/2021), JUS-TOB5 (Rev. 11/2021), and JUS-TOB8 (Rev. 11/2021) as well as the repeal of form JUS-TOB15. The Department incorporates the Initial Statement of Reasons and the Supplement to Initial Statement of Reasons by reference.

The Department amended sections 999.10, 999.11, 999.14 - 999.20, 999.22 - 999.22, and 999.29, amended forms JUS-TOB1 (Rev. 11/2021), JUS-TOB3 (Rev. 11/2021), JUS-TOB4 (Rev. 11/2021), JUS-TOB5 (Rev. 11/2021), JUS-TOB7 (Rev. 09/2020), and JUS-TOB8 (Rev. 11/2021), and repealed form JUS-TOB15.

For many years, the Department has required applicants to provide a brand list during the Tobacco Directory certification process. Initially, the Department's updated brand list was noticed as a revised JUS-TOB15 form. After determining the initially proposed revision to the JUS-TOB8 form was not necessary at this time, the brand list was renumbered to JUS-TOB8 to eliminate a gap in the Department's forms and form JUS-TOB15 was repealed.

AUTHORITY AND REFERENCE

Authority: Section 30165.1, Revenue and Taxation Code; Sections 104555 through 104557, Health and Safety Code.

Reference: Section 30165.1, Revenue and Taxation Code; Sections 104555 through 104557, Health and Safety Code; Section 22979, Business and Professions Code.

SUMMARY OF COMMENTS SUBMITTED TO THE DEPARTMENT AND THE DEPARTMENT'S RESPONSES

On December 18, 2021, the Notice of Proposed Rulemaking was published in the California Regulatory Notice Register, sent to interested parties, and published on the Department's Tobacco Directory Website, available at <https://oag.ca.gov/tobacco/directory/regulations>.

The Department received three comment letters during the 45-day notice period, which closed on February 9, 2021

In March 2021, the Department revised forms JUS-TOB1, JUS-TOB8, and JUS-TOB15 to implement several of the changes proposed during the 45-day public comment period. The Department also implemented some of the changes to form JUS-TOB1 in form JUS-TOB5.

On May 5, 2021, the Department issued a Notice of Modification to Proposed Forms, which was sent to interested parties and published on the Department's California Tobacco Directory Website, available at <https://oag.ca.gov/tobacco/directory/regulations>. The Notice of Modification to Proposed Forms provided notice that proposed forms JUS-TOB1 (Rev. 03/2021), JUS-TOB5 (Rev. 03/2021), JUS-TOB8 (Rev. 03/2021), and JUS-TOB15 (Rev. 03/2021) were revised following the comments received in March 2021. The revised forms were noticed, sent to interested parties, and published on the Department's California Tobacco Directory Website. The Department received one comment letter during the 15-day notice period, which closed on May 27, 2021.

A summary of each public comment, and the Department's response to each public comment, are attached as Appendix A.

STATEMENT REGARDING PUBLIC HEARING

The Department did not receive a request for public hearing.

DOCUMENTS INCORPORATED BY REFERENCE

Form number JUS-TOB1 (Rev. 11/2021) was revised, will now be titled "PARTICIPATING TOBACCO PRODUCT MANUFACTURER ('PM') CERTIFICATION SEEKING LISTING ON THE CALIFORNIA TOBACCO DIRECTORY," and is referenced in sections 999.16 and 999.17 of title 11, of the California Code of Regulations.

Form number JUS-TOB3 (Rev. 11/2021) was revised, is now titled "CERTIFICATION OF COMPLIANCE AND AFFIDAVIT BY NON-PARTICIPATING TOBACCO PRODUCT MANUFACTURER," and is referenced in section 999.10 of title 11, of the California Code of Regulations.

Form number JUS-TOB4 (Rev. 11/2021) was revised, will now be titled "CIG-SALES," and is referenced in sections 999.10, 999.14, and 999.16 of title 11, of the California Code of Regulations.

Form number JUS-TOB5 (Rev. 11/2021) was revised, will now be titled "NON-PARTICIPATING TOBACCO PRODUCT MANUFACTURER ('NPM') CERTIFICATION SEEKING LISTING ON THE CALIFORNIA TOBACCO DIRECTORY," and is referenced in sections 999.16, 999.17, and 999.22 of title 11, of the California Code of Regulations.

Form number JUS-TOB7 (Rev. 09/2020) was revised, will now be titled "CIG-MAP," and is referenced in section 999.16 of title 11, of the California Code of Regulations.

Form number JUS-TOB8 (Rev.11/2021) was revised, will now be titled "BRAND LIST," and is referenced in sections 999.16, 999.24, and 999.29 of title 11, of the California Code of Regulations.

The above forms are incorporated by reference because it would be cumbersome, unduly expensive, or otherwise impractical to publish the forms in the California Code of Regulations. During the rulemaking proceeding, the forms were sent to all interested parties, made available upon request, and were available for viewing on the Department's website at <https://oag.ca.gov/tobacco/directory/regulations>.

ALTERNATIVES DETERMINATION

In accordance with Government Code section 111346.9, subdivision (a)(4), the Department has determined that no alternative it considered, or that it otherwise identified, or was brought to its attention, 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.

The Department has determined that the proposed revisions to forms and regulations are the most effective way to ensure compliance with the Directory Statute, Reserve Fund Statute, and MSA. The forms and sections of the California Code of Regulations addressed by the notice were modified so California gathers only the information needed from tobacco product manufacturers, and does so as clearly and efficiently as possible.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

None of the small businesses impacted by this regulatory action proposed any alternatives, submitted a comment, or objected to any of the proposed changes. The Department does not believe this regulatory action has any long-term adverse economic impacts on any small businesses. While businesses must familiarize themselves with the new forms, the Department anticipates that this action will streamline the process for tobacco product manufacturers seeking listing on the California Tobacco Directory.

The Department has determined that no alternative it considered, or that it otherwise identified, or was brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected small businesses or

would be more cost-effective to small businesses and equally effective in implementing the proposed changes to the Departments tobacco forms and regulations.

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate or other impacts on any local agencies or school districts.

NON-DUPLICATION

Some of the regulations may repeat or rephrase in whole or in part a state or federal statute or regulation. This was necessary to satisfy the clarity standard set forth in Government Code section 11349.1, subdivision (a)(3).

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TOPIC	NO.	COMMENT SUMMARY	DEPARTMENT RESPONSE TO COMMENT
General Comments	RJ-1, PM-1 SPM-1	General background information of the commenter.	No response is required.
	RJ-2, PM-3 SPM-2	General objections to the form changes on the basis that the changes are burdensome, not relevant to the Department's implementation of enforcement of California law, outside the scope of the Department's authority, and in violation of the necessity standard. These comments also object to the economic impact analysis in the Initial Statement of Reasons.	No response is required as these particular comments are general objections to the form changes, rather than specific recommendations to revise the forms. In response to specific recommendations described below, the Department revised the JUS TOB1, TOB5, TOB8, and specifically removed the terms "Affiliate" and "Domestic Affiliate." The revisions appear to address the concerns raised by the general objections to the form changes. The Department or received only one public comment letter following the May 2021 15-day public comment period and did not receive any public comment letter following the March 2022 15-day public comment period.
	RJ-3, PM-2	General summary of statutes being implemented by the proposed action.	No response is required.
Definition of Affiliate	RJ-4, PM-6, SPM-4, SPM-8	Limit the proposed questions referring to Applicant's Affiliates in Form JUS-TOB1 to the Applicant itself, or at most to the Applicant and Affiliates' cigarette brand styles sold in or imported into the United States for commercial purposes. The amendments are overbroad because they require information from affiliates all over the world, including companies under common ownership or control with no nexus to the United States, California, or the MSA. The amendments would also require information about cigarette brands	The Department accepts this comment in part. Without waiving California's right to seek this information or revisit the issue in the future, the Department has revised the JUS-TOB1, JUS-TOB5, and JUS-TOB8 to remove terms "Affiliate" and "Domestic Affiliate."

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		not sold in the United States. The Department does not have the authority to require information from affiliates without any nexus to the United States.	
PACT Act Compliance	RJ-5	The proposed amendments ask Participating Manufacturers ("PMs") to identify all entities that sold, transferred, or shipped any cigarettes fabricated by the PM or Affiliate into California or within California through any Indian County in the past 16 months, or are anticipated to do so in the next 12 months. Indian Country is not defined in the amendments or forms. The proposed amendment is neither relevant nor reasonably necessary information from the PMs. No other state has any such requirement, nor has California previously required this information. Remove the "Indian Country" questions from Sections VII.E and VII.F of Form JUS-TOB1, or, alternatively, limit those questions to shipments or transfers "to Indian Country," as opposed to shipments or transfers "through Indian Country."	The Department accepts this comment in part. Without waiving California's right to seek this information or revisit the issue in the future, the Department has revised the JUS-TOB1 to remove the requirement to provide this data.
Complete List of Brand Styles	RJ-6, PM-5, SPM-3	The proposed amendments appear to require that each PM list and provide detailed information about any cigarette brand style the PM fabricated within the past 39 months for sale anywhere in the United States or even for export only, or imported into the United States within the past 39 months. These requirements are not limited to brand styles that a PM seeks to	The Department reduced the reporting interval from 39 months to 12 months, but did not make other changes in response to this comment. The proposed modification would unreasonably hinder and delay the Department's ability to enforce the Directory and Reserve Fund Statue. Generally, California law prohibits all tobacco product manufacturers and all other persons from selling off-Directory cigarettes in California. (Rev. & Tax., § 30165.1, subd. (e).) Under

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		<p>list on the California Tobacco Directory and intends to sell in California, and in that respect go far beyond what is necessary for the Department in carrying out its responsibilities. No other state imposes any similar requirement. Brand styles fabricated outside California for export have no possible relevance to the Department, nor do brand styles sold only in other jurisdictions.</p> <p>It would be highly burdensome for PMs to institute new systems to begin tracking such information, much less to go back and do it historically. Compiling this information for all brand styles would be extremely onerous to PMs and would result in providing massive amounts of documentation to the Department to sort through, contrary to the stated goal to reduce the workload of the Department and the Tobacco Product Manufacturer</p> <p>The proposed amendments also appear to require a PM to file an amended certification form within 30 days even if there is a minor change to a brand style that is not sold in California or listed on the California Tobacco Directory. Proposed Amendments, § 999.29(a). There is no statutory justification for imposing that burden on PMs.</p>	<p>the Directory Statute, the Department gathers information regarding off-Directory cigarette brands and their manufacturers and takes steps to prevent off-Directory cigarette sales in California. The application of the Directory Statute to sales of off-Directory cigarettes often requires several predicate factual inquiries including "Who manufactured this cigarette?" and "Is the manufacturer a PM or NPM?" There is no public or otherwise accessible list of all the tobacco product manufacturers selling cigarettes in the United States or all of their cigarette brands. The manufacturers listed on the Tobacco Directory manufacture the significant majority of the cigarette brands sold in California and the United States. Thus, a complete brand list is relevant to Department's regulatory and investigative powers under the Directory Statute.</p> <p>The Legislature expressly provided the Department with the statutory authority to require all Directory applicants to provide "a complete list" of their cigarette brands, updated with supplemental certifications 30 days prior to any brand changes. (Rev. & Tax., § 30165.1, subd. (b)(1).) Applicants may then designate which Cigarette brands from that complete list they seek to list on the California Tobacco Directory. (Id.) Section III.A of the JUS-TOB1 form properly implements this statutory instruction, requiring PMs to provide the Department with a complete list of their cigarette brands and supplement the list as their cigarette brands change.</p> <p>Commenters contend they cannot be required to disclose anything more than the cigarette brands they</p>

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		<p>Revise Part III of Form JUS-TOB1 to require PMs to list in Form JUS-TOB8 (originally proposed as JUS-TOB15) only the cigarette brand styles that the PM seeks to list or is required to list on (or remove from) the California Tobacco Directory.</p>	<p>seek to list on the California Tobacco Directory under California law. But this argument does not answer the "complete list" of brands requirement in subsection (b)(1) of the Directory Statute or satisfy the general purpose of the Directory Statute, which is to identify all known cigarette brands with Directory applicants to assist the Department's efforts to create a brand list that can be used to identify and prevent off-Directory cigarette sales. (Rev. & Tax., § 30165.1, subd. (b)(1).) Moreover, it is inequitable for a tobacco company to simultaneously contend in MSA payment disputes and arbitrations that off-Directory cigarette brands sometimes enter into California, continue to assert that California should seek to identify the manufacturers of off-Directory cigarettes and their cigarettes brands to identify and address off-Directory sales, but also withhold the relevant information they possess for the Department's complete brand list.</p>
<p>When Brand Style Was First Commercially Marketed</p>	<p>RJ-7, PM-4, SPM-7</p>	<p>Remove from Form JUS-TOB8 (originally proposed as JUS-TOB15) the three columns with the questions about the historical dates when the "cigarette was first commercial marketed." Not only is this detailed information unnecessary to ascertain a PM's compliance with the applicable California statutes, this information is confidential and proprietary. The proposed regulations do not explain how the Department intends to use this commercially sensitive information and does not purport to provide any protection from disclosure.</p>	<p>The Department accepts this comment in part. Without waiving California's right to seek this information or revisit the issue in the future, the Department has revised the JUS-TOB8 to remove the requirement to provide this data.</p>
<p>Denial or Withdrawal</p>	<p>RJ-8</p>	<p>Limit questions in JUS-TOB1, Sections XIV.F and XIV.G, to a state's formal</p>	<p>The Department accepts this comment in part and has modified questions XIV.E and XIV.G of the revised</p>

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of Certification in Other States		<p>denial of a certification to gain directory listing and apply the requirement only prospectively. The proposed amendments go far beyond what is reasonably necessary in requiring PMs to provide detailed information about withdrawn or denied certifications. The proposed new forms would require PMs to identify and provide a written explanation about any withdrawn certifications or applications for directory listing from any state before that state has "rendered a decision on any portion of the certification or application" within the past 5 years. (JUS-TOB 1, Section XIV.F). Certifications or applications are withdrawn on occasion for commercial reasons with no relevance to MSA enforcement, such as when a PM decides not to sell a particular brand style it had been considering.</p> <p>No other state imposes similar requirements. These problems can be avoided if the proposed information sought in JUS-TOB1, Sections XIV.F and XIV.G is limited to a state's denial of a certification to gain directory listing, and the requirement is imposed only prospectively from this point forward, and does not require PMs to attempt to compile and provide such information going back five years.</p>	<p>JUS-TOB1 so they apply only prospectively. But the Department made no other changes in response to this comment. Over 40 states have a tobacco directory that requires tobacco product manufacturers to submit a certification before selling any cigarettes in that state. Since at least 2012, California's JUS-TOB1 form has asked NPMs whether any state has denied a manufacturer's certification for a tobacco directory listing in another state. (JUS-TOB1 (Rev. 06/2012, Part VI.) Section XIV.G of the revised JUS-TOB1 (Rev. 03/2021) requires PMs to answer the same question. Section XIV.E of the revised JUS-TOB1 (Rev. 03/2021) also asks whether a manufacturer withdrew a certification listing in another state with a tobacco directory before the state rendered a final decision on the certification. This question helps identify evidence probative of California Tobacco Directory eligibility, including (but not limited to) instances where manufacturers have withdrawn their certification after another state issued an adverse preliminary determination, but before the issuance of a formal written denial notice, to avoid answering follow up questions that may reveal damaging responses, or to avoid triggering the reporting obligation to several states associated with a tobacco directory listing denial. The Department seeks to identify such events to ascertain whether they are relevant to California Directory eligibility.</p>
Prospective Application	RJ-9	To the extent that the Department does not eliminate or limit any of these proposed	The Department accepts this comment in part. The Department revised Sections XIV.F and XIV.G so they

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of New Requirements		requirements, modify the proposed amendments to institute the requirements only prospectively, to permit the PMs to implement systems to attempt to track the required information and not be required to attempt to compile and submit past information not previously required.	apply only prospectively. Department did not make any changes to the requirement to provide a complete list of brands.
Definition of Domestic Affiliate	PM-8	The proposed amended Form JUS-TOB8 includes a broad definition of "Domestic Affiliate" and the proposed amended Form JUS-TOB 1 would require a PM to answer multiple questions about its Domestic Affiliates, regardless of whether such Domestic Affiliates have anything to do with the MSA, or even with the manufacture or sale of cigarettes, let alone the sale of cigarettes in California. Limit questions a PM is required to answer in Form JUS-TOB1 to the PM itself and those of its affiliates who themselves manufacture or sell cigarettes in the United States	The Department accepts this comment in part. Without waiving California's right to seek this information or revisit the issue in the future, the Department has revised the JUS-TOB1, JUS-TOB5, and JUS-TOB8 to remove terms "Affiliate" in and "Domestic Affiliate." Also, the definitions originally proposed in JUS-TOB8 have been moved to section 999.10 of the regulations.
Fire Safety Compliance	PM-7 SPM-7	Eliminate the duplicative and unnecessary reproduction of information regarding cigarette fire safety compliance from Form JUS-TOB8 (originally proposed as JUS-TOB15) because that information will already be provided with Form JUS-TOB1.	The Department accepts this comment in part. Without waiving California's right to seek this information or revisit the issue in the future, the Department has revised the form to remove the requirement to provide this data.
Federal Excise Tax Information	SPM-5	An example of irrelevant and burdensome information that the proposed changes would require: detailed information about federal excise tax paid and access to federal excise tax records.	The Department did not make any changes in response to this comment. Pursuant to subdivisions (b) and (c) of section 30165.2 of the Revenue and Taxation Code, every tobacco product manufacturer that sells cigarettes in California must provide the Department with either: (1) copies of the tax returns reflecting that

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			<p>the federal excise was tax paid on the cigarettes; or (2) a consent authorizing federal tax agencies to disclose the returns to the Department. The Directory Statute implements section 30165.2 of the Revenue and Taxation Code and expressly makes noncompliance with section 30165.2 a ground for removing a PM from the California Tobacco Directory or denying a PM's certification for listing. (Rev. & Tax., §§ 30165.1, subds. (d)(1) and (g)(4), 30165.2, subd. (b).) Thus, federal tax information is expressly required by the Directory Statute and relevant to the Department's duties.</p>
Packaging and Labeling Information	SPM-5	<p>An example of irrelevant and burdensome information that the proposed changes would require: detailed information about federal excise tax paid and access to federal excise tax records.</p>	<p>The Department did not make any changes in response to this comment. Pursuant to subdivisions (b) and (c) of section 30165.2 of the Revenue and Taxation Code, every tobacco product manufacturer that sells cigarettes in California must provide the Department with either: (1) copies of the tax returns reflecting that the federal excise was tax paid on the cigarettes; or (2) a consent authorizing federal tax agencies to disclose the returns to the Department. The Directory Statute implements section 30165.2 of the Revenue and Taxation Code and expressly makes noncompliance with section 30165.2 a ground for removing a PM from the California Tobacco Directory or denying a PM's certification for listing. (Rev. & Tax., §§ 30165.1, subds. (d)(1) and (g)(4), 30165.2, subd. (b).) Thus, federal tax information is expressly required by the Directory Statute and relevant to the Department's duties.</p>