

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1742 (Robert Rivas)
Version: May 31, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
AM

SUBJECT

California Cigarette Fire Safety and Firefighter Protection Act: Tobacco Master Settlement Agreement

DIGEST

This bill revises the Cigarette and Tobacco Products Tax Law to provide the Attorney General and the Department of Justice (Department) enhanced ability to enforce the Tobacco Master Settlement Agreement (MSA). The bill also provides that the California Cigarette Fire Safety and Firefighter Protection Act is to be administered by the Attorney General instead of the State Fire Marshal, and that proposed markings of cigarette manufacturers are deemed approved if the Attorney General fails to act within 30 days instead of the existing requirement of 10 days.

EXECUTIVE SUMMARY

In 1998 California entered into a settlement with certain manufacturers. The resulting Master Settlement Agreement (MSA) promised multi-billion dollar annual payments to California. As part of the MSA, California required non-signatory manufacturers to make annual payments into a state-held escrow account based on the total number of cigarettes sold to California consumers as measured by state excise taxes collected on the sales. The MSA requires signatory states to diligently enforce the terms of the agreement, and to fund tobacco settlement escrow accounts at a rate roughly equivalent to the level of settlement payments received from signatory manufacturers under the MSA. Failure to diligently enforce the agreement and any related implementing statute exposes non-compliant states to substantial reductions in their MSA settlement payments. This bill is intended to enhance the ability of the Attorney General and Department to ensure compliance with the MSA.

The bill is sponsored by Attorney General Rob Bonta. The bill is supported by the California State Association of Counties and League of California Cities. There is no known opposition. The bill passed the Senate Business, Professions and Economic Development Committee on a vote of 9 to 3.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, under the Master Settlement Agreement (MSA) entered into by the several state attorneys general and various tobacco companies, that, in return for a release from certain claims brought against them, the tobacco companies agree to pay substantial sums to the states based on volume of sales; fund a national foundation devoted to the interests of public health; and make substantial changes in their advertising and marketing practices, especially with the intention of reducing underage smoking. (Hlth. & Saf. Code § 104555(e).)
- 2) Requires any tobacco product manufacturer selling cigarettes to consumers within this state, whether directly or through a distributor, retailer, or similar intermediary, to either become a participating manufacturer as that term is used in the MSA, or place into a qualified escrow account fund specified amounts based on the volume of products sold within the state. (Hlth. & Saf. Code § 104557.)
- 3) Requires every tobacco product manufacturer whose cigarettes are sold in California, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, to execute and deliver on a form and in the manner prescribed by the Attorney General, a certification to the Attorney General that the tobacco product manufacturer is either a participating manufacturer that has made all payments calculated by the independent auditor to be due under the Master Settlement Agreement, or is in full compliance with the escrow provisions of 4) and 5). (Rev. & Tax. Code § 30165.1 (b).)
- 4) Provides that, if the Attorney General determines that a tobacco manufacturer that did not participate in the Master Settlement Agreement poses an elevated risk for noncompliance with the law, the Attorney General may require the manufacturer to post a bond. (Rev. & Tax. Code § 30465.1 (c)(6).)
- 5) Requires the Attorney General to develop and publish on its Internet Web site a directory listing all tobacco product manufacturers that have provided current, timely, and accurate certifications conforming to the requirements of 6) and all brand families that are listed in the certifications. This is known as the California Tobacco Directory. (Rev. & Tax. Code § 30465.1 (c).)
- 6) Provides that a manufacturer not participating in the Master Settlement Agreement is deemed at risk of noncompliance if certain factors are met. (*Ibid.*)
- 7) Prohibits the sales of cigarettes or tobacco products in California unless the brand family of the cigarettes or tobacco product, and the tobacco product manufacturer that makes or sells the cigarettes or tobacco product, are included on the California Tobacco Directory. (Rev. & Tax. Code § 30465.1 (e).)

- 8) Establishes the California Cigarette Fire Safety and Firefighter Protection Act (Act) to prohibit a person from selling, offering for sale, or possessing for sale cigarettes that are not in compliance with certain fire safety standards. (Hlth. & Saf. C. §§14950-14959.)
 - a) Requires cigarettes to be tested by the manufacturer in accordance with American Society of Testing and Materials (ASTM) Standard, as provided, and requires cigarettes meet a specified performance standard. (Hlth. & Saf. C. §14952.)
 - b) Requires each cigarette manufacturer to submit a written certification to the State Fire Marshall attesting that each cigarette listed in the certification has been tested as required and is in compliance with specified self-extinguishing fire safety and performance standards. (Hlth. & Saf. C. §14953.)
 - c) Requires cigarettes to be marked on the packaging and case to indicate compliance with the requirements of the Act consistent as provided. (Hlth. & Saf. C. § 14954(a).)
 - d) Prior to selling the product in California, cigarette manufacturers must submit a proposed marking for the packaging to the State Fire Marshall, who is required to approve markings upon a finding that the marking is compliant with the specified requirements. (Hlth. & Saf. C. § 14954(b).)
 - e) If the State Fire Marshall fails to act within 10 business days of receiving the proposed marking, the proposed marking is deemed approved. (Hlth. & Saf. C. § 14954(b).)
 - f) Provides for various civil penalties for violations of the Act and authorizes the Attorney General to bring an action on behalf of the people to enforce the act. (Hlth. & Saf. C. § 14954(a)-(f).)

This bill:

- 1) Revises the Cigarette and Tobacco Products Tax Law by requiring every tobacco manufacturer to renew its listing on the directory annually, beginning with the 2023 calendar year, and requiring a \$1,000 fee for the annual certification.
- 2) Expands the existing certification requirement for participating manufacturers to also to include specified information for brand styles in addition to brand families and requires a nonparticipating manufacture to include in the certification that it fabricates all of the brand families of the cigarettes that it seeks to certify.
- 3) Prohibits the Attorney General from including or retaining in the directory any brand style that has not met certain requirements, including if the brand has not been tested and marked in compliance with the California Cigarette Fire Safety and Firefighter Protection Act.
- 4) Requires a newly qualified and elevated-risk nonparticipating manufacturer to file a surety bond with the Attorney General in an amount equal to the greater of \$50,000

or the amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of the largest of its most recent five calendar year's sales in California.

- 5) Authorizes the Attorney General to bring a civil action for civil penalties and injunctive relief against any nonparticipating manufacturer that does not submit a timely, complete, and accurate certification related to its qualified escrow funds regarding its sales of cigarettes in this state. The amount of the civil penalty may not exceed the greater of either five times the retail value of the cigarettes or \$5,000.
- 6) Authorizes the Attorney General to bring a civil action on behalf of the state for civil penalties and injunctive relief against any nonparticipating manufacturer that does not submit timely, complete, and accurate certifications to the Attorney General regarding its sales of cigarettes in this state and tobacco escrow account compliance for its ongoing and previous sales in this state, as provided.
- 7) Revises the California Cigarette Fire Safety and Firefighter Protection Act to have the Act administered by the Attorney General instead of the State Fire Marshal.
 - a) Requires the Attorney General to approve proposed markings of cigarette manufacturers that certify cigarettes are manufactured in accordance with the Act's fire safety provisions and provides that the markings are deemed approved if the Attorney General fails to act within 30 days instead of the existing requirement of 10 days.

COMMENTS

1. Stated need for the bill

The author writes:

AB 1742 strengthens California's ability to enforce both the Tobacco Master Settlement Agreement (MSA) and Fire Safety Act to ensure that the state receives the money it is entitled to from tobacco companies and to protect against dangerous non-fire-safe cigarettes entering the market. This bill equips the Attorney General with tools to better enforce the MSA by enacting additional safeguards to monitor and impose financial obligations on tobacco manufacturers that are not part of the MSA. Additionally, AB 1742 transfers authority of the Fire Safety Act to the Attorney General's office to streamline enforcement and extends the review window from 10 days to 30 days to allow for adequate review to avoid approval of products by default. Together, these provisions help prevent the state from missing out on hundreds of millions of dollars in annual MSA payments and protect the public from cigarettes that fail to meet fire safety standards.

2. This bill is a reintroduction of both AB 1626 (Robert Rivas, 2020) and AB 1627 (Robert Rivas, 2020)

The provisions in this bill were originally proposed in AB 1626 and AB 1627 in 2020. AB 1626 contained the changes to the Fire Safety Act in this bill and AB 1627 contained the changes to the Cigarette and Tobacco Products Tax Law. AB 1626 passed the Assembly by a vote of 62 to 10 and AB 1627 passed the Assembly by a vote of 56 to 15. Due to the COVID-19 pandemic, both of these bills were not heard in this Committee.

3. Master Settlement Agreement

On November 23, 1998, a \$206 billion settlement was reached between California and 45 other states, Puerto Rico, the District of Columbia, three territories, and five major cigarette manufacturers in the United States concerning antitrust, consumer protection, and health-related litigation claims that were pending against the major tobacco companies at the time. The resulting Master Settlement Agreement (MSA) placed significant limitations on tobacco-related advertisements by tobacco companies and promised multi-billion dollar annual payments to the states. At the time of settlement, California was projected to receive approximately \$25 billion in settlement funding through 2025. As part of the agreement, the states dropped their lawsuits against the named tobacco companies and agreed to impose similar settlement terms via state law on those tobacco companies that elected not to join the MSA.

California implemented the relevant terms of the MSA against non-signatory tobacco companies, in part, by enacting the Model Escrow Statute, which required these non-signatories to make annual payments into a state-held escrow account based on the total number of cigarettes sold to California consumers as measured by state excise taxes collected on the sales. (*See* SB 822 (Escutia, Ch. 780, Stats. 1999); Hlth. & Saf. Code § 104555 et. seq.) The implementing statute specified that funds held in the escrow account would be used to pay judgments or settlements on any claim released by the state against the non-signatory tobacco manufacturers, or would be released back to the manufacturers under certain circumstances. The statute also authorized the California Attorney General to enforce its terms, and to bring a civil action on behalf of the state against any tobacco product manufacturer that failed to place the mandated funds into the escrow account.

The MSA includes provisions that require signatory states to diligently enforce the terms of the agreement and to fund tobacco settlement escrow accounts at a rate roughly equivalent to the level of settlement payments received from signatory manufacturers under the MSA. Failure to diligently enforce the agreement and any related implementing statute exposes non-compliant states to substantial reductions in their MSA settlement payments. Attorney General Rob Bonta, the sponsor of the bill, notes that California has received payments in excess of \$800 million in recent years from the MSA but:

These annual payments, however, are conditioned upon California's enactment and diligent enforcement of an escrow statute, which imposes similar financial obligations on nonparticipating manufacturers (NPM), who are not parties to the MSA. The MSA provides that, if California fails to diligently enforce its escrow statute in a given year, it risks the loss of some, and potentially all, of its annual settlement payment.

AB 1742 provides the Attorney General with additional tools to deter NPMs from noncompliance with state regulations, expands the circumstances in which NPMs may be required to post a surety bond for compliance failure, and increases coordination between state agencies in enforcement related proceedings as part of the MSA payment dispute process, among other changes. These changes will help strengthen and clarify the law in order to aid the Attorney General in California's tobacco enforcement efforts.

4. Changes to the Cigarette and Tobacco Products Tax Law will assist the Attorney General and Department in diligently enforcing the MSA

This bill revises the Cigarette and Tobacco Products Tax Law, which requires every tobacco products manufacturer whose cigarettes are sold in this state to make an annual certification to the Attorney General that the manufacturer is a participating manufacturer that has made all payments due under the MSA or has placed funds into the qualified escrow fund. The bill's changes are intended to assist the Attorney General and the Department in diligently enforcing the terms of the MSA, and to ensure tobacco settlement escrow accounts are being funded appropriately. The bill does this in various ways.

Beginning with the 2023 calendar year, every tobacco manufacturer is required to renew its listing on the directory annually by providing a certification of compliance with existing law, and pay a \$1,000 fee for the annual certification. The bill requires a nonparticipating manufacturer to include in the certification that it fabricates all of the brand families of the cigarettes that it seeks to certify. It expands the existing certification requirement for participating manufacturers to also to include specified information for brand styles in addition to brand families.

The bill prohibits the Attorney General from including or retaining in the directory any brand style that has not met certain requirements, including if the brand has not been tested and marked in compliance with the California Cigarette Fire Safety and Firefighter Protection Act. Any newly qualified and elevated-risk nonparticipating manufacturer is required to file a surety bond with the Attorney General in an amount equal to the greater of \$50,000 or the amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of the largest of its most recent five calendar year's sales in California.

The bill requires the California Department of Tax and Fee Administration to disclose to the Attorney General any information it receives under the Cigarette and Tobacco Products Tax Law for specified purposes. It additionally authorizes the Attorney General or the Department to share information received with a court arbitrator, or data clearinghouse or similar entity for purposes of resolving disputes arising under, and making calculations and determinations required by, the MSA or related settlement agreements. The bill prohibits the Attorney General of the Department from publicly disclosing confidential information except as necessary to carry out their functions and duties.

The bill authorizes the Attorney General to bring a civil action for civil penalties and injunctive relief against any nonparticipating manufacturer that does not submit a timely, complete, and accurate certification related to its qualified escrow funds regarding its sales of cigarettes in this state. The amount of the civil penalty may not exceed the greater of either five times the retail value of the cigarettes or \$5,000.

Additionally, the Attorney General is authorized to bring a civil action on behalf of the state for civil penalties and injunctive relief against any nonparticipating manufacturer that does not submit timely, complete, and accurate certifications to the Attorney General regarding its sales of cigarettes in this state and tobacco escrow account compliance for its ongoing and previous sales in this state. A court, upon a finding of a violation, may impose a civil penalty not to exceed \$1,000 for each day the nonparticipating manufacturer fails to timely, completely, and accurately certify to the Attorney General, and issue an injunction prohibiting the nonparticipating manufacturer's cigarettes from being sold in or into the state until the failure to certify has been fully cured.

5. Changes to the California Cigarette Fire Safety and Firefighter Protection Act

This bill revises the California Cigarette Fire Safety and Firefighter Protection Act (Act) to have the Act administered by the Attorney General instead of the State Fire Marshal in order to remove the inconsistency in the State Fire Marshal's administration with the Act and the Attorney General's authority to enforce the Master Settlement Agreement. The bill requires the Attorney General to approve proposed markings of cigarette manufacturers that certify cigarettes are manufactured in accordance with the Act's fire safety provisions and provides that the markings are deemed approved if the Attorney General fails to act within 30 days instead of 10 days, with the goal of preventing automatic approval of markings for administrative inaction and ensuring that the Act's fire safety standards are being adequately enforced. Attorney General Rob Bonta, the sponsor of the bill, writes that these provisions enhance and increase protections for Californians against fires caused by unsafe cigarettes by:

[...] shifting the authority to review fire-safe-cigarettes to the Attorney General's Office, ensuring that cigarettes sold in California meet current fire safety requirements.

Under California's fire-safe-cigarette laws, a cigarette cannot be sold in the state unless the cigarette manufacturer receives approval from the State Fire Marshal that the product is firesafe. To receive approval, a cigarette manufacturer is required to provide the State Fire Marshal with a certification establishing that its product meets nationwide fire-safe standards. The State Fire Marshal has 10 days to review this certification information and approve the cigarettes as compliant with the law. However, if the State Fire Marshal does not act within the 10-day review period, the cigarette product receives default approval and can be sold in the state. In recent years, there has been limited administrative review of fire-safe-cigarette certifications, leading to default approvals of cigarettes by the state.

The Attorney General enforces the fire-safe-cigarette laws throughout the state and default approval has impaired the Attorney General's responsibilities to protect the public from non-fire-safe-cigarettes. AB 1742 would shift the responsibility to review fire-safe-cigarette certification from the State Fire Marshal to the Attorney General and increase the review period to 30 days. This would ensure cigarettes receive the necessary review by the state. Moreover, AB 1742 promotes government efficiency, as the AGO already receives fire-safe-cigarette certification information as part of its tobacco enforcement work.

6. Statements in support

The League of California Cities writes in support:

Cal Cities continues to support legislation that strengthens smoking and tobacco standards in California and ensures the equitable distribution of funding received from the MSA. AB 1742 would be a step in the right direction, strengthening the Attorney General's ability to enforce state tobacco laws.

SUPPORT

Attorney General Rob Bonta (sponsor)
California State Association of Counties
League of California Cities

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known

Prior Legislation:

AB 1626 (Robert Rivas, 2020), *see* comment 2) above.

AB 1627 (Robert Rives, 2020), *see* comment 2) above.

PRIOR VOTES:

Senate Business, Professions and Economic Development Committee (Ayes 9, Noes 3)

Assembly Floor (Ayes 51, Noes 14)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Judiciary Committee (Ayes 7, Noes 1)

Assembly Governmental Organization Committee (Ayes 14, Noes 5)
