Date of Hearing: April 26, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 1742 (Robert Rivas) – As Amended March 24, 2022

SUBJECT: CALIFORNIA CIGARETTE FIRE SAFETY AND FIREFIGHTER PROTECTION ACT: TOBACCO MASTER SETTLEMENT AGREEMENT

KEY ISSUES:

1) SHOULD AUTHORITY TO ADMINISTER THE CALIFORNIA CIGARETTE FIRE SAFETY AND FIREFIGHTER PROTECTION ACT BE TRANSFERRED FROM THE STATE FIRE MARSHAL TO THE ATTORNEY GENERAL?

2) SHOULD THE CRITERIA FOR DETERMINING WHETHER A TOBACCO MANUFACTURER SHOULD BE LISTED ON THE CALIFORNIA TOBACCO DIRECTORY FOR POSING AN ELEVATED RISK OF NONCOMPLIANCE WITH EXISTING LAWS BE EXPANDED?

3) SHOULD NEW CIVIL PENALTIES BE IMPOSED ON TOBACCO MANUFACTURERS THAT SUBMIT UNTIMELY OR INACCURATE DISCLOSURES RELATED TO THE CALIFORNIA TOBACCO DIRECTORY?

SYNOPSIS

This bill proposes to update and expand the Attorney General's powers to manage the California Tobacco Directory and enforce California law related to the directory. The California Tobacco Directory was created in the wake of the state's settlement with large tobacco companies for the massive harm to public health inflicted by their products. This settlement was memorized in the Master Settlement Agreement signed between the state and defendants in the late 1990s. The Master Settlement Agreement requires participating manufacturers to provide annual settlement payments to the state, and requires the state to set up a process whereby non-participating companies place a sum similar to the settlement payments into an escrow account to guard against any liabilities that the manufacturer incurs. Much of this arrangement has been codified into existing law.

This bill seeks to update the standards whereby a non-participant company may be deemed to be at "elevated" risk of failing to comply with the escrow laws or other aspects of the program. The Attorney General suggests that these changes are necessary to ensure that the law addresses all of the potential risks in the industry. Furthermore, this bill expands the authority for the Attorney General to seek civil penalties against manufacturers that submit incorrect or delayed disclosures required by law. The bill modifies the certification process whereby manufacturers are listed in the California Tobacco Directory, and imposes a $1,000 fee for such registrations to defray the Attorney General's cost of managing the Directory. Finally, the bill transfers oversight of the California Cigarette Fire Safety and Firefighter Protection Act from the State Fire Marshal to the Attorney General. The bill adopts a proactive approach to ensure that California can continue to successfully administer the Master Settlement Agreement and that the millions of dollars in public health funding generated by the Agreement will not be compromised. This bill is sponsored by the Office of the Attorney General and is supported by *the California State Association of Counties and the League of California Cities. There is no registered opposition. This bill was previously heard by the Assembly Committee on Governmental Organization which approved the bill by a vote of 14-5.*

SUMMARY: Transfers oversight and management of the California Cigarette Fire Safety and Firefighter Protection Act from the State Fire Marshal to the Attorney General. Also updates and expands the Attorney General's authority to maintain the California Tobacco Directory as well as compliance with the escrow provisions of the Master Settlement Agreement reached between states and large tobacco corporations related to the harm inflicted by tobacco products. Specifically, **this bill**:

1) Reassigns authority to administer the California Cigarette Fire Safety and Firefighter Protection Act from the State Fire Marshal to the Attorney General.

2) Withdraws authorization for sellers to market cigarette inventory that existed before January 1, 2007.

3) Authorizes the Attorney General to establish standards for the certification of cigarettes pursuant to the Firefighter Protection Act from the State Fire Marshal, notwithstanding existing statutory requirements, including the form, manner, and detail required.

4) Authorizes the Attorney General to publish information submitted pursuant to the California Cigarette Fire Safety and Firefighter Protection Act on its internet website.

5) Authorizes the Attorney General to adopt rules and regulations to implement the California Cigarette Fire Safety and Firefighter Protection Act.

6) Grants additional regulatory control over nonparticipating manufacturers.

7) Prohibits the Attorney General from including or retaining in the Directory any brand style that has not been tested and marked in compliance with the California Cigarette Fire Safety and Firefighter Protection Act.

8) Specifically states that certifications for listing the brand family of cigarettes or tobacco products within the California Tobacco Directory are to expire annually on April 29.

9) Requires tobacco manufacturers seeking listing in the California Tobacco Directory to annually update a certificate of compliance and pay a $1,000 fee to the Attorney General for the purpose of administering the California Tobacco Directory.

10) Expands the criteria by which the Attorney General may utilize when declaring a tobacco manufacturer that is not participating in the Master Settlement Agreement to pose an elevated risk of failing to comply with the law to include the following:

    a) If during any of the past three years, escrow and equity fee payments were made on less than 80 percent of the nonparticipating manufacturer's nationwide cigarette sales as measured by excise taxes collected by the federal government;

    b) If, as of January 1, 2021, a nonparticipating manufacturer's cigarettes are sold in or into California by distributors that have not reported their last 12 months of California sales electronically and in the manner prescribed by the Attorney General; or

c) For a domestic manufacturer, if the nonparticipating manufacturer's cigarettes are sold in California through one or more distributors that do not purchase directly from the nonparticipating manufacturer. For a foreign manufacturer, the nonparticipating manufacturer's cigarettes are sold in California through one or more distributors that do not purchase directly from an importer that has accepted joint and several liability in accordance with existing law.

11) Authorizes the California Department of Tax and Fee Administration and the Attorney General's office to share certain sales reports and data to other government agencies and courts for the purpose of resolving payment disputes under the Master Settlement Agreement.

12) Authorizes the Attorney General to bring a civil action on behalf of the state for civil penalties and injunctive relief against a retailer, distributor, wholesaler, manufacturer, importer, or other person who violates the disclosure and certification provisions of existing law.

13) Makes various technical and conforming changes to the statutes implementing the Master Settlement Agreement.

EXISTING LAW:

1) Defines "Master Settlement Agreement" to mean the settlement agreement and related documents entered into on November 23, 1998, by the State of California and leading United States tobacco product manufacturers. (Health and Safety Code Section 104556 (e).)

2) Defines "qualified escrow fund" to mean an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars ($1,000,000,000) where the arrangement requires that the financial institution hold the escrowed funds' principal for the benefit of releasing the parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as provided by law. (Health and Safety Code Section 104556 (f).)

3) Defines "tobacco product manufacturer" to mean an entity that after the date of enactment of the Master Settlement Agreement, and not exclusively through any affiliate, that:

   a) Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where the importer is an original participating manufacturer as that term is defined in the Master Settlement Agreement);

   b) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

   c) Becomes a successor of an entity described in a) or b). (Health and Safety Code Section 104556 (i).)

4) Provides that any tobacco product manufacturer selling cigarettes to consumers within California, whether directly or through a distributor, retailer or similar intermediary or intermediaries, shall do one of the following:

   a) Become a participating manufacturer as that term is defined in Section II (jj) of the Master Settlement Agreement and generally perform its financial obligations under the Master Settlement Agreement; or

   b) Place into a qualified escrow specified sums of money based on the number of units sold in California in a specified year. (Health and Safety Code Section 104557 (a).)

5) Provides that any tobacco product manufacturer that places funds into escrow pursuant to 4) is entitled to the interest or other appreciation on the funds as earned. The funds, other than the interest or other appreciation, shall be released from escrow only under the following circumstances:

   a) To pay a judgment or settlement on any released claim brought against that tobacco product manufacturer by the state or any releasing party located or residing in the state.

   b) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in this state in a particular year was greater than the Master Settlement Agreement payments would have been required to make on account of the units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to that tobacco product manufacturer; or

   c) To the extent not released from escrow pursuant to a) or b), the funds shall be released from escrow and revert back to the tobacco product manufacturer 25 years after the date on which they were placed into escrow. (Health and Safety Code Section 104557 (b).)

6) 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). (Revenue & Taxation Code Section 30165.1 (b).)

7) 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. (Revenue and Taxation Code Section 30465.1 (c).)

8) 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. (Revenue and Taxation Code Section 30465.1 (c)(6).)

9) Provides that a manufacturer not participating in the Master Settlement Agreement is deemed at risk of noncompliance pursuant to 8) if any of the following are satisfied:

a) The manufacturer, generally, fails to deposit fully the amount due on an escrow obligation with respect to any state at any time during the calendar year or within the past three calendar years;

b) Any other state has removed the manufacturer or its brands or an affiliate or any of the affiliate's brands from that state's tobacco directory for noncompliance with a state escrow deposit or tobacco tax law at any time during the calendar year or within the past three calendar years;

c) Any state has litigation pending against, or an unsatisfied final judgment against, the manufacturer or any affiliate thereof for escrow or for penalties, fees, costs, refunds, or attorney's fees related to noncompliance with state escrow laws;

d) The manufacturer sells cigarettes or tobacco products directly to consumers via remote or other non-face-to-face means;

e) A state or federal court has determined that the manufacturer has violated any tobacco tax or tobacco control law or engaged in unfair business practice or unfair competition;

f) Any state has suspended or revoked its license to engage in any aspect of tobacco business; or

g) Any state or federal court has determined that it failed to comply with state or federal law imposing marking, labeling, and stamping requirements or requiring information to be affixed to, or contained in, the labels, markings, or packaging. (*Ibid.*)

10) 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. (Revenue and Taxation Code Section 30465.1 (e).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Seeking to recover for the harm inflicted on millions of smokers, the Attorneys General of more than 40 states, in conjunction with the federal government, sued America's largest tobacco manufacturers in the 1990s. The historic litigation ended with a massive settlement, codified in a document known as the Master Settlement Agreement. In order to carry out the Master Settlement Agreement, California enacted several statutes to outline the state's rights and obligations under the agreement. This bill updates and strengthens one of those statutes as it pertains to the management and oversight of the California Tobacco Directory, a registry detailing which companies are in compliance with the law and thus are entitled to continue selling tobacco products in California.

The bill seeks to enhance the Attorney General's ability to seek penalties against companies that fail to properly certify their compliance with the law. In support of this bill, the author states:

> 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.

Background on the Master Settlement Agreement and California's enforcement of the historic settlement against tobacco companies. By the early 1990s the harms stemming from the use of tobacco products had become common knowledge. The public health impact of smoking was costing the state millions of dollars in public health-related expenses annually. Accordingly, the Attorneys General of more than 40 states and territories filed lawsuits against several tobacco product manufacturers. Facing significant legal liability, America's largest tobacco manufacturers, including Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard, agreed to settle the litigation with the states on November 23, 1998. (*The Master Settlement Agreement: An Overview* (2019) Public Law Center-Tobacco Control Legal Consortium.) In addition to imposing significant restrictions on tobacco advertising, as part of the settlement, the participating states released the participating manufacturers from liability for healthcare costs incurred by the states for smoking related illnesses in return for the participating manufacturers' agreement to provide annual settlement payments to the state. (*Ibid.*) States participating in the settlement are required to establish a method for non-participating tobacco manufacturers to fund escrow accounts to cover the potential liability to the state of those manufacturers. As a participant in the Master Settlement Agreement, California has codified its duties and rights in several statutes.

One such statute outlines the process for non-participating tobacco manufacturers to contribute to an escrow account. Generally, the escrow statutes require a tobacco manufacturer that is not a participant in the settlement agreement to contribute a sum to the account which is roughly equivalent to the amount of settlement money paid to the state by the companies that opt to participate in the Master Settlement Agreement. In the event that the Attorney General believes that a manufacturer poses an elevated risk of not complying with the escrow statutes, the Attorney General has authority to require a manufacturer to obtain a surety bond to cover its potential liabilities. To ensure proper oversight and continued enforcement of the settlement, in 2003 the Legislature passed AB 71 (Horton, Chap. 890, Stats. 2003), which created the California Tobacco Directory, a registry where tobacco manufacturers must certify that their products comply with the laws implementing the Master Settlement Agreement. If a product is not certified and entered into the California Tobacco Directory, the product may not be lawfully distributed, sold, offered for sale, or possessed for sale in this state.

This bill provides the Attorney General several new tools to police the Master Settlement Agreement (MSA) and associated escrow payments. It also transfers oversight and management authority over the California Cigarette Fire Safety and Firefighter Protection Act from the State Fire Marshal to the Attorney General. With regard to increasing the Attorney General's ability to police the MSA, the bill first enhances the requirements for tobacco manufacturers seeking placement on the California Tobacco Directory. Recognizing that the existing law may not adequately address all scenarios in which a manufacturer could fail to comply with the law, the bill expands the criteria by which the Attorney General may determine that a manufacturer poses an elevated risk of non-compliance. Additionally, the bill provides for the imposition of civil penalties against tobacco manufacturers that file delinquent or deficient certifications and enables the Attorney General to seek injunctive relief against such manufacturers. Finally, the bill imposes a $1,000 filing fee to be remitted as a part of the tobacco product manufacturer's annual certification for appearance on the California Tobacco Directory, and provides that the fee revenue is to be utilized by the Attorney General to maintain the Directory.

To protect against potential noncompliance with the law and uncompensated liability, the Attorney General seeks to strengthen existing law bonding statutes. As noted above, any manufacturer that is not a participant in the Master Settlement Agreement must contribute to an escrow fund designed to cover their potential liabilities. Recognizing that businesses may not always remain solvent, or worse yet may deliberately flout the law, existing law provides the Attorney General with authority to deem a manufacturer to be at an "elevated" risk for non-compliance and require such manufacturers to obtain a surety bond to cover potential liabilities. Existing law already provides for seven conditions under which the Attorney General may exercise this power, typically in cases where a manufacturer has not complied with the laws of other jurisdictions, is facing litigation in another jurisdiction, or has been found to have engaged in questionable or unfair business practices.

As the nature of the tobacco industry evolves, new risk factors for potential non-compliance of manufacturers have come to the attention of the Attorney General. This bill proposes three new risk factors that justify requiring a manufacturer to obtain a surety bond. Much like the existing law, these factors focus on unsavory business practices and general behavior that indicates an unwillingness or inability to properly comply with the Master Settlement Agreement and related escrow statutes. Given that the new factors generally align with existing criteria for deeming a manufacturer to be an elevated risk, the proposed additions seem appropriate and practical.

This bill provides new tools to ensure proper disclosures by tobacco manufacturers. Much of the day-to-day management of the California Tobacco Directory involves regular filings by tobacco manufacturers regarding their financial status and tax disclosures to permit the Attorney General to track sales of their products in California. The failure of manufacturers to adhere to proper reporting deadlines may not result in significant penalties under existing law, but nonetheless complicate the Attorney General's management of the program.

To ensure that manufacturers properly comply with all aspects of the California Tobacco Directory program, this bill proposes authorizing the Attorney General to impose civil penalties on manufacturers that fail to follow disclosure rules, or fail to file disclosures in a timely manner. Given that the proposed penalties are relatively modest, not to exceed $5,000, these penalties should serve as a sufficient deterrent to bad actors and appear to be a reasonable measure to ensure proper compliance with the law.

This bill transfers oversight of the California Cigarette Fire Safety and Firefighter Protection Act from the State Fire Marshal to the Attorney General. California's Fire Safety Act became effective on January 1, 2007 and is designed to save lives by reducing the risk that cigarettes will ignite upholstered furniture, mattresses, household furnishings and other combustible material. According to a 2019 National Fire Protection Association report, smoking remained the leading cause of home fire deaths over the total five-year period of 2012-2016.

Under the Fire Safety Act, cigarettes sold in California must meet the following criteria: 1) satisfy the American Society of Testing and Materials (ASTM) Standard, "Standard Test Method for Measuring the Ignition Strength of Cigarettes; 2) be sold in packaging marked and approved by the State Fire Marshal; and 3) a certification must be submitted by the manufacturer to the State Fire Marshal certifying that each cigarette listed was tested and satisfies the performance requirements of the ASTM. The Act also allows for the automatic approval of cigarette markings used to indicate compliance with safety standards if State Fire Marshal does not act within 10 business days of receiving the proposed markings.

According to the State Fire Marshal staff, no funds were ever appropriated for its enforcement or oversight activities. The Attorney General's staff notes that this has led to proposed cigarette markings being approved automatically without adequate state oversight. Transferring oversight of the program from the State Fire Marshal to the Attorney General will arguably both allow the Attorney General to enact greater control over tobacco regulations and free up more of the State Fire Marshal’s resources to focus on other issues in their jurisdiction, including the identification and prevention of seasonal wildfires.

ARGUMENTS IN SUPPORT*:* The Office of the Attorney General, the bill’s sponsor, point to their role in enforcing the laws and regulations relating to the state’s obligations under the Master Settlement Agreement as the basis for the proposed changes:

> AB 1742 provides the Attorney General with additional tools to deter NPMs from non-compliance 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.
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> Second, AB 1742 improves government efficiency and helps protect 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.

Recent similar or related legislation. AB 1627 (R. Rivas, 2019) was substantively similar to AB 1742. AB 1627 died in the Senate Judiciary Committee without a hearing.

SB 1408 (Pan, 2018) revised the legal characterization of cigarettes found to be in violation of the Act. (Chap. 613, Stats. 2018.)

AB 178 (Koretz, 2005) established the Act, which prohibited the sale of cigarettes that do not meet specified fire safety standards beginning January 1, 2007, established fire safety certification requirements and new civil penalties for violations. (Chap. 633, Stats. 2005.)

REGISTERED SUPPORT / OPPOSITION:

Support

State of California Office of the Attorney General (sponsor)
California State Association of Counties
League of California Cities

Opposition

None on file

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