



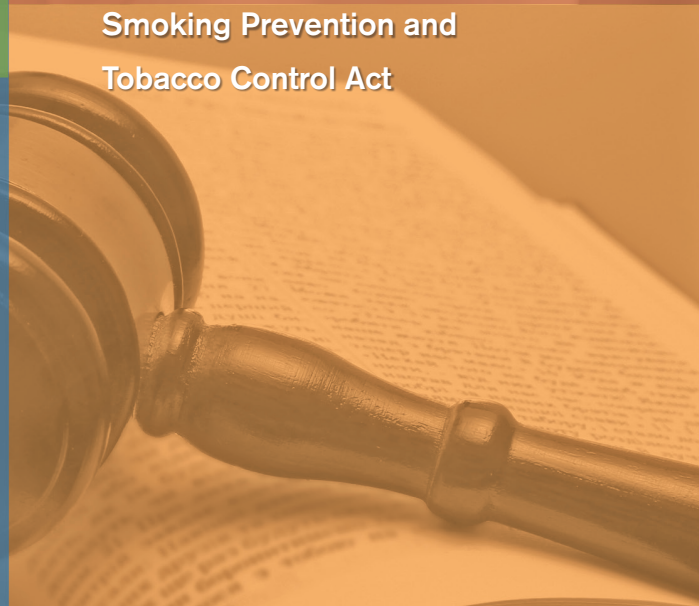
Tobacco Laws

Affecting California

2019



Fully updated, user-friendly guide to laws regulating exposure to secondhand smoke and the sale and marketing of tobacco products, including the federal Family Smoking Prevention and Tobacco Control Act



ChangeLab Solutions
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ChangeLab Solutions works across the nation to advance equitable laws and policies that ensure healthy lives for all. We prioritize communities whose residents are at highest risk for poor health. Our interdisciplinary team of lawyers, planners, policy analysts, and more, works with neighborhoods, cities, and states to create thriving communities.

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OVERVIEW..... 7

UPDATED STATE TOBACCO CONTROL LAWS..... 8

FEDERAL REGULATION OF ELECTRONIC NICOTINE DELIVERY SYSTEMS, CIGARS, AND OTHER TOBACCO PRODUCTS 10

FINDING THE ACTUAL LAWS..... 13

DISCLAIMERS..... 14

ADDITIONAL COPIES OF THIS BOOKLET 14

SECONDHAND SMOKE..... 15

1. Workplaces..... 16

2. Multiunit Residences..... 17

3. Public Housing..... 18

4. State, County, and City Buildings 19

5. Certified Farmers’ Markets..... 20

6. Tot Lots and Playgrounds..... 20

7. Youth Sports Events..... 21

8. Schools..... 21

9. Day Care Facilities 22

10. Foster Homes 23

11. Smoking in Vehicles with Children 23

12. Public Transit Systems 23

13. Airplanes and Trains..... 24

14. Youth Buses and Public Paratransit Vehicles 26

15. Adoption of Local Secondhand Smoke Laws 26

16. Restrictions on Smoking and Ingesting Cannabis 26

POSSESSION AND USE 29

17. State Mental Health Hospitals..... 30

18. Youth Possession No Longer Illegal 30

19. Student Possession and Use 31

20. Tobacco-Free Campus Policies 31

21. Baseball Stadiums 32

22. Possession and Use in Prisons 32

23. Possession and Use in Youth Correctional Facilities..... 33

24. Possession in Local Correctional Facilities..... 33

25. Use in Food Service Facilities and Nonprofit Temporary Food Facilities 34

26. Employment and Off-Duty Use..... 35

TOBACCO SALES..... 36

27. Age-Based Sales Restrictions: Penal Code 308 37

28. Age-Based Sales Restrictions: The STAKE Act 38

Table of Contents

29. Sales to Minors: The Tobacco Control Act.....	39
30. Sales to Minors: The Synar Amendment	41
31. ID Check Requirement: The STAKE Act	41
32. ID Check Requirement: The Tobacco Control Act.....	41
33. Sign Posting Requirement: The STAKE Act	43
34. Vending Machines: The STAKE Act	44
35. Self-Service Displays: The STAKE Act	44
36. Self-Service Displays: The Tobacco Control Act.....	45
37. Bidis.....	47
38. Single Cigarettes	47
39. Minimum Package Size.....	47
40. Single Items and Minimum Package Size: The Tobacco Control Act	48
41. Mail Order/Internet Sales: The STAKE Act	49
42. Mail Order/Internet Sales: The PACT Act	50
43. Mail Order/Internet Sales: The Tobacco Control Act.....	51
44. Home Delivery of Unsolicited Tobacco Products	53
45. Fire Safe Cigarettes.....	53
46. Liquid Nicotine Packaging Requirements	54
47. Non-Nicotine Product in a Vapor State	55
48. Tobacco Product Standards: The Tobacco Control Act.....	55
49. Premarket Review of New Tobacco Products: The Tobacco Control Act	56
50. Adulterated and Misbranded Tobacco Products: The Tobacco Control Act	58
51. Modified Risk Tobacco Products: The Tobacco Control Act.....	59
52. “Light,” “Low,” and “Mild” Tobacco Products: The Tobacco Control Act.....	60
53. Ban On Flavored Cigarettes or Cigarette Components: The Tobacco Control Act..	61
54. Origin Labeling: The Tobacco Control Act.....	62
55. Restrictions On Tobacco and Alcohol Sales Near Cannabis Sellers	63
ADVERTISING	64
56. Outdoor Advertising: The MSA.....	65
57. Outdoor Advertising: The STAKE Act	65
58. Outdoor Advertising: The Tobacco Control Act	66
59. Federal Preemption of State and Local Regulation of Cigarette and Smokeless Tobacco Advertising and Promotion.....	67
60. Storefront Advertising	68
61. Blunt Wraps Advertising.....	69
62. State Building Advertising.....	69
63. Transit Advertising.....	70
64. Cartoon Characters.....	70
65. Youth Targeting.....	71
66. Video Games	71

67. Television/Radio Cigarette Advertising.....	71
68. Television/Radio Smokeless Tobacco Advertising.....	72
69. Ban on Misleading Consumers About U.S. Food and Drug Administration (FDA) Endorsements: The Tobacco Control Act	72
70. Content Disclosures to The Public: The Tobacco Control Act.....	73
71. Permissible Forms of Labeling and Advertising: The Tobacco Control Act	73
72. Equal Treatment of Retail Outlets: The Tobacco Control Act	75
SPONSORSHIP, BRANDING, AND SAMPLING	76
73. Sponsorship: The MSA.....	77
74. Sponsorship: The Tobacco Control Act.....	77
75. Brand Name Merchandise	79
76. Brand Name Limitations	80
77. Brand Name Limitations: The Tobacco Control Act	80
78. Product Placement	81
79. Samples, Coupons, and Promotional Offers: California Law	81
80. Samples, Coupons, and Promotional Offers: MSA/STMSA.....	83
81. Samples: The Tobacco Control Act.....	83
82. Proof-of-Purchase Gifts	86
83. Lottery	86
84. Sale and Distribution of Non-Tobacco Items or Services: The Tobacco Control Act.....	86
85. Joint Marketing: The Tobacco Control Act	87
WARNING LABELS.....	88
86. Cigarette Warning Labels.....	89
87. Tobacco Product Labels and Advertising Warnings: The Tobacco Control Act.....	91
88. Smokeless Tobacco Warning Labels	92
89. Smokeless Tobacco Label and Advertising Warnings: The Tobacco Control Act.....	92
90. Cigar Warning Labels	93
91. E-Cigarette and Other Liquid Nicotine Exposure Warnings	95
TAXATION, LICENSING, AND REPORTING	96
92. Federal Tobacco Tax.....	97
93. Reporting Requirements: The Jenkins Act.....	97
94. Reporting Requirements: The PACT Act	98
95. California State Tobacco Tax	98
96. Cigarette Tax Stamps/Meter Impressions	100
97. Mail Order/Internet Cigarette Taxation	101
98. Illicit Market and Counterfeit Cigarettes	102
99. Forgery of Stamps/Meter Impressions.....	103

Table of Contents

100. Possession or Sale of False Stamps/Meter Impressions	104
101. Tobacco Retailer License	104
102. Retailer License Display	105
103. Licensing Penalties for Illegal Sales to Underage Individuals	106
104. Distributor and Wholesaler Licenses.....	106
105. Distributor and Wholesaler Reporting	108
106. Manufacturer and Importer License and Reporting	108
107. Record Retention by State Licensees	109
108. Inspections	109
109. Transactions With Unlicensed Entities.....	110
110. Administrative Penalties Applicable to All Licensees	110
111. California Department of Tax and Fee Administration Licensing Database	112
112. Manufacturer Certification	112
113. Record-Keeping: The Tobacco Control Act.....	113
114. Registration of Tobacco Establishments: The Tobacco Control Act	114
115. User Fees: The Tobacco Control Act.....	114
116. Required Disclosures to the U.S. Food and Drug Administration (FDA): The Tobacco Control Act.....	115
MASTER SETTLEMENT AGREEMENT (MSA) FUNDS	117
117. MSA Payments	118
118. MSA Bonds	118
119. Appeal Bonds	119
RELATED LAWS.....	120
120. Preservation of State and Local Authority: The Tobacco Control Act	121
121. Additional Regulations: The Tobacco Control Act.....	121
122. Advisory Committee: The Tobacco Control Act	122
123. Federal Americans with Disabilities Act (ADA).....	122
124. Federal Fair Housing Act (FHA).....	123
125. California Fair Employment and Housing Act (FEHA)	124
126. California Unruh Civil Rights Act.....	125
127. Proposition 65.....	126
128. Unfair Competition Law.....	126
129. Medi-Cal Cessation, Prevention, and Education Services	127
130. Patient Protection and Affordable Care Act.....	127
131. Tricare Smoking Cessation Program.....	129
INDEXES.....	130

OVERVIEW

This booklet provides summaries of state and federal tobacco laws that affect California. It is designed as a resource for tobacco control advocates, government attorneys, local law enforcement agencies, and anyone who is working on tobacco control issues. The booklet includes information on California state laws and regulations related to tobacco, including the Stop Tobacco Access to Kids Enforcement Act (known as the STAKE Act), as well as federal laws and regulations that apply within California, such as the Family Smoking Prevention and Tobacco Control Act (known as the Tobacco Control Act).¹ It also summarizes portions of the 1998 Master Settlement Agreement (MSA) between the attorneys general of 46 states (including California) and the major tobacco companies, and the 1998 Smokeless Tobacco Master Settlement Agreement (STMSA) between the attorneys general of 45 states (including California) and U.S. Smokeless Tobacco Company.

In some cases, there are multiple laws covering a particular topic. For example, both California and the federal government ban distributing free samples of cigarettes (see entries 79–81 for more information on the distribution of free samples). In other cases, state and federal laws may cover the same topic but have different restrictions. Moreover, California and federal laws often use similar terminology with different definitions. A glossary of terms used in federal and California laws is included below. Readers will need to examine the scope of each law closely to determine what is prohibited.

The information in this booklet includes tobacco-related laws that are effective as of May 31, 2019.

This booklet does not contain information on the numerous local laws in California that regulate tobacco use, sales, or distribution. Many of these local laws are stricter than state or federal law. For example, local governments in California have passed laws to limit exposure to secondhand smoke in both indoor and outdoor areas where smoking is permitted by state law. Local governments in California also have enacted laws to supplement state laws regarding how tobacco products are sold. For instance, the state tobacco retailer licensing law focuses on protecting state revenue by targeting tax evasion, while numerous communities have local tobacco retailer licensing laws that focus on protecting the public's health.

It is important to review local laws to determine whether a jurisdiction has adopted restrictions to supplement the laws described in this book.

¹This booklet does not include every instance in which the word *tobacco* is mentioned in state or federal law. However, the booklet contains information on the laws that are relevant to tobacco control implementation and enforcement efforts in California. If you note any omissions in the booklet, please contact ChangeLab Solutions.

UPDATED STATE TOBACCO CONTROL LAWS

On January 1, 2018, 2 laws impacting tobacco took effect in California:

- **Proposition 64** legalized the sale, possession, and consumption of adult-use marijuana. Proposition 64 was amended by AB 64 and SB 64 to align it with existing law in regard to medicinal cannabis. While sale and taxation of adult-use cannabis was legal effective January 1, 2018, personal use and cultivation was legal effective November 9, 2016. This booklet will discuss the regulation of secondhand smoke as well as the interaction between Proposition 64 and tobacco control laws. See http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB64.
- **AB 404** extended smokefree protections to resource family homes. Resource family homes are a type of foster care placement with a different approval process from certified foster placements. See http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB404.

Following changes to state law in 2016, most state laws use the following definitions:

- **Smoking** means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. Smoking includes the use of an electronic smoking device that creates an aerosol or a vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking. California Business and Professions Code Section 22950.5(c).
- **Tobacco Product** means
 - (A) A product containing, made from, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.
 - (B) An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.
 - (C) Any component, part, or accessory of a tobacco product, whether or not sold separately.

Tobacco Products do not include products approved by the U.S. Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.

Local laws that use the words smoking and tobacco product are not affected by these changes, unless a local law specifically refers to a state law definition. None of the 2016 bills alters the authority of local governments to regulate the use of tobacco products. Furthermore, local governments may regulate electronic smoking devices to the same extent they are able to regulate traditional tobacco products.

FEDERAL REGULATION OF ELECTRONIC NICOTINE DELIVERY SYSTEMS, CIGARS, AND OTHER TOBACCO PRODUCTS

As of August 8, 2016, the U.S. Food and Drug Administration's (FDA) authority over the regulation of tobacco products extends to all tobacco products, including cigarettes, smokeless tobacco, cigars, pipe tobacco, hookah tobacco, gels, dissolvables, electronic nicotine delivery systems containing anything made or derived from tobacco, and other newly deemed tobacco products. 81 Federal Register 28973 (May 10, 2015), available at www.federalregister.gov/articles/2016/05/10/2016-10685/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the. The FDA applies varying requirements and limitations to different categories of tobacco products. The following is a non-exhaustive list of terms used in the Tobacco Control Act and FDA regulations (it is possible for a product to fall under more than one category below):

- The **deeming rule** refers to the final rule issued by the FDA that extends its regulatory authority under the Tobacco Control Act to all tobacco products.

Under the Tobacco Control Act, the scope of preemption that applies to state and local regulation of newly deemed tobacco products subject to FDA authority will likely be the same or less than it is for regulation of cigarettes. However, provisions in the Federal Cigarette Labeling and Advertising Act and the Comprehensive Smokeless Tobacco Health Education Act that preempt states from regulating the content of cigarette and smokeless tobacco product advertisements, respectively, still apply only to cigarettes and smokeless tobacco products (see entries 59, 86, and 120 for more information about preemption).

The rule does not apply to accessories of newly deemed tobacco products.

- A **tobacco product** means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product. Tobacco products do not include raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product, nor any article regulated as a drug, device, or combination product under the Food, Drug, and Cosmetics Act (FDCA). 21 United States Code Sections 321(g)(1), 321(h), 353(g).
- An **accessory** means any item that (1) does not contain tobacco; (2) is not derived from tobacco; (3) is used with or for the human consumption of a tobacco product; and (4) does not affect or alter the performance, composition, constituents, or characteristics of a tobacco product, with the exception of items that only control moisture/temperature or provide an external heat source to ignite but not maintain combustion. 21 Code of Federal Regulations Section 1140.3.
- A **component or part** means any software or assembly of materials intended or reasonably expected (1) to alter or affect the tobacco product's performance, composition, constituents, or characteristics; or (2) to be used with or for the human consumption of a tobacco product. Component or part excludes anything that is an accessory of a tobacco product. 21 Code of Federal Regulations Section 1140.3.

- A **newly deemed tobacco** product means a tobacco product that is not cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco. For example, this includes cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco. Newly deemed tobacco products include any component or part of newly deemed products, but do not include their accessories. On varying effective and compliance dates, different newly deemed tobacco products will be subject to many Tobacco Control Act provisions that apply to cigarettes, roll-your-own tobacco, and smokeless tobacco, including the following:
 - (1) Adulteration and misbranding provisions
 - (2) Required submission of ingredient listing and reporting of harmful and potentially harmful constituents
 - (3) Required registration and product listing
 - (4) Prohibition against the use of modified risk descriptors and claims (eg, “light,” “low,” and “mild” descriptors), unless the FDA issues an order permitting their use
 - (5) Prohibition on the distribution of free samples
 - (6) Premarket review requirements
- **Electronic nicotine delivery systems** are tobacco products under the FDA deeming rule, and may include products such as e-cigarettes, e-cigars, e-hookah, vape pens, personal vaporizers, and electronic pipes. These products are all subject to FDA regulation, regardless of what they’re called or their heating source. Components or parts of electronic nicotine delivery systems may include, for example, e-liquids, tanks, cartridges, pods, wicks, or atomizers. 81 Federal Registrar 28974, 29028.
- A **covered tobacco product** means any tobacco product deemed to be subject to the Federal Food, Drug, and Cosmetic Act under 21 Code of Federal Regulations Section 1100.2. However, covered tobacco products exclude any component or part that is not made or derived from tobacco. 21 Code of Federal Regulations Section 1140.3.

In addition to the requirements and limitations applicable to all newly deemed tobacco products, the deeming rule applies 3 additional provisions to covered tobacco products:

- (1) Restricting sales to individuals under 18 years of age
 - (2) Requiring health warnings for product packages and advertisements
 - (3) Prohibiting vending machine sales, unless the vending machine is located in a facility where the retailer ensures that individuals under 18 are prohibited from entering at any time
- A **finished tobacco** product means a tobacco product, including all components and parts, sealed in final packaging intended for consumer use. 81 Federal Registrar 28973, 28995 (May 10, 2016).

- A **new tobacco product** means any tobacco product (including those products in test markets) that was not commercially marketed in the United States as of February 15, 2007. A new tobacco product also includes any modification (including a change in design, any component, any part, or any constituent, including a smoke constituent, or in the content, delivery or form of nicotine, or any other additive or ingredient) of a tobacco product in which the modified product was commercially marketed in the United States after February 15, 2007. 21 United States Code Section 387j(a)(1).

This booklet includes a discussion of these provisions where applicable and provides effective and compliance dates relevant to retailers, manufacturers, importers, and distributors of newly deemed tobacco products. The FDA has reserved the authority to impose additional restrictions and limitations on newly deemed tobacco products.

FINDING THE ACTUAL LAWS

The full text of the laws and regulations described in this booklet can be found on the following websites:

- **California Laws**

<http://leginfo.legislature.ca.gov/faces/codes.xhtml>

This website is the easiest place to find the California laws. To locate a particular code section, check the box next to the type of code (eg, Penal Code), type the number of the section in the keyword(s) box, and click on the search button under the keyword(s) box. To browse an entire code (as opposed to a particular section), check the box next to the type of code and click on the search button without typing anything into the keyword(s) box.

- **California Regulations**

<http://ccr.oal.ca.gov>

This website provides access to the California Code of Regulations. To find a specific regulation, you can search by key word, by exact citation, or by browsing through the different Titles.

- **Federal Laws**

www.ecfr.gov/cgi-bin/ECFR?SID=829200e2378d1731cf45dfd0e581fe21&mc=true&page=browse

This website contains the full text of the federal laws (the United States Code). To pinpoint a particular federal law, you can search by several methods, including keyword, title, and section.

- **Federal Regulations**

www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR

This website provides access to the Code of Federal Regulations (C.F.R.).

- **U.S. Food and Drug Administration (FDA) Guidance, Compliance and Regulatory Information**

www.fda.gov/tobaccoProducts/guidancecomplianceregulatoryInformation/default.htm

This website provides access to FDA guidance and compliance information on the 2009 federal Family Smoking Prevention and Tobacco Control Act.

- **Master Settlement Agreement (MSA) and Smokeless Tobacco Master Settlement Agreement (STMSA)**

<https://oag.ca.gov/tobacco/msa>

This website contains the entire MSA between the attorneys general of 46 states (including California) and the major tobacco companies, as well as the entire STMSA between the attorneys general of 45 states (including California) and the U.S. Smokeless Tobacco Company.

DISCLAIMERS

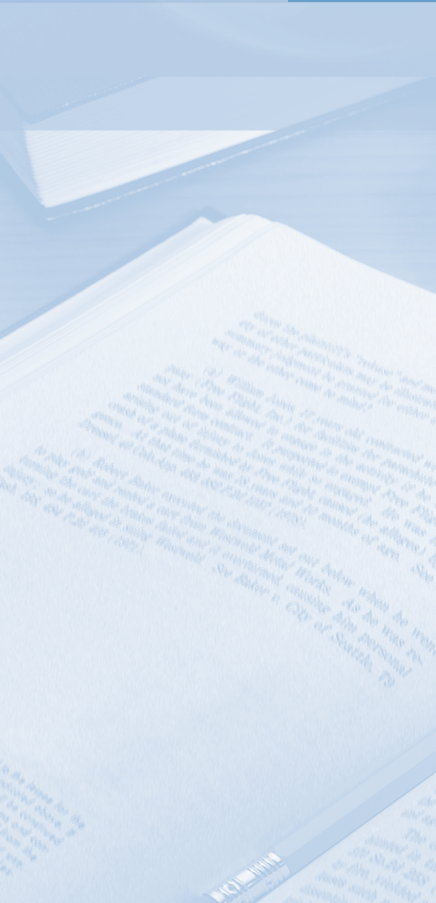
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ADDITIONAL COPIES OF THIS BOOKLET

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SECONDHAND SMOKE



1. WORKPLACES

California Labor Code Section 6404.5

SCOPE: It is against the law to smoke, including the use of electronic smoking devices, in an enclosed space at a place of employment or owner-operated business. No employer or owner-operated business shall knowingly or intentionally permit smoking in an enclosed space. *Enclosed space* includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building. A place of employment is any place where employees or owner-operators carry on their work.

An employer or owner-operator who permits any nonemployee access to his or her place of employment on a regular basis must take reasonable steps to prevent smoking by any nonemployee, as specified.

Note: This law applies to places of employment at any time of day or night, regardless of whether any employees are present. Legis. Counsel of Cal. Op. 16332, Question No. 18 (May 12, 1995).

Note: A business constitutes a “place of employment” if employment of any kind is carried on at the business location, whether the employment is carried on by employees, by individuals who are employed by someone other than the business owner, or by the business owner himself or herself.

Note: In many cases, volunteers may be considered employees for the purposes of determining whether a space is a place of employment. For instance, a person who provides unpaid services but who receives some other kind of benefit from these services (such as reduced-price admission) may be considered an employee. Legis. Counsel of Cal. Op. 24807, Question No. 3 (Dec. 20, 1997).

Note: Local governments may impose and enforce their own smoking restrictions if they apply to areas not covered by state law. *City of San Jose v. Dep’t of Health Services*, 66 Cal. App. 4th 35, 44 (1998). However, to the extent that state law currently prohibits smoking in an enclosed place of employment, a local government may only enforce the state law (and not a similar local law).

EXCEPTION: The following places are exempt from the smoking ban:

1. Up to 20% of hotel and motel guest rooms.

Note: Hotels and motels may choose to be 100% smokefree.

2. Retail or wholesale tobacco shops (businesses whose main purpose is the sale of tobacco products, including electronic smoking devices) and private smokers’ lounges (any enclosed area, in or attached to a retail or wholesale tobacco shop, dedicated to tobacco use, including the use of electronic smoking devices).

Note: Businesses that serve alcoholic beverages do not qualify for this exception. Cal. Atty. Gen. Op. No. 09-507 (Dec. 21, 2011).

3. Cabs of trucks or tractors, if nonsmoking employees are not present.
4. Theatrical production sites, if smoking is an integral part of the story.
5. Medical research and treatment sites, if smoking is integral to the research and treatment being conducted.
6. Private residences except for those licensed as family day care homes (where smoking is prohibited pursuant to Section 1596.795 of the Health and Safety Code).
7. Patient smoking areas in long-term health facilities.

ENFORCEMENT: This section may be enforced by local law enforcement agencies, including local health departments, as determined by the local governing body. The enforcement agency may refer the violation to the California Occupational Safety and Health Administration (Cal/OSHA) for further enforcement; however, Cal/OSHA is not required to respond to a complaint until after a third conviction under Labor Code Section 6404.5. In addition, under Labor Code Section 2699, an aggrieved employee or former employee may bring a civil action if Cal/OSHA fails to act upon a complaint.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$100 for a first violation, \$200 for a second violation within 1 year, and \$500 for a third or subsequent violation within 1 year.

Note: Cal/OSHA's fines are potentially much greater; Cal/OSHA has fined a violator over \$50,000.

2. MULTIUNIT RESIDENCES

California Labor Code Section 6404.5

SCOPE: The workplace smoking prohibitions in Labor Code Section 6404.5 apply to the indoor common areas of apartment and condominium complexes (including, for example, hallways, stairwells, laundry rooms, and recreation rooms) if these areas are places of employment (see entry 1 for a summary of Labor Code Section 6404.5). Smoking includes the use of electronic smoking devices.

Note: An indoor common area may be a place of employment if *any* employment is carried on at the property, even if the employment is carried on by the property owner or by individuals who are employed by someone other than the property owner. Cal. Atty. Gen. Op. No. 12-901 (Dec. 20, 2013). Thus, this law may apply to common areas if the property has any individual who works on the property at any time (eg, manager, security guard, or maintenance worker), regardless of whether the individual is the property owner, is employed directly by the property owner, or is employed by a separate business that the property owner hires to perform services.

Note: Landlords and condominium associations may adopt policies further restricting where residents smoke. Such policies could prohibit smoking in indoor and outdoor common areas as well as in individual units.

Note: Tenants or condominium owners with certain disabilities relating to smoke sensitivity may have other legal remedies available to address the problem of drifting smoke entering their units (see entries 123-126 for more information on remedies available to people with disabilities).

ENFORCEMENT: See entry 1 for a summary of how the Labor Code may be enforced.

PENALTY: See entry 1 for penalties available under the Labor Code.

California Civil Code Section 1947.5

SCOPE: A landlord may prohibit the smoking of cigarettes or other tobacco products, including electronic smoking devices, on the property or in any portion of the building.

Note: Landlords who exercise their authority to prohibit smoking remain subject to all federal, state, and local laws regarding changes to the terms of a lease or rental agreement for all leases or rental agreements that were entered into before the smokefree policy was adopted (eg, notice requirements, local rent ordinances, etc.). If a landlord prohibits smoking anywhere on the property, any lease or rental agreement entered into on or after January 1, 2012, must include a provision specifying where smoking is prohibited. For a lease or rental agreement entered into before January 2012, a prohibition against smoking in any portion of the property where smoking was previously allowed constitutes a change of the terms of tenancy, requiring adequate notice in writing.

Note: This law explicitly permits local governments to pass ordinances, regulations, and policies that prohibit smoking or tobacco product use, including the use of electronic smoking devices, in residential dwellings.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

3. PUBLIC HOUSING

24 Code of Federal Regulations Sections 965.651–965.655

SCOPE: Federal law prohibits the use of certain “prohibited tobacco products” in all public housing living units and interior areas. This prohibition also applies to any outdoor area within 25 feet of public housing and administrative office buildings. Public Housing Authorities (PHAs) must amend their PHA plans and resident lease agreements by July 30, 2018. Further, PHAs may make the entire property smokefree.

Note: This law defines “prohibited tobacco products” as items that involve the ignition and burning of tobacco leaves (eg, cigarettes, cigars, and pipes) and water pipes (hookahs). The law does not apply to electronic smoking devices. Public housing includes low-income housing and all necessary accessory buildings (eg, community facilities) assisted under the US Housing Act of 1937.

EXCEPTION: Public housing does not include mixed-finance projects or assisted units under Section 8 housing. The law does not apply to smokeless tobacco, electronic smoking devices, or cannabis products.

Note: PHAs are not required to provide designated smoking areas. If a PHA establishes a designated smoking area, the area may be partially enclosed but cannot be located in any area where smoking is prohibited (eg, within 25 feet of an administrative office building).

Note: The law provides PHAs significant flexibility to implement its requirements. PHAs may elect to prohibit the use of electronic smoking devices and other noncombustible tobacco products. PHAs may also decide whether to establish a designated smoking area, extend the 25-foot buffer zone around buildings, or make the entire property smokefree.

ENFORCEMENT: Enforcement of this law will occur through specific lease provisions. PHAs are encouraged to use a graduated enforcement scheme, using eviction only as a last resort. PHAs are also encouraged to post signs and partner with community-based organizations to provide cessation support.

PENALTY: PHA plans and lease provisions will establish specific penalties. PHAs are encouraged to use eviction only as a last resort.

4. STATE, COUNTY, AND CITY BUILDINGS

California Government Code Sections 7596–7598

California Education Code Section 89031

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited:

- Inside a public building, which is a building owned and occupied, or leased and occupied, by the state, a county, a city, or a California community college district
- In an outdoor area within 20 feet of a main exit, entrance, or operable window of a public building
- In a passenger vehicle owned by the state

This law explicitly permits local governments and campuses (eg, a campus of the University of California, the California State University, or the California community college system) to pass more restrictive ordinances, regulations, and policies.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

EXCEPTION: The smoking prohibition does not apply to private living areas of public buildings (such as dormitories) or to the parking areas of covered public parking lots. Smoking may be allowed in any outdoor area of a public building unless otherwise prohibited by state or local law and a sign describing the prohibition is posted by the state, county, or city agency, or other appropriate entity.

ENFORCEMENT: The governing bodies of the University of California, the California State University, and each community college district have the authority to enforce their requirements by citation and fine. If a campus exercises its enforcement and fine authority, it must (and a campus of the University of California may) post signs stating its tobacco use policy and inform employees and students of the policy.

Furthermore, the trustees of the California State University may establish rules and regulations for the governance and maintenance of the university's buildings and grounds.

PENALTY: The governing bodies of the University of California, the California State University, and each community college district may impose a fine for each offense, with the amount to be determined by the local governing body. Funds shall be allocated to include, but not be limited to, the designated enforcement agency, education and promotion of the policy, and tobacco cessation treatment options. The civil penalty shall not exceed \$100.

Violations or attempted violations of the rules and regulations governing and maintaining the buildings and grounds of California State University constitute misdemeanors.

5. CERTIFIED FARMERS' MARKETS

California Health and Safety Code Section 114371(f)

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited within 25 feet of the common commerce area of a certified farmers' market. The *common commerce area* is comprised of sales personnel and shopping customers of the certified farmers' market.

ENFORCEMENT: Health enforcement officers are authorized to enforce this law and related regulations under Health and Safety Code Section 114390 *et seq.*

PENALTY: Violators are guilty of a misdemeanor, and each offense is punishable by a fine of \$25 to \$1,000 and/or by imprisonment for no more than 6 months. For violations by employees, or at shared facilities, each owner, manager, or operator may be held responsible.

6. TOT LOTS AND PLAYGROUNDS

California Health and Safety Code Section 104495

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited within 25 feet of a playground or tot lot sandbox area. The disposal of tobacco-related waste, such as cigar and cigarette butts, in these areas is also prohibited. A *playground* is defined as a park or recreational area specifically designed for use by children that has play equipment installed. This includes facilities located on public or private school grounds or on city, county, or state park grounds. A tot lot sandbox area is a play area within a public park designated for use by children under 5 years of age. The law allows local governments to pass and enforce stricter laws.

EXCEPTION: The law does not apply to public sidewalks within 25 feet of a playground or tot lot sandbox area.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of \$250 per violation.

7. YOUTH SPORTS EVENTS

California Health and Safety Code Section 104495

SCOPE: The use of tobacco products, including electronic smoking devices, is prohibited within 250 feet of a youth sports event when the user is located in the same park or facility where a youth sports event is taking place. A youth sports event is any practice, game, or related activity, organized by any entity, at which athletes up to 18 years of age are present.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of \$250 per violation.

8. SCHOOLS

California Health and Safety Code Section 104559

SCOPE: California law prohibits the use of tobacco and nicotine products, including electronic nicotine delivery devices, at all times in county offices of education, in buildings owned or leased by a charter school or school district, on school or school district property, and in school or school district vehicles. School districts, charter schools, and county offices of education shall prominently display signs stating “Tobacco Use Is Prohibited” at all entrances to school property.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1). When a school is housed in a government-owned or government-leased building, the smoking restrictions in California Government Code Sections 7596–7598 also apply (see entry 4).

Note: See entries 19 and 20 for summaries of tobacco possession and use restrictions relating to schools.

ENFORCEMENT: Not applicable.

20 United States Code Section 6083

SCOPE: It is illegal under federal law to permit smoking within any indoor facility utilized for kindergarten, elementary, or secondary education or library services for children.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

Note: See entries 19 and 20 for summaries of tobacco possession and use restrictions relating to schools.

ENFORCEMENT: The U.S. Department of Education is authorized to enforce this law.

Note: A school or library may use its general power over its property to enforce no-smoking rules against visitors and its general power over its terms of employment to enforce no-smoking rules against employees. A school may use its normal disciplinary powers to enforce no-smoking rules against students.

PENALTY: Violators may be liable for a civil penalty of up to \$1,000 for each violation and/or may be subject to an administrative compliance order. Each day a violation continues constitutes a separate violation.

9. DAY CARE FACILITIES

California Health and Safety Code Sections 1596.795, 1596.890

SCOPE: California law prohibits smoking, including the use of electronic smoking devices, on the premises of a licensed day care center and in a licensed family day care home (eg, a day care for children based in the home of the provider) at all times, including non-business hours. The law allows for more stringent local laws.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: This law may be enforced by the California Department of Social Services or by local law enforcement agencies.

PENALTY: Violators are guilty of a misdemeanor punishable by a \$1,000 fine and/or imprisonment for no more than 180 days.

20 United States Code Section 6083

SCOPE: It is illegal under federal law to permit smoking within any indoor facility that is used for federally funded health care, day care, or Head Start services for children or that is used by the employees of the provider of such services.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

EXCEPTION: This law does not apply to any private residence or to areas used for inpatient hospital treatment for drug or alcohol addiction.

Note: California Health and Safety Code Section 1596.795 prohibits smoking in family day care homes.

ENFORCEMENT: The U.S. Department of Education is authorized to enforce this law.

Note: The facilities covered by this law may use their general power over their property to enforce no-smoking rules against visitors and their general power over their terms of employment to enforce no-smoking rules against employees.

PENALTY: Violators may be liable for a civil penalty of up to \$1,000 for each violation and/or may be subject to an administrative compliance order. Each day a violation continues constitutes a separate violation.

10. FOSTER HOMES

California Health and Safety Code Section 1530.7

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited in group homes, foster family agencies, small family homes, transitional housing placement providers' facilities, resource family homes, and crisis nurseries licensed pursuant to the California Community Care Facilities Act.

Indoor smoking is prohibited in foster family homes and certified family homes. When a child is present, outdoor smoking within these facilities is also prohibited. Moreover, a foster care provider shall not smoke in any vehicle regularly used to transport the child or children in foster care.

ENFORCEMENT: The California Department of Social Services is authorized to enforce this law.

PENALTY: Violation may result in the denial or revocation of a certificate of approval for a certified family home or other disciplinary action against the certified or prospective foster parent.

11. SMOKING IN VEHICLES WITH CHILDREN

California Health and Safety Code Sections 118947–118949

SCOPE: It is illegal to smoke, including the use of electronic smoking devices, in any motor vehicle in which a minor is present, regardless of whether the vehicle is in motion or at rest.

ENFORCEMENT: A law enforcement officer may not stop a vehicle for the sole purpose of determining whether the driver is violating this prohibition.

PENALTY: Violation of this section is an infraction punishable by a fine not exceeding \$100 per violation.

12. PUBLIC TRANSIT SYSTEMS

California Health and Safety Code Sections 118925–118945

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited on public transportation systems and in any vehicle of an entity receiving transit assistance from the state. A notice prohibiting smoking, displayed as a symbol and in English, must be posted in such vehicles or aircraft, in addition to other sign posting requirements. The law allows for more restrictive local laws.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$125 for a first or second violation and up to \$200 for a third or subsequent violation.

Note: The issuing agency must allow installment or deferred payments if the total amount owed is \$200 or more and the person can show satisfactory evidence of inability to pay. Further, if the person is under 18 years of age or can show evidence of inability to pay, the issuing agency must allow performance of community service instead of payment.

EXCEPTION: The issuing agency does not have to allow community service if the person has had more than 3 violations for which community service was previously allowed and he or she did not complete the community service. However, the person must have been provided with a community service placement and enough time to complete the required hours.

Note: A person may not be cited for both a violation for this law and a violation under California Penal Code Section 640.

California Public Utilities Code Section 99580(b)(4)

California Penal Code Section 640

SCOPE: Smoking, including the use of electronic smoking devices, is not allowed on public transportation in areas where it is prohibited by that system.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1. A public transportation agency may also enact and enforce an ordinance to impose an administrative penalty for smoking in places where smoking has been prohibited.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$250 and 48 hours of community service.

13. AIRPLANES AND TRAINS

California Health and Safety Code Sections 118925–118945

California Public Utilities Code Section 561

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited on any aircraft or Amtrak train, except to the extent permitted by federal law. The law contains sign posting requirements.

Note: Under the Public Utilities Code, any railroad corporation, passenger stage corporation, passenger air carrier, and street railroad corporation providing departures originating in this state shall prohibit smoking, including the use of electronic smoking devices, in passenger seating areas. They must also post readily visible signs advising passengers of these no smoking requirements.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$100 for a first violation, up to \$200 for a second violation within 1 year, and up to \$500 for a third or subsequent violation within 1 year.

49 United States Code Section 41706

14 Code of Federal Regulations Section 252.3

49 Code of Federal Regulations Section 175.10

SCOPE: Smoking is prohibited on domestic U.S. airline flights. Smoking also is prohibited in foreign air travel arriving in or departing from the United States.

Note: In February 2016, the U.S. Department of Transportation updated its definition of smoking to explicitly include the use of electronic smoking devices in the prohibition of smoking on aircraft. Products (other than electronic cigarettes) that meet the definition of a medical device in section 201(h) of the Federal Food, Drug, and Cosmetic Act are exempted from this definition.

Note: In October 2015, the U.S. Pipeline and Hazardous Materials Safety Administration issued an interim final rule, effective November 2015, that disallows several actions: carrying electronic smoking devices in checked baggage, carrying on board any associated batteries exceeding certain capacity limits, and charging electronic smoking devices or their batteries on board an aircraft. The rule applies to all battery-powered portable electronic smoking devices, such as e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, and electronic nicotine delivery systems.

EXCEPTION: If a foreign government objects to the prohibition of smoking during foreign air travel, the Secretary of Transportation shall negotiate an alternative.

ENFORCEMENT: The Secretary of Transportation shall prescribe regulations necessary to carry out this section.

PENALTY: Not specified.

14. YOUTH BUSES AND PUBLIC PARATRANSIT VEHICLES

California Vehicle Code Sections 336, 680, 12523(d)(2), 12523.5(d)(2), 13369(c)(3)

SCOPE: Drivers of a *youth bus* (a bus that is not a school bus but is used to transport children) may not smoke, including the use of electronic smoking devices, while operating the bus. Operators of *general public paratransit vehicles* (motor vehicles designed to carry no more than 24 persons that provide local transportation to the public, including transporting students who are at or below the 12th grade level to or from a public or private school or school activity) shall refrain from smoking.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: The California Department of Motor Vehicles is authorized to enforce this law.

PENALTY: A violator may be subject to the denial, suspension, or revocation of a certificate to drive a youth bus or general paratransit vehicle.

15. ADOPTION OF LOCAL SECONDHAND SMOKE LAWS

California Health and Safety Code Section 118910

SCOPE: A local governing body may regulate or completely ban smoking, including the use of electronic smoking devices, in any manner not inconsistent with state law.

Note: Several state laws explicitly permit cities and counties to pass secondhand smoke laws that have stricter restrictions than those imposed by the state (see entries 1–4, 6–8, and 11 for summaries of those state laws). Some cities and counties have passed local laws banning smoking in areas not covered by state law, including parks, beaches, outdoor dining areas, bus stops, and areas within 20 feet of commercial building entryways. These local laws are enforced by various local agencies and impose various penalties.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

16. RESTRICTIONS ON SMOKING AND INGESTING CANNABIS

California Health and Safety Code Sections 11353.1, 11362.3, 11362.45

California Business and Professions Code Section 26200

California Vehicle Code Section 23152(f)

SCOPE: It is against the law to smoke cannabis anywhere that smoking tobacco is prohibited. In addition, smoking or ingesting cannabis is prohibited in the following places:

1. Public places

EXCEPTION: Local jurisdictions may allow public use of cannabis in licensed cannabis retailers or microbusinesses if (1) access to the public area is restricted to persons 21 and older, (2) the area is not visible from any public place that is not age-restricted, and (3) no tobacco or alcohol is sold on the premises.

EXCEPTION: Local jurisdictions may allow temporary event licenses that permit smoking and ingesting cannabis at a county fair or district agricultural event or at another venue expressly approved by a local jurisdiction for the purpose of holding temporary events of this nature if:

- (1) access to the public area is restricted to persons 21 and older,
- (2) the area is not visible from any public place that is not age restricted,
- (3) no tobacco or alcohol is sold on the premises,
- (4) all participants are licensed, and
- (5) the activities are otherwise consistent with other temporary licensing regulations.

2. Within 1,000 feet of a school, day care center, or youth center (smoking only)

Note: A youth center is defined as a public or private facility primarily used for recreation or social activities of minors.

EXCEPTION: A person may smoke or ingest cannabis within 1,000 feet of a school, day care center, or youth center if the smoking happens at a private residence or, in accordance with California Business and Professions Code Section 26200, where it is not detectable and children are not present.

3. In a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation

4. At a school, day care center, or youth center while children are present

5. On federal lands within California (eg, national parks)

Note: Smoking of medical cannabis on a school bus is prohibited under California Health and Safety Code Sections 11362.79 and 11362.3(a)(4).

Additionally, a private property owner may prohibit the use of cannabis on their property.

ENFORCEMENT: This section may be enforced by local peace officers under California Penal Code Section 830.1.

PENALTY:

Smoking or ingesting cannabis in public:

- If the violator is 18 years of age or older:
They are guilty of an infraction and subject to a fine of \$100.
- If the violator is under the age of 18:
They are guilty of an infraction and must complete 4 hours of drug education and up to 10 hours of community service.

Smoking or ingesting cannabis on the grounds of a school, day care center, or youth center:

- If the violator is 18 years of age or older:
For a first-time violation, they are guilty of an infraction and subject to a fine of \$250. For subsequent violations, they are guilty of a misdemeanor and subject to a fine of \$500 and/or 10 days in jail.
- If the violator is under the age of 18:
For a first-time violation, they are guilty of an infraction and must complete 8 hours of drug education and up to 40 hours of community service. For subsequent violations, they are guilty of an infraction and must complete 16 hours of drug education and up to 60 hours of community service.

Smoking or ingesting cannabis where tobacco is prohibited or smoking within 1,000 feet of a school, day care center, or youth center:

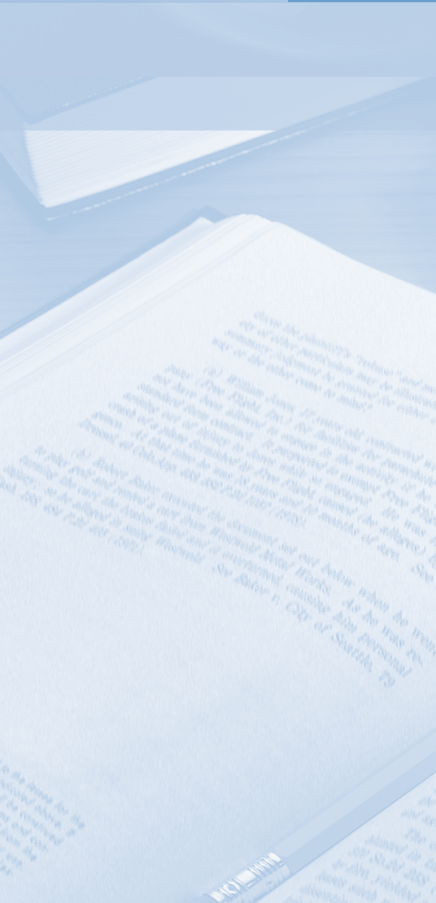
- If the violator is 18 years of age or older:
They are guilty of a misdemeanor and subject to a fine of \$250.
- If the violator is under the age of 18:
They are guilty of an infraction and must complete 4 hours of drug education and up to 20 hours of community service.

Drivers who are under the influence of cannabis while driving are subject to California Vehicle Code Section 23152 et seq.

Note: Drug education programs must be provided free of charge, must be based on science, and must use evidence-based principles and practices specific to the use of cannabis and controlled substances.



POSSESSION AND USE



17. STATE MENTAL HEALTH HOSPITALS

California Welfare and Institutions Code Sections 4138, 4139

SCOPE: Upon receiving a request from the director of a state mental hospital, the state Director of Mental Health may prohibit the possession and use of tobacco products on the grounds of the requesting facility following a phase-in period. The Director must provide an implementation plan to effectuate the prohibition, and must provide any requesting patient with smoking cessation information and assistance. At hospitals where possession and use of tobacco products are prohibited, the facility's store or canteen may not sell tobacco products. This law applies to California's 5 state mental hospitals: Atascadero State Hospital, Coalinga State Hospital, Metropolitan State Hospital, Napa State Hospital, and Patton State Hospital.

EXCEPTION: The prohibition shall not apply on the premises of residential staff housing where patients are not present. Also, departmentally approved religious ceremonies are exempt.

ENFORCEMENT: Not specified, but the state mental hospitals are under the jurisdiction of the Department of Mental Health.

PENALTY: In a state hospital where the possession of tobacco products by a patient has been prohibited by law or regulation, delivery of tobacco products to a patient or possession of tobacco with the intent to deliver to a patient is a misdemeanor, punishable by a fine not to exceed \$1,000 for each item. If a person visiting a patient in a state hospital is found with an item prohibited for patient possession, the item is subject to confiscation but must be returned on the same day unless the item is held as evidence.

18. YOUTH PURCHASE AND POSSESSION NO LONGER ILLEGAL

As of June 9, 2016, under California law it is no longer illegal for individuals of any age to purchase, receive, or possess any tobacco products or paraphernalia. However, California law prohibits **selling, giving, or in any way furnishing** tobacco products or paraphernalia, including electronic smoking devices, to any individual under the age of 21, or under the age of 18 for active military personnel with valid identification (for more information, see entries 27 and 28). See California Senate Bill X2-7, which enacted these changes, available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520162SB7.

Note: For additional information, see our fact sheet on penalties for youth possession: www.changelabsolutions.org/product/pup-smoke.

19. STUDENT POSSESSION AND USE

California Education Code Section 48901

SCOPE: No elementary or secondary school shall permit its students to smoke, including the use of electronic smoking devices, while the students are on campus, attending school-sponsored activities, or under the supervision and control of school district employees.

EXCEPTION: This provision does not prohibit students' use or possession of cessation or therapeutic products approved by the U.S. Food and Drug Administration.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply to the enclosed areas of schools (see entry 1).

Note: See entry 8 for a summary of the laws prohibiting smoking that apply to schools.

ENFORCEMENT: Not specified except to say that the governing board of any school district maintaining a high school shall take all steps it deems practical to discourage high school students from smoking.

Note: A school may use its normal disciplinary powers to enforce no-tobacco-use rules against students.

PENALTY: Not specified.

California Education Code Sections 48900(h), 48900(s)

SCOPE: A student who possesses or uses tobacco products, or products containing tobacco or nicotine, may be suspended or expelled if the act is related to school activity or attendance (for instance, while on school grounds, while going to or returning from school or a school-sponsored activity, or during the on- or off-campus lunch period).

EXCEPTION: This provision does not prohibit students' use or possession of their own prescription products.

ENFORCEMENT: The superintendent or principal of the school is authorized to enforce this law.

PENALTY: The student may be suspended or expelled.

20. TOBACCO-FREE CAMPUS POLICIES

California Health and Safety Code Section 104420(n)(2)

SCOPE: Each school district, charter school, and county office of education that receives Proposition 99 tobacco control funding from the State of California must adopt and enforce a tobacco-free campus policy. The policy shall prohibit the use of tobacco products at all times in buildings owned or leased by a charter school or school district, on school or school district property, and in school or school district vehicles. Tobacco products may include, but are not limited to, smokeless tobacco, snuff, chew, clove cigarettes, and electronic cigarettes that can deliver nicotine and non-nicotine vaporized solutions. Under

the policy, signs stating Tobacco Use Is Prohibited shall be prominently displayed at all entrances to school property.

Note: See entry 8 for a summary of the laws prohibiting smoking that apply to schools.

Note: See entry 19 for a summary of the tobacco use and possession prohibitions that apply to students.

ENFORCEMENT: The California Department of Education monitors the school districts and county offices of education that receive Proposition 99 funding.

Note: A school may use its normal disciplinary powers to enforce no-tobacco-use rules against students, its general power over its property to enforce no-tobacco-use rules against visitors, and its general power over its terms of employment to enforce no-tobacco-use rules against employees.

PENALTY: Any school district, charter school, or county office of education that does not have a tobacco-free policy on July 1 of any given year is not eligible to apply for Proposition 99 funds for that fiscal year (see entry 95 for a summary of Proposition 99).

21. BASEBALL STADIUMS

California Health and Safety Code Section 118916

SCOPE: As of December 1, 2016, the use and possession of smokeless tobacco products are prohibited on a baseball stadium's playing field, including the dugout, bullpen, and team bench areas. A baseball stadium is any physical area in which a professional baseball game or practice is occurring in connection with Major League Baseball or minor league baseball. Local ordinances with more restrictive bans are allowed, and in the event that a local law conflicts with state law, the more restrictive ban shall control.

ENFORCEMENT: Not specified.

PENALTY: Not specified.

22. POSSESSION AND USE IN PRISONS

California Penal Code Section 5030.1

California Code of Regulations, Title 15, Sections 3006(c)(18), 3187–3189

SCOPE: The possession or use of any product that contains tobacco is prohibited by inmates under the jurisdiction of the California Department of Corrections and Rehabilitation. The possession or use of tobacco products is prohibited by anyone on the grounds of any facility under the jurisdiction of the California Department of Corrections and Rehabilitation. Tobacco products are considered to be contraband when possessed or used by inmates or by anyone in facilities where inmates are housed or detained.

EXCEPTION: Inmates may use tobacco products in departmentally approved religious ceremonies. A non-inmate may use tobacco products in certain residential staff housing

where inmates are not present. A non-inmate may possess tobacco products in a locked private vehicle for personal use off facility grounds. Tobacco cessation products such as a patch, inhaler, or lozenges are permitted for immediate personal use by staff.

ENFORCEMENT: California Department of Corrections and Rehabilitation officials are authorized to enforce this law.

PENALTY: Possession of tobacco products by inmates may result in disciplinary action and the confiscation of the tobacco products.

Note: A prison may use its general power over its property to enforce no-tobacco rules against visitors and its general power over its terms of employment to enforce no-tobacco rules against employees.

23. POSSESSION AND USE IN YOUTH CORRECTIONAL FACILITIES

California Welfare and Institutions Code Section 1712.5

SCOPE: The possession or use of tobacco products by wards and inmates in all institutions and camps under the jurisdiction of the Department of the Youth Authority is prohibited. The use of tobacco products by anyone on the grounds of any institution or facility under the jurisdiction of the Department of the Youth Authority is prohibited.

EXCEPTION: Inmates and wards may use tobacco products in departmentally approved religious ceremonies. Tobacco products may be used in residential staff housing where inmates or wards are not present.

ENFORCEMENT: Division of Juvenile Facilities officials are authorized to enforce this law.

PENALTY: Not specified.

Note: A facility may use its normal disciplinary powers to enforce no-tobacco rules against inmates and wards, its general power over its property to enforce no-tobacco rules against visitors, and its general power over its terms of employment to enforce no-tobacco rules against employees.

24. POSSESSION IN LOCAL CORRECTIONAL FACILITIES

California Penal Code Section 4575

SCOPE: The possession of any tobacco products in any form, or any device intended to be used for ingesting or consuming tobacco, by a person housed in a local correctional facility is prohibited if the local board of supervisors has adopted an ordinance or resolution banning tobacco products in its correctional institutions.

Note: See entry 22 for prohibitions and restrictions on tobacco use and possession in state prisons under the jurisdiction of the California Department of Corrections and Rehabilitation.

EXCEPTION: Possession of tobacco products is not prohibited in local correctional institutions in counties where the board of supervisors has not adopted an ordinance banning tobacco products in those facilities.

PENALTY: Violation of this section is an infraction, punishable by a fine not to exceed \$250.

25. USE IN FOOD SERVICE FACILITIES AND NONPROFIT TEMPORARY FOOD FACILITIES

California Health and Safety Code Sections 113953.3(a)(5), 113977, 113978, 114390, 114395, 114405

SCOPE: Food service employees may use any form of tobacco only in designated areas where contamination of food and equipment cannot result. Food service employees shall wash their hands after using tobacco. Owners, managers, and operators are responsible for violations by employees. Food facilities shall have a No Smoking sign posted in the food preparation, food storage, and dishwashing areas.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply (see entry 1).

ENFORCEMENT: State and local environmental health services officials are authorized to enforce this law. Local law enforcement agencies have the general authority to enforce the misdemeanor penalty under California Penal Code Section 830.1.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of \$25 to \$1,000 and/or imprisonment for up to 6 months. A violator may be subject to the suspension or revocation of a permit to operate a food facility.

California Health and Safety Code Sections 113842, 114332.1, 114332.3(f), 114332.7, 114390, 114395, 114405

SCOPE: Smoking, including the use of electronic smoking devices, is prohibited in nonprofit charitable temporary food facilities. A nonprofit charitable temporary food facility is (1) a temporary food facility that is conducted by a nonprofit charitable organization, or (2) an established club or organization of students that operates under the authorization of a school or another type of educational facility.

Note: The workplace smoking restrictions in California Labor Code Section 6404.5 also apply to enclosed temporary food facilities that constitute places of employment (see entry 1).

ENFORCEMENT: Enforcement officers from the departments or local health agencies that have jurisdiction over these food facilities are authorized to enforce this law by performing inspections of, or requiring permits for, any nonprofit charitable temporary food facility to ensure compliance with this provision and the other food safety provisions in this chapter.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of \$25 to \$1,000 and/or imprisonment for up to 6 months. A violator may be subject to the suspension or revocation of any applicable permit to operate.

26. EMPLOYMENT AND OFF-DUTY USE

California Labor Code Sections 96(k), 98.6

SCOPE: It is illegal for an employer to discriminate against an employee or applicant on the basis of off-duty lawful conduct.

Note: This law could apply to legal, off-duty tobacco use.

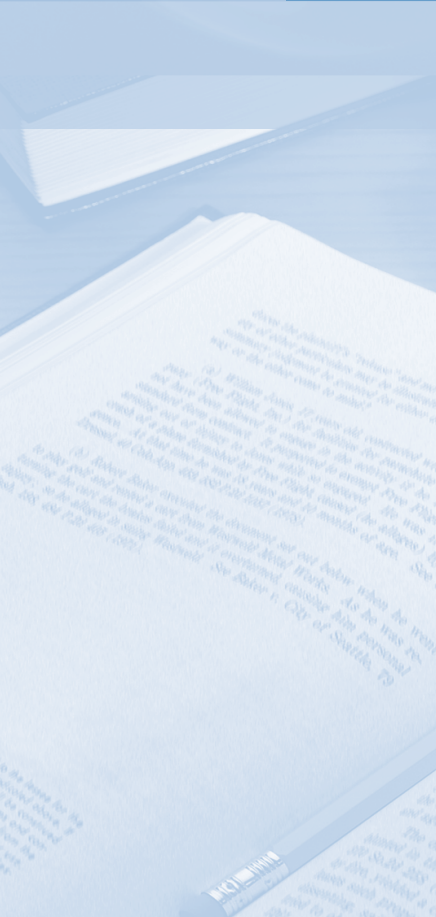
EXCEPTION: An employer may discriminate against an applicant on the basis of off-duty lawful conduct if the conduct is actually in direct conflict with the essential enterprise-related interest of the employer and if the conduct is prohibited in an employment contract or collective bargaining agreement. An employer may discriminate on the basis of off-duty tobacco use against an applicant for a position as a firefighter. Local and state law enforcement agencies, certain media organizations, and religious associations may discriminate against employees and applicants on the basis of off-duty lawful conduct.

ENFORCEMENT: Anyone who believes that he or she has suffered discrimination in violation of the law may file a complaint with the Division of Labor Standards Enforcement of the California Department of Industrial Relations within 6 months of the alleged occurrence. In addition, under Labor Code Section 2699, an aggrieved individual may bring a civil action if the California Labor and Workforce Development Agency declines to act upon a complaint.

PENALTY: The Division of Labor Standards Enforcement shall order a violator to cease and desist from the violation and may order the violator to take any action deemed necessary to remedy the violation.



TOBACCO SALES



27. AGE-BASED SALES RESTRICTIONS: PENAL CODE 308

California Penal Code Section 308

SCOPE: It is illegal for any person, firm, or corporation to sell, give, or in any way furnish to an individual under the age of 21 any tobacco products or paraphernalia, including electronic smoking devices and those used to consume controlled substances, if that person, firm, or corporation knows or should otherwise have grounds to know that the recipient is under 21 years of age. This law may be enforced against a business owner or an employee who sold the tobacco product or paraphernalia. Penal Code Section 308(d) states that cities and counties may not adopt any ordinance or regulation that is inconsistent with this law.

EXCEPTION: It is legal for any person, firm, or corporation to sell, give, or furnish tobacco products or paraphernalia to active-duty military personnel who are 18 years of age or older. An identification card issued by the U.S. Armed Forces shall be used as proof of age for this purpose.

EXCEPTION: These restrictions do not include the sale of products approved by the U.S. Food and Drug Administration for sale as tobacco cessation products or as products that have other therapeutic purposes where the products are marketed and sold solely for such approved purposes.

EXCEPTION: A valid defense to an action under this law is proof that the person who sold or furnished the tobacco products or paraphernalia demanded, was shown, and reasonably relied upon evidence of legal age (such as a driver's license).

ENFORCEMENT: A city attorney, county counsel, or district attorney may bring a civil action to enforce the law. Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

Note: A local licensing law that suspends or revokes a license based on a violation of Penal Code Section 308 is not legally inconsistent with this law, and such local licensing laws are expressly permitted under California Business and Professions Code Section 22971.3 (see entry 101).

Note: Local law enforcement agencies do not need to use the STAKE Act protocol described in entry 28 when enforcing this law.

PENALTY: Violators are subject to a criminal action for misdemeanor or a civil action punishable by a fine of \$200 for a first offense, \$500 for a second offense, and \$1,000 for a third offense. Each individual franchise or location of a business is treated as a separate entity for purposes of determining liability for the second and subsequent violations of the law. The prosecuting agency receives 25% of penalties collected.

Note: A business may not be penalized for the same incident under both Penal Code Section 308 and the STAKE Act (see entry 28 for a summary of the STAKE Act age-based sales restrictions; see entry 103 for license-related penalties that attach to Section 308 violations).

Note: If an employee sells tobacco to an underage individual, the business owner can be penalized under the STAKE Act and the employee can be penalized under Penal Code Section 308. This is because the owner and employee are not legally the same violator (see entry 103 for license-related penalties that attach to STAKE Act violations).

Note: Underage individuals are no longer legally responsible for purchasing, receiving, or possessing tobacco products or paraphernalia (see entry 18).

28. AGE-BASED SALES RESTRICTIONS: THE STAKE ACT

*California Business and Professions Code Sections 22952, 22957, 22958 (STAKE Act)
California Code of Regulations, Title 17, Section 6903*

SCOPE: It is illegal for any person, firm, or corporation to sell, give, or in any way furnish any tobacco products or paraphernalia, including electronic smoking devices, to an individual under the age of 21. This law may be enforced only against a business owner and not against an employee who sold the tobacco product or paraphernalia.

EXCEPTION: It is legal for any person, firm, or corporation to sell, give, or furnish tobacco products or paraphernalia to active-duty military personnel who are 18 years of age or older. An identification card issued by the U.S. Armed Forces shall be used as proof of age for this purpose.

EXCEPTION: These restrictions do not include the sale of products approved by the U.S. Food and Drug Administration for sale as tobacco cessation products or as products that have other therapeutic purposes where the products are marketed and sold solely for such approved purposes.

EXCEPTION: A valid defense to an action under this law is that a youth decoy's appearance was not that which could be generally expected of a person under 21 years of age, or that the undercover operation was not carried out in reasonable compliance with the detailed protocol specified in the law. Any failure on the part of the person under 21 years of age to provide true and correct identification, if verbally asked for it, is also a valid defense.

ENFORCEMENT: The STAKE Act may be enforced by any defined "enforcing agency," including the California Department of Public Health, office of the Attorney General, and local law enforcement agencies. The law instructs enforcing agencies to use youth decoys in on-site inspections to determine whether retailers are making illegal sales of tobacco products. The law authorizes enforcing agencies to use youth decoys to investigate illegal sales to underage individuals by telephone, mail, or the internet.

An enforcing agency may conduct such inspections at random, in response to public complaints (eg, on the 1-800-5ASK-4-ID phone line), or at retail sites where violations have previously occurred. The law contains a detailed protocol for an enforcing agency to follow in its undercover operations (the STAKE Act protocol).

PENALTY: Violators are subject to a civil penalty of \$400 to \$600 for a first violation; \$900 to \$1,000 for a second violation within a 5-year period; \$1,200 to \$1,800 for a third violation

within a 5-year period; \$3,000 to \$4,000 for a fourth violation within a 5-year period; and \$5,000 to \$6,000 for a fifth or subsequent violation within a 5-year period.

Additional civil penalties in the amount of \$250 each for the third, fourth, and fifth violations are assessed by the California Department of Tax and Fee Administration (CDTFA) and deposited into the Cigarette and Tobacco Products Compliance Fund for the administration of these provisions. The CDTFA may also suspend or revoke the retailer's license with 10 days' notice (see entry 103 for license-related penalties that attach to STAKE Act violations).

A business owner may not be penalized for the same incident under both the STAKE Act and California Penal Code Section 308 (see entry 27 for a summary of Penal Code Section 308 prohibitions on sales to underage individuals).

Note: If an employee sells tobacco to an underage individual, the business owner can be penalized under the STAKE Act and the employee can be penalized under Penal Code Section 308. This is because the owner and employee are not legally the same violator (see entry 103 for license-related penalties that attach to STAKE Act violations).

29. SALES TO MINORS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Sections 1100.3, 1140.14(a), (b)

SCOPE: It is illegal for any tobacco retailer to sell covered tobacco products to any person under the age of 18. As of August 8, 2016, this restriction includes cigarettes, smokeless tobacco, cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco (see the overview on page 10 for more information about recent updates to this definition under the deeming rule).

EXCEPTION: Tobacco products do not include articles that are drugs, devices, or combination products under the U.S. Food, Drug, and Cosmetic Act. 21 United States Code Sections 321(g)(1), 321(h), 353(g).

ENFORCEMENT: The U.S. Department of Health and Human Services (HHS) is authorized to enforce this provision with the help of other federal agencies and state governments. In California, HHS has contracted with the California Department of Public Health's Food and Drug Branch to enforce this provision.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the FDA shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;

- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

30. SALES TO MINORS: THE SYNAR AMENDMENT

42 United States Code Section 300x-26

45 Code of Federal Regulations Section 96.130

SCOPE: In order to receive the annual Substance Abuse Prevention and Treatment federal block grant, a state must have and enforce a law prohibiting the sale of tobacco products to individuals under the age of 18. The state must conduct annual youth purchase surveys to ensure compliance with the law and must report the results of these inspections to the U.S. Department of Health and Human Services (HHS).

Note: California enacted the STAKE Act to comply with the Synar Amendment.

ENFORCEMENT: HHS is authorized to monitor states' compliance and to reduce the amount of the block grant upon noncompliance.

PENALTY: For a state that reports more than a 20% rate of illegal sales to youth, the annual Substance Abuse Prevention and Treatment federal block grant will be reduced by up to 40% of the amount originally allocated to the state, if the Secretary determines that the state is not in substantial compliance with the law.

31. ID CHECK REQUIREMENT: THE STAKE ACT

California Business and Professions Code Sections 22956, 22957 (STAKE Act)

SCOPE: Retailers must check the identification of purchasers of tobacco products, including electronic smoking devices, who reasonably appear to be under 21 years of age.

ENFORCEMENT: This requirement may be enforced by any "enforcing agency" authorized to enforce the STAKE Act, including the California Department of Public Health, California Attorney General's office, and local law enforcement agencies.

PENALTY: Not specified.

32. ID CHECK REQUIREMENT: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Sections 1100.3, 1140.14(a), (b)

SCOPE: Tobacco retailers must verify that a purchaser of any covered tobacco product is 18 years of age or older through a photo identification card containing the individual's date of birth. As of August 8, 2016, this requirement applies to sales of cigarettes, smokeless tobacco, cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco (for more information about products covered by the deeming rule, see the overview on page 10).

Note: See entry 31 for information about California's requirement to check the identification of purchasers who reasonably appear to be under 21 years of age.

EXCEPTION: Verification is not required for any person over the age of 26.

ENFORCEMENT: The U.S. Department of Health and Human Services (HHS) is authorized to enforce this provision with the help of other federal agencies and state governments. In California, HHS has contracted with the California Department of Public Health's Food and Drug Branch to enforce this provision.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the U.S. Food and Drug Administration (FDA) shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money*

Penalties and No-Tobacco-Sale Orders for Tobacco Retailers (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

33. SIGN POSTING REQUIREMENT: THE STAKE ACT

California Business and Professions Code Sections 22952(b), 22957, 22958(e) (STAKE Act)
California Code of Regulations, Title 17, Section 6902(a)
California Penal Code Section 308(b)

SCOPE: Every store that sells tobacco products, including electronic smoking devices, must post a boldly printed, contrasting-color sign in a conspicuous place at each point of purchase saying that tobacco products may not be sold to underage individuals.

The sign must contain the following words with initial letters capitalized in the following manner: “The Sale of Tobacco Products to Persons Under 21 Years of Age Is Prohibited by Law and Subject to Penalties. To Report an Unlawful Tobacco Sale Call 1-800-5 ASK-4-ID. U.S. Armed Forces active duty personnel with military ID must be at least 18 years of age. Valid Identification May Be Required. Business and Professions Code Section 22952.” The sign must be square (at least 5.5 inches by 5.5 inches) or rectangular (at least 3.66 inches by 8.5 inches), and the required words must meet specified font sizes and typefaces.

ENFORCEMENT: This requirement may be enforced by any “enforcing agency” authorized to enforce the STAKE Act, including the California Department of Public Health, California Attorney General’s office, and local law enforcement agencies.

PENALTY: The STAKE Act authorizes a \$200 civil fine for the first violation for failure to post the required signage, and a \$500 civil fine for each subsequent violation.

Under Penal Code Section 308(b), violators who fail to post the sign are subject to a fine of \$50 for a first offense, \$100 for a second offense, \$250 for a third offense, and \$500 for a fourth or subsequent offense, or by imprisonment for not more than 30 days.

A business owner may not be penalized for the same incident under both the STAKE Act and Penal Code Section 308 (see entry 103 for license-related penalties that attach to STAKE Act violations).

34. VENDING MACHINES: THE STAKE ACT

California Business and Professions Code Sections 22960, 22958, 22957 (STAKE Act)

SCOPE: Tobacco products, including electronic smoking devices, shall not be sold, offered for sale, or distributed from vending machines. This law may be enforced against a business owner only and not against an employee. A local government may also restrict or completely ban tobacco vending machines.

EXCEPTION: Vending machines may be located where an on-sale public premises license to sell alcoholic beverages (usually a bar) has been issued, provided that the machine is inside the premises and at least 15 feet away from the entrance.

ENFORCEMENT: This requirement may be enforced by any “enforcing agency” authorized to enforce the STAKE Act, including the California Department of Public Health, Attorney General’s office, and local law enforcement agencies.

PENALTY: Violators are subject to a civil penalty of \$400 to \$600 for a first violation; \$900 to \$1,000 for a second violation within a 5-year period; \$1,200 to \$1,800 for a third violation within a 5-year period; \$3,000 to \$4,000 for a fourth violation within a 5-year period; and \$5,000 to \$6,000 for a fifth or subsequent violation within a 5-year period (see entry 27 for possible related penalties under Penal Code Section 308, and entry 103 for license-related penalties that attach to STAKE Act violations).

35. SELF-SERVICE DISPLAYS: THE STAKE ACT

California Business and Professions Code Sections 22958, 22960, 22962 (STAKE Act)

SCOPE: It is illegal to sell, offer for sale, or display any tobacco products or paraphernalia, including electronic smoking devices, through a self-service display, which is an open display of tobacco products or paraphernalia that is accessible to the public without the assistance of the clerk. This law may be enforced against a business owner only and not against an employee. The law allows local governments to pass and enforce laws that are stricter than state law.

EXCEPTION: Tobacco stores may make available by self-service display pipe tobacco, snuff, chewing tobacco, and dipping tobacco. However, only the following cigars are permitted for self-service display in tobacco stores:

- Single, unwrapped cigars;
- Single, individually wrapped cigars **only if** they are sold from the manufacturer’s original box, bundle, or other container;
- Multiple cigars **only if** they are **not** in a sealed box, bundle, tin, or multiple-pack container; and
- Multiple cigars in sealed boxes, bundles, tins, or multiple-pack containers **only if** they contain at least 6 cigars.

Aside from these exceptions, self-service displays of tobacco products and paraphernalia are not permitted in a tobacco store. A *tobacco store* is defined as a business that (1) primarily sells tobacco products; (2) generates more than 60% of its gross revenue annually from the sale of tobacco products and paraphernalia; (3) prohibits individuals under 18 years of age on the premises unless they are accompanied by a parent or guardian; and (4) does not sell alcohol or food for consumption on the premises.

Note: This law does not affect the state law allowing tobacco to be sold through vending machines in limited circumstances (see entry 34).

ENFORCEMENT: The state Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this law.

PENALTY: Violators are subject to a civil penalty of \$400 to \$600 for a first violation; \$900 to \$1,000 for a second violation within a 5-year period; \$1,200 to \$1,800 for a third violation within a 5-year period; \$3,000 to \$4,000 for a fourth violation within a 5-year period; and \$5,000 to \$6,000 for a fifth or subsequent violation within a 5-year period (see entry 103 for license-related penalties that attach to STAKE Act violations).

36. SELF-SERVICE DISPLAYS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Sections 1140.14, 1140.16(c)

SCOPE: Cigarettes and smokeless tobacco may be sold only via a direct, face-to-face exchange. The use of vending machines and self-service displays is not permitted. As of August 8, 2016, the prohibition of sales from vending machines also includes cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco (for more information about these and other tobacco products newly covered by the deeming rule, see the overview on page 10).

EXCEPTION: Mail-order sales are permitted. (Mail-order redemption of coupons and distribution of free samples through the mail do not fall within the exception and are prohibited.) Vending machines and self-service displays are permitted in facilities where the retailer ensures that no person under the age of 18 is present or allowed to enter at any time.

ENFORCEMENT: The U.S. Department of Health and Human Services (HHS) is authorized to enforce this provision with the help of other federal agencies and state governments. In California, HHS has contracted with the California Department of Public Health's Food and Drug Branch to enforce this provision.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the U.S. Food and Drug Administration (FDA) shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer*

Training Programs (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

37. BIDIS

California Penal Code Section 308.1

SCOPE: It is illegal to sell, offer to sell, distribute, or import *bidis* (also known as beedies), which are defined as products containing tobacco wrapped in temburni leaf or tendu leaf, or products that are marketed and sold as “bidis” or “beedies.”

Note: Bidis are hand-rolled filterless cigarettes that are imported primarily from India and some Southeast Asian countries. They are available in a variety of candy-like flavors and often are sold in packs of fewer than 20, which makes them more affordable.

EXCEPTION: The law does not apply to businesses that legally prohibit individuals under 18 years of age on the premises.

ENFORCEMENT: The state Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this law. Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

38. SINGLE CIGARETTES

California Penal Code Section 308.2

SCOPE: No person may sell 1 or more cigarettes, other than in a sealed and properly labeled package. A sealed and properly labeled package means the original packaging of the manufacturer or importer that meets federal labeling requirements.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction.

39. MINIMUM PACKAGE SIZE

California Penal Code Section 308.3

SCOPE: Cigarettes may not be manufactured, distributed, sold, or offered for sale in packages of fewer than 20 cigarettes. Roll-your-own tobacco may not be manufactured, distributed, sold, or offered for sale in a package containing less than 0.60 ounces of tobacco.

ENFORCEMENT: A civil action to enforce the law may be brought by the state Attorney General, a district attorney, a county counsel, or a city attorney. Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

PENALTY: Violators are liable for a civil penalty of \$200 for a first violation, \$500 for a second violation, and \$1,000 for each subsequent violation or are guilty of an infraction.

40. SINGLE ITEMS AND MINIMUM PACKAGE SIZE: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Sections 1100.3, 1140.14(a)(4), 1140.16(b)

SCOPE: Cigarettes may not be manufactured, sold, or distributed in packages containing fewer than 20 cigarettes. A tobacco retailer may not sell or distribute any quantity of cigarettes or smokeless tobacco that is smaller than the smallest package distributed by the manufacturer for individual consumer use.

ENFORCEMENT: The U.S. Department of Health and Human Services (HHS) is authorized to enforce this provision with the help of other federal agencies and state governments. In California, HHS has contracted with the California Department of Public Health's Food and Drug Branch to enforce the provisions that create obligations for tobacco retailers.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the FDA shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has "repeated violations" of the Tobacco Control Act, the FDA may impose a "no-tobacco-

sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

41. MAIL ORDER/INTERNET SALES: THE STAKE ACT

California Business and Professions Code Section 22963 (STAKE Act)

SCOPE: No person may sell, distribute, or engage in the *non-sale distribution* of tobacco products, including electronic smoking devices, to persons under 21 years of age via public or private postal services. The law includes directives designed to ensure that people who order tobacco products by mail, fax, phone, or the internet are 21 years of age or older. For example, distributors or sellers must either (1) match the name, address, and date of birth provided by the customer to information contained in a database of individuals verified to be 21 or older, or (2) require the customer to submit verification of age, including a copy of a valid form of government identification. The law establishes a 2-carton minimum on each order of cigarettes. It also mandates that all applicable purchases be made by personal check or credit card and that the distributor or seller call purchasers to confirm their orders.

Non-sale distribution is defined as giving smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards, or other similar offers, or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at nominal cost. Distribution of tobacco products, coupons, coupon offers, gift certificates, gift cards, or other similar offers, or rebate offers

in connection with the sale of another item, including tobacco products, cigarette lighters, magazines, or newspapers shall not constitute non-sale distribution.

EXCEPTION: The U.S. Postal Service and other common carriers are exempt from penalties when they deliver a package without any reason to know the package's contents.

ENFORCEMENT: A district attorney, city attorney, or the state Attorney General may assess civil penalties against any person or entity that violates this law.

PENALTY: Violators who make prohibited sales or distributions are liable for a civil penalty of \$1,000 to \$2,000 for a first violation; \$2,500 to \$3,500 for a second violation; \$4,000 to \$5,000 for a third violation within a 5-year period; \$5,500 to \$6,500 for a fourth violation within a 5-year period; and \$10,000 for a fifth or subsequent violation within a 5-year period.

42. MAIL ORDER/INTERNET SALES: THE PACT ACT

15 United States Code Sections 375, 376, 376a, 377

18 United States Code Section 1716E

SCOPE: The Prevent All Cigarette Trafficking Act (the PACT Act) prohibits the delivery of sales of cigarettes (including roll-your-own tobacco) and smokeless tobacco via the U.S. Postal Service. Other common carriers (eg, UPS, FedEx) may deliver a package containing cigarettes or smokeless tobacco if the package weighs less than 10 pounds and bears stamps and signs verifying that all appropriate local, state, and federal taxes have been paid. Upon delivery, the age and identity of the buyer must be confirmed, and the recipient must be of minimum legal age to purchase tobacco products.

EXCEPTION: The U.S. Postal Service restrictions do not apply to sales shipments that begin and end entirely within Alaska or Hawaii and to certain APO/FPO military addresses. Infrequent, lightweight shipments can still be sent via U.S. mail by age-verified adults as long as certain restrictions are met. Additional exceptions apply for authorized business/regulatory purposes, as well as for consumer testing and public health purposes.

ENFORCEMENT: The U.S. Postal Service provision is enforced by the Postmaster General with the cooperation of any other federal agency or agency of any state, local, or tribal government, whenever appropriate. The common carrier provisions are enforced by the U.S. Attorney General, state attorneys general, and state tobacco tax administrators.

PENALTY: Violators are subject to criminal penalties of up to 3 years imprisonment. Retailers who violate the law are also subject to civil penalties in an amount not to exceed the greater of \$5,000 for a first violation and \$10,000 for a subsequent violation, or 2% of their gross sales of cigarettes or smokeless tobacco during the 1-year period ending on the date of the violation. Common carriers or other delivery services that knowingly violate the new law are subject to civil penalties in an amount not to exceed \$2,500 for a first violation and \$5,000 for any violation within 1 year of a prior violation.

Any person found delivering cigarettes or smokeless tobacco through the U.S. Postal Service is subject to an additional civil penalty in the amount equal to 10 times the retail value of the

non-mailable cigarettes or smokeless tobacco, including all federal, state, and local taxes. Any cigarette or smokeless tobacco that is deposited in the mail shall be subject to seizure and forfeiture. Any tobacco products seized and forfeited under this subsection shall be destroyed or retained by the federal government for the detection or prosecution of crimes or related investigations and then destroyed.

43. MAIL ORDER/INTERNET SALES: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387f(d)

21 Code of Federal Regulations Section 1100.3

SCOPE: The Tobacco Control Act directed the U.S. Department of Health and Human Services (HHS) to issue regulations regarding the remote sale and distribution of tobacco products, such as via the internet or mail order, by December 22, 2010. The Tobacco Control Act also directed HHS to issue regulations regarding the promotion and marketing of tobacco products sold or distributed remotely by June 22, 2011.

Note: In March 2010, Congress enacted the Prevent All Cigarette Trafficking (PACT) Act of 2009, which regulates the remote sale and distribution of cigarettes (including roll-your-own tobacco) and smokeless tobacco via the internet or mail order, and made a new HHS regulation largely unnecessary. Specifically, the PACT Act largely prohibits the U.S. Postal Service from shipping cigarettes (including roll-your-own tobacco) and smokeless tobacco (see entry 42 for additional information on the PACT Act).

In September 2011, the FDA issued an advance notice of proposed rulemaking and requested comments, data, research, or other information related to non-face-to-face sale and distribution of tobacco products; the advertising, promotion, and marketing of such products; and the advertising of tobacco products via the internet, email, direct mail, telephone, smart phones, and other communication technologies that can be directed to specific recipients. 76 Fed. Reg. 55,835 (Sept. 9, 2011).

ENFORCEMENT: HHS is authorized to enforce the regulations it issues under this provision with the help of other federal agencies and state governments.

PENALTY: At the time of publication, regulations had not yet been issued by the FDA. Once regulations go into effect, the following penalties will apply:

Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the FDA shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;

- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

44. HOME DELIVERY OF UNSOLICITED TOBACCO PRODUCTS

California Penal Code Section 308b

SCOPE: It is illegal for a person to knowingly deliver or cause to be delivered any unsolicited tobacco products to any residence in California (see entry 79 for more information on mailing unsolicited samples of smokeless tobacco products).

EXCEPTION: It is a defense to a violation of this section that the sender personally knows the recipient of the tobacco products at the time of the delivery. The law does not impose liability on any U.S. Postal Service employee for actions performed in the scope of his or her employment.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

PENALTY: Violators are guilty of a misdemeanor, and violations constitute a nuisance within the meaning of California Civil Code Section 3479.

45. FIRE SAFE CIGARETTES

California Health and Safety Code Sections 14950–14960

SCOPE: It is illegal to sell, offer to sell, or possess for sale cigarettes unless they meet fire safety standards modeled on standards currently in place in New York. Specifically, manufacturers must certify to the state Fire Marshal that their cigarettes have been tested in accordance with standards established by the American Society of Testing and Materials, and that no more than 25% of the cigarettes tested in a test trial exhibited full-length burns. Manufacturers shall mark the packaging and case of cigarettes in compliance with this law.

EXCEPTION: Distributors, wholesalers, or retailers may sell their existing inventory of cigarettes after January 1, 2007, if certain conditions are met.

ENFORCEMENT: The state Attorney General may bring a civil action to enforce the law. Any law enforcement agency may seize cigarettes sold, offered for sale, or possessed for sale in violation of the law.

PENALTY: Manufacturers or others who knowingly sell or offer cigarettes in violation of these provisions other than through retail sale are subject to a civil penalty of up to \$10,000 for each sale. Retailers, distributors and wholesalers who knowingly sell cigarettes in violation of these provisions are subject to a civil penalty of up to \$500 for each sale of up to 50 packages of cigarettes and a civil penalty of up to \$1,000 for each sale of more than 50 packages of cigarettes. Cigarettes that are sold in violation of these provisions are subject to seizure.

46. LIQUID NICOTINE PACKAGING REQUIREMENTS

California Health and Safety Code Section 119406

16 Code of Federal Regulations Sections 1700.20

SCOPE: As of October 1, 2016, all cartridges for electronic cigarettes and solutions for filling or refilling an electronic cigarette shall be in child-resistant packaging, according to federal child-resistant packaging standards and testing procedures.

ENFORCEMENT: Not specified.

PENALTY: Not specified.

15 United States Code Section 1472a

16 Code of Federal Regulations Sections 1700.15 et seq.

SCOPE: As of July 26, 2016, the Child Nicotine Poisoning Prevention Act of 2015 subjects liquid nicotine to existing packaging and testing requirements found in the federal Poison Prevention Packaging Standards. These standards apply to liquid nicotine of any type that is sold, offered for sale, manufactured for sale, distributed in commerce, or imported into the United States. Requirements include child-resistant packaging and restricted flow rates for containers.

EXCEPTION: The Act does not include sealed, prefilled, and disposable liquid nicotine containers that are inserted directly into electronic cigarettes, electronic nicotine delivery systems, or similar products, so long as the nicotine in the container is inaccessible through customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion or other contact by children.

Note: The Child Nicotine Poisoning Prevention Act is not intended to limit or otherwise affect the authority of the Secretary of Health and Human Services to regulate, issue guidance on, or take action regarding any nicotine-related products. The Act is not intended to limit or affect the U.S. Food and Drug Administration's (FDA) advance notice of proposed rulemaking concerning packaging requirements for liquid nicotine, nicotine-containing e-liquid(s), and other tobacco products (see entry 91 for information about the notice). The Act also specifically states that the FDA's deeming rule is not affected by the Act (see the overview on page 10 for information). The Child Nicotine Poisoning Prevention Act makes it clear that the FDA can move forward with these and other regulations regarding the manufacture, marketing, sale, distribution, importation, or packaging of nicotine-related products.

ENFORCEMENT: The U.S. Consumer Product Safety Commission is authorized to enforce this provision with the help of other federal agencies.

PENALTY: Not specified.

47. NON-NICOTINE PRODUCT IN A VAPOR STATE

California Health and Safety Code Section 24600

SCOPE: It is illegal to sell anyone under 18 years of age any device intended to deliver by inhalation a non-nicotine product in a vapor state.

EXCEPTION: This provision exempts drug or medical devices approved by the U.S. Food and Drug Administration.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$500 for a first violation; up to \$1,000 for a second violation; and up to \$1,500 for a third or subsequent violation.

48. TOBACCO PRODUCT STANDARDS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387g 21 Code of Federal Regulations Section 1100.3

SCOPE: The U.S. Department of Health and Human Services (HHS) may establish tobacco product standards for the protection of public health. Tobacco manufacturers may no longer use tobacco that contains an unsafe level of pesticide chemical residue, as determined by federal law.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Manufacturers who intentionally misrepresent that they meet tobacco product standards may be subject to civil penalties of up to \$250,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding. If violations continue after HHS provides written notice of violation, the violator is subject to a penalty of \$250,000 for the first 30-day period, which doubles every 30 days thereafter that the violation continues, up to \$1 million in any 30 day period or \$10 million for all such violations ruled on in a single proceeding.

Note: On July 28, 2017, the FDA announced that it would develop a new plan for tobacco and nicotine regulation. On March 16, 2018, the FDA issued an Advanced Notice of Proposed Rule Making (ANPRM) to collect information on whether to develop a tobacco product standard for the maximum nicotine level in cigarettes. The FDA is considering reducing the amount of nicotine in cigarettes to minimally addictive or nonaddictive levels and is looking for comments on what the maximum level of nicotine should be in products, how to best implement a maximum standard, and possible analytical testing

methods for nicotine levels. Additionally, the FDA is considering which products should be covered by the product standard and possible negative effects of establishing a maximum nicotine level. The docket for the ANPRM is available here: www.regulations.gov/document?D=FDA-2017-N-6189-0001.

Note: On January 23, 2017, the FDA proposed a new product standard for N-Nitrosornicotine levels in smokeless tobacco products. The FDA is considering establishing a limit for the amount of N-Nitrosornicotine and a testing process for determining N-Nitrosornicotine levels, as well as developing expiration dates for smokeless tobacco products. The rule would also establish additional labeling requirements for smokeless tobacco products. The proposed rule is available here: www.federalregister.gov/documents/2017/01/23/2017-01030/tobacco-product-standard-for-n-nitrosornicotine-level-in-finished-smokeless-tobacco-products.

49. PREMARKET REVIEW OF NEW TOBACCO PRODUCTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387e, 387j

21 Code of Federal Regulations Sections 25.35, 25.50, 25.52

21 Code of Federal Regulations Section 1100.3

SCOPE: Tobacco products or modified tobacco products not commercially marketed in the United States as of February 15, 2007, must be approved by the U.S. Food and Drug Administration (FDA) prior to commercial release. Applications for new products shall be made available to the public. Approval may be withdrawn as information changes and new findings are made.

Note: The FDA has released guidance on the procedures and the types of evidence necessary to establish that a product was commercially marketed in the United States before February 15, 2007. *Guidance for Industry: Establishing That a Tobacco Product Was Commercially Marketed in the United States as of February 15, 2007* (Sept. 2014), www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM416498.pdf.

Note: FDA has released several guidance documents related to its enforcement policy for newly deemed finished tobacco products such as electronic nicotine delivery systems and cigars. *Guidance for Industry: Extension of Certain Tobacco Product Compliance Deadlines Related to the Final Deeming Rule (Revised)* (Mar. 2019), www.fda.gov/media/105346/download. At the time of publication, FDA's enforcement policy for electronic nicotine delivery systems is the subject of ongoing litigation. *Am. Acad. of Pediatrics v. Food & Drug Admin.*, No. PWG-18-883, 2019 WL 2123397 (D. Md. May 15, 2019).

EXCEPTION: A new or modified tobacco product may be exempted from this requirement if the U.S. Department of Health and Human Services (HHS) Secretary issues an order stating that the product is

1. Substantially equivalent to a tobacco product commercially marketed in the United States as of February 15, 2007 (“substantially equivalent”); and
2. Otherwise in compliance with the law.

A modified tobacco product may be exempted from this requirement if the Secretary determines that

1. The modification would be a minor modification of a tobacco product that can be legally sold; and
2. A report is not necessary to ensure that allowing the tobacco product to be marketed would be appropriate for protection of public health.

If an order is issued finding that a product is not substantially equivalent to another, the product is considered adulterated and misbranded. The FDA has indicated that it will take no enforcement action for at least the first 30 days after it issues such an order for products that are in a retailer’s current inventory at a specific retail location on the date the order is issued. *Guidance for Industry and Tobacco Retailers: Enforcement Policy for Certain (Provisional) Tobacco Products That FDA Finds Not Substantially Equivalent* (Sept. 2015), www.fda.gov/media/87919/download.

At the time of publication, FDA has released updated draft guidance on its enforcement policy for certain tobacco products after a finding that a product is not substantially equivalent to another. When finalized, this guidance will supersede the September 2015 guidance. *Draft Guidance for Industry: Enforcement Policy for Certain Marketed Tobacco Products* (Feb. 2019), www.fda.gov/media/120808/download.

Note: The September 2015 guidance was challenged in federal court and partially vacated. *Philip Morris USA, Inc., et al. v. United States Food & Drug Admin.*, No. 15-CV-1590 (APM), 2016 WL 4378970 (D.D.C. Aug. 16, 2016). The original guidance stated that modifying a tobacco product’s label or changing the quantity of products in each package could constitute a new tobacco product, necessitating substantial equivalence review. The court held that changes to a product label do not create a new tobacco product and vacated that portion of the guidance.

Note: In *Nicopure Labs v. FDA*, 266 F.Supp.3d.360 (D.D.C. 2017), the D.C. District Court upheld the validity of the new deeming rule and the FDA’s decision to deem electronic smoking devices and their components and parts, including nicotine-free e-liquids, as tobacco products. Nicopure Labs has appealed this decision, and it is pending at the Court of Appeals for the D.C. Circuit.

Note: Many of the government actions described in this section are subject to an October 2015 FDA regulation exempting them from certain requirements under the National Environmental Policy Act (NEPA) and the Council on Environmental Quality regulations. Issuance of orders for the following actions are “categorically excluded” and therefore normally do not require preparation of an Environmental Assessment or an Environmental

Impact Statement (reports required by NEPA before the government undertakes certain activities):

- Finding a tobacco product “substantially equivalent” or not;
- Denying a request for exemption from the requirement to demonstrate substantial equivalence or rescinding an order granting such exemption;
- Prohibiting a new tobacco product or a modified risk tobacco product from being introduced into interstate commerce; and
- Rescinding or suspending an order “authorizing the marketing of a new tobacco product” or a modified risk tobacco product.

Note: In January 2017, the FDA released a final rule on when products are regulated as drugs, devices, or combination products, available at www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/UCM535838.pdf. However, on March 16, 2018, the FDA issued a final rule indefinitely delaying the effective dates for the rule on when products are regulated as drugs, devices, or combination products.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Civil penalty of up to \$250,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding. If violations continue after HHS provides written notice, the violator is subject to a penalty of \$250,000 for the first 30-day period, which doubles every 30 days thereafter that the violation continues, up to \$1 million in any 30-day period or \$10 million for all such violations ruled on in a single proceeding.

50. ADULTERATED AND MISBRANDED TOBACCO PRODUCTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387b, 387c, 387e, 387f
21 Code of Federal Regulations Sections 1100.3, 1143.3, 1143.5

SCOPE: A tobacco product is deemed to be adulterated if (1) it is subject to a tobacco product standard but is in any respect out of compliance with such standard, (2) it fails to obtain any required premarket review order, or (3) it violates any modified risk provisions. A tobacco product is deemed to be misbranded if it is manufactured or prepared in an unregistered establishment, or if it is sold in violation of any other federal regulations governing the sale and distribution of tobacco products. A tobacco product is also misbranded if its labeling is false or misleading, or if the package label does not contain all of the following:

1. The name and address of the manufacturer, packer, or distributor;
2. An accurate net quantity statement;
3. The percentage of tobacco that is foreign versus domestic; and
4. The statement “sale only allowed in the United States.”

The U.S. Department of Health and Human Services (HHS) may issue regulations requiring prior approval of statements made on the label of a tobacco product.

These provisions also apply to newly deemed tobacco products, such as cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco (for more information about these and other tobacco products newly covered by the deeming rule, see the overview on page 10).

Note: As of May 10, 2018, it is also illegal to sell tobacco products whose packaging and advertisements do not contain applicable warning labels under the FDA's deeming rule (see entries 87, 90, and 91 for required warnings for tobacco products newly covered by the deeming rule).

EXCEPTION: Under this provision, HHS shall establish regulations to permit “reasonable variations” and exemptions for “small packages.” For example, the required warning label provisions of the deeming rule include certain exceptions for small packages (see the overview on page 10 for more information about the deeming rule; see entries 87, 90, and 91 for required warnings for tobacco products covered by the deeming rule).

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding. Intentional violations of certain provisions may result in higher or compounded penalties.

51. MODIFIED RISK TOBACCO PRODUCTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387k

21 Code of Federal Regulations Sections 1100.3, 1100.5

SCOPE: No person may introduce a “modified risk” tobacco product into interstate commerce or commercially market such a product without approval from the U.S. Department of Health and Human Services (HHS). As of August 8, 2016, this requirement applies to cigars, “modified risk” electronic nicotine delivery systems containing anything made or derived from tobacco, and other newly deemed tobacco products (see the overview on page 10 for more information about the deeming rule). Approval is limited to a 5-year term but may be renewed. The agency shall approve a modified risk tobacco product only after determining that the product, as it is actually used by consumers, (1) significantly reduces harm and the risk of tobacco-related disease to individual tobacco users, and (2) benefits the health of the population as a whole.

Approval is conditioned on the applicant's agreement to conduct post-market surveillance and studies and to submit the results to HHS annually so that the agency may determine the impact of such marketing on consumer perception, behavior, and health. HHS may

also impose additional marketing and label restrictions. Approval may be withdrawn if requirements are not met.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the modified risk provision improperly regulated speech and violated the First Amendment.

EXCEPTION: In some cases a modified risk tobacco product can be introduced into interstate commerce and yet may not be commercially marketed.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Civil penalty for intentionally purporting to meet tobacco product standards of up to \$250,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding. If violations continue after the agency provides written notice, the violator is subject to a penalty of \$250,000 for the first 30-day period, which doubles every 30 days thereafter that the violation continues, up to \$1 million in any 30-day period or \$10 million for all such violations ruled on in a single proceeding.

52. “LIGHT,” “LOW,” AND “MILD” TOBACCO PRODUCTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387k

21 Code of Federal Regulations Section 1100.3

SCOPE: Descriptors similar to and including “light,” “low,” and “mild” are prohibited in all advertising, labeling, and marketing of cigarettes and smokeless tobacco products manufactured on or later than June 22, 2010. As of August 8, 2017, this prohibition applies to the manufacture of all newly deemed tobacco products, including cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco. Newly deemed tobacco products with these prohibited descriptors can no longer be distributed into interstate commerce beginning September 8, 2017 (see the overview on page 10 for more information about the deeming rule).

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the prohibition on the use of the terms, “low,” “light,” and “mild,” improperly regulated speech and violated the First Amendment.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Civil penalty for intentionally purporting to meet tobacco product standards of up to \$250,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding. If violations continue after the agency provides written notice, the violator is

subject to a penalty of \$250,000 for the first 30-day period, which doubles every 30 days thereafter that the violation continues, up to \$1 million in any 30-day period or \$10 million for all such violations ruled on in a single proceeding.

53. BAN ON FLAVORED CIGARETTES OR CIGARETTE COMPONENTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387g

SCOPE: Cigarettes and their component parts (including the tobacco, filter, or paper) must not contain any artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. The Secretary of the U.S. Department of Health and Human Services (HHS) has the authority to ban menthol or any artificial or natural flavor, herb, or spice not specified in this list.

EXCEPTION: Tobacco flavor and menthol are excluded from this provision. This provision does not apply to tobacco products other than cigarettes.

Note: Two federal circuit courts of appeal have held that local governments may enact laws restricting the sale of flavored non-cigarette tobacco products, such as cigars and chewing tobacco. *See United States Smokeless Tobacco Mfr. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013). A federal district court similarly dismissed a challenge to Chicago's flavored tobacco sales restriction (which prohibits the sale of flavored tobacco, including menthol cigarettes, within 500 feet of any elementary, middle, or secondary school). *Indeps. Gas & Serv. Stations Associations, Inc. v. City of Chicago*, 112 F. Supp. 3d 749, 753 (N.D. Ill. 2015). These courts found that local laws were not preempted by the federal Tobacco Control Act. These decisions are not binding in California but can be influential, and they signal that courts may be more likely to uphold similar laws in other jurisdictions.

Note: The Tobacco Control Act required the U.S. Food and Drug Administration (FDA) Tobacco Products Scientific Advisory Committee (TPSAC) (see entry 122) to submit a report and recommendation to the Secretary on the public health impacts of the use of menthol in cigarettes, including use among children, African Americans, Hispanics, and other racial and ethnic minorities. The TPSAC submitted its report and recommendations to the FDA in March 2011. On July 24, 2013, the FDA issued an advance notice of proposed rulemaking (ANPRM) to solicit public input on menthol in cigarettes. Although the FDA collected significant information at that time, it never issued a proposed or final rule. On March 20, 2018, the FDA again issued an advance notice of proposed rulemaking (ANPRM) to solicit public input on menthol and other flavors in tobacco products. The docket for the ANPRM is available at www.regulations.gov/document?D=FDA-2017-N-6565-0001. The FDA is considering the role flavors play in youth and young adult use of tobacco products and how flavors may help adults transition away from using combustible tobacco

products. The FDA also conducted a preliminary independent scientific evaluation of existing data and research on menthol cigarettes.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

54. ORIGIN LABELING: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387t

21 Code of Federal Regulations Section 1100.3

SCOPE: All tobacco products must bear the statement “sale only allowed in the United States” on all labels, packaging, and shipping containers. This requirement went into effect on July 22, 2010, for non-cigarette tobacco products (or tobacco products other than cigarettes). The Tobacco Control Act stipulated that this requirement will become effective for cigarettes 15 months after the U.S. Department of Health and Human Services (HHS) issues cigarette label and advertising regulations.

As of May 10, 2018, the U.S. Food and Drug Administration (FDA) requires this statement for all newly deemed tobacco products in package form, including cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco (see the overview on page 10 for more information about the FDA’s deeming rule).

Note: The graphic warning labels proposed by the FDA were ruled unconstitutional and were not in effect at the time of publication. *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). In March 2013, the FDA decided not to appeal the D.C. Circuit Court of Appeals ruling to the U.S. Supreme Court. The Tobacco Control Act’s mandate that the FDA promulgate regulations requiring graphic warning labels remains subject to ongoing litigation.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

55. RESTRICTIONS ON TOBACCO AND ALCOHOL SALES NEAR CANNABIS SELLERS

*California Business and Professions Code Sections 26030, 26031, 26054
16 California Code of Regulations Section 5026*

SCOPE: A business licensed to sell cannabis may not sell any tobacco products or alcohol on the premises. Further, a business licensed to sell cannabis may not be located in a place where a consumer must pass through a store that sells tobacco products or alcohol. The cannabis business must also not be in a place where consumers must pass through it in order to reach a store that sells tobacco products or alcohol.

ENFORCEMENT: The Bureau of Cannabis Control (BCC) is authorized to enforce these provisions. Additionally, BCC may enforce these provisions based on information received from local authorities.

PENALTY: BCC may suspend or revoke a business's cannabis license.



ADVERTISING



56. OUTDOOR ADVERTISING: THE MSA

Master Settlement Agreement (MSA) Sections II(ii), II(xx), III(c), III(d), VII(c)
Smokeless Tobacco Master Settlement Agreement (STMSA) Sections II(dd), II(rr), III(c), III(d), VII(c)

SCOPE: Under the MSA and STMSA, the settling tobacco companies are prohibited from engaging in *outdoor advertising* of tobacco products, defined as (1) billboards; (2) signs and placards in arenas, stadiums, shopping malls, and video game arcades; and (3) any other tobacco advertisements that are outdoors, or on the inside surface of a window but facing outward.

EXCEPTION: The MSA and STMSA do not restrict:

- Advertisements that are 14 square feet or smaller, and are either outside a tobacco retail store but on store property, or on the window of a tobacco retail store facing outward;
- Advertisements inside a tobacco retail store that are not placed on a window facing outward;
- Advertisements located inside an adult-only facility (where the operator ensures that no minors are present);
- Outside Advertisements at the site of an adult-only facility advertising the event with a brand name for the duration of the event, and no more than 14 days before the event;
- Billboards advertising a tobacco brand-sponsored event at the site of the event for 90 days before the initial sponsored event and 10 days after the last sponsored event; or
- Advertisements outside a tobacco manufacturing facility.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

57. OUTDOOR ADVERTISING: THE STAKE ACT

California Business and Professions Code Sections 22957, 22958, 22961 (STAKE Act)

SCOPE: No advertising of tobacco products, including electronic smoking devices, on any outdoor billboard located within 1,000 feet of any public or private elementary, junior high, or high school, or public playground.

Note: This law currently is not being enforced and partially overlaps with the limits on outdoor advertising in the Master Settlement Agreement and Smokeless Tobacco Master Settlement Agreement. Moreover, inasmuch as the law applies to cigarettes, it may be preempted by federal law in light of the U.S. Supreme Court decision in *Lorillard Tobacco Co. v. Reilly* (see entry 59 for more information about this decision). *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

EXCEPTION: This law does not prohibit a message or advertisement opposing the use of tobacco products.

ENFORCEMENT: The Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this section.

PENALTY: Violators are subject civil penalties according to Section 22958(d).

58. OUTDOOR ADVERTISING: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Section 1100.3

SCOPE: The Tobacco Control Act directed the U.S. Food and Drug Administration (FDA) to issue a rule regulating outdoor advertising for tobacco products by June 22, 2010. The FDA was instructed to consider any necessary modifications to its proposed 1996 rule prohibiting advertising (ie, billboards, posters, placards) within 1,000 feet of any public playground or playground areas on public property (eg, swings, seesaws, baseball diamonds, basketball courts, public schools).

Note: In March 2010, the FDA issued an advance notice of proposed rulemaking and request for comments. 75 Fed. Reg. 13,241 (Mar. 19, 2010). At the time of publication, the FDA had not yet issued rules about outdoor advertising.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court. The federal district court neither upheld nor struck down the provision, instead ruling that the issue was not properly before the court (ie, the issue was not ripe because the FDA had not yet issued an outdoor advertising rule). *Commonwealth Brands, Inc. v. United States*, 678 F.Supp.2d 512 (W.D.Ky. 2010), *overruled in part on other grounds by Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013).

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

59. FEDERAL PREEMPTION OF STATE AND LOCAL REGULATION OF CIGARETTE AND SMOKELESS TOBACCO ADVERTISING AND PROMOTION

15 United States Code Sections 1331–1341, 4401–4408

SCOPE: The Federal Cigarette Labeling and Advertising Act (FCLAA) establishes a comprehensive federal program governing cigarette labeling and advertising (for a summary of the FCLAA’s warning label requirements and its ban on television advertising, see entries 86 and 68, respectively). In sections 1334(b) and (c), the FCLAA also contains a preemption clause that prohibits most state and local laws and regulations from imposing any requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes. Permissible state and local laws and regulations must constitute “specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.” Similarly, the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) establishes a federal program governing smokeless tobacco labeling and advertising. In section 4406, the CSTHEA also contains a preemption clause that prohibits state and local laws and regulations from requiring any statements relating to the use of smokeless tobacco products and health on any package or advertisement of a smokeless tobacco product (unless the advertisement is an outdoor billboard advertisement).

Note: In the 1990s, tobacco companies sued various state and local governments for passing laws that allegedly imposed requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the U.S. Supreme Court struck down a Massachusetts regulation banning cigarette advertising within 1,000 feet of schools because it found that the state regulation was preempted by the FCLAA. Note that this case preceded the FCLAA provision allowing state and local governments to implement time, place, and manner restrictions on cigarette advertising and promotion.

Note: The FCLAA applies only to cigarettes. It does not preempt state and local governments from passing laws on the basis of smoking and health that regulate the advertising or promotion of other tobacco products (eg, cigars, etc.). However, the First Amendment of the U.S. Constitution remains an important consideration regarding the legality of any such law.

Note: The preemption provision of the FCLAA does not apply to the Master Settlement Agreement (MSA) because the MSA is not a state law but instead is a contract to which the tobacco companies have voluntarily agreed to be bound.

Note: In 2012, a federal court of appeals held that the FCLAA preempted a New York City law requiring tobacco retailers to display signs bearing graphic images showing the adverse health effects of smoking. *23-34 9th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012). The court concluded that requiring graphic warnings to be placed adjacent to product displays impermissibly affected cigarette makers’ promotions at retail

sites. Although this decision is not binding in California, the case may serve as guidance for California courts examining similar issues. By contrast, a different federal court of appeals held that the FCLAA did not preempt a Providence, RI law that prohibits tobacco retailers from accepting or redeeming coupons and multipack discounts for any tobacco products or cigarettes. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013). The court also held that the law did not conflict with the First Amendment rights of tobacco manufacturers or distributors because it did not prohibit these parties from disseminating coupons or multipack offers.

Following the ruling upholding Providence's law, in November 2013 New York City adopted a similar law that prohibits tobacco retailers from accepting or redeeming coupons and multipack discounts for any tobacco products or cigarettes. This law also withstood a challenge in federal court, on similar preemption and First Amendment grounds as the First Circuit case. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 27 F.Supp.3d 415 (S.D.N.Y. 2014). New York City's law also set minimum retail prices for the sale of cigarettes, cigars, and little cigars, but this action was not at issue in the case.

Note: The CSTHEA applies only to smokeless tobacco products that contain cut, ground, powdered, or leaf tobacco and are intended to be placed in the oral or nasal cavity. It does not preempt state and local governments from passing laws on the basis of smoking and health that regulate the advertising or promotion of other tobacco products (eg, cigars, etc.). However, the First Amendment of the U.S. Constitution remains an important consideration regarding the legality of any such law.

ENFORCEMENT: Aggrieved private parties (eg, tobacco companies or retailers) may bring a civil action against state or local governments in court.

PENALTY: A court will invalidate a law that it finds to be preempted by the FCLAA or CSTHEA.

60. STOREFRONT ADVERTISING

California Business and Professions Code Sections 25612.5(c)(7), 25617, 25619
(Known informally as the Lee Law)

SCOPE: No more than 33% of the square footage of windows and clear (eg, glass) doors of an alcohol retailer may have advertising signs of any sort, including tobacco.

Note: This law is not preempted by the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smokeless Tobacco Health Education Act (see entry 59) because it applies generally to advertising of all types, not specifically to advertising of cigarettes or smokeless tobacco.

EXCEPTION: The law applies only to retailers with an off-sale premises license to sell alcoholic beverages.

ENFORCEMENT: This law may be enforced by the California Department of Alcoholic Beverage Control and by local law enforcement agencies.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment for up to 6 months.

Note: An officer who refuses or neglects to diligently prosecute persons whom they have reasonable cause to believe have violated this provision is guilty of a misdemeanor under Section 25619.

61. BLUNT WRAPS ADVERTISING

*California Business and Professions Code Sections 22958(a), 22962 (STAKE Act)
California Penal Code Section 308*

SCOPE: No person or business may place advertising for blunt wraps lower than 4 feet above the floor. No person or business offering blunt wraps for sale may place blunt wrap advertising within 2 feet of a candy, snack, or nonalcoholic beverage display. This law may be enforced against a business owner only and not against an employee.

Note: *Blunt wraps* are defined as cigar papers or cigar wrappers that are designed for smoking or ingestion of tobacco products and contain less than 50% tobacco.

ENFORCEMENT: The state Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this law.

PENALTY: Violators are subject to a civil penalty of \$400 to \$600 for a first violation; \$900 to \$1,000 for a second violation within a 5-year period; \$1,200 to \$1,800 for a third violation within a 5-year period; \$3,000 to \$4,000 for a fourth violation within a 5-year period; and \$5,000 to \$6,000 for a fifth or subsequent violation within a 5-year period.

Violations by one retail location are not counted against other retail locations of the same corporation or business. Violations against a prior owner of a single franchise location are not counted against a new owner of the same single franchise location (see entry 103 for license-related penalties that attach to STAKE Act violations).

62. STATE BUILDING ADVERTISING

California Government Code Section 19994.35

SCOPE: No advertising for any product containing tobacco shall be allowed in any building owned and occupied by the state.

EXCEPTION: This law does not apply to tobacco advertising contained in a program, leaflet, newspaper, magazine, or other written material lawfully sold, brought, or distributed within a state building.

ENFORCEMENT: Not specified.

PENALTY: Not specified.

63. TRANSIT ADVERTISING

Master Settlement Agreement Sections II(xx), III(c)(3)(E), III(d), VII(c)
Smokeless Tobacco Master Settlement Agreement Sections II(rr), III(c)(3)(E), III(d), VII(c)

SCOPE: The settling tobacco companies are prohibited from placing tobacco *transit advertisements*, defined as advertisements on or within private or public vehicles, and placed at, on, or within a bus stop, taxi stand, transportation waiting area, train station, airport, or similar location.

EXCEPTION: This prohibition does not apply to advertisements inside an adult-only facility (where the operator ensures that no minors are present and that the advertisements are not visible to persons outside the facility) or to outside advertisements on the site of an adult-only facility advertising a brand-sponsored event, no more than 14 days before the event, or to vehicles bearing a tobacco brand name used in a brand-sponsored event.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

64. CARTOON CHARACTERS

Master Settlement Agreement Sections II(l), III(b), VII(c)
Smokeless Tobacco Master Settlement Agreement Sections II(j), III(b), VII(c)

SCOPE: The settling tobacco companies are prohibited from using cartoons in tobacco advertising, promoting, labeling, and packaging.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

65. YOUTH TARGETING

Master Settlement Agreement Sections III(a), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(a), VII(c)

SCOPE: The settling tobacco companies are prohibited from directly or indirectly targeting youth in tobacco advertising, promotion, and marketing, and from taking any action the primary purpose of which is to initiate, maintain, or increase the incidence of youth smoking.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

66. VIDEO GAMES

California Penal Code Section 308.5

SCOPE: This law prohibits paid commercial advertising for alcohol and tobacco products in video games intended for either private use or use in a public establishment, and intended primarily for use by any person under the age of 18 years. Paid commercial advertising includes, for example, containers or packaging, product brand names, trademarks, or copyrighted slogans.

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under Penal Code Section 830.1.

PENALTY: Violators are guilty of a misdemeanor.

67. TELEVISION/RADIO CIGARETTE ADVERTISING

15 United States Code Sections 1335, 1338, 1339

SCOPE: This law prohibits advertising cigarettes or little cigars (defined by weight) on any medium of electronic communication subject to the jurisdiction of the U.S. Federal Communications Commission (FCC) (such as television and radio).

EXCEPTION: This law does not apply to regular size cigars.

ENFORCEMENT: The U.S. Attorney General may seek an injunction in federal court against violators to prevent future violations of this law.

Note: Information on filing complaints to the FCC is located on the FCC's website: www.fcc.gov/complaints.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of not more than \$10,000.

68. TELEVISION/RADIO SMOKELESS TOBACCO ADVERTISING

15 United States Code Sections 4402, 4404, 4405

SCOPE: This law prohibits advertising smokeless tobacco on any medium of electronic communication subject to the jurisdiction of the U.S. Federal Communications Commission (FCC) (such as television and radio).

ENFORCEMENT: The U.S. Attorney General may seek an injunction in federal court against violators to prevent future violations of this law.

Note: Information on filing complaints to the FCC is located on the FCC's website: www.fcc.gov/complaints.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of not more than \$10,000.

69. BAN ON MISLEADING CONSUMERS ABOUT U.S. FOOD AND DRUG ADMINISTRATION (FDA) ENDORSEMENTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 331(tt), 333, 372

SCOPE: It is illegal to make any express or implied statement to consumers in tobacco product labeling or through the media or advertising that would mislead consumers into believing that a tobacco product is:

1. Approved by the FDA;
2. Endorsed by the FDA;
3. Deemed safe by the FDA; or
4. Less harmful due to FDA regulation.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the ban on misleading consumers about FDA endorsements improperly regulated speech and violated the First Amendment.

ENFORCEMENT: The U.S. Department of Health and Human Services (HHS) is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

70. CONTENT DISCLOSURES TO THE PUBLIC: THE TOBACCO CONTROL ACT

21 United States Code Sections 387d, 387n

15 United States Code Sections 1333, 1336, 1338, 1339

SCOPE: The U.S. Department of Health and Human Services (HHS) will determine whether tar and nicotine yields of cigarette and tobacco products must be disclosed on all product packages and advertisements. If HHS decides that the levels of any other cigarette or tobacco constituents should be disclosed to benefit the public health, the disclosure may be required through a product package or advertisement insert, or by another approved means.

EXCEPTION: Mandatory disclosures of yields of cigarette or tobacco constituents, other than tar or nicotine, cannot appear directly on the face of any cigarette package or advertisement.

ENFORCEMENT: The U.S. Attorney General is authorized to enforce this provision, acting through several U.S. attorneys. A violation is also considered an unfair or deceptive act or practice and subject to enforcement under the Federal Trade Commission Act.

Note: In April 2012, the FDA issued a notice establishing a list of tobacco product constituents that the agency believes are harmful or potentially harmful to health. The notice includes the criteria the FDA used to develop the list and the reasons the FDA may add or remove constituents from the list. 77 Fed. Reg. 20,034 (Apr. 3, 2012). The FDA has also issued guidance on the meaning of “harmful and potentially harmful constituents” in the context of the list requirements. *“Harmful and Potentially Harmful Constituents” in Tobacco Products as Used in Section 904(e) of the Federal Food, Drug, and Cosmetic Act: Guidance for Industry and FDA Staff* (revised) (August 2016), www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM241352.pdf.

PENALTY: A violation is considered a misdemeanor, and a conviction will subject the violator to a fine of \$10,000 or less.

71. PERMISSIBLE FORMS OF LABELING AND ADVERTISING: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Section 1140.30(a)

SCOPE: A manufacturer, distributor, or retailer must notify the U.S. Food and Drug Administration (FDA) 30 days in advance if it seeks to advertise cigarettes or smokeless tobacco in a medium other than: in periodicals or other publications; on billboards, posters, and placards; or in promotional material such as direct mail or point-of-sale material, including audio or video presented at the point of sale. The notice to the FDA must discuss the extent to which the advertising or labeling may be seen by people under the age of 18.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the FDA shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf. In addition, retailers may access training materials from the FDA - such as posters and an age-calculating smartphone application - to assist them with age identification. Available at www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Retail/ucm237741.htm.

72. EQUAL TREATMENT OF RETAIL OUTLETS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387m

SCOPE: The U.S. Department of Health and Human Services (HHS) must issue rules requiring that retail establishments whose primary business is the sale of tobacco products must comply with all advertising restrictions that apply to retail establishments accessible to people under 18 years of age.

Note: This provision ensures that tobacco stores are subject to the same advertising restrictions as other retailers, such as supermarkets and convenience stores.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.



SPONSORSHIP, BRANDING, AND SAMPLING



73. SPONSORSHIP: THE MSA

Master Settlement Agreement (MSA) Sections II(j), III(c), VII(c)

Smokeless Tobacco Master Settlement Agreement (STMSA) Sections II(h), III(c), VII(c)

SCOPE: Under the MSA and STMSA, each settling tobacco company may engage in only 1 brand name sponsorship in any 12-month period. A national or multistate series or tour (eg, Skoal Racing) will count as 1 brand name sponsorship. The MSA and STMSA prohibit brand name sponsorship of events in which the intended audience is comprised of a significant percentage of youth (*significant percentage* is not defined); events in which paid contestants are under the age of 18; concerts; and football, basketball, soccer, baseball, or hockey games.

The MSA and STMSA prohibit naming a stadium or arena with a brand name and prohibit tobacco companies from paying football, basketball, baseball, soccer, or hockey leagues in exchange for use of a brand name.

EXCEPTION: The MSA and STMSA exempt the following sponsorship activities:

- Events at adult-only facilities (where minors are not present and cannot see inside);
- Vehicles bearing a brand name used in a brand-sponsored event;
- Billboards for the brand-sponsored event at the site of the event for 90 days before and 10 days after the event; and
- Corporate name sponsorship.

Note: The corporate name sponsorship exception allows sponsorship in the name of the parent company (eg, Altria) but not in the name of the brand (eg, Marlboro).

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

74. SPONSORSHIP: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Section 1140.34(c)

SCOPE: Manufacturers, distributors, or retailers may not directly or indirectly sponsor any athletic, social, or cultural event, or any entry or team in any event, in the brand name, logo, symbol, motto, selling message, recognizable color or pattern of colors, or anything identifiable with any brand of cigarettes or smokeless tobacco.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the prohibition on tobacco sponsorships improperly regulated speech and violated the First Amendment.

EXCEPTION: Manufacturers, distributors, or retailers are allowed to sponsor events in the name of the corporation that manufactures the tobacco product if: (1) both the corporate name and the corporation were registered and in use in the United States prior to January 1, 1995; and (2) the corporate name does not include anything identifiable with any brand of cigarettes or smokeless tobacco.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the U.S. Food and Drug Administration (FDA) shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation.
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least

5 violations of the Tobacco Control Act, each of the retailer's 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer's 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf.

75. BRAND NAME MERCHANDISE

Master Settlement Agreement Sections III(f), III(c)(3)(C), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(f), III(c)(3)(D), VII(c)

SCOPE: The settling tobacco companies are prohibited from selling or distributing apparel (eg, hats, T-shirts) or other merchandise that bears a tobacco product brand name.

EXCEPTION: These provisions do not apply to apparel or other merchandise distributed or sold by a third party at the site of a brand name sponsorship, under limited circumstances. These provisions do not apply to coupons or other items used by adults solely in connection with the purchase of tobacco products; and do not apply to apparel or other merchandise used within an adult-only facility that is not distributed (by sale or otherwise) to any member of the general public.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

76. BRAND NAME LIMITATIONS

Master Settlement Agreement Sections III(j), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(j), VII(c)

SCOPE: Brands of the settling tobacco companies may not be named after any nationally recognized brand or trade name of a non-tobacco product or any nationally recognized sports team, entertainment group, or celebrity.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

77. BRAND NAME LIMITATIONS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1

21 Code of Federal Regulations Section 1140.16(a)

SCOPE: Brands of cigarettes or smokeless tobacco may not include a trade or brand name of a non-tobacco product.

EXCEPTION: This provision does not apply to a tobacco product whose trade or brand name was both a tobacco product and a non-tobacco product that were sold in the United States on January 1, 1995.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Note: In May 2010, after the U.S. Food and Drug Administration (FDA) became aware of concerns regarding the constitutionality of this provision, the FDA announced how it would exercise its enforcement discretion with respect to 21 Code of Federal Regulations Section 1140.16(a). *Guidance for Industry and FDA Staff: Enforcement Policy Concerning Certain Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco* (May 2010), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM210766.pdf. The FDA voluntarily suspended enforcement of this provision while the rule is under consideration as long as (1) the trade or brand name of the cigarettes or smokeless tobacco product was registered, or the product was marketed, in the United States on or before June 22, 2009; or (2) the first marketing or registration in the United States of the tobacco product

occurs before the first marketing or registration in the United States of the non-tobacco product bearing the same name, as long as the tobacco and non-tobacco product are not owned, manufactured, or distributed by the same, related, or affiliated entities. On November 17, 2011, the FDA published a proposed rule to amend Section 1140.16(a). 76 Fed. Reg. 71,281 (Nov. 17, 2011). The FDA noted that it was aware of concerns raised by the current rule, including its constitutionality, and that, after considering those concerns, it was proposing to narrow the scope of the rule. At the time of publication, the proposal was pending and the FDA's enforcement discretion policy in its 2010 guidance was still in effect. *Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents* (Aug. 2013), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM248241.pdf.

78. PRODUCT PLACEMENT

Master Settlement Agreement Sections III(e), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(e), VII(c)

SCOPE: The settling tobacco companies may not pay for product placement in movies, television, theater, video games, music videos, concerts, or other performances.

EXCEPTION: These provisions do not apply to media shown in an adult-only facility (where the operator ensures that no minors are present), media not intended for distribution to the public, or instructional media concerning non-conventional cigarettes if viewed only by adult smokers.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

79. SAMPLES, COUPONS, AND PROMOTIONAL OFFERS: CALIFORNIA LAW

California Health and Safety Code Section 118950

California Code of Regulations Title 18, Section 4081

SCOPE: Free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, rebate offers, gift certificates, gift cards, or “other similar offers” for such products) may not be distributed on public grounds or on private grounds that are open to the public.

Note: An example of *public grounds* is a state-owned or county-owned fairground. Examples of *private grounds that are open to the public* are most racetracks or retail outlets.

Note: Every package of legally issued samples must be clearly marked as a sample and must contain the wording “Not for sale. Applicable state tax has been paid.” Local governments may pass local laws that are stricter than the state law.

Note: Many local jurisdictions in California have adopted ordinances prohibiting tobacco product sampling. In addition, at the time of publication, at least 2 local jurisdictions outside of California—Providence, RI, and New York City—had adopted a prohibition on redeeming tobacco product coupons and multipack discounts. The Providence, RI, ordinance was challenged in federal court and upheld in *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013), and the New York City ordinance was similarly challenged in federal court and upheld. *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of New York*, 27 F.Supp.3d 415 (S.D.N.Y. 2014).

EXCEPTION: This law applies only to cigarettes and smokeless tobacco products (eg, it does not apply to cigars). The law exempts product samples, coupons, coupon offers, rebate offers, gift certificates and gift cards in connection with the sale of another item, including tobacco products, lighters, magazines, or newspapers.

The law does not apply to locations where minors are prohibited by law or to public grounds leased for a private function where minors are denied access to the private function by a peace officer or licensed security guard. Nor does the law apply to a separate distribution area on private property that is open to the public where minors are denied access by a peace officer or licensed security guard. However, the area must be enclosed so as to prevent persons outside the area from seeing the distribution unless they undertake unreasonable efforts to see inside the area.

ENFORCEMENT: The state Attorney General may enforce this law.

PENALTY: Violators are liable for a civil penalty of not less than \$200 for a first item distributed, \$500 for a second item, and \$1,000 for each item after that. Each distribution of a single package, coupon, coupon offer, gift certificates, gift cards, or other similar offers, or rebate offer to an individual member of the general public in violation of this section shall be considered a separate violation.

California Business and Professions Code Sections 17534, 17535, 17537.3

SCOPE: Free samples of smokeless tobacco products may not be distributed within a 2-block radius of any premises or facility whose primary purpose is directed toward persons under the age of 21, including schools, clubhouses, and youth centers, when those premises are being used for their primary purposes.

Promotional offers of smokeless tobacco that require proof of purchase are prohibited unless the offer states that it is not available to individuals under 21 years of age. Mail-in and telephone requests for promotional offers must include appropriate efforts to ensure that the person is at least 21 years old, such as asking for the purchaser’s birth date.

Mailing unsolicited samples of smokeless tobacco as part of an advertising program is prohibited (see entry 44 for more information on home delivery of unsolicited tobacco products).

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1. Actions for injunction may be brought by the state Attorney General, district attorney, county counsel, city attorney, city prosecutor, or a private individual.

PENALTY: Violators (which can be a person, firm, corporation, partnership or association or any employee or agent thereof) are guilty of a misdemeanor.

80. SAMPLES, COUPONS, AND PROMOTIONAL OFFERS: MSA/STMSA

Master Settlement Agreement Sections III(g), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(g), VII(c)

SCOPE: The settling tobacco companies are prohibited from distributing free samples of cigarettes and smokeless tobacco products.

EXCEPTION: This prohibition does not apply to the distribution of tobacco products in an adult-only facility (where the operator ensures that no minors are present). Nor does this prohibition apply to tobacco products provided to adults in exchange for proof of purchase or through special promotions such as “2-for-1” offers, or for consumer testing.

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

81. SAMPLES: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1, 387f(d)

21 Code of Federal Regulations Sections 1100.3, 1140.16(d)

SCOPE: Manufacturers, distributors, and retailers may not distribute (or cause to be distributed) free samples of tobacco products (for more information about products newly covered by the deeming rule, see the overview on page 10).

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the prohibition on tobacco sponsorships improperly regulated speech and violated the First Amendment.

Note: In October 2017, the FDA released additional guidance for the industry, clarifying the applicability of the prohibition on free tobacco product samples, including the effects on

coupons, membership and rewards programs, contests, and games of chance. Available at www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM579648.pdf.

EXCEPTION: This prohibition does not apply to the distribution of free samples of smokeless tobacco in a qualified adult-only facility (QAF), but an adult consumer may only leave with 1 package (15 grams) of smokeless tobacco. A QAF must:

1. Have a law enforcement officer present to check photo ID and ensure that access is limited only to adults;
2. Be a temporary structure created for the purpose of distributing free samples of smokeless tobacco;
3. Be enclosed by a barrier that prevents people from outside the facility from seeing inside the facility unless they make an unreasonable effort to do so;
4. Not sell, serve, or distribute alcohol;
5. Not be located adjacent to or immediately across from an area used primarily for youth-oriented marketing, promotional, or other activities; and
6. Not have exterior advertising other than brand names in conjunction with a word to identify the QAF.

QAFs are not permitted at any football, basketball, baseball, soccer, or hockey event. The Secretary of Health and Human Services has the authority to add additional types of events to this list in the future.

Note: The QAF exception is limited to smokeless tobacco products that contain cut, ground, powdered, or leaf tobacco and that are intended to be placed in the oral or nasal cavity.

Note: This provision does not affect the authority of a state or local government to prohibit or otherwise restrict the distribution of free samples of smokeless tobacco.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Retailers who violate this provision and have a training program in place that complies with standards developed by the U.S. Food and Drug Administration (FDA) shall be subject to the following penalties, not to exceed:

- A warning letter for a first violation;
- \$250 for a second violation within a 12-month period;
- \$500 for a third violation within a 24-month period;

- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Retailers who violate this provision and do not have an approved training program in place shall be subject to civil penalties not to exceed:

- \$250 for a first violation;
- \$500 for a second violation within a 12-month period;
- \$1,000 for a third violation within a 24-month period;
- \$2,000 for a fourth violation within a 24-month period;
- \$5,000 for a fifth violation within a 36-month period; and
- \$10,000 for a sixth or subsequent violation within a 48-month period.

Note: In June 2014, the FDA updated its guidance regarding Tobacco Control Act penalties. The guidance discusses the procedures that apply if the FDA seeks civil money penalties and describes the amount of the penalties that the FDA may assess. If a retailer has “repeated violations” of the Tobacco Control Act, the FDA may impose a “no-tobacco-sale order” prohibiting the retailer from selling tobacco products for a specified period. The FDA interprets “repeated violation” to mean the following: a retailer incurs at least 5 violations of the Tobacco Control Act, each of the retailer’s 5 violations represents the second or subsequent violation of a particular requirement, and each of the retailer’s 5 violations occurs within a 36-month period. The FDA states that it generally does not intend to seek a civil money penalty or no-tobacco-sale order the first time an inspection identifies violations by a retailer; the FDA instead intends to send the retailer a warning letter after the first violation. *Guidance for FDA and Tobacco Retailers: Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM252955.pdf. The FDA provided additional information on civil penalties in December 2016. Available at www.fda.gov/downloads/tobaccoproducts/labeling/rulesregulationsguidance/ucm447310.pdf.

At the time of publication, the FDA had not yet established standards for retailer training programs. Until the FDA establishes standards for retailer training programs, all retailers who violate this provision are treated as though they have an approved retailer training program in place. However, until the FDA establishes these standards, having a training program in place can nevertheless lead the FDA to further reduce the penalty for violations of the Tobacco Control Act. *Guidance for Industry: Tobacco Retailer Training Programs* (Revised) (June 2014), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM218906.pdf. In addition, the FDA has produced materials for retailers—such as posters and information on free sample restrictions—to help them comply with these rules. www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Retail/ucm237741.htm.

82. PROOF-OF-PURCHASE GIFTS

Master Settlement Agreement Sections III(h), VII(c)

Smokeless Tobacco Master Settlement Agreement Sections III(h), VII(c)

SCOPE: The settling tobacco companies are prohibited from giving gifts in exchange for the purchase of a tobacco product (including coupons or credits for a purchase) unless the recipient provides sufficient proof that he or she is an adult (eg, a photocopy of a driver's license or other government-issued ID card).

ENFORCEMENT: The state Attorney General (AG) is authorized to enforce these provisions. Suspected violations can be reported to the AG by calling (916) 565-6486 or by completing an online complaint form at <http://ag.ca.gov/tobacco/contact.php>.

PENALTY: The AG may seek a court order to enforce these provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

83. LOTTERY

26 United States Code Sections 5723(c), 5762(b)

SCOPE: Nothing that is or represents a ticket, chance, share, or an interest in a lottery shall be placed in or on any package of tobacco products, processed tobacco, or cigarette papers or tubes.

ENFORCEMENT: Not specified.

PENALTY: For each offense, violators are subject to a fine of up to \$1,000 and/or imprisonment for up to 1 year.

84. SALE AND DISTRIBUTION OF NON-TOBACCO ITEMS OR SERVICES: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387a-1

21 Code of Federal Regulations Sections 1100.3, 1140.34(a)

SCOPE: Manufacturers and distributors of imported cigarettes or smokeless tobacco may not directly or indirectly market, license, distribute, or sell any item or service bearing anything identifiable with any brand of cigarettes or smokeless tobacco, such as the brand name, logo, symbol, motto, or recognizable color or pattern of colors.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the prohibition on the use of cigarette and smokeless tobacco branding improperly regulated speech and violated the First Amendment.

EXCEPTION: This provision does not apply to the marketing of cigarettes, smokeless tobacco, or roll-your-own tobacco. This provision does not apply to manufacturers of domestic cigarettes or smokeless tobacco.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

85. JOINT MARKETING: THE TOBACCO CONTROL ACT

21 United States Code Sections 321(rr), 333, 372

SCOPE: A tobacco product may not be marketed with any other product regulated by the U.S. Food and Drug Administration (FDA), including a drug, food, cosmetic, medical device, or dietary supplement.

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Commonwealth Brands, Inc. v. United States*, 678 F.Supp.2d 512 (W.D.Ky. 2010), overruled in part on other grounds by *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the prohibition on joint marketing improperly regulated speech and violated the First Amendment.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.



WARNING LABELS



86. CIGARETTE WARNING LABELS

15 United States Code Sections 1333, 1334, 1338, 1339

SCOPE: Under the Federal Cigarette Labeling and Advertising Act, cigarettes may not be manufactured, packaged, or imported for sale or distribution unless they bear one of the Surgeon General’s warning labels. It is also illegal for manufacturers or importers to advertise cigarettes without one of the warning labels.

Note: State and local governments may not create additional cigarette label warning requirements beyond those required by federal law.

ENFORCEMENT: The U.S. Federal Trade Commission is responsible for approving labeling plans. The U.S. Attorney General may seek an injunction in federal court against violators to prevent future violations of this law or restrain current violations.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of not more than \$10,000.

21 United States Code Section 387n

15 United States Code Sections 1333, 1336, 1338, 1339

SCOPE: All cigarette packages made, sold, or distributed within the United States, and all related advertising and marketing, shall be required to bear 1 of 9 specified warnings regarding associated health risks. The warning labels must adhere to placement and typography restrictions. (For example, the warnings must cover the top 50% of front and rear panels of cigarette packages, and must cover at least 20% of a newspaper, magazine, or poster advertisement and be in the predominant language of the publication.) The U.S. Department of Health and Human Services (HHS) can make changes to the warning label requirements upon a finding that such a change would promote greater public understanding of the risks associated with the use of tobacco products.

Note: HHS issued regulations on June 22, 2011, specifying that the warning labels would include 9 specific graphic images and 9 printed warnings depicting the negative consequences of smoking. The graphic warning label requirements were scheduled to go into effect in September 2012; however, the warning label requirement was the subject of 2 separate lawsuits. Two federal appellate courts issued conflicting rulings regarding the constitutionality of the graphic warning label requirement. The Court of Appeals for the Sixth Circuit held that the label requirement did not violate tobacco companies’ First Amendment rights, finding that the graphic warnings were reasonably related to the government’s interest in preventing consumer deception. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). By contrast, the Court of Appeals for the District of Columbia held that the warning labels proposed by the U.S. Food and Drug Administration (FDA) violated tobacco companies’ First Amendment rights, finding that the government failed to show that the labels would lower smoking rates. *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). On March 14, 2013, the U.S. Department of Justice declined to appeal the D.C. Circuit ruling. The FDA

indicated that it will develop a second set of labels that will address the issues identified by the court. As a result, the agency indefinitely postponed implementation of the graphic warning labels.

EXCEPTION: This provision does not apply to tobacco products other than cigarettes or to foreign distribution of cigarettes. A retailer of cigarettes will not be in violation if the packaging contains a warning label, was supplied by a licensed manufacturer or distributor, and was not materially altered by the retailer.

ENFORCEMENT: The U.S. Attorney General is authorized to enforce this provision, acting through several U.S. attorneys. A violation is also considered an unfair or deceptive act or practice and subject to enforcement under the Federal Trade Commission Act.

PENALTY: A violation is considered a misdemeanor, and a conviction will subject the violator to a fine of \$10,000 or less.

Note: In another ruling involving the First Amendment, a federal court of appeals affirmed the text of several corrective statements that tobacco companies are required to publish in various media outlets. *United States v. Philip Morris USA Inc.*, 801 F.3d 250, 254 (D.C. Cir. 2015). After years of litigation, the companies were ordered to publish the corrective statements once the court found that the companies deceived the public regarding the addictiveness and health effects of smoking. Finding that these corrective statements were factual and uncontroversial, the appeals court rejected the companies' arguments that the statements violated their First Amendment rights. Examples of the statements that were finally approved on remand include "Smoking is highly addictive" and "There is no safe cigarette." *United States v. Philip Morris USA Inc.*, No. CA 99-2496 (D.D.C. Feb. 8, 2016). On October 5, 2017, the D.C. District Court issued remand order 72 (Civil Action No. 99-CV-2496), ordering the tobacco companies to issue corrective statements in television ads and print and online newspaper ads. A future order will address the manner and timing of package inserts and website advertisements.

The statements concern 5 topic areas: the adverse health effects of tobacco; the addictiveness of smoking and nicotine; the lack of health benefits of modified risk tobacco products such as ultra-light or mild cigarettes; the manipulation of cigarettes by the tobacco companies for optimum nicotine delivery; and the adverse health effects of secondhand smoke. The tobacco companies cannot alter, modify, or add to the ordered statements. The ads must also appear in Spanish. The full text of the statements can be found at www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doj/corrective_statements/2017_10_corrective_statements.pdf. The television ads can be found at www.tobaccofreekids.org/media/2017/corrective-statements.

The newspaper and television ads began running on November 26, 2017. The newspaper ads appeared in both the online and print editions of the Sunday paper on five specified dates over the course of 14 weeks. The television ads must air five times a week between 7 pm and 10 pm on ABC, NBC, or CBS for a total of one year. Tobacco companies may also place one-third of the ads on other networks with an audience at least as large as

the primetime slots, if they are expected to have more African American viewers than the primetime slot on a major network.

87. TOBACCO PRODUCT LABELS AND ADVERTISING WARNINGS: THE TOBACCO CONTROL ACT

21 United States Code Section 387a(b), 387c, 387n, 387f(d)

21 Code of Federal Regulations Sections 1143.3(a), (b)

SCOPE: As of August 10, 2018, the U.S. Food and Drug Administration’s (FDA) deeming rule requires a nicotine addictiveness warning on all packages and advertisements for cigarette tobacco, roll-your-own tobacco, and covered tobacco products (other than cigars), such as pipe tobacco, hookah tobacco, gels, dissolvables, electronic nicotine delivery systems containing anything made or derived from tobacco (see the overview on page 10 for more information about the FDA’s deeming rule). The warning must read “WARNING: This product contains nicotine. Nicotine is an addictive chemical.” For covered tobacco products that do not contain nicotine, manufacturers must submit a self-certification to the FDA and their products must bear a warning label that reads as follows: “This product is made from tobacco.” These warnings must adhere to placement and typography restrictions. As of September 11, 2018, all distribution of products without such warnings must stop. Additionally, retailers may not sell noncompliant products as of August 10, 2018.

Note: As of May 10, 2018, all packaged tobacco products are also subject to origin labeling requirements (see entry 54 for more information).

EXCEPTIONS: If a product package is too small or otherwise unable to accommodate a label, it is exempt from these requirements only if the required information or label appears on the carton or other outer container or wrapper. If the carton, outer container, or wrapper does not have sufficient space to display the information, the required information may be located on a tag permanently affixed to the package.

These provisions do not apply to cigars or tobacco products sold outside the United States. A retailer of tobacco products will not be in violation of this provision if the packaging contains a warning label; was supplied by a licensed manufacturer, importer, or distributor; and was not materially altered by the retailer. If a retailer meets safe harbor requirements, they may have a defense for selling noncompliant products. A retailer may not be penalized for selling noncompliant products if all of the following “safe harbor” requirements are met: (1) the product contains a health warning; (2) the product was supplied to the retailer by a distributor, manufacturer, or importer; and (3) the retailer has not altered the product in a material way.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

88. SMOKELESS TOBACCO WARNING LABELS

15 United States Code Sections 4402, 4404, 4405

SCOPE: Smokeless tobacco products may not be manufactured, packaged, or imported for sale or distribution unless they bear one of the warning labels listed in the law. It is also illegal for manufacturers, packagers, or importers to advertise smokeless tobacco products without one of the warning labels.

ENFORCEMENT: The U.S. Federal Trade Commission (FTC) is responsible for approving labeling plans. The U.S. Attorney General or the FTC may seek an injunction in federal court against violators to prevent future violations of this law.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of not more than \$10,000.

89. SMOKELESS TOBACCO LABEL AND ADVERTISING WARNINGS: THE TOBACCO CONTROL ACT

21 United States Code Section 387n

15 United States Code Sections 4402, 4404, 4405

21 Code of Federal Regulations Section 1143.3(a)

SCOPE: All smokeless tobacco product packages made, sold, or distributed within the United States must bear 1 of 4 specified warnings regarding associated health risks:

- **WARNING:** This product can cause mouth cancer.
- **WARNING:** This product can cause gum disease and tooth loss.
- **WARNING:** This product is not a safe alternative to cigarettes.
- **WARNING:** Smokeless tobacco is addictive.

The warning labels must adhere to placement and typography restrictions. The U.S. Department of Health and Human Services can make changes to the warning label requirements upon a finding that such a change would promote greater public understanding of the risks associated with the use of smokeless tobacco products.

Note: As of May 10, 2018, the U.S. Food and Drug Administration's (FDA's) deeming rule also requires nicotine warning labels for covered smokeless tobacco products (see entry 88 for more information about these labels; see the overview on page 10 for more information about the FDA's deeming rule).

Note: As of May 10, 2018, all packaged tobacco products are also subject to origin labeling requirements (see entry 54 for more information).

Note: This provision in the Tobacco Control Act, among others, was challenged in federal court and upheld. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 1996 (2013). The lawsuit alleged that the required tobacco

label and advertising warnings improperly regulated speech and violated the First Amendment.

EXCEPTION: This provision does not apply to tobacco products other than smokeless tobacco or to foreign distribution of smokeless tobacco products. A retailer of smokeless tobacco will not be in violation if the packaging contains a warning label, was supplied by a licensed manufacturer or distributor, and was not materially altered by the retailer.

ENFORCEMENT: The U.S. Attorney General is authorized to enforce this provision, acting through several U.S. attorneys. A violation is also considered an unfair or deceptive act or practice and subject to enforcement under the Federal Trade Commission Act.

PENALTY: A violation is considered a misdemeanor, and a conviction will subject the violator to a fine of \$10,000 or less.

90. CIGAR WARNING LABELS

FTC Agreements, File Numbers 0023199–00023205

SCOPE: Pursuant to agreements between the U.S. Federal Trade Commission (FTC) and the 7 largest cigar companies (comprising approximately 95% of the U.S. cigar market), every signing company’s cigar packages and advertisements in the United States must clearly and prominently display 1 of 5 Surgeon General’s health warnings listed in the agreement.

Note: For more information about this agreement, see the FTC’s website at www.ftc.gov/news-events/press-releases/2000/06/ftc-announces-settlements-requiring-disclosure-cigar-health-risks.

ENFORCEMENT: The FTC is charged with enforcing this agreement.

PENALTY: Not specified.

California Health and Safety Code Sections 104550–104552

SCOPE: Cigar manufacturers or importers must label each retail package of cigars with one of the warnings listed in the law. Display boxes or containers used to sell individual cigars must be clearly labeled.

Note: The state Attorney General (AG) has agreed that any cigar company that signed an agreement with the FTC regarding warning labels and that remains in compliance with terms of that agreement is deemed to be in compliance with Health and Safety Code Sections 104550–104552.

EXCEPTION: Warning labels are not required on the cellophane wrappers, tubes, or similar wrappings in which individual cigars are sold.

ENFORCEMENT: Actions to enforce this section may be brought by the AG, any district attorney, any city attorney of a city with a population greater than 750,000, or, with permission of the district attorney, by a city prosecutor in any city having a full-time city prosecutor.

PENALTY: Violators are subject to a civil penalty up to \$2,500 per day for each violation.

21 United States Code Sections 387a(b), 387c, 387f(d)

21 Code of Federal Regulations Sections 1143.5(a), (b)

SCOPE: As of August 10, 2018, the U.S. Food and Drug Administration's (FDA) deeming rule requires warning labels on all cigar packaging and advertisements (see the overview on page 10 for more information about the FDA's deeming rule). As of September 11, 2018, all distribution of products without the requisite warnings must stop. For cigars sold individually without packaging, the warning statements must be displayed at all points of sale as of August 10, 2018. All package warnings and signs must adhere to placement and typography restrictions. Packages must bear 1 of these 6 warnings:

- **WARNING:** Cigar smoking can cause cancers of the mouth and throat, even if you do not inhale.
- **WARNING:** Cigar smoking can cause lung cancer and heart disease.
- **WARNING:** Cigars are not a safe alternative to cigarettes.
- **WARNING:** Tobacco smoke increases the risk of lung cancer and heart disease, even in nonsmokers.
- **WARNING:** Cigar use while pregnant can harm you and your baby; or **SURGEON GENERAL WARNING:** Tobacco Use Increases the Risk of Infertility, Stillbirth and Low Birth Weight.
- **WARNING:** This product contains nicotine. Nicotine is an addictive chemical.

By August 10, 2017, or 12 months before advertising or commercially marketing cigars (whichever is later), retailers, manufacturers, importers, and distributors must submit plans to the FDA for the rotation and distribution of these warnings.

Note: As of August 10, 2018, all packaged tobacco products are also subject to origin labeling requirements (see entry 54 for more information).

EXCEPTIONS: A retailer of tobacco products will not be in violation of this provision if the product packaging was supplied by a licensed manufacturer, importer, or distributor; contains a warning label; and was not materially altered by the retailer.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Note: Litigation on the required warning labels is pending in the D.C. District Court. Two lawsuits (*Cigar Association of America et al. v. FDA*, No. 1:16-cv-1460 (D.D.C.); *En Fuego Tobacco Shop LLC v. FDA*, No. 4:18-cv-00028 (E.D. Tex.)) alleging First Amendment and Administrative Procedures Act violations were recently consolidated. On July 5, 2018, the D.C. District Court issued an order enjoining the FDA from enforcing the health warning

requirements for cigars and pipe tobacco pending disposition of the plaintiffs' appeal. Order, *Cigar Association of America et al. v. FDA*, No. 1:16-cv-01460 (D.D.C. July 5, 2018).

Note: In September 2017, the FDA released guidance that for packages that are too small to accommodate the exact size and placement requirements, it does not intend to take enforcement action if the required warnings are placed on the carton, other outer container, wrapper, or on a tag permanently attached to the carton. Available at www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM536924.pdf.

91. E-CIGARETTE AND OTHER LIQUID NICOTINE EXPOSURE WARNINGS

Advance Notice of Proposed Rulemaking, 21 Code of Federal Regulations Parts 1100, 1140, and 1143

21 Code of Federal Regulations Sections 1100.3, 1140.14(b)

SCOPE: In July 2015, the U.S. Food and Drug Administration (FDA) issued an advance notice of proposed rulemaking about new packaging requirements for liquid nicotine, nicotine-containing e-liquid(s), and other tobacco products. The agency requested information about possible nicotine exposure warnings and child-resistant packaging for these products, and potentially for novel tobacco products like dissolvables, lotions, gels, and drinks. At the time of publication, the FDA had issued only an advance notice of proposed rulemaking. The docket for the advance notice and request for comments is available at www.regulations.gov/document?D=FDA-2015-N-1514-0090.

As of August 10, 2018, the FDA's deeming rule requires nicotine warning labels for parts of electronic nicotine delivery systems containing anything made or derived from tobacco (see entry 87 for more information about these labels; see the overview on page 10 for more information about the FDA's deeming rule). The FDA is currently message testing potential warnings for e-cigarettes.

Note: As of July 26, 2016, the Child Nicotine Poisoning Prevention Act regulates the packaging of liquid nicotine, but it is not intended to limit or otherwise affect the authority of the Secretary of Health and Human Services to regulate, issue guidance on, or take action regarding any nicotine-related products (see entry 47 for more information). The Act makes it clear that the FDA can move forward with this advance notice of proposed rulemaking and with any other regulations regarding the manufacture, marketing, sale, distribution, importation, or packaging of nicotine-related products.

ENFORCEMENT: Not specified.

PENALTY: Not specified.



TAXATION, LICENSING, AND REPORTING



92. FEDERAL TOBACCO TAX

26 United States Code Sections 5701–5704, 5761–5763

SCOPE: The manufacturer or importer of tobacco products shall pay taxes in the amount specified for each type of tobacco product, including cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco. The taxes on all tobacco products increased on April 1, 2009. The federal tax on cigarettes is now \$1.01 per 20 pack. The federal taxes on cigars and smokeless tobacco are calculated according to weight.

EXCEPTION: There are 4 categories of exemptions from the federal tobacco tax: tobacco furnished for employee use or experimental purposes; certain tobacco products transferred or removed from domestic factories and export warehouses; certain tobacco products released from customs custody; and tobacco products exported and returned.

ENFORCEMENT: The federal tax laws are enforced by federal law enforcement agencies.

Note: In July 2012, Congress amended the federal Internal Revenue Code’s definition of “manufacturer of tobacco products.” The revised definition adds retailers who, for commercial purposes, provide consumers with access to roll-your-own tobacco machines. These retailers now must pay the same federal excise taxes and comply with the same permitting processes as mass manufacturers. The amendment closes a tax loophole for retailers that allowed consumers to use high-speed machines to produce cartons of cigarettes that were similar to other mass-produced cigarettes. A “manufacturer of tobacco products” does not include a person who sells a roll-your-own tobacco machine to a consumer for personal home use.

Note: The federal tax status of the entity that provides consumers with access to roll-your-own tobacco machines (ie, nonprofit vs. for-profit) is not relevant in determining whether the entity is providing that access for a “commercial purpose.” Federal tax liability can apply to “nonprofit” organizations and “social clubs” that make these machines available. *Enforcement Efforts in Connection with Cigarette-Making Machines* (Aug. 2013), www.ttb.gov/announcements/ttb-announcement-cigarette-making-machines-announcement.pdf.

PENALTY: There are a range of civil and criminal penalties that attach to a failure to comply with the federal tobacco tax laws. In addition, any property intended for use in violating the federal tobacco tax laws is subject to forfeiture.

93. REPORTING REQUIREMENTS: THE JENKINS ACT

15 United States Code Sections 375–378

SCOPE: The Jenkins Act applies to cigarette and smokeless tobacco sellers who ship or advertise to buyers in another state who are not distributors. Such sellers must make 2 filings with the state into which they are shipping or advertising. First, sellers must file their name and address. Second, sellers must file a monthly report documenting every shipment

into the state. The report must include the name and address of each buyer, the brand, and the quantity shipped.

ENFORCEMENT: The Jenkins Act may be enforced by federal law enforcement agencies.

Note: Courts in 2 states have held that state law enforcement agencies may bring a civil action to enforce the Jenkins Act reporting requirements. *See Washington v. WWW. Dirtcheapcigs.com, Inc.*, 260 F. Supp. 2d 1048, 1053–55 (W.D. Wash. 2003); *Angelica Co. v. Goodman*, 276 N.Y.S.2d 766, 769 (1966). California Code of Civil Procedure Section 1021.10 authorizes the state of California to sue to enforce the Jenkins Act to the extent not expressly prohibited by federal law.

PENALTY: Violators are subject to criminal penalties of up to 3 years imprisonment. Violators are also subject to civil penalties in an amount not to exceed the greater of \$5,000 for a first violation and \$10,000 for a subsequent violation, or 2% of their gross sales of cigarettes or smokeless tobacco during the 1-year period ending on the date of the violation.

94. REPORTING REQUIREMENTS: THE PACT ACT

15 United States Code Sections 375, 376a, 377, 378

18 United States Code Section 1716E

SCOPE: The Prevent All Cigarette Trafficking Act (the PACT Act) requires cigarette or smokeless tobacco product sellers to make the filings specified in the Jenkins Act with the U.S. Attorney General, who will compile a list of delivery sellers that have not registered or not complied with this law. Common carriers (eg, UPS, FedEx) are prohibited from delivering packages for delivery sellers that are on the list.

ENFORCEMENT: The U.S. Attorney General shall administer and enforce this chapter.

PENALTY: Violators are subject to criminal penalties of up to 3 years imprisonment. Violators are also subject to civil penalties in an amount not to exceed the greater of \$5,000 for a first violation and \$10,000 for a subsequent violation, or 2% of their gross sales of cigarettes or smokeless tobacco during the 1-year period ending on the date of the violation.

Common carriers or other delivery services that intentionally violate the new law are subject to civil penalties in an amount not to exceed \$2,500 for a first violation and \$5,000 for any violation within 1 year of a prior violation.

95. CALIFORNIA STATE TOBACCO TAX

California Revenue and Taxation Code Sections 30001–30483

California Health and Safety Code Sections 104350–104480, 104500–104545, 130100–130155

SCOPE: Under the Cigarette and Tobacco Products Tax Law, California imposes 4 taxes on the distribution of cigarettes and other tobacco products, including:

- A tax of 12 cents per package of 20 cigarettes, of which 2 cents are earmarked for breast cancer research and control.
- A Proposition 99 surtax of 25 cents per package of 20 cigarettes (with an equivalent surtax on other tobacco products), all of which is allocated to the Cigarette and Tobacco Products Surtax Fund. The revenues are earmarked for tobacco health education, tobacco related disease research, health care for medically indigent families, and certain types of environmental programs. The revenues are deposited according to the following formula: 20% in the Health Education Account; 35% in the Hospital Services Account; 10% in the Physician Services Account; 5% in the Research Account; 5% in the Public Resources Account; and 25% in the Unallocated Account. This surtax became effective on January 1, 1989. Proposition 99 funds are allocated to school-based programs through a single competitive grant process for tobacco education and cessation programs for grades 6 through 12.
- A Proposition 10 surtax of 50 cents per package of 20 cigarettes (with an equivalent surtax on other tobacco products), all of which is allocated to the California Children and Families Program to support early childhood development programs. This surtax became effective on January 1, 1999.
- Effective April 1, 2017, a Proposition 56 surtax of 2 dollars per package of 20 cigarettes. Other tobacco products, including electronic cigarettes, are taxed on the basis of the wholesale cost of the product at a rate set by the California Department of Tax and Fee Administration (CDTFA). More information on the wholesale cost can be found here: www.cdtfa.ca.gov/taxes-and-fees/cig-n-tob-prod-tax-faq.htm.

Distributors are responsible for paying state cigarette taxes through the use of tax stamps or meter impressions (see entry 96). Non-cigarette tobacco products are subject to a surtax that is set annually by the California Department of Tax and Fee Administration (CDTFA). The surtax rate is calculated to be equivalent to the total tax on cigarettes. Distributors are responsible for paying state tobacco taxes.

EXCEPTION: Tobacco taxes do not apply to:

- Sales to armed services;
- Sales to the U.S. Veterans' Administration;
- Distributions that are exempt from taxation under federal tax law;
- Distributions by a manufacturer to a licensed distributor;
- Sales to a law enforcement agency for use in criminal investigations;
- Sales to a common carrier engaged in interstate or foreign commerce;
- Sales by the original importer to a licensed distributor;
- Certain sales or gifts to veterans; or

- Use or consumption of untaxed cigarettes brought into the state in a single lot of not more than 400 cigarettes (ie, 2 cartons) by an individual for his own use or consumption.

ENFORCEMENT: The CDTFA is authorized to enforce this law. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Anyone who intentionally engages in tax evasion under the Cigarette and Tobacco Products Tax Law is guilty of a misdemeanor if the amount of tax liability is less than \$25,000 in any 1-year period and is guilty of a felony if the amount of tax liability is \$25,000 or more in any 1-year period. Each felony offense is punishable by imprisonment and/or a fine of not less than \$5,000 and not more than \$20,000 (see entries 96-100, 108-110, and 113 for other penalties associated with the violation of state tobacco tax laws).

Note: State law expressly preempts local governments from imposing additional taxes on cigarettes and tobacco products.

96. CIGARETTE TAX STAMPS/METER IMPRESSIONS

California Revenue and Taxation Code Sections 30161–30165

California Code of Regulations Title 18, Sections 4048, 4054, 4081

SCOPE: Distributors pay cigarette taxes through the use of stamps or meter impressions. The California Department of Tax and Fee Administration (CDTFA) sells stamps and meter register settings for approved metering machines. A stamp or meter impression must appear on each package of cigarettes prior to distribution. Stamps shall be affixed to the bottom end of each standard package of 20 cigarettes or to the lid or top of each individual package of flats or rounds. Stamps may not be affixed to cartons or larger containers of cigarettes. Meter impressions shall be clearly imprinted on the bottom end of each standard package of 20 cigarettes. Meter impressions may not be imprinted on any other size of package, carton, or container of cigarettes. Stamps and meter impressions may not be affixed to any package of cigarettes if any one of the following occurs:

- The package does not comply with federal laws requiring health warnings (see entries 86 and 87);
- The package is labeled with wording indicating that the manufacturer did not intend that the product be sold in the United States;
- The package has been altered by adding or deleting federal warnings or labels;
- The package was imported into the United States after January 1, 2000, in violation of federal tobacco importation law, 26 United States Code Section 5754; or
- The package bears a brand name of a participating manufacturer in the Master Settlement Agreement and is imported by an entity other than the participating manufacturer.

EXCEPTION: Stamps or meter impressions need not appear on tobacco products legally given away as samples. However, the manufacturer giving away such samples must notify the CDTFA in advance of the sampling, report the distribution, and pay the tax due. Each package of samples must be clearly marked as a sample and must contain the wording “Not for sale. Applicable state tax has been paid.”

Note: Sampling is restricted under California and federal laws (see entries 79–81).

ENFORCEMENT: The CDTFA is authorized to enforce this law.

PENALTIES: The CDTFA shall revoke the license issued to a distributor under the Revenue and Taxation Code if the distributor violates this law (see entries 97–100, 108, and 110 for penalties that attach to various violations relating to tax stamps and meter impressions).

In addition, the penalties listed in entry 110 may apply.

97. MAIL ORDER/INTERNET CIGARETTE TAXATION

California Revenue and Taxation Code Section 30101.7

SCOPE: In order to sell cigarettes or tobacco products, including any article or product containing at least 50% tobacco, to a person in California over the internet, over the phone, or via any other non–face-to-face sales method, the seller must meet all of the following conditions: (1) it must fully comply with all of the requirements of the Jenkins Act (see entry 94); (2) it must obtain and maintain any applicable license under the California Business and Professions Code, as if the delivery-sale occurred entirely within California; and (3) it must comply with any applicable state law that imposes escrow or other payment obligations on tobacco product manufacturers.

The California Department of Tax and Fee Administration must provide information to the state Attorney General (AG) regarding a seller’s failure or attempt to comply with the Jenkins Act. The AG must provide an annual report to the Legislature regarding all actions taken to comply with, and enforce, the Jenkins Act. The AG may require a seller to report its delivery sales of cigarettes and tobacco products to consumers within California.

EXCEPTION: This law does not apply to cigars.

ENFORCEMENT: The AG, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this law.

PENALTY: Any violation of the above requirements is a misdemeanor, punishable by a maximum fine of \$5,000, imprisonment of up to 1 year in county jail, or both. Violators are also liable for a civil penalty of between \$1,000 and \$2,000 for a first violation; \$2,500 and \$3,500 for a second violation within a 5-year period; \$4,000 and \$5,000 for a third violation within a 5-year period; \$5,500 and \$6,500 for a fourth violation within a 5-year period; and \$10,000 for a fifth or subsequent violation within a 5-year period.

98. ILLICIT MARKET AND COUNTERFEIT CIGARETTES

California Revenue and Taxation Code Sections 30474, 30474.5

SCOPE: It is illegal to knowingly hold for sale, offer for sale, or sell any packages of cigarettes without the required tax stamp or meter impression (see entry 96 for a summary of the tax stamp and meter impression requirements).

ENFORCEMENT: The California Department of Tax and Fee Administration (CDTFA) and local law enforcement agencies are authorized to enforce this law.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine of no more than \$25,000 and/or imprisonment for up to 1 year. Moreover, violators shall pay 2 fines, each amounting to \$100 per violating carton of 200 cigarettes or portion thereof. The first fine shall be divided evenly between the local prosecuting jurisdiction and the CDTFA. The second fine shall be deposited in the Unlawful Sales Reduction Fund, which shall be used to support local grantees in multiagency efforts to reduce sales of untaxed cigarettes.

In addition, the penalties listed in entry 110 may apply.

California Revenue and Taxation Code Sections 30474.1, 30477

SCOPE: Notwithstanding any other provision of law, the sale or possession for sale of counterfeit cigarettes and tobacco products, including any article or product containing at least 50% tobacco, is illegal. Counterfeit tobacco products include tobacco products with false manufacturing labels and/or fraudulent tax stamps or meter impressions.

ENFORCEMENT: The California Department of Tax and Fee Administration and local law enforcement agencies are authorized to enforce this law.

PENALTY: The illegal products are subject to seizure and forfeiture, and violators are guilty of a misdemeanor. If less than two cartons are seized, violators are subject to a fine of up to \$5,000 and/or imprisonment not to exceed 1 year, as well as revocation of a distributor, wholesaler, or manufacturer license. If 2 or more cartons are seized, violators are subject to a fine of up to \$50,000 and/or imprisonment not to exceed 1 year, as well as revocation of a distributor, wholesaler, or manufacturer license (see entries 105–111 for more information on distributor, wholesaler, and manufacturer licenses).

In addition, the penalties listed in entry 110 may apply.

California Business and Professions Code Sections 22974.3(a), 22978.2(a)

SCOPE: It is illegal to possess, store, own, or sell a package of cigarettes that bears a counterfeit tax stamp or meter impression or that lacks a tax stamp or meter impression (see entry 96 for more information on tax stamps and meter impressions).

ENFORCEMENT: The California Department of Tax and Fee Administration and local law enforcement agencies are authorized to enforce this law.

PENALTY: The unstamped packages are subject to seizure and forfeiture, and violators are guilty of a misdemeanor punishable by the following:

- If fewer than 20 packages are seized: For a first violation, a fine of \$1,000 and/or imprisonment not to exceed 1 year; for a second or subsequent violation within 5 years, a fine of \$2,000 to \$5,000 and/or imprisonment not to exceed 1 year, and revocation of a retailer, distributor, or wholesaler license (see entries 105–111 for more information on retailer, distributor, and wholesaler licenses).
- If 20 or more packages are seized: For a first violation, a fine of \$2,000 and/or imprisonment not to exceed 1 year; for a second or subsequent violation within 5 years, a fine of \$5,000 to \$50,000 and/or imprisonment not to exceed 1 year, and revocation of a retailer, distributor, or wholesaler license (see entries 105–111 for more information on retailer, distributor, and wholesaler licenses).
- In addition, the penalties listed in entry 110 may apply.

California Business and Professions Code Sections 22974.3(b), 22978.2(b), 22981

SCOPE: It is illegal to possess, store, own, or sell a tobacco product on which tax is due. Retailers, distributors, wholesalers, and others in possession of tobacco products have the burden of proving that the tax has been paid.

ENFORCEMENT: The California Department of Tax and Fee Administration and local law enforcement agencies are authorized to enforce this law.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year. Illegal packages are subject to seizure and forfeiture.

In addition, the penalties listed in entries 109 and 110 may apply.

99. FORGERY OF STAMPS/METER IMPRESSIONS

California Revenue and Taxation Code Section 30473

SCOPE: It is illegal to fraudulently make, forge, alter, reuse, or counterfeit any tax stamp or meter impression (see entry 96 for more information on tax stamps and meter impressions).

ENFORCEMENT: The California Department of Tax and Fee Administration and local law enforcement agencies are authorized to enforce this law.

PENALTY: Violators are guilty of a felony and subject to imprisonment for 2, 3, or 4 years, and/or to a fine of not less than \$1,000 and not more than \$25,000.

In addition, the penalties listed in entry 110 may apply.

100. POSSESSION OR SALE OF FALSE STAMPS/METER IMPRESSIONS

California Revenue and Taxation Code Section 30473.5

SCOPE: It is illegal to possess, sell, offer to sell, buy, or offer to buy any false, fraudulent, or unaffixed tax stamps or meter impressions (see entry 96 for more information on tax stamps and meter impressions).

EXCEPTION: In the possession of a licensed distributor, “unaffixed stamps” do not include unused and unapplied stamps acquired from the California Department of Tax and Fee Administration (CDTFA) or its authorized agent.

ENFORCEMENT: The CDTFA and local law enforcement agencies are authorized to enforce this law.

PENALTY: Violators are guilty of a misdemeanor punishable by: (1) for false or fraudulent tax stamps or meter impressions in a quantity of less than 2,000, a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year; (2) for false or fraudulent tax stamps or meter impressions in a quantity of 2,000 or greater, a fine not to exceed \$50,000 and/or imprisonment not to exceed 1 year. The CDTFA shall destroy any stamps seized under this law.

In addition, the penalties listed in entry 110 may apply.

101. TOBACCO RETAILER LICENSE

California Business and Professions Code Sections 22971–22971.7, 22972–22973.3, 22980.2, 22981, 22990.7

SCOPE: Tobacco retailers must be licensed by the California Department of Tax and Fee Administration (CDTFA) for each tobacco retail location. For the purposes of this law, a retailer is someone who sells tobacco products from a building or a vending machine. Each retailer must apply for a 12-month license and pay a license fee of \$265 for each retail location. Beginning on and after January 1, 2017, retailers must apply to renew their licenses with a \$265 fee.

As of January 1, 2017, retailers of electronic smoking devices are required to comply with tobacco retailer licensing requirements under state law. Retailers may also sell these products under any existing, valid tobacco retailer license.

A tobacco retailer license is not assignable or transferable. A retailer may not obtain a license if the retailer has been issued a license that is currently suspended or revoked. Licenses will not be issued for any location where a license has been revoked in the last 5 years, unless a new owner obtained the property in an arms-length transaction.

The state licensing law does not preempt or supersede any local tobacco control law other than those related to the collection of state taxes. Local tobacco retailer licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law.

Note: The state licensing law focuses on protecting state revenue by targeting tax evasion. Local jurisdictions can pass tobacco retailer licensing laws that focus on protecting the public's health by, for example, providing for the suspension of tobacco retailer licenses for illegal sales to underage individuals.

Note: In 2012, the CDTFA implemented a new policy based on a legal opinion that determined that catering trucks, lunch wagons, and other mobile facilities cannot be licensed as retail locations. Tobacco products cannot be sold from a mobile location. *Mobile Sellers of Cigarettes and Tobacco Products* (undated), www.boe.ca.gov/pdf/Mobile_Seller_Letter.pdf.

ENFORCEMENT: The CDTFA is authorized to enforce this law. No later than January 1, 2019, the CDTFA must report to the Legislature regarding the adequacy of funding for the Cigarette and Tobacco Products Licensing Act of 2003, including recommendations for funding levels sufficient to maintain an effective enforcement program. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Unlicensed retailers are guilty of a misdemeanor and subject to a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year. Each day of continued sales or gifting without a valid license after notification by a law enforcement agency that a valid license is required constitutes a separate violation. Continued sales or gifting after notification by the CDTFA that a license has been suspended or revoked shall result in the seizure and forfeiture of all tobacco products in the possession of the person making such sales.

In addition, the penalties listed in entry 110 may apply.

102. RETAILER LICENSE DISPLAY

California Business and Professions Code Sections 22972, 22974.5, 22980.5

SCOPE: A retailer shall conspicuously display the license at each retail location in a manner visible to the public. A retailer whose license has been suspended or revoked by the California Department of Tax and Fee Administration (CDTFA) must conspicuously post a notice of that suspension or revocation at each public entrance to the retail location and at each cash register and other point of sale. The notice must be posted for the duration of the suspension or for 30 days following the effective date of a revocation.

ENFORCEMENT: The CDTFA is authorized to enforce this law.

PENALTY: A retailer who fails to display the license is liable for a \$500 fine. A retailer who removes, alters, or fails to post required notices of suspension or revocation shall be subject to a civil penalty of \$1,000 for each offense.

In addition, the penalties listed in entry 110 may apply.

103. LICENSING PENALTIES FOR ILLEGAL SALES TO UNDERAGE INDIVIDUALS

California Business and Professions Code Section 22958

SCOPE: Retailers convicted of a STAKE Act violation (see entries 27, 28, 30, 31, 33–35, 41, 57, 61, 103, and 105) shall be subject to license-related penalties.

ENFORCEMENT: The California Department of Tax and Fee Administration (CDTFA) is charged with enforcing this law.

PENALTY: The following penalties apply:

- Upon a first conviction, the retailer shall be fined \$400 to \$600.
- Upon a second conviction within a 5-year period, the retailer shall be fined \$900 to \$1,000.
- Upon a third conviction within a 5-year period, the retailer shall be fined \$1,200 to \$1,800. The California Department of Public Health is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall suspend the retailer's license for 45 days.
- Upon a fourth conviction within a 5-year period, the retailer shall be fined \$3,000 to \$4,000. The California Department of Public Health is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall suspend the retailer's license for 90 days.
- Upon a fifth conviction within a 5-year period, the retailer shall be fined \$5,000 to \$6,000. The California Department of Public Health is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall revoke the retailer's license.

The CDTFA must give a retailer at least 10 days' written notice of a pending suspension or revocation and an opportunity to appeal the suspension, revocation, and/or civil penalty, but only for the purpose of correcting a mistake or clerical error.

Convictions by a retailer at one retail location are not accumulated against other locations owned by that retailer. Convictions accumulated against a prior retail owner of a franchise location are not accumulated against a new retail owner of the same franchise location.

In addition, the penalties listed in entry 110 may apply.

104. DISTRIBUTOR AND WHOLESALER LICENSES

California Business and Professions Code Sections 22971, 22975–22978.8, 22980.2, 22981

SCOPE: Tobacco distributors and wholesalers must be licensed by the California Department of Tax and Fee Administration (CDTFA). Each distributor or wholesaler must pay a license

fee of \$1,200. A \$1,000 license renewal fee is required each year. Starting January 1, 2017, the license renewal fee is \$1,200. This license requirement is in addition to the California Revenue and Taxation Code license requirements described below in this entry.

ENFORCEMENT: The CDTFA is authorized to enforce this law. No later than January 1, 2019, the CDTFA must report to the Legislature regarding the adequacy of funding for the Cigarette and Tobacco Products Licensing Act of 2003, including recommendations for funding levels sufficient to maintain an effective enforcement program. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Unlicensed distributors and wholesalers are guilty of a misdemeanor and subject to a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year. Each day of continued sales or gifting without a valid license after notification by a law enforcement agency that a valid license is required constitutes a separate violation. Continued sales or gifting after notification by the CDTFA that a license has been suspended or revoked shall result in the seizure and forfeiture of all tobacco products in the possession of the person making such sales. The CDTFA shall include on its website the name of any distributor or wholesaler whose license has been suspended or revoked.

In addition, the penalties listed in entry 110 may apply.

California Revenue and Taxation Code Sections 30140–30149

SCOPE: Tobacco distributors must be licensed by the California Department of Tax and Fee Administration (CDTFA) for each place of business. This license requirement is in addition to the California Business and Professions Code license requirements described above in this entry. License applicants must submit a security deposit (minimum of \$1,000) to the BOE. The security is conditioned upon the lawful performance of all tobacco tax related requirements.

ENFORCEMENT: The CDTFA is authorized to enforce this law.

PENALTY: The license may be revoked for failure to comply with applicable rules and regulations. Distributing without a license is a misdemeanor.

In addition, the penalties listed in entry 110 may apply.

California Revenue and Taxation Code Sections 30155–30159

SCOPE: Tobacco wholesalers must be licensed at no cost separately for each place of business. This license requirement is in addition to the California Business and Professions Code license requirements described above in this entry. This license must be prominently displayed at each place of business.

ENFORCEMENT: The California Department of Tax and Fee Administration is authorized to enforce this law.

PENALTY: The license may be suspended or revoked for failure to comply with applicable rules and regulations. Engaging in wholesaling without a license is a misdemeanor.

In addition, the penalties listed in entry 110 may apply.

105. DISTRIBUTOR AND WHOLESALER REPORTING

California Business and Professions Code Sections 22954, 22957 (STAKE Act)
California Government Code Sections 6250–6276.48

SCOPE: Tobacco distributors, tobacco wholesalers, and cigarette vending machine operators shall report annually to the California Department of Public Health (CDPH) the names and addresses of those persons to whom they provide tobacco products. The data provided shall be deemed confidential by CDPH and shall be exempt from disclosure under the California Public Records Act.

ENFORCEMENT: Primary enforcement responsibility rests with CDPH. However, this requirement may also be enforced by any “enforcing agency” authorized to enforce the STAKE Act, including the California Attorney General’s office and local law enforcement agencies.

PENALTY: Not specified.

106. MANUFACTURER AND IMPORTER LICENSE AND REPORTING

California Business and Professions Code Sections 22971, 22971.7, 22979, 22979.21–22979.24, 22979.7, 22980.2
California Government Code Sections 6250–6276.48

SCOPE: Tobacco manufacturers and importers must be licensed by the California Department of Tax and Fee Administration (CDTFA). In order to obtain and maintain a license, the manufacturer or importer must supply the CDTFA with specified lists, certifications, and consents.

Every manufacturer or importer of chewing tobacco or snuff must pay a one-time license fee of \$10,000, and every manufacturer or importer of other tobacco products must pay a one-time license fee of \$2,000.

Every tobacco manufacturer and importer must file a monthly report to the CDTFA that includes a list of all licensed distributors to which the manufacturer or importer shipped its products and the total wholesale cost of the products. The data provided shall be deemed confidential and shall be exempt from disclosure under the California Public Records Act.

In order to be eligible to obtain a license, every tobacco manufacturer or importer must do either of the following: (1) waive any sovereign immunity defense that may apply to any enforcement action brought by the Attorney General or the CDTFA to enforce state manufacturer and importer licensing requirements, the manufacturer requirements relating to the Master Settlement Agreement (MSA), or state tobacco tax laws; or (2) file a surety bond with the Attorney General in favor of the State of California that is conditioned on the manufacturer’s performance of its duties and obligations.

ENFORCEMENT: The CDTFA is authorized to enforce this law. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

Every tobacco manufacturer or importer must consent to the jurisdiction of the California courts for enforcement of the MSA and the Cigarette and Tobacco Products Tax Law, must appoint a registered agent for service of process in California, and must identify the registered agent to the CDTFA and the state Attorney General.

PENALTY: Unlicensed manufacturers and importers are guilty of a misdemeanor and subject to a fine of up to \$5,000 and/or imprisonment not to exceed 1 year. For a first offense, the CDTFA may revoke or suspend the license or licenses of the manufacturer or importer pursuant to the procedures applicable to the revocation of a license, which include a written notice and an opportunity for a hearing. The procedures for revocation are set forth in Section 30148 of the California Revenue and Taxation Code.

Each day of continued sales or gifting without a valid license after notification by a law enforcement agency that a valid license is required constitutes a separate violation. Continued sales or gifting must result in the seizure and forfeiture of all tobacco products in the possession of the person making such sales. *Gifting* is defined as any transfer of title or possession without consideration, exchange, or barter.

In addition, the penalties listed in entry 110 may apply.

107. RECORD RETENTION BY STATE LICENSEES

California Business and Professions Code Sections 22974, 22978.1, 22979.4, 22979.5, 22981

SCOPE: Each retailer, distributor, wholesaler, manufacturer, and importer must retain purchase and sale invoices for tobacco products for a period of 4 years. Such records shall be kept at the location identified in the license for a period of 1 year and shall be made available for inspection upon request of the California Department of Tax and Fee Administration (CDTFA) or by a law enforcement agency.

ENFORCEMENT: The CDTFA is authorized to enforce this law. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year.

In addition, the penalties listed in entry 110 may apply.

108. INSPECTIONS

California Business and Professions Code Sections 22980, 22981

SCOPE: Any peace officer or authorized California Department of Tax and Fee Administration (CDTFA) employee may enter and inspect any place where tobacco products are sold, produced, or stored; any site where evidence of activities involving evasion of tobacco product taxes may be discovered; or any site where there is evidence of a violation of Section 30165.1 of the California Revenue and Taxation Code, which prohibits the sale of

tobacco products that are not included on the state Attorney General's directory of tobacco product manufacturers and brands.

ENFORCEMENT: State and local law enforcement agencies and the CDTFA are authorized to enforce this law.

PENALTY: Anyone who fails to permit an inspection is guilty of a misdemeanor punishable by a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year.

In addition, the penalties listed in entry 110 may apply.

California Revenue and Taxation Code Sections 30435, 30471

SCOPE: California Department of Tax and Fee Administration (CDTFA) employees may enter and inspect any place where tobacco products are sold, produced, or stored, or any site where there is evidence of activities involving tobacco tax evasion or Master Settlement Agreement violations.

ENFORCEMENT: The CDTFA is authorized to enforce this law.

PENALTY: Refusal to allow an inspection is a misdemeanor punishable by a fine not to exceed \$1,000 for each offense.

In addition, the penalties listed in entry 110 may apply.

109. TRANSACTIONS WITH UNLICENSED ENTITIES

California Business and Professions Code Sections 22980.1, 22981 15 United States Code Section 1335a

SCOPE: No entity shall sell tobacco products to or purchase tobacco products from an entity that is illegally operating without a license or that has a suspended or revoked license. No entity shall acquire any package of cigarettes to which the required tax stamp or meter impression may not be properly affixed or that fails to comply with federal ingredient reporting provisions.

ENFORCEMENT: The California Department of Tax and Fee Administration is authorized to enforce this law. Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1.

PENALTY: Violators are guilty of a misdemeanor punishable by a fine not to exceed \$5,000 and/or imprisonment not to exceed 1 year.

In addition, the penalties listed in entry 110 may apply.

110. ADMINISTRATIVE PENALTIES APPLICABLE TO ALL LICENSEES

California Business and Professions Code Sections 22974.7, 22978.7, 22979.7

SCOPE: In addition to any other penalties, violators of the California Cigarette and Tobacco Products Licensing Act of 2003, sections 22970–22991 of the California Business and

Professions Code, are subject to administrative penalties (see entries 101–109 for summaries of relevant provisions of the California Cigarette and Tobacco Products Licensing Act).

As of January 1, 2017, retailers of electronic smoking devices are required to comply with licensing requirements under state law (see entries 101–103, 108, and 109 for more information about these requirements).

ENFORCEMENT: The California Department of Tax and Fee Administration (CDTFA) is authorized to enforce this law.

PENALTY: The CDTFA may for a first offense, revoke or suspend a license; and for a second or subsequent offense, revoke or suspend a license, and impose a civil penalty not to exceed the greater of 5 times the retail value of the seized tobacco products or \$5,000.

Note: These provisions apply to retailers, distributors, wholesalers, manufacturers and importers.

California Business and Professions Code Section 22980.3

SCOPE: In addition to any other fines or penalties, violators of the tobacco tax laws or the California Cigarette and Tobacco Products Licensing Act of 2003, sections 22970–22991 of the California Business and Professions Code, may have their licenses suspended or revoked. After having received notice of suspension or revocation, violators may not sell, gift, or display for sale cigarettes or other tobacco products (see entries 98 and 101–109 for summaries of relevant provisions of the tobacco tax laws and the California Cigarette and Tobacco Products Licensing Act).

As of January 1, 2017, retailers of electronic smoking devices are required to comply with licensing requirements under state law (see entries 101–103, 108, and 109 for more information about these requirements).

ENFORCEMENT: The California Department of Tax and Fee Administration (CDTFA) is authorized to enforce this law.

PENALTY: For a first conviction, the penalty is a written notice from the CDTFA detailing the suspension and revocation provisions of this law, and the CDTFA at its discretion may suspend the license for up to 30 days. For a second conviction within 4 years, the license shall be revoked, but a previously licensed applicant may apply for a new license 6 months after a revocation. Violations at one location are not counted against other locations of that same licensee or against a new owner at the same licensed location. Each day of continued sales without a valid license after notification by a law enforcement agency that a valid license is required constitutes a separate violation.

California Business and Professions Code Sections 22974.4, 22978.6

SCOPE: The license of a retailer, distributor, or wholesaler shall be revoked if (1) the license holder has been convicted of a felony pursuant to California Revenue and Taxation Code Sections 30473 (see entry 99) or 30480 (see entry 95); or (2) the license holder has had any permit or license revoked under any provision of the California Revenue and Taxation Code.

As of January 1, 2017, retailers of electronic smoking devices are required to comply with licensing requirements under state law (see entries 101–103, 108, and 109 for more information about these requirements).

ENFORCEMENT: The California Department of Tax and Fee Administration is authorized to enforce this law.

PENALTY: Revocation of the license.

111. CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION LICENSING DATABASE

California Business and Professions Code Sections 22973.2, 22978, 22979.3

SCOPE: Upon request, the California Department of Tax and Fee Administration shall provide its database of licenses issued to retailers, distributors, wholesalers, manufacturers, and importers to the California Department of Public Health, the state Attorney General, a law enforcement agency, or any agency authorized to enforce local tobacco control laws. The database may be used only for the purposes of enforcing tobacco control laws, and its use must adhere to all state laws, policies, and regulations governing the use of personal information and privacy.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

112. MANUFACTURER CERTIFICATION

California Revenue and Taxation Code Sections 30165.1(b), 30165.1(c)(5), 30165.1(m)

SCOPE: A manufacturer must make an annual certification to the state Attorney General (AG) that it has signed the Master Settlement Agreement or has complied with California law regarding nonparticipating manufacturers. The certification must include a complete list of brand families.

For each manufacturer that has submitted the required certification, the AG shall provide a written acknowledgment of receipt within 7 business days. In turn, each manufacturer shall provide to each distributor to whom it sells or ships cigarettes a copy of the AG's receipt.

ENFORCEMENT: The California Department of Tax and Fee Administration and the AG are authorized to enforce this law.

PENALTY: False certifications knowingly made are a misdemeanor punishable by a fine of not more than \$1,000 and/or imprisonment for up to 1 year.

In addition, the penalties listed in entry 110 may apply.

California Revenue and Taxation Code Sections 30165.1(b), 30165.1(m)

SCOPE: Manufacturers located outside the United States must provide the state Attorney General (AG) with current contact information for all importers that sell their cigarettes

in California, and must require these importers to provide the AG with copies of a valid importer permit issued by the U.S. Treasury and a valid importer license issued by the California Department of Tax and Fee Administration (CDTFA). Nonparticipating manufacturers who are newly qualified or whom the AG deems to pose an elevated risk for noncompliance must file a surety bond with the AG in favor of the state, in an amount equal to the greater of \$50,000 or the amount of escrow the manufacturer was required to deposit as a result of the largest of its most recent 5 calendar years' sales in California.

ENFORCEMENT: The CDTFA and the AG are authorized to enforce this law.

PENALTY: Any person who makes a certification pursuant to this subdivision that asserts the truth of any material matter that he or she knows to be false is guilty of a misdemeanor punishable by imprisonment of up to 1 year in the county jail, or a fine of not more than \$1,000, or both the imprisonment and the fine.

California Revenue and Taxation Code Sections 30165.1(c)–(l)

SCOPE: The state Attorney General (AG) shall publish and maintain a website directory listing manufacturers that have complied with the required certification and listing all certified brand families of the manufacturer. No one shall affix a tax stamp or meter impression to any package of cigarettes unless the brand family is included in the AG's directory. No one shall sell, offer, possess for sale, or import for personal consumption cigarettes of a brand family not included in the AG's directory. No one shall acquire, hold, own, possess, transport, or import cigarettes that the person knows or should know are intended to be distributed in violation of the requirement that tax stamps and meter impressions may only be affixed to packages of cigarettes whose brand families are included on the AG's directory.

ENFORCEMENT: The California Department of Tax and Fee Administration (CDTFA) and the AG are authorized to enforce this law.

PENALTY: A violation constitutes a misdemeanor. In addition, distributors who violate this law are subject to a license revocation or suspension for a first offense. For a second or subsequent offense, the CDTFA may revoke or suspend the distributor's license and may impose a civil penalty not to exceed the greater of 5 times the retail value of the seized cigarettes or \$5,000.

In addition, the penalties listed in entry 110 may apply.

113. RECORD-KEEPING: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387t

21 Code of Federal Regulations Section 1100.3

SCOPE: The U.S. Department of Health and Human Services (HHS) must issue regulations regarding how any person who manufactures, processes, transports, distributes, receives, packages, holds, exports, or imports tobacco products should establish and maintain records. Some records must be furnished for inspection upon request by the government to aid an investigation about illicit trade, smuggling, or a counterfeit product.

EXCEPTION: Retailers do not have to maintain records for individual purchasers who purchase tobacco products for personal consumption. HHS must have the express written consent of an Indian tribe before inspecting records located in Indian country.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments. The HHS Secretary may also consult with the U.S. Attorney General and the Secretary of the Treasury. Manufacturers and distributors of a tobacco product must notify the Attorney General and the Secretary of the Treasury if they have knowledge of illegal transactions.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

114. REGISTRATION OF TOBACCO ESTABLISHMENTS: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387e

21 Code of Federal Regulations Section 1100.3

SCOPE: Owners and operators engaged in the manufacture, preparation, compounding, or processing of a tobacco product sold or distributed must register their establishments, both foreign and domestic, with the U.S. Department of Health and Human Services (HHS). Registration information shall be made available to the public.

Note: By December 31, 2016, the U.S. Food and Drug Administration (FDA) requires registration by all manufacturers and importers (to the extent that they repackage or change the packaging of any tobacco product) of tobacco products, including cigarettes, smokeless tobacco, electronic nicotine delivery systems containing anything made or derived from tobacco, cigars, pipe tobacco, hookah tobacco, gels, and dissolvables. At this time, the FDA plans to enforce registration requirements only for manufacturers and importers of newly deemed *finished* tobacco products (see the overview on page 10 for more information about the FDA's deeming rule).

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

115. USER FEES: THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387s

21 Code of Federal Regulations Sections 1100.3, 1150.1–1150.17

SCOPE: Tobacco manufacturers and importers must pay a quarterly fee that is earmarked for tobacco regulation activities. The annual fee varies by fiscal year and class of tobacco products.

Note: In order to assist the FDA in calculating user fees, domestic tobacco manufacturers and importers of certain classes of products are required monthly to submit information to the FDA (formerly submitted to the USDA) about product units removed into commerce and taxes paid per class of product. For example, no later than August 20, 2016, the FDA requires manufacturers and importers of newly deemed cigars and pipe tobacco to submit data to calculate fees and payments.

ENFORCEMENT: The U.S. Department of Health and Human Services is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

116. REQUIRED DISCLOSURES TO THE U.S. FOOD AND DRUG ADMINISTRATION (FDA): THE TOBACCO CONTROL ACT

21 United States Code Sections 333, 372, 387, 387d, 387i, 387o

15 United States Code Section 1333

21 Code of Federal Regulations Sections 1100.3, 1150.1–1150.17

SCOPE: Manufacturers and importers of cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco must provide the Food and Drug Administration (FDA) with:

1. A list of the ingredients used in each product;
2. A description of content, delivery, and form of nicotine;
3. A list of smoke constituents that are harmful or potentially harmful to health (HPHCs) and reports of required testing; and
4. All documents related to health, toxicological, behavioral, or physiological effects.

As of August 8, 2016, manufacturers and importers of newly deemed finished tobacco products, including cigars, pipe tobacco, hookah tobacco, gels, dissolvables, and electronic nicotine delivery systems containing anything made or derived from tobacco, are required to submit lists according to a schedule based on their release dates. The FDA has released a chart with the effective and compliance dates applicable to retailers, manufacturers, importers, and distributors of newly deemed tobacco products, available at www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm500778.htm (see the overview on page 10 for more information about the FDA's deeming rule).

EXCEPTIONS: Small manufacturers of tobacco products shall be exempt from testing and reporting requirements regarding tobacco product constituents, ingredients, and additives either for 2 years after final regulations are issued or when a compliance date is set by HHS for all other tobacco product manufacturers, whichever is later.

There are also reporting requirement exemptions for product manufacturers determined by the FDA to be "small scale." For products on the market on August 8, 2016, ingredient

lists are due by November 8, 2018, for small-scale product manufacturers. Tobacco health documents are due November 8, 2018, for small-scale product manufacturers.

Note: Small-scale manufacturers are those with 150 employees or less and total annual revenue of \$5 million dollars or less. 21 U.S.C. 387(16).

Note: At the request of the Department of Health and Human Services (HHS), tobacco manufacturers and importers must furnish any or all documents relating to particular research activities. In addition, tobacco product manufacturers or importers must maintain records and provide information to HHS upon request to assure that a tobacco product is not adulterated or misbranded, and to otherwise protect public health.

Note: In April 2012, the FDA issued a notice establishing a list of tobacco product constituents that the agency believes are harmful or potentially harmful to health. The notice includes the criteria the FDA used to develop the list and the reasons the FDA may add or remove constituents from the list. 77 Fed. Reg. 20,034 (Apr. 3, 2012). At the time of publication, the FDA was gradually phasing in enforcement, starting with 20 constituents for which testing is already widely available. The FDA prepared guidance on this abbreviated list of harmful or potentially harmful constituents that tobacco product manufacturers and importers must report. *Draft Guidance for Industry: Reporting Harmful and Potentially Harmful Constituents in Tobacco Products and Tobacco Smoke Under Section 904(a)(3) of the Federal Food, Drug, and Cosmetic Act* (Mar. 2012), www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM297828.pdf.

This guidance likely will be changed and/or withdrawn as the FDA begins to more fully enforce this provision.

Note: In order to assist the FDA in calculating user fees, domestic tobacco manufacturers and importers of certain classes of products are also required monthly to submit information to the FDA (formerly submitted to the USDA) about product units removed into commerce and taxes paid per class of product.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Any person who violates this provision shall be subject to a civil penalty of up to \$15,000 for each violation and up to \$1 million for multiple violations ruled on in a single proceeding.

Any person who intentionally violates this provision shall be subject to a civil monetary penalty of up to \$250,000 per violation and up to \$1 million for multiple violations ruled on in a single proceeding. If violations continue after HHS provides written notice, the violator is subject to a penalty of \$250,000 for the first 30-day period, which doubles every 30 days thereafter that the violation continues, up to \$1 million in any 30-day period or \$10 million for all such violations ruled on in a single proceeding.



MASTER SETTLEMENT AGREEMENT (MSA) FUNDS



117. MSA PAYMENTS

Master Settlement Agreement (MSA) Sections IX, XI, VII(c); Exhibit A, VII

SCOPE: Under the MSA between the major tobacco companies and the attorneys general of 46 states, the settling companies are responsible for making annual payments to the settling states in perpetuity. These payments are distributed to the states based on formulas agreed to in the MSA.

Note: In recent years, California has usually received between \$700 and \$750 million per year (it received \$1.1 billion in 2013). Half of that money is allocated to the state and half to local governments within the state.

ENFORCEMENT: The state Attorney General (AG) may enforce these provisions.

PENALTY: The AG may seek a court order to enforce the provisions or stop a violation of the provisions. If such an order is violated, the AG may pursue monetary compensation, civil contempt charges, or criminal sanctions. The parties must first attempt to resolve alleged violations through discussion.

118. MSA BONDS

California Government Code Sections 63049–63049.55

SCOPE: California law allows state and local governments to generate revenue by selling tobacco bonds that are backed by the future flow of payments to the state by tobacco companies as required by the Master Settlement Agreement (MSA) (see entry 117 for a summary of the MSA payments).

Note: State and local agencies can use the proceeds to fund capital improvement projects and health care programs and facilities. There is no limit on the amount of tobacco securitization bonds that can be issued. From 2001 to 2007, state and local governments in California issued bonds totaling \$16.8 billion. *See* Cal. Debt and Investment Advisory Commission, *Issue Brief: Tobacco Securitization Bond Issuance in California* (June 2009), www.treasurer.ca.gov/cdiac/reports/tobacco.pdf. Some local governments have elected to borrow against expected future payments but haven't guaranteed to cover their debt with general fund revenue.

EXCEPTION: The sale of state tobacco bonds does not affect MSA funding received by California local governments.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

119. APPEAL BONDS

California Health and Safety Code Section 104558

SCOPE: In a civil lawsuit involving a tobacco company that has signed the Master Settlement Agreement (MSA) or that involves a successor or affiliate of such a company, the amount of the bond to be furnished during the course of an appeal shall not exceed 100% of the verdict or \$150 million, whichever is less. The stated purpose of the appeal bond cap is to secure the funds owed to the state by tobacco companies as required by the MSA.

EXCEPTION: If the opposing party proves by a preponderance of the evidence that a tobacco company is intentionally dissipating or diverting assets outside the ordinary course of its business for the purpose of avoiding ultimate payment of the judgment, the cap may be lifted and the court may order any actions necessary to prevent dissipation or diversion of the assets.

ENFORCEMENT: The court shall set the amount of the appeal bond.

PENALTY: Not applicable.



RELATED LAWS



120. PRESERVATION OF STATE AND LOCAL AUTHORITY: THE TOBACCO CONTROL ACT

21 United States Code Section 387p

21 Code of Federal Regulations Section 1100.3

SCOPE: State and local governments are permitted to enact more stringent restrictions related to the sale, distribution, possession, use, availability, or advertising and promotion of tobacco products, including electronic nicotine delivery systems. The Tobacco Control Act also does not limit the existing ability of state and local governments to regulate the reporting of information to the state, fire safety standards for tobacco products, and taxation of tobacco products.

EXCEPTION: State and local governments cannot enact restrictions that are different from or in addition to the provisions in the Tobacco Control Act regarding tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

121. ADDITIONAL REGULATIONS: THE TOBACCO CONTROL ACT

21 United States Code Sections 372, 387f

21 Code of Federal Regulations Section 1100.3

SCOPE: The U.S. Department of Health and Human Services (HHS) may issue additional regulations restricting the sale and distribution of tobacco products, including restrictions on advertising and promotion. Regulations must be appropriate for the protection of the public health, which should be determined with respect to the risks and benefits to the population as a whole, taking into account whether individuals will likely either stop or start using tobacco products.

EXCEPTION: Federal regulations may not limit the sale or distribution of a tobacco product to prescription by licensed medical professionals; prohibit the sale of a tobacco product in face-to-face transactions by a specific category of retail outlets; or raise the minimum age for the sale of tobacco products above the age of 18.

Note: Restrictions on the advertising or promotion of a tobacco product must be consistent with the First Amendment to the U.S. Constitution.

ENFORCEMENT: HHS is authorized to enforce this provision with the help of other federal agencies and state governments.

PENALTY: Not applicable.

122. ADVISORY COMMITTEE: THE TOBACCO CONTROL ACT

21 United States Code Section 387q

SCOPE: The U.S. Department of Health and Human Services shall appoint 12 people to a Tobacco Products Scientific Advisory Committee (Advisory Committee) to provide advice, information, and recommendations. The members will include 7 individuals from the medical, dental, scientific, and health care industries; 1 government employee; 1 member of the general public; and 3 nonvoting members representing the tobacco manufacturing industry, the small business tobacco manufacturing industry, and tobacco growers.

EXCEPTION: Full-time employees of the U.S. Food and Drug Administration or any agency responsible for enforcing the Tobacco Control Act may not be appointed to this Advisory Committee.

Note: In 2011, 2 tobacco companies, Lorillard and R.J. Reynolds, challenged the make-up of the Advisory Committee, claiming that several members were biased against the tobacco industry and should not be allowed to continue to serve in this capacity. While the companies were initially successful and the committee was enjoined for a time, *Lorillard, Inc. v. United States Food & Drug Admin.*, 56 F. Supp. 3d 37 (D.D.C. 2014), ultimately the court of appeals held that the harms alleged by the companies were too remote and uncertain, and approved the make-up of the Committee. *R.J. Reynolds Tobacco Co. v. United States Food & Drug Admin.*, No. 14-5226 (D.C. Cir. Jan. 15, 2016).

ENFORCEMENT: Not applicable.

123. FEDERAL AMERICANS WITH DISABILITIES ACT (ADA)

42 United States Code Sections 1981a, 2000e-5, 12101–12213, 12181-12182 28 Code of Federal Regulations Part 36, Appendices A, C

SCOPE: The federal Americans with Disabilities Act (ADA) prohibits discrimination against a person with a disability. 42 United States Code Section 12112(a). The law applies to public entities, including schools and public transportation, employers with at least 15 employees, and entities that operate places of public accommodation as defined in the federal regulations, such as social service center establishments, restaurants, hotels, and theaters.

Note: The ADA does not apply to private housing, which is covered by the federal Fair Housing Act (entry 124).

The ADA defines a *disability* as: (1) a physical or mental impairment that substantially limits one or more of a person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. Breathing is specifically listed as one of the major life activities covered by the ADA and a major life activity is also defined as the operation of a major bodily function, including respiratory functions.

An impairment that is episodic or in remission is a disability if it would substantially limit

a *major life activity* when active. Even if the person’s breathing is substantially improved through the use of oxygen therapy equipment, he or she would still be considered disabled under the ADA.

Note: For example, a person may be disabled under the ADA if he or she has chronic obstructive pulmonary disease or severe asthma, which substantially limits breathing. *Equal Employment Opportunity Comm’n v. Supervalu, Inc.*, 674 F. Supp. 2d 1007, (N.D. Ill. 2009).

Under the ADA, employers must provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless that accommodation causes an undue hardship. In addition, places of public accommodation may not deny patrons with disabilities an equal opportunity to enjoy the goods, services, facilities, privileges, advantages, or accommodations of such a place.

Note: The ADA may be used by a person with a respiratory disability to enforce existing laws against smoking. For example, a California restaurant owner who knowingly allows smoking in the restaurant in the presence of an employee or patron with severe asthma may be violating the ADA, in addition to other laws.

ENFORCEMENT: Employees and tenants may file a complaint with the Equal Employment Opportunity Commission (EEOC) or with the California Department of Fair Employment and Housing (DFEH). The EEOC and DFEH are obligated to investigate the complaint. A private lawsuit may be filed if the EEOC and DFEH do not file an action based on the complaint. Patrons who believe a business has violated the ADA may also file a private lawsuit.

PENALTY: Available penalties include financial penalties (limited based on the number of employees), injunctive relief (a court order to stop the violation of the ADA), and attorneys’ fees.

124. FEDERAL FAIR HOUSING ACT (FHA)

42 United States Code Sections 1437f, 3601–3619

24 Code of Federal Regulations Sections 100.200–100.205

SCOPE: The federal Fair Housing Act (FHA) prohibits discrimination based on handicap, which is defined as (1) a physical or mental impairment that substantially limits a person’s major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment.

Note: The U.S. Department of Housing and Urban Development (HUD) has ruled that multiple chemical sensitivity disorder and environmental illness could qualify as a *handicap* under the FHA. HUD Memorandum, *Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicaps*, doc. no. GME-0009 (Mar. 5, 1992), www.hud.gov/sites/documents/GME-0009LOPS.PDF. A person may have a handicap under the FHA if he or she is hypersensitive to tobacco smoke. *Vickers v. Veterans Administration*, 549 F. Supp. 85, 86–87 (W.D. Wash. 1982).

If a resident has a disability under the law, the FHA requires landlords and condominium associations to make reasonable accommodations in rules, practices, policies, and services that provide the resident with a disability an equal opportunity to use and enjoy the housing.

Note: Examples of reasonable accommodations that a tenant with a respiratory disability might request include: allowing the tenant to move to a vacant apartment to avoid exposure to drifting smoke; allowing the tenant to break a lease without penalty; or implementing a no-smoking policy for common areas or units.

The FHA applies to most private and federal government housing, including Section 8 housing.

Note: Section 8 housing refers to federal programs offering low-income housing assistance through payments to private landlords.

EXCEPTION: The law may not apply to buildings with 4 or fewer units if the owner lives on site or to single-family homes sold or rented by the owner.

ENFORCEMENT: Individuals may file a complaint with HUD or a state agency which is its substantial equivalent (California Department of Fair Employment and Housing) within 1 year of the discrimination and/or file a lawsuit in federal district court within 2 years of the discrimination.

PENALTY: Available relief includes actual damages, injunctive relief (a court order to stop the violation of the law), attorneys' fees, civil penalties, and other relief as appropriate.

125. CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (FEHA)

California Government Code Sections 12900–12996

SCOPE: The state Fair Employment and Housing Act (FEHA) prohibits discrimination based on physical disability, mental disability, or medical condition. Under section 12926(k) of the law, a physical disability includes physiological and anatomical conditions that limit a person's ability to participate in major life activities.

Note: FEHA's definition of physical disability is broader than the definition in the federal Americans with Disabilities Act (ADA), which requires a disability to substantially limit a major life activity (see entry 123 for a summary of the ADA).

Note: A person may be disabled under FEHA if he or she is hypersensitive to tobacco and tobacco exposure interferes with a major life activity, such as breathing. *See County of Fresno v. Fair Employment & Housing Comm'n*, 226 Cal. App. 3d 1541, 1548–1550 (1991).

Under FEHA, both private and public employers with 5 or more employees must engage in an interactive process to determine what accommodation is reasonable. These employers must provide reasonable accommodation for the known physical or mental disability of an applicant or employee, unless that accommodation causes an undue hardship.

Note: FEHA may be used by an employee with a respiratory disability to enforce existing

laws against smoking. For example, a California restaurant owner who knowingly allows smoking in the restaurant in the presence of an employee with severe asthma may be violating FEHA, in addition to other laws.

FEHA also applies to most housing accommodations, which are defined in sections 12927(d) and 12955 as any building, structure, or portion of a structure occupied or intended for occupancy as a residence by 1 or more families, and any vacant land that is offered for sale or lease for the construction of such buildings. FEHA requires landlords and condominium associations to make reasonable accommodations and/or modifications of policies for residents with disabilities in order to ensure equal access to and enjoyment of their housing.

Note: Examples of reasonable accommodations that a tenant with a respiratory disability might request include: allowing the tenant to move to a vacant apartment to avoid exposure to drifting smoke; allowing the tenant to break a lease without penalty; or implementing a no smoking policy for common areas and/or units.

ENFORCEMENT: Individuals may file a complaint with the California Department of Fair Employment and Housing (DFEH) and/or file a lawsuit in state court; however, before filing a lawsuit in state court individuals must exhaust administrative remedies by filing a complaint with DFEH and obtaining a right-to-sue notice.

PENALTY: Available relief includes actual damages, injunctive relief (a court order to stop the violation of the law), prospective relief (ongoing remedies to correct past illegal practices), attorneys' fees, and other relief as appropriate.

126. CALIFORNIA UNRUH CIVIL RIGHTS ACT

California Civil Code Sections 51–51.3

SCOPE: The state Unruh Civil Rights Act (Unruh Act) applies to all business establishments in California, including housing and public accommodations, and prohibits discrimination based on physical disability, mental disability, or medical condition, among other protected statuses. The Unruh Act's definitions of physical disability, mental disability, and medical condition mirror the definitions in the state Fair Employment and Housing Act (FEHA) (see entry 125 for more information about FEHA's definition of physical disability).

Note: While FEHA covers discrimination in employment and housing, the Unruh Act covers discrimination in housing and public accommodations. The Unruh Act requires full and equal accommodations, advantages, facilities, privileges, and services in all business establishments.

ENFORCEMENT: Individuals may file a complaint with the California Department of Fair Employment and Housing (DFEH) and/or file a lawsuit in state court. The Unruh Act is different from FEHA in that it is not necessary for individuals to exhaust administrative remedies prior to filing a lawsuit in state court. Individuals do not need to obtain a right-to-sue notice from DFEH before filing a lawsuit.

PENALTY: Available relief includes actual damages, injunctive relief (a court order to stop the violation of the law), attorneys' fees, and other relief as appropriate.

127. PROPOSITION 65

California Health and Safety Code Sections 25249.6–25249.13

SCOPE: The state Safe Drinking Water and Toxic Enforcement Act of 1986 requires notification to the public about exposure to chemicals known to the State of California to cause cancer or reproductive toxicity. This law applies to exposure to tobacco smoke. Warnings need not be made to each exposed individual. Instead, warnings may be provided by general methods such as posting clear and reasonable notices or labels on consumer products. The law requires businesses with at least 10 employees to post warnings when they knowingly or intentionally expose an individual to a chemical on the list.

EXCEPTION: The law applies only to exposures that are made knowingly and intentionally.

ENFORCEMENT: Actions may be brought by the state Attorney General, a district attorney, a city attorney of a city with a population larger than 750,000, a city prosecutor in any city having a full-time city prosecutor (with the consent of the district attorney), or an individual acting in the public interest.

PENALTY: Violators may be subject to an injunction to stop the violation and are liable for a civil penalty not to exceed \$2,500 per day for each violation.

128. UNFAIR COMPETITION LAW

California Business and Professions Code Sections 17200–17209

SCOPE: It is illegal to engage or propose to engage in an unfair, unlawful, or fraudulent business act or practice.

Note: This general law can be used as a mechanism to enforce many tobacco control laws that affect businesses, since a business that violates a tobacco control law is presumed to be in violation of the unfair competition law. For example, the law has been used against retailers who sell tobacco to underage individuals in violation of California Penal Code Section 308 (see entry 27 for a summary of Penal Code Section 308).

ENFORCEMENT: Actions may be brought by the state Attorney General, a district attorney, or, with the consent of the district attorney in certain cases, by a county counsel, city attorney, or city prosecutor. Actions also may be brought by anyone who has suffered injury in fact and has lost money or property as a result of the unfair competition.

PENALTY: Violators are subject to an injunction to stop the behavior and a civil penalty of up to \$2,500 for each violation.

129. MEDI-CAL CESSATION, PREVENTION, AND EDUCATION SERVICES

California Welfare and Institutions Code Sections 14134.25, 15810-15818

SCOPE: Once appropriate federal approvals have been obtained, tobacco cessation services are covered benefits under the Medi-Cal program, starting January 1, 2017. The program covers medically necessary quit attempts, including 4 counseling sessions and FDA-approved treatment regimens. California requires the Medi-Cal Access Program under the Department of Social Services to develop protocols and to provide additional prevention and health education services relating to tobacco use.

ENFORCEMENT: Not specified.

PENALTY: Not specified.

130. PATIENT PROTECTION AND AFFORDABLE CARE ACT

42 United States Code Sections 300u-11, 300gg, 1395w-102(e), 1396d, 1396o, 1396r-8(d)(2)(E), 1396r-8(d)(7)(A), 1397e, 1397r-8

45 Code of Federal Regulations Sections 150.101(b)(1)–(2), 150.201, 150.301

SCOPE: The federal Patient Protection and Affordable Care Act (PPACA) generally expands tobacco cessation coverage in most health insurance plans. Specific requirements vary based on the type of health insurance. The PPACA and related federal materials provide the following guidance.

Private, Employer-Sponsored, and Marketplace Insurance: Health insurance plans provided by an employer, purchased through a PPACA Marketplace, or purchased directly from an insurer.

- These plans must provide coverage for tobacco cessation at no cost to the patient. This requirement does not apply to grandfathered plans in existence prior to March 23, 2010.
- Plans can satisfy this requirement by, for example, covering at least 2 cessation attempts per year, with each attempt including, at minimum, coverage for 4 counseling sessions and a 90-day supply of all U.S. Food and Drug Administration (FDA)-approved cessation medications. U.S. Dept. of Labor, *FAQs About Affordable Care Act Implementation (Part XIX)*, Q5 (May 2014), www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xix.pdf.

Medicare: Medicare is a public health insurance program that provides coverage for most individuals ages 65 or older, as well as certain individuals with disabilities.

- Medicare Part B covers up to 8 tobacco cessation counseling sessions per year. Centers for Medicare & Medicaid Services, *Smoking & tobacco use cessation (counseling to stop smoking or using tobacco products)*, www.medicare.gov/coverage/smoking-and-tobacco-use-cessation.html.

- Medicare Part D also covers prescription tobacco cessation drugs.

Medicaid: Medicaid is a public health insurance program for many low-income populations, people with disabilities, and pregnant women. Medicaid limits eligibility based on an individual's income and assets; these limitations vary among the states.

- In all states, Medicaid covers tobacco cessation therapy and doctor-approved cessation medications for pregnant women and for people under the age of 21. Centers for Medicare & Medicaid Services, *Dear State Medicaid Director Letter, SDL # 11-007* (June 2011), <https://downloads.cms.gov/cmssgov/archived-downloads/SMDL/downloads/SMD11-007.pdf>.
- State Medicaid programs are prohibited from *excluding* coverage for tobacco cessation drugs. Centers for Medicare & Medicaid Services, *Medicaid Drug Rebate Program Notice Release No. 165* (Sept. 2013), www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Prescription-Drugs/Downloads/Rx-Releases/State-Releases/state-rel-165.pdf.
- In states expanding Medicaid under the PPACA, individuals in the expansion population, as well as other Medicaid beneficiaries receiving coverage through an Alternative Benefits Package, must receive coverage for tobacco cessation at no cost to the patients. Medicaid programs can satisfy this requirement by, for example, covering at least 2 cessation attempts per year, with each attempt including, at minimum, coverage for 4 counseling sessions and a 90-day supply of all FDA-approved cessation medications. U.S. Department of Labor, *FAQs About Affordable Care Act Implementation (Part XIX)*, Q5 (May 2014), www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xix.pdf.
- Medi-Cal, California's Medicaid program, provides nearly all beneficiaries coverage for tobacco cessation services, including counseling and FDA-approved cessation medications. Cal. Department of Health Care Services, *Policy Letter 14-006* (Sept. 2014), www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/PL2014/PL14-006.pdf.

Under the PPACA, health insurers are permitted to vary their premium rates on the basis of tobacco use. However, California Insurance Code sections 10753.14 and 10965.9 allow insurers in the individual and small-group markets to use only age, geographic region, and family size for the purposes of establishing premium rates. As a result, in California, these insurers cannot charge an individual a higher premium based on the individual's tobacco use. The prohibition on differential premiums does not apply to certain "grandfathered" health care plans that were in effect on March 23, 2010.

The PPACA establishes a Prevention and Public Health Fund to be administered by the U.S. Department of Health and Human Services (HHS), which is made available to individual communities for tobacco prevention and other public health programs on a competitive basis. Information about funding distribution is available at www.hhs.gov/open/prevention/index.html.

ENFORCEMENT: Various federal and state agencies have oversight of different types of health plans covered by the PPACA.

Generally, states have primary authority to enforce PPACA provisions against health insurance issuers, and the federal Centers for Medicare and Medicaid Services (CMS) has secondary enforcement authority. In California, under Chapter 2.2 of the Health and Safety Code, the state Department of Insurance and Department of Managed Health Care oversee private health insurance plans. The California Department of Health Care Services oversees Medi-Cal, California's Medicaid program.

At the federal level, the CMS has primary authority to enforce PPACA provisions against plans issued through nonfederal government employers (eg, state governments), Medicare, and Medicaid. The HHS, Department of Labor, Department of the Treasury, and the Internal Revenue Service also share oversight of private health insurance plans. U.S. Dept. of Labor, *Affordable Care Act Implementation Frequently Asked Questions*, www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs.

PENALTY: Penalties vary for the different federal, state, and local actions affected by the requirements of the PPACA. If a health plan overseen by CMS fails to comply with federal requirements, the agency may impose civil fines on the health insurance issuer. Individual states determine the penalties for noncompliance by plans within their oversight. For example, sections 1386-1389 and 1390-1394.3 of California's Health and Safety Code authorize a variety of penalties for noncompliance with state and/or federal requirements, including civil (eg, fines), criminal (eg, jail), administrative (eg, revoking a license to sell insurance), and equitable remedies (eg, a court-ordered injunction).

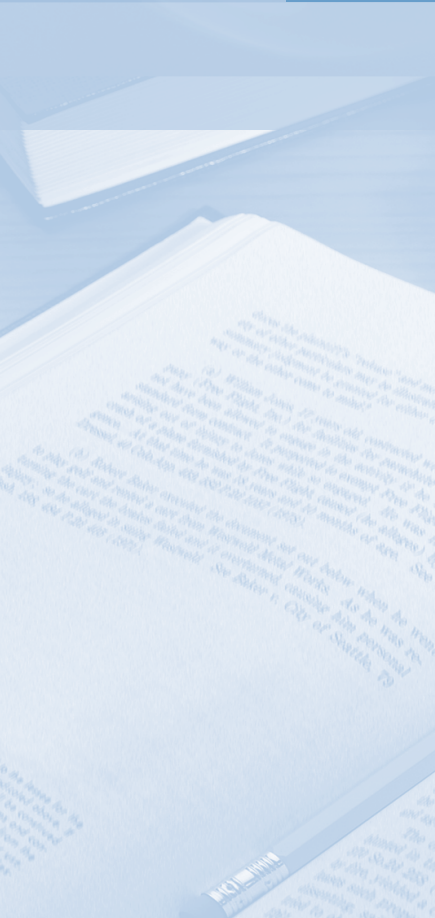
131. TRICARE SMOKING CESSATION PROGRAM

32 Code of Federal Regulations Section 199.4(e)(30)

SCOPE: On February 27, 2013, the U.S. Department of Defense issued regulations regarding a smoking cessation program under TRICARE, which provides health benefits for military personnel, military retirees, and their dependents. The regulations state that smoking cessation medications are available through TRICARE at no cost to the beneficiary, and that TRICARE covers individual and group cessation counseling. Beneficiaries also have access to a toll-free quit line and web-based resources. Beneficiaries are entitled to 2 quit attempts per 12-month period. A third quit attempt may be covered with physician authorization.



INDEXES



Advertising (see also Brand Names and Marketing)	
Blunt wraps.....	61
Cartoon characters, use of in advertising and packaging.....	64
Content disclosures.....	70
Coupons (see Coupons)	
Endorsement by U.S. Food and Drug Administration.....	69
Generally.....	56-72, 87, 89, 120, 121
Modified risk tobacco products.....	51, 52
Outdoor.....	56-59
Preemption.....	57, 59, 120
Public transportation.....	63
Reporting.....	93
Samples.....	36, 44, 79-81, 96
State buildings.....	62
Video games.....	66, 78
Warnings, health.....	50-52, 59, 86-91
Youth targeting.....	65
Affordable Care Act (see Patient Protection and Affordable Care Act)	
Airplanes.....	13
Americans with Disabilities Act (ADA) (see also Discrimination).....	123
Apartments	
Housing discrimination.....	124-127
Tobacco use in.....	2
Appeal bonds (see also Master Settlement Agreement).....	119
Bars.....	1, 25, 34
Baseball stadiums.....	21
Bidis.....	37
Billboards.....	56-59, 71, 73
Blunt wraps, advertising.....	61
Brand names (see also Advertising and Marketing)	
Generally.....	56, 63, 66, 73-77, 81, 84, 97, 112
Product placement.....	78
Reporting.....	93
Buses	
Advertising.....	63
Tobacco use in.....	12, 14
Cannabis.....	15, 55
Cartoon characters, use of in advertising and packaging.....	64

ENTRY NUMBERS

Cessation4, 17, 19, 22, 27, 28, 95, 129-131

Colleges (see Universities)

Condominiums

 Housing discrimination.....124-126

 Tobacco use in2

Correctional facilities22-24

Corrective statements86

Counterfeit products98-100, 113

Coupons

 Prohibition generally.....36, 41, 59

 Prohibition relating to samples.....79-81

Day cares1, 9

Disabilities (see Discrimination)

Disclosures, content.....70, 116

Discounts59, 79

Discrimination

 Employment26, 123, 125, 126

 Housing123-126

Distributors36-37, 39-41, 43-46, 50-52, 59, 71, 74, 77,
81, 84, 86, 88-90, 93-100, 104, 105, 107-111, 114, 116

Electronic cigarettes.....overview, 13, 20, 46

Electronic nicotine delivery systems.....overview, 8, 13, 29, 32, 36, 49-52,
54, 87, 91, 114, 116, 120

Electronic smoking devices.....overview, 1, 2, 4-7, 9-15, 18, 19, 25, 27,
28, 31, 33-35, 41, 57, 101, 110

Employment discrimination.....26, 123,125, 126

Fair Employment and Housing Act (FEHA) (see also Discrimination125

Fair Housing Act (FHA) (see also Discrimination)124

Farmers’ markets5

Federal Cigarette Labeling and Advertising Act (FCLAA)59, 60, 86

Fire safe cigarettes.....45

Flavored tobacco36, 46, 53

Food service25

Foster homes10

Gifts, proof of purchase82

Government buildings (see Public buildings)

Harmful or potentially harmful (see Disclosures, content)

Health insurance premiums130

ENTRY NUMBERS

Home delivery44, 79

Housing

 Housing discrimination123-126

 Tobacco use in2

Identification checks18, 27-33, 41, 42, 47

Illicit market cigarettes (see Counterfeit products)

Ingredients70, 109, 116

Importers37, 46, 49, 86, 88, 90, 92, 106, 107, 110-116

Internet sales (see Mail order sales)

Jenkins Act.....93, 94, 97

Labeling

 Cartoons, use of in advertising and packaging64

 Counterfeit products98

 Endorsement by FDA.....69

 Generally38, 49-52, 54, 59, 64, 69, 71, 86-91, 96, 98, 120, 127

 Modified risk tobacco products.....49-51, 120

 Preemption59, 60, 86, 120

 Warnings, health50, 54, 59, 86-91, 96, 127

Lee Law60

Licensing

 Retailers101-103, 107-111

 Wholesalers/distributors.....104, 105, 107-111

 Manufacturers/importers106, 107-111

“Light,” “low,” and “mild” tobacco products (see Modified risk tobacco products)

Liquid nicotine46, 91

Lottery.....83

Mail order sales

 Generally28, 36, 41-44, 97

 Samples41, 44, 79-81

Manufacturers35, 38-40, 45, 46, 48-54, 56-59, 63-71, 73-78, 80-99, 106-116

Marketing

 Generally (see Advertising and Brand Names)

 Joint85

Master Settlement Agreement (MSA)

 Funds117-119

 Generally56, 59, 63-65, 73, 75, 76, 78, 80, 82, 96, 106, 108, 112

ENTRY NUMBERS

Medicaid, coverage of tobacco cessation therapy.....129, 130

Mental health hospitals17

Menthol, cigarettes.....53

Minimum purchase age.....18, 27-33, 41-43, 47, 79, 121

Minors (see Youth)

Misbranded tobacco products.....49, 50, 116

Modified risk tobacco products.....49-51, 120

Multiunit housing

 Housing discrimination.....123-126

 Tobacco use in2, 3

National Environmental Policy Act.....49

Packaging

 Cartoons, use of in advertising or packaging.....64

 Child resistant46, 91

 Disclosures, content70

 Labeling (see Labeling)

 Minimum size38-40

Patient Protection and Affordable Care Act (PPACA)130

Playgrounds.....6, 57, 58

Possession of tobacco.....17, 24, 27, 45, 98, 112, 120

Preemption15, 53, 57, 59, 60, 95, 101, 120

Premarket review of new tobacco products49, 50, 120

Prevent All Cigarette Trafficking (PACT) Act.....42, 43, 94

Prevention and Public Health Fund.....130

Pricing, minimum.....59

Prisons (see Correctional facilities)

Product placement78

Proof-of-purchase gifts82

Proposition 1095

Proposition 5692

Proposition 6416, 55

Proposition 65127

Proposition 9920, 95

Public buildings4, 62, 63

Public housing.....3

Public transportation.....12-14, 63, 123

Radio advertising.....67, 68

Reasonable accommodations (see Discrimination)

ENTRY NUMBERS

Record-keeping107, 113, 116

Registration of tobacco establishments77, 114, 120

Reporting (see also Disclosures, content)

 By distributors105

 By importers.....106, 115, 116

 By manufacturers.....49, 96, 106, 112, 115, 116

 By sellers.....93, 94, 97

 By state Attorney General97

 By California Department of Tax and Fee Administration (CDTFA).... 101, 104

 By wholesalers105

Restaurants.....1, 25, 123, 125

Retailers27-54, 59-61, 71, 72, 74, 79, 81, 86, 87, 89, 90, 92,
98, 101-103, 107-111, 113, 116, 121, 128

Roll-your-own tobacco

 Mail order/internet sales prohibitions.....42, 43

 Minimum package size.....39

 Reporting, contents.....116

 Tax compliance.....92

 Warning labels.....87

Sales.....18, 27-54, 71, 74, 81, 84, 86, 88, 90, 91, 93-95, 97-98,
101, 103, 104, 106, 107, 109, 110, 112, 120, 121, 128

Samples36, 44, 79-81, 96

Schools.....6, 8, 14, 19, 20, 25, 53, 57-59, 79, 95, 123

Secondhand smoke (see Smoking)

Self-service displays.....35, 36

Single cigarettes.....38-40

Smokeless Tobacco Master Settlement Agreement (STMSA).....56, 57, 63-65, 73, 75,
76, 78, 80, 82

Smoking.....1-17, 19-26

Sponsorship (see also Brand names)56, 63, 73-75, 81

State buildings (see Public buildings)

Stop Tobacco Access to Kids Enforcement (STAKE) Act

 Generally.....27, 28, 30, 31, 33-35, 41, 57, 61, 103, 105

 Sign posting requirement.....33

Storefront advertising56-58, 60

Students4, 8, 14, 19, 20, 25

Substance Abuse Prevention and Treatment.....30

Synar Amendment30

Tax	
Generally	92, 95-101, 104, 106, 108-110, 112, 115, 116, 120
Licensing (see Licensing)	
Stamps/meter impressions	42, 95, 96, 98-100, 109, 112
Television advertising	59, 67, 68, 78
Tobacco Products Scientific Advisory Committee (TPSAC).....	53, 122
Tobacco product standards	48, 51, 52, 120
Tot lots (see Playgrounds)	
Trains	
Advertising	63
Tobacco use in	13
Transportation	
Advertising	63
Discrimination prohibited	123
Electronic cigarette use in	20
Electronic smoking device use in	1, 4, 10-14
Tobacco use in	1, 10-14, 20
TRICARE Smoking Cessation Program	131
Unfair competition law.....	128
Universities.....	4
Unruh Civil Rights Act (see also Discrimination).....	126
Use of tobacco.....	1, 17, 19-26
Vehicles	
Advertising	63, 73
Tobacco use in	4, 8, 10-12, 14, 20
Vending machines.....	34, 36, 101, 105
Video games	66, 78
Warnings, health	
Advertising	50-52, 59, 86-91
Labeling.....	50-52, 59, 86-91, 96, 128
Preemption	59
Wholesalers	45, 98, 104, 105, 107-111, 113
Youth	
Advertising targeting youth (see also Advertising)	65
Correctional facilities	23
Possession/use.....	18-20, 23
Sales.....	18, 27-33, 41, 47, 121
Secondhand smoke.....	1-3, 6-11, 14, 20, 23, 25

ENTRY NUMBERS

CALIFORNIA BUSINESS AND PROFESSIONS CODE

Sections 17200–17209.....	128
Sections 17534–17535.....	79
Section 17537.3.....	79
Section 22952 (STAKE Act).....	28, 33
Section 22954 (STAKE Act).....	105
Section 22956 (STAKE Act).....	31
Section 22957 (STAKE Act).....	28, 31, 33, 34, 57, 105
Section 22958 (STAKE Act).....	28, 33-35, 57, 61, 103
Section 22960 (STAKE Act).....	34, 35
Section 22961 (STAKE Act).....	57
Section 22962 (STAKE Act).....	35, 61
Section 22963 (STAKE Act).....	41
Sections 22970–22991.....	110
Section 22971.....	101, 104, 106, 110
Sections 22971.1–22971.2.....	101, 110
Section 22971.3.....	27, 101, 110
Sections 22971.4–22971.5.....	101, 110
Section 22972.....	101, 102, 110
Sections 22972.1–22973.1.....	101, 110
Section 22973.2.....	101, 110, 111
Section 22974.....	104, 107
Section 22974.3.....	107, 110
Section 22974.4.....	110
Section 22974.5.....	102, 110
Section 22974.7.....	110
Sections 22975–22978.8.....	104, 110
Section 22978.....	104, 110, 111
Section 22978.1.....	104, 107, 110
Section 22978.2.....	98, 104, 110
Sections 22978.6–22978.7.....	104, 110
Section 22979.....	106, 110
Section 22979.3.....	110, 111
Sections 22979.4–22979.5.....	107, 110
Section 22979.7.....	106, 110
Sections 22979.21–22979.24.....	106, 110
Section 22980.....	108, 110
Section 22980.1.....	109, 110

ENTRY NUMBERS

Section 22980.2101, 104, 106, 110
 Section 22980.3110
 Section 22980.5102, 110
 Section 2298198, 101, 104, 107-110
 Section 22900.7.....101, 110
 Section 25612.5.....60
 Section 2561760
 Section 2561960

CALIFORNIA CIVIL CODE

Sections 51–51.3126
 Section 1947.52
 Section 347944

CALIFORNIA CODE OF REGULATIONS

Title 15, Section 3006.....22
 Title 15, Sections 3187–318922
 Title 17, Section 6902.....33
 Title 17, Section 690328
 Title 18, Section 404896
 Title 18, Section 405496
 Title 18, Section 408179, 96

CALIFORNIA EDUCATION CODE

Sections 48900–4890119
 Section 89031.....4

CALIFORNIA GOVERNMENT CODE

Sections 6250–6276.48.....105, 106
 Sections 7596–75984, 8
 Sections 12900–12996125
 Section 19994.3562
 Sections 63049–63049.55118

CALIFORNIA HEALTH AND SAFETY CODE

Sections 1386–1394.3.....130
 Section 1530.710
 Section 1596.7959

ENTRY NUMBERS

Section 1596.8909
 Sections 14950–1496045
 Section 2460047
 Sections 25249.6–25249.13127
 Sections 104350–10448095
 Section 104420.....20
 Section 1044956, 7
 Sections 104500–104545.....95
 Sections 104550–104552.....90
 Section 104558.....119
 Section 104559.....8
 Section 113842.....25
 Section 113953.3.....25
 Sections 113977–113978.....25
 Section 11433225
 Section 114371.....5
 Section 1143905, 25
 Section 11439525
 Section 11440525
 Section 11891015
 Section 11891621
 Sections 118925–11894512, 13
 Sections 118947–11894911
 Section 11895079
 Section 11940646
 Sections 130100–13015595

CALIFORNIA INSURANCE CODE

Section 10753.14130
 Section 10965.9130

CALIFORNIA LABOR CODE

Section 96(k)26
 Section 98.626
 Section 26991
 Section 6404.51, 2, 4, 8, 9, 12-14, 17, 19-25

CALIFORNIA PENAL CODE

Section 308.....27-28, 33, 34, 61, 128
 Section 308.137
 Section 308.238
 Section 308.339
 Section 308.566
 Section 308b44
 Section 64012
 Section 830.16, 7, 12, 13, 25, 27, 37-39, 44, 47, 66,
 79, 95, 101, 104, 106-107, 109
 Section 457524
 Section 5030.122

CALIFORNIA PUBLIC UTILITIES CODE

Section 561.....13
 Section 99580.....12

CALIFORNIA REVENUE AND TAXATION CODE

Sections 30001–3048395
 Section 30101.795, 97
 Sections 30140–3014995, 104
 Section 30148.....95, 104, 106
 Sections 30155–3015995, 104
 Sections 30161–3016595, 96
 Section 30165.1.....95, 108, 112
 Section 3043595, 108
 Section 3047195, 108
 Section 3047395, 99, 110
 Section 30473.595, 100
 Section 3047495, 98
 Section 30474.195, 98
 Section 30474.595, 98
 Section 30477.....95, 98
 Section 30480.....95, 110

CALIFORNIA VEHICLE CODE

Section 33614
 Section 68014

ENTRY NUMBERS

Sections 12523–12523.5 14
 Section 13369..... 14

CALIFORNIA WELFARE AND INSTITUTIONS CODE

Section 1712.5 23
 Sections 4138–4139 17
 Section 14134.25..... 129
 Sections 15810–15818 129

CODE OF FEDERAL REGULATIONS

14 Code of Federal Regulations Section 252.3..... 13
 16 Code of Federal Regulations Sections 1700.15–1700.20 46
 21 Code of Federal Regulations Section 25.35 49
 21 Code of Federal Regulations Section 25.50 49
 21 Code of Federal Regulations Section 25.52 49
 21 Code of Federal Regulations Section 1100..... 91
 21 Code of Federal Regulations Section 1100.2..... overview
 21 Code of Federal Regulations Section 1100.3..... 29, 32, 40, 43, 48-52, 54, 58,
 81, 84, 91, 113-116, 120, 121
 21 Code of Federal Regulations Section 1140..... 91
 21 Code of Federal Regulations Section 1140.3..... overview
 21 Code of Federal Regulations Section 1140.14 29, 32, 36, 40, 91
 21 Code of Federal Regulations Section 1140.16..... 36, 40, 77, 81
 21 Code of Federal Regulations Section 1140.30..... 71
 21 Code of Federal Regulations Section 1140.34..... 74, 84
 21 Code of Federal Regulations Section 1143..... 91
 21 Code of Federal Regulations Section 1143.3..... 50, 87, 89
 21 Code of Federal Regulations Section 1143.5..... 50, 90
 21 Code of Federal Regulations Section 1150 115, 116
 24 Code of Federal Regulations Sections 100.200–100.205 124
 PROPOSED 24 Code of Federal Regulations Sections 965–966 2
 28 Code of Federal Regulations Part 36, Appendices A, C..... 123
 32 Code of Federal Regulations Section 199.4..... 131
 45 Code of Federal Regulations Section 96.130 30
 45 Code of Federal Regulations Section 150.101..... 130
 45 Code of Federal Regulations Section 150.201..... 130
 45 Code of Federal Regulations Section 150.301..... 130
 49 Code of Federal Regulations Section 175..... 13

FTC AGREEMENTS

File Numbers 0023199–0002320590

MASTER SETTLEMENT AGREEMENT (MSA)

Section II(j)73
 Section II(l)64
 Section II(ii)56
 Section II(xx)56, 63
 Section III(a)65
 Section III(b)64
 Section III(c)56, 63, 73, 75
 Section III(d)56, 63
 Section III(e)78
 Section III(f)75
 Section III(g)80
 Section III(h)82
 Section III(j)76
 Section VII(c)56, 63-65, 73, 75, 76, 78, 80, 82, 117
 Section IX117
 Section XI117
 Exhibit A117

SMOKELESS TOBACCO MASTER SETTLEMENT AGREEMENT (STMSA)

Section II(h)73
 Section II(j)64
 Section II(dd)56
 Section II(rr)56, 63
 Section III(a)65
 Section III(b)64
 Section III(c)56, 73
 Section III(c)(3)(D)75
 Section III(c)(3)(E)63
 Section III(d)56, 63
 Section III(e)78
 Section III(f)75
 Section III(g)80
 Section III(h)82

ENTRY NUMBERS

Section III(j)76
 Section VII(c)56, 63-65, 73, 75, 76, 78, 80, 82

UNITED STATES CODE

15 United States Code Section 37542, 93, 94
 15 United States Code Section 37642, 94
 15 United States Code Section 376a42, 94, 95
 15 United States Code Section 37742, 94, 95
 15 United States Code Section 37894, 95
 15 United States Code Sections 1331–133259
 15 United States Code Section 133359, 70, 86, 116
 15 United States Code Section 133459, 86
 15 United States Code Section 133559, 67
 15 United States Code Section 1335a109
 15 United States Code Section 133659, 70, 86
 15 United States Code Sections 1338–133959, 67, 70, 86
 15 United States Code Sections 1340–134159
 15 United States Code Section 1472a46
 15 United States Code Sections 4401–4408.....59
 15 United States Code Section 440259, 68, 88, 89
 15 United States Code Sections 4404–4405.....59, 68, 88, 89
 18 United States Code Section 1716E42, 94
 20 United States Code Section 60838, 9
 21 United States Code Sections 321(g)–(h)overview, 29
 21 United States Code Section 321(rr)85
 21 United States Code Section 331(tt)69
 21 United States Code Section 33329, 32, 36, 40, 43, 48-54, 58, 69,
 71, 72, 74, 77, 81, 84, 85, 113-116
 21 United States Code Section 353(g)overview, 29
 21 United States Code Section 37229, 32, 36, 40, 43, 48-54, 58, 69,
 71, 72, 74, 77, 81, 84, 85, 113-116, 121
 21 United States Code Section 387116
 21 United States Code Section 387a87, 90
 21 United States Code Section 387a-129, 32, 36, 40, 58, 71, 74, 77, 81, 84
 21 United States Code Section 387b50
 21 United States Code Section 387c50
 21 United States Code Section 387d71, 117
 21 United States Code Section 387e50, 115

ENTRY NUMBERS

21 United States Code Section 387f29, 32, 36, 40, 43, 50, 58, 71, 74, 81, 87, 90, 121

21 United States Code Section 387g48, 53

21 United States Code Section 387i116

21 United States Code Section 387joverview, 49

21 United States Code Section 387k51, 52

21 United States Code Section 387m72

21 United States Code Section 387n70, 86, 87, 89

21 United States Code Section 387o116

21 United States Code Section 387p120

21 United States Code Section 387q122

21 United States Code Section 387s115

21 United States Code Section 387t54, 113

26 United States Code Sections 5701–570492

26 United States Code Section 572383

26 United States Code Section 575496

26 United States Code Sections 5761–576392

26 United States Code Section 576283

42 United States Code Section 300u-11130

42 United States Code Section 300x-2630

42 United States Code Section 300gg130

42 United States Code Section 1395w-102(e)130

42 United States Code Section 1396d130

42 United States Code Section 1396o130

42 United States Code Section 1396r-8(d)(2)(E)130

42 United States Code Section 1397e130

42 United States Code Section 1397r-8130

42 United States Code Section 1437f124

42 United States Code Section 1981a123

42 United States Code Section 2000e-5123

42 United States Code Sections 3601–3619124

42 United States Code Sections 12101–12213123

42 United States Code Sections 12181–12182123

49 United States Code Section 4170613

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