



**Volume 24**

**August 2023**

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**Message from the National Chair**

Hello Everyone! Summer has just flown by and I hope everyone got to take a well-deserved vacation this year. I have been lucky to celebrate a few milestones in that both my daughters graduated this year, one from high school and the other from college. I think about what they are going to have to go through the next few years and I think there are a lot of parallels in the work that we do on a daily basis related to tobacco taxes.

time and meet other participants in those meetings. If you are new to tobacco taxes, don't hesitate to ask a question. The wealth of knowledge that is in these meetings is tremendous. Use this time to learn and think about how it may apply to your State.

Since this is my last uniformity newsletter, I want to thank everyone for allowing me to represent FTA and the North Carolina Department of Revenue. I encourage everyone to try to get involved whether it is attending an FTA meeting or participating as a member of some of our committees. "This is the Way." I hope to see everyone at the FTA Tobacco Tax Section Annual Conference in Tucson Arizona, August 21-24, 2022.

**Al Milak**

**Upcoming Meetings:**

**Southern Regional**  
June 28-29, 2023  
Savannah, GA

**August Uniformity**  
August 18-19, 2023  
Tucson, AZ

**Annual Business Meeting**  
August 20-23, 2023  
Tucson, AZ

It is imperative that we continue the great work that FTA has done to help administer the tobacco tax laws of our States. With that being said, we need to find the next generation that will have the same passion about tobacco taxes. I always think back to the very first FTA Annual Meeting that I attended. My mind was blown away with the amount of information available and it really helped me understand tobacco taxes and how they should be administered. Over the years, we have used some of these best practices learned at FTA meetings and I am constantly learning new things. Spend



## Message from Uniformity Committee Co-Chairs

Tim and I are looking forward to seeing everyone in Tucson, AZ for the Tobacco Uniformity meeting that meets prior to the 2023 Tobacco Annual Meeting. At the May meeting in St. Louis, MO Tim and I gave a presentation on what is Tobacco Uniformity, and how this can help the states and industry. We are looking forward to continuing our discussion on the benefits of Tobacco Uniformity at the upcoming meeting in Tucson, AZ. The topics discussed at the last meeting in St. Louis, MO were modified risk and what challenges it causes to the XML Schema, alternative nicotine products, white papers, flavor bans, and an update to the electronic filing guide. In addition, we had a very informative presentation by the cannabis sub-committee on the cannabis industry. We also heard an update from states that are in the process of moving to uniformity. We are looking forward to hearing more from the states moving to uniformity at the next meeting!

**Jason and Tim**

## Compliance Subcommittee Update

We had a great uniformity meeting in Saint Louis, Missouri in May 2023 with lots of interesting presentations and time for networking.

The Compliance Update included:

- Flavor Bans and the number of States where legislation failed in 2022 and 2023;
- Alternative Nicotine Tobacco Products such as IQOS, ENDS, Dissolvables, Hookah, ON! & Zyn;
- Confiscation or Seizure in Place, Storage and the High Costs for Destruction of Vape Liquids;

Food & Drug Administration (FDA) updates;

- Pre-Market Tobacco Application (PMTA) process with the FDA and where those applications stand;
- Modified Risk Tobacco Products (MRTP) & proposed FDA rules;
- Compliance Issues reviewed TX case studies on untaxed hookah and counterfeit cigarettes and tax stamps.

Recent FDA Regulatory activity: (Final Rules and Proposed Rules)

Anticipating two final rules to be published in late August / early September. One for menthol cigarettes and one for flavored cigars. Both rules from the FDA will ban both menthol in cigarettes and characterizing flavors in cigars. We won't know the effective dates on these two rules until they are published. Expected

litigation will likely delay or push out the effective dates.

In June 2022, the FDA proposed a new regulation that would place a cap on the maximum amount of nicotine allowed in cigarettes and possibly other combustible tobacco products and would likely result in a significant reduction in the amount of nicotine allowed in those products. While the FDA had previously stated that this proposed "very low nicotine" regulation would be published by October 2023, the proposed regulation is now expected in December 2023.

### FDA Enforcement:

The FDA is prioritizing its enforcement efforts with the resources that it has available. Specifically, the FDA is not currently taking enforcement action against all tobacco products with a pending Pre-Market Tobacco Application (PMTA), which includes those that have not yet received a Marketing Granted Order. Rather, the agency's enforcement efforts are focused on the following:

- Tobacco products with no PMTA submitted.
- Tobacco products with a Marketing Denial Order (MDO). Note that some manufacturers who have sued after receiving a MDO have obtained court orders requiring the FDA to re-review their PMTAs.
- Flavored cartridge type e-cigarettes, but not tobacco or menthol flavor.
- E-cigarette manufacturers not preventing youth access.

- E-cigarettes targeted to youth.
- In another action taken in May, the FDA issued import alerts for all products under both the Elf Bar and Esco Bars brands. An import alert places these tobacco products on what is known as the "red list," which makes the products subject to detention without physical examination upon importation through a port of entry into the United States.

The uniformity compliance subcommittee is planning for updates and case studies at the August meeting in Tucson, Arizona. We hope to see you there on the Friday and Saturday before the annual tobacco tax conference.

**Jim & Justin**

## Forms Subcommittee Update

Hello and welcome to Tucson!! We have a challenge for everyone attending the conference. We challenge you to approach at least one conference attendee that you do not know and introduce yourself. This is a great opportunity to not only learn something but to make contacts in other areas or states that are likely going through or have been through the same issues you are.

A question was presented to us about removing the Sticks Per Pack column on the cigarette forms since 25s are no longer made. We will be discussing this with the group.

If you have any questions, comments, or suggestions about the Uniformity Forms, please feel free to reach out to one of us. Have a GREAT conference!



## House of Cannabis

### IRC 280E tax burden on cannabis industry

The U.S. cannabis industry is benefiting from long-desired tax relief now that an increasing number of states – 20 so far – have approved laws that exempt, or “decouple,” businesses from Section 280E of the federal tax code. This spring, legislators in Connecticut, Illinois, New Jersey and New York passed legislation that will allow cannabis companies to deduct business expenses from their state income taxes, despite those companies remaining illegal under federal law. The savings could be in the millions for some larger operators, depending on the state’s corporate tax rate. The state-level exemption does not affect the federal taxes owed by marijuana companies, however, and businesses will still not be allowed to deduct expenses toward those federal income taxes. Section 280E of the IRS tax code prohibits marijuana businesses from taking traditional business deductions because the plant is listed as a Schedule 1 drug under the federal Controlled Substances Act. According to the Marijuana Policy Project (MPP), a Washington DC-based advocacy group, 16 states where adult-use cannabis is legal have now passed some type of legislation that decouples companies from 280E. By contrast, Alaska, Arizona, Maine, Nevada and Washington state haven’t exempted the adult-use cannabis industry from 280E, and Rhode Island’s efforts appear to have stalled in a legislative committee, according to Karen O’Keefe, director of state policies at MPP. Medical marijuana operators in Arkansas, Hawaii, Louisiana, Maine and Washington DC are also exempt from 280E under state tax law.

**Benefits vary from state to state**—Corporate tax rates are different in each state. So depending on where companies are operating, they’ll see different benefits from state exemptions from 280E, Matthew Bergman, a Chicago-based certified public accountant and senior partner at accounting and consulting firm CJBS, told MJBizDaily. In Nevada, for example, there is no corporate tax. But in Illinois, which decoupled from 280E in May, the corporate tax rate is 9.5% across the board. “So if you were now allowed to operate under normal circumstances, you could be saving like a third of your tax burden,” he said. Joshua Hamlet, an associate in tax at New York-based law firm Akerman, warned in an interview with MJBizDaily that states decoupling from 280E present complicated bookkeeping issues because not all states will apply the same rules. New Jersey, for example, will allow deductions for both corporate business tax and gross income tax. But other states might not allow deductions for both. Aaron Miles, the chief investment officer at Chicago-based marijuana multistate operator Verano Holdings, told MJBizDaily he welcomes the shift at the state level. But he said it’s small businesses and social equity licensees that will benefit the most from tax relief. Verano has been able to leverage its cash flow for growth, Miles said. But the chances of success for smaller players without access to banking and capital are hurt even further by overtaxation, he noted.

**Ballooning federal tax bills** —With operations in 13 states, Verano is also paying a high price in both state and federal income taxes, particularly because of 280E. But part of the MSO’s strategy is to pay its state income taxes on time but pay its federal income taxes late because the penalty for doing so is at a lower cost than borrowing money. Miles said the first credit facility he did with Verano came with a 15.25% interest rate - far more expensive than it would have been in other industries. “When you defer your taxes and you can keep that balance within 12 to 18 months, the penalties and fees that actually accrue are less than what we’d be able to borrow,” he noted. This year, Verano will pay roughly \$100 million in taxes and will not continue to defer, but the company will be carrying a balance of \$250 million in taxes owed. “While you have this kind of glaring income tax payable line item,” Miles said, in reality we’re saving money by going down this path.” If the prime lending rate - currently at 8.25% - came down, the strategy could change, he added. But the bigger change industry watchers are hoping for is at the federal level. The cannabis industry paid an estimated \$1.8 billion more in federal taxes than non-cannabis businesses in 2022, according to an analysis by Oregon-based Whitney Economics. That number is expected to grow to \$2.1 billion this year. Industry insiders and investors are closely watching for any sign of progress from President Joe Biden’s administration, which announced it would review and possibly deschedule or reschedule marijuana. “We certainly think that cannabis should just be descheduled,” O’Keefe said. “But if he is going to reschedule, it’s very important that he does it to (Schedule) 3 or lower - not 1 or 2 - because if it was just rescheduled to 2, it wouldn’t fix 280E.”

## ***How Can You Become More Involved In Uniformity?***

- ◆ Regularly check for updates at FTA's updated Tobacco Uniformity website at [taxadmin.org](http://taxadmin.org).
- ◆ Talk to other states and industry members.
- ◆ Attend meetings!



### Things to consider.....

If you don't currently require cigarette and/or tobacco returns, and/or PACT Act reports to be filed electronically, do you know when your state is expected to do so?

Has your revenue staff coordinated with your AG's staff to ensure the uniform schedules will also fulfill all of their filing requirements? If you're from the AGO, reach out to your Revenue Department.

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## ***Tobacco news you can use...***

### **FDA Denies Marketing of myblu Menthol E-Cigarette Product**

July 10, 2023, the U.S. Food and Drug Administration (FDA) issued a marketing denial order (MDO) for myblu Menthol 2.4%, an e-cigarette product made by Fontem US, LLC (myblu). As a result, the company must not market or distribute this product in the United States, or they risk enforcement action by FDA. The company may resubmit a new application to address the deficiencies for the product subject to this MDO.

Thorough scientific review of tobacco applications is a key pillar under FDA's role to protect the public from the dangers of tobacco use," said Matthew Farrelly, Ph.D., Director of the Office of Science within FDA's Center for Tobacco Products. "This application lacked the scientific evidence needed to demonstrate that the product provided a net benefit to the public health that outweigh the known risks."

FDA evaluates premarket tobacco product applications (PMTAs) based on a public health standard that considers the impact of the product on the population as a whole, including benefits (i.e., complete transitioning to the product or significant reduction in combustible cigarette use among adults who smoke) and risks (e.g., initiation among youth). After reviewing the company's PMTA, FDA determined that the application lacked sufficient evidence to demonstrate that permitting the marketing of the product would be appropriate for the protection of the public health, which is the applicable standard legally required by the 2009 Family Smoking Prevention and Tobacco Control Act. For example, among other deficiencies, the application did not present sufficient scientific evidence to show the menthol-flavored e-cigarette products provided an added benefit for adults who smoke relative to tobacco-flavored e-cigarettes. Tobacco products that receive a marketing denial order may not be offered for sale, distributed, or marketed in the U.S. Additionally, such products may not be introduced or delivered for introduction into interstate commerce, and if the product is already on the market, the product must be removed from the market – or risk FDA enforcement. In addition to ensuring that the manufacturer complies with this order, as with unauthorized products generally, FDA intends to ensure compliance by distributors and retailers.

Today's actions are just one of many FDA has taken to ensure any tobacco products that are marketed in the U.S. undergo science-based review and receive marketing authorizations by the agency. To date, the agency has received applications for more than 26 million deemed products and has made determinations on 99% of these applications.

"FDA has made considerable progress on the unprecedented volume of applications received," said Brian King, Ph.D., M.P.H., director of FDA's Center for Tobacco Products. "We're committed to making determinations on the remaining applications as expeditiously as possible, while ensuring the decisions are scientifically accurate, legally defensible, and aligned with the authorities granted by Congress."

To date, FDA has authorized 23 tobacco-flavored e-cigarette products and devices, which are the only e-cigarettes that currently may be lawfully sold or distributed in the United States. Last year, FDA issued MDOs to Fontem US for several other myblu products, which are the subject of ongoing litigation. Decisions on additional Fontem US e-cigarette products are pending. Retailers should contact Fontem US, LLC with any questions about products in their inventory.

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## Uniformity Committee Chairs

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Jason Kraemer  
State of Wisconsin

Tim Harris  
Eby Brown Company LLC

### Cannabis

Alberto DeLaSerna  
SICPA Product Security, LLC

Emily Joorfelz  
State of Mississippi

### Communication and Legislation

Julian Daniels  
State of Texas

Cheyenne Still  
McLane Company Inc.

### Compliance

Justin Scott  
State of Texas

Jim Pulsifer  
Altria Group Distribution Company

### Forms

Marci Rosencutter  
State of Kansas

Casey Anders  
Associated Wholesale Grocers

### Technology

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State of California

Raymond Chu  
Core-Mark International Inc.

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Governor

Brian Schummacher,  
North Dakota  
Lt. Governor

Dan Hughes,  
Minnesota  
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New Jersey  
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Lisa Qualter,  
New Hampshire  
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Sarwat Joarder,  
New York State  
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Wyoming  
Governor

Anthony Muller,  
Colorado  
Lt. Governor

James Hammack,  
Idaho  
Secretary

## **Technology Subcommittee Update**

Welcome to the Tobacco Uniformity meeting in August 2023. The Technology Subcommittee's main objective is to support the Uniformity Committee's Mission Statement by providing Uniformity Guides and Schemas that have been approved.

During our last meeting in May 2023, the subcommittee discussed Modified Risk Tobacco Products (MRTP) and the impact to electronic return filing. Specifically, we discussed the difference between a Modified Risk Order (MRO) and Exposure Modification Order (EMO), the states providing discounts for products with an MRO or EMO, and the methods used by states to provide the discount.

In addition, we discussed the challenges to identifying MRTP in the schema. At the upcoming August subcommittee meeting, we plan to further discuss MRTP, the brand code table, and changes to the Electronic Filing Guide.

We hope that you will find our discussions productive and informative. As always, we welcome your input and feedback.

**Mike and Ray**

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## **Communications and Legislation Subcommittee Update**

Thank you to all the participants in the May Uniformity meeting. We're excited to see everyone in August and to welcome some newcomers.

The Tobacco Tax Information by State (TTIBS) book has become a great resource for states, industry, and everyone in-between. The yearly update is underway, and the most recent version will be published on the website sometime in August. At the meeting, we will review which states did not participate in the 2023 update in hopes to have 100% participation next year! To view the most recent version, please visit [www.taxadmin.org/tobacco-tax-uniformity-project](http://www.taxadmin.org/tobacco-tax-uniformity-project).

We are always looking for volunteers to complete white papers, and the topics to choose from are endless with the ever-growing tobacco industry. If anyone would like to volunteer for one or would like topic suggestions, please let us know.

Most state legislative sessions have ended for the year, so we ask that States come prepared to talk about any known legislation changes that may occur or recent changes made effective.

**Cheyenne and JD**

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## **Communications and Legislation Subcommittee Update**

### **White Paper Discussed Topics:**

- Flavor Bans
- Alternative Nicotine Products
- Delivery/Remote Sales



If you would be interested in participating in a white paper topic, please contact the chair.

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## **Cannabis Subcommittee**

We are looking forward to meeting everyone in Arizona in August! Cannabis has been a popular topic and whether your state is looking to enact or alter current legislation, we encourage everyone to review the White Papers as they contain tons of useful information!

Cannabis is still federally illegal, but we have seen the rise of Delta 8 and 10 (both are legal on the federal level), which is causing some headaches for states that are only allowing medical cannabis sales.

Join us in Arizona for a more in-depth discussion as we give an overview of cannabis history, taxation, and complex issues surrounding this industry.

**Emily and Alberto**

**FDA News**—On July 10, 2023, the U.S. Food and Drug Administration (FDA) issued a marketing denial order (MDO) for myblu Menthol 2.4%, an e-cigarette product made by Fontem US, LLC (myblu). As a result, the company must not market or distribute this product in the United States, or they risk enforcement action by FDA. The company may resubmit a new application to address the deficiencies for the product subject to this MDO.

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## **Training & Development Opportunities**

**More information regarding training coming soon.**

### **Tobacco Tax Section Officers**

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**National Vice Chair**

Justin Scott, Texas

**National Secretary**

Florence Sam, DC





[www.taxadmin.org](http://www.taxadmin.org)

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FTA Tobacco Tax Section  
Uniformity Committee  
Mission Statement

Provide an opportunity for government and industry to partner for the efficient and effective reporting and remittance of tobacco taxes, to minimize tobacco tax evasion, and to act as an information resource to stakeholders.

