

Title 11 – Department of Justice

**Notice of Finding of Emergency
(Second Re-Adoption)**

**Second Re-Adoption of Emergency Regulations to Implement 2010
Amendments to
Business and Professions Code section 22979(a), Revenue and Taxation Code
section 30165.1, and Health and Safety Code sections 104555-104557**

Finding of Emergency

The emergency conditions still exist and the emergency regulations must be re-adopted a second time so that manufacturers can comply with the recently amended statutes. Pursuant to Revenue and Taxation Code section 30165.1, subdivision (b), on or before April 30th of each year, all tobacco product manufacturers whose cigarettes are sold in California must submit a completed Certification For Listing On California Directory (JUS-TOB1) with supporting documentation as specified. A tobacco product manufacturer and its brand families will not be listed on the directory, or will be removed from the directory, if the tobacco product manufacturer or any of its brand families are not in full compliance with the terms and requirements of the reserve fund statute (Health & Saf. Code, §§ 104555-104557), the tobacco directory statute (Rev. & Tax. Code, § 30165.1), and any implementing regulations.

The California Department of Justice (Department) approved emergency regulations and forms to implement certain enhancements and clean-up made to Revenue and Taxation Code section 30165.1, Business and Professions Code section 22979, and Health and Safety Code sections 104555-104557, pursuant to the enactment of AB 2496 (Stats. 2010, ch. 265, effective January 1, 2011). The Department subsequently approved a re-adoption of those regulations, which included certain changes to Form JUS-TOB11, in response to comments and questions from several participating manufacturers. While the first re-adoption was already in process, after receiving the comments from the participating manufacturers and conducting additional legal research, the Department undertook a closer review of, and made changes to, the text of regulations and to three additional forms, JUS-TOB9, JUS-TOB10, and JUS-TOB14. In order to implement these changes, the Department approved a second re-adoption of the emergency forms and regulations. The changes that the Department has made to the regulations and the four forms in response to comments from participating manufacturers and internal legal research demonstrate that the Department has made substantial progress and proceeded with diligence on these regulations, as required by Government Code section 11346.1, subdivision(h). The Department's substantial progress regarding changes made to the regulations and forms is described in greater detail in its Chronology of Changes Made to Regulations and Forms in the *Informative Digest/Policy Statement Overview, Infra*.

The Attorney General may adopt rules and regulations to implement these legislative amendments pursuant to express authority provided in subdivision (o) of section 30165.1 of the

Revenue and Taxation Code. Furthermore, the Department has the authority to adopt these rules as emergency regulations based on the Legislature's declaration that:

The regulations adopted to effect the purposes of this section [30165.1] are emergency regulations in accordance with Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purpose of that chapter, including section 11349.6 of the Government Code, the adoption of the regulations shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare. Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the regulations shall be repealed 180 days after their effective date, unless the adopting authority or agency complies with that chapter, as provided in subdivision (e) of Section 11346.1 of the Government Code.

(Rev. & Tax. Code, § 30165.1, subd. (o).)

Government Code section 11346.1, subdivision (a)(2)

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency must provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency regulations to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations, as set forth in the Government Code section 11349.6. Pursuant to section 11346.1(a)(2), upon approval of the notice of proposed emergency action, specific language of the revised regulations and all revised forms proposed to be adopted, and the Notice of Finding of the Emergency (collectively, "Second Re-Adoption"), the Department will promptly send these documents to Alexander Shaknes, an attorney representing Philip Morris USA Inc., and Elizabeth McCallum, an attorney requesting information on behalf of Commonwealth Brands, Inc., Japan Tobacco International USA, Inc., King Maker Marketing, Inc., Liggett Group LLC, Lignum-2, Inc., Top Tobacco, LP, Sherman's 1400 Broadway N.Y.C. Inc., and Vectro Tobacco Inc. The Department will send the above-described documents to these individuals at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law.

The proposed emergency regulations of the Department will be posted on the Department of Justice website at <http://caag.state.ca.us/tobacco/directory.htm>.

If you should have any questions regarding this Notice of Finding of Emergency or the attached regulations, please submit them to:

Deputy Attorney General Laura W. Kaplan
Office of the Attorney General
Tobacco Litigation and Enforcement Section
1300 I Street, P.O. Box 944255
Sacramento, CA 94244-2550
(916)323-3822
or Laura.Kaplan@doj.ca.gov

Authority and Reference

Authority to adopt these regulations is set forth in Revenue and Taxation Code section 30165.1, subdivision (o). Reference: Section 104557, subdivision (c), Health and Safety Code; Section 30165.1, subdivision (b), Revenue and Taxation Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Laws Related to the Proposed Action

The California Cigarette and Tobacco Products Licensing Act of 2003 (Bus. & Prof. Code, § 22970 et seq., hereafter the licensing act) provides for the licensure, by the State Board of Equalization, of manufacturers, distributors, wholesalers, importers, and retailers of cigarette or tobacco products that are engaged in business in California. The act prohibits retailers, manufacturers, distributors, and wholesalers from distributing or selling cigarettes and tobacco products unless they are in compliance with those licensure requirements. The licensing act requires a manufacturer or importer to comply with specified requirements in order to be eligible for obtaining and maintaining a license under that act, including consenting to jurisdiction of the California courts for the purpose of enforcement of that act and appointment of a registered agent for service of process in this state.

The California reserve fund statute (Health & Saf. Code, §§ 104555-104557) requires every tobacco product manufacturer whose cigarettes or roll-your-own (“RYO”) tobacco is sold in California to either become a party to the Tobacco Master Settlement Agreement (MSA) and comply with the terms of that agreement or establish a qualified escrow account and make annual deposits based on the manufacturer’s California sales, as provided by law.

The tobacco directory law (Rev. & Tax. Code, § 30165.1) requires the Attorney General to establish and maintain on its Internet web site a directory of compliant tobacco product manufacturers and brand families that may be sold in California. Section 30165.1 prohibits the sale of cigarettes and RYO tobacco that are not listed on the directory.

Effect of the Emergency Regulations in the Legal Context

AB 2496 (Stats. 2010, ch. 265) enhances and cleans up the reserve fund statute and the tobacco directory law to provide additional enforcement tools to the State of California by, among other things, requiring manufacturers and importers to consent to the jurisdiction of the California courts for the purpose of enforcement of the reserve fund statute and the tobacco directory law.

AB 2496 also provides that all manufacturers and importers shall obtain and maintain a license to engage in the sale of cigarettes in California, and that manufacturers must be licensed in order to be listed on the California Tobacco Directory.

AB 2496 amended section 22979 of the Business and Professions Code to provide that in order to be eligible for obtaining and maintaining a license manufacturers and importers must waive any sovereign immunity defense that may apply to any enforcement of the licensing act, the reserve fund statute and the tobacco directory law. In lieu of waiving sovereign immunity, a manufacturer or importer may post a surety bond. Section 22979, as amended, provides that waivers of sovereign immunity and surety bonds must be in a form and manner acceptable to the Attorney General. New regulation section 999.24 establishes the form and manner for manufacturers and importers to waive sovereign immunity and consent to the jurisdiction of the California courts for purposes of licensure by the Board of Equalization, as required by subdivision (a)(4) of section 22979. New regulation section 999.26 prescribes the form and manner for manufacturers and importers to post surety bonds.

Changes were made to Section 999.24 regarding the form and manner for manufacturers and importers to waive sovereign immunity and consent to the jurisdiction of the California courts for purposes of licensure by the Board of Equalization, as required by subdivision (a)(4) of section 22979 of the Business and Professions Code. The form and manner of waiver of sovereign immunity, as set forth in the incorporation by reference forms contained therein, were modified after review of California and federal statutes and case law regarding the scope of foreign government and tribal sovereign immunity, including the Foreign Sovereign Immunities Act, 28 U.S.C. sections 1602 et seq., and *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003). The Attorney General determined that three sovereign immunity forms, incorporated therein by reference, were reasonable and necessary to accommodate the unique scope of tribal sovereign immunity, foreign government sovereign immunity, and any other form of sovereign immunity.

Changes were made to Section 999.26 regarding the form and manner for manufacturers and importers to post a surety bond in lieu of waiving sovereign immunity pursuant to section 22979, subdivision (a)(4), of the Business and Professions Code, the form and manner by which newly qualified and elevated risk non-participating manufacturers must post a bond pursuant to section 30165.1, subdivision (c)(4), of the Revenue and Taxation Code, and the form and manner by which tobacco product manufacturers engaging in delivery sales may post a bond as a form of reasonable assurances pursuant to section 30165.1, subdivision (c)(2)(E), of the Revenue and Taxation Code. This section incorporates by reference the surety bond form approved by the Attorney General, established in accordance with section 22979, subdivision (a)(4), of the Business and Professions Code and section 30165.1, subdivisions (c)(2)(E) and (c)(4) of the Revenue and Taxation Code, and upon a review of California surety bond requirements.

The Department also made non-substantive changes to sections 999.10, 999.14, 999.16, 999.19, and 999.22.

Chronology of Changes Made to Regulations and Forms

First Re-adoption

After implementing the emergency regulations and forms, the Department received several comments and questions from participating manufacturers regarding Form JUS-TOB11, then titled "Standard Waiver of Sovereign Immunity by Tobacco Company." As a result of the comments, the Department made changes to Form JUS-TOB11 to more closely conform to federal statutes and case law governing the scope of sovereign immunity and to respond to the companies' concerns. Because the Department revised the title and body of Form JUS-TOB11, the Department made corresponding changes in California Code of Regulations section 999.24(d) that referred to the version and title of Form JUS-TOB11.

Second Re-adoption

While the first round of re-adoption was in progress, the Department undertook a closer review of the AB 2496 statutes and regulations, particularly Business and Professions Code section 22979, subdivision (a), and Revenue and Taxation Code section 30165.1, subdivision (c). The Department also reviewed various surety bond forms used by State agencies for guidance. As a result, the Department determined that edits to "California Tobacco Manufacturer and Importer Surety Bond," Form JUS-TOB14, were necessary to encompass all situations under the AB2496 regulations in which a tobacco manufacturer or importer could be required to post a surety bond. The Department edited Form JUS-TOB14 to encompass the different situations in which a tobacco manufacturer or importer could be required to post a surety bond, and added clarifying language regarding the terms of the bond and obligations of the surety. The Department made corresponding changes in California Code of Regulations section 999.26 that referred to the version of Form JUS-TOB14.

In addition, after editing Form JUS-TOB11 in the first round of re-adoption, the Department determined that the same edits regarding the scope of sovereign immunity were necessary for "Waiver of Tribal Sovereign Immunity by Native American Tribe," Form JUS-TOB9, and "Waiver of Sovereign Immunity by Government-Owned Tobacco Company," Form JUS-TOB10. The Department made these changes, and eliminated unnecessary provisions. The Department made corresponding changes in California Code of Regulations sections 999.24(b)-(c), which referred to the provisions of Form JUS-TOB9 and Form JUS-TOB10.

The forms incorporated by reference herein are:

State of California, JUS-TOB1, (Rev. 09/2010), Certification For Listing On California Directory;

State of California, JUS-TOB2, (Rev. 02/2011), Notice Of Appointment Of Registered Agent And Registered Agent's Statement For Non-Participating Manufacturer;

State of California, JUS-TOB3, (Rev. 02/2011), Certification Of Compliance And Affidavit By Non-Participating Tobacco Product Manufacturer Regarding Deposit Of Reserve Funds Into Escrow,

State of California, JUS-TOB4, (Rev. 02/2011) Brand Families Unit Sales Schedule 1;

State of California, JUS-TOB9, (Rev. 10/2011), Waiver Of Tribal Sovereign Immunity By Native American Tribe;

State of California, JUS-TOB10, (Rev. 10/2011), Waiver Of Sovereign Immunity By Government-Owned Tobacco Company; and

State of California, JUS-TOB11, (Rev. 08/2011), Standard Waiver Of Sovereign Immunity By Tobacco Manufacturer or Importer;

State of California, JUS-TOB12, (Rev. 02/2011), United States Importer Declaration Accepting Joint And Several Liability;

State of California, JUS-TOB13, (Rev. 02/2011), Notice of Appointment Of Registered Agent And Registered Agent's Statement for Importer;

State of California, JUS-TOB14, (Rev. 10/2011), California Tobacco Manufacturer And Importer Surety Bond.

State of California, JUS-TOB15, (Orig. 02/2011), Cigarette Brand Style Authentication Information;

Disclosure/Determinations Regarding the Regulation's Fiscal Impact

- Cost or savings to State Agencies: None
- Cost to any local agency or school district where they must be reimbursed in accordance with Government Code sections 17500 through 17620: None
- Mandate and cost to any local agency or school district: None
- Other non-discretionary cost or savings imposed upon local agencies: None
- Cost or savings in federal funding the state: None
- Cost impacts on representative private person or businesses: The DOJ is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- Significant statewide adverse economic impact: None
- Effect on small business: The DOJ had made an initial determination that compliance with the regulations will not impose significant costs.
- Significant effect on housing costs: None

In accordance with Government Code section 11346.3, the following are required responses of state agencies proposing to adopt or amend administrative regulations to assess whether and to what extent it will affect the following:

- The creation or elimination of jobs within the State of California: None
- The creation of new businesses or the elimination of existing businesses within the State of California: None
- The expansion of businesses currently doing business within the State of California: None