

**NOTICE OF IMPLEMENTING REGULATIONS NEEDED BY THE ENACTMENT OF
A.B. 2496**

Title 11 – Department of Justice

IMPLEMENTING REGULATIONS NEEDED BY THE ENACTMENT OF A.B. 2496

NOTICE IS HEREBY GIVEN that the Department of Justice (DOJ) proposes to approve the emergency regulations implementing certain enhancements and clean-up made to Business and Professions Code section 22979(a), Revenue and Taxation Code section 30165.1, and Health and Safety Code sections 104555-104557, pursuant to the enactment of A.B. 2496 (Stats. 2010, ch. 265, effective January 1, 2011).

OPPORTUNITY TO SUBMIT COMMENTS AND TO REQUEST A PUBLIC HEARING

Notice is also given that DOJ will accept written comments, statements, arguments, or contentions relevant to this regulatory action until **January 2, 2012**. No public hearing will be held unless an interested person requests a hearing in writing on or before on **December 18, 2011**. Requests for a public hearing and/or written comments should be addressed to:

Laura Kaplan
Office of the Attorney General
Tobacco Litigation and Enforcement Section
1300 'I' Street
P.O. Box 944255
Sacramento, CA 94244-2550

Comments may also be submitted by e-mail to tobacco@doj.ca.gov.

PROPOSED REVISIONS AND FINAL ADOPTION OF REGULATIONS

Following the public comment period, which closes on January 2, 2012, forty-five (45) calendar days from the date of this Notice, DOJ may adopt the proposed regulations if they remain substantially unchanged as described in the informative digest. DOJ may make changes in the proposed regulations before adopting them. The text of any modified regulations will be made available to the public with the changes clearly marked at least fifteen (15) days before the regulations are adopted. If a modified text is required, a request for a copy should be made to the agency official designated in this notice. DOJ will accept comments on the modified regulations for fifteen (15) days after date on which the revised text is made available.

The Attorney General's Office has made an initial determination that no reasonable alternative considered or that has otherwise been identified and brought to the attention of this office, would be more effective in carrying out the purpose for which this regulatory action is proposed or

would be as effective as and less burdensome to affected private persons than the proposed action.

If adopted, the regulations will appear in the California Code of Regulations, Title 11, Division 1, Chapter 16, Sections 999.10-999.29.

AUTHORITY AND REFERENCE

Authority to adopt these regulations is set forth in Revenue and Taxation Code section 30165.1, subdivision (o). References include Health and Safety Code section 104557(c), Revenue and Taxation Code section 30165.1, and Business and Professions Code sections 22979(a)(3) and (4). Specific authority and reference citations are included after the text of each regulation.

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 licensing 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

A.B. 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. A.B. 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.

A.B. 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.

Sections 999.10, 999.11, 999.14, 999.19, 999.20, 999.21 and 999.22 were added to this action solely for the purpose of updating the incorporation by reference forms contained therein.

The amendments to existing regulation sections 999.16 and 999.17 prescribe additional procedures to be followed, and additional documentation to be provided, by all tobacco product manufacturers whose cigarettes or RYO tobacco are sold in California. Section 999.16 requires, as part of the certification process for inclusion in California's directory of compliant tobacco product manufacturers and their cigarettes or RYO tobacco, that every manufacturer waive sovereign immunity pursuant to new section 999.24, provide reasonable assurance documents pursuant to new section 999.27 if the manufacturer or any of its importers engages in delivery sales, and complete a Cigarette Brand Styles Authentication form pursuant to new section 999.29. Section 999.17, which lists the conditions under which a tobacco product manufacturer must provide supplemental certifications to the Department, is amended to require manufacturers to submit a supplemental certification when documents submitted along with a previously submitted certification are no longer accurate and complete.

New regulations sections 999.25, 999.27, 999.28 and 999.29 prescribe additional procedures to be followed and forms to be used by all tobacco product manufacturers and importers whose cigarettes or RYO tobacco is sold in California.

Section 999.25 establishes the forms and manner for complying with subdivision (b)(3)(E) of section 30165.1 of the Revenue and Taxation Code, as amended by A.B. 2496, as a condition for listing on the California Tobacco Directory. The statute requires that every non-participating manufacturer located outside the United States provide a declaration in the form prescribed by the Attorney General from each of its importers into the United States of any of its brand families to be sold in California, that the importer accepts joint and several liability with the non-participating manufacturer for all required escrow deposits due in accordance with the reserve fund statute, and for payment of all fees, costs, attorney's fees, penalties, and refunds imposed or required under the tobacco directory law, including but not limited to all refunds resulting from the removal of the manufacturer or any of its brand families from the directory. The importer must appoint an agent for the service of process in California in accordance with subdivision (f) of section 30165.1; in addition, the non-participating manufacturer must affirm that it has caused

every importer that will sell its tobacco products in this state to obtain and maintain a license as an importer pursuant to the licensing act.

In addition to establishing the form and manner for manufacturers and importers to post a surety bond in lieu of waiving sovereign immunity, section 999.26 provides the form and manner by which newly qualified and elevated risk non-participating manufacturers must post a bond pursuant to Revenue and Taxation Code section 30165.1(c)(4) and appoint a registered agent in the state for service of process and other enforcement purposes.

Section 999.27 establishes the forms and manner for manufacturers and importers that engage in delivery sales to provide reasonable assurances to the Attorney General of compliance with all the federal and state laws governing delivery sellers, as required by subdivision (c)(2)(E) of section 30165.1, as amended by A.B. 2496.

Section 999.28 establishes the forms and manner for non-participating manufacturers to provide reasonable assurances of compliance with the tobacco directory law, new section 30165.2 of the Revenue and Taxation Code and the reserve fund law, as required by subdivision (c)(2)(C) of section 30165.1 as amended by A.B. 2496.

Section 999.29 establishes the forms and manner for tobacco product manufacturers to complete and submit a Cigarette Brand Styles Authentication form as a condition for listing on the tobacco directory, as required by subdivisions (c)(2)(C) and(E), (g)(4) and (q)(2) of section 30165.1.

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, "Standard Waiver of Sovereign Immunity by Tobacco Manufacturer and Importer." 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 A.B. 2496 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 A.B. 2496 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 Code of Regulations section 999.24(b)-(c) that referred to the version and scope 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;

State of California, JUS-TOB11, (Rev. 8/2011), 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; and

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

DISCLOSURES/DETERMINATIONS REGARDING THE PROPOSED ACTION

- 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 17630: 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 to 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: The Department has made an initial determination that the proposed regulatory action will not have any significant statewide adverse economic impact directly affecting California businesses including the ability of California businesses to compete with businesses in other states.
- Effect on small business: The DOJ has 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

INITIAL STATEMENT OF REASONS, TEXT AND INFORMATION

The Attorney General's Office has prepared an initial statement of reasons for the proposed regulatory action and has available all the information upon which the proposal is based.

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all the information upon which the proposal is based, may be obtained by contacting the persons named below or by accessing the Department's website as indicated below in this notice.

FINAL STATEMENT OF REASONS

A final statement of reasons will be prepared when all comments have been received and considered, prior to the closing of the rulemaking period. Any person may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below. You may obtain a copy of any or all information contained in the rulemaking record by making a written request to the contact person. The rulemaking file is available for public inspection at all times and can be accessed by contacting the contact person.

CONTACT PERSON

Non-substantive inquiries regarding this action, such as requests for copies of the text of the proposed regulations or forms, may be directed to Debra Berry at (916) 323-3566. Inquiries regarding the substance of the proposed regulations may be directed to Deputy Attorney General Laura Kaplan at (916) 323-3822 or Deputy Attorney General Erin Rosenberg at (510) 622-2137.

WEB ACCESS

Materials regarding this action can be found at <http://ag.ca.gov/tobacco/directory/regulations.php>

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