

Department of Justice

Regulations to Implement Revenue & Taxation Code Section 30165.1

Initial Statement of Reasons

Pursuant to section 11346.1(b) of the Government Code, the Department of Justice provides this initial statement of reasons for regulations implementing section 30165.1 of the Revenue & Taxation Code, as added by A.B. 71 (Stats. 2003, ch. 890. sec. 7), effective January 1, 2004.

Revenue and Taxation Code section 30165.1 ("section 30165.1") complements California's reserve fund statute (Health & Saf. Code, §§ 104555-104557) and provides additional enforcement tools to the state. The reserve fund statute requires every tobacco product manufacturer whose cigarettes or roll-your-own ("RYO") tobacco is sold in California either to become a party to the Tobacco Master Settlement Agreement (MSA) and comply with the terms of that agreement or to establish a qualified escrow account and make annual deposits based on the manufacturer's California sales, as provided by law.

Section 30165.1 requires the Attorney General to establish and maintain on his Internet website a directory of compliant tobacco product manufacturers and brand families which may be sold in California. Section 30165.1 prohibits the sale of cigarettes and RYO tobacco that are not listed in the directory. Any person who sells, distributes, acquires, holds, owns, possesses, transports, imports, or causes to be imported cigarettes or RYO tobacco that the person knows or should know are not included in the directory commits a misdemeanor, as well as a violation of California's Unfair Competition Law, and is subject to civil penalties. A tobacco product distributor that violates this law is also subject to license suspension and revocation.

SECTION BY SECTION EXPLANATION

Section 999.15 provides definitions of terms used in the regulations, principally by incorporating by reference the terms defined in section 30165.1 and in the reserve fund statute.

Section 999.16 establishes specific requirements, forms and procedures for tobacco product manufacturers to follow in submitting the certification required by section 30165.1 to be included on California's directory of compliant tobacco product manufacturers and their cigarettes or RYO tobacco. Subdivision (b) of section 30165.1 requires all tobacco product manufacturers whose cigarettes are sold in California to execute and deliver to the Attorney General a certification "on a form and in the matter prescribed by the Attorney General." Subdivision a of section 999.16 specifies the approved certification form tobacco product manufacturers must use, the date for submitting the initial certification and annual certifications thereafter, and who is authorized to sign the certification on behalf of the manufacturer. Subdivision b of section 999.16 lists the information and documents tobacco product manufacturers must include with their certification. The Attorney General needs this

information to properly identify the manufacturer and its brand families and determine whether the certifying company is in compliance with the applicable requirements of either the MSA or the reserve fund statute, whichever is applicable. Subdivision c of section 999.16 explains the circumstances that constitute a change of ownership for a non-participating manufacturer, which necessitate the filing of a new certification.

Section 999.17 explains the procedures a tobacco product manufacturer must follow and the forms it must use when it files a supplemental certification. Subdivisions (b)(1) and (b)(2)(D) of section 30165.1 require manufacturers to file supplemental certifications when they introduce a new brand or make changes to their existing brands as listed on their most recent certification.

Sections 999.18 sets forth record retention requirements for tobacco product manufacturers, generally implementing subdivision (b) of section 30165.1, including subdivision (b)(5) which specifically requires manufacturers to retain invoices and sales documentation and other information relied upon for the certification for a period of five years. By specifying the records that must be retained, this regulation helps ensure that the Attorney General can effectively monitor manufacturers' compliance with section 30165.1 and with the reserve fund statute.

Section 999.19 sets forth record retention requirements for tobacco product distributors and wholesalers. Subdivision (g) of section 30165.1 requires distributors to maintain documentation of sales relied upon in reporting such sales to the Board of Equalization and/or the Attorney General. By specifying the records that must be retained, the regulation ensures that the Attorney General and the Board can effectively monitor distributors' and wholesalers' compliance with section 30165.1 and other requirements imposed by applicable law.

Section 999.20 specifies the circumstances in which nonparticipating tobacco product manufacturers may be required to certify and make escrow deposits on a more frequent basis than annually. The reserve fund statute (Health & Safety Code, section 104557) requires such manufacturers to deposit funds on or before April 30 of each year following any year in which the manufacturer sold cigarettes or RYO tobacco in California. Subdivision (h) of section 30165.1 authorizes the Attorney General to promulgate regulations to require nonparticipating tobacco product manufacturers to make deposits into a qualified escrow fund on a quarterly basis or more frequently. The Attorney General has determined that in the circumstances listed in section 999.20 quarterly deposits are warranted. The circumstances include, but are not limited to, previously non-compliant companies and new entrants into the marketplace. In the regulation, the Attorney General reserves the discretion to waive the quarterly deposit requirement and to require more frequent deposits in appropriate cases.

Section 999.21 establishes the forms and procedures for complying with subdivision (f) of section 30165.1. The statute requires nonparticipating manufacturers that do not reside in California and are not registered to do business in California to appoint an agent for service of process and to notify the Attorney General of such appointment. The forms and procedures established by section 999.21 are necessary to ensure that manufacturers subject to this statutory requirement do so in a way that fulfills the purpose of the statute.

Section 999.22 specifies the form California distributors must use to provide the Attorney General with an electronic mail (e-mail) address for receiving notices from the Attorney General, regarding updates to the Directory of compliant manufacturers and brand families. Section 999.12 implements subdivision (c)(4) of section 30165.1, which requires that all distributors provide the Attorney General with an e-mail address for this purpose. Section 999.22 also explains and clarifies the conditions under which a distributor is entitled to claim the defenses provided by subdivision (i)(2) of section 30165.1, in the event the Board of Equalization initiates a disciplinary proceeding against the distributor for violating section 30165.1.

Section 999.23 explains how a tobacco product manufacturer that has been removed from the directory applies to be re-listed with its brand families. This regulation specifies the conditions the manufacturer must meet and the documentation that must be submitted. Although section 30165.1 generally establishes the conditions a manufacturer must meet to be listed on the directory and the circumstances in which the Attorney General is to remove a manufacturer from the directory, the statute does not specifically describe what conditions the manufacturer that has been removed from the directory must meet in order to be placed back on the directory.

DETERMINATION REGARDING REASONABLE ALTERNATIVES

The Attorney General has determined that there is no reasonable alternative to adopting these regulations and that they are the least burdensome and most fair and equitable way to implement section 30165.1. Requiring by formal rule that standardized forms and procedures must be used ensures that all manufacturers must provide the same kinds of information and documentation to establish their entitlement to being listed on the directory. The consequence of being listed on the Attorney General's directory is that a manufacturer's listed brand families may lawfully be sold in California. Given the importance of making correct determinations about whether a manufacturer and its brand families should or should not be listed, it is critical that the Attorney General obtain detailed information about tobacco product manufacturers to ensure that only those manufacturers and brands that are in full compliance with applicable California law are approved for sale in this state. The Attorney General has also determined that it is appropriate to exercise the authority expressly delegated to him by the Legislature in section 30165.1 to adopt regulations so that every tobacco product manufacturer has notice of and is subject to the same legal requirements as every other tobacco product manufacturer whose cigarettes or RYO tobacco is sold in this state. Such uniformity of legal requirements fosters a "level playing field" for all tobacco product manufacturers.

DETERMINATION REGARDING ECONOMIC IMPACT

The Attorney General has determined that these regulations do not impose costs on tobacco product manufacturers in addition to the costs already imposed by section 30165.1 itself. In section 30165.1 the Legislature mandated the Attorney General to establish and publish a directory of compliant manufactures and brand families. The Legislature mandated the conditions a manufacturer must meet in order to qualify for listing on the directory. However,

the Legislature also expected and intended that the Attorney General would adopt forms and procedures, as appropriate and necessary, to implement the statutory requirements in an orderly and consistent manner.