STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Introduced:	**02/15/11**	Bill No:	**Senate Bill 331**
Tax Program:	**Cigarette and Tobacco Products Licensing Act of 2003**	Author:	**Padilla**
Sponsor:	**Author**	Code Sections:	**BPC 22973.1, 22974.8, & 22974.9**
Related Bills:		Effective Date:	**01/01/12**

BILL SUMMARY

This bill would make the following changes to the Cigarette and Tobacco Products Licensing Act of 2003[1] (Licensing Act):

- Prohibit the Board of Equalization (BOE) from issuing a cigarette and tobacco products retail license upon receipt of a completed application and payment of the fees if the application is for a retail location that is within 600 feet of a public or private elementary or secondary school.
- Require the BOE to take action against a retailer of a licensed location that is located 600 feet or less from a school and who is convicted of a violation of specified laws pertaining to sales of cigarettes, tobacco products, and certain other tobacco-related products, to a person under 18 years of age.

ANALYSIS

CURRENT LAW

Chapter 2, *License for Retailers of Cigarettes and Tobacco Products*, of the Licensing Act (commencing with Section 22972) provides that a retailer who sells cigarettes and tobacco products in this state is required to have in place a license to engage in the sale of cigarettes and tobacco products and conspicuously display the license at each retail location in a manner visible to the public. A retailer that owns or controls more than one retail location where cigarettes and tobacco products are sold is required to obtain a separate license for each retail location.

Section 22973 requires that an application for a license be filed on a form prescribed by the BOE, which must include specified information. The BOE is authorized to investigate the truthfulness and completeness of the information provided in a retailer's application. The BOE may also issue a license without further investigation to an applicant for a retail location if that applicant holds a valid license from the Department of Alcoholic Beverage Control (ABC) for that same location. A license is valid for a 12-month period, and is renewed annually.

[1] Division 8.6 (commencing with Section 22970) of the Business and Professions Code.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

Section 22973.1 provides that the BOE is required to issue a license to a retailer upon receipt of a completed application and payment of the fees, unless any of the following apply:

- The retailer has previously been issued a licensed that is suspended or revoked for a violation of the Licensing Act;
- The application is for a retail location that is the same retail location as that of a retailer whose license was revoked or is subject to revocation proceedings for a violation of the Licensing Act, as specified;
- The retailer has been convicted of a felony pursuant to specified sections of the Cigarette and Tobacco Products Tax Law;
- The retailer does not possess all required permits or licenses required under the Revenue and Taxation Code.

Any retailer who is denied a license may petition for a redetermination of the BOE's denial within 30 days after service upon that retailer of the notice of the denial.

Section 22974.8 of the Licensing Act requires the BOE to take action against a retailer convicted of a violation of either the Stop Tobacco Access to Kids Enforcement (STAKE) Act[2] or Penal Code Section 308, according to the following schedule:

- Upon the first conviction of a violation, the retailer receives a warning letter from the BOE that delineates the circumstances under which a retailer's license may by suspended or revoked and the amount of time the license may be suspended or revoked. The retailer and its employees are required to receive training on tobacco control laws from the Department of Health Services upon a first conviction.
- Upon the second conviction of a violation within 12 months, the retailer is subject to a fine of five hundred dollars ($500).
- Upon the third conviction of a violation within 12 months, the retailer is subject to a fine of one thousand dollars ($1,000).
- Upon the fourth to the seventh conviction of a violation within 12 months, the BOE is required to suspend the retailer's license to sell cigarette and tobacco products for 90 days.
- Upon the eighth conviction of a violation within 24 months, the BOE is required to revoke the retailer's license to sell cigarette and tobacco products.

Convictions of violations by a retailer at one retail location are not accumulated against other locations of that same retailer. Furthermore, convictions of violations accumulated against a prior retail owner at a licensed location are not accumulated against a new retail owner at the same retail location.

This provision becomes operative on the date results from the Youth Tobacco Survey are released if the survey finds that 13 percent or more of youth were able to purchase cigarettes (trigger language). The BOE's authority to take action under this provision

[2] Division 8.5 (commencing with Section 22950) of the Business and Professions Code.

STAKE Act. The STAKE Act (Division 8.5 (commencing with Section 22950) of the Business and Professions Code) established a statewide enforcement program to take action against businesses that illegally sell tobacco to minors. In general, the STAKE Act requires the Department of Public Health (DPH) to:

- Implement an enforcement program to reduce the availability of tobacco products to minors and to conduct sting operations using 15 and 16 year old minors granted immunity;
- Establish requirements for tobacco product retailers to conspicuously post a notice stating that selling tobacco products to a person under 18 years of age is illegal and subject to penalties;
- Assess civil penalties ranging from $200 to $6,000 against the store owner for violations; and
- Comply with the Synar Amendment (Section 1926 of Title XIX of the federal Public Health Service Act) and prepare an annual report regarding enforcement activities and their effectiveness for the federal government, Legislature, and Governor.

Furthermore, the STAKE Act:

- Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 18 years of age.
- Prohibits any person, firm, or corporation from selling, giving, or in any way furnishing to another person who is under the age of 18 years any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance.
- Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or appliances are located at least 15 feet away from the entrance of a premise issued an on-sale public premise license, as defined.
- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits a person engaged in the retail sale of: 1) tobacco products to sell, offer for sale, or display for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted, or 2) blunt wraps to place or maintain, or to cause to be placed or maintained, any blunt wraps advertising display within two feet of candy, snack, or nonalcoholic beverage displayed inside any store or business or that is less than four feet above the floor.
- Prohibits the distributing or selling of tobacco products directly or indirectly to any person under the age of 18 years through the United State Postal Service or through any other public or private postal or package delivery service, as described.

Penal Code Section 308. Penal Code Section 308 prohibits every person, firm, or corporation which knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, from selling, giving, or in any way furnishing to another person who is under the age of 18 years:

- Any tobacco, cigarette, or cigarette papers, or
- Blunt wraps, or

- Any other preparation of tobacco, or
- Any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or
- Any controlled substance.

Any person failing to comply is subject to criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense.

Section 308 also requires every person, firm, or corporation which sells, or deals in tobacco or any preparation thereof, to post conspicuously and keep posted at each point of purchase a notice that states, in part, selling tobacco products to anyone under 18 years of age is illegal. Any person failing to do so is punished, upon conviction, by a fine of fifty dollars ($50) for the first offense, one hundred dollars ($100) for the second offense, two hundred fifty dollars ($250) for the third offense, and five hundred dollars ($500) for the fourth offense and for each succeeding violation, or by imprisonment for not more than 30 days.

PROPOSED LAW

This bill would amend Section 22973.1 of the Licensing Act to prohibit the BOE from issuing a license to a retailer upon receipt of a completed application and payment of the fees if the application is for a new license for a retail location that is within 600 feet of a public or private elementary or secondary school. This requirement would not prohibit the renewal or transfer of a license for a retail location that is within 600 feet of any school.

The bill would also amend Section 22974.8 to limit its provisions only to retailers at a location that is more than 600 feet from a public or private elementary or secondary school and to incorporate language providing that the section shall not preempt or supersede any local tobacco control laws other than those related to the collection of state taxes.

And lastly, Section 22974.9 would be added to incorporate provisions identical to Section 22974.8, except that it (1) applies only to a retailer of a licensed location that is located 600 feet or less of a public or private elementary or secondary school, (2) revokes a retailer's license upon the third conviction of a violation of the STAKE Act or Penal Code Section 308, and (3) does not contain the "trigger" language making the section operative or inoperative based on the findings of the annual youth tobacco survey.

This provision would become effective January 1, 2012.

BACKGROUND

In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the BOE to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the BOE has approximately 37,000 retailers and 1,000 distributors and wholesalers licensed to engage in the sale of cigarettes and tobacco products in California.

In 2009, Senate Bill 601 (Padilla) and Senate Bill 603 (Padilla) would have, among other things, amended the Licensing Act to prohibit the issuance of a license for retail locations in close proximity to schools. SB 601 was held under submission in the Senate Appropriations Committee, and SB 603 was referred to the Assembly Governmental Organization Committee, but was never heard.

COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the author and is intended to restrict new retailer cigarette and tobacco products licenses within 600 ft. of schools and to toughen penalties for selling tobacco to kids.

2. **How does the retail proximity to a school restriction affect existing retailers and locations?** If enacted, the proposed retail license restriction related to a retail location's proximity to a school would apply only to applications for new retail locations. As such, those retail locations that are currently licensed would be able to renew or transfer their license despite the possibility of being located within 600 feet of a school.

3. **BOE's mission and tasks.** The mission of the BOE is to serve the public through fair, effective, and efficient tax administration. The provisions in this bill represent a departure from our traditional "tax collection" functions. In general, the BOE requires a license, permit, or registration for the various tax and fee programs that we administer. Essentially, the purpose of the licensing/registration/permit is to ensure collection of vital revenues for the state.

   According to the legislative findings in the Licensing Act, the licensing of manufacturers, importers, wholesalers, distributors, and retailers was a comprehensive program to reduce untaxed distribution and illegal sales of cigarette and other tobacco products in California. Although the Licensing Act provided stricter retailer licensing requirements, compared to permit requirements for sales and use tax, the stricter standards were established to support the overall goal of improving tax collection. The licensing restrictions that this bill proposes are intended to relate to health, public safety, or other non-tax purposes. Is the Licensing Act the proper venue for the proposed changes?

4. **This measure could delay the issuance of new licenses.** The BOE is currently authorized to issue a retail license upon receipt of a completed application and the payment of fees, unless otherwise specified. This requirement does not preclude the BOE's authority to investigate the truthfulness and completeness of the information provided in the application, or the BOE's authority to issue a license without further investigation for a retail location if that same location is licensed by the ABC.

   The ABC is authorized to refuse issuance of an alcoholic license for a retail location within 600 feet of a school pursuant to Business and Professions Code Section 22789, which is the same distance proposed by this bill. Therefore, at first blush it appears that the BOE could continue to issue a license without further investigation if the application is for a retail location already licensed by the ABC. However, the ABC generally won't deny a license where a retail location is within 600 feet of a school unless there is evidence that normal operation of the licensed premises will be contrary to public welfare and morals. As such, the BOE would not be able to

rely on ABC license information as evidence that the retail location is not within 600 feet of a school.

The BOE would be required to conduct its own investigation of each of the approximately 6,300 new retail license applications received each year in order to determine a retail location's proximity to a school before issuing a new license for a retail location. The investigation would require additional staff time and would cause a considerable delay in processing the license. This is a substantially different workload for the BOE as there are no similar retailer limitations in existing law.

5. **Funding necessary for administrative start-up costs.** This bill proposes a new retail licensing restriction beginning on and after January 1, 2012. To implement the proposed change, the BOE would need to revise applications and publications, programming computers, answer applicant inquiries, and hire appropriate staff, and develop procedures to identify a retail location's proximity to schools. The BOE would need an adequate appropriation to cover these administrative start-up costs not currently identified in the BOE's 2011-12 budget.

6. **Delayed operative date may be necessary.** To effectively implement this bill, it would be necessary for the BOE to develop a computer program to track each new application submitted to ensure a new retail license is not issued to a retail location within 600 feet of a school. This programming should take place before the new license requirement becomes operative, which BOE staff estimates would take at a minimum of three months.

   In order to provide the BOE with the 3-month lead-time necessary to implement the proposed licensing restriction, this bill would have to be signed into law on or before September 30, 2011. If it is anticipated that the bill may be signed after that date, it is suggested that the bill be amended to provide for a delayed operative date for the first day of the first month commencing more than three months after the bill is enacted. This would provide the BOE with sufficient lead-time to successfully implement the bill.

7. **What effect would this bill have on the Cigarette and Tobacco Products Compliance (Compliance) Fund?** Currently, the BOE's Licensing Act enforcement costs exceed the amount of revenues from the licensing fees with the shortfall made up by the various cigarette and tobacco products tax funds (comprised of payments made to the state for the excise taxes on the distribution of cigarettes and tobacco products). If the number of retail licenses decreases and the BOE has additional administration and enforcement costs, then this would result in additional shortfalls in funding from the Compliance Fund.

   As the Licensing Act (AB 71) was developed and made its way through the Legislature, it was determined that the licensure fees would not permanently sustain the program. Since the Licensing Act enforces the Cigarette and Tobacco Products Tax Law and directly benefits the funds established pursuant to that program, the funding for the Licensing Act would eventually shift to the cigarette and tobacco products tax funds. AB 71 also included uncodified language to clarify that all revenues and expenses generated by the Licensing Act are to be allocated in the same manner as those revenues and expenses are allocated under the Cigarette and Tobacco Products Tax Law to make sure no one cigarette and tobacco products fund benefited or was burdened when the funding shift took place.

Since this bill is intended to address youth smoking and not the administration and collection of cigarette and tobacco products taxes, it is unclear how this bill would be funded. While the Licensing Act provides that all moneys in the Compliance Fund are to be used for the purpose of implementing, enforcing, and administering the Licensing Act, this bill could result in a significantly larger shortfall in the Fund, thus shifting a larger burden of the expense to the cigarette and tobacco products tax funds. As such, it could be construed that the cigarette and tobacco products funds, which existing law requires to be used for the administration and collection of the cigarette and tobacco products taxes[3], are being used to fund enforcement of youth smoking.

7. **How is "600 feet" measured?** For purposes of the 600 foot requirement for ABC licensure, the distance is measured by direct line from the closest edge of the facility structure to the closest edge of your structure. For purposes of the 100 foot rule for a premises proximity to a residence, Rule 61.4 provides that distances "shall be measured by airline from the closest edge of any residential structure to the closest edge of the premises or the closest edge of the parking lot or parking area, as defined herein above, whichever distance is shorter." The 600 foot threshold could also be interpreted to mean driving or walking distance. To avoid any ambiguity, it is suggested that the bill be amended to clarify the method of measurement.

8. **Sales to minors provision unworkable.** Section 22974.8 of the Licensing Act requires the BOE to take action against a retailer convicted of violating specified laws relating to sales of cigarettes or tobacco products to persons under 18 years of age. The provisions requiring the BOE to take action against retailers become operative on the date of the release of the results from the youth tobacco purchase survey finds that 13 percent or more of youth were able to purchase cigarettes. Conversely, the provisions become inoperative when the results from the survey show less that 13 percent of youth were able to purchase cigarettes. Since the Licensing Act was enacted in 2003, this provision has only become operative twice: after the release of results from the 2004 survey (14 percent) and 2006 survey (13.2 percent).

   During the periods of operation, the BOE did not receive any conviction information. BOE staff understands this is due to the wording in existing law that action shall be taken *against a <u>retailer, convicted</u> of a violation of either the STAKE Act or Section 308 of the Penal Code*.

   STAKE Act violations are subject to civil penalties that may be assessed by the California Department of Public Health. As such, *STAKE Act violations do not result in a conviction*. Also, violations of Penal Code Section 308 are subject to either a criminal action or a civil action that may result in a conviction of the person making the illegal sale. Typically, retailers hire clerks to make sales of products, such as in retail grocery stores. In such a case, it would be the clerk subject to the violation conviction, not the retailer, for making a sale of cigarettes to a minor. Violation convictions against a clerk would not be considered a "retailer" convicted of the Penal Code for purposes of BOE authorized actions pursuant to proposed Section 22974.8.

[3] R&TC §§30124, 30125, 30131.3 and 30131.4.

This bill would amend Section 22974.8 to specify its provisions only apply to a retail location that is not within 600 feet of a school. The bill would also add Section 22974.9, which duplicates the language in Section 22974.8, except that it: (1) applies only to a retailer of a licensed location that is located 600 feet or less of a school, (2) revokes a retailer's license upon the third conviction of a violation of the STAKE Act or Penal Code Section 308, and (3) does not contain the "trigger" language. Since Sections 22974.8 and 22974.9 do not include any change to the problematic and conflicting language that make the current provisions unworkable, it appears both of these sections would be unenforceable.

9. **Suggested technical amendments.** The author may wish to consider amendments to address the following:

   - **License transfer.** Although this bill would not prohibit the transfer of a license for a retail location that is within 600 feet of any school, it should be noted that Section 22972(c) specifically forbids the transfer of a retailer license. Since a license transfer is prohibited under existing law, it is suggested the reference to "transfer" be removed from proposed Section 22973.1(a)(5).

     However, if the author's intent is to allow existing retail locations within 600 feet of a school to be issued a new license regardless of a change in ownership, the bill should be amended to clarify that intent. BOE staff is available to assist in drafting amendments.

   - **Duplicate preemption language.** Section 22971.3 provides that, with the exception of collection of state taxes, nothing in the Licensing Act preempts or supersedes local tobacco control laws. This bill adds similar language to existing Section 22974.8 and proposed Section 22974.9, which appears to be redundant. As such, it is suggested that the bill be amended to remove the duplicate preemption language.

COST ESTIMATE

The BOE would incur costs to administer this bill. These costs would be attributable to revising applications and publications, computer programming, hiring staff, developing procedures to investigate a retail location's proximity to schools, and answering inquires from the public. An estimate of these costs is pending.

REVENUE ESTIMATE

This measure would not affect the state's revenues.

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