



**STATE BOARD OF EQUALIZATION  
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date Amended:	<b>05/18/09</b>	Bill No:	<b><a href="#">SB 602</a></b>
Tax:	<b>Cigarette and Tobacco Products Licensing Act</b>	Author:	<b>Padilla</b>
Related Bills:	<b>SB 601 (Padilla) SB 603 (Padilla)</b>		

**BILL SUMMARY**

Relative to the Cigarette and Tobacco Products Licensing Act of 2003<sup>1</sup> (Licensing Act), this bill would:

- Except for renewal or transfer, or public convenience or necessity, the Board would otherwise be prohibited from issuing a cigarette and tobacco products retail license (retail license) for a location in an “area of overconcentration,” as defined; and
- Allow the Board to take action relating to the licensure of retailers who have violated the Stop Tobacco Access to Kids Enforcement (STAKE Act) and misdemeanor provisions at any time and makes changes to the penalty provisions and the reporting requirements by enforcing agencies for any conviction of furnishing cigarettes or tobacco products to a person under 18 years of age, as specified.

**Summary of Amendments**

Since the previous analysis, this bill was amended on **May 18, 2009** to provide local governments with the exclusive authority to grant public convenience or necessity determinations, define terms related to an “area of overconcentration,” authorize suspension of a retailer’s license for specified violations, and specify information that the Department of Alcoholic Beverage Control (ABC) and Department of Public Health (DPH) may share with the Board. The **April 28, 2009 amendments** (1) clarified that transfers of retail licenses are prohibited except for license transfers in an “area of overconcentration,” (2) revised the penalty structure for violations or convictions related to illegal sales to minors, (3) prohibited a licensee from appealing a suspension or revocation and from filing an offer in compromise related to illegal sales to minors, and (4) requires DPH and ABC to provide the Board, upon request, any necessary information regarding retailers to administer this measure. The **April 21, 2009 amendments** allowed the Board to take action against retailers who have violated the STAKE Act or had misdemeanor violations. The **April 13, 2009 amendments** allow a local governing body or the Board to issue a license to retail locations for public convenience or necessity.

<sup>1</sup> Division 8.6 (commencing with Section 22970) of the Business and Professions Code.

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**ANALYSIS****Area of Overconcentration***Business and Professions Code Section 22973.3***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 cigarette 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 retail license is not assignable or transferable. A person who obtains a retailer license and stops doing business, or never starts doing business, or whose license is suspended or revoked, is required to immediately surrender the license to the Board.

A retailer that owns or controls more than one retail location where cigarette and tobacco products are sold is required to obtain a separate license for each retail location. Each retailer is required to submit a one-time license fee of one hundred dollars (\$100) with each application and may submit a single application for multiple locations with a license fee of one hundred dollars (\$100) per location. A "retail location" is defined to mean any building, including a residence, from which cigarettes or tobacco products are sold at retail or a vending machine.

Additionally, Section 22973 authorizes the Board to investigate the truthfulness and completeness of the information provided in a retailer's application. The Board may also issue a license without further investigation to an applicant for a retail location if that applicant holds a valid license from the ABC for that same location. A license is valid for a 12-month period, and is renewed annually.

Section 22973.1 provides that the Board is required to issue a license to a retailer upon receipt of a completed application and payment of the fees, unless otherwise specified. Any person or retailer convicted of a felony under the Cigarette and Tobacco Products Tax Law would not be issued a license, or if that person holds a license, that license would be revoked. Any retailer who is denied a license may petition for a redetermination of the Board's denial within 30 days after service upon that retailer of the notice of the denial.

Chapter 3, License for **Wholesalers and Distributors** of Cigarettes and Tobacco Products, of the Licensing Act (commencing with Section 22975) requires that every distributor and wholesaler must annually obtain and maintain a license to engage in the sale of cigarettes or tobacco products. Every distributor and wholesaler must file an initial application and a yearly renewal application accompanied by a fee of \$1,000 for each location. The fee is for a calendar year and may not be prorated. In addition, Chapter 4, License and Administration Fee for **Manufacturers and Importers**, of the Licensing Act (commencing with Section 22979) requires every manufacturer and importer to maintain a license to engage in the sale of cigarettes or tobacco products and to pay a one-time fee.

As provided in Sections 22990 and 22991 all moneys collected pursuant to of the Licensing Act are deposited in the Cigarette and Tobacco Products Compliance Fund (Compliance Fund) and are available for expenditure, upon appropriation by the

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Legislature, solely for the purpose of implementing, enforcing, and administering the Licensing Act.

#### PROPOSED LAW

This bill would add Section 22973.3 to the Licensing Act to prohibit the issuance of a new retail license for a location in an “area of overconcentration,” which is defined as follows:

- an area where the ratio of retail licenses to population in the census tract is greater than the ratio of retail licenses to population in the county overall.

Related definitions include the following:

- “Population in the census tract” means the population as determined by the most recent United States decennial or special census. The population determination shall not operate to prevent an applicant from establishing that an increase of resident population has occurred within the census tract.
- “Population in the county” means the annual population estimate for California counties published by the Population Research Unit of the Department of Finance (DOF).

The Board may issue the new retail license if the local governing body determines public convenience or necessity would be served by the license issuance. If the local governing body fails to make a determination within 90 days the license would be deemed denied.

This bill provides that the 90 days commences when the Board notifies the appropriate local governing body that a completed application for licensure has been filed by the applicant with the Board, or the local governing body is in receipt of a completed application according to local requirements, whichever is later.

Finally, the measure requires the DPH, and the ABC to provide, upon request, any necessary information regarding retailers in order to implement the provisions. .

This provision would be operative January 1, 2010.

#### BACKGROUND

In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the Board to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the Board has approximately 38,000 retailers and 1,000 distributors and wholesalers licensed to engage in the sale of cigarettes and tobacco products in California.

#### COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to prevent the proliferation of tobacco retail outlets in California communities by allowing overconcentration to be a condition for license denial.
2. **Board’s mission and tasks.** The mission of the Board 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

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Board 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?

3. **An “area of overconcentration” compares the ratio of retail licenses within a census tract to the ratio of retail licenses in the county.** The bill was amended to define both “population in the census tract” and “population in the county” and provides an applicant the ability to establish that an increase in population has occurred within the census tract. While these amendments addressed a concern previously expressed, there continue to be issues with the administration of these new amendments. These include, but are not limited to, the following:

- An applicant may establish that an increase of resident population has occurred within the census tract. As explained by the U.S. Census Bureau, a census tract is a small, relatively permanent statistical subdivision of a county; census tracts do not cross county boundaries. All of California is covered by census tracts, which may be adjusted occasionally due to population increases or decreases. The formation, splitting, or combining of census tracts are made by local census statistical area committees. The census tract populations appear to be set every 10 years. Does the author intend that an applicant may present information to the Board to consider a population increase in the census tract? What type of information would the applicant need to present? What standards would the Board use to evaluate a census tract population adjustment? Additionally, the Board would note that the applicant would only be able to address the population in the census tract and not the comparative county population. This is because the population in the county is estimated annually by the DOF.
- How often is the area of overconcentration updated? Would the information be readily available to potential applicants? Would the Board have to adjust and make public the “area of overconcentration” ratios for each county and each census tract within the county? The Board would anticipate that the “area of overconcentration” ratio would be of interest to potential retail applicants and that the information could be updated at least annually, after release of the DOF population estimate for California counties. Based upon the ratios the Board would be authorized to either issue additional licenses or further restrict licenses. The Board could experience additional workloads related to the computation and dissemination of this information.
- Should the Board issue licenses in an area of overconcentration in the order they are received? SB 603 (Padilla, 2009), which places a cap on the number of licenses in a county, requires the Board to issue retail licenses to

- qualified applicants in the order in which the applications are received. Did the author intend for these provisions to be administered differently?
- There could be inconsistency between the ABC and the Board in determining the population within a census tract. Section 23958.4 of the ABC Act has a similar definition for “population within the census tract or census division.” As a matter of consistency in state administration it may be necessary for the ABC and the Board to coordinate any population adjustments to the census tract. To that end, the Board may need to create or revise an information sharing agreement. To the extent that the ABC and Board have requests for the same counties within a similar time frame, and coordinate the census tract population adjustments, the Board may be able to save costs. Are there other state agencies that also make determinations related to the census tract population?
  - The population determination for an area of overconcentration is different than the population determination as proposed by the author’s SB 603. While SB 602 considers the total population in a county, SB 603 requires the Board to determine the number of licenses in a county based on the adult population (over 18 years old).
4. **What would the effect be if there are areas of overconcentration?** If there is a determination that there are existing areas of overconcentration, the Board would be able to renew, reinstate, and allow for a proposed transfer of an existing license in the affected area. The Board would also be authorized to issue a “new license” to a retailer in the area of overconcentration when the local governing body determines that public convenience or necessity would be served by issuance of the license. The Board would otherwise be precluded from issuing a “new license” until the ratio in the census tract is equal to or less than the ratio in the county. This could have the same effect as a moratorium.

Additionally, if this bill were to pass and be signed by the Governor on or near October 11<sup>th</sup>, it may not give the Board sufficient time to develop, analyze, and prepare the process for determining the ratios related to the “area of overconcentration.” It may be necessary to have a delayed operative date and/or to provide authority for the Board to adopt emergency regulations to administer the bill’s provisions. The Board is available to work with the author’s office to address these administrative concerns.

4. **“Public convenience or necessity” only applies to license issuance for locations within an “area of overconcentration”, and this exception becomes a local government responsibility.** Local governments would be allowed to make a determination that a location within an area of overconcentration should be issued a retail license because of “public convenience or necessity.” Under the ABC Act, Section 23958.4, an applicant for a retail alcohol license in an area of undue concentration also has an opportunity to demonstrate to the local government or the ABC that a license should be issued in an area of undue concentration due to “public convenience or necessity.” Section 23958.4 was added to the ABC Act in 1994 and was amended in 1996 (AB 2841, Ch. 869, Stats. 1996) to provide the applicant the opportunity to demonstrate to ABC that “public convenience or necessity” would be

served by issuing the license. According to the legislative analysis<sup>2</sup> of AB 2841, the requirements allowing the applicant to show “public convenience or necessity” to the ABC was added because some local governments were not taking timely action in determining the “public convenience or necessity.” According to the sponsor, part of this issue was related to the State’s exclusive authority to license alcoholic beverage retail locations; the local governments had no expertise or interest in taking on responsibilities reserved to the state.

In the case of cigarette and tobacco licensing, the local governing bodies already have the authority and ability to issue local ordinances and licenses. The Licensing Act, 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. In other words, the local governing bodies have a strong public policy interest in determining public convenience or necessity for cigarette and tobacco licenses; the same can not be said of the Board in determining public convenience or necessity.

- 5. The bill needs to specifically authorize the “transfer” of a license and specify when a license can or can not be transferred.** The bill provides that “notwithstanding subdivision (c) of Section 22972, this section shall not apply to the renewal or transfer of a retail license.” This language appears to make an exception to the existing section in the Licensing Act, Section 22972(c), which specifies that a license is not assignable or transferable. The bill should specifically authorize a retailer to “transfer” an existing license, similar to the “transfer” provisions provided in the author’s companion measure, SB 603, proposed Section 22973.3 (b)(1), which states in part “notwithstanding any other law...a retailer may transfer an existing license to another person...”

In general, the restriction on the transfer of a license was intended to prohibit the transfer of a business between related persons, so that the business can not be transferred for the purposes of evading payment of taxes, fees, or penalties, and to avoid the imposition of a license suspension or revocation. The definition of a “transfer” or additional provisions related to a “transfer” should be added to clarify the author’s intent. Without additional provisions, for example, an existing licensee with a retail location within an area of overconcentration that wishes to change their ownership structure from a sole proprietor to a corporation (otherwise meeting the license issuance provisions in Section 22973.1) may not be considered a “transfer,” and a “new” license could not be issued. It should be noted that under the current Licensing Act provisions a new license would be issued for a change in ownership type if the business otherwise meets the licensing provisions.

Additionally, considering the cumulative limiting effects on the issuance of retail licenses that the author’s bills (SB 601, SB 602, SB 603) would have, allowing for the “transfer” of a license may result in the licenses obtaining substantial monetary value and, similar to an ABC license, they may be sold by the license holders – ultimately costing the purchaser an additional expense to acquire a business. While most potential business owners purchasing a business or stock of goods acquire a business through an escrow, it is not required by the Revenue and Taxation Code. There are, however, escrow provisions in the ABC Act which specify the rights and priorities of certain parties and creditors. Without these provisions would the parties and creditors look to the Board to act as an escrow agent? Are escrow provisions in

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<sup>2</sup> Senate Committee on Governmental Organization, Staff Analysis, AB 2841 (Hoge), as amended July 2, 1996.

the Licensing Act necessary? If this bill progresses then the Board would need to discuss this issue in more detail with the author.

Moreover, it is important to note that Article 5 of Chapter 6 of the ABC Act has over twenty separate sections related to the issuance and transfer of licenses. Do some of the ABC provisions related to transfers apply to transfers of cigarette and tobacco retail licenses? Should the retail license be transferred if an existing tobacco excise tax or sales tax liability is outstanding? Should the Board have the authority to prevent the transfer of a license unless tax liabilities are paid? Are there other situations when a transfer should not occur?

6. **What effect would this bill have on the Cigarette and Tobacco Products Compliance Fund?** Currently, the Board's 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 Board has additional administration and enforcement costs, then this would result in additional shortfalls in funding from the Compliance Fund. The Proposition 99 fund, Proposition 10 fund, the Breast Cancer Fund and the General Fund would have to pay for the shortfall. However, since the provisions of this bill are related to sales to minors and not tax collection, it does not appear that the Proposition funds and the Breast Cancer Fund could be used to fund costs associated with the author's bills (SB 601, SB 602, SB 603). If this is the case, then the additional workload imposed by these bills would be borne solely by the General Fund.

As Assembly Bill 71 was developed and made its way through the Legislature, it was determined that the licensure fees would not permanently sustain the Licensing Act 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 measure is intended to address youth smoking and not the administration and collection of cigarette and tobacco products taxes, it is unclear how this measure 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 measure 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<sup>3</sup>, are being used to fund enforcement of youth smoking.

7. **Cigarette and tobacco products tax evasion.** Tax evasion is one of the major areas that can reduce state revenues generated from cigarettes and other tobacco products taxes. Board staff recently estimated that cigarette tax evasion in

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<sup>3</sup> R&TC §§30124, 30125, 30131.3 and 30131.4.

California was running at a rate of approximately \$182 million, along with \$94 million in tax on other tobacco products.<sup>4</sup>

During the mid-1990's, the Board's cigarette tax evasion estimates changed little since there was little change to cigarette prices and excise taxes during that time. However, two major events that occurred since November 1998 dramatically increased California excise taxes as well as cigarette prices (excluding taxes): Proposition 10 and the Tobacco Master Settlement Agreement between states and tobacco manufacturers (tobacco settlement). Together, these two developments, when coupled with typical wholesaler and retailer distribution margins, coincided with an increase in the average prices of cigarettes to California consumers by about 50 percent in relation to early November 1998 prices. It is estimated that the impacts of Proposition 10 and the tobacco settlement more than doubled the dollar amount of cigarette tax evasion in California.

Since the 1998 experience, many new measures have been implemented to reduce cigarette and other tobacco products tax evasion. These include the Licensing Act, an encrypted cigarette tax stamp, and various Internet restrictions (such as agreements with UPS, DHL, and FedEx under which those companies have agreed to stop transporting cigarettes directly to individual consumers nationwide and credit card companies adopting policies to prohibit the use of credit cards for the illegal sale of cigarettes over the Internet).

Traditionally the Board has experienced tax evasion with an increase in the excise taxes for cigarette and tobacco products. This measure, along with Senator Padilla's related bills, SB 601 and SB 603, would not increase taxes, but rather restricts the number of retail licenses that may be issued by the Board. While these restrictions may not have an effect on the retail price of the products they will most likely have a direct effect on the value/cost of a license and affect consumer purchasing options. Based on the state's previous experience with alcohol licenses, Board staff believes the proposed retail license restrictions could result in significant value being given to the retail licenses which could lead to an increase in unlicensed sales of cigarette and tobacco products (perhaps even an increase in illegal sales to minors). Additionally, as consumer convenience is affected more consumers may turn to the internet to purchase their cigarette and tobacco products, with state excise and sales taxes being affected to the extent the online retailer does not collect California taxes. The exact effect and magnitude of these responses is uncertain since this state has not had experience with similar retail license restrictions for cigarette and tobacco products. The experience with alcohol licensing restrictions in this state are similar in some respects, but significantly different since alcohol production, distribution, and use is more tightly regulated.

In summary, the author's package of bills, SB 601, SB 602, and SB 603, could counteract the intent of the Licensing Act, which could result in an increased workload for the Board since additional enforcement and resources would be needed to address possible increases in internet sales, unlicensed sales, and other tax avoidance/evasion activities.

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<sup>4</sup> <http://www.boe.ca.gov/pdf/cig-evasion-07.pdf>

**Reporting Requirements related to Sales to Minors***Business and Professions Code Section 22974.8***CURRENT LAW**

Section 22974.8 requires the Board to take action against a retailer convicted of a violation of either the Stop Tobacco Access to Kids Enforcement (STAKE) Act 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 Board that delineates the circumstances under which a retailer's license may be 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 Board 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 Board 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 would be 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 Board's authority to take action under this provision becomes inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

**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 Act requires the Department of Health Services to:

- Implement an enforcement program to reduce the illegal sale of tobacco products to minors and to conduct sting operations using 15 and 16 year old minors granted immunity;
- Operate a toll-free number for the public to report illegal tobacco sales to minors;
- Assure that tobacco retailers post warning signs which include the toll-free number to report violations;
- Assure clerks check the identification of youthful-appearing persons prior to a sale;
- Assess civil penalties ranging from \$200 to \$6,000 against the store owner for violations; and

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- 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, or cigarette papers, or 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 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
- 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 ten dollars (\$10) for the first offense and fifty dollars (\$50) for each succeeding violation, or by imprisonment for not more than 30 days.

#### PROPOSED LAW

This bill would amend Section 22974.8 of the Licensing Act to remove the 13 percent trigger language and requires the Board to take action relating to the licensure of retailers who have violated the STAKE Act and misdemeanor provisions at any time and

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would require the State Department of Public Health (DPH) or other enforcing agency to timely notify the Board of any conviction of a violation of either the STAKE Act or Penal Code Section 308. The Board would be authorized to take action against a retailer for a violation even if the state or local enforcing agency does not notify the Board in a timely manner. "Timely manner" is defined as "when the conviction is obtained and all appeal rights are exhausted."

The penalty structure for convictions of a violation of either the STAKE Act or Penal Code Section 308 have been changed to the following:

- Upon the first conviction the retailer will receive from the Board a warning letter detailing the conditions and terms for suspension or revocation of the retail license, and shall be assessed an unspecified fine amount. The DPH will also provide training on tobacco control laws to the retailer and its employees.
- Upon the second conviction the retailer will be assessed an unspecified fine amount and the Board shall suspend the retailer's license for 25 days.
- Upon the third conviction the Board shall revoke the retailer's license.

"Conviction of a violation" includes a conviction under Section 308 of the Penal Code, or a final administrative adjudication imposing a civil penalty under the STAKE Act.

A retailer will be prohibited from petitioning the Board for an offer in compromise for a third or any subsequent violation of either the STAKE Act or Penal Code Section 308 that occurs within 36 months of the initial violation.

Requires the DPH, and the ABC to provide the Board, upon request, any necessary information regarding retailers to implement the provisions.

This provision would be operative January 1, 2010.

## COMMENTS

1. **Purpose.** This provision is intended to reduce illegal sales of tobacco products to minors by requiring state tobacco licensing authority to revoke or suspend retail tobacco licenses under specified circumstances.
2. **Violations by an agent or employee of a retail licensee.** This bill provides in Section 22974.8(d) that an enforcing agency provide timely notice of a conviction for a violation of either the STAKE Act or Section 308. However, it is not clear what is intended by this provision. There are not "convictions" under Section 308 and the convictions under the STAKE Act are usually against the employee and not the retailer. 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 STAKE Act for purposes of Board authorized actions pursuant to proposed Section 22974.8. Is the intent to require the Board to impose the specified sanctions against a retail licensee for violations enforced against an agent or employee of that retail licensee?

In addition, while enforcing agencies are required to notify the Board in a timely manner, what constitutes "timely?" Is it when a conviction is entered with a court? Is it when the conviction is enforced and all appeal rights extinguished? Or, is timely notice by the enforcing agency a general guide, subject to administrative and

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workload priority timelines? It is suggested that this provision provide more specifics as to what agency is responsible for notifying the Board of retailer convictions and to specify the number of days after a conviction that the agency is required to notify the Board.

3. **This bill removes the “trigger language” for the Board to impose penalties for STAKE Act and Section 308 violations.** Existing law provides that the Board's authority to take action against retailers pursuant to Section 22974.8 commences 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. Further, the Board's authority to take action under this provision will become inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

In 2008, the results of the Youth Tobacco Survey found that 12.6 percent of youth were able to purchase cigarettes; this was an increase from the 2007 results which was 10.7 percent. In 2004 and 2006 when the survey results were over 13%, the Board had the authority to take action against a retailer, however the Board was never notified of a conviction, so it is questionable whether or not the Board would receive notices under this measure.

5. **Additional administrative concerns.** The Board has several administrative concerns regarding the amendments to Section 22974.8, including, but not limited to the following:

- Penalty amounts are not specified. Board staff has provided the author's office information regarding other penalty provisions in the Licensing Act. Penalty provisions are also found in the STAKE Act, which may serve as a better guide to the author than penalties for the tax enforcement purposes of the Licensing Act.
- Subdivision (c) was amended to provide the Board the ability to take action against a retailer for a violation, even if the state or local enforcing agency does not timely notify the Board. The Board is unsure if this subdivision works with the 36-month period that applies to revocations as specified in subdivisions (d)(2), or if no time constraint applies to suspensions and financial penalties, or if the Board is expected to otherwise obtain information about the violations and take the appropriate action. This subdivision needs to be clarified, but the Board suggests striking out the provisions authorizing the Board to take action against a retailer even when not timely notified by a local agency. Without notification, the Board would not have information of a “conviction of a violation.”
- Subdivision (d)(1) prohibits a licensee from petitioning the Board for an offer in compromise for a third or any subsequent violation of the STAKE Act or Penal Code Section 308 that occurs within 36 months of the initial violation. The Board notes that there are no provisions in the Licensing Act for a licensee to petition the Board for an offer in compromise. Since this subdivision refers to the third violation then this would appear to apply to a revocation action. It does not appear that this prohibition is necessary and the Board would suggest striking the reference to an offer in compromise. Also, since the third violation would result in a revocation, it would appear that “any subsequent violation” would not occur for that same license.

- Subdivision (d)(2) allows the Board to revoke a license for a third violation that occurs within any 36-month period. This would appear to allow the Board to take license revocation action for a third violation that was not “timely reported.” This language is substantially different from “within 36 months of the initial violation” and may possibly have the effect of delaying reporting, disassociating the penalty from the violation, or even allowing for a retroactive revocation (past penalties being considered).
- Subdivisions (d)(3) and (f) both seem to address the question of when a violation or a conviction is final. However, as noted in our analysis of SB 400 (Kuehl, 2005), not all violations of the STAKE Act are appealed and heard before an administrative law judge. Such violations include those where the fines imposed pursuant to the STAKE Act are simply paid upon receipt of a demand letter and the violation is not contested. Board staff is concerned that uncontested violations where the retail licensee pays the fine would not be considered “final administrative adjudication” for purposes of the Board imposing the sanctions provided in this measure. Moreover, Penal Code Section 308 violations that are not prosecuted would not be considered a conviction for purposes of this measure.

6. **Related legislation.** SB 601 (Padilla) adds provisions to the Licensing Act to prohibit the issuance of a retail license for a location within 600 feet of a school, except in cases of public convenience or necessity, limits retail licenses to “traditional retail locations”, authorizes the DPH to petition the Board to specify other “traditional” retail locations through regulation, and proposes the transfer of a retail license.

SB 603 (Padilla) under the Licensing Act, imposes an annual retailer fee, limits the total number of retailer licenses issued in a county, and provides for the transfer of a license under specified conditions.

## **COST ESTIMATE**

The provisions related to administering licenses in an “area of overconcentration” would result in significant administrative costs. The Board would need to notify retailers, revise applications and publications, develop procedures to define and identify areas of overconcentration, develop regulations and procedures to identify and issue licenses to retailers in an area of overconcentration, develop procedures to investigate retail licenses consistent with the restrictions, address legal issues, and answer inquiries from licensees. The Board may experience increased workloads related to census tract population revisions, licensing enforcement and tax evasion, and pursuing collection of excise and sales tax from internet purchasers. A detailed cost estimate is pending.

To the extent that excise tax funds will be prohibited from backfilling the Compliance Fund costs, there may be increased cost pressures on the General Fund.

With respect to reporting requirements related to sales to minors, the Board would incur some costs for suspending or revoking retail licenses, processing appeals filed for a suspended or revoked licenses through the petition for redetermination process, inspecting suspended or revoked retail licensee locations, and seizing cigarettes or tobacco products for continued sales of such products after a license has been suspended or revoked. Additional costs would also be incurred for the storage and destruction of seized property. A detailed cost estimate is pending.

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**REVENUE ESTIMATE**

According to the Board's Excise Taxes Division, there are approximately 38,200 licensed retail locations selling cigarettes or tobacco products in California. This figure has been fairly stable since the inception of the Licensing Act. On average, there are about 6,000 new licenses issued annually, with a corresponding amount of licenses surrendered.

The bill analysis for AB 2897 (Ch. 630, Stats. 1994), related to undue concentration of liquor licenses, noted that there would be an unknown minor state revenue loss if fewer licenses are granted. Does the same hold true for fewer cigarette and tobacco retail licenses? Although we are not able to quantify the revenue impact for this bill, we believe it would result in a net loss of excise tax, sales tax, and licensing fees due to less convenience for consumers and the retail license restrictions. As this bill progresses and more details are provided, the Board can develop a revenue estimate.

The proposed changes to reporting requirements related to sales to minors would not affect the state's revenues.

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