



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE ANALYSIS**

Date Amended:	03/24/10	Bill No:	SB 1071
Tax:	Drug Manufacturer and Importer Fee	Author:	DeSaulnier
Related Bills:	SB 341 (DeSaulnier)		

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

This bill would require the Board of Equalization (Board) to administer and collect a fee imposed upon manufacturers and importers of Schedule II, III, or IV controlled substances.

ANALYSIS

CURRENT LAW

Sales and Use Tax Law. Under existing law, state and local sales and use taxes are imposed on the sale or use of tangible personal property in this state, including prescription drugs, unless specifically exempted in the law. Section 6369, for example, provides an exemption for prescription medicines sold or furnished under specified conditions.

Currently, the total combined sales and use tax rates are between 8.25 and 10.25 percent, depending on the location in which the merchandise is sold. The Board does not collect any additional taxes or fees on the prescription drugs.

California Uniform Controlled Substances Act. Division 10 (commencing with Section 11000) of the Health and Safety Code is known as the California Uniform Controlled Substances Act (Act). Among other things, the Act classifies, pursuant to Chapter 2 (commencing with Section 11053) of the Act, controlled substances into five schedules (I, II, III, IV, or V) according to their danger and potential for abuse, with Schedule I having the greatest restrictions and penalties.

Also under the Act, Health and Safety Code Section 11165 requires, contingent upon the availability of adequate funds, the Department of Justice (DOJ) to maintain the Controlled Substance Utilization Review and Evaluation System (CURES) for the electronic monitoring of the prescribing and dispensing of Schedule, II, Schedule III, and Schedule IV controlled substances by all practitioners authorized to prescribe or dispense these controlled substances.

PROPOSED LAW

This bill would amend Health and Safety Code Section 11165 to add to the contingent funds available for funding the CURES program, adequate funds from the CURES Fund, which this bill would establish in the State Treasury.

This bill would also add Section 11165.05 to require the DOJ to annually impose, beginning January 1, 2011, a fee on manufacturers and importers of controlled substances classified in Schedule II, III, or IV. The fee imposed would be in an amount that the DOJ determines to be sufficient for, and limited to, reimbursement of the DOJ for the following expenses:

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- The cost of the administration of the CURES program, as described.
- The cost of the maintenance of, and any improvements to, the CURES program.
- The cost of education and outreach relating to the CURES program.
- The cost of investigation of abuses of the CURES program.

The bill would require the Board to administer and collect the fee. The Board would be authorized to prescribe, adopt, and enforce regulations relating to the administration and enforcement of the fee, including, but not limited to, regulations governing collections, reports, refunds, and appeals relating to the fee imposed. The Board would also be authorized to prescribe, adopt, and enforce emergency regulations as necessary to implement the fee imposed.

The fee imposed would be due and payable from the manufacturer or importer to the Board on a quarterly basis, on or before the last day of the second month following each calendar quarter. Each manufacturer or importer would also be required to electronically file a return, as prescribed by the Board, on or before the last day of the second month following each calendar quarter. To facilitate the administration of the fee, the Board may require the payment of the fee and filing of returns for periods other than quarterly periods.

The Board would transmit any fee payments, including any interest or penalties, to the Treasurer for deposit in the CURES Fund, which this bill would establish in the State Treasury. Except for payments required to reimburse the Board for administrative costs to collect the fee, all moneys in the CURES Fund would, upon appropriation by the Legislature, be expended for the purpose of reimbursing the DOJ for expenses specified.

This bill also states that any fee imposed pursuant to Section 11165.05 would be consistent with all applicable legal requirements for imposing fees, including the requirements set forth in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866.

This bill would become operative January 1, 2011.

BACKGROUND

During the 2005-06 Legislative Session, AB 71 (Chan and Frommer) was introduced to require the Board to annually assess and collect a fee on manufacturers of drugs sold in the state. That bill failed passage on the Senate Floor. In 2009, Senator DeSaulnier introduced SB 341 which was virtually identical to AB 71. The May 6, 2009, amendments deleted the provisions that would have required the Board to annually assess and collect a fee on manufacturers of drugs sold in the state.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author. This bill represents one of the winning entries in Senator DeSaulnier's annual "There Ought to Be a Law" contest. The idea was submitted by Danville resident Bob Pack, whose two children, Troy and Alana Pack, ages 10 and 7, were killed in 2003 by a driver who was abusing prescription medication. The intent of the bill is to provide the necessary revenue to make the CURES database sustainable and ensure that it stays accessible to all practitioners authorized to prescribe or dispense controlled substances, including physicians and pharmacists, so that they can prevent the over-prescription and abuse of these drugs.

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2. **How would the Board be funded for administrative start-up costs?** This bill proposes a new fee to be paid by drug manufacturers and importers beginning and after January 1, 2011. To implement the proposed fee program, the Board would need to notify and register manufacturers and importers, develop computer programs and reporting forms, answer feepayer inquiries, and hire appropriate staff. The Board would need an adequate appropriation to cover these administrative start-up costs not currently identified in the Board's 2010-11 budget.
3. **The bill needs administrative and collection provisions.** This bill requires an amendment to specify that the Board is authorized to collect the drug manufacturer and importer fee pursuant to the Fee Collection Procedures Law. The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. It was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions.

Among other things, the Fee Collection Procedures Law includes collection, reporting, refund, and appeals provisions, as well as providing the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law. To provide consistency with other Board administered fees, it is suggested that proposed Section 11165.05 be amended to provide the following:

11165.05. (c)(1) The State Board of Equalization shall collect the fee imposed pursuant to this section in accordance to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). ~~The State Board of Equalization shall administer and collect the fee imposed by the department in compliance with the following:~~

4. **Additional terms need defining.** This bill does not contain a definition for the term "importer." In order to avoid any ambiguity in administering the proposed fee, it is recommended that a precise definition for this term be incorporated into the bill.

The term "manufacturer" is defined under the Act pursuant to Health and Safety Code Section 11017 to have the same meaning as that term is defined in Business and Professions Code 4034.¹ Does the definition for "manufacturer" under existing law correspond with the author's intent? If not, it is suggested that a precise definition for the term "manufacturer" also be incorporated into the bill.

5. **Would the fee amounts be reported or billed?** This bill provides in subdivision (a) of Section 11165.05 that the DOJ shall annually impose a fee on manufacturers and importers; however, subdivision (c)(3) of that same section requires that the fee be collected quarterly. As such, the bill is unclear as to whether the Board would send manufacturers and importers an annual fee assessment, or if manufacturers and importers would self report quarterly to the Board the amount of the fee due.

If the DOJ licenses, or requires reports from, manufacturers or importers of controlled substances, that agency would have the necessary contact information for the fee-payers proposed under this bill. Therefore, if the intent of this measure is to impose an annual fee, it is suggested that this measure be amended to require the

¹ Health and Safety Code Section 11017 incorrectly references Business and Professions Code Section 4034. The term "manufacturer" is defined in Business and Professions Code Section 4033.

DOJ to provide the Board with the fee-payer's name and address, the amount of the annual fee, and the fee due date. This would make for a more efficient and less costly administration of the proposed fee program. However, if the intent is to have manufacturers and importers self report the amount of the fee due by means of a quarterly return, additional amendments would be needed to allow for the Board to properly administer the fee program.

6. Other Administrative and technical concerns. Board staff is available to work with the author's office in drafting appropriate amendments to address the following concerns:

- It is suggested that the bill be amended to clarify the Board's reimbursement of ongoing administrative costs and to authorize the payment of refunds on overpayments of the fee from the CURES Fund.

11165.05. (d) The CURES Fund is hereby established in the State Treasury. All fees imposed under this section, and any interest or penalties imposed by the department or State Board of Equalization~~board~~ with respect to those fees, shall be paid to the State Board of Equalization~~board~~ in the form of remittances payable to the State Board of Equalization~~board~~. Except for payments as described in subdivision (e), the State Board of Equalization board shall transmit any payment to the Treasurer for deposit in the CURES Fund.

(e) With the exception of payments of refunds made pursuant to Chapter 4 (commencing with Section 55221) of Part 30 of Division 2 of the Revenue and Taxation Code, and reimbursement of the State Board of Equalization for expenses incurred in the administration and collection of the tax imposed by this section, Except for payments required to reimburse the board for its administrative costs in collecting the fee imposed by this section, all moneys deposited in the CURES Fund shall, upon appropriation by the Legislature, be expended only for the purposes specified in subdivision (b).

- The bill requires the DOJ to determine a fee amount that is sufficient for, and limited to, reimbursement of the DOJ for specified costs. Should the DOJ's fee determination also consider reimbursement of the Board for its administrative costs to collect the fee? Would the Board be timely notified of the annual fee amount in order to properly update returns or determination, and to notify fee-payers?
- The provisions contained in Section 11165.05(c)(5) are not necessary since the Fee Collection Procedures Law has identical language in Section 55041.1 that allows the Board to require fee payments and filing of returns for period other than the period set forth in the tax and fee laws administered under that part.

7. Legal challenges of any new fee program might be made on the grounds that the fee is a tax. In July 1997, the California Supreme Court held in *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866 that the Childhood Lead Poisoning Prevention Act of 1991 imposed bona fide regulatory fees and not taxes requiring a two-thirds vote of the Legislature under Proposition 13. In summary, the Court found that, while the Act did not directly regulate by conferring a specific benefit on, or granting a privilege to, those who pay the fee, it nevertheless imposed regulatory fees under the police power by requiring manufacturers and others whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating those products' adverse health effects.

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Although this measure has been keyed by the Legislative Counsel as a majority vote bill, opponents of this measure might question whether the fees imposed are in legal effect “taxes” required to be enacted by a two-thirds vote of the Legislature.

COST ESTIMATE

The Board would incur non-absorbable costs to adequately develop and administer a new fee program. These costs would include notifying fee-payers, developing forms and publications, writing computer programs, mailing and processing determinations (or returns) and payments, training staff, and answering fee payer inquiries. A cost estimate of this workload is pending.

REVENUE ESTIMATE

This measure does not specify the amount of the proposed fee. Accordingly, a revenue estimate could not be prepared.

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