



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	08/31/05	Bill No:	AB 178
Tax:	California Cigarette Fire Safety	Author:	Koretz, et. al.
Related Bills:			

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

BILL SUMMARY

Among other things, this bill would authorize an employee of the Board of Equalization (Board), upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of any site where there is evidence of a violation of specified requirements of the Cigarette Fire Safety and Firefighter Protection Act (Act).

Summary of Amendments

Since the previous analysis, amendments impacting the Board specify that cigarettes not in compliance with specified requirements of the Act are subject to seizure by the Board or a law enforcement agency. However, only cigarettes not meeting the performance standard are subject to disposal by the Board or a law enforcement agency. Other amendments clarify that an employee of the Board is authorized to conduct inspections at any site where there is evidence of a violation of specified compliance requirements of the Act, and make other technical changes.

ANALYSIS

Current Law

Under existing law, the Board administers the **Cigarette and Tobacco Products Tax Law**. An excise tax of \$0.87 per package of 20 cigarettes is imposed on the distribution of cigarettes in this state.

Section 30435 of the Cigarette and Tobacco Products Tax Law authorizes an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of, any of the following:

- Any building, facility, site, or place at which cigarette or tobacco products are sold, produced, or stored; or
- Any building, facility, site, or place for which there is evidence of either the evasion of the cigarette or tobacco products taxes, or the failure to comply with the requirements of the Master Settlement Agreement, as defined.

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Any inspection performed must be performed in a reasonable manner and at a reasonable time, taking into consideration the normal business hours of the building, facility, site, or place that is inspected. Any person that refuses to allow an inspection is subject to a fine not to exceed one thousand dollars (\$1,000) for each offense.

Section 30436 authorizes the Board to seize cigarettes and tobacco products under specified conditions, which includes, but is not limited to, cigarettes not contained in packages to which the California cigarette tax stamp is affixed or tobacco products upon which the surtax has not been paid. Upon seizure, those items become the property of the state.

Upon the administrative seizure and forfeiture of cigarettes, the Board is required to give notice to all persons known by the Board to have any right, title or interest in the property. In addition, notice of seizure and forfeiture must be given on the Board's Web site, as specified, if the seizure involves 61 cartons of 200 or more cigarettes.

Any person owning or claiming any interest in the cigarettes may file a verified petition with the Board stating his or her interest in the property and requesting the release or recovery of the property on the grounds that property was erroneously or illegally seized. The petition must be filed within 20 days from the date of the personal service upon him or her or the date of the mailing of the notice. Any person not served personally or by mail, however, must file the petition within 20 days from the date of publication of the notice. The failure of any such person to file a timely verified petition constitutes a bar to his or her right to any interest in the property, unless otherwise provided.

Petitions for release or recovery of seized cigarettes generally appear before the Board by the next scheduled Board Meeting if the 20-day petition period has elapsed. At that point, the Board determines whether the cigarettes were erroneously or illegally seized. If the Board finds that the cigarettes were erroneously or illegally seized, it is required under current law to order the release of the property. However, if the Board denies the petition for the release or recovery of the property, notice of the denial is mailed (within five days) to the petitioner and the Board then destroys the seized cigarettes.

The Board also administers the **Cigarette and Tobacco Products Licensing Act of 2003** (Licensing Act), which requires the licensure of cigarette and tobacco products distributors, wholesalers and retailers, and cigarette manufacturers and importers.

The Licensing Act authorizes any peace officer, or Board employee granted limited peace officer status, upon presenting appropriate credentials, to enter any place, as described, and to conduct inspections. Such inspections must be conducted in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered, and must be requested or conducted no more than once in a 24-hour period. Any person that refuses to allow an inspection is subject to a misdemeanor, punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

The Board also has the authority to seize cigarettes and tobacco products under the Licensing Act. With the exception of cigarettes and tobacco products seized and forfeited for continued sales after notification of suspension or revocation, the seizure and forfeiture of such products under the Licensing Act must comply with the seizure and forfeiture procedures set forth in the Cigarette and Tobacco Products Tax Law.

Proposed Law

This bill would add Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code as the California Cigarette Fire Safety and Firefighter Protection Act (Act).

CERTIFICATION, TESTING AND MARKING

This bill would require each cigarette manufacturer to submit a written certification to the State Fire Marshal attesting that each cigarette listed in the certification:

- Has been tested in accordance with the American Society of Testing and Materials standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes," and
- Meets the specified performance standards.

Cigarettes certified by a manufacturer would require a marking on the packaging to indicate compliance. The marking would be required to be in 8-point type or larger and consist of one of the following:

- Modification of the Universal Product Code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the Universal Product Code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.
- Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

Before a certified cigarette can be sold in the state, a manufacturer would be required to submit its proposed marking to the State Fire Marshal. The State Fire Marshal is required to approve the marking upon a finding that it is compliant with the marking criteria. Proposed markings would be deemed approved if the State Fire Marshal fails to act within 10 business days of receiving a proposed marking. A marking in use and approved for the sale of cigarettes in New York would be deemed approved. A manufacturer would only be allowed to use one marking and apply that marking uniformly for all packaging, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer. A manufacturer who modifies its marking would be required to notify the State Fire Marshal of this change and submit to the State Fire Marshal a copy of the new marking, as specified.

GENERAL REQUIREMENTS

This bill would prohibit a person from selling, offering, or possessing for sale in this state cigarettes not in compliance with the following requirements:

- The cigarettes are tested by the manufacturer in accordance with the prescribed test method.
- The cigarettes meet the performance standard, as specified.
- The cigarettes meet the marking requirement.
- The manufacturer files a written certification with the State Fire Marshal.

Distributors, wholesalers, or retailers would not be prohibited from selling their inventory of cigarettes existing on January 31, 2007, if they can establish that California tax stamps or meter impressions were affixed to the cigarettes before January 1, 2007, and that the inventory was purchased before January 1, 2007, in comparable quantity to the inventory purchased during the same period of 2005.

In addition, a person or entity would not be prohibited from manufacturing or selling cigarettes if the cigarettes are or will be stamped or metered for sale in another state or are packaged for sale outside the United States.

PENALTIES

Any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of the Act would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

Any retailer, distributor, or wholesaler that knowingly sells or offers to sell cigarettes in violation of this part would be subject to the following:

- A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.
- A civil penalty not to exceed one thousand dollars (\$1,000) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

The civil penalties would be deposited in the Cigarette Fire Safety and Firefighter Protection Fund.

In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

Any person violating any other provision in this part would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard would be deemed contraband and subject to seizure and disposal by the Board or a law enforcement agency.

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It would be a defense in any action for civil penalties that a distributor, wholesaler, retailer, or any person in the stream of commerce relied in good faith on the manufacturer's marking that the cigarettes comply with the requirements of the Act.

ENFORCEMENT

Manufacturers, distributors, wholesalers, and retailers would be required to permit an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of, any building, facility, site, or any place where cigarettes are sold, offered for sale, or stored or at any site where there is evidence of a violation of specified requirements of the Act.

Any person that refuses to allow an inspection would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each failure or refusal.

Upon discovery by the Board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of specified compliance requirements of the Act, the Board or that law enforcement agency would be authorized to seize those cigarettes possessed.

The Act would cease to be applicable if federal fire safety standards for cigarettes that preempt this Act are enacted and take effect subsequent to the effective date of this act and the Board so notifies the Secretary of State.

FINANCIAL PROVISIONS

This bill would create the Cigarette Fire Safety and Firefighter Protection Fund in the State Treasury. Upon appropriation by the Legislature, moneys deposited into that fund would be made available, in part, to the Board to offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.

DEFINITIONS

This bill would define the following terms:

- "Cigarette" - a cigarette as defined in Section 30003 of the Revenue and Taxation Code.
- "Distributor" - a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- "Manufacturer" - any of the following:
 - An entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that manufacturer intends to be sold in the state, including cigarettes intended to be sold in the United States through an importer.
 - The first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States.

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- An entity that becomes a successor of an entity, as described.
- "Offer to sell" - to offer or agree to sell.
- "Package" - package as defined in Section 30015 of the Revenue and Taxation Code.
- "Retailer" - a person who engages in the sale of cigarettes, but not for the purpose of resale.
- "Sale" or "sell" - any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes. The giving of cigarettes as samples, prizes, or gifts, and the exchanging of cigarettes for any consideration other than money are considered sales.
- "Stamp and meter impression" - stamp and meter impression as defined in Section 30018 of the Revenue and Taxation Code.
- "Wholesaler" - a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

The bill would become operative January 1, 2007.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to increase the safety of cigarettes sold in California by prohibiting sales of cigarettes that do not meet established fire safety standards. This bill is modeled on a New York State law that became effective in June 2004. According to the National Fire Protection Association (NFPA), cigarettes are the leading cause of fire-related injuries and death nationwide. Each year 1,000 people die and another 4,000 are injured in cigarette-related fires.
2. **Key amendments.** The **August 31, 2005, amendments** specify that cigarettes not in compliance with specified requirements of the Act are subject to seizure by the Board or a law enforcement agency. **The August 24, 2005, amendments** impacting the Board 1) specify that cigarettes sold or offered for sale not meeting the performance standard are subject to seizure and disposal by the Board or a law enforcement agency, 2) clarify that an employee of the Board is authorized to conduct inspections at any site where there is evidence of a violation of specified requirements of the Act, and 3) make other technical changes.

The August 16, 2005, amendments require a cigarette manufacturer to submit certifications, testing data, and modified markings to both the State Fire Marshal and the Attorney General, and require proposed markings to be submitted only to the State Fire Marshal. These amendments do not impact the Board.

The **June 23, 2005, amendments** provide for a January 1, 2007, operative date for the Act. The **June 16, 2005, amendments** delete the requirement for the approval of a proposed marking and require a manufacturer to submit its proposed marking to the Attorney General before a certified cigarette can be sold in the state. The amendments also remove the Bureau of Home Furnishings and Thermal Insulation from the bill and make other technical changes. These amendments do not impact the Board.

3. **Only cigarettes not meeting the performance standard are subject to disposal by the Board or a law enforcement agency.** This measure would allow the Board or a law enforcement agency to seize cigarettes upon discovery that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951. Subdivision (a) of Section 14951 provides, in part:

14951. (a) A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements:

(1) The cigarettes are **tested** by the manufacturer in accordance with the test method prescribed in subdivision (a) of Section 14952.

(2) The cigarettes **meet the performance standard** specified in subdivision (b) of Section 14952.

(3) The cigarettes **meet the marking requirement** of Section 14954.

(4) **A written certification is filed by the manufacturer** with the State Fire Marshal in accordance with Section 14953.

However, the bill would only allow the Board or a law enforcement agency to dispose of the seized cigarettes if they do not comply with the **performance standard** (Section 14955(e)). As such, the Board cannot dispose of cigarettes that do not meet the marking requirement, or for which a written certification has not been submitted to the State Fire Marshal. How would the Board know if a seized package of cigarettes meets the performance standard? Does the Board rely on the certification that was filed with the State Fire Marshal that describes, in part, the brand and style of the cigarette? What if a certification was not filed with the State Fire Marshal, but the cigarettes do meet the performance standard? Does the Board rely on performance standard information provided by the cigarette manufacturer? What if the brand and style is listed in a certification filed with the State Fire Marshal, but the cigarettes seized were meant to be sold in a state that does not have cigarette fire safety standards? Under such a scenario, that particular package of cigarettes would not meet the performance standards. Would that package of cigarettes not be subject to disposal because the brand and style meet the performance standard? Or would they be subject to disposal because that specific package of cigarettes does not meet the performance standard, and how would the Board know? And what would become of the cigarettes seized under this measure where the Board is not authorized to dispose of such cigarettes? Without a forfeiture provision or other statutory direction, it appears the cigarettes would be returned to the person from whom they were seized.

The following language is suggested to address this concern:

14957. Upon discovery by the board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951, the board or that law enforcement agency may seize those cigarettes possessed in violation of this part. Any cigarettes seized by the board or by a law enforcement agency shall be deemed forfeited.

4. **What agency is responsible for the collection of penalties?** This measure would impose civil penalties upon persons that knowingly sell or offer to sell cigarettes in violation of the Act, are engaged in the manufacture of cigarettes that knowingly make a false certification, or are in violation of any other provision of the Act. In addition, any person who knowingly fails or refuses to allow an inspection by the Board would be subject to a civil penalty for each failure or refusal. However, this measure does not specify an agency responsible for the collection of the penalties imposed. Based on discussions with the author's office, staff understands that collection would be administered by an agency other than the Board.
5. **Is this measure enforceable?** With ambiguity related to the final disposition of cigarettes seized under the Act, combined with the fact that the bill does not specify an agency to collect the penalties or any administrative provisions for that collection, it is questionable how this measure would be enforced. Without proper enforcement, would the bill accomplish the intent provided in the Legislative findings and declarations "to reduce the likelihood that cigarettes will cause fire, which results in deaths, injuries, and property damage?"
6. **Should the State Fire Marshal maintain an online directory of certified cigarettes by manufacturer?** This bill would require manufacturers certifying cigarettes to provide a copy of the certifications to all distributors and wholesalers to which they sell cigarettes. Manufacturers would also be required to provide sufficient copies of an illustration of the cigarette packaging marking utilized by the manufacturer for each retailer to which the distributors and wholesalers sell cigarettes.

Consideration should be given to replace the requirement of providing copies with a requirement that the State Fire Marshal post on its Web site cigarettes certified by the manufacturer, as well as an illustration of the marking utilized by the manufacturer. This suggestion would provide manufacturers, distributors, and wholesalers with an efficient manner to verify certified cigarettes and approved markings, as well as provide Board staff the information necessary to conduct inspections of cigarettes to ensure compliance with the Act. Without an online directory, a provision should be added to the bill to require the State Fire Marshal to promptly notify the Board of cigarettes certified by a manufacturer and provide illustrations of approved markings, as well as any updates to such certifications or markings.

7. **Could inspections be conducted concurrently with the Board’s current inspection program?** The inspections provided under this bill would be conducted at the same time as inspections under the Cigarette and Tobacco Products Tax Law and Licensing Act since both involve the examination of packages of cigarettes. As such, the provisions of this bill that authorize the Board to conduct inspections to ensure compliance with the Act, and to seize cigarettes in violation of the Act, would not be problematic to administer.

COST ESTIMATE

The Board would incur costs to seize and destroy cigarettes that are in violation of the Act. A detailed cost estimate of this workload is pending; however, it is estimated that such costs would be minor (over \$10,000 and under \$50,000). The Board’s administrative costs would be offset with moneys deposited into the Cigarette Fire Safety and Firefighter Protection Fund.

REVENUE ESTIMATE

The provisions of this bill could have a negative impact on the state excise tax collected on sales of cigarettes and also on sales and use taxes collected if consumers quit smoking or begin to purchase cigarettes from out-of-state sellers as a result of this bill. However, the Board has no way of measuring the potential impact this bill may have, and therefore, cannot provide an estimate at this time.

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