



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

Date Amended:	05/06/02	Bill No:	SB 1766
Tax:	Cigarette	Author:	Ortiz
Board Position:		Related Bills:	SB 2082 (Bowen)

BILL SUMMARY

Among its provisions, this bill would require that every retail sale of a tobacco product in California be a vendor-assisted, face-to-face sale, unless the seller either remits to the Board of Equalization all applicable taxes due on the sale or includes a prominent label on the package indicating that the package contains tobacco products, the package is not to be delivered to a minor, and a notice that the purchaser is responsible for any applicable California taxes on the tobacco products.

ANALYSIS

Current Law

Under current law, Section 30101 of the Cigarette and Tobacco Products Tax Law imposes an excise tax of 6 mills (or 12 cents per package of 20) on each cigarette distributed. In addition, Section 30123 and 30131.2 impose a surtax of 12 ½ mills (25 cents per package of 20) and 25 mills (50 cents per package of 20), respectively, on each cigarette distributed. The current total tax on cigarettes is 43 ½ mills per cigarette (87 cents per package of 20). This excise tax is imposed upon each cigarette distribution, which is basically defined as the first sale of untaxed cigarettes in this state.

For tobacco products (which are defined in Section 30121 to include cigars, smoking tobacco, chewing tobacco, snuff, and other products containing at least 50 percent tobacco), Section 30123 imposes a tax on the wholesale cost of the tobacco products distributed at a rate which is equivalent to the combined rate of tax imposed on cigarettes. In addition, Section 30131.2 imposes an additional tax on tobacco products based on the wholesale cost of the tobacco products distributed at a rate which is equivalent to the additional 50 cent per pack tax on cigarettes also imposed by this section. The tobacco products tax rate is determined annually by the Board. The tax rate on tobacco products is currently set at 52.65 percent of the wholesale cost of such products for the period through June 30, 2002.

Chapter 10A of Title 15 of the United States Code (also known as the Jenkins Act) requires any person that sells or transfers cigarettes for profit in interstate commerce and ships the cigarettes into a state that imposes a tax on cigarettes to file by the 10th of each calendar month a copy of the invoice for each and every shipment of cigarettes made during the previous calendar month in that state. This information is required to show the name and address of the person to whom the shipment was made, the brand,

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and the quantity of shipment. Any person who violates these provisions shall be guilty of a misdemeanor and shall be subject to a fine of not more than \$1,000, or imprisoned not more than 6 months, or both.

Current law imposes a sales or use tax on the sale or purchase of tangible personal property in this state (including cigarettes and tobacco products). When a person sells cigarettes or tobacco products at retail in this state, the sales tax applies. The seller is responsible for this tax and must pay it to the state. When the sales tax does not apply, the use tax does. For example, when a person buys cigarettes or tobacco products from a point outside this state for the use or consumption in this state, the use tax is the applicable tax. If the out-of-state seller has nexus within the state, the seller is required to collect the use tax from the purchaser at the time of sale. If the seller does not collect the use tax, or if the seller does not have nexus in this state, the purchaser is required to pay the use tax directly to the Board of Equalization.

Proposed Law

Vendor sales

This bill would add Division 8.6 (commencing with Section 22965) to the Business and Professions Code to provide that no person may engage in a retail sale of a tobacco product in California unless the sale is a vendor-assisted, face-to-face sale.

This bill defines a “face-to-face sale” to mean a sale in which the purchaser is in the physical presence of the seller or the seller’s employee or agent at the time of the sale. A face-to-face sale would not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller’s physical presence. However, this section would not prohibit any lawful sale of a tobacco product that occurs by means of a vending machine.

Non-face-to-face sales

This bill also provides that a person may engage in a non-face-to-face sale of a tobacco product to a person in California provided that the seller complies with all of the following:

- Before completing any non-face-to-face sale of a tobacco product, the seller must require the purchaser to submit a copy of a valid form of government identification and an attestation signed by the purchaser that he or she is 18 years of age or older and that the government identification truly and correctly identifies the purchaser and the purchaser’s current address. The seller would also be required to attempt to match the name, address, and date of birth provided by the purchaser to information contained in records in a data base of individuals whose age has been verified to be 18 years or older. An appropriate data base would include information based on public records.
- If the seller is unable to verify that the purchaser is 18 years of age or older, the seller shall not sell any tobacco products to the consumer.
- The seller shall impose a two-carton minimum on each order of tobacco products, and shall require payment for the purchase of any tobacco product to be made by

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personal check of the purchaser or the purchaser's credit card. No money order or cash payment shall be received or permitted.

- The seller shall deliver the tobacco product to the address displayed on the valid form of government identification provided by the purchaser. The method of delivery shall be limited to a postal or package delivery service method that either limits delivery to the purchaser and requires the purchase to sign personally to receive the delivery or requires the signature of an adult at the purchaser's address in order to deliver the package. Delivery to a post office box would not be permitted.

Tax remittance

This bill would require the seller to either 1) remit to the Board all applicable taxes on the sale or 2) include on the outside of the shipping container for any tobacco product shipped to a resident in California from any source in the United States, a prominent, externally visible, and easily legible label that includes all of the following information:

- A notice that the package contains tobacco products and a description of the contents, including the size and number of containers.
- A notice that the package is not to be delivered to a minor and that a signature by the addressee or an adult is required for delivery.
- A notice that the purchaser is responsible for any applicable California taxes on the tobacco products.

This bill also provides that all the provisions are severable, and if any provision of this bill is found to be invalid, that invalidity would not affect other provisions of this bill.

Background

In 1992 Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the Synar Amendment. The Synar Amendment requires states to pass and enforce laws that prohibit the sale of tobacco to individuals under 18 years of age. To comply with the Synar Amendment, the Legislature passed Senate Bill 1927 (Stats. 1994, Ch. 1009) which established the Stop Tobacco Access to Kids Enforcement (STAKE) Act. The STAKE Act created a new statewide enforcement program to take regulating action against businesses that illegally sell tobacco products to minors. Authority for enforcement and responsibility for implementation of the program was delegated to the Department of Health Services.

COMMENTS

- 1. Sponsor and Purpose.** This bill is sponsored by the author to limit the access of tobacco products to minors and to help the state enforce the excise tax and use tax provisions.
- 2. Internet purchases.** As efforts increase in this state to stop the illegal sale of cigarettes and tobacco products to minors, minors may find it more difficult to purchase cigarettes from traditional locations such as liquor stores and gas station mini-marts. This may lead to minors turning to the Internet as a means of acquiring cigarettes since the retailer is not likely to verify the age of the purchaser. This can

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lead to additional tax avoidance since the Internet retailer is unlikely to collect the California taxes due and the minor purchasing cigarettes is unlikely to self-report the California taxes due.

- 3. The Jenkins Act.** The Jenkins Act requires any person that sells or transfers cigarettes for profit in interstate commerce and ships the cigarettes into a state that imposes a tax on cigarettes to file by the 10th of each calendar month a copy of the invoice for each and every shipment of cigarettes made during the previous calendar month in that state. Many consumers who shop on the internet may not be aware of these provisions and think they are successfully avoiding the tax by purchasing cigarettes from out-of-state sellers over the internet. The Board utilizes the information required to be provided by the Jenkins Act to bill consumers for the taxes due. Unfortunately, some cigarette retailers do not comply with the provisions of the Jenkins Act. Since the Jenkins Act is a federal statute, the Board requires the assistance of federal law enforcement agencies to enforce the provisions of the Jenkins Act. Also, the provisions of the Jenkins Act apply only to the sale of cigarettes, not tobacco products.
- 4. Enforcement.** This bill would make several requirements of any person who sells tobacco products to consumers in this state. However, some of these retailers are located outside California and have no business presence in this state. Without a presence in this state, the state would have a difficult time enforcing the provisions of this bill.
- 5. Penalty provisions.** This bill provides that any person who violates the provisions of this bill would be subject to the civil penalties set forth in subdivision (a) of Section 22958 of the Business and Professions Code. Section 22958 provides penalties ranging from \$200 to \$6,000, depending on the frequency of violations.
- 6. Suggested technical amendment.** Throughout this bill, a restriction is placed on the sale of a “tobacco product.” Although the STAKE Act contained in the Business and Professions Code does not define the term “tobacco products,” it appears to make a distinction between cigarettes and tobacco products since both are listed in the text of the law. Additionally, the Revenue and Taxation Code makes a distinction between “cigarettes” and “tobacco products.” Revenue and Taxation Code Section 30003 defines a cigarette to mean any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and irrespective of whether the tobacco is flavored, adulterated or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material, except where such wrapper is wholly or in the greater part made of tobacco and such roll weighs over three pounds per thousand. Revenue and Taxation Code Section 30121 defines tobacco products to include, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent, tobacco, but does not include cigarettes. It is recommended that a definition of tobacco products be added to this bill to clarify that the provisions of this bill would apply to the sale of cigarettes in addition to the sale of tobacco products. Board staff is willing to work with the authors office in drafting language for this bill.

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- 7. Related legislation.** Senate Bill 2082 (Bowen) would require any person who advertises on the Internet to sell cigarettes in California and is subject to the provisions of the Jenkins Act to conspicuously disclose that a purchaser who buys cigarettes that are shipped into California is responsible for paying the state excise tax and the state use tax and to show in the advertisement the amount of these taxes that would be due. This bill would also require the person selling or transferring the cigarettes to provide to the Board of Equalization a copy of the invoice for each shipment made into California. The Board voted to support SB 2082.

COST ESTIMATE

Any costs associated with the provisions of this bill are expected to be absorbable.

REVENUE ESTIMATE

The provisions of this bill may have a positive impact on the state excise tax collected on sales of cigarettes and tobacco products and also on use tax collected on cigarettes and tobacco products purchased from out-of-state retailers. However, the Board has no way of measuring the potential impact these provisions may have, and therefore, cannot provide an estimate at this time.

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