

Item J1
Req Cncept Aprvl on Dft
Cig& Tobacco Prod Lic
Regs (AB71)

Memorandum

To: Honorable John Chiang, Chair
Honorable Claude Parrish, Vice Chairman
Ms. Betty T. Yee, Acting Board Member
Honorable Bill Leonard
Honorable Steve Westly

Date: June 16, 2006

From: Kristine Cazadd
Chief Counsel 

Subject: **Board Meeting – June 27, 2006**
Chief Counsel Matters – Item J1

Concept Approval of Cigarette and Tobacco Products Licensing Act Regulations (Division 8.6 of the Business and Professions Code, Sections 22970-22995)

I. Summary and Recommendation

Attached is the staff's first draft of proposed Board regulations implementing the Cigarette and Tobacco Products Licensing Act of 2003 (hereafter the Act) found at sections 22970 to 22995 of the Business and Professions Code. This draft has been prepared with input from the Excise Taxes and Fees Division staff, the Investigations Division staff, and staff attorneys in the Appeals and Tax and Fee Programs Divisions of the Legal Department. Staff requests your approval of the main concepts embodied in the draft regulations as set forth below:

II. Main Concepts Underlying the Draft Regulations

- a. The proposed regulations authorize staff to deny a new license to an applicant: (1) for a location where a violation and appeal are already pending; (2) when the existing license at the location is presently suspended; (3) for a location where any license has been revoked within the preceding five years; or (4) where an owner or person controlling the owner or the business has been convicted of a felony. Nevertheless, the regulations permit staff to make an exception in the case of a license applicant for a location where a violation and appeal are already pending if the applicant is purchasing the business on an arm's length basis. In those cases, the staff may grant the new license request.

- b. When a violation or violations of the Act have occurred at a licensed location and a sale or transfer of that licensed business between related parties is proposed, there will be a presumption that the transaction is not at arm's length.
- c. An appeal procedure is outlined for license applicants who have been denied the issuance of a license, with a final administrative appeal step of an oral hearing before the Board.
- d. The penalties and fines for violations of the Act are set forth in detail and, in cases in which the statutes give the Board discretion, provision is made for less severe penalty assessments when there are specified mitigating circumstances. Under appropriate circumstances, provision is made for warning notices, for 10-day suspensions, 20-day suspensions, 30-day suspensions and revocations, and for fines in varying amounts.
- e. Two separate appellate paths for penalties are provided for:
 - (1) In the case of a notice of revocation or fine of more than \$2,500, after issuance of a citation, the staff first serves a Notice of Violation; if the licensee files a timely appeal, then an initial telephonic conference with the Excise Taxes and Fees Division is scheduled. If the licensee does not so file a timely appeal, however, then the revocation or fine is final.¹ If the Excise Taxes and Fees Division rules against the licensee and the licensee files a timely appeal, then the Appeals Division will schedule a telephonic conference. Finally, if the Appeals Division does not issue a decision that is satisfactory to the licensee, then the licensee may file a timely appeal to the Board for an oral hearing.
 - (2) In the case of lesser penalties or fines, the same process applies, but the Appeals Division conference is the last administrative review available to the appellant. In these cases, no appeal to the Board will be permitted. Because the Appeals Division conference is the final administrative appellate step, provision is made for recording the telephonic conference so that a record is available.

¹ Please note that this proposal deviates from the initial Board instruction, which the staff has been and still is following, that no revocation should be implemented except by the Board. We are suggesting this modification in policy to make this procedure consistent with the standard business tax assessment and license suspension processes and to make sure that no matter is set for a Board hearing unless and until the licensee has expressed an interest in pursuing such procedure. Otherwise, Board hearings will be set for licensees who have not expressed an interest in appealing and who have not indicated that they will even attend the hearing.

- f. Finally, in the case of seized cigarettes or tobacco products, reference is made to the statutory forfeiture provisions in the Business and Professions Code and the statutory administrative appellate procedures set forth in the Revenue and Taxation Code.

III. Recommendation

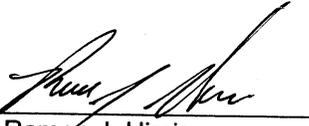
Staff recommends the Board grant concept approval of Cigarette and Tobacco Products Licensing Act Regulations (Division 8.6 of the Business and Professions Code, Sections 22970-22995).

KC;jlh

Chief Counsel/Cig & Tobacco AB17 cover memo.doc

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Ms. Anita Gore, MIC: 86
Ms. Randie L. Henry, MIC: 43
Ms. Karen Johnson, MIC: 69

Approved: _____


Ramon J. Hirsig
Executive Director

****DRAFT – FOR DISCUSSION PURPOSES ONLY****

**CONFIDENTIAL: ATTORNEY-CLIENT AND
WORK-PRODUCT PRIVILEGED**

**CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT REGULATIONS
(Division 8.6 of the BUSINESS AND PROFESSIONS CODE Sections 22970-22995)**

Title 18. Public Revenues

Division 2. State Board of Equalization – Business Taxes, Fees, and Licenses

CHAPTER 9.5 CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT OF 2003

Article 1: DEFINITIONS AND CITATIONS

Regulation 45000. DEFINITIONS.

In addition to the definitions at Business and Professions Code section 22971, the following definitions shall apply to this chapter:

- (a) “Act” means the Cigarette and Tobacco Products Licensing Act of 2003, set forth in Division 8.6 of the Business and Professions Code.
- (b) “Appeals Division staff” means an employee or employees of the State Board of Equalization assigned to the Appeals Division of the Legal Department.
- (c) “Appellant” means a person, business owner or legal entity appealing a Notice of Violation.
- (d) “Arm’s length transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction.
- (e) “Board” means the Board Members of the State Board of Equalization meeting as a body or the agency created by article XIII, section 9, of the California Constitution, as the context indicates.
- (f) “Board Proceedings Division staff” means an employee or employees of the State Board of Equalization assigned to the Board Proceedings Division of the Legal Department.
- (g) “Business” means a business operated by a licensee and/or the property upon which or location at which such licensed business is operated.

- (h) "Citation" means a civil notice of violation(s) or a criminal misdemeanor notice to appear.
- (i) "Conviction" means a judgment of guilt of a criminal offense.
- (j) "Excise Taxes and Fees Division staff" means an employee or employees of the State Board of Equalization assigned to the Excise Taxes and Fees Division of the Property and Special Taxes Department.
- (k) "Fine" means any fine imposed by the Board pursuant to the Act.
- (l) "Investigations Division" means an employee or employees of the State Board of Equalization assigned to the Investigations Division of the Legal Department.
- (m) "License subject to a civil or criminal citation" means a license as to which a citation has been issued but no final determination of violation has yet been entered into the licensee's or unlicensed person's permanent record.
- (n) "Notice of Violation" means the document sent to a licensee or unlicensed person referring to the citation issued, the charged violation(s), the penalty or penalties to be imposed, and the licensee's or unlicensed person's appeal rights.
- (o) "Offense" means a criminal conviction of violations of the Act and/or civil findings of violations of the Act.
- (p) "Regulation" means a section of title 18 of the California Code of Regulations.
- (q) "Unlicensed Person" means any person not holding a license issued by the Board pursuant to the Act.
- (r) "Warning Notice" means the document advising a licensee or unlicensed person that the stated violation(s) of the Act will be entered into the licensee's or unlicensed person's permanent record as a first offense and that future violations will result in civil penalties.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22970, 22971, 22974.5, 22978.7, and 22979.7, Business and Professions Code.

Regulation 45010. CITATIONS.

(a) Issuance of a Civil or Criminal Citation.

The Investigations Division may issue a citation to a licensee or unlicensed person if the licensee or unlicensed person is determined to be in violation of any provision of the Act.

(b) Contents and Service of a Civil Citation.

The citation shall be in writing and shall describe the nature and facts of the violation, including a reference to the statute(s) violated. The citation shall state that the Board will mail a notice regarding the citation and information about any penalties, if applicable, and appeal rights. The citation may be served personally by delivery to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure. In lieu of personal service, the citation may be mailed by certified mail, return receipt requested. Such mailed citation shall be placed in a sealed envelope, with postage paid, addressed to the licensee at the address as it appears in the records of the Board. The giving of notice shall be deemed complete five days after being deposited in the United States Post Office, or mailbox, sub-post office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason.

(c) Contents and Service of a Criminal Citation.

A criminal citation shall state the appearance date and the appropriate jurisdiction. The citation shall be served in accordance with Penal Code section 853.6.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973(a)(5), 22974, 22974.3, 22974.4, 22974.5, 22974.7, 22974.8, 22978.1, 22978.2, 22978.4, 22978.5, 22978.6, 22978.7, 22979.6, 22979.7, 22979, 22980, 22980.2, 22980.3, and 22981, Business and Professions Code; Section 853.6, Penal Code.

Article 2: LICENSES – ISSUANCE, TRANSFER AND DENIAL

Regulation 45020. DENIAL OF LICENSE.

A new license shall not be issued to a retailer, wholesaler or distributor, or if the retailer, wholesaler or distributor is not an individual, to any person controlling

such entity, when any of the following apply: (1) a license subject to civil or criminal citation has been issued for the same location; (2) a license for the same location is suspended; (3) a license for the same location has been revoked any time within the preceding five years; or (4) any person controlling the retailer, wholesaler or distributor has been convicted of a felony pursuant to section 30473 or 30480 of the Revenue and Taxation Code. For purposes of this article, a person controls an entity if that person holds more than 50 percent of the voting stock or ownership interests in the entity or otherwise holds the power to direct the operations of the entity.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45030. ISSUANCE OF LICENSE TRANSFER OF BUSINESS.

Notwithstanding the provisions of Regulation 45020, subsection (1), a new license will be issued for a business with a license subject to a civil or criminal citation, if the person applying for the license has acquired the business pursuant to an arm's length transaction.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45040. DETERMINATION OF ARM'S LENGTH TRANSACTION.

The Excise Taxes and Fees Division shall determine whether the transfer of a business was pursuant to an arm's length transaction, utilizing the criteria set forth in Regulations 45050 and 45060.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45050. TRANSFERS OR SALES BETWEEN RELATED PARTIES.

(a) Presumption – Not Arm's Length. When a violation or violations of the Act have occurred at a licensed location, the sale of the business between and among relatives (by blood or marriage, which relationships include spouses, parents, children and siblings), partners, and persons and entities under their control, is presumed to be a sale for the primary purpose of avoiding the effects of violations of the Act and not at arm's length.

(b) This presumption may be rebutted only by clear and convincing evidence to the contrary.

- (c) The taxpayer has the burden of proving that the transaction was an arm's length transaction.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45060. EVIDENCE OF A NON-ARM'S LENGTH TRANSACTION.

Evidence that a sale is a non-arm's length transaction, includes, but is not limited to, the following:

- (a) Inadequate consideration was paid for the assets of the prior licensee (former owner).
- (b) No bill of sale, sales contract or escrow account was prepared or executed for the sale of the business.
- (c) The former owner holds a significant equity interest in the inventory of products for sale, fixtures or equipment.
- (d) The purchaser was or is an employee, co-owner or independent contractor with the former owner.
- (e) The ownership of the real property at which the business is located, or a master leasehold interest therein, remains with the former owner, with no lease, sublease or lease assignment having been executed with the purchaser providing for the payment of reasonable rentals, subrentals, or other consideration to the former owner.
- (f) The business license for the business remains in the name of the former owner.
- (g) The purchaser holds itself out as being the same business as that operated by the former owner or as being affiliated with the former owner in the business; and the former owner:
 - (1) is present at the business on a regular basis;
 - (2) continues to contract with suppliers to purchase products for use at the business;
 - (3) assumes personal liability for services, supplies or inventory for the business;
 - (4) continues to sign checks on one or more of the business's bank accounts; or

(5) maintains the authority to hire and fire business employees.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45070. REQUEST FOR INFORMATION AND RECORDS.

When a business's license is suspended, revoked, or is subject to civil or criminal citation, then the parties, both transferor and transferee, to a proposed or completed transfer or purchase of the business must, at the Board's request, provide all relevant information on the transfer or purchase to the Excise Taxes and Fees Division, including, but not limited to, the purchase agreement, all escrow documents and proof of payment or tender of the purchase consideration.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45080. APPEAL – DENIAL OF LICENSE.

- (a) If the Excise Taxes and Fees Division determines that a new license should not be issued pursuant to Regulation 45020, then it shall notify the transferee and transferor of such determination and deny the transferee's application for issuance of a new license for that business. The transferee and transferor may petition for a redetermination within 30 days from the date of service of the notice upon the transferee and transferor. The determination shall become final, however, if a petition for redetermination is not filed by the expiration of the 30-day period.
- (b) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded.
- (c) The Board shall reconsider the determination of the Excise Taxes and Fees Division pursuant to its administrative appeals process set forth in Regulation 5023 [NOTE: reference to change when new Rules of Practice are adopted] and shall grant the transferee and transferor an oral hearing if timely requested within 30 days of the date of the Decision and Recommendation issued by the Appeals Division. Any Board hearing will be governed by the rules set forth in Regulation 5070 through 5086 [NOTE: reference to change when new Rules of Practice are adopted].
- (d) The order or decision of the Board upon a petition for redetermination becomes final 30 days from the date of the mailing of notice thereof.

(e) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the retailer at the address as it appears in the records of the Board. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States Post Office, or mailbox, sub-post office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973.1, 22977.2, and 22979, Business and Professions Code.

Regulation 45090. NON-ARM'S LENGTH TRANSFER - SALES.

The Excise Taxes and Fees Division's determination that a licensee's transfer of a business with a suspended or revoked license to a third party was not at arm's length may establish grounds for an additional violation of the Act. The Investigations Division may issue a citation for a violation of subdivision (c) of Business and Professions Code section 22980.2, if the business is found selling cigarettes or tobacco products.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973.1, 22977.2, 22979, and 22980.2, Business and Professions Code.

Article 3: NOTICES OF VIOLATION

Regulation 46000. ISSUANCE AND CONTENTS OF A NOTICE OF VIOLATION.

The Investigations Division shall forward a copy of a citation issued to a licensee or unlicensed person to the Excise Taxes and Fees Division, which shall prepare and mail a Notice of Violation to the cited licensee or unlicensed person.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 46010. SERVICE OF A NOTICE OF VIOLATION.

The Notice of Violation shall be placed in a sealed envelope, with postage paid, addressed to the person at his or her address as it appears in the records of the

Board. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States Post Office, or a mailbox, sub-post office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, a Notice of Violation may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal delivery to a corporation may be made by delivery of a notice to any person designated to be served for the corporation with summons and complaint in a civil action, pursuant to the Code of Civil Procedure.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 46020. FINALITY.

The penalty or penalties stated in the Notice of Violation shall become final if a timely appeal is not filed with the Board, as set forth in Regulations 47000, 47010 and 47020.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, and 22974.8, and 22979.7, Business and Professions Code.

Article 4: PENALTIES AND FINES

Regulation 46030. PENALTIES FOR RETAIL LICENSEES OR UNLICENSED PERSONS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a retailer has violated any provision of the Act:

- (a) A first offense of a violation of any of the following provisions shall result in the issuance of a Warning Notice to the licensee or unlicensed person:
- (1) Business and Professions Code section 22974 (failure to retain purchase invoices).
 - (2) Business and Professions Code section 22980.1(c), (d) or (e) (purchase from unlicensed person or person with suspended or revoked license).
 - (3) Business and Professions Code section 22980.1(g) (purchase of cigarettes to which a stamp may not be affixed in accordance with subdivision (b) of Rev. & Tax. Code, § 30163).
 - (4) Business and Professions Code section 22980.2(a) (sales of cigarettes or tobacco products by an unlicensed person or person with suspended or revoked license).

- (b) A first offense of a violation of any of the following provisions shall result in the issuance of a 20-day suspension:
- (1) Business and Professions Code section 22973(a)(5) (false statement on application).
 - (2) Business and Professions Code section 22980(b) (refusal to allow inspection).
- (c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above, shall result in a both a 30-day suspension or revocation and a fine. The fine shall be determined in accordance with Regulation 46070.
- (d) A violation of Business and Profession Code section 22974.3 (possession of unstamped cigarettes or tobacco products) shall result in the following:
- (1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee has been in business for less than one month and there has been no purchase of new cigarette or tobacco product inventory during that period.
 - (2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.
 - (3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.
 - (4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine shall be determined in accordance with Regulation 46070.
- (e) The violation punishable with the longest suspension period or revocation will be used for penalty assessment in cases involving multiple violations.
- (f) Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. However, if a suspension period is reduced, the redetermined period of suspension shall be either 10 days or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3(a)(2).

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: 22973(a)(5), 22974, 22974.3, 22974.4, 22974.7, 22978.6, 2, 2978.7, 22979.7, 22980.1(c), (d), (e), (g), 22980(b), 22980.2(a) and 22980.3(a)(2), Business and Professions Code.

Regulation 46040. PENALTIES FOR WHOLESALER AND DISTRIBUTOR LICENSEES OR UNLICENSED PERSONS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a wholesaler or distributor has violated any provision of the Act:

- (a) A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:
 - (1) Business and Professions Code section 22978.1 (failure to retain purchase invoices).
 - (2) Business and Professions Code section 22978.5(b) (failure to retain sales records).
 - (3) Business and Professions Code section 22980.1(b), (c), (d), (e) (sales or purchases of cigarettes or tobacco products from unlicensed person or person with suspended or revoked license) or (f) (sales of cigarettes or tobacco products to retailer or wholesaler revoked or suspended until debts are clear).
 - (4) Business and Professions Code section 22980.2(a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

- (b) A first offense of a violation of any of the following provisions will result in the issuance of a 20-day suspension:
 - (1) Business and Professions Code section 22977(a)(5) (false statement on application).
 - (2) Business and Professions Code section 22980(b) (refusal to allow inspection).
 - (3) Business and Professions Code section 22980.1(g) (purchase of cigarettes to which a stamp may not be affixed in accordance with subdivision (b) of Rev. & Tax. Code, § 30163).

- (c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation and a fine. The fine shall be determined in accordance with Regulation 46070.

(d) A violation of Business and Profession Code section 22978.2 (possession of unstamped cigarettes or tobacco products) shall result in the following:

- (1) Notwithstanding paragraphs (2) and (3) below, a Warning Notice for a first offense when the licensee or unlicensed person has been in business for less than one month, and there has been no purchase of new cigarette or tobacco product inventory during the month.
- (2) A 10-day suspension for a first offense for a seizure of less than 20 packages of cigarettes, or the equivalent amount of tobacco products based on wholesale cost.
- (3) A 20-day suspension for a first offense for a seizure of 20 packages of cigarettes or more, or the equivalent amount of tobacco products based on wholesale cost.
- (4) Both a 30-day suspension or revocation and a fine for a second or subsequent offense. The fine will be determined in accordance with section 45070.

(e) In cases involving multiple violations, the violation punishable with the most severe penalty will be used for purposes of determining the penalty assessed.

(f) Notwithstanding subdivisions (b) through (e) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. However, if a suspension period is reduced, the redetermined period of suspension shall be either 10 days or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3(a)(2).

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22977(a)(5), 22978.1, 22978.2, 22978.7, 22978.5(b), 22979.7, 22980(b), 22980.1(b), (c), (d), (e), (f), (g), and 22980.2(a), Business and Professions Code.

Regulation 46050. PENALTIES FOR MANUFACTURER AND IMPORTER LICENSEES OR UNLICENSED PERSONS.

The following penalties shall be assessed in addition to any other civil or criminal penalty provided by law upon a finding that a manufacturer or importer has violated any provision of the Act:

- (a) A first offense of a violation of any of the following provisions will result in the issuance of a Warning Notice to the licensee or unlicensed person:
- (1) Business and Professions Code section 22979.4 (failure to retain purchase invoices on premise).
 - (2) Business and Professions Code section 22979(b)(1) (participating manufacturer's false statement on certification to the Board).
 - (3) Business and Professions Code section 22979.5(b) (failure to retain sales records on premise).
 - (4) Business and Professions Code section 22980.1(a), (e) or (f). (purchases or sales from or to an unlicensed person or person with suspended or revoked license)
 - (5) Business and Professions Code section 22980.2(a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).
 - (6) Business and Professions Code section 22979.6(c) (failure to comply with invoice requirements).
- (b) A first offense of any of a violation of Business and Professions Code section 22980.1(g) (purchase of cigarettes to which a stamp may not be affixed in accordance with subdivision (b) of Rev. & Tax. Code, § 30163) shall result in a 20-day suspension.
- (c) A second or subsequent offense for a violation of the provisions listed in subdivision (a) or (b) above shall result in both a 30-day suspension or revocation and a fine totaling a maximum of \$5,000 or five (5) times the retail value of any cigarettes and/or tobacco products seized, whichever is greater. The fine shall be determined in accordance with Regulation 46070.
- (d) In cases involving multiple violations, the violation punishable with the most severe penalty will be used for purposes of determining the penalty assessed.
- (e) Notwithstanding subdivisions (b) through (d) above, a reduction in the length of a suspension period may be warranted if mitigating circumstances are present, as set forth in Regulation 46060. However, if a suspension period is reduced, the redetermined period of suspension shall be either 10 days or 20 days. The existence of mitigating circumstances may also warrant reducing a revocation penalty to a 30-day suspension, unless revocation is mandated pursuant to Business and Professions Code section 22974.4, 22978.6, or 22980.3(a)(2).

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, 22979.4, 22979(b)(1), 22979.5(b), 22979.7, 22980.1(a), (e), (f), 22980.2(a), and 22979.6(c), Business and Professions Code.

Regulation 46060. MITIGATING CIRCUMSTANCES.

Factors including, but not limited to the following, may be considered for purposes of determining whether mitigating circumstances exist pursuant to Regulations 46030, 46040 and 46050:

- (a) How recently the licensee purchased the business and inventory of cigarettes and/or tobacco.
- (b) A small amount of cigarettes without tax stamps or counterfeit tax stamps in relation to the size of the licensee's overall inventory.
- (c) The size of the licensee's cigarette and/or tobacco product business.
- (d) The retail value of any cigarettes or tobacco products seized.
- (e) An absence of prior seizures.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 46070. DETERMINATION OF FINE.

A fine shall be determined as follows:

- (a) Any second or subsequent offense of a violation of any of the following provisions shall result in a fine of \$1,000:
 - (1) Business and Professions Code section 22973(a)(5) (retailer's false statement on application).
 - (2) Business and Professions Code section 22977(a)(5) (wholesaler's/distributor's false statement on application).
 - (3) Business and Professions Code section 22979(b)(1) (participating manufacturer's false statement on certification to Board).
- (b) A second offense of a violation of any of the following provisions shall result in a \$1,000 fine, and each subsequent offense shall increase the fine by an increment of \$1,000, up to a maximum fine of \$5,000:
 - (1) Business and Professions Code section 22974 (retailer's failure to retain purchase invoices).
 - (2) Business and Professions Code section 22978.1 (distributor's/wholesaler's failure to retain purchase invoices).
 - (3) Business and Professions Code section 22978.5(b) (distributor's/wholesaler's failure to retain sales records).

- (4) Business and Professions Code section 22979.4 (importer's failure to retain purchase invoices).
- (5) Business and Professions Code section 22979.5(b) (manufacturer's/importer's failure to retain sales records).
- (6) Business and Professions Code section 22974.3(b) (retailer's sale or possession of untaxed tobacco products).
- (7) Business and Professions Code section 22978.2(b) (distributor's/wholesaler's sale or possession of untaxed tobacco products).
- (8) Business and Professions Code section 22978.4(c) (distributor's/wholesaler's failure to comply with invoice requirements).
- (9) Business and Professions Code section 22979.6(c) (manufacturer's/importer's failure to comply with invoice requirements).
- (10) Business and Professions Code section 22980(b) (any person's refusal to allow inspection).
- (11) Business and Professions Code sections 22980.1(b), (c), (d), (e), (f), and (g) (sales or purchases of cigarettes or tobacco products to unlicensed person or person with suspended or revoked license).
- (12) Business and Professions Code section 22980.2(a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

(c) A second offense of any of the following provisions shall result in a \$2,000 fine, and each subsequent offense shall increase the fine by \$1,000, up to a maximum of \$5,000 per offense:

- (1) Business and Professions Code section 22974.3(a)(2) (second seizure from retailer within five years of less than 20 packs of untaxed cigarettes).
- (2) Business and Professions Code section 22978.2(a)(2) (second seizure from a distributor/wholesaler within five years of less than 20 packs of untaxed cigarettes).

(d) A second offense of any of the following provisions shall result in a fine of \$5,000 or five times the retail value of any cigarettes or tobacco products seized, whichever is greater, with each subsequent offense resulting in a fine of up to \$10,000 for the third offense, \$15,000 for the fourth offense, \$20,000 for the fifth offense and \$50,000 for the sixth and subsequent offenses:

- (1) Business and Professions Code section 22974.3(a)(4) (second seizure within five years from retailer or any other person of 20 or more packs of untaxed cigarettes).

(2) Business and Professions Code section 22978.2(a)(4) (second seizure within five years from a distributor or wholesaler of 20 or more packs of untaxed cigarettes)

(e) Fines are reduced by the amount of any fine imposed as a result of a misdemeanor citation issued for the same violation of the Act.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22973(a)(2), (4) and (5), 22974, 22974.3(a)(4), 22974.3(b), 22974.7, 22977(a)(5), 22978.1, 22978.2(a), 22978.2(b), 22978.4(c), 22978.5(b), 22978.7, 22979(b)(1), 22979.4, 22979.5(b), 22979.6(c), 22979.7, 22980(b), 22980.1(b)-(g), and 22980.2(a), Business and Professions Code.

Regulation 46080. COLLECTION OF FINES.

The Board shall collect fees, fines and penalties in compliance with Chapter 4 of Part 30, Division 2, of the Revenue and Taxation Code, commencing with section 55121.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code; Section 55121 et seq., Revenue and Taxation Code.

Article 5: APPEAL PROCEDURES

Regulation 46090. RIGHT TO APPEAL.

(a) Every licensee or unlicensed person has the right to appeal any violation of the Act, and may appeal a Warning Notice or Notice of Violation issued by the Excise Taxes and Fees Division, as specified below:

(1) The Notice of Violation for revocation and/or a fine of more than \$2,500:

(A) first appeal to the Excise Taxes and Fees Division;

(B) second appeal to the Appeals Division; and

(C) third appeal to the Board for the final decision.

(2) The Notice of Violation or Warning Notice for any other penalty or fine:

(A) first appeal to the Excise Taxes and Fees Division; and

(B) second appeal to the Appeals Division for the final decision.

- (b) A conference and/or hearing will be scheduled to allow the licensee or unlicensed person requesting an appeal an opportunity to contest the violation(s) and show cause why the penalties should not apply or should be reduced.
- (c) **Burden of Proof.** The licensee or unlicensed person shall have the burden of proof as to the grounds for dismissal of any violations or for reduction of penalties.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 47000. APPEAL - EXCISE TAXES AND FEES DIVISION.

- (a) **Time For Filing.** A written request for an appeal must be filed within 10 days of the date of the Warning Notice or Notice of Violation.
- (b) **Failure to File a Timely Appeal.** If a written request for an appeal is not filed within the 10-day period, the licensee or unlicensed person shall be deemed to have waived his or her right to an appeal and the Warning Notice or Notice of Violation, and the penalty or penalties stated therein, shall become final.
- (c) **Request for an Excise Taxes and Fees Division Appeal.** The Request for Appeal shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice or Notice of Violation and shall be accompanied by any and all documentation and written argument to be considered in support of the appeal. The Request for Appeal shall be signed by the licensee or unlicensed person or by an authorized representative.
- (d) **Notice of Conference.** The Excise Taxes and Fees Division will schedule a conference and send a Notice of Conference stating the date and time to the licensee or unlicensed person. The Notice of Conference will provide at least 15 days notice of the time and date of the conference.
- (e) **Conference.** The conference is intended to be an informal, non-adversarial proceeding with a discussion of the relevant facts and applicable laws and regulations. Written statements made under penalty of perjury may be submitted, but subpoenas are not issued for conferences, nor is sworn testimony required. The conference will be conducted by telephone and shall not be recorded and or transcribed, unless by the licensee or unlicensed person. A copy of a recording or transcript shall be made available to the

Excise Taxes and Fees Division if the licensee or unlicensed person records or transcribes the conference.

- (f) The Excise Taxes and Fees Division may grant one conference reschedule or postponement. A reschedule or postponement shall not be for more than 15 days unless approved by the Chief of the Excise Taxes and Fees Division or his or her designees.
- (g) The Excise Taxes and Fees Division may grant additional time to a party at the conference to submit documents. The documents shall be submitted no later than 7 days after the conference date.
- (h) Decision. Following the conference, the Excise Taxes and Fees Division shall issue a Notice of First Decision. The Notice of First Decision will set forth the Excise Taxes and Fees Division's decision, the applicable penalty or penalties, and the licensee's or unlicensed person's appeal rights.
- (i) A licensee or unlicensed person who receives a Notice of First Decision may appeal the decision within 10 days of the date of the Notice of First Decision by timely filing a Request For Appeals Conference with the Board Proceedings Division.
- (j) Failure to File a Timely Appeal. If a Request For Appeals Conference is not filed within the 10-day period, then the licensee or unlicensed person shall be deemed to have waived his or her right to an appeal and the Notice of First Decision, and the penalty or penalties stated therein, shall become final.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 47010. APPEAL - APPEALS DIVISION.

- (a) Time For Filing. A Request For Appeals Conference must be filed with the Board Proceedings Division within 10 days of the date of the Notice of First Decision issued by the Excise Taxes and Fees Division.
- (b) Request for Appeals Conference. The Request for an Appeals Conference shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice or Notice of Violation and shall be accompanied by any and all documentation and written argument to be considered in the appeal. The Request for an Appeals Conference shall be signed by the licensee or unlicensed person or by an authorized representative.
- (c) Conference. Upon receipt of a Request for an Appeals Conference, except as provided herein, a conference will be scheduled and held as set forth in

Regulation 5023 [NOTE: reference to change when new Rules of Practice are adopted] to allow a licensee or unlicensed person an opportunity to show cause why the Warning Notice or Notice of Violation, and the penalty or penalties imposed therein, should not be upheld.

- (1) The conference will be held by telephone and shall be recorded. A licensee or unlicensed person may request a copy of the recording or a transcription, at his or her expense.
 - (2) A reschedule or postponement shall not be for more than 15 days unless approved by the Chief Counsel or his or her designees.
 - (3) If at the conference, a party requests time to submit additional documents, the party shall have 7 days after the conference to submit the documents.
- (d) Decision. The Appeals Division shall issue a Notice of Second Decision following the conference. The Second Decision will set forth the Appeal Division's decision, the applicable penalty or penalties, and the licensee's or unlicensed person's appeal rights, if any, as set forth in subdivision (e) below.
- (e) A Notice of Second Decision that imposes a penalty of revocation and/or a fine of more than \$2,500 may be appealed by timely filing a Request for Board Hearing. A Notice of Second Decision that imposes a penalty of suspension and/or a fine of \$2,500 or less is final and may not be appealed further.
- (f) Failure to File. When applicable, a Request for Board Hearing must be filed within 10 days of the date of the Notice of Second Decision. If a Request for a Board Hearing is not filed within the 10-day period, then the licensee or unlicensed person shall be deemed to have waived his or her right to an appeal and the Notice of Second Decision, and the penalty or penalties stated therein, shall become final. If a hearing is not requested or is waived, then official notice of the Board's action on the appealed Notice of Second Decision will be mailed to the licensee or unlicensed person.

Note: Authority: Section 22971.2, Business and Professions Code.

Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Regulation 47020. APPEAL – BOARD HEARING.

- (a) Timely filing. When applicable, a Request for a Board Hearing must be filed within 10 days of the date of the Notice of Second Decision.
- (b) Request for Board Hearing. The Request for Board Hearing shall state the specific grounds upon which the licensee or unlicensed person is contesting

the Notice of Second Decision and whether an oral hearing is requested, and shall be accompanied by any and all documentation and written argument to be considered in support of licensee's or unlicensed person's contentions. The Request for Board Hearing shall be signed by the licensee or unlicensed person or by an authorized representative.

- (c) When applicable, upon receipt of the Request for Board Hearing, a Board hearing shall be scheduled and conducted in accordance with the procedures as set forth in Regulations 5070 through 5086 [NOTE: reference to change when new Rules of Practice are adopted], to allow the licensee or unlicensed person an opportunity to show cause why the Notice of Second Decision, and the penalty or penalties imposed therein, should not be upheld. Following the Board hearing, a Notice of Board Decision will be mailed to the licensee or unlicensed person.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22974.7, 22978.7, and 22979.7, Business and Professions Code.

Article 6: SEIZURES

Regulation 47030. FORFEITURE.

Any cigarettes or tobacco products seized by the Investigations Division or delivered to the Board by a law enforcement agency shall be deemed forfeited to the state pursuant to Business and Professions Code section 22974.3(a) or (b), 22978.2(a) or (b), or 22980.2(c) of the Act. In effecting such forfeitures, the Board shall comply with the procedures set forth in Revenue and Taxation Code commencing with section 30435.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Sections 22974.3(a) or (b), 22978.2(a) or (b), and 22980.2(c), Business and Professions Code; Section 30435 et seq., Revenue and Taxation Code.