

# Memorandum

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

Date : May 20, 2005

From : Kristine E. Cazadd  
Chief Counsel *K. Cazadd*

Subject : Request for Further Direction Regarding the Procedures for Resolving Appeals  
under AB 71 (The Cigarette and Tobacco Products Licensing Act of 2003)

At its November 4, 2004, meeting, the Board considered the appeals procedures to be used in the implementation of AB 71, The Cigarette and Tobacco Products Licensing Act of 2003. (Exhibit 1 is a copy of the Informal Issue Paper prepared for the Board's consideration.) AB 71 provides for fines, suspensions, and revocations for violations of the Act. On November 4, the Board adopted the AB 71 Penalty Table attached to the Informal Issue Paper. (Exhibit 2 is a copy of the transcript of the Board's discussion and motion at its November 4, 2004, meeting.)

Under the processes adopted by the Board, with the exception discussed later, it is staff's understanding that for cases where a penalty is imposed, the licensee has the right to a conference with the Excise Taxes and Fee Division. The licensee may appeal that decision to the Appeals Division, who would hold a conference and issue a decision. For less serious cases involving suspensions and fines up to \$2,500, the decision of the Appeals Division will be final, and there are no appeal rights to the Board. For cases involving revocations and fines over \$2,500, the licensee may also request a hearing before the Board.

In cases where the Appeals Division holds a conference, it will determine whether the violation actually occurred and whether all procedural requirements for imposition of the penalty are satisfied (e.g., proper notice). The penalties imposed under AB 71 are different than the mandatory penalties subject to relief that commonly come before the Appeals Division. There is no specific relief provision, but some of the penalties themselves are imposed based on permissive statutory language, that is, that the Board "may" impose the penalty. Our understanding, based on the Board's motion on November 4, 2004, is that staff does not have the authority to depart from the parameters of the penalty table adopted by the Board. Thus, where three choices are given for a penalty that the Board "may" impose, staff understands that it may impose one of those three choices, but that it cannot impose a different penalty (e.g., between two of the choices) or impose no penalty at all. Staff requests the Board's confirmation that this is the level of review

*Item m.1  
e-25-05*

and discretion that both the Excise Taxes and Fee Division and the Appeals Division should employ in performing their respective reviews.

The exception to the appeals process discussed above is for mandatory revocations under Business and Professions Code section 22974.4 (conviction of a felony under Revenue and Taxation Code section 30473 or 30480 or having any permit or license revoked under any provision of the Revenue and Taxation Code). The process the Board adopted for these appeals is for direct appeal to the Board. While preparing the first group of these appeals for Board hearing, an issue has arisen for which staff seeks further direction from the Board. Although the Appeals Division prepared the Board hearing summaries, it has exercised no independent review in these matters per our understanding of the Board's motion at its November 4, 2004, meeting. That decision appears to bypass intermediate Appeals Division review, and thus the Appeals Division simply provided the Board a summary along with the Department's submission. This raised certain questions because in all other cases where the Appeals Division has prepared the summaries for Board hearing, it exercises some level of independent review and provides a complete package of information to the Board.

In order to better serve the Board Members during the hearing phase of this program we have concluded that certain refinements might be beneficial. It is appropriate and consistent with the Board's quasi-judicial functions for the Appeals Division to prepare the summaries for the Board hearings under AB 71 and to introduce the hearings, and thus, as with other appeals for which the Appeals Division prepares the summary and introduces the hearing, we believe that the Appeals Division should exercise some level of independent review and make its own specific recommendation to the Board. Such review could be by way of an Appeals conference followed by a decision, or simply a review of the documentation submitted by the Department and the licensee.

In deciding on the appeals process under AB 71, one issue that concerned the Board on November 4, 2004, was that the appeals be resolved as promptly as possible. Toward that end, we do not recommend that a licensee appealing a revocation of its license based on revocation of a seller's permit be automatically afforded an Appeals conference as well as the Board hearing. Doing so would delay the final decision by 60 days or more. Rather, we recommend that the Board authorize the Appeals Division to exercise its discretion in performing an independent review, with the primary purpose of ensuring that the summary package submitted to the Board include all relevant documentation (including sufficient evidence, proper notice, verification that due process was observed) that the Board would expect in order to have a solid basis for making its decision.

In most cases, we anticipate that the Department will be able to provide the Appeals Division everything it requires for an independent review, and the Appeals Division will be able to include its recommendation in the summary prepared for the Board hearing. In these cases, there would be no separate decision issued to the licensee. If necessary, the Appeals Division would contact the licensee or the Department, or both, to request additional information, and this might result in some delay while the parties are given the opportunity to respond to the request. In these cases, again, there would be no separate decision issued to the licensee, and additional relevant information obtained by the Appeals Division would be explained in the Board hearing summary. If, however, the Appeals Division were to conclude that it is necessary and helpful to hold a conference it would do so, and would then issue the same type of decision that it will issue in cases where it hears an appeal after the licensee has had a conference with the Excise

Taxes and Fee Division. As noted above, holding a conference would usually result in a delay of at least 60 days in holding the Board hearing, but we anticipate that it will be rare for the Appeals Division to conclude that a conference for these cases is required. Nevertheless, authorizing the Appeals Division to hold a conference if it deems one necessary permits the Appeals Division to better ensure that the matter is truly ready for a Board hearing.

If the Board agrees with this recommendation, we suggest the following motion:

That the Appeals Division independently review AB 71 cases where a Board hearing will be held as part of the Appeals Division's preparation of the Board hearing summary, but that a separate decision should be issued by the Appeals Division only when it concludes that an Appeals conference is required to ensure that all facts and arguments have been laid out before the Board hearing.

If you have any questions, please contact Tax Counsel IV David H. Levine at (916) 324-2192.

KEC:te

Attachments: Exhibits 1 and 2

Cc: Ramon Hirsig  
Gil Haas  
Dennis Maciel  
Vic Day  
Jean Ogrod  
Jeff Vest  
Tim Treichelt  
Monica Brisbane  
Paul Steinberg

Honorable Board Members

-4-

May 20, 2005

Honorable Board Members  
AB71 Document May 20, 2005

Bc: Marcy Jo Mandell

- For Information  
 For Discussion  
 For Decision Making

BOARD OF EQUALIZATION  
**INFORMAL ISSUE PAPER**

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**Civil Penalties and Appeal Procedures for Violations of AB 71 -  
The California Cigarette and Tobacco Products Licensing Act of 2003**

**Issues**

1. What civil penalties should be imposed for AB 71 violations?
2. What appeal procedures should the Board establish for AB 71 violations?

**Background**

To address the problem of untaxed purchases and illegal sales of cigarettes and tobacco products in California, AB 71 enacted the California Cigarette and Tobacco Products Licensing Act of 2003 (hereafter "the Act"). The Act imposes licensing and various other requirements on all retailers, wholesalers and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes.

Any violation of the Act, except the failure to display a license, may result in either a criminal or civil citation issued by the Board. The Act authorizes the Board to impose civil penalties (suspension or revocation of a license and/or fines) when a civil citation is issued. When a criminal citation is issued, the Act authorizes the Board to impose additional civil penalties after a court has imposed criminal penalties (fines and/or jail time). With few exceptions, the civil penalties provided in the Act are not mandatory and, therefore, the Board has discretion in determining the civil penalties to be imposed.

The Investigations Division and the Excise Taxes and Fees Division (Excise Division) are responsible for implementing the provisions of the Act. The Investigations Division is conducting over 800 field inspections of retailers, wholesalers, and distributors per month. In addition to ongoing seizures of unstamped cigarettes, licensees are being warned verbally when violations of the Act are observed. Now that the Board has approved limited peace officer status for designated Investigations Division employees for a six-month period, BOE inspectors will begin issuing criminal or civil citations when appropriate. It is therefore necessary to determine the appropriate civil penalties to be imposed and the appeal procedures to be followed.

The purpose of this issue paper is to seek the Board's approval for imposition of civil penalties for violations of the provisions of the Act as set forth in the *AB 71 Penalty Table* (Attachment A). This issue paper also seeks approval of appeal procedures for the civil penalties imposed.

## Discussion of Issue 1 – What Civil Penalties Should be Imposed for AB 71 Violations?

### Statutory Authority<sup>1</sup>

In addition to any other civil or criminal penalty, Business and Professions Code (hereafter “BPC”) section 22974.7 provides that “upon a finding that a retailer has violated any provision of [the Act], the board may take the following actions:

- (a) In the case of the first offense, the board may revoke or suspend the license or licenses of the retailer pursuant to the procedures applicable to the revocation of a license set forth in Section 30148 of the Revenue and Taxation Code.
- (b) In the case of a second or any subsequent offense, in addition to [suspension or revocation], the board may impose a civil penalty in an amount not to exceed the greater of either of the following:
  - (1) Five times the retail value of the seized cigarettes or tobacco products.
  - (2) Five thousand dollars (\$5,000).”

BPC section 22980.3(a) further provides that licenses issued under the Act “shall be subject to suspension or revocation for violations of the provisions of [the Act or the Revenue and Taxation Code (hereafter “RTC”) as follows:]

- (1) In addition to any applicable fines or penalties for a violation, upon first conviction of a violation, a licensee shall receive a written notice from the board detailing the suspension and revocation provisions of this act. At its discretion, the board may also suspend a license for up to 30 days.
- (2) In addition to any applicable fines or penalties for a violation, upon a second conviction of a violation within four years of a previous violation the license shall be revoked.”

### Staff Recommendation

To ensure fairness and consistency in the enforcement of AB 71, staff recommends approval of the civil penalties listed in Attachment A for violations of the Act. The civil penalties will be imposed only after a criminal conviction has been obtained or the Board’s civil adjudication process, as discussed in Issue 2 below, is complete.

The following provides an overview of the civil penalty recommendations in Attachment A:

- (1) A first civil citation for any violation(s) of the sections listed below will result in the issuance of a Warning Notice to the licensee. The Warning Notice advises the licensee that the violation(s) will be entered into the licensee’s permanent record as a first offense, which means that a future violation will result in a civil penalty as a second offense.

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<sup>1</sup> All statutory references cited herein apply to retailers. Similar provisions exist for other licensees.

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|---------------------|--|
| BPC § 22974         | Failure to retain purchase invoices.                                 |
| BPC § 22980.1(c)(d) | Purchases from unlicensed, suspended or revoked manufacturer/person. |
| BPC § 22980.1(g)    | Acquiring cigarettes in violation of RTC 30163.                      |
| BPC § 22980.2(a)    | Unlicensed sales of cigarettes & tobacco products.                   |

(2) A first criminal or civil citation<sup>2</sup> for any violation(s) of the sections listed below will result in a 10-day or a 30-day suspension or a revocation, depending on the severity of the violation. In cases involving multiple violations, the violation punishable with the longest suspension period or revocation will be used for penalty assessment. No fine will be imposed for additional violation(s) listed on a first citation.

- |                |   |
|----------------|---|
| BPC § 22973    | False statements on application.                                  |
| BPC § 22974.3  | Sale or possession of unstamped cigarettes.                       |
| BPC § 22980(b) | Failure to allow inspection.                                      |
| RTC § 30474.1  | Sale or possession of counterfeit cigarettes or tobacco products. |

(3) A second and each subsequent criminal or civil citation for violation(s) of the BPC sections listed in either (1) or (2) above will result in a 30-day suspension or revocation, depending on the nature of the violation(s), plus a civil fine up to \$5000 or five times the retail value of any cigarettes/tobacco products seized, whichever is greater.

(4) The following civil penalties are mandatory by statute:

- BPC § 22974.5 - Any first or subsequent civil citation for failure to display the license results in a \$500 fine.
- BPC § 22980.3 - A second criminal conviction within four years for the same violation results in license revocation.

## Discussion of Issue 2 –

### What Appeal Procedures Shall the Board Establish for AB 71 Violations?

#### Statutory Authority

The Act requires the Board to provide the following notice and hearing before suspending or revoking a license:

- 10-day notice and hearing to allow licensee to show cause why the license should not be suspended or revoked. (BPC section 22974.7(a) and RTC section 30148.)
- 60-day notice to licensee before revocation or suspension. (RTC section 30459.6.)

<sup>2</sup> Depending on the factual circumstances of the case, as well as the success of previous attempts at criminal prosecution for similar violations, BOE inspectors may issue a civil citation rather than a criminal citation for these violations.

### Staff Recommendation

Staff is recommending that the following appeals be available to a licensee before the imposition of any civil penalties.

- Warning Notices, \$500 fines, or 10-day suspensions: The licensee has the opportunity for a hearing with the Chief of the Excise Division or a designee whose decision will be final.<sup>3</sup>
- 30-day suspensions and associated fines: The licensee has the opportunity for a hearing with the Chief of the Excise Division or a designee and further appeal to the Appeals Division whose decision will be final.
- Revocations and associated fines: The licensee has the opportunity for a direct appeal to the Board for a final determination.

### Overview of Citation Processing and Appeal Procedures:

When the Excise Division receives a copy of a citation from the Investigations Division, the Excise Division will mail the licensee a Warning Notice or a Notice of Violation, depending on the statutes violated, which will reference the citation issued and the violation(s) observed. The Notice of Violation will indicate the penalties to which the licensee is subject. Both notices will provide information regarding appeal rights. The Notice of Violation will specify a date 60 days from the date of the notice when the license may be suspended or revoked. This meets the statutory requirements of notice before actual suspension or revocation.

If the licensee appeals, a hearing will be scheduled to allow the licensee an opportunity to show cause why the violation(s) should not be added to the licensee's permanent record and why the license should not be suspended or revoked or why fines should not be imposed. Upon approval of the staff recommendations set forth above, the Excise Division will hear appeals of Warning Notices, \$500 fines, and suspensions. Thirty-day suspensions and associated civil fines may be further appealed to the Appeals Division. Appeals of license revocations and associate civil fines will go directly to the Board for final adjudication. Any civil fines will be issued as demand billings after appeal of the citation has been adjudicated.

If the licensee does not respond to the Notice of Violation, waives his or her right to a hearing, or fails to appear at a scheduled hearing, the Excise Division will notify the licensee of the suspension and issue a demand billing for applicable civil fines. Cases involving license revocations will go to the Board Proceedings Division for inclusion in the Board's non-appearance or consent calendar.

### **Requested Board Action**

Staff is requesting approval of the penalty provisions set forth in Attachment A and the appeal procedures described above.

*Attachment A – AB 71 Penalty Table - Retailers*

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<sup>3</sup> In a separate memorandum, staff is recommending that the Board delegate to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees the authority to hold and decide license suspension hearings and appeals of citations that would subject a licensee to fines.

## Attachment A

### AB 71 Penalty Table - Retailers<sup>1</sup>

**1<sup>st</sup> Citation = Suspension or Revocation, No Fine Except for Failure to Display License<sup>2</sup>**

Statute/Violation	Penalty <sup>3</sup>
BPC § 22973 – False statements on application	10 or 30-Day Suspension or a Revocation
BPC § 22974 – Retention of purchase invoices	Warning Notice
BPC § 22974.3 – Sale or possession of unstamped cigarettes	30-Day Suspension
BPC § 22974.5 – Failure to display license	\$500 Fine (mandatory)
BPC § 22980(b) – Failure to allow inspection	30-Day Suspension
BPC § 22980.1(c)(d) – Purchases from unlicensed, suspended or revoked manufacturer/person	Warning Notice
BPC § 22980.1(g) – Acquiring cigarettes in violation of RTC § 30163	Warning Notice to retailers 10-Day Suspension for wholesalers and distributors
BPC § 22980.2(a) – Unlicensed sales of cigarettes & tobacco products	Warning Notice
RTC § 30474.1 – Sale or possession of counterfeit cigarettes or tobacco products	10 or 30-Day Suspension

**2<sup>nd</sup> & Subsequent Citation(s) = Fine(s) + Suspension or Revocation**

Statute/Violation	Penalty
BPC § 22974.5 – Failure to display license	\$500 (mandatory)
All other AB 71 BPC violations	Up to the greater of \$5000 or 5X value of cigarettes/tobacco products seized plus a 30-Day Suspension or a Revocation
BPC § 22980.2(c) – Continued sales after notice of revocation/suspension	Revocation of license
BPC § 22980.3 – 2 <sup>nd</sup> conviction within four years for the same violation	Revocation of license (mandatory)

<sup>1</sup> Unless otherwise indicated, the same penalties are proposed for manufacturers, importers, wholesalers, and distributors, only the referencing statutes will change. Where a penalty range is indicated, the Excise Division will determine the actual penalty based on the severity of the offense.

<sup>2</sup> Fines may be imposed for the “second or any subsequent offense” (B&P 22974.7(b)), which could be interpreted to mean the 2<sup>nd</sup> or any succeeding violation in a multiple-violation 1<sup>st</sup> citation. For the 1<sup>st</sup> citation, however, regardless of the number of violations, no fines will be assessed and the penalty will be a license suspension or revocation (B&P 22974.7(a)). No suspension for failure to display a license; statute requires a \$500 fine (B&P 22974.5).

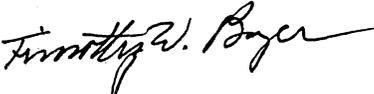
<sup>3</sup> Violation punishable with the longest suspension controls. All other suspensions will run concurrently. Where two or more violations in the same citation have the same suspension period, one will be selected as the punishable violation with penalties for the others to run concurrently.

# **ATTACHMENT 2**

**M e m o r a n d u m**

**To:** Honorable Carole Migden, Chairwoman  
Honorable Claude Parrish, Vice Chairman  
Honorable Bill Leonard  
Honorable John Chiang  
Honorable Steve Westly

**Date:** October 27, 2004

**From:** Timothy W. Boyer   
Chief Counsel

**Subject:** Request for Delegation of Authority

**Recommendation**

Staff recommends that the Board delegate to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees the authority to hold and decide license suspension hearings and appeals of citations that subject a licensee to fines under the *California Cigarette and Tobacco Products Licensing Act of 2003*.

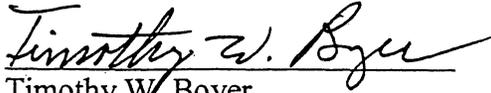
**Background**

Assembly Bill 71, the California Cigarette and Tobacco Products Licensing Act of 2003 ("the Act"), codified into law primarily in the Business and Professions Code, requires the licensing of all retailers, wholesalers and distributors of cigarettes and tobacco products, and all manufacturers and importers of cigarettes. It also provides for fines and the suspension or revocation of licenses under certain conditions related to the conviction or final adjudication of a violation of the Act.

The Act provides for suspensions or revocations using the hearing process set forth in Revenue and Taxation Code section 30148. Section 30148 requires the Board to provide the licensee with a hearing, after at least 10-day notice, to show cause why his or her license should not be revoked. As discussed in the Issue Paper entitled *Civil Penalties and Appeal Procedures for Violations of AB 71 – The California Cigarette and Tobacco Products Licensing Act of 2003*, staff has recommended that 10-day license suspension hearings be decided by the Chief of the Excise Taxes and Fees Division or a designee without further right of appeal. A licensee subject to a 30-day suspension and associated fines would have the right to appeal the suspension to the Appeals Division for final decision. Staff is also recommending the right to appeal citations that would result in imposition of fines and is seeking delegation of authority with regard to appeals of such citations.

Currently there is no delegation of authority in place authorizing Board staff to hold and decide license suspension hearings or appeals of citations under the Act. In order to implement the recommendations of the aforementioned Issue Paper, staff is seeking a delegation of authority to the Chief of the Excise Taxes and Fees Division, the Assistant Chief Counsel of the Appeals Division, and their designees to hold and decide license suspension hearings and appeals of citations that would subject a licensee to fines.

Recommended by:



Timothy W. Boyer  
Chief Counsel

Approved by:



Ramon J. Hirsig, Executive Director

BOARD APPROVED

At the \_\_\_\_\_, 2004 Board Meeting

Deborah Pellegrini, Chief  
Board Proceedings Division

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N Street, Room 121

Sacramento, California

REPORTER'S TRANSCRIPT

NOVEMBER 4, 2004

ITEM P3

ADMINISTRATIVE SESSION

DISCUSSION REGARDING

AB 71 THE CALIFORNIA CIGARETTE & TOBACCO

PRODUCTS LICENSING ACT OF 2003

Reported by: Beverly D. Toms

CSR No. 1662

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P R E S E N T

For the Board  
of Equalization:

Carole Migden  
Chairwoman

Claude Parrish  
Vice-Chair

Bill Leonard  
Member

John Chiang  
Member

Marcy Jo Mandel  
Appearing for Steve Westly,  
State Controller (per  
Government Code Section 7.9)

Deborah Pellegrini  
Chief, Board Proceedings Division

Board of Equalization  
Staff:

Dennis Maciel  
Chief, Excise Tax Division

Gil Haas  
Chief, Investigations Division

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1 Sacramento, California

2 November 4, 2004

3 ----oOo----

4 MS. PELLEGRINI: The next item is P3. That's  
5 AB 71, The California Cigarette and Products Licensing  
6 Act of 2003.

7 Mr. Boyer.

8 MR. BOYER: Madam Chairwoman, Members, my  
9 name is Tim Boyer. I'm the Chief Counsel for the Board.

10 With me today I have Dennis Maciel, who is the  
11 Chief of our Excise Tax Division. And also Mr. Gil  
12 Haas, who is the Chief of our Investigations Division.

13 P3 concerns two major items that involve our  
14 cigarette license program under AB 71.

15 First, civil penalties for violation of the  
16 law and the appeal of those penalties.

17 Second, delegation of authority to hear some  
18 of the appeals at the staff level.

19 For civil purposes, some first-time violators  
20 of the Business and Profession Code under our cigarette  
21 tax law will warrant only a warning letter. For some  
22 first-time violations, the more serious ones, these  
23 could result in a 10- to 30-day suspension of a license  
24 to sell cigarettes or tobacco products, depending on the  
25 severity of the violation.

26 For a second violation, a 30-day suspension of  
27 a license or revocation of the license will result.

28 In addition, in these types of cases, in the

1 second violation types, a civil fine of up to \$5,000  
2 or five times the value of the product seized, whichever  
3 is greater, can be imposed.

4 These fines will depend upon the severity of  
5 the violations.

6 We have outlined for you in the materials  
7 provided the Staff proposals as to the violations and  
8 corresponding recommended civil fines.

9 For purposes of appeal, staff is proposing  
10 that warning notices of \$500 mandatory fines or 10-day  
11 suspensions be heard by the Excise Tax Division. 30-day  
12 suspensions and associated fines would be heard by the  
13 Appeals Division. And revocations and associated fines  
14 would be brought to the Board directly for  
15 determination.

16 So at this point I would ask the Board of --  
17 approval of the penalty table and fine schedules as  
18 allowed by statute and the appeals process that I've  
19 outlined for you.

20 I would also ask that you approve the  
21 delegation of authority of the staff with regard to the  
22 appeals process.

23 MS. MANDEL: Question.

24 MS. MIGDEN: Yeah.

25 MS. MANDEL: What kind of reporting to the  
26 Board are we going to get? Can we get maybe monthly  
27 reports? They don't have to be on a Board agenda, I  
28 don't think, but just so that the Board Members know

1 what's going on and how it is being enforced and how  
2 well the process is working and -- so, if we're going to  
3 delegate the authority we can keep track of it in  
4 case --

5 MR. BOYER: All right.

6 MS. MANDEL: -- we want to --

7 MR. BOYER: Ms. Mandel, I'll make that  
8 commitment on a monthly basis if the Board wants that.

9 MS. MIGDEN: You want a monthly or bi-monthly?

10 MS. MANDEL: What --

11 MR. PARRISH: I have a --

12 MR. BOYER: I would think bi-monthly would be  
13 more appropriate.

14 MS. MIGDEN: Bi-monthly is better.

15 MS. MANDEL: Oh, I always get confused by that  
16 bi --

17 MS. MIGDEN: Bi, I understand.

18 MR. BOYER: Bi-monthly would be fine.

19 MS. MIGDEN: Bi-monthly I think is better.

20 MR. PARRISH: I wonder if I could ask the --  
21 our counsel a question here.

22 We're delegating authority to hear the  
23 minor -- you know, I guess the 10-day suspension and  
24 fines up to \$500. But are -- are we delegating the  
25 final authority, assuming that the -- I guess we are,  
26 assuming that the taxpayer objects to the findings,  
27 they -- they would use their right to go to the elected  
28 representatives?

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MR. BOYER: Yes.

MR. PARRISH: They would.

MR. BOYER: That's --

MR. PARRISH: All -- all except for the most serious --

MR. BOYER: Right, Mr. Parrish.

MR. PARRISH: -- is the revocation.

MR. BOYER: I think it's probably just a matter of numbers because we would anticipate that there are going to be quite a few of the minor violations.

MR. LEONARD: Madam Chair.

MS. MIGDEN: Yes.

MR. LEONARD: On that same point, my suggestion for change would be to allow -- to strike the language that says in the first violation that there is no appeal -- to strike that language and allow some appeals process.

My concern about the Board doing it, Mr. Parrish, on all these occurrences is that the taxpayer has a right to an early hearing.

MR. PARRISH: Yeah.

MR. LEONARD: And the way the calendar works it would mean we'd -- we'd be meeting almost daily, I assume, if the volumes could be as high as we're talking about.

So for the minor first level ones, I don't mind it not coming to the Board, but I would like to give the taxpayer a -- a second shot in case there's

1 something that they believe has gone wrong in the  
2 process.

3 MR. BOYER: I'll strike that from the  
4 delegation.

5 MR. LEONARD: Make that kind --

6 MR. PARRISH: Yeah.

7 MR. LEONARD: Yeah, a middle ground between  
8 the two --

9 MR. PARRISH: Yeah.

10 MR. LEONARD: Thank you. I think that would  
11 be helpful.

12 MR. BOYER: I will do that.

13 MS. MIGDEN: There are -- I mean -- well, I  
14 guess --

15 MS. MANDEL: So, then -- so, then -- no, I  
16 mean --

17 MS. MIGDEN: I get -- there's a second screen  
18 but then --

19 MR. LEONARD: Right.

20 MS. MIGDEN: -- if we are going to say, geez,  
21 you're in charge of dismissing all those under, but  
22 there's an invitation to directly appeal, I'm also --  
23 want to strike a balance where we'd all agree staff made  
24 the right decision, or you want the opportunity to  
25 review all staff decisions.

26 MR. LEONARD: No, I'm not saying that. What  
27 I'm saying is more akin to our sales tax process where  
28 there's -- there's -- there's an audit conference;

1 taxpayer doesn't like that; they can go to an appeals  
2 conference. I'd like at least two tiers there.

3 I don't mind it stopping at that appeals level  
4 in Mr. Boyer's Division for the minor ones --

5 MS. MIGDEN: Okay, that's fine.

6 MR. LEONARD: -- because I think it's going to  
7 be hard to schedule them and get -- honor the law, and  
8 the taxpayer's right to an early hearing.

9 But I -- I would like a -- I'm -- it's not  
10 going to happen, but some tax -- I think it's a greater  
11 due process comfort level of the taxpayers --

12 MS. MIGDEN: All right.

13 MR. LEONARD: -- to have that -- that chance  
14 to repeat their story.

15 MR. BOYER: All right, Mr. Leonard and  
16 Madam --

17 MS. MIGDEN: Can you incorporate that?

18 MR. BOYER: We will incorporate that in the  
19 delegation, without a problem.

20 MS. MIGDEN: Very well.

21 Okay. Now, tell me this about the penalty  
22 suggestions. Are those consistent with other penalties  
23 that --

24 MR. BOYER: These --

25 MS. MIGDEN: -- that we levy for other  
26 violations?

27 MR. BOYER: These are consistent with the  
28 statute, Madam Chairwoman, and we try to equalize those

1 with any criminal penalty that also might be imposed so  
2 that we achieve hopefully throughout the state based  
3 upon possible criminal fines.

4 And then we will make adjustments with regard  
5 to the civil penalty so that --

6 MS. MIGDEN: How does it work with failure to  
7 display license? So, somebody gets a fine --

8 MR. BOYER: If they get cited for that --

9 MS. MIGDEN: -- \$500 they don't have a  
10 license. And then they are supposed to -- when do they  
11 get re-fined \$500?

12 MR. BOYER: I think that if one of our  
13 inspectors walks in and the license is not visible it's  
14 a mandatory \$500 fine.

15 MS. MIGDEN: Right.

16 MR. BOYER: If they are selling without a  
17 license, then that's a criminal violation.

18 MS. MIGDEN: So they come back a week later --

19 MR. BOYER: Yes.

20 MS. MIGDEN: So, we give them some -- does  
21 that inspector give them a ticket then, or a citation  
22 then?

23 MR. BOYER: That's a mandatory fine for that  
24 one instance. But I think that just like in all our  
25 programs, there's got to be discretion on the part of  
26 the staff.

27 MS. MIGDEN: Oh, of course. Very well.

28 MR. BOYER: I'm anticipating that from our

1 inspectors.

2 MS. MIGDEN: So, unlicensed sales of  
3 cigarettes and tobacco is a warning.

4 MR. PARRISH: -- (inaudible) if they're going  
5 to have a \$5,000 penalty --

6 MS. MIGDEN: Hold on a second, Claude. What  
7 about selling to youth?

8 MS. MANDEL: Selling to what?

9 MS. MIGDEN: Youth.

10 MS. MANDEL: Oh, youth. Under-age sales.

11 MR. LEONARD: That's already in the statute.  
12 That wasn't covered by this.

13 MS. MIGDEN: I'm asking. He didn't tell me  
14 that.

15 MR. HAAS: Madam Chairwoman, Gil Haas of the  
16 Investigations Division.

17 As it is currently under the law, it is not a  
18 violation under this section until it reaches a certain  
19 point. I believe that's 13 percent of the -- the sales  
20 to under youth.

21 When that comes out from the Department of  
22 Health Services then it becomes a violation under this  
23 section and it would be subject to criminal.

24 MS. MIGDEN: How do you know when there's 13  
25 percent are sent to youth?

26 MR. HAAS: It's a report that the Department  
27 of Health Services is supposed to put out each year.  
28 It will --

1 MS. MIGDEN: Because it audits?

2 MR. PARRISH: This means --

3 MR. HAAS: Yes, it does tests in the field.  
4 It conducts investigations and undercover tests for  
5 sales to youth.

6 MR. PARRISH: No -- another --

7 MS. MIGDEN: So, you're telling me now -- now,  
8 wait a minute, Claude, if you're going to go off on the  
9 thing.

10 So, do we, Mr. Boyer, have the ultimate veil  
11 of protection for young people that are targeted for  
12 consumption of tobacco products? And to -- so, we're  
13 superceded by statute, is what you're saying?

14 MR. BOYER: I believe so, yes.

15 MS. MIGDEN: There are statutory directives  
16 that are already in place. In that -- what happens if  
17 somebody makes a report that a certain vendor is selling  
18 cigarettes to kids?

19 MR. MACIEL: This is Dennis Maciel, of the  
20 Excise Tax and Fees Division. We turn that information  
21 over to the Department of Health Services, who has a --  
22 a team and conducts undercover sting operations. And  
23 they have a violation procedure in place to --

24 MS. MIGDEN: How quick do they work? Somebody  
25 called you or you have information, you just turn it  
26 over and then what happens?

27 MR. MACIEL: We have found that the Department  
28 of Health Services has been very responsive to the

1 inquiries that have been turned over to us.

2 MS. MIGDEN: So, that's working well?

3 MR. MACIEL: Yes, I think so.

4 MS. MIGDEN: All right.

5 MR. PARRISH: Madam Chairwoman, I have a  
6 question. I was given an analysis here and -- my deputy  
7 gave it to me, but one thing is not clear. You have  
8 one, two and three categories, I guess, and the first  
9 category we've kind of dealt with, what Mr. Leonard has  
10 talked about. But item two is a 30-day suspension and  
11 associated fines. And my understanding is that those  
12 fines will be up to \$5,000 and that the Appeals  
13 Division's decision is final.

14 That's what you're saying, right?

15 MR. BOYER: Correct.

16 MR. PARRISH: Now, I think something up to  
17 \$5,000 is -- and the -- and the taxpayer not having the  
18 right to come to the Board is -- is not democracy.

19 I -- I can't see -- I can see it, you know,  
20 \$500, I understand that. But something up to \$5,000  
21 they don't have any appeal rights?

22 MR. BOYER: Well, we can -- Mr. Parrish, we  
23 can change it. Do you want to go to --

24 MR. PARRISH: You know, maybe --

25 MR. BOYER: -- over a thousand.

26 MR. PARRISH: Yeah, something over \$1,000 --  
27 or --

28 MR. BOYER: -- can be appealed to the Board?

1 MR. PARRISH: Yes.

2 MR. BOYER: Then we'll write that up if the  
3 Board's -- that's the Board's --

4 MR. PARRISH: Now, they have to -- they have  
5 to probably pay it. They probably have to pay it and  
6 come or something. Maybe a refund --

7 MS. MIGDEN: Can you go back again -- Claude,  
8 I beg your pardon. Tell me --

9 MR. PARRISH: See, what happens here is that  
10 the Appeals Division is final up to \$5,000.

11 MS. MANDEL: And the 30-day suspension.

12 MR. PARRISH: And the 30-day suspension. And  
13 we never see it or have any authority over it.

14 MS. MANDEL: That's one reason why -- I mean,  
15 part of the purpose of getting reports is so we can  
16 watch what's going on in case --

17 MR. PARRISH: Make it \$1,000 then. Yes,  
18 or --

19 MR. LEONARD: Question. When I read through  
20 this, I was concerned that the -- the statute gives the  
21 taxpayer a right to an early hearing. In other words,  
22 within some timeframe. Can you remind me what that is?

23 MR. BOYER: Well, it's a 60-day Taxpayer Bill  
24 of Rights hearing where we should be operating within  
25 that 60-day period, as fast as we can.

26 MS. MIGDEN: We're not --

27 MR. MACIEL: Absolutely.

28 MS. MIGDEN: Hold on.

1 MR. MACIEL: Upon notification from the  
2 Investigations Division that a citation has been upheld  
3 through the Courts we will immediately trigger that  
4 10-day to 60-day event that Mr. Boyer referred to.

5 We realize that --

6 MR. LEONARD: Now, the 60-day event is the  
7 time that the appeal must be addressed.

8 MR. PARRISH: Because 5 grand is a lot of  
9 money.

10 MR. MACIEL: We would have to act within that  
11 period. And what we're talking about is revocations  
12 only.

13 MR. LEONARD: Now, maybe we're on a different  
14 subject. If we -- if we go along with Mr. Parrish's  
15 suggestion, will we compromise our own Board calendar  
16 in -- in trying to get these matters before us and still  
17 comply with the law that gives the taxpayer a right to  
18 an early hearing? Or a speedy hearing, or whatever  
19 word.

20 MS. MIGDEN: Well -- please, answer the  
21 gentleman's question.

22 MR. BOYER: I don't think so.

23 MS. MIGDEN: I have something. I want --

24 MR. BOYER: No. I mean, the Board's calendar  
25 is the one that's going to determine the speed. We're  
26 going to try to get them on to the Board's calendar as  
27 soon as possible.

28 MS. MIGDEN: Yeah.

1 MR. BOYER: But if it's over 60 days it's  
2 going to be over 60 days.

3 MS. MANDEL: We're not going to be adding  
4 Board meeting dates unless we have humongous --

5 MR. BOYER: No.

6 MS. MIGDEN: I think it's a \$2500 --

7 MR. PARRISH: Yes.

8 MS. MIGDEN: -- feeling is more appropriate.

9 MR. BOYER: All right.

10 MS. MIGDEN: Let's have some latitude. Let's  
11 stick it there, compromise in the middle.

12 MR. BOYER: \$2500 and above or over 25?

13 MR. PARRISH: In other words, I believe --

14 MS. MIGDEN: Over \$2500.

15 MR. BOYER: \$2500, we will incorporate that.

16 MS. MIGDEN: \$2501.

17 MS. MANDEL: And does that necessarily include  
18 the license suspensions, or were you not as --

19 MR. PARRISH: Yeah, all license suspensions --

20 MS. MANDEL: -- concerned --

21 MR. PARRISH: -- still go to us.

22 MS. MANDEL: Oh.

23 MR. BOYER: Well, Mr. Parrish, all license  
24 suspensions are --

25 MS. MIGDEN: Hold on.

26 MR. PARRISH: Oh, not suspensions,  
27 revocation, I'm sorry.

28 MR. BOYER: All revocations.

1 MR. PARRISH: Suspensions under 30 days stays  
2 with you; over 30 days comes to us, right? Is that what  
3 it says?

4 MR. BOYER: 30 days.

5 MR. PARRISH: Comes to us. Anything --

6 MS. MIGDEN: Wait a minute, what does your  
7 proposal say?

8 MS. MANDEL: The --

9 MS. MIGDEN: Mr. Leonard, I want to know what  
10 you -- you've come in with a set of proposals that we're  
11 beginning to modify. And I'm wanting very quickly to  
12 check to see if they're workable and then, you know,  
13 Board members are not confounding your efforts.

14 MR. BOYER: I understand, Madam Chairwoman.

15 MS. MIGDEN: So, you know, and all of us have  
16 an open discussion here.

17 MR. BOYER: I think Mr. Parrish would like to  
18 see fines that are over \$2500. And I think we can do  
19 that without a problem.

20 MS. MIGDEN: Okay.

21 MR. BOYER: We don't have to worry about all  
22 suspensions, et cetera, et cetera. If it's over \$2500  
23 it will be a suspension and a revocation, also. So, you  
24 will see that, but -- I think everything is workable so  
25 far.

26 MS. MIGDEN: Does that sound --

27 MR. PARRISH: Yes.

28 MR. LEONARD: Question. As we -- as we

1 finalize this, are we adopting this by emergency  
2 regulation? Are we going through the regular --

3 MR. BOYER: We don't need the -- I looked and  
4 I've researched the area. We don't need the regulatory  
5 process. There's an exception to the APA from what I  
6 understand, because it's only geared to a small segment.

7 MR. LEONARD: These are penalties.

8 MR. BOYER: And these are penalties and that's  
9 simply something that's already been put forth in -- in  
10 the statute, Mr. Leonard.

11 MR. LEONARD: Okay.

12 MS. MIGDEN: So, there's no special emergency  
13 aspect to this?

14 MR. BOYER: Correct.

15 MS. MIGDEN: Okay.

16 MR. LEONARD: I would still recommend some --  
17 as we go from here, some extra effort to publicize,  
18 maybe even an interested parties explanatory meeting,  
19 even though we're not formally going through a  
20 regulatory adoption, so that, you know, we get as many  
21 people knowledgeable about -- about the -- the  
22 procedures, the penalties.

23 I mean, I know most of them are in the law.  
24 And hopefully the -- the licensees --

25 MS. MIGDEN: Don't spend money, though.

26 All right. It's all right, put it on line.  
27 That's it.

28 MR. BOYER: Right.

1 MS. MIGDEN: No postage. Forget about it.  
2 You know. And I agree, gentlemen, let's -- let's have  
3 this be known.

4 MR. BOYER: So, Madam Chairwoman, with the  
5 Board's approval then and with the --

6 MS. MIGDEN: Why don't we review the  
7 modifications made. Because --

8 MR. BOYER: The modifications made. We have  
9 Mr. Parrish's modifications where if you have a fine of  
10 over \$2500 that's appealable to the Board.

11 Suspensions, et cetera, that generally would  
12 be heard by the Excise Tax Division will also be  
13 appealable or can be heard in the Appeal Section of the  
14 Legal Division for a final say.

15 Those are the two that I have written down.

16 MS. MIGDEN: Very well.

17 MS. PELLEGRINI: And there's also Ms. Mandel  
18 recommended the bi-monthly reporting.

19 MR. BOYER: And the bi-monthly report, of  
20 course.

21 MS. MANDEL: So, I have the bi-monthly report.  
22 For the first level of the three in your memo, that  
23 those can go to Appeals Division.

24 MR. BOYER: Yes.

25 MS. MANDEL: The second level is the over  
26 \$2500 fine, they can come to the Board --

27 MR. BOYER: Yes.

28 MS. MANDEL: -- instead of stopping at

1 Appeals. And that I have a note that you said that  
2 would necessarily include a suspension and revocation.

3 MR. BOYER: If they have the \$2500 or --

4 MS. MANDEL: Because they're not going to --

5 MR. BOYER: More than the \$2500 fine. You  
6 will also have appurtenant thereto a suspension or  
7 revocation.

8 MS. MANDEL: Okay, thank you.

9 MS. MIGDEN: Very well.

10 MR. BOYER: So, with the Board's approval --

11 MS. MIGDEN: Is there a motion with  
12 amendments?

13 MR. PARRISH: I make --

14 MS. MIGDEN: As amended.

15 MR. PARRISH: As amended I move.

16 MS. MIGDEN: Is there objection?

17 MS. MANDEL: Second.

18 MS. MIGDEN: Mandel.

19 Okay, all members voting aye.

20 MR. BOYER: Thank you, Madam Chairman and  
21 Members.

22 MS. MIGDEN: Thank you, Mr. Boyer and others.  
23 It's well done.

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REPORTER'S CERTIFICATE

State of California        )  
                                  )    ss.  
County of Sacramento     )

I, BEVERLY D. TOMS, Hearing Reporter for the California State Board of Equalization certify that on November 4, 2004 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding 19 pages constitute a complete and accurate transcription of the shorthand writing.

Dated: November 15, 2004.



BEVERLY D. TOMS

Hearing Reporter