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State Controller, Sacramento

RAMON J. HIRSIG
Executive Director

October 2, 2006

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for the October 11, 2006, Business Taxes Committee Meeting. This meeting will address the adoption of Regulations 45000 through 47030 of the Cigarette and Tobacco Products Licensing Act of 2003, to implement, interpret and make specific the statutory provisions of Division 8.6 of the Business and Professions Code sections 22970 through 22995.

The Agenda describes Action 1 on which we believe industry and staff are in full agreement.

If you wish to have Action 1, which is a consent item, discussed fully at the Committee meeting, you must contact a Board Member prior to October 10, 2006, to request removal of the item from the Consent Agenda. In addition, please notify Ms. Monica Gonzalez Brisbane, Senior Tax Counsel, after you contact a Board Member's Office. Ms. Gonzalez Brisbane may be reached at (916) 322-0438.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **9:30 a.m.** on **October 11, 2006**, in Room 121 at the address shown above.

Sincerely,

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:me

Enclosures



cc: (all with enclosures)
Honorable John Chiang, Chair
Honorable Claude Parrish, Vice Chairman
Ms. Betty T. Yee, Acting Member, First District (MIC 71)
Honorable Bill Leonard, Member, Second District (MIC 78)
Honorable Steve Westly, State Controller, C/O Ms. Marcy Jo Mandel (MIC 73)
Mr. Chris Schutz, Board Member's Office, Fourth District (MIC 72)
Mr. Neil Shah, Board Member's Office, Third District (via e-mail)
Mr. Romeo Vinzon, Board Member's Office, Third District (via e-mail)
Mr. Alan LoFaso, Board Member's Office, First District (via e-mail)
Ms. Mira Tonis, Board Member's Office, First District (via e-mail)
Mr. Steve Kamp, Board Member's Office, First District (MIC 71 and via e-mail)
Ms. Margaret Pennington, Board Member's Office, Second District (via e-mail)
Mr. Tom Hudson, Board Member's Office, Second District (MIC 78 and via e-mail)
Mr. Ramon J. Hirsig (MIC 73)
Ms. Kristine Cazadd (MIC 83)
Ms. Randie L. Henry (MIC 43)
Ms. Lynn Bartolo (MIC 56)
Mr. Gil Haas, Jr. (MIC 42)
Ms. Monica Brisbane (MIC 82)

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<p>Action 1 — Agreed Upon Items Agenda, pages 1 – 35.</p>	<p>Adopt proposed Regulations 45000 through 47030 as agreed upon by staff and interested parties.</p>
<p>Action 2 – Authorization to Publish</p>	<p>Recommend publication of proposed Regulations 45000 through 47030 as adopted in the above actions.</p> <p>Operative Date: None. Implementation: 30 days following OAL approval.</p>

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Action 1 — Agreed Upon Items

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 in 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) “Applicant” means a retailer, wholesaler, distributor, importer or manufacturer who has applied for a license pursuant to the Act, and, if the retailer, wholesaler, distributor, importer or manufacturer is not an individual, the term includes any person controlling such entity.
- (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.

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- (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) “Control” or “controlling” means control or controlling as defined in Business and Professions Code section 22971, subdivision (p).
- (j) “Conviction” means a judgment of guilt of a criminal offense.
- (k) “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.
- (l) “Finding” or “Findings” means a determination that a violation of the Act has occurred. This can occur by default if no appeal is made from a Notice of Violation or Warning Notice, or by a final decision made pursuant to Regulations 47000, 47010, or 47020.
- (m) “Fine” means any fine imposed by the Board pursuant to the Act.
- (n) “Investigations Division staff” means an employee or employees of the State Board of Equalization assigned to the Investigations Division of the Legal

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Department.

(o) “Licensee” means a licensee as defined in Business and Professions Code section 22971, subdivision (j).

(p) “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.

(q) “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.

(r) “Offense” means a criminal conviction of violations of the Act and/or civil findings of violations of the Act.

(s) “Person” means a person as defined in Revenue and Taxation Code section 30010.

(t) “Regulation” means a section of title 18 of the California Code of Regulations.

(u) “Unlicensed Person” means any person not holding a valid license issued by the Board pursuant to the Act.

(v) “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: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22970, 22971, 22974.5, 22978.7, 22979.7; Revenue and Taxation Code section 22971, subdivision (n).

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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 shall be placed in a sealed envelope, with postage paid, addressed to the owner of record at the owner's last known 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 at a United States Post Office, mailbox, sub-post office, substation, 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 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.

(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.

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Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973, subdivision (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, 22979.4, 22979.5, 22979.6, 22979.7, 22980, 22980.1, 22980.2, 22980.3, 22981; Penal Code section 853.6.

Article 2: LICENSES – ISSUANCE, TRANSFER AND DENIAL

Regulation 45020. DENIAL OF LICENSE.

A new license shall not be issued to an applicant 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 applicant has been convicted of a felony pursuant to Revenue and Taxation Code section 30473 or 30480.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 45030. ISSUANCE OF LICENSE - TRANSFER OF BUSINESS.

Notwithstanding the provisions of Regulation 45020 and if all other statutory requirements are met, a new license will be issued for a business with a license subject to a civil or criminal citation, if the applicant acquired the business pursuant to an arm's length transaction after the violations contained in the citation were committed.

Note: Authority: Business and Professions Code section 22971.2.

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

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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: Business and Professions Code section 22971.2.

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

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, but are not limited to, spouses, parents, children and siblings), a partnership and its partners, a limited liability company or association and its members, a corporation and its shareholders, 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 purchaser has the burden of proving that the transaction was an arm's length transaction.

Note: Authority: Business and Professions Code section 22971.2.

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

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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 an 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

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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: Business and Professions Code section 22971.2.

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

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 to a proposed or completed transfer or sale of the business must, at the Board's request, provide all relevant information on the transfer or sale 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: Business and Professions Code section 22971.2.

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

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 45030, then it shall notify the applicant of such determination and deny the application for issuance of a new license for the applicant's business. The applicant may petition for a redetermination within 30 days from the date notice of the denial is mailed or personally delivered to the

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- applicant. The denial of the application shall become final if a petition for redetermination is not filed before 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 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the applicant. Any Board hearing will be governed by the rules set forth in Regulations 5070, 5072 through 5075, 5076, 5077 through 5082, and 5083 through 5087.
- (d) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the applicant, except as provided in Regulation 5082.
- (e) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the applicant's last known 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 at a United States Post Office, mailbox, sub-post office, substation, 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 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.

Note: Authority: Business and Professions Code section 22971.2.

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

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 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 Business and Professions Code section 22980.2, subdivision (c), if the business is found selling cigarettes or tobacco products.

Note: Authority: Business and Professions Code section 22971.2.

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

Article 3: NOTICES OF VIOLATION OR WARNING NOTICES

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

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 or Warning Notice to the cited licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 46010. SERVICE OF A NOTICE OF VIOLATION OR WARNING NOTICE.

The Notice of Violation or Warning Notice shall be placed in a sealed envelope, with postage paid, addressed to the licensee or unlicensed person at his or her last

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known 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 at a United States Post Office, a mailbox, sub-post office, substation, 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 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.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 46020. FINALITY.

The penalty or penalties stated in the Notice of Violation or Warning Notice shall become final as provided in Regulations 47000 and 47010, unless an appeal is filed with the Board within the applicable time periods provided therein.

Note: Authority: Business and Professions Code section 22971.2.

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

Article 4: PENALTIES AND FINES

Regulation 46030. PENALTIES FOR LICENSED OR UNLICENSED RETAILERS.

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:

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(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 (retailer's failure to retain purchase invoices).

(2) Business and Professions Code section 22980.1, subdivision (c), (d) or (e) (purchase from unlicensed person or person with suspended or revoked license).

(3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).

(4) Business and Professions Code section 22980.2, subdivision (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, subdivision (a)(5) (retailer's false statement on application).

(2) Business and Professions Code section 22980, subdivision (b) (any person's 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 both a 30-day suspension or revocation and a fine. The fine shall be determined in accordance with Regulation 46070.

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- (d) A violation of Business and Profession Code section 22974.3 (possession of unstamped cigarettes or untaxed 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) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

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Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22973, subdivision (a)(5), 22974, 22974.3, 22974.4, 22974.7, 22980.1, subdivisions (c), (d), (e), (g), 22980, subdivision (b), 22980.2, subdivision (a), 22980.3, subdivision (a)(2).

Regulation 46040. PENALTIES FOR LICENSED OR UNLICENSED
WHOLESALEERS AND DISTRIBUTORS.

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 (distributor's or wholesaler's failure to retain purchase invoices).

(2) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).

(3) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).

(4) Business and Professions Code section 22980.1, subdivision (b), (c), (d), (e) (sales to or purchases 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).

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(5) Business and Professions Code section 22980.2, subdivision (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, subdivision (a)(5) (distributor's or wholesaler's false statement on application).

(2) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).

(3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).

(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 counterfeit stamped cigarettes by distributors, unstamped cigarettes by wholesalers or untaxed 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

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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 46070.

(e) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

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

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**Regulation 46050. PENALTIES FOR LICENSED OR UNLICENSED
MANUFACTURERS AND IMPORTERS.**

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 (importer's failure to retain purchase invoices on premises).
 - (2) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).
 - (3) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).
 - (4) Business and Professions Code section 22980.1, subdivision (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, subdivision (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, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).

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- (b) A first offense of a violation of Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)) 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.
- (d) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

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

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:

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- (a) How recently the licensee purchased the business or began operations and acquired inventory of cigarettes and/or tobacco.
- (b) The amount of cigarettes without tax stamps and with 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: Business and Professions Code section 22971.2.

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

Regulation 46070. DETERMINATION OF FINE.

- (a) The fine for Business and Professions Code section 22974.5 (retailer's failure to display a license) is \$500.
- (b) The fine for all other violations of the Act shall be determined as follows:
 - (1) Any second or subsequent offense of a violation of any of the following provisions shall result in a fine of \$1,000:
 - (A) Business and Professions Code section 22973, subdivision (a)(5) (retailer's false statement on application).
 - (B) Business and Professions Code section 22977, subdivision (a)(5) (distributor's or wholesaler's false statement on application).

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(C) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).

(2) 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:

(A) Business and Professions Code section 22974 (retailer's failure to retain purchase invoices).

(B) Business and Professions Code section 22974.3, subdivision (b) (retailer's sale or possession of untaxed tobacco products).

(C) Business and Professions Code section 22978.1 (distributor's or wholesaler's failure to retain purchase invoices).

(D) Business and Professions Code section 22978.2, subdivision (b) (distributor's or wholesaler's sale or possession of untaxed tobacco products).

(E) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).

(F) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).

(G) Business and Professions Code section 22979.4 (importer's failure to retain purchase invoices on premises).

(H) Business and Professions Code section 22979.5, subdivision (b)

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(manufacturer's or importer's failure to retain sales records on premises).

(I) Business and Professions Code section 22979.6, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).

(J) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).

(K) Business and Professions Code sections 22980.1, subdivisions (a), (b), (c), (d), (e), (f), and (g) (sales or purchases of cigarettes or tobacco products to or from an unlicensed person or person with suspended or revoked license).

(L) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).

(3) 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:

(A) Business and Professions Code section 22974.3, subdivision (a)(2) (second seizure from retailer within five years of less than 20 packs of untaxed cigarettes).

(B) Business and Professions Code section 22978.2, subdivision (a)(2) (second seizure from a distributor or wholesaler within five years of less than 20 packs of untaxed cigarettes).

(4) A second offense of any of the following provisions shall result in a fine

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of \$5,000 or five times the retail value of any cigarettes or tobacco products seized, whichever is greater, and the \$5,000 fine shall be increased 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:

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

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

(5) 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: Business and Professions Code section 22971.2.

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

Regulation 46080. COLLECTION OF FINES.

The Board shall collect fees, fines and penalties in compliance with Revenue and Taxation Code, division 2, part 30, chapter 4, commencing with section 55121.

Note: Authority: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7; Revenue

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and Taxation Code section 55121 et seq.

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) If the Notice of Violation contains a penalty of revocation and/or a fine of more than \$2,500, the Notice of Violation may be appealed as follows:

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

(B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division; and

(C) If the licensee or unlicensed person disagrees with the Notice of Second Decision issued by the Appeals Division, the licensee or unlicensed person may make a third appeal to the Board for a final decision.

(2) If the Notice of Violation or Warning Notice does not contain a penalty of revocation or a fine of more than \$2,500, the Notice of Violation or Warning Notice may be appealed as follows:

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

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(B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division for a final decision.

(b) If a timely appeal is made, 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 the reduction of penalties.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 47000. APPEAL - EXCISE TAXES AND FEES DIVISION.

(a) Time For Filing. A written Request for Appeal must be filed within 10 days of the date the Warning Notice or Notice of Violation was mailed to or personally delivered to the licensee or unlicensed person.

(b) Failure to File a Timely Appeal. If a written Request for 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

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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. After receiving a timely Request for Appeal the Excise Taxes and Fees Division will schedule a conference and send a Notice of Conference stating the date and time of the scheduled conference to the licensee or unlicensed person. The Notice of Conference shall be sent to the licensee or unlicensed person at least 15 days prior to the date of the scheduled 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 by the Excise Taxes and Fees Division. The conference may be recorded and/or transcribed by the licensee or unlicensed person, but only if the licensee or unlicensed person agrees to provide a copy of the recording or transcript to the Excise Taxes and Fees Division.

(f) The Excise Taxes and Fees Division may grant one request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief of the Excise Taxes and Fees Division or his or her designee approves of a later date.

(g) During a conference, the Excise Taxes and Fees Division may grant a request for additional time to submit additional evidence. If additional time is granted, the evidence shall be submitted to the Excise Taxes and Fees Division no later than 7 days after the conference date.

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(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 the Notice of First Decision was mailed or personally delivered to the licensee or unlicensed person 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 provided in subdivision (i), 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: Business and Professions Code section 22971.2.

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

Regulation 47010. APPEAL - APPEALS DIVISION.

(a) Request for Appeals Conference. The Request for Appeals Conference shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice, Notice of Violation, or Notice of First Decision, and shall be accompanied by any and all documentation and written argument to be considered in the appeal. The Request for Appeals Conference shall be signed by the licensee or unlicensed person or by an authorized representative.

(b) Conference. Upon receipt of a Request for Appeals Conference, a conference will be scheduled and held as set forth in Regulation 5023, unless otherwise provided herein. The conference shall allow a licensee or unlicensed person an opportunity to show cause why the Warning Notice, Notice of Violation, or

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Notice of First Decision, and the penalty or penalties imposed therein, should not be upheld.

(1) The conference will be held by telephone and shall be recorded by the Appeals Division. A licensee or unlicensed person may request a copy or transcript of the recording, at his or her expense.

(2) The Appeals Division may grant a request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief Counsel or his or her designee approves of a later date.

(3) During a conference, the Appeals Division may grant a request for additional time to submit additional evidence. If such additional time is granted, the evidence shall be submitted to the Appeals Division no later than 7 days after the conference date.

(c) Decision. The Appeals Division shall issue a Notice of Second Decision following the conference. The Notice of Second Decision will set forth the Appeals 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 (f) below.

(d) No later than 35 days after the Notice of Second Decision is issued, the Appeals Division may, in its sole discretion, issue a Notice of Second Decision – Reconsideration to correct any mistakes of law and/or facts.

(e) A Notice of Second Decision or Notice of Second Decision – Reconsideration that upholds 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 or Notice of Second Decision – Reconsideration that upholds a penalty

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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 the Notice of Second Decision is mailed or personally delivered to the licensee or unlicensed person. 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 appeal will be mailed to the licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 47020. APPEAL – BOARD HEARING.

(a) Request for Board Hearing. The Request for Board Hearing shall:

(1) State the specific grounds upon which the licensee or unlicensed person is contesting the Notice of Violation or Notice of Second Decision;

(2) State whether an oral hearing is requested;

(3) Be accompanied by any and all documentation and written argument to be considered in support of the licensee's or unlicensed person's contentions; and

(4) Be signed by the licensee or unlicensed person or by an authorized representative.

(b) When applicable, upon receipt of the Request for Board Hearing, a Board

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hearing shall be scheduled and conducted in accordance with the procedures as set forth in Regulations 5070, 5072 through 5075, 5076, 5077 through 5082, and 5083 through 5087, to allow the licensee or unlicensed person an opportunity to show cause why the Notice of Violation or 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: Business and Professions Code section 22971.2.

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

Article 6: SEIZURE AND FORFEITURE

Regulation 47030. Seizures and Forfeitures.

(a) Seizures. The seizure of cigarette and tobacco products is authorized under the Cigarette and Tobacco Products Licensing Act Law and the Cigarette and Tobacco Products Tax Law.

(b) Seizure of Untaxed Products.

(1) The Board or a law enforcement agency shall be authorized to seize cigarettes and tobacco products that cannot be sold legally in California, including, but not limited to the following:

(A) Cigarette packages without any cigarette tax stamp that are possessed, stored, owned or for sale by a retailer, wholesaler, or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.

(B) Cigarette packages with another state's tax stamp or the stamp of

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another taxing jurisdiction that are possessed, stored, owned or for sale by a retailer, wholesaler, or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.

(C) Cigarette packages with a California tax stamp affixed and marked “Not for sale in the United States” or similar wording indicating the manufacturer did not intend the product to be sold in the United States, that are possessed, stored, owned by a retailer, wholesaler, distributor, manufacturer importer, or any other person.

(D) Tobacco products for which the California excise tax is due, but has not been paid that are possessed, stored, owned, or for sale by a retailer, wholesaler or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.

(2) Forfeiture. Cigarettes or tobacco products as described in subsection (b) for which the California excise tax has not been paid that are seized by the Investigations Division or seized and delivered to the Board by a law enforcement agency shall be forfeited to the state.

(3) Petition Procedure. The Board’s seizure of such products as described under subsection (b) shall comply with the procedures set forth in Revenue and Taxation Code, Division 2, Part 13, Chapter 7.5, commencing with section 30435.

(A) An owner or any person owning an interest in the seized property may file a petition with the Board to request recovery of the seized property as permitted by Revenue and Taxation Code section 30438.

(B) The petitioner has the burden of proving in the petition that the

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seized cigarettes and/or tobacco products are legal to possess, store, own or sell and that taxes have been paid to obtain the recovery of the seized product(s).

(c) Seizure of Product From Persons Without a Valid License. The Board or a law enforcement agency shall be authorized to seize cigarettes and tobacco products, whether or not the California excise taxes have been paid when the owner does not have a valid license under the Cigarette and Tobacco Products Licensing Act Law. Seizures shall include, but are not limited to the following:

(1) Unlicensed Persons.

(A) Stamped cigarettes that are possessed, stored, owned or for sale by an unlicensed retailer, distributor, wholesaler, manufacturer, importer, or any other person after notice by the Board or a law enforcement agency.

(B) Tobacco products for which the California excise tax has been paid, that are possessed, stored, owned or for sale by an unlicensed retailer, distributor, wholesaler, or any other person after notice by the Board or a law enforcement agency.

(2) Persons with Suspended or Revoked Licenses.

(A) Stamped or unstamped cigarettes offered for sale at the time of seizure by a retailer, distributor, wholesaler, manufacturer or importer with a suspended or revoked license after notice by the Board of the suspension or revocation.

(B) Tobacco products, regardless of whether the California excise taxes have been paid, that are offered for sale at the time of seizure by a retailer, distributor or wholesaler with a suspended or revoked license

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after notice by the Board of the suspension or revocation.

(3) Forfeiture. Any cigarettes and tobacco products seized by the board or a law enforcement agency as described under subsection (c) shall be deemed forfeited to the state.

(4) Petition Procedure. The petitioner may file a petition to contest the citation(s) resulting in the suspension or revocation of the license issued under the Cigarette and Tobacco Products Licensing Act Law pursuant to Article 5 of these regulations.

(d) Evidence Required For Recovery of Product. Depending on the circumstances, evidence that may be relevant to the issue of whether or not the cigarettes or tobacco products were erroneously or illegally seized, includes, but is not limited to the following:

(1) The cigarette packages had valid California tax stamps affixed and the petitioner held a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.

(2) The cigarette packages had valid California tax stamps affixed and the petitioner was not operating at the time of seizure with a suspended or revoked license after notice by the Board of the suspension or revocation.

(3) The cigarette packages without California tax stamps affixed were in the possession of a cigarette distributor, manufacturer or importer with a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.

(4) Cigarette packages that bear another state's tax stamp or the stamp of another taxing jurisdiction were in the possession of a cigarette distributor, manufacturer or importer with a valid license under the

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Cigarette and Tobacco Products Licensing Act Law at the time of seizure.

(5) Cigarette packages without a California tax stamp affixed and marked “Not for sale in the United States” or similar wording indicating that the manufacturer did not intend the product to be sold in the United States were in the possession of a distributor, manufacturer or importer with a valid license under the Cigarette and Tobacco Products Licensing Act Law and intended for sale outside of California at the time of seizure.

(6) The petitioner held a valid license under the Cigarette and Tobacco Products Licensing Act Law and the tax was paid for the seized tobacco products at the time of seizure.

(7) The petitioner was not operating with a suspended or revoked license after notice by the Board of the suspension or revocation and the tax was paid for the seized tobacco products at the time of seizure.

(8) The untaxed tobacco products were in the possession of a tobacco products distributor with a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.

(e) Counterfeit Products. Counterfeit cigarette and tobacco products are defined as those with false manufacturing labels or false or fraudulent stamps, or both false labels and false stamps.

(1) The Board shall be authorized to seize counterfeit cigarette and tobacco products that are possessed, stored, owned or for sale by a retailer, distributor, wholesaler, manufacturer, importer, or any other person.

(2) The Board is not authorized to return seized counterfeit cigarettes and tobacco products as defined in this part as such products are illegal under California law.

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(f) Additional grounds for seizure. The California Cigarette and Tobacco Products Tax Law at Revenue and Taxation Code section 30436 sets forth additional circumstances under which cigarettes or tobacco products may be seized by the Board and forfeited to the state.

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

Reference: Business and Professions Code sections 22971 subdivisions (l) and (m), 22974.3, subdivisions (a) and (b), 22978.2, subdivision (a) and (b) and 22980.2, subdivision (c); Revenue and Taxation Code sections 30102 through 30106, 30435, 30436, 30438, 30473 and 30474.1.

Issue Paper Number **06 - 006**



BOARD OF EQUALIZATION
KEY AGENCY ISSUE

- Board Meeting
- Business Taxes Committee
- Customer Services and Administrative Efficiency Committee
- Legislative Committee
- Property Tax Committee
- Other

Proposed Regulations for the Cigarette and Tobacco Products Licensing Act of 2003

I. Issue

Should the Board adopt proposed regulations 45000 through 47030 to clarify the application of the Cigarette and Tobacco Products Licensing Act of 2003?

II. Alternative 1 - Staff Recommendation

Staff recommends that the Board adopt and authorize publication of the proposed regulations listed below for the Cigarette and Tobacco Products Licensing Act of 2003. The proposed regulations attached as Exhibit 2, would place into regulation format the current procedures being used by staff to conduct conferences for protested citations and the application of fines and penalties as prescribed by the Board, with certain modifications for which the Board gave concept approval at its June 27, 2006, meeting.

Article 1: Definitions and Citations

Regulation 45000. Definitions.

Regulation 45010. Citations.

Article 2: Licenses – Issuance, Transfer and Denial

Regulation 45020. Denial of License.

Regulation 45030. Issuance of License - Transfer of Business.

Regulation 45040. Determination of Arm's Length Transaction.

Regulation 45050. Transfers or Sales Between Related Parties.

Regulation 45060. Evidence of a Non-Arm's Length Transaction.

Regulation 45070. Request for Information and Records.

Regulation 45080. Appeal – Denial of License.

Regulation 45090. Non-Arm's Length Transfer – Sales.

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Article 3: Notices of Violation or Warning Notices

- Regulation 46000. Issuance and Contents of a Notice of Violation or Warning Notice.
- Regulation 46010. Service of a Notice of Violation or Warning Notice.
- Regulation 46020. Finality.

Article 4: Penalties and Fines

- Regulation 46030. Penalties for Licensed or Unlicensed Retailers.
- Regulation 46040. Penalties for Licensed or Unlicensed Wholesalers and Distributors.
- Regulation 46050. Penalties for Licensed or Unlicensed Manufacturers and Importers.
- Regulation 46060. Mitigating Circumstances.
- Regulation 46070. Determination of Fine.
- Regulation 46080. Collection of Fines.

Article 5: Appeal Procedures

- Regulation 46090. Right to Appeal.
- Regulation 47000. Appeal – Excise Taxes and Fees Division.
- Regulation 47010. Appeal – Appeals Division.
- Regulation 47020. Appeal – Board Hearing.

Article 6: Seizure and Forfeiture

- Regulation 47030. Seizures and Forfeitures.

III. Other Alternative Considered

Alternative 2 – Do not adopt proposed regulations 45000 through 47030.

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IV. Background

To address the problem of untaxed distributions and illegal sales of cigarettes and tobacco products in California, Assembly Bill 71 [Sec. 21. of stats 2003, Ch. 890 (AB 71)] enacted the 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 may result in either a criminal or civil citation. The Act authorizes the Board to impose civil penalties (suspensions or revocations of a license and/or fines) for violations of the Act. 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.

Prior to issuing citations to licensees or unlicensed persons, at the November 4, 2004, Board meeting a proposal titled "Civil Penalties and Appeals Procedures for Violations of AB 71" was brought before the Board by staff to: (1) adopt a fine schedule and appeal process, and (2) delegate the authority to staff to hear appeals of fines and penalties through the suspension process. Staff also made a "Request for Delegation of Authority" to hold and decide license suspension hearings. The Board unanimously approved the "Civil Penalties and Appeals Procedures for Violations of AB 71" (with modifications) and the "Request for Delegation of Authority." The modifications included lowering the threshold for fines appealable to the Board to amounts above \$2,500 and to allow suspensions to be appealable to the Legal Department's Appeals Division.

Under the guidelines approved by the Board, an automatic 30-day suspension was to be imposed for a violation of Business and Professions Code (BPC) section 22974.3, for possession of unstamped cigarette packages. Based on several months of appeals, staff found mitigating circumstances that could warrant a lesser period of suspension in many instances. Accordingly at the October 25, 2005, Board meeting, through a document titled "Proposed Clarification of Penalties and Request to Draft Regulations" staff requested: (1) delegation from the Board to allow the staff discretion to be flexible in imposing 0-to-30-day suspensions for violations of BPC section 22974.3, involving sale or possession of unstamped cigarette packages; and (2) authorization for staff to draft proposed regulations setting forth the appeals procedures to be followed and penalties to be imposed in implementing the Act. The Board unanimously adopted staff's recommendation.

At the June 27, 2006, Board meeting, staff provided a first draft of proposed regulations for concept approval, with the understanding that further refinement, after input from interested parties, would be necessary before formal rulemaking commenced. The Board granted concept approval, and the matter was referred to the Business Taxes Committee to start the interested parties process.

Based on the direction of the Board, staff has followed the guidelines approved by the Board in determining penalties and the appeals process.

Interested Parties Meeting – September 20, 2006

A meeting with interested parties was held on September 20, 2006, to discuss the proposed regulations for the Cigarette and Tobacco Products Licensing Act of 2003. Two written submissions were received,

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as described below. A comment was made with respect to proposed regulation 45060, subdivision (c), Evidence of A Non-Arm's Length Transaction. Specifically, a concern was raised regarding what the term "significant" meant with respect to a former owner's equity interest in the inventory of products for sale, fixtures or equipment. Since the amount of equity interest may have a different impact in each case, staff recommends deleting the term "significant."

Staff commented at the meeting that certain references would be changed to make the definition regulation, 45000, more "user friendly." It was made clear that the definitions would not be changed, just the references. These nonsubstantive changes have been made.

On September 19, an email was received from Mr. Charles Janigian, of JMG International, suggesting that the proposed regulations address the issue of new licenses when a business changes addresses within a building versus from one building to another. After review, staff believes the concern is outside the scope of the proposed regulations.

Just prior to the interested parties meeting, staff received a facsimile from Mr. Charles Hennegan on behalf of the California Association of Retail Tobacconists. Mr. Hennegan references the issue of using mailing services for a business address. Staff believes the comments are also outside the scope of the proposed regulations.

By facsimile on September 26, 2006, staff received a letter from Juliatt L. Gilliam, Special Operations Tax Group Supervisor for McLane Company, Inc. (McLane). The letter provides two comments. The first comment concerns references to using the U.S. Mail to serve notice in Regulations 45010, 45080 and 46010. Specifically, McLane "requests that a more rigorous standard be adopted since the U.S. Mail may be unreliable to the point of the licensee never receiving notice of the charges," and suggests that "[u]se of delivery with traceable shipping method, for example, USPS mail sent Certified with return receipt, Federal Express or UPS with signatures, would allow confirmation of receipt." Staff has considered the comment and is of the opinion that the additional costs associated with traceable shipping methods would not be warranted because the vast majority of citations are personally served. In the few instances where notice by U.S. Mail is necessary due to the inability to personally serve a citation, notice served by U.S. Mail is consistent with the Board's practices for serving Notices of Determination under the various tax and fee programs administered by the Board. Additionally, staff's experience with the types of traceable shipping methods advocated by McLane has been that many recipients simply refuse delivery to prevent service from being completed.

Second, McLane "requests a provision clarifying that any proposed penalties; suspension, revocation, fine, etc., be stayed from enforcement until all appeals have been exhausted." Staff has considered this comment and is of the opinion that no revision is necessary because the proposed regulations are sufficiently clear that no penalty can be enforced until a final decision has been reached that a violation has occurred (i.e., a "finding" had been made).

After considering comments and information discussed at the meeting of interested parties, staff recommends the Board adopt the proposed regulations with the changes discussed above.

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V. Alternative 1 - Staff Recommendation

A. Description of the Staff Recommendation

Staff recommends the following regulation's be approved for publication. See Exhibit 2.

1. Regulation 45000. Definitions.

This regulation provides additional definitions for terms not defined under Business and Professions Code section 22971 (Definitions).

2. Regulation 45010. Citations.

This regulation discusses the contents and service of a civil citation or a criminal citation.

3. Regulation 45020. Denial of License.

This regulation discusses when a new license should not be issued to an applicant when the current license is suspended or a citation has been issued.

4. Regulation 45030. Issuance of License Transfer of Business.

This regulation discusses what conditions may allow a license to be issued for a business subject to a criminal or civil citation.

5. Regulation 45040. Determination of Arm's Length Transaction.

This regulation specifies certain criteria the Excise Taxes and Fees Division may use to determine whether a transfer of a business was pursuant to an arm's length transaction.

6. Regulation 45050. Transfer or Sales Between Related Parties.

This regulation provides that there is a presumption that a transfer or sale between related parties is not at arm's length.

7. Regulation 45060. Evidence of a Non-Arm's Length Transaction.

This regulation provides examples of items that may indicate a sale or transfer was not an arm's length transfer.

8. Regulation 45070. Request for Information and Records.

This regulation describes examples of items that may be provided to the Excise Taxes and Fees Division to establish that a transfer or sale of a business with a suspended or revoked license, or subject to a civil or criminal citation, is at arm's length.

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9. Regulation 45080. Appeal – Denial of License.

This regulation describes the appeals rights of an applicant if a request for a new license is denied.

When appropriate, reference(s) to the Rules of Practice will be changed to conform to any new Rules of Practice the Board may adopt.

10. Regulation 45090. Non-Arm's Length Transfer – Sales.

This regulation describes that a determination by the Excise Taxes and Fees Division that a transfer or sale of a business was not at arm's length may establish grounds for additional violations of the Act, resulting in the possibility of a citation being issued under Business and Professions Code section 22980.2, subdivision (c).

11. Regulation 46000. Issuance and Contents of a Notice of Violation or Warning Notice.

This regulation discusses that upon receipt of a copy of a citation, the Excise Taxes and Fees Division will prepare and mail a Notice of Violation or Warning Notice to the appropriate person.

12. Regulation 46010. Service of a Notice of Violation or Warning Notice.

This regulation describes that mailing the Notice of Violation or Warning Notice to the cited person's last known address as it appears in the records of the Board will complete delivery of said notice. In lieu of mailing, the Notice of Violation or Warning Notice may be served by personal delivery to the person to be served and shall be deemed complete at the time of such delivery.

13. Regulation 46020. Finality.

This regulation states that unless the Warning Notice or Notice of Violation is timely appealed, such notice and the penalties listed therein shall become final.

14. Regulation 46030. Penalties for Licensed or Unlicensed Retailers.

This regulation describes the penalties applicable to licensed or unlicensed retailers for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in both a 30-day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30-day suspension if mitigating circumstances are present.

15. Regulation 46040. Penalties for Licensed and Unlicensed Wholesalers and Distributors.

This regulation describes the penalties applicable to licensed or unlicensed wholesalers and distributors for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and

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the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in both a 30-day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30-day suspension if mitigating circumstances are present.

16. Regulation 46050. Penalties for Licensed and Unlicensed Manufacturers and Importers.

This regulation describes the penalties applicable to licensed or unlicensed manufacturers and importers for violations of specific sections of the Act. The regulation describes when a Warning Notice for a first offense shall be issued, which first offenses shall result in a license suspension and the length of time of such suspension, and that a second or subsequent offense for any violation of the specific sections listed shall result in both a 30-day suspension or revocation and a fine. The regulation also allows for a reduction in the length of suspension or reduction of a revocation to a 30-day suspension if mitigating circumstances are present.

17. Regulation 46060. Mitigating Circumstances.

This regulation provides some examples of instances that may be considered for purposes of determining whether mitigating circumstances exist.

18. Regulation 46070. Determination of Fine.

This regulation discusses the fines imposed upon licensed or unlicensed retailers, wholesalers and distributors, and manufacturers and importers. The regulation explains the mandatory fine imposed on retailers under BPC section 22974.5. The regulation further provides which violations will result in a fine of \$1,000 for the second and any subsequent violations, and which violations will result in a fine of \$1,000 for a second offense, with each subsequent violation resulting in an increase in the fine by \$1,000, up to a maximum fine of \$5,000. With respect to seizures of cigarettes, the regulation imposes fines as follows: (1) for a seizure of less than 20 packages of unstamped cigarettes, the fine for a second offense will be \$2,000 and for each subsequent offense the fine shall increase \$1,000 up to a maximum of \$5,000 per offense; and (2) for a seizure of more than 20 packages of unstamped cigarettes, the fine for a second offense will result in a fine of \$5,000 or five times the retail value of cigarettes or tobacco products seized, whichever is greater, and the \$5,000 fine shall be increased to \$10,000 for a third offense, \$15,000 for a fourth offense, \$20,000 for a fifth offense, and \$50,000 for a sixth and subsequent offenses. In addition, any fines imposed under this regulation will be reduced by the amount of any fine imposed as a result of a misdemeanor citation issued for the same violation.

19. Regulation 46080. Collection of Fines.

This regulation specifies the Board shall collect fees, fines, and penalties in compliance with Revenue and Taxation Code, division 2, part 30, chapter 4, commencing with section 55121.

20. Regulation 46090. Right to Appeal.

This regulation describes that every licensed or unlicensed person has the right to appeal any violation of the Act, and may appeal a Warning Notice or Notice of Violation. The regulation

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explains that if the Notice of Violation contains a penalty for revocation and/or a fine of more than \$2,500, and timely appeals are made, then the matter may be heard by the Board Members. For Warning Notices or Notices of Violation containing a suspension and/or fine of \$2,500 or less, the decision of the Appeals Division is the final step in the appeals process.

21. Regulation 47000. Appeal – Excise Taxes and Fees Division.

This regulation discusses how to request an appeal with the Excise Taxes and Fees Division, the Excise Taxes and Fees Division’s conference procedures, and in the event the licensee or unlicensed person disagrees with the Notice of First Decision, how he or she may appeal the decision. In the event a timely appeal is not filed, then the licensee or unlicensed person shall be deemed to have waived his or her right to further appeal, and the Notice of First Decision and the penalty or penalties stated therein shall become final.

22. Regulation 47010. Appeal – Appeals Division.

This regulation discusses how to request an Appeals conference, the Appeals Division’s conference procedures, and appeal procedures in the event the licensee or unlicensed person disagrees with the Notice of Second Decision and the Notice of Second Decision upholds penalty of revocation and/or a fine of more than \$2,500. In the event a timely appeal is not filed, then the licensee or unlicensed person shall be deemed to have waived his or her right to a Board Hearing and the Notice of Second Decision and the penalty or penalties stated therein shall become final. If the Notice of Second Decision does not uphold a revocation and/or fine of more than \$2,500, the Notice of Second Decision and the penalty or penalties stated therein will be final.

When appropriate, reference(s) to the Rules of Practice will be changed to conform to any new Rules of Practice the Board may adopt.

23. Regulation 47020. Appeal – Board Hearing.

This regulation discusses how a request for a Board Hearing should be filed and the procedure for a Board Hearing.

When appropriate, reference(s) to the Rules of Practice will be changed to conform to any new Rules of Practice the Board may adopt.

24. Regulation 47030. Seizures and Forfeitures.

This regulation describes situations where cigarettes or tobacco products may be seized under certain statutes and that such seized products are forfeited to the state unless a timely petition for release of seized property is filed. The regulation further describes what evidence can be provided that may result in the return of the seized property.

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B. Pros of the Staff Recommendation

- Puts into regulatory form the interpretation the Board has used since it began implementing the Act, with certain modifications for which the Board gave concept approval at its June 27, 2006, meeting.
- Clarifies and describes the Board's penalties and appeals processes.
- Defines the criteria to determine if a sale is at arm's length for purposes of issuing a new license when the current license is suspended or a citation has been issued.
- Describes when product may be seized and what evidence can be provided that may result in the return of seized property.

C. Cons of the Staff Recommendation

Requires regulatory change.

D. Statutory or Regulatory Change

No statutory change is required. However, approval of staff's recommendation will require adoption of proposed regulations 45000 through 47030.

E. Administrative Impact

Staff will be required to notify taxpayers of the proposed regulations through articles in the Tax Information Bulletin and the Excise Taxes Newsletter.

F. Fiscal Impact

1. Cost Impact

Staff will notify taxpayers of the proposed regulations through newsletter articles. The workload associated with the publishing and distribution of the newsletters is routine and will be accommodated within existing resources.

2. Revenue Impact

None. See Revenue Estimate, Exhibit 1.

G. Taxpayer/Customer Impact

The proposed regulations will provide cigarette and tobacco products retailers, wholesalers, distributors, manufacturers, and importers with additional clarification as to the administration of the Act. In addition, the proposed regulations will describe the penalties that may be applied for violation of any provision of the Act, the appeals procedures to contest citations issued, products subject to seizure under the Act, and the evidence that can be provided which may result in return of seized product.

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H. Critical Time Frames

There is no operative date since the proposed regulations describe current policies and procedures with modifications that the Board gave concept approval to at its June 27, 2006, meeting.

VI. Alternative 2

A. Description of the Alternative

Do not adopt staff's proposed Regulations 45000 through 47030 for the Act.

B. Pros of the Alternative

Does not require regulatory change.

C. Cons of the Alternative

There will be no regulatory language to implement or interpret the provisions of the Act.

D. Statutory or Regulatory Change

None.

E. Administrative Impact

None.

F. Fiscal Impact

1. Cost Impact

None.

2. Revenue Impact

None. See Revenue Estimate, Exhibit 1.

G. Taxpayer/Customer Impact

There will be no regulatory language to implement or interpret the Act. Most significantly, licensees will not have available a description of the penalties that may be applied for violation of any provision of the Act, the appeals procedures to contest citations issued, products subject to seizure under the Act, and the evidence that can be provided which may result in return of seized product.

H. Critical Time Frames

None.

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Prepared by: Investigations Division, Legal Department

Current as of: September 28, 2006



Proposed Regulations for the Cigarette and Tobacco Products Licensing Act of 2003

Alternative 1 - Staff Recommendation

Staff recommends that the Board adopt and authorize publication of the proposed regulations listed below for the Cigarette and Tobacco Products Licensing Act of 2003. The proposed regulations would place into regulation format the current procedures being used by staff to conduct conferences for protested citations and the application of fines and penalties as prescribed by the Board, with certain modifications for which the Board gave concept approval at its June 27, 2006, meeting.

Article 1: Definitions and Citations

Regulation 45000. Definitions.

Regulation 45010. Citations.

Article 2: Licenses – Issuance, Transfer and Denial

Regulation 45020. Denial of License.

Regulation 45030. Issuance of License - Transfer of Business.

Regulation 45040. Determination of Arm's Length Transaction.

Regulation 45050. Transfers or Sales Between Related Parties.

Regulation 45060. Evidence of a Non-Arm's Length Transaction.

Regulation 45070. Request for Information and Records.

Regulation 45080. Appeal – Denial of License.

Regulation 45090. Non-Arm's Length Transfer – Sales.

Article 3: Notices of Violation or Warning Notices

Regulation 46000. Issuance and Contents of a Notice of Violation or Warning Notice.

Regulation 46010. Service of a Notice of Violation or Warning Notice.

Regulation 46020. Finality.

Revenue Estimate

Article 4: Penalties and Fines

- Regulation 46030. Penalties for Licensed or Unlicensed Retailers.
- Regulation 46040. Penalties for Licensed or Unlicensed Wholesalers and Distributors.
- Regulation 46050. Penalties for Licensed or Unlicensed Manufacturers and Importers.
- Regulation 46060. Mitigating Circumstances.
- Regulation 46070. Determination of Fine.
- Regulation 46080. Collection of Fines.

Article 5: Appeal Procedures

- Regulation 46090. Right to Appeal.
- Regulation 47000. Appeal – Excise Taxes and Fees Division.
- Regulation 47010. Appeal – Appeals Division.
- Regulation 47020. Appeal – Board Hearing.

Article 6: Seizure and Forfeiture

- Regulation 47030. Seizures and Forfeitures.

Other Alternative Considered

Alternative 2 – Do not adopt proposed regulations 45000 through 47030.

Background, Methodology, and Assumptions

Alternative 1 - Staff Recommendation

To address the problem of untaxed distributions and illegal sales of cigarettes and tobacco products in California, Assembly Bill 71 [Sec. 21. of stats 2003, Ch. 890 (AB 71)] enacted the 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.

Staff recommendation would place into regulation format the current procedures being used by staff to comply with the provisions of AB 71 pursuant to certain modifications for which the Board gave concept approval at its June 27, 2006, meeting. The staff recommendation will in no way impact the current revenue collections for the Cigarette and Tobacco Products Compliance Fund, created by AB 71.

Alternative 2

Alternative 2 does not have a revenue impact. Staff would continue to operate pursuant to provisions of AB 71.

Revenue Summary

Revenue Estimate

Alternative 1 - Staff Recommendation – This alternative does not have a revenue impact.

Alternative 2 – This alternative does not have a revenue impact.

Preparation

Mr. Bill Benson, Jr., Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. Ms. Aileen Lee, Acting Manager, Research and Statistics Section, Legislative and Research Division, and Ms. Lynn Bartolo, Chief, Excise Tax Division, also reviewed this revenue estimate. For additional information, please contact Mr. Benson at (916) 445 0840.

Current as of September 29, 2006

**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 in 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) “Applicant” means a retailer, wholesaler, distributor, importer or manufacturer who has applied for a license pursuant to the Act, and, if the retailer, wholesaler, distributor, importer or manufacturer is not an individual, the term includes any person controlling such entity.
- (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) “Control” or “controlling” means control or controlling as defined in Business and Professions Code section 22971, subdivision (p).
- (j) “Conviction” means a judgment of guilt of a criminal offense.
- (k) “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.
- (l) “Finding” or “Findings” means a determination that a violation of the Act has occurred. This can occur by default if no appeal is made from a Notice of Violation or Warning Notice, or by a final decision made pursuant to Regulations 47000, 47010, or 47020.
- (m) “Fine” means any fine imposed by the Board pursuant to the Act.
- (n) “Investigations Division staff” means an employee or employees of the State Board of Equalization assigned to the Investigations Division of the Legal Department.
- (o) “Licensee” means a licensee as defined in Business and Professions Code section 22971, subdivision (j).
- (p) “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.
- (q) “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.
- (r) “Offense” means a criminal conviction of violations of the Act and/or civil findings of violations of the Act.
- (s) “Person” means a person as defined in Revenue and Taxation Code section 30010.
- (t) “Regulation” means a section of title 18 of the California Code of Regulations.
- (u) “Unlicensed Person” means any person not holding a valid license issued by the Board pursuant to the Act.

- (v) “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: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22970, 22971, 22974.5, 22978.7, 22979.7; Revenue and Taxation Code section 22971, subdivision (n).

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 shall be placed in a sealed envelope, with postage paid, addressed to the owner of record at the owner’s last known 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 at a United States Post Office, mailbox, sub-post office, substation, 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 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.

(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: Business and Professions Code section 22971.2.

Reference: Business and Professions Code sections 22973, subdivision (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, 22979.4, 22979.5, 22979.6, 22979.7, 22980, 22980.1, 22980.2, 22980.3, 22981; Penal Code section 853.6.

Article 2: LICENSES – ISSUANCE, TRANSFER AND DENIAL**Regulation 45020. DENIAL OF LICENSE.**

A new license shall not be issued to an applicant 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 applicant has been convicted of a felony pursuant to Revenue and Taxation Code section 30473 or 30480.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 45030. ISSUANCE OF LICENSE - TRANSFER OF BUSINESS.

Notwithstanding the provisions of Regulation 45020 and if all other statutory requirements are met, a new license will be issued for a business with a license subject to a civil or criminal citation, if the applicant acquired the business pursuant to an arm's length transaction after the violations contained in the citation were committed.

Note: Authority: Business and Professions Code section 22971.2.

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

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: Business and Professions Code section 22971.2.

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

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, but are not limited to, spouses, parents, children and siblings), a partnership and its partners, a limited liability company or association and its members, a corporation and its shareholders, 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 purchaser has the burden of proving that the transaction was an arm's length transaction.

Note: Authority: Business and Professions Code section 22971.2.

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

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 an 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: Business and Professions Code section 22971.2.

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

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 to a proposed or completed transfer or sale of the business must, at the Board's request, provide all relevant information on the transfer or sale 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: Business and Professions Code section 22971.2.

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

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 45030, then it shall notify the applicant of such determination and deny the application for issuance of a new license for the applicant's business. The applicant may petition for a redetermination within 30 days from the date notice of the denial is mailed or personally delivered to the applicant. The denial of the application shall become final if a petition for redetermination is not filed before 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 and shall grant the applicant an oral hearing if timely requested within 30 days of the date the Decision and Recommendation issued by the Appeals Division is mailed to the applicant. Any Board hearing will be governed by the rules set forth in Regulations 5070, 5072 through 5075, 5076, 5077 through 5082, and 5083 through 5087.

(d) The order or decision of the Board upon a petition for redetermination becomes final 30 days after the date notice thereof is mailed to the applicant, except as provided in Regulation 5082.

(e) Any notice required by this section shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the applicant's last known 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 at a United States Post Office, mailbox, sub-post office, substation, 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 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.

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22973.1, 22977.2, 22979.

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 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 Business and Professions Code section 22980.2, subdivision (c), if the business is found selling cigarettes or tobacco products.

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22973.1, 22977.2, 22979, 22980.2.

Article 3: NOTICES OF VIOLATION OR WARNING NOTICES

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

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 or Warning Notice to the cited licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 46010. SERVICE OF A NOTICE OF VIOLATION OR WARNING NOTICE.

The Notice of Violation or Warning Notice shall be placed in a sealed envelope, with postage paid, addressed to the licensee or unlicensed person at his or her last known 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 at a United States Post Office, a mailbox, sub-post office, substation, 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 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.

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22974.7, 22978.7, 22979.7.

Regulation 46020. FINALITY.

The penalty or penalties stated in the Notice of Violation or Warning Notice shall become final as provided in Regulations 47000 and 47010, unless an appeal is filed with the Board within the applicable time periods provided therein.

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22974.7, 22974.8, 22979.7.

Article 4: PENALTIES AND FINES

Regulation 46030. PENALTIES FOR LICENSED OR UNLICENSED RETAILERS.

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 (retailer's failure to retain purchase invoices).

(2) Business and Professions Code section 22980.1, subdivision (c), (d) or (e) (purchase from unlicensed person or person with suspended or revoked license).

- (3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).
- (4) Business and Professions Code section 22980.2, subdivision (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, subdivision (a)(5) (retailer's false statement on application).
- (2) Business and Professions Code section 22980, subdivision (b) (any person's 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 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 untaxed 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) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.
Reference: Business and Professions Code sections 22973, subdivision (a)(5), 22974, 22974.3, 22974.4, 22974.7, 22980.1, subdivisions (c), (d), (e), (g), 22980, subdivision (b), 22980.2, subdivision (a), 22980.3, subdivision (a)(2).

Regulation 46040. PENALTIES FOR LICENSED OR UNLICENSED WHOLESALEERS AND DISTRIBUTORS.

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 (distributor's or wholesaler's failure to retain purchase invoices).
- (2) Business and Professions Code section 22978.4, subdivision (c) (distributor's or wholesaler's failure to comply with invoice requirements).
- (3) Business and Professions Code section 22978.5, subdivision (b) (distributor's or wholesaler's failure to retain sales records).
- (4) Business and Professions Code section 22980.1, subdivision (b), (c), (d), (e) (sales to or purchases 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).
- (5) Business and Professions Code section 22980.2, subdivision (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, subdivision (a)(5) (distributor's or wholesaler's false statement on application).
- (2) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).
- (3) Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)).
- (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 counterfeit stamped cigarettes by distributors, unstamped cigarettes by wholesalers or untaxed 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 46070.
- (e) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 46050. PENALTIES FOR LICENSED OR UNLICENSED MANUFACTURERS AND IMPORTERS.

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 (importer's failure to retain purchase invoices on premises).

(2) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer's false statement on certification to the Board).

(3) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).

(4) Business and Professions Code section 22980.1, subdivision (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, subdivision (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, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).

(b) A first offense of a violation of Business and Professions Code section 22980.1, subdivision (g) (purchase of cigarettes to which a stamp may not be affixed in accordance with Rev. & Tax. Code, § 30163, subd. (b)) 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.
- (d) In cases involving multiple violations, the violation punishable by 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. If a suspension period is reduced, the redetermined period of suspension shall be 0 days, 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, subdivision (a)(2).

Note: Authority: Business and Professions Code section 22971.2.

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

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 or began operations and acquired inventory of cigarettes and/or tobacco.
- (b) The amount of cigarettes without tax stamps and with 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: Business and Professions Code section 22971.2.

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

Regulation 46070. DETERMINATION OF FINE.

- (a) The fine for Business and Professions Code section 22974.5 (retailer's failure to display a license) is \$500.

(b) The fine for all other violations of the Act shall be determined as follows:

(1) Any second or subsequent offense of a violation of any of the following provisions shall result in a fine of \$1,000:

(A) Business and Professions Code section 22973, subdivision (a)(5) (retailer’s false statement on application).

(B) Business and Professions Code section 22977, subdivision (a)(5) (distributor’s or wholesaler’s false statement on application).

(C) Business and Professions Code section 22979, subdivision (b)(1) (participating manufacturer’s false statement on certification to the Board).

(2) 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:

(A) Business and Professions Code section 22974 (retailer’s failure to retain purchase invoices).

(B) Business and Professions Code section 22974.3, subdivision (b) (retailer’s sale or possession of untaxed tobacco products).

(C) Business and Professions Code section 22978.1 (distributor’s or wholesaler’s failure to retain purchase invoices).

(D) Business and Professions Code section 22978.2, subdivision (b) (distributor’s or wholesaler’s sale or possession of untaxed tobacco products).

(E) Business and Professions Code section 22978.4, subdivision (c) (distributor’s or wholesaler’s failure to comply with invoice requirements).

(F) Business and Professions Code section 22978.5, subdivision (b) (distributor’s or wholesaler’s failure to retain sales records).

(G) Business and Professions Code section 22979.4 (importer’s failure to retain purchase invoices on premises).

- (H) Business and Professions Code section 22979.5, subdivision (b) (manufacturer's or importer's failure to retain sales records on premises).
- (I) Business and Professions Code section 22979.6, subdivision (c) (manufacturer's or importer's failure to comply with invoice requirements).
- (J) Business and Professions Code section 22980, subdivision (b) (any person's refusal to allow inspection).
- (K) Business and Professions Code sections 22980.1, subdivisions (a), (b), (c), (d), (e), (f), and (g) (sales or purchases of cigarettes or tobacco products to or from an unlicensed person or person with suspended or revoked license).
- (L) Business and Professions Code section 22980.2, subdivision (a) (sales of cigarettes or tobacco products by unlicensed person or person with suspended or revoked license).
- (3) 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:
- (A) Business and Professions Code section 22974.3, subdivision (a)(2) (second seizure from retailer within five years of less than 20 packs of untaxed cigarettes).
- (B) Business and Professions Code section 22978.2, subdivision (a)(2) (second seizure from a distributor or wholesaler within five years of less than 20 packs of untaxed cigarettes).
- (4) 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, and the \$5,000 fine shall be increased 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:
- (A) Business and Professions Code section 22974.3, subdivision (a)(4) (second seizure within five years from retailer or any other person of 20 or more packs of untaxed cigarettes).
- (B) Business and Professions Code section 22978.2, subdivision (a)(4) (second seizure within five years from a distributor or wholesaler of 20 or more packs of untaxed cigarettes).

(5) 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: Business and Professions Code section 22971.2.

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

Regulation 46080. COLLECTION OF FINES.

The Board shall collect fees, fines and penalties in compliance with Revenue and Taxation Code, division 2, part 30, chapter 4, commencing with section 55121.

Note: Authority: Business and Professions Code section 22971.2.

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

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) If the Notice of Violation contains a penalty of revocation and/or a fine of more than \$2,500, the Notice of Violation may be appealed as follows:

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

(B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division; and

(C) If the licensee or unlicensed person disagrees with the Notice of Second Decision issued by the Appeals Division, the licensee or unlicensed person may make a third appeal to the Board for a final decision.

(2) If the Notice of Violation or Warning Notice does not contain a penalty of revocation or a fine of more than \$2,500, the Notice of Violation or Warning Notice may be appealed as follows:

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

(B) If the licensee or unlicensed person disagrees with the Notice of First Decision issued by the Excise Taxes and Fees Division, the licensee or unlicensed person may make a second appeal to the Appeals Division for a final decision.

(b) If a timely appeal is made, 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 the reduction of penalties.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 47000. APPEAL - EXCISE TAXES AND FEES DIVISION.

(a) Time For Filing. A written Request for Appeal must be filed within 10 days of the date the Warning Notice or Notice of Violation was mailed to or personally delivered to the licensee or unlicensed person.

(b) Failure to File a Timely Appeal. If a written Request for 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. After receiving a timely Request for Appeal the Excise Taxes and Fees Division will schedule a conference and send a Notice of Conference stating the date and time of the scheduled conference to the

licensee or unlicensed person. The Notice of Conference shall be sent to the licensee or unlicensed person at least 15 days prior to the date of the scheduled 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 by the Excise Taxes and Fees Division. The conference may be recorded and/or transcribed by the licensee or unlicensed person, but only if the licensee or unlicensed person agrees to provide a copy of the recording or transcript to the Excise Taxes and Fees Division.
- (f) The Excise Taxes and Fees Division may grant one request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief of the Excise Taxes and Fees Division or his or her designee approves of a later date.
- (g) During a conference, the Excise Taxes and Fees Division may grant a request for additional time to submit additional evidence. If additional time is granted, the evidence shall be submitted to the Excise Taxes and Fees Division 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 the Notice of First Decision was mailed or personally delivered to the licensee or unlicensed person 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 provided in subdivision (i), 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: Business and Professions Code section 22971.2.

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

Regulation 47010. APPEAL - APPEALS DIVISION.

- (a) Request for Appeals Conference. The Request for Appeals Conference shall state the specific grounds upon which the licensee or unlicensed person is contesting the Warning Notice, Notice of Violation, or Notice of First Decision, and shall be accompanied by any and all documentation and written argument to be considered in the appeal. The Request for Appeals Conference shall be signed by the licensee or unlicensed person or by an authorized representative.
- (b) Conference. Upon receipt of a Request for Appeals Conference, a conference will be scheduled and held as set forth in Regulation 5023, unless otherwise provided herein. The conference shall allow a licensee or unlicensed person an opportunity to show cause why the Warning Notice, Notice of Violation, or Notice of First Decision, and the penalty or penalties imposed therein, should not be upheld.
- (1) The conference will be held by telephone and shall be recorded by the Appeals Division. A licensee or unlicensed person may request a copy or transcript of the recording, at his or her expense.
 - (2) The Appeals Division may grant a request to reschedule or postpone a conference. If a request is granted, the conference shall be rescheduled or postponed so that it can be held within 15 days of the date the conference was scheduled to be held prior to the granting of the request, unless the Chief Counsel or his or her designee approves of a later date.
 - (3) During a conference, the Appeals Division may grant a request for additional time to submit additional evidence. If such additional time is granted, the evidence shall be submitted to the Appeals Division no later than 7 days after the conference date.
- (c) Decision. The Appeals Division shall issue a Notice of Second Decision following the conference. The Notice of Second Decision will set forth the Appeals 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 (f) below.
- (d) No later than 35 days after the Notice of Second Decision is issued, the Appeals Division may, in its sole discretion, issue a Notice of Second Decision – Reconsideration to correct any mistakes of law and/or facts.
- (e) A Notice of Second Decision or Notice of Second Decision – Reconsideration that upholds 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 or Notice of Second Decision – Reconsideration that upholds 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 the Notice of Second Decision is mailed or personally delivered to the licensee or unlicensed person. 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 appeal will be mailed to the licensee or unlicensed person.

Note: Authority: Business and Professions Code section 22971.2.

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

Regulation 47020. APPEAL – BOARD HEARING.

(a) Request for Board Hearing. The Request for Board Hearing shall:

(1) State the specific grounds upon which the licensee or unlicensed person is contesting the Notice of Violation or Notice of Second Decision;

(2) State whether an oral hearing is requested;

(3) Be accompanied by any and all documentation and written argument to be considered in support of the licensee’s or unlicensed person’s contentions; and

(4) Be signed by the licensee or unlicensed person or by an authorized representative.

(b) 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, 5072 through 5075, 5076, 5077 through 5082, and 5083 through 5087, to allow the licensee or unlicensed person an opportunity to show cause why the Notice of Violation or 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: Business and Professions Code section 22971.2.

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

Article 6: SEIZURE AND FORFEITURE**Regulation 47030. Seizures and Forfeitures.**

- (a) Seizures. The seizure of cigarette and tobacco products is authorized under the Cigarette and Tobacco Products Licensing Act Law and the Cigarette and Tobacco Products Tax Law.
- (b) Seizure of Untaxed Products.
- (1) The Board or a law enforcement agency shall be authorized to seize cigarettes and tobacco products that cannot be sold legally in California, including, but not limited to the following:
- (A) Cigarette packages without any cigarette tax stamp that are possessed, stored, owned or for sale by a retailer, wholesaler, or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.
- (B) Cigarette packages with another state's tax stamp or the stamp of another taxing jurisdiction that are possessed, stored, owned or for sale by a retailer, wholesaler, or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.
- (C) Cigarette packages with a California tax stamp affixed and marked "Not for sale in the United States" or similar wording indicating the manufacturer did not intend the product to be sold in the United States, that are possessed, stored, owned by a retailer, wholesaler, distributor, manufacturer importer, or any other person.
- (D) Tobacco products for which the California excise tax is due, but has not been paid that are possessed, stored, owned, or for sale by a retailer, wholesaler or any other person except when an exemption from tax is provided under Revenue and Taxation Code section 30102 through section 30106.
- (2) Forfeiture. Cigarettes or tobacco products as described in subsection (b) for which the California excise tax has not been paid that are seized by the Investigations Division or seized and delivered to the Board by a law enforcement agency shall be forfeited to the state.

- (3) Petition Procedure. The Board’s seizure of such products as described under subsection (b) shall comply with the procedures set forth in Revenue and Taxation Code, Division 2, Part 13, Chapter 7.5, commencing with section 30435.
- (A) An owner or any person owning an interest in the seized property may file a petition with the Board to request recovery of the seized property as permitted by Revenue and Taxation Code section 30438.
- (B) The petitioner has the burden of proving in the petition that the seized cigarettes and/or tobacco products are legal to possess, store, own or sell and that taxes have been paid to obtain the recovery of the seized product(s).
- (c) Seizure of Product From Persons Without a Valid License. The Board or a law enforcement agency shall be authorized to seize cigarettes and tobacco products, whether or not the California excise taxes have been paid when the owner does not have a valid license under the Cigarette and Tobacco Products Licensing Act Law. Seizures shall include, but are not limited to the following:
- (1) Unlicensed Persons.
- (A) Stamped cigarettes that are possessed, stored, owned or for sale by an unlicensed retailer, distributor, wholesaler, manufacturer, importer, or any other person after notice by the Board or a law enforcement agency.
- (B) Tobacco products for which the California excise tax has been paid, that are possessed, stored, owned or for sale by an unlicensed retailer, distributor, wholesaler, or any other person after notice by the Board or a law enforcement agency.
- (2) Persons with Suspended or Revoked Licenses.
- (A) Stamped or unstamped cigarettes offered for sale at the time of seizure by a retailer, distributor, wholesaler, manufacturer or importer with a suspended or revoked license after notice by the Board of the suspension or revocation.
- (B) Tobacco products, regardless of whether the California excise taxes have been paid, that are offered for sale at the time of seizure by a retailer, distributor or wholesaler with a suspended or revoked license after notice by the Board of the suspension or revocation.

- (3) Forfeiture. Any cigarettes and tobacco products seized by the board or a law enforcement agency as described under subsection (c) shall be deemed forfeited to the state.
- (4) Petition Procedure. The petitioner may file a petition to contest the citation(s) resulting in the suspension or revocation of the license issued under the Cigarette and Tobacco Products Licensing Act Law pursuant to Article 5 of these regulations.
- (d) Evidence Required For Recovery of Product. Depending on the circumstances, evidence that may be relevant to the issue of whether or not the cigarettes or tobacco products were erroneously or illegally seized, includes, but is not limited to the following:
- (1) The cigarette packages had valid California tax stamps affixed and the petitioner held a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.
 - (2) The cigarette packages had valid California tax stamps affixed and the petitioner was not operating at the time of seizure with a suspended or revoked license after notice by the Board of the suspension or revocation.
 - (3) The cigarette packages without California tax stamps affixed were in the possession of a cigarette distributor, manufacturer or importer with a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.
 - (4) Cigarette packages that bear another state's tax stamp or the stamp of another taxing jurisdiction were in the possession of a cigarette distributor, manufacturer or importer with a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.
 - (5) Cigarette packages without a California tax stamp affixed and marked "Not for sale in the United States" or similar wording indicating that the manufacturer did not intend the product to be sold in the United States were in the possession of a distributor, manufacturer or importer with a valid license under the Cigarette and Tobacco Products Licensing Act Law and intended for sale outside of California at the time of seizure.
 - (6) The petitioner held a valid license under the Cigarette and Tobacco Products Licensing Act Law and the tax was paid for the seized tobacco products at the time of seizure.

- (7) The petitioner was not operating with a suspended or revoked license after notice by the Board of the suspension or revocation and the tax was paid for the seized tobacco products at the time of seizure.
- (8) The untaxed tobacco products were in the possession of a tobacco products distributor with a valid license under the Cigarette and Tobacco Products Licensing Act Law at the time of seizure.
- (e) Counterfeit Products. Counterfeit cigarette and tobacco products are defined as those with false manufacturing labels or false or fraudulent stamps, or both false labels and false stamps.
- (1) The Board shall be authorized to seize counterfeit cigarette and tobacco products that are possessed, stored, owned or for sale by a retailer, distributor, wholesaler, manufacturer, importer, or any other person.
- (2) The Board is not authorized to return seized counterfeit cigarettes and tobacco products as defined in this part as such products are illegal under California law.
- (f) Additional grounds for seizure. The California Cigarette and Tobacco Products Tax Law at Revenue and Taxation Code section 30436 sets forth additional circumstances under which cigarettes or tobacco products may be seized by the Board and forfeited to the state.

Note: Authority: Section 22971.2, Business and Professions Code.
Reference: Business and Professions Code sections 22971 subdivisions (l) and (m), 22974.3, subdivisions (a) and (b), 22978.2, subdivision (a) and (b) and 22980.2, subdivision (c); Revenue and Taxation Code sections 30102 through 30106, 30435, 30436, 30438, 30473 and 30474.1.