

[Senate Bill 140](#) (Leno, et al)

Date: 06/01/15

Program: Cigarette & Tobacco Products Licensing Act

Sponsors: American Heart Association, American Lung Association, and American Cancer Society

Business and Professions Code Sections 22950.5, 22958 and 22971

Effective January 1, 2016

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This analysis only addresses the provisions that impact the Board of Equalization (BOE).

Summary: Among other things, this bill:

- Adds a “tobacco product” definition to the Stop Tobacco Access to Kids Enforcement (STAKE) Act¹ that includes an electronic nicotine delivery device, such as an electronic cigarette (e-cigarette), and
- Requires the BOE to suspend or revoke a retailer’s Cigarette and Tobacco Products Licensing Act of 2003² (Licensing Act) license and impose a civil penalty for furnishing a “tobacco product” to a minor.
- Revises the Licensing Act’s “tobacco products” definition for retail licensure purposes to conform to the STAKE Act’s “tobacco product” definition.

Summary of Amendments: Among other things, the amendments since the last analysis limit the STAKE Act’s “tobacco products” definition to the retailer licensure provisions and make the STAKE Act-defined tobacco product retailer licensure requirement operative on October 1, 2016.

Purpose: To protect the public against exposure to e-cigarettes.

Fiscal Impact Summary: One time revenues of \$3.4 million in Fiscal Year 2016-17, and \$0.7 million annually thereafter.

Existing Law: Cigarette and Tobacco Products Tax Law³ (CTPTL). Revenue and Taxation Code (RTC) Section 30451 specifically provides that the BOE shall enforce the provisions of the CTPTL and may prescribe, adopt, and enforce rules and regulations relating to its administration and enforcement.

Existing law imposes an 87-cent per package of 20 (43 ½ mills per cigarette) cigarette tax. The CTPTL requires tax payment through the use of stamps or meter impressions that a distributor affixes on each cigarette package prior to the distribution.

RTC Section 30123 imposes a tax upon the distribution of tobacco products, based on the wholesale cost of these products at a tax rate that is equivalent to the combined rate of tax imposed on cigarettes. In addition, Section 30131.2 imposes an additional tobacco products tax at a rate equivalent to the \$0.50 per pack cigarette tax. The BOE annually determines the tobacco products tax rate based on the March 1 wholesale cost of cigarettes. The tobacco products rate is 28.95% for fiscal year 2014-15 and 28.13% for fiscal year 2015-16. Distributors pay the tobacco products tax through the use of a tax return that reports the wholesale cost of the tobacco products distributed and calculates the tax due.

RTC Sections 30121 and 30131.1 define “tobacco products” to include, but not be limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50%, tobacco, but does not include cigarettes.

¹ Division 8.5 (commencing with Section 22950) of the BPC.

² Division 8.6 (commencing with Section 22970) of the BPC.

³ Part 13 (commencing with Section 30001) of Division 2 of the RTC.

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Licensing Act. The Licensing Act requires the BOE to administer a statewide program to license cigarette and tobacco products manufacturers, importers, distributors, wholesalers, and retailers. Business and Professions Code (BPC) Section 22972 requires a retailer to have a license to sell cigarettes and tobacco products in this state. Section 22972 further requires a retailer to obtain a separate license for each retail location that sells cigarettes and tobacco products. Section 22971 defines “tobacco products” to have the same meaning as defined under the CTPTL.

Section 22974.8 requires the BOE to suspend or revoke a retailer’s license upon notification by the California Department of Public Health (CDPH) for certain STAKE Act violations.

STAKE Act. The STAKE Act established a statewide enforcement program to take action against businesses that illegally sell tobacco to minors. In general, the STAKE Act requires the CDPH to:

- Implement an enforcement program to reduce the availability of tobacco products to minors and conduct sting operations using 15 and 16 year old minors granted immunity;
- Establish requirements for tobacco product retailers to conspicuously post a notice stating that selling tobacco products to a person under 18 years of age is illegal and subject to penalties;
- Assess civil penalties ranging from \$200 to \$6,000 against the store owner for violations; and
- Comply with the Synar Amendment (Section 1926 of Title XIX of the federal Public Health Service Act) and prepare an annual report regarding enforcement activities and their effectiveness for the federal government, Legislature, and Governor.

Furthermore, the STAKE Act:

- Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 18 years of age.
- Prohibits any person, firm, or corporation from selling, giving, or in any way furnishing to another person who is under the age of 18 years any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance.
- Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or appliances are located at least 15 feet away from the entrance of a premises issued an on-sale public premises license, as defined.
- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits a person engaged in the retail sale of tobacco products from selling, offering for sale, or displaying for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted. Retailers of blunt wraps cannot place or maintain, or cause to be placed or maintained, any blunt wraps advertising display within two feet of candy, snack, or nonalcoholic beverage displayed inside any store or business or that is less than four feet above the floor.
- Prohibits the distributing or selling of tobacco products directly or indirectly to any person under the age of 18 years through the United State Postal Service or through any other public or private postal or package delivery service, as described.

BPC Section 22958 authorizes an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under the age of 18 years, any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance. Upon CDPH notification, Section 22958 requires the BOE to suspend or revoke a retailer’s Licensing Act license upon a civil penalty assessment for third, fourth, or fifth sales to minors violation, in accordance with the following schedule:

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- A 45-day suspension of the license for a third violation at the same location within a five-year period.
- A 90-day suspension of a license for a fourth violation at the same location within a five-year period.
- Revocation of the license for a fifth violation at the same location within a five-year period.

Section 22958 also requires the BOE to assess an additional \$250 civil penalty. The BOE deposits the penalty amounts collected into Cigarette and Tobacco Products Compliance Fund (Compliance Fund).

Proposed Law: Among other things, this bill amends BPC Section 22950.5 within the STAKE Act to define “tobacco product” to mean any of the following:

- A product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.
- An electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.
- Any component, part, or accessory of a tobacco product, whether or not sold separately.

“Tobacco product” does not include a product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.

This bill amends BPC Section 22958 to allow an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person under 18 years of age any “tobacco product.” As a result, Section 22958 requires the CDPH to notify the BOE upon a civil penalty assessment for a third, fourth, or fifth violation that includes any electronic delivery device or component parts, as well as any cigarette, tobacco, or specified related product. Existing law requires the BOE to impose a \$250 civil penalty and to take action in accordance with the specified schedule, which includes the suspension or revocation of a retailer’s Licensing Act license.

BPC Section 22971.7 is added within the Licensing Act’s retailer licensure provisions to define “tobacco product” to mean a tobacco product or device as defined in Section 22950.5.

BCP Section 22973 is amended to specify the existing one-time \$100 license fee applies to retailers that engage in the sale of tobacco product, as defined in the CTPTL. In addition, BOE must determine a one-time license fee for retailers of tobacco products, as defined in the STAKE Act, who are not subject to tax pursuant to the CTPTL. The fee may not exceed the BOE’s cost to administer and enforce the license.

This bill amends BPC Section 22980.2 to apply existing penalties to a person that continues to sell electronic delivery devices or component parts without a valid license or after a BOE suspension or revocation notification.

This bill becomes effective January 1, 2016; however, the electronic nicotine delivery device retailer licensing requirement becomes operative on October 1, 2016.

In General: In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the "Synar Amendment," which requires each state to:

- Have in effect a law prohibiting any manufacturer, retailer or distributor of tobacco products from selling or distributing such products to any individual under the age of 18.
- Enforce such laws in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.

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- Conduct annual random, unannounced inspections to ensure compliance with the law. These inspections are to be conducted in such a way as to provide a valid sample of outlets accessible to youth.
- Develop a strategy and timeframe for achieving an inspection failure rate of less than 20% of outlets accessible to youth.

Failure to meet the terms and conditions of the Synar Amendment could result in reductions (up to 40%) in the amount of Substance Abuse Prevention and Treatment (SAPT) block grant funds allocated to California for alcohol and other drug prevention and treatment programs.

To comply with the Synar Amendment, the Legislature passed Senate Bill 1927 (Stats. 1994, Ch. 1009) which established the STAKE Act. The STAKE Act created a new statewide enforcement program to take regulating action against businesses that illegally sell tobacco products to minors. Enforcement authority and implementation responsibility was delegated to the Department of Health Services.⁴

E-Cigarettes. The California Attorney General Office's Tobacco Highlights includes e-cigarette information:

"Electronic cigarettes are battery powered devices designed to look and feel like regular cigarettes, but they emit water vapor rather than smoke. The cartridges contain liquid nicotine and various flavors. Known as e-cigarettes or e-cigs, the products have become popular in the past couple of years. The U.S. Food and Drug Administration consider e-cigarettes "drugs or devices" and claims the products must be approved by the FDA before they can be sold in the U.S. To date, no e-cigarettes have been approved by the FDA. Preliminary tests by the FDA found that e-cigarettes contain many impurities and some contain dangerous chemicals. FDA's jurisdiction to regulate e-cigarettes is in litigation, however. E-cigarettes are not governed by the Master Settlement Agreement or by many of California's tobacco laws.

The California Attorney General's Office is concerned that e-cigarettes are being sold in the state without appropriate quality control and with many false or misleading claims about their safety or effectiveness. Many are also in violation of California's Proposition 65 which requires health warnings about dangerous chemicals.

California passed a statute prohibiting the sale of electronic cigarettes to minors. (Health & Safety Code §119405). The office is investigating a number of electronic cigarette companies selling e-cigarette products on the Internet to ensure compliance with the statute as well as other consumer protection provisions. Many companies are coming into compliance voluntarily."

Background: In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the BOE to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the BOE licenses approximately 35,000 retailers and 850 distributors and wholesalers to engage in the sale of cigarettes and tobacco products in California.

As AB 71 was developed and made its way through the Legislature, it was determined that the licensure fees would not permanently sustain the Licensing Act program. Since the Licensing Act enforces the CTPTL and directly benefits the funds established pursuant to that program, the funding for the Licensing Act would eventually shift to the cigarette and tobacco products tax funds: General Fund, Breast Cancer Fund, Cigarette and Tobacco Products Surtax Fund (Prop. 99) and California Children and Families Trust Fund (Prop. 10). However, there was concern about the Licensing Act program and the impact it would have on the cigarette and tobacco products tax funds if the Licensing Act expenses were more than the revenues generated. To address this concern, a sunset date of January 1, 2010, was incorporated into the Licensing Act to make sure the Licensing Act would not harm the cigarette and

⁴ The CDPH, Food and Drug Branch, now enforces the STAKE Act program.

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tobacco products tax funds. Furthermore, AB 71 included uncodified language to clarify that all revenues and expenses generated by the Licensing Act are to be allocated in the same manner as those revenues and expenses are allocated under the Cigarette and Tobacco Products Tax Law to make sure no one cigarette and tobacco product fund benefited or was burdened when the funding shift took place. In 2006, Assembly Bill 1749 (J. Horton, Ch. 501) repealed the sunset date for the Licensing Act due to the amount of additional excise tax revenues generated. The BOE has estimated that the Licensing Act and enhanced cigarette tax stamp generates an additional \$66.8 million in cigarette excise tax annually. The Licensing Act generates an additional \$24.5 million in additional tobacco products tax. The resulting additional sales and use tax revenue is estimated to be \$44.4 million annually.⁵

In 2012, Assembly Bill 1301 (Hill, Ch. 335) amended the STAKE and Licensing Acts to require the BOE to suspend or revoke a retailer license for certain cigarette and tobacco products sales to minors violations.

Commentary:

1. **Amendments summary.** The **June 1, 2015 amendments** limit the STAKE Act's "tobacco products" definition to the retailer licensure provisions and make the STAKE Act-defined tobacco product retailer licensure requirement operative on October 1, 2016. The **April 13, 2015 amendments** revised the STAKE Act's "tobacco product" definition and added a definition for "smoking." The **March 10, 2015 amendments** revised the Licensing Act's "tobacco products" definition to conform to the STAKE Act's "tobacco product" definition thereby requiring licensure of an e-cigarette and tobacco product accessory or component (tobacco device) manufacturer, importer, distributor, wholesaler, and retailer.
2. **Necessary Amendment.** The bill adds BPC Section 22973 to require a retailer to submit a \$100 one-time license fee with a license application to engage in the sale of a tobacco product, as defined in the CTPTL. The added section inadvertently dropped the one-time license fee for a retailer to engage in the sale of cigarettes. The suggested amendment adds back a license fee for cigarette retailers:

22973. (d) (1) A one-time license fee of one hundred dollars (\$100) shall be submitted with each application to obtain a license to engage in the sale of cigarettes or tobacco products, as defined in subdivision (b) of Section 30121 and subdivision (b) of Section 30131.1. An applicant that owns or controls more than one retail location shall obtain a separate license for each retail location, but may submit a single application for those licenses with a one-time license fee of one hundred dollars (\$100) per location.

3. **Some retailers will pay two fees.** Operative October 1, 2016, this bill requires a retail license applicant to pay a BOE-determined license fee when filing an application for a license to engage in the sale of STAKE Act-defined tobacco products (electronic delivery device), that are not subject to tax pursuant to the CTPTL.

Accordingly, an **existing retailer** licensed to engage in the sale of cigarettes and tobacco products, as defined in the CTPTL, must pay the new BOE-determined license fee to engage in the sale of STAKE Act defined tobacco products.

A **new retailer** of cigarettes, CTPTL-defined tobacco products, *and* STAKE Act-defined tobacco products must pay both the \$100 and the new BOE-determined license fees in order to sell such products.

4. **BOE's mission and tasks.** The BOE's mission "is to serve the public through fair, effective, and efficient tax administration." This bill's provisions that require e-cigarette and tobacco component manufacturer, importer, distributor, wholesaler, and retailer licensure represent a departure from

⁵ <http://www.boe.ca.gov/legdiv/pdf/CigaretteEvasion.pdf>.

the BOE's traditional "tax collection and enforcement" functions. In general, the BOE requires a license, permit, or registration for the various tax and fee programs administered. The licensing/registration/permit requirement ensures vital tax revenue collection for the state.

The Licensing Act's declarations and findings state, in part, that manufacturer, importer, wholesaler, distributor, and retailer licensing will help stem the tide of untaxed distributions. However, this bill's e-cigarette and tobacco component licensing requirements relate to health, public safety, or other non-tax purposes.

5. **Tobacco products taxation.** This bill creates a "tobacco product" definition within the STAKE Act and Licensing Act, which includes electronic delivery devices and component parts. This bill does not amend the "tobacco products" definition within the CTPTL. Accordingly, this bill does not impose the cigarette and tobacco products tax upon a tobacco product as defined pursuant to this bill's BPC Section 22950.5 (electronic delivery devices and component parts). The cigarette and tobacco products tax continues to apply to "tobacco products" as defined in RTC Sections 30121 and 30131.1, which reads:

"Tobacco products" includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent, tobacco, but does not include cigarettes.

6. **Effect on the Compliance Fund.** Currently, the BOE's Licensing Act enforcement costs exceed licensing fee revenues. The Licensing Act authorizes the various cigarette and tobacco products tax funds⁶ to make up the difference.

The Licensing Act makes available Compliance Fund moneys to implement, enforce, and administer the Licensing Act, including any provisions this bill adds to the Licensing Act. Thus, the Licensing Act administrative costs related to this bill increases the Compliance Fund shortfall and increases the amount needed from the cigarette and tobacco products tax funds, including the General Fund.

To address the increased administrative costs, this bill adds a BOE-determined one-time retailer license fee, based on the BOE's costs associated with the administration and enforcement of the license, to engage in the sale of tobacco products, as defined in the STAKE Act, that are not subject to cigarette and tobacco products tax.

7. **This bill should define "tobacco product component, part, or accessory."** This bill includes within the "tobacco product" definition any tobacco product component, part, or accessory, whether or not sold separately. However, the bill does not define that term. BOE staff suggests an amendment to add a "tobacco product component, part, or accessory" definition to eliminate any uncertainty.
8. **Related legislation.** [Senate Bill 24](#) (Hill) revises the Licensing Act to require the licensure of e-cigarette retailers, and requires the BOE to assess a civil penalty and suspend or revoke a retailer license for specified e-cigarette violations of the STAKE Act. This bill has been moved to the Senate's Inactive File.

Administrative Costs: The bill results in additional BOE administrative costs to identify, notice, and license e-cigarette and tobacco device retailers and to suspend or revoke retailer licenses for e-cigarette and tobacco device sales to minors violations. These costs include: e-cigarette identification, notification, and registration; publication and form revisions; compliance, inspection and enforcement tasks; public inquiry responses; and related computer programming. A detailed cost estimate is pending.

⁶ Comprised of payments made to the state for the excise taxes on the distribution of cigarettes and tobacco products.

Revenue Impact:

Background, Methodology, and Assumptions. BOE records indicate that 37,001 retailers were registered to sell cigarettes and tobacco products in fiscal year 2013-14.⁷ Estimated revenue impact is based on the following assumptions:

- The BOE-determined licensing fee would be \$100 per location, the same as the cigarette and tobacco products retailer licensing fee under current law.
- About 90% of retailers that currently sell cigarettes or tobacco products would also register to sell electronic delivery devices and component parts.
- Based on an industry survey, there are about 1,100 retailers that sell electronic delivery devices and component parts, but do not sell cigarettes or tobacco products.
- Changes in ownership of retailers of cigarettes and tobacco products as defined by this bill will be about 20% per year, the same as under current law. This implies annual fees of about 20% of the number of registrants even if there is no increase in the total number of registrants.
- No long-term growth expected in the total number of registrants. This assumption is consistent with BOE records since the licensing program began in 2004. For example, in fiscal year 2005-06 there were 38,084 retailers selling cigarettes or tobacco products, slightly more registrants than today.

Revenue Summary. Based on the preceding data and assumptions, we estimate one-time revenues of approximately \$3.4 million in FY 2016-17. A 20% ownership turnover rate implies ongoing revenues of \$0.7 million in FY 2017-18 and following years.

This revenue estimate does not account for any further changes in economic activity that may or may not result from enactment of the proposed law.

⁷ *Taxes and Fees Administered by the California State Board of Equalization, FY 2013-14*, Publication 41, December 2014.