



# STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date:	01/18/12	Bill No:	<a href="#">Assembly Bill 1301</a>
Tax Program:	Cigarette and Tobacco Products Licensing Act	Author:	Hill
Sponsor:	Author	Code Sections:	BPC 22958 & 22974.8 PC 308
Related Bills:		Effective Date:	01/01/13

***This analysis only addresses the provisions that impact the BOE.***

## **BILL SUMMARY**

Relative to the Cigarette and Tobacco Products Licensing Act of 2003<sup>1</sup> (Licensing Act), this bill changes provisions that require the Board of Equalization (BOE) to take action against a retailer who violates laws related to sales of cigarettes or tobacco products to a person under the age of 18, as specified.

### **Summary of Amendments**

Since the previous analysis, this bill was amended to require the BOE assess a civil penalty against a retailer upon notification by the California State Department of Public Health (CDPH) of a third, fourth, or fifth violation of the Stop Tobacco Access to Kids Enforcement (STAKE) Act<sup>2</sup>.

## **ANALYSIS**

### **CURRENT LAW**

Business and Professions Code Section 22974.8 of the Licensing Act requires the BOE to take action against a retailer convicted of a violation of either the STAKE Act or Penal Code Section 308, according to the following schedule:

- Upon the first conviction of a violation, the retailer receives a warning letter from the BOE that delineates the circumstances under which a retailer's license may be suspended or revoked and the amount of time the license may be suspended or revoked. The retailer and its employees are required to receive training on tobacco control laws from the Department of Health Services upon a first conviction.
- Upon the second conviction of a violation within 12 months, the retailer is subject to a fine of five hundred dollars (\$500).
- Upon the third conviction of a violation within 12 months, the retailer is subject to a fine of one thousand dollars (\$1,000).
- Upon the fourth to the seventh conviction of a violation within 12 months, the BOE is required to suspend the retailer's license to sell cigarette and tobacco products for 90 days.

<sup>1</sup> Division 8.6 (commencing with Section 22970) of the Business and Professions Code.

<sup>2</sup> Division 8.5 (commencing with Section 22950) of the Business and Professions Code.

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- Upon the eighth conviction of a violation within 24 months, the BOE is required to revoke the retailer's license to sell cigarette and tobacco products.

Convictions of violations by a retailer at one retail location are not accumulated against other locations of that same retailer. Furthermore, convictions of violations accumulated against a prior retail owner at a licensed location are not accumulated against a new retail owner at the same retail location.

This provision becomes operative on the date results from the Youth Tobacco Survey are released if the survey finds that 13 percent or more of youth were able to purchase cigarettes (trigger language). The BOE's authority to take action under this provision becomes inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

**STAKE Act.** The STAKE Act (Division 8.5 (commencing with Section 22950) of the Business and Professions Code) 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 to 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 premise issued an on-sale public premise license, as defined.
- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits a person engaged in the retail sale of: (1) tobacco products to sell, offer for sale, or display for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted, or (2) blunt wraps to place or maintain, or to 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.

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- 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.

#### **PROPOSED LAW**

This bill amends Section 22958 of the STAKE Act to require, upon notification by the CDPH, the BOE to suspend or revoke a license issued to a retailer under the Licensing Act for any person, firm, or corporation that is assessed a civil penalty for the third, fourth, or fifth violation under subdivision (a) for 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, in accordance with the following schedule:

- 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.

The BOE would also be required to assess a two hundred dollars (\$200) civil penalty that would be deposited in the Cigarette and Tobacco Products Compliance Fund to be made available to the BOE, upon appropriation by the Legislature, for suspending or revoking a license as described.

This bill also repeals and adds Section 22974.8 to the Business and Professions Code to require the BOE to suspend or revoke the license of a retailer as directed by the CDPH pursuant to Section 22958. The licensee would be provided with at least 10 days written notice of a pending suspension or revocation, and an opportunity to appeal the suspension or revocation and two hundred dollar (\$200) penalty assessed by the CDPH pursuant to Section 22958, but only to correct a mistake or clerical error. The BOE would be prohibited from accepting or considering an appeal founded upon the grounds of whether a retailer violated the STAKE Act, as described. The BOE would be permitted to modify its action on its own to correct a mistake or clerical error.

This bill would become effective January 1, 2013.

#### **IN GENERAL**

In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the "Synar Amendment." The Synar Amendment requires 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 percent of outlets accessible to youth.
- Failure to meet the terms and conditions of the Synar Amendment could result in reductions (up to 40 percent) 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. Authority for enforcement and responsibility for implementation of the program was delegated to the DPH, Food and Drug Branch.

### 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 has approximately 37,000 retailers and 1,000 distributors and wholesalers licensed to engage in the sale of cigarettes and tobacco products in California.

In 2004, Senate Bill 433 (Ortiz), and in 2005, Senate Bill 400 (Kuehl), would have repealed and added Section 22974.8 to the Business and Professions Code to make various changes to the penalties imposed for a conviction of a violation by a retailer for sales to persons under 18 years of age. Both bills were held under submission in the Senate Appropriations Committee.

In 2009, Senate Bill 602 (Padilla) and Senate Bill 603 (Padilla) would have, among other things, allowed the BOE to take action relating to the licensure of retailers who have violated the STAKE Act and misdemeanor provisions at any time and made changes to the penalty provisions and the reporting requirements by enforcing agencies for any conviction of furnishing cigarettes or tobacco products to a person under 18 years of age, as specified. SB 602 was amended on July 1, 2009, to remove these provisions, and SB 603 was referred to the Assembly Governmental Organization Committee, but was never heard.

### COMMENTS

- 1. Sponsor and Purpose.** This bill is sponsored by the author and intended to hold retailers accountable for repeated violations of the STAKE Act by requiring the BOE to take action against a retailer's license to engage in the sale of cigarettes or tobacco products in this state.
- 2. Summary of amendments.** The **January 18, 2012 amendments** require the BOE, rather than the CDPH, to assess a civil penalty of two hundred dollars (\$200) against a retailer upon notification of a third, fourth, or fifth violation of the STAKE Act.

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The **January 4, 2012 amendments** required the CDPH to direct the BOE to suspend or revoke a license upon a third, fourth, and fifth violation of the STAKE Act, as provided, and assess an additional two hundred dollar penalty (\$200) to offset the BOE's administrative costs to take action on a license as directed. The amendments also repealed and added Section 22974.8 to require the BOE to take action on a license as directed by the CDPH, and to accept an appeal of that action only to correct a mistake or clerical error.

The **June 22, 2011 amendments** required the BOE to take action against a retailer only if the violation occurred in a jurisdiction where the local government has not adopted a tobacco retail license ordinance and clarified that only an action of suspension or revocation may be appealed to the BOE within 30 days of notice.

The **April 25, 2011 amendments** (1) revised the Licensing Act penalty structure for the occurrence of multiple sales to minors violations to be within 3 years rather than 5 years, (2) decreased the suspension penalty from 90 days to 45 days upon a third violation, (3) allowed the BOE's decision to suspend or revoke a license to be appealed within 30 days after notice, and (4) made the specified penalties applicable only to violations that occur on and after January 1, 2012.

- 3. Civil penalty collection by BOE most efficient?** The current version of the bill requires the BOE to collect a two hundred dollar (\$200) civil penalty from a retailer upon notification by the CDPH of a third, fourth, or fifth STAKE Act violation. This civil penalty would be deposited into the Cigarette and Tobacco Products Compliance Fund to offset the BOE's administrative costs to suspend or revoke a license for STAKE Act violations. The prior version of the bill required the CDPH to collect this civil penalty at the same time the existing STAKE Act penalty is collected to take advantage of an existing penalty collection process so not to incur any new administrative costs. However, by shifting the penalty collection responsibility to the BOE, new computer programming and resources would be required to implement and administer the new collection function.
- 4. Funding necessary for administrative start-up costs.** This measure proposes a new penalty collection requirement upon the BOE beginning January 1, 2013. In order to implement the new collection requirement, the BOE would need to program computers and develop assessment forms prior to the January 1, 2013 effective date, which is during the 2012-13 fiscal year. Accordingly, an adequate appropriation is required to cover these administrative start-up costs would not already be identified in the BOE's 2012-13 budget. It appears the start-up and ongoing costs associated with the civil penalty collection would be funded by the Sale of Tobacco to Minors Control Account since the requirement for the BOE to assess and collect the penalty is within the STAKE Act.
- 5. BOE's mission and tasks.** The mission of the BOE is to serve the public through fair, effective, and efficient tax administration. The provisions in this bill to impose the specified penalties against a retailer if the violation occurred in a jurisdiction that has not adopted a tobacco retail license ordinance would require the BOE to continuously monitor for local tobacco retail licensing ordinances, which represents a departure from our traditional "tax collection" functions. In general, the BOE requires a license, permit, or registration for the various tax and fee programs administered. Essentially, the purpose of the licensing/registration/permit is to ensure collection of vital tax revenues for the state.

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According to the legislative findings in the Licensing Act, the licensing of manufacturers, importers, wholesalers, distributors, and retailers was a comprehensive program to reduce untaxed distribution and illegal sales of cigarette and other tobacco products in California. Although the Licensing Act provided stricter retailer licensing requirements, compared to permit requirements for sales and use tax, the stricter standards were established to support the overall goal of improving tax collection.

Although this measure would require the BOE to suspend or revoke a license based on violations of the STAKE Act, such action would not interfere with the BOE's mission of tax administration. The action against a licensee for STAKE Act violations have been amended into the STAKE Act to be administered and overseen by the CDPH, and the Licensing Act amended to delete the existing penalty structure and instead require the BOE to suspend or revoke a license as prescribed under the STAKE Act and directed by the CDPH.

- 6. Due process.** This bill would require the BOE to suspend or revoke the license of a retailer, as directed by the CDPH. The BOE would be required to provide the licensee with at least a 10 day written notice of that action, and to allow the licensee to appeal the suspension or revocation and penalty, but only to correct a mistake or clerical error. The BOE would be prohibited from accepting or considering an appeal related to whether the retailer, or any employee or agent of the retailer, violated the STAKE Act for which a civil penalty was assessed under that Act that triggered the CDPH to direct the BOE to suspend or revoke the license.

The licensee's appeal rights under the Licensing Act would be limited since that person has the right to appeal the STAKE Act violation, which is processed through an administrative hearing with an administrative law judge making a ruling on that violation. It would be only after final administrative adjudication, or payment of the civil penalty for an uncontested violation, that the CDPH would direct the BOE to suspend or revoke a license.

- 7. Technical amendment.** On page 4, line 13, the reference to "board" should be changed to "State Board of Equalization" since the term "board" is not defined within the STAKE Act.

## **COST ESTIMATE**

The BOE would incur non-absorbable costs to assess and collect the two hundred dollar (\$200) civil penalty related to programming computers, developing forms, processing assessments and payments, carrying out collection efforts, and answering inquiries from licensees. An estimate of these costs is pending; however, it is estimated these costs could be moderate (over \$50,000 and less than \$250,000).

The BOE would also incur minor costs in administering the provisions related suspending or revoking a license for violations of the STAKE Act. Costs would be related to suspending or revoking retail licenses and inspecting suspended or revoked retail licensee locations to ensure cigarettes or tobacco products are not being sold.

The number of suspensions and revocations would depend on the number of third through fifth STAKE Act violations. According to the CDPH, there were the following violations during 2008, 2009, and 2010:

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<b>Number of STAKE Act Violations</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Third Violation	17	3	9
Fourth Violation	1	1	1
Fifth Violation	0	0	0

Based on the above figures, it is estimated that the BOE costs for suspending or revoking a retailer’s license would be minor.

**REVENUE ESTIMATE**

This measure would not affect the state’s revenues.

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Analysis prepared by: Cindy Wilson 916-445-6036 05/21/12  
 Contact: Margaret S. Shedd 916-322-2376  
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