STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	**04/25/11**	Bill No:	**Assembly Bill 1301**
Tax Program:	**Cigarette and Tobacco Products Licensing Act**	Author:	**Hill**
Sponsor:	**Author**	Code Sections:	**BPC 22952 & 22974.8** **PC 308**
Related Bills:	**SB 331 (Padilla)**	Effective Date:	**01/01/12**

This analysis only addresses the provisions that impact the BOE.

BILL SUMMARY

Relative to the Cigarette and Tobacco Products Licensing Act of 2003[1] (Licensing Act), this bill would change 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 revise the Licensing Act penalty structure for multiple violations of laws related to cigarette or tobacco products sales to minors and allow an appeal of the BOE's decision to suspend or revoke a license within 30 days after notice.

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 Stop Tobacco Access to Kids Enforcement (STAKE) Act[2] 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.

[1] Division 8.6 (commencing with Section 22970) of the Business and Professions Code.
[2] Division 8.5 (commencing with Section 22950) of the Business and Professions Code.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

- 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 Department of Public Health (DPH) 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.

- 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.

Penal Code Section 308. Section 308 prohibits every person, firm, or corporation which knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, from selling, giving, or in any way furnishing to another person who is under the age of 18 years:

- Any tobacco, cigarette, or cigarette papers, or
- Blunt wraps, or
- Any other preparation of tobacco, or
- Any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or
- Any controlled substance.

Any person failing to comply is subject to criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense.

Section 308 also requires every person, firm, or corporation which sells, or deals in tobacco or any preparation thereof, to post conspicuously and keep posted at each point of purchase a notice that states, in part, selling tobacco products to anyone under 18 years of age is illegal. Any person failing to do so is punished, upon conviction, by a fine of fifty dollars ($50) for the first offense, one hundred dollars ($100) for the second offense, two hundred fifty dollars ($250) for the third offense, and five hundred dollars ($500) for the fourth offense and for each succeeding violation, or by imprisonment for not more than 30 days.

PROPOSED LAW

This bill would amend Section 22974.8 of the Licensing Act to remove the 13 percent trigger language that makes the section operative or inoperative based on the results from the Youth Tobacco Survey.

The bill would also require the BOE to take action against a retailer for a “violation” rather than a “conviction of a violation.” For purposes of determining the accumulation of violations, it would be the intent of the Legislature that:

- A violation of the STAKE Act has occurred when either a final administrative adjudication is reached or when the retailer pays the fine of an uncontested violation;
- A violation of Penal Code Section 308 has occurred when a final judgment of guilty, either by jury, appeal, or plea, is entered against the retailer or any employee or agent of the retailer.

It would also be the intent of the Legislature for the enforcing agency to notify the BOE within 30 days of determining that a violation has occurred.

The penalty structure for violations of either the STAKE Act or Penal Code Section 308 has been changed to the following:

- Upon the second violation within three years, the retailer would be subject to a fine of five hundred dollars ($500) unless the retailer can show proof that he or she has purchased and installed an identification verification scanner since the date of the violation.
- Upon the third violation within three years, the retailer's license would be suspended for 45 days.
- Upon the fourth violation within three years, the retailer's license would be suspended for 180 days.
- Upon the fifth violation within three years, the retailer's license would be revoked.

When determining the penalty for violations, the BOE would be prohibited from including violations that occurred prior to January 1, 201.

The BOE would be required to revoke or suspend the license pursuant to the provisions applicable to the revocation of a license as set forth in Revenue and Taxation Code Section 30148. The decision of the BOE to suspend or revoke a retailer's license may be appealed in writing within 30 days after notice of suspension or revocation.

This bill would become effective January 1 2012.

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.
- 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 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 and Penal Code Section 308 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. The **April 25, 2011 amendments** (1) revise the Licensing Act penalty structure for the occurrence of multiple sales to minors violations to be within 3 years rather than 5 years, (2) decrease the suspension penalty from 90 days to 45 days upon a third violation, (3) allow the BOE's decision to suspend or revoke a license to be appealed within 30 days after notice, and (4) make the specified penalties applicable only to violations that occur on and after January 1, 2012.

3. **This bill removes the "trigger language" for the BOE to impose penalties for STAKE Act and Penal Code Section 308 violations.** Existing law provides that the BOE's authority to take action against retailers pursuant to Section 22974.8 commences 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. Further, the BOE's authority to take action under this provision will become 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.

   In 2009, the results of the Youth Tobacco Survey found that 8.6 percent of youth were able to purchase cigarettes; this was a decrease from the 2008 results which was 12.6 percent. In 2004 and 2006 when the survey results were over 13 percent, the BOE had the authority to take action against a retailer, however the BOE was never notified of a conviction of a violation.

4. **Revoking or suspending a license.** This bill would require the BOE to impose specified penalties (such as suspension and revocation) and fines as set forth in the bill. Licensing Act Regulation 4609, *Right to Appeal*, provides that every person has the right to appeal any alleged violation of the Licensing Act. Licensing Act Regulation 4700, *Appeal – Excise Taxes Division*, provides a licensee 10 days from the Warning Notice or Notice of Violation to submit a request for appeal to the Excise Taxes Division. After the appeals conference, the Excise Taxes Division will issue a Notice of First Decision. If the licensee disagrees with the Notice of First Decision, Regulation 4701, *Appeal – Appeals Division*, allows a retailer 10 days from the date of the First Decision to file a request for an Appeals Conference. If the decision is upheld by the Appeals Division, it is final and may not be appealed further unless it is a penalty of revocation in which case the licensee may make a third appeal to the BOE for a final decision.

   This bill would allow a retailer to appeal a penalty of license suspension or revocation within 30 days after notice of that suspension or revocation. This is consistent with existing law, which provides 20 days more to appeal the violation than allowed under the existing regulatory scheme. As such, the timeline to appeal provided in existing regulations would be applicable only for first and second violations since the required action by the BOE does not involve the suspension or revocation of a license.

   Since this bill would require the BOE to take specified action against a retailer for a violation of laws pertaining to under-aged sales, the BOE would be limited in its decision to not uphold a penalty to only those cases involving an error. For example, if the BOE inadvertently imposed a penalty upon the wrong licensee, or the penalty imposed was not in accordance with the specified penalty schedule.

5. **What is final administrative adjudication under the STAKE Act?** According to DPH staff, final administrative adjudication occurs when a violation is appealed and processed through an administrative hearing with an administrative law judge making a ruling on that violation. However, not all violations of the STAKE Act are appealed and heard before an administrative law judge. Such violations include those in which the fines imposed pursuant to the STAKE Act are simply paid upon receipt of a demand letter and the violation is not contested, which would also be considered a violation under Section 22974.8.

   It should also be noted that Penal Code Section 308 violations that are not prosecuted would not be considered a violation for purposes of this measure.

6. **Additional administrative concerns.** The BOE staff has administrative concerns regarding the amendments to Section 22974.8 that include the following:

   - **Identification scanner.** Section 22974.8(b)(2) would, upon second violation, subject a retailer to a five hundred dollar fine ($500) unless the retailer can show proof that an identification verification scanner has been purchased and installed since the date of the violation. What if the retailer has a scanner installed at the time of the violation? Does this automatically subject the retailer to the fine? What if the retailer had a scanner installed, but purchased and installed a new scanner after the violation? Furthermore, how much is a scanner? Is it more than the $500 penalty? If so, is there an incentive to purchase and install a scanner?

In addition, the BOE would be required to review a retailer's proof that a scanner has been purchased and installed. What is an identification verification scanner? Does the device need to meet certain standards in order to relieve the retailer of the $500 penalty? As a tax agency, the BOE staff is not trained to know what to look for in order to make a determination as to whether or not a device is acceptable and meets the intent for which the scanner is required to be installed? BOE staff suggests verification of a scanner purchase and installation should be with the enforcing agency that would then provide a recommendation to the BOE.

- **Required action.** Section 22874.8(c) infers that the BOE has discretion to suspend or revoke a retailer's license, as specified, upon the third, fourth and fifth violations; however, the BOE is required to take action upon a retailer as dictated in the schedule. The author may wish to substitute the word "decision" with "action" to avoid any ambiguity.
- **Violations.** Section 22974.8(f) provides Legislative intent language with respect to determining the accumulation of violations. BOE staff suggests amending this subdivision with the following language to replace the intent language with language that specifies when a "violation" under Section 22974.8 occurs:

  22974.8. (e) For the purposes of determining the accumulation of violations pursuant to this section, ~~it is the intent of the Legislature that~~ all of the following apply:

7. **Related legislation.** SB 331 (Padilla) would revise, in part, the provisions that require the 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.

COST ESTIMATE

The BOE would incur costs in administering the provisions related to sales to minors. Costs would be related to imposing fines, suspending or revoking retail licenses, inspecting suspended or revoked retail licensee locations, and seizing cigarettes or tobacco products for continued sales of such products after a license has been suspended or revoked. Additional costs would also be incurred for the storage and destruction of seized property. A detailed cost estimate is pending; however, it's estimated that these costs would be major (over $1 million).

Since this bill is intended to address youth smoking and not the administration and collection of cigarette and tobacco products taxes, it is unclear how this bill would be funded. While the Licensing Act provides that all moneys in the Cigarette and Tobacco Products Compliance Fund are to be used for the purpose of implementing, enforcing, and administering the Licensing Act, this bill could result in a significantly larger shortfall in the Fund, thus shifting a larger burden of the expense to the cigarette and tobacco products tax funds. As such, it could be construed that the cigarette and tobacco products funds[3], which existing law requires to be used for the administration and collection of the cigarette and tobacco products taxes[4], are being used to fund enforcement of youth smoking.

[3] General Fund, Breast Cancer Fund, Cigarette and Tobacco Products Surtax Fund, and California Children and Families Trust Fund.
[4] R&TC §§30124, 30125, 30131.3 and 30131.4.

REVENUE ESTIMATE

This measure would not affect the state's revenues.

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