STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date:	**06/18/12**	Bill No:	**Assembly Bill 1301**
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[1] (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 make non-substantive corrections throughout the bill.

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.
- 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.

[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.

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.

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.

- 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 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.

- 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 CDPH, 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 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 **June 18, 2012 amendments** make non-substantive corrections throughout the bill.

   The **January 18, 2012 amendments** required 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.

The **January 4, 2012 amendments** required the CDPH to: 1) direct the BOE to suspend or revoke a license upon a third, fourth, and fifth violation of the STAKE Act, as provided, and 2) 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 assess a two hundred dollar ($200) civil penalty from a retailer upon notification by the CDPH of a third, fourth, and 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 assessed and collected to take advantage of an existing penalty collection process so not to incur any new administrative costs. However, by shifting the penalty assessment and collection responsibility to the BOE, some new computer programming and resources would be required to implement and administer the new billing and collection function.

4. **Suggested amendment.** In its current form, the bill does not provide the BOE the authority to collect the two hundred dollar ($200) civil penalty, imposed pursuant to Section 22958(b), consistent with other taxes and fees collected by the BOE. It is suggested amending Section 22958 to allow the BOE to collect the civil penalty in accordance with Chapter 4 (commencing with Section 55121) of Part 30 of Division 2 of the Revenue and Taxation Code (Fee Collections Procedures Law).

   The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the BOE. Chapter 4 (commencing with Section 55121) specifically provides administrative provisions for the collection of amounts due and payable, including, but not limited to judgment for fee amounts, warrant for collection and levies.

5. **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 with the CDPH, 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.

COST ESTIMATE

The BOE would incur 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.

The BOE would also incur costs in administering the provisions related to suspending or revoking a license for violations of the STAKE Act. Costs would be related to issuing notices of suspension or revocation to retail licensees, programming computers, 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:

Number of STAKE Act Violations	2008	2009	2010
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 related to suspending or revoking a retail license, as described, and assessing the $200 penalty would be insignificant (under $10,000) and absorbable. If the number of STAKE Act violations referred to the BOE for action increases substantially, the BOE's costs would also increase accordingly and the costs may no longer be absorbable.

REVENUE ESTIMATE

This measure would not affect the state's revenues.

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