

**Amend Business and Professions Code Sections 22971, 22980.2, and 22980.3 to (1) prohibit a licensee from gifting or displaying cigarettes or tobacco products during a period when the license is suspended or after a license has been revoked and (2) provide that cigarettes or tobacco products displayed during a license suspension or after a license has been revoked are presumed to be displayed for sale.**

**Source: Excise Taxes Division**

**Existing Law**

The Cigarette and Tobacco Products Licensing Act of 2003 (Division 8.6 (commencing with Section 22970) of the Business and Professions Code) (Licensing Act) requires the Board to administer a statewide cigarette and tobacco products license program to regulate the sale of cigarettes and tobacco products in the state. The Licensing Act requires every retailer, distributor, wholesaler, manufacturer and importer to have in place and maintain a license to engage in the sale of cigarettes or tobacco products.

Section 22980.1 contains prohibitions with respect to the purchase and sale of cigarettes and tobacco products. In general, no licensee may purchase from, or sell for resale to, a person not properly licensed or whose license has been suspended or revoked. This prohibition does not include retail sales by a retailer to an end consumer.

Sections 22974.7, 22978.7 and 22979.7 provide that, upon a finding that a retailer, distributor, wholesaler, manufacturer, or importer has violated the Licensing Act, the Board may take one of the following actions:

- First offense: the Board may revoke or suspend the license or licenses, as described.
- Second or any subsequent offense: in addition to the action authorized for the first offense, the Board may impose a civil penalty in an amount not to exceed the greater of five times the retail value of the seized cigarettes or tobacco products, or \$5,000.

Additionally, Section 22980.3 provides that licenses issued pursuant to the Licensing Act are subject to suspension or revocation for violations of the Licensing Act or the Revenue and Taxation Code. Licensees served with a notice of suspension must immediately cease the sale of cigarettes or tobacco products. Continued sales after the notification constitutes a violation of the Licensing Act and will result in the revocation of a license.

And lastly, Section 22980.2 provides that a person or entity that engages in the business of selling cigarettes or tobacco products in this state without a license or after a license has been suspended or revoked is guilty of a misdemeanor, punishable by a fine, as provided. Continued sales of cigarettes or tobacco products by a person without a license or after notification to the person that the license has been suspended or revoked constitutes a Licensing Act violation and

will result in the seizure of all cigarettes and tobacco products in the possession of the person.

### **Background**

When a license has been suspended or revoked for violations of the Licensing Act, the licensee is served with a notice of suspension or revocation. Such notice states that the suspended or revoked licensee must cease the sale of cigarettes or tobacco products on the effective date of the suspension or revocation. The notice also asks that cigarette and tobacco products be removed from the retail sales area. To ensure compliance, the Board's Investigations Division follows up on suspended and revoked licenses by inspecting locations where the license has been suspended or revoked to verify cigarettes or tobacco products are no longer being sold.

During these inspections, there have been instances where cigarettes or tobacco products are found to be in retail stock and clearly visible to customers. In such cases, Board investigators will make a purchase of these cigarettes or tobacco products as evidence of a sale during suspension or revocation, which is a violation of the Licensing Act and subjects all of the suspended licensee's cigarettes and tobacco products to seizure and forfeiture. When appealing the violation, the suspended license holder typically argues that no sale occurred because it was a mistake by their employee. In order to prevent a dispute over an issue of fact that is in the control of the licensee, this proposal would provide a presumption that cigarettes or tobacco products are displayed for sale if they remain clearly visible to a retail customer in retail stock otherwise held for sale on the premises during a period of suspension or revocation.

Board staff has also received inquiries from licensees about furnishing cigarettes or tobacco products to persons without consideration or combined with another product or service during a period of suspension. For example, staff was asked if a suspended licensee could furnish cigars at no additional cost at a wine tasting party, which attendees paid \$10 per person to attend. Such a transfer constitutes a sale and is a violation of the Licensing Act; however, it is not clear to licensees that such a transfer is a violation that would cause the products to be subject to seizure and forfeiture. Board investigators have also witnessed suspended or revoked licensees furnishing free sticks of cigarettes to customers as an incentive to continue patronizing their retail locations. In addition to violating Penal Code Section 308.2, which provides that no person may sell one or more cigarettes other than in a sealed and properly labeled package, the licensee should not be engaging in the sale or any other transfer of cigarettes or tobacco products while the license is suspended or revoked.

**This Proposal**

This proposal would prohibit a license holder from gifting or displaying for sale cigarettes or tobacco products during a period of suspension or after revocation of a license. This proposal is intended to provide the necessary clarification to licensees that gifting cigarettes or tobacco products or the displaying of such products in retail stock in a retail sales area is prohibited during periods of license suspension or revocation, thereby avoiding further violations of the Licensing Act. Such violations are punishable, in part, by the seizure and forfeiture of all cigarettes and tobacco products, which could have a substantial financial impact on the licensee.

*Section 22971 of the Business and Professions Code is amended to read:*

22971. For purposes of this division, the following terms shall have the following meanings:

- (a) "Board" means the State Board of Equalization.
- (b) "Importer" means an importer as defined in Section 30019 of the Revenue and Taxation Code.
- (c) "Distributor" means a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- (d) "Manufacturer" means a manufacturer of cigarettes or tobacco products sold in this state.
- (e) "Retailer" means a person who engages in this state in the sale of cigarettes or tobacco products directly to the public from a retail location. Retailer includes a person who operates vending machines from which cigarettes or tobacco products are sold in this state.
- (f) "Retail location" means both of the following:
  - (1) Any building from which cigarettes or tobacco products are sold at retail.
  - (2) A vending machine.
- (g) "Wholesaler" means a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.
- (h) "Cigarette" means a cigarette as defined in Section 30003 of the Revenue and Taxation Code.
- (i) "License" means a license issued by the board pursuant to this division.
- (j) "Licensee" means any person holding a license issued by the board pursuant to this division.
- (k) "Sale" or "sold" means a sale as defined in Section 30006 of the Revenue and Taxation Code.
- (l) "Tobacco products" means tobacco products as defined in subdivision (b) of Section 30121 and subdivision (b) of Section 30131.1 of the Revenue and Taxation Code.
- (m) "Unstamped package of cigarettes" means a package of cigarettes that does not bear a tax stamp as required under Part 13 (commencing with Section 30001) of Division 2 of the Revenue and Taxation Code, including a package of cigarettes that bears a tax stamp of another state or taxing

jurisdiction, a package of cigarettes that bears a counterfeit tax stamp, or a stamped or unstamped package of cigarettes that is marked "Not for sale in the United States."

(n) "Person" means a person as defined in Section 30010 of the Revenue and Taxation Code.

(o) "Package of cigarettes" means a package as defined in Section 30015 of the Revenue and Taxation Code.

(p) (1) "Control" or "controlling" means possession, direct or indirect, of the power:

(A) To vote 25 percent or more of any class of the voting securities issued by a person.

(B) To direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract (other than a commercial contract for goods or nonmanagement services), or otherwise provided; however, no individual shall be deemed to control a person solely on account of being a director, officer, or employee of such person.

(2) For purposes of subparagraph (B) of this subdivision, a person who, directly or indirectly, owns, controls, holds, with the power to vote, or holds proxies representing 10 percent or more of the then outstanding voting securities issued by another person, is presumed to control such other person.

(3) For purposes of this division, the board may determine whether a person in fact controls another person.

(q) "Law enforcement agency" means a sheriff, a police department, or a city, county, or city and county agency or department designated by the governing body of that agency to enforce this chapter or to enforce local smoking and tobacco ordinances and regulations.

(r) "Brand family" has the same meaning as that term is defined in paragraph (2) of subdivision (a) of Section 30165.1 of the Revenue and Taxation Code.

(s) ~~The amendments made to this section by the act adding this subdivision shall become operative May 1, 2007.~~ "Gifting" means any transfer of title or possession without a consideration, exchange, or barter, in any manner or by any means whatsoever of cigarettes or tobacco products purchased for resale under a license issued pursuant to this division prior to suspension or revocation of that license.

(t) "Displaying for sale" means placing cigarettes or tobacco products in a vending machine or in retail stock for the purpose of selling or gifting the cigarettes or tobacco products. It is presumed that cigarettes or tobacco products, clearly and easily visible in retail stock, are displayed for sale.

*Section 22980.2 of the Business and Professions Code is amended to read:*

22980.2. (a) A person or entity that engages in the business of selling cigarettes or tobacco products in this state without a license or after a license has been suspended or revoked, and each officer of any corporation that so engages in business, is guilty of a misdemeanor punishable as provided in Section 22981.

(b) Each day after notification by the board or by a law enforcement agency that a manufacturer, wholesaler, distributor, importer, retailer, or any other person required to be licensed under this act offers cigarette and tobacco products for sale or exchange without a valid license for the location from which they are offered for sale shall constitute a separate violation.

(c) Continued sales, gifting, or displaying for sale of cigarettes or tobacco products without a license or after a notification of suspension or revocation shall constitute a violation subject to the actions described in ~~of~~ Section 22981, and shall result in the seizure of all cigarettes and tobacco products in the possession of the person by the board or a law enforcement agency. Any cigarettes and tobacco products seized by the board or by a law enforcement agency shall be deemed forfeited.

*Section 22980.3 of the Business and Professions Code is amended to read:*

22980.3. (a) Licenses issued pursuant to this division shall be subject to suspension or revocation for violations of the provisions of this division or the Revenue and Taxation Code as provided in this section.

(1) In addition to any applicable fines or penalties for a violation, upon first conviction of a violation, a licensee shall receive a written notice from the board detailing the suspension and revocation provisions of this act. At its discretion, the board may also suspend a license for up to 30 days.

(2) In addition to any applicable fines or penalties for a violation, upon a second conviction of a violation within four years of a previous violation the license shall be revoked.

(b) The date of the occurrence of a violation shall be used to calculate the duration between subsequent violations. A violation shall be noted in the license record at the board only after judicial conviction or final adjudication of a violation.

(1) Upon updating a record for a violation triggering a suspension, the board shall serve the licensee with a notice of suspension and shall order the licensee to immediately cease the sale, gifting, or displaying for sale of cigarettes or tobacco products on the effective date and during the entire period of the suspension.

(2) Upon updating a record for a violation triggering a revocation, the board shall serve the licensee with a notice of revocation and shall order the

licenseholder to cease the sale, gifting, or displaying for sale of cigarettes or tobacco products on the effective date of the revocation.

~~(c) Upon notice of suspension, the board shall serve the licensee with a notice of suspension and shall order the licensee to immediately cease the sale of cigarettes or tobacco products. Continued sales, gifting, or displaying for sale of cigarettes or tobacco products after the notification of effective date of suspension shall constitute a violation of the licensing provisions of this division and shall result in the revocation of a license.~~

(d) Upon completion of a suspension period, a license shall be reinstated by the board upon certification that all outstanding debts of that retailer or wholesaler that are owed to a wholesaler or distributor for the purchase of cigarette and tobacco products are paid.

(e) After a revocation, a previously licensed applicant may apply for a new license after six months. The board may, at its discretion, issue a new license.

(f) Upon updating a license record for a violation, suspension, or revocation to a license of a person or entity that owns or controls more than one location, the board shall send notice in writing of the violations, suspensions, or revocations within 15 days of the board's action to the address included in the application and listed on the license for receipt of correspondence or notices from the board.

(g) Upon suspension or revocation of a license pursuant to this section, the board shall notify all licensed distributors and wholesalers by electronic mail within 48 hours of the suspension or revocation of that license. All licensed distributors and wholesalers shall provide the board and shall update, as necessary, an electronic mail address that the board can use for purposes of making the notifications required by this subdivision.

(h) Violations by a licensee at one location may not be accumulated against other locations of that same licensee. Violations accumulated against a prior owner at a licensed location may not be accumulated against a new owner at the same licensed location.

(i) For purposes of this section, a violation includes violations of the Revenue and Taxation Code relating to cigarettes and tobacco products, and violations of this division. Only one violation per discrete action shall be counted towards a suspension or revocation of a license.