



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date Introduced:	02/27/09	Bill No:	SB 602
Tax:	Cigarette and Tobacco Products Licensing Act	Author:	Padilla
Related Bills:	SB 601 (Padilla) SB 603 (Padilla)		

BILL SUMMARY

Relative to the Cigarette and Tobacco Products Licensing Act of 2003¹ (Licensing Act), this bill would:

- Prohibit the Board from issuing a cigarette and tobacco products retail license (retail license) for a location in an “area of overconcentration,” as defined; and
- Allow the Board to take action relating to the licensure of retailers who have violated the Stop Tobacco Access to Kids Enforcement (STAKE Act) and misdemeanor provisions at any time and makes changes to 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.

ANALYSIS

Area of Overconcentration
Business and Professions Code Section 22973.3

CURRENT LAW

Chapter 2, License for Retailers of Cigarettes and Tobacco Products, of the Licensing Act (commencing with Section 22972) provides that a retailer who sells cigarette and tobacco products in this state is required to have in place a license to engage in the sale of cigarettes and tobacco products and conspicuously display the license at each retail location in a manner visible to the public. A retail license is not assignable or transferable and can not be sold between businesses. A person who obtains a retailer license and stops doing business, or never starts doing business, or whose license is suspended or revoked, is required to immediately surrender the license to the Board.

A retailer that owns or controls more than one retail location where cigarette and tobacco products are sold is required to obtain a separate license for each retail location. Each retailer is required to submit a one-time license fee of one hundred dollars (\$100) with each application and may submit a single application for those licenses with a license fee of one hundred dollars (\$100) per location. A "retail location" is defined to mean any building, including a residence, from which cigarettes or tobacco products are sold at retail or a vending machine.

Additionally, Section 22973 authorizes the Board to investigate the truthfulness and completeness of the information provided in a retailer’s application. The Board may also issue a license without further investigation to an applicant for a retail location if that applicant holds a valid license from the Department of Alcoholic Beverage Control

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

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(ABC) for that same location. A license is valid for a 12-month period, and is renewed annually.

Section 22973.1 provides that the Board is required to issue a license to a retailer upon receipt of a completed application and payment of the fees, unless otherwise specified. Any person or retailer convicted of a felony under the Cigarette and Tobacco Products Tax Law would not be issued a license, or if that person holds a license, that license would be revoked. Any retailer who is denied a license may petition for a redetermination of the Board's denial within 30 days after service upon that retailer of the notice of the denial.

Chapter 3, License for **Wholesalers and Distributors** of Cigarettes and Tobacco Products, of the Licensing Act (commencing with Section 22975) requires that every distributor and wholesaler must annually obtain and maintain a license to engage in the sale of cigarettes or tobacco products. Every distributor and wholesaler must file an initial application and a renewal application accompanied by a fee of \$1,000 for each location. The fee is for a calendar year and may not be prorated. In addition, Chapter 4, License and Administration Fee for **Manufacturers and Importers**, of the Licensing Act (commencing with Section 22979) requires every manufacturer and importer to maintain a license to engage in the sale of cigarettes or tobacco products and to pay a one-time fee.

As provided in Sections 22990 and 22991 all moneys collected pursuant to of the Licensing Act are deposited in the Cigarette and Tobacco Products Compliance Fund (Compliance Fund) and are available for expenditure, upon appropriation by the Legislature, solely for the purpose of implementing, enforcing, and administering the Licensing Act.

PROPOSED LAW

This bill would add Section 22973.3 to the Licensing Act to prohibit the issuance of a retail license for a location in an “area of overconcentration,” which is defined as an area where the ratio of retail licenses to population in the census tract is greater than the ratio of retail licenses to population in the county overall.

This provision would be operative January 1, 2010.

BACKGROUND

In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the Board to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the Board has approximately 38,000 retailers and 1,000 distributors and wholesalers licensed to engage in the sale of cigarettes and tobacco products in California.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to prevent the proliferation of tobacco retail outlets in California communities by allowing overconcentration to be a condition for license denial.
2. **Board's mission and tasks.** The mission of the Board is to serve the public through fair, effective, and efficient tax administration. The provisions in this bill may represent a departure from our traditional “tax collection” functions. In general, the Board requires a license, permit, or registration for the various tax and fee programs

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that we administer. Essentially, the purpose of the licensing/registration/permit is to ensure collection of vital revenues for the state.

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. The licensing restrictions that this bill proposes appear to be related to health, public safety, or other non-tax purposes. Is the Licensing Act the proper venue for the proposed changes?

3. **What is an “area of overconcentration?”** Although this bill provides a definition for “area of overconcentration,” there is no definition for “population in the census tract” or “population in the county.” Without a definition of these terms the Board would have the responsibility of determining what population base to use and how often the population base would be updated, and thereby having an effect on which counties will be affected by this provision.

With respect to alcohol licensing restrictions, BPC Section 23958 requires the ABC to deny a retailer license if issuing the license would result in “undue concentration” of licensed retailers within a defined area. Section 23958.4 goes on to further define “undue concentration” and provides definitions for “population within the census tract or census division” and “population in the county.” It is suggested that the author provide similar definitions that apply to an “area of overconcentration.”

4. **What would the effect be if there are areas of overconcentration?** If the statistics determine that there are existing areas of overconcentration, and if the Board was unable to issue a “new license” to a retailer in those areas, what would be the effect? Would the Board be precluded from issuing a “new license” until the ratio in the census tract is equal to or less than the ratio in the county? Would that be the same as a moratorium? Does the failure to include provisions for renewals or reinstatement mean that these licenses are considered “new licenses?” The Licensing Act currently provides that a license cannot be assigned or transferred, therefore if a business in an area of overconcentration is sold, then the new business could not receive a new license.

Alcohol licensing provisions (Section 23958.4) allow local governments to make a determination that a license in an area of undue concentration should be issued because of public convenience or necessity. The applicant for a retail license also has an opportunity to demonstrate to the ABC that a license should be issued in an area of undue concentration due to public convenience or necessity. Is there any consideration for local governments to determine if a cigarette and tobacco retail license should be issued for public convenience or necessity?

5. **What effect would this provision have on the Cigarette and Tobacco Products Compliance Fund?** Currently, the Board’s enforcement costs exceed the amount of revenues from the licensing fees with the shortfall made up by the various cigarette and tobacco tax funds (comprised of payments made to the state for the excise taxes on the distribution of cigarettes and tobacco products). If the number of retail licenses decreases and the Board has additional licensing investigation duties, then this may result in additional shortfalls in funding from the Compliance Fund.

As Assembly Bill 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 Cigarette and Tobacco Products Tax Law 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. AB 71 also 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. Since this measure is intended to address youth smoking and not the administration and collection of cigarette and tobacco products taxes, it is unclear how this measure would be funded. While the Licensing Act provides that all moneys in the Compliance Fund are to be used for the purpose of implementing, enforcing and administering the Licensing Act, this measure 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, which existing law requires to be used for the administration and collection of the cigarette and tobacco products taxes², are being used to fund enforcement of youth smoking.

6. **Local retailer licensing requirements and possible preemption issues.** Many local cities and counties in California have adopted local tobacco retailer licensing laws, which require a retailer to pay an annual licensing fee and be subject to suspension or revocation of that license if they are found selling tobacco to minors. Therefore, California retailers engaged in the sale of cigarettes or tobacco products and located in a city or county that has adopted local tobacco retailer licensing laws have two licenses (state and city/county). This also means that some retailers may have local licensing requirements and restrictions unrelated to payment of excise taxes. For example, Los Angeles county has a tobacco retail license program in which they indicate the necessity of having both a state and county license:

I already have a state tobacco license issued by the California Board of Equalization. Why do I need a tobacco license from the County?

The tobacco license issued by the California Board of Equalization is meant to curb tobacco tax fraud and the counterfeiting of tobacco products. That license does not preempt local jurisdiction from adopting local tobacco licenses. The Los Angeles County Board of Supervisors adopted this ordinance on December 18, 2007 to encourage responsible tobacco retailing and to discourage violations of federal, state and local tobacco-related laws, especially those that prohibit the sale or distribution of tobacco products to minors.

To legally sell tobacco products in the unincorporated areas of the County you will need a valid state tobacco license and a County tobacco license.
http://www.lapublichealth.org/tob/pdf/Retailer%20FAQ%20v.6_FINAL.pdf

Section 22971.3 provides that, with the exception of collection of state taxes, nothing in the Licensing Act preempts or supersedes local tobacco control laws. However, the proposed state licensing limitation appears to be related to health and public safety, rather than collection of state taxes. Would the proposed denial of a license in an area of overconcentration preempt or supersede related local tobacco control

² R&TC §§30124, 30125, 30131.3 and 30131.4.

laws? It may be necessary for the author to authorize the State to preempt or supersede local tobacco control laws in order to prevent conflicts between local and state licensing requirements.

7. **Related legislation.** SB 601 (Padilla) adds provisions to the Licensing Act to prohibit the issuance of a retail license for a location within 1,000 feet of a school, and limits retail licenses to “traditional retail locations.”

SB 603 (Padilla) under the Licensing Act, imposes an annual retailer fee, limits the total number of retailer licenses issued in a county, and provides for the transfer of a license under specified conditions.

Reporting Requirements related to Sales to Minors

Business and Professions Code Section 22974.8

CURRENT LAW

Section 22974.8 requires the Board to take action against a retailer convicted of a violation of either the Stop Tobacco Access to Kids Enforcement (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 Board 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 Board 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 Board 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 would be 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 Board'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 Act requires the Department of Health Services to:

- Implement an enforcement program to reduce the illegal sale of tobacco products to minors and to conduct sting operations using 15 and 16 year old minors granted immunity;
- Operate a toll-free number for the public to report illegal tobacco sales to minors;
- Assure that tobacco retailers post warning signs which include the toll-free number to report violations;
- Assure clerks check the identification of youthful-appearing persons prior to a sale;
- 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, or cigarette papers, or 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 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. Penal Code 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
- 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.

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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 ten dollars (\$10) for the first offense and fifty dollars (\$50) 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 and allow the Board to take action relating to the licensure of retailers who have violated the STAKE Act and misdemeanor provisions at any time and would require the State Department of Public Health or other enforcing agency to timely notify the Board of any conviction of a violation of either the STAKE Act or Penal Code Section 308.

This provision would be operative January 1, 2010.

COMMENTS

1. **Purpose.** This provision is intended to reduce illegal sales of tobacco products to minors by requiring state tobacco licensing authority to revoke or suspend retail tobacco licenses upon a recommendation of tobacco enforcement agencies.
2. **Violations by an agent or employee of a retail licensee.** This bill provides in Section 22974.8(d) that an enforcing agency provide timely notice of a conviction for a violation of either the STAKE Act or Section 308. However, it is not clear what is intended by this provision. There are not “convictions” under Section 308 and the convictions under the STAKE Act are usually against the employee and not the retailer. Typically, retailers hire clerks to make sales of products, such as in retail grocery stores. In such a case, it would be the clerk subject to the violation conviction, not the retailer, for making a sale of cigarettes to a minor. Violation convictions against a clerk would not be considered a “retailer” convicted of the STAKE Act for purposes of Board authorized actions pursuant to proposed Section 22974.8. Is the intent to require the Board to impose the specified sanctions against a retail licensee for violations enforced against an agent or employee of that retail licensee?

In addition, while enforcing agencies are required to notify the Board in a timely manner, what constitutes “timely?” Is it when a conviction is entered with a court? Is it when the conviction is enforced and all appeal rights extinguished? Or, is timely notice by the enforcing agency a general guide, subject to administrative and workload priority timelines? It is suggested that this provision provide more specifics as to what agency is responsible for notifying the Board of retailer convictions and to specify the number of days after a conviction that the agency is required to notify the Board.

3. **This bill removes the “trigger language” for the Board to impose penalties for STAKE Act and Section 308 violations.** Existing law provides that the Board’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 Board’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 2008, the results of the Youth Tobacco Survey found that 12.6 percent of youth were able to purchase cigarettes; this was an increase from the 2007 results which was 10.7 percent. In 2004 and 2006 when the survey results were over 13%, the Board had the authority to take action against a retailer, however the Board was never notified of a conviction, so it is questionable whether or not the Board would receive notices under this measure.

COST ESTIMATE

The provisions related to administering licenses in an “area of overconcentration” would result in significant administrative costs. The Board would need to notify retailers, revise applications and publications, develop procedures to define and identify areas of overconcentration, develop regulations and procedures to identify and issue licenses to retailers in an area of overconcentration, develop procedures to investigate retail licenses consistent with the restrictions, address legal issues, and answer inquiries from licensees. A detailed cost estimate is pending.

With respect to reporting requirements related to sales to minors, the Board would incur some costs for suspending or revoking retail licenses, processing appeals filed for a suspended or revoked licenses through the petition for redetermination process, 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.

REVENUE ESTIMATE

According to the Board’s Excise Taxes Division, there are approximately 38,200 licensed retail locations selling cigarettes or tobacco products in California. This figure has been fairly stable since the inception of the Licensing Act. On average, there are about 6,000 new licenses issued annually, with a corresponding amount of licenses surrendered.

The bill analysis for AB 2897 (Ch. 630, Stats. 1994), related to undue concentration of liquor licenses, noted that there would be an unknown minor state revenue loss if fewer licenses are granted. Does the same hold true for fewer cigarette and tobacco retail licenses? Although we are not able to quantify the revenue impact for the “area of overconcentration” provided in this bill, we believe it could result in a net loss of excise tax and licensing fees due to less convenience for consumers. As this bill progresses and more details are provided, the Board can develop a revenue estimate.

The proposed changes to reporting requirements related to sales to minors would not affect the state’s revenues.

Analysis prepared by:	John Cortez	(916) 445-6662	04/06/09
Contact:	Margaret S. Shedd	(916) 322-2376	
Is			0602-1jc.doc

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