



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

DRAFT

Date Amended:	05/28/09	Bill No:	SB 602
Tax:	Cigarette and Tobacco Products Licensing Act	Author:	Padilla
Related Bills:	SB 400 (Corbett) SB 601 (Padilla) SB 603 (Padilla)		

BILL SUMMARY

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

Summary of Amendments

Since the previous analysis, this bill was amended to provide penalty amounts for a first and second conviction of a violation, as specified, and to delete the provisions related to an area of overconcentration.

ANALYSIS

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.

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

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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.

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 requires 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 (DPH) 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. The Board would be authorized to take action against a retailer for a violation even if the state or local enforcing agency does not notify the Board in a timely manner. “Timely manner” is defined as “when the conviction is obtained and all appeal rights are exhausted.”

The penalty structure for convictions of a violation of either the STAKE Act or Penal Code Section 308 have been changed to the following:

- Upon the first conviction the retailer will receive from the Board a warning letter detailing the conditions and terms for suspension or revocation of the retail license, and shall be assessed a fine of \$750. The DPH will also provide training on tobacco control laws to the retailer and its employees.
- Upon the second conviction the retailer shall be assessed a fine of \$1,500 and the Board shall suspend the retailer’s license for 25 days.
- Upon the third conviction the Board shall revoke the retailer’s license.

“Conviction of a violation” includes a conviction under Section 308 of the Penal Code, or a final administrative adjudication imposing a civil penalty under the STAKE Act.

A retailer will be prohibited from petitioning the Board for an offer in compromise for a third or any subsequent violation of either the STAKE Act or Penal Code Section 308 that occurs within 36 months of the initial violation.

Requires the DPH, and the Department of Alcoholic Beverage Control (ABC) to provide the Board, upon request, any necessary information regarding retailers to implement the provisions.

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 under specified circumstances.
2. **The May 28, 2009 amendments** provide penalty amounts for a first and second conviction of a violation, as specified, and delete the provisions related to an area of overconcentration (those provisions were amended into SB 603). The **May 18, 2009** amendments provided local governments with the exclusive authority to grant public convenience or necessity determinations, define terms related to an “area of overconcentration,” authorized suspension of a retailer’s license for specified violations, and specified information that the ABC and DPH may share with the Board. The **April 28, 2009 amendments** (1) clarified that transfers of retail licenses are prohibited except for license transfers in an “area of overconcentration,” (2) revised the penalty structure for violations or convictions related to illegal sales to minors, (3) prohibited a licensee from appealing a suspension or revocation and from filing an offer in compromise related to illegal sales to minors, and (4) requires DPH and ABC to provide the Board, upon request, any necessary information regarding retailers to administer this measure. The **April 21, 2009** amendments allowed the Board to take action against retailers who have violated the STAKE Act or had misdemeanor violations. The **April 13, 2009** amendments allow a local governing body or the Board to issue a license to retail locations for public convenience or necessity.
3. **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 Penal Code Section 308. However, it is not clear what is intended by this provision. 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.
4. **This bill removes the “trigger language” for the Board to impose penalties for STAKE Act and Penal Code 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

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never notified of a conviction of a violation, so it is questionable whether or not the Board would receive notices under this measure.

5. **Additional administrative concerns.** The Board has several administrative concerns regarding the amendments to Section 22974.8, including, but not limited to the following:

- Subdivision (a)(4) provides that the Board would send a notice to the retailer prior to suspending or revoking the license, with the notice to include instructions for appealing the license suspension or revocation. However, in the April 28th amendments to this bill, the author deleted the existing provisions that authorized the retailer to appeal a suspension or revocation to the Board within 30 days of the notification. The appeal provisions should be clarified so that the retailer and the Board understand their rights and responsibilities. Board staff is available to work with the author's office in drafting appropriate amendments.
- Subdivision (c) was amended to provide the Board the ability to take action against a retailer for a violation, even if the state or local enforcing agency does not timely notify the Board. The Board is unsure if this subdivision works with the 36-month period that applies to revocations as specified in subdivisions (d)(2), or if no time constraint applies to suspensions and financial penalties, or if the Board is expected to otherwise obtain information about the violations and take the appropriate action. This subdivision requires clarification. The Board suggests striking out the provisions authorizing the Board to take action against a retailer even when not timely notified by a local agency. Without notification, the Board would not have information of a "conviction of a violation."
- Subdivision (d)(1) prohibits a licensee from petitioning the Board for an offer in compromise for a third or any subsequent violation of the STAKE Act or Penal Code Section 308 that occurs within 36 months of the initial violation. The Board notes that there are no provisions in the Licensing Act for a licensee to petition the Board for an offer in compromise. It does not, therefore, appear that this prohibition is necessary and the Board would suggest striking this subdivision.
- Subdivision (d)(2) has been amended to allow the Board to revoke a license for a third violation that occurs within any 36-month period. This would appear to allow the Board to take license revocation action for a third violation that was not "timely reported." Additionally, the penalties set forth in subdivision (b) are mandatory, while this subdivision appears discretionary. The language related to revocations should be clarified so that the retailer and the Board understand their rights and responsibilities. Board staff is available to work with the author's office in drafting appropriate amendments.
- Subdivisions (d)(3) and (f) both appear to address the question of when a violation or a conviction is final. However, as noted in our analysis of SB 400 (Kuehl, 2005), not all violations of the STAKE Act are appealed and heard before an administrative law judge. Such violations include those where the fines imposed pursuant to the STAKE Act are simply paid upon receipt of a demand letter and the violation is not contested. Board staff is concerned that uncontested violations where the retail licensee pays the fine may not be considered "final administrative adjudication" for purposes of the Board

imposing the sanctions provided in this measure. Penal Code Section 308 violations that are not prosecuted would not be considered a conviction for purposes of this measure. Clarification is required to ensure proper notice to the Board of a “conviction of a violation” in order for the Board to properly administer the penalties set forth in this section.

6. **Related legislation.** SB 400 (Corbett) was gutted and amended to revise the definition of “tobacco products” for purposes of the Cigarette and Tobacco Products Licensing Act to include a battery-powered device that can provide inhaled doses of nicotine by delivering a vaporized solution (known as electronic cigarettes).

SB 601 (Padilla) adds provisions to the Licensing Act to prohibit the issuance of a retail license for a location within 600 feet of a school, except in cases of public convenience or necessity, limits retail licenses to “traditional retail locations”, authorizes the DPH to petition the Board to specify other “traditional” retail locations through regulation, and proposes the transfer of a retail license. SB 601 was held under submission by the Senate Appropriations Committee.

SB 603 (Padilla) under the Licensing Act, imposes an annual retailer fee, limits the total number of retailer licenses issued in an “area of overconcentration,” and prohibits the issuance of a retail license for a location within 600 feet of a school, except in cases of public convenience or necessity.

COST ESTIMATE

The Board would incur major costs in administering the provisions related to sales to minors. Costs would be related to 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.

The costs associated with administering the provisions in this measure, operative January 1, 2010, are estimated to be \$496,000 for fiscal year 2009-10, \$2.28 million for fiscal year 2010-11, \$2.41 million for fiscal year 2011-12, and \$2.46 million for all other outgoing fiscal years.

REVENUE ESTIMATE

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

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