



*California State Board of Equalization,
Legislative and Research Division*

LEGISLATIVE BULLETIN



State Capitol Building (from the East) c.1945
Photo courtesy of California State Archives

SPECIAL TAXES AND FEES LEGISLATION 2010

SPECIAL TAXES LEGISLATION
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Assembly Bill 1004 (Portantino) Chapter 417

Delay of Solid Waste Postclosure Fee

Effective January 1, 2011. Amends Sections 48000 and 48010, 48012, and 48013 of the Public Resources Code.

BILL SUMMARY

Among other things, this bill delays, from January 1, 2012, to July 1, 2012, the 12 cent per ton integrated waste management (IWM) fee increase imposed upon each operator of a solid waste landfill whose owner elects to participate in the State Solid Waste Postclosure and Corrective Action Trust Fund (Fund).

Sponsor: Waste Management

LAW PRIOR TO AMENDMENT

Under current law, Division 30 (commencing with Section 40000) of the Public Resources Code, known as the *California Integrated Waste Management Act of 1989* (Act), imposes an IWM fee on each operator of a disposal facility based on the amount, by weight or volumetric equivalent, as determined by the Department of Resources Recycling and Recovery (CalRecycle), of all solid waste disposed of at each disposal site. Existing law provides that the use of solid waste for beneficial reuse in the construction and operation of a solid waste landfill, including use of alternative daily cover, is not considered disposal for purposes of the Act.

The fee is established by CalRecycle at an amount that is sufficient to generate revenues equivalent to the approved budget for that fiscal year, including a prudent reserve, but shall not exceed \$1.40 per ton. The fee is currently set at \$1.40 per ton of solid waste disposed.

The IWM fee is collected by the Board of Equalization (BOE) and, after payment of refunds and administrative costs of collection, deposited in the Integrated Waste Management Account. The money in the account is used by CalRecycle, upon appropriation by the Legislature, for the following purposes:

- The administration and implementation of the Act, and
- The state water board's and regional water board's administration and implementation of the *Porter-Cologne Water Quality Control Act* at solid waste disposal sites.

On and after January 1, 2012, the IWM fee will increase by 12 cents per ton upon each operator of a solid waste landfill that notifies CalRecycle that it elects to participate in the Fund, but the increase will only become operative if CalRecycle receives, on or before July 1, 2011, letters of participation in the Fund from landfill operators representing at least 50 percent of the total volume of waste disposed of in 2010.

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Proceeds from the 12 cent per ton fee will be deposited in the Fund, after payment of refunds and administrative costs of collection. The fees, revenues, and all interest earned will be available to CalRecycle, upon appropriation by the Legislature, to carry out the purposes of the Fund program.

AMENDMENT

Among other things, this bill delays by six months the dates imposed with respect to activation of the Fund, including the date by which CalRecycle must receive letters of participation in the Fund from landfill owners, as specified, to determine if the increase in the fee would become operative, and the operative date of that increase.

In addition to the delayed date, the bill also amends Section 48000 to make changes to who is subject to the increased fee. Currently, the fee increase would be imposed upon each operator that itself notifies CalRecycle of its election to participate in the Fund. This bill revises the language to impose the increased fee upon each operator of a solid waste landfill whose owner notifies CalRecycle of its election to participate in the Fund. A corresponding change from operator to owner was also made for purposes of the criteria that must be met for the fee increase to become operative.

This bill also amends Section 48010 to change from the operator, to the owner, of a landfill electing to participate in the Fund whose name, address and other information necessary to administer and collect the fee must be provided by CalRecycle to the BOE.

Further, the bill makes necessary agency name reference corrections from the California Integrated Waste Management Board (CIWMB) to CalRecycle.

This bill is effective January 1, 2011.

BACKGROUND

Assembly Bill 939 (Chapter 1095, Statutes of 1989) enacted the Act. Among other things, AB 939 added Section 48000 to the Public Resources Code to require each operator of a solid waste landfill to pay a quarterly fee, in addition to the solid waste fee, to the BOE based on all solid waste disposed of at each disposal site on or after January 1, 1990. The fee was initially set at \$0.50 per ton of waste disposed of during the period of January 1, 1990, through June 30, 1990. The fee for waste disposed of during the period of July 1, 1990, through June 30, 1991, was to be set by CalRecycle at an amount sufficient to generate revenues equivalent to the approved budget for the 1990-91 fiscal year, including a prudent reserve, but not to exceed \$0.75 per ton.

In 1993, [AB 1220](#) (Chapter 656) consolidated the solid waste fee and the IWM fee into a single IWM fee. The IWM fee was set at \$1.34 per ton for the 1994-95 fiscal year. That bill also provided that, commencing with the 1995-96 fiscal year, the amount of the fee established by CalRecycle be an amount sufficient to generate adequate revenues, as specified, but in an amount not to exceed \$1.40 per ton.

[AB 1647](#) (Chapter 978, Statutes of 1996), among other things, added Section 41781.3 to the Public Resources Code to state that the use of solid waste for beneficial reuse in the construction and operation of a solid waste landfill, including use of alternative daily cover, which reduces or eliminates the amount of solid waste

being disposed, constitutes diversion through recycling and is not considered disposal for purposes of the Act.

In 2009, [AB 274](#) (Chapter 318) created the State Solid Waste Postclosure and Corrective Action Trust Fund, intended to create a dedicated funding mechanism to protect the General Fund from expenditures resulting from the failure of the owner or operator of a closed solid waste landfill, who was required to maintain evidence of financial ability, to comply with a final order from CalRecycle related to compliance with postclosure and corrective action requirements. Among other things, that bill will increase, on and after January 1, 2012, the IWM fee by an additional 12 cents per ton upon each operator of a solid waste landfill that elects to participate in the Fund.

IN GENERAL

Effective January 1, 2010, [Senate Bill 63](#) (Chapter 21, Statutes of 2009), among other things, abolished the CIWMB and transferred its duties and responsibilities to CalRecycle, within the California Natural Resources Agency, which that bill also created.

COMMENTS

1. **Purpose.** This bill is intended to create a dedicated funding mechanism to protect the General Fund from expenditures resulting from the failure of the owner or operator of a closed solid waste landfill, who was required to maintain evidence of financial ability, to comply with a final order from the CIWMB related to compliance with postclosure and corrective action requirements.
2. **CalRecycle information to BOE should identify feepayers.** This bill imposes the increased IWM fee upon each operator of a solid waste landfill whose owner notifies CalRecycle that it elects to participate in the Fund. Since the imposition of the fee would be triggered based on a landfill owner's election to participate in the Fund, the bill also revises the information provided to the BOE from CalRecycle to instead include landfill owner information. However, the increased IWM fee is imposed on the operator, not the owner. Accordingly, this bill should be amended to provide the BOE the information necessary to notify and register each operator that would be subject to the increased fee. The following language is suggested:

48010. (a)(4) The Department of Resources Recycling and Recovery shall provide to the state board the name and address, and any other information necessary to administer and collect the fee imposed pursuant to paragraph (2) of subdivision (b) of Section 48000, of every operator of a solid waste landfill whose owner has elected~~owner of a landfill electing~~ to participate in the State Solid Waste Postclosure and Corrective Action Trust Fund on or before August 31, 2012.

Assembly Bill 1585 (Committee on Accountability) Chapter 7
State Government Reports – Requirements and Repeal Date

Urgency measure, effective February 26, 2010. Amends Sections 9795 and 10242.5 of, and adds Section 10231.5 to, the Government Code.

BILL SUMMARY

This bill, among other things, requires that the summary of a report prepared by a state agency be submitted to each Member of the appropriate house of the Legislature by that agency, instead of by the Legislative Counsel. This measure also requires that any bill requiring a report to include a repeal date.

Sponsor: Committee on Accountability and Administrative Review

LAW PRIOR TO AMENDMENT

Existing law requires or requests state and local agencies to prepare and submit various reports to the Governor, the Legislature, and other state entities. Government Code Section 9795 provides that any report required or requested by law to be submitted by a state or local agency to the members of either house of the Legislature generally, shall instead be submitted to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly. However, this provision does not apply if the report is required or requested by law to be directed to a committee or other specified entity within the Legislature. Existing law provides that when a state agency submits reports to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly, it must provide one hard copy and one electronic copy. Each report must include a summary of its contents, not to exceed one page. The Legislative Counsel is required to provide a copy of the summary to each Member of the appropriate house of the Legislature within two working days of receipt of the summary.

Current law requires a state agency report to include an Internet Web site where the report can be downloaded and a telephone number to call to order a hard copy of the report.

Government Code Section 10242.5 requires the Legislative Counsel to provide a list of reports due from various state and local agencies and to update this list on a continual basis. A list of agencies with reports due can be accessed on the California Legislative web site at www.agencyreports.ca.gov/.

Under various California Codes, the Board of Equalization (BOE) is currently required to produce six statutorily-mandated reports, which includes the BOE's annual report. The following table lists the reports due from the BOE:

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Section	Report	Due Date
Government Code Section 13292.5	Requires specified state agencies, including the BOE, to submit a report identifying and describing the status of its liquidated and delinquent accounts.	No later than October 31 of each year
Government Code Section 15616	Report shall include: (1) The assessed value of state-assessed and locally assessed real and personal property in each county and the assessed value of state-assessed and locally assessed property in each incorporated city or town, and (2) Information concerning other BOE-administered taxes. (Information required under this section is reported and published in the BOE's annual report.)	Annually (BOE's annual report)
Government Code Section 15624	Report on all requests made by any county, city, or city and county or the assessor related to the following: (1) rendering advisory or other services, and (2) furnishing auditor and appraisal personnel to aid local taxing authorities in making post audits of personal property.	On the opening day of each regular session of the Legislature
Government Code Section 15646	Final survey report on local assessment procedures and practices employed by county assessors.	On the opening day of each regular session of the Legislature
Health and Safety Code Section 25178.1	Quarterly report on hazardous waste disposal, facilities, and generator fees collected pursuant to Health and Safety Code Sections 25174.1, 25205.2, and 25205.5	On the 15 th day of the second month following each quarter
Revenue and Taxation Code Section 30166.1	Report evaluating the average actual costs, including labor for applying indicia or impressions, bonding, warehousing, and leasing stamping equipment, including case cutters and packers, associated with applying stamps or meter impressions to cigarette packages.	No later than July 1, 2005, with updates every two years

AMENDMENT

This bill amends Government Code Sections 9795 and 10242.5 of, and adds Section 10231.5, to revise the procedures for mandatory reporting requirements by state agencies and deletes certain obsolete reports. Among its provisions, this bill:

- Requires that the summary of any report made by a state agency to either house of the Legislature be submitted to each Member of the appropriate house by that agency, instead of by the Legislative Counsel.
- Provides that any report required or requested by law to be submitted by a state agency to the Members of either house of the Legislature must instead be submitted as a printed copy to Legislative Counsel and the Secretary of the Senate and as an electronic copy to the Chief Clerk of the Assembly.

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- Provides that any bill introduced or amended in either house of the Legislature requiring a state agency to submit a report on any subject to the Legislature or Legislative Counsel must include a provision repealing or making inoperative the reporting requirement, no later than four years following the operative date of the bill or four years after the due date of any report required every four or more years.
- Requires the Legislative Counsel, in drafting a bill for introduction or an amendment that imposes a reporting requirement to include a provision repealing or making inoperative the reporting requirement, four years after the date on which the requirement becomes operative, unless the person requesting the bill or amendment directs Legislative Counsel to do otherwise, as specified.
- Contains a listing of existing reports, as specified, identified as obsolete, to be deleted from the list of reports maintained by Legislative Counsel.

The provisions of the bill became effective on February 26, 2010.

LEGISLATIVE HISTORY

There have been several bills introduced during the last few legislative sessions related to state agency reporting requirements. These include:

[SB 1641 \(Oropeza, 2008\)](#) would have allowed the BOE and the Franchise Tax BOE to send any required report to the Legislature in electronic format instead of printing and mailing paper copies of the report. This bill was vetoed by Governor Schwarzenegger, and the veto message states:

“The historic delay in passing the 2008-2009 State Budget has forced me to prioritize the bills sent to my desk at the end of the year’s legislative session. Given the delay, I am only signing bills that are the highest priority for California. This bill does not meet that standard and I cannot sign it at this time.”

[AB 219 \(Nakanishi, 2005\)](#) would have required all state agencies to provide the California State Library with electronic copies of their publications. This bill was held in the Senate Appropriations Committee suspense file.

[AB 2482 \(Campbell, 2004\)](#) would have required state agencies to submit reports electronically and submit printed copies of the reports upon request. This bill failed passage in the Assembly Business and Professions Committee.

[AB 2198 \(Liu, 2004\)](#) would have established procedures for state agencies to submit mandated reports. In addition, this bill would have required state agencies to have electronic versions of reports available for download. This bill was never heard in committee.

COMMENTS

1. **Purpose.** This bill was the result of a hearing held by the Assembly Accountability and Administrative Review Committee in February 2009, which examined reporting requirements of state and local agencies and compliance in fulfilling those requirements. According to Committee staff, the main purpose of this bill was to create efficiencies relating to required reports due to the Legislature from state and local agencies.

2. **Implementing the new reporting requirements has a minor impact on the BOE's operations.** Current law requires state agencies, including the BOE, to submit one printed copy and one electronic copy to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly. The bill clarifies reports to be submitted as a printed copy to the Legislative Counsel and the Secretary of the Senate, and as an electronic copy to the Chief Clerk of the Assembly. Current law provides that each report must include a one-page summary of its contents, which the Legislative Counsel is required to distribute to each member of the Legislature. The bill instead requires all state agencies, including the BOE, to submit a one-page electronic summary directly to each member of the Legislature.
3. **The bill requires Legislative Counsel to eliminate certain reports from the current list of required reports.** There are 12 BOE-related reports to be deleted from the current list maintained by Legislative Counsel. Of the 12 reports, 11 are one-time reports for which the BOE has completed and submitted those reports in accordance with the law. The report due pursuant to RTC 30166.1, which requires the BOE to provide updates to the Legislature every two years, evaluates the average actual costs incurred by cigarette distributors to apply tax stamps to cigarette packages. The BOE submitted the first report in July 2006 and the update in March 2008. BOE staff is currently working on the second update of this report.

Assembly Bill 2195 (Silva) Chapter 168

Burden of Proof

Effective January 1, 2011. Adds Section 524 to the Evidence Code.

BILL SUMMARY

This bill adds a new provision to the Evidence Code to specify that the burden of proof is with the Board of Equalization (BOE) in any assertion of penalties for intent to evade or fraud and requires a clear and convincing evidence standard for such assertions, as specified.

Sponsor: Assembly Member Jim Silva

LAW PRIOR TO AMENDMENT

Under existing law, Evidence Code Section 115 provides, in part, "Except as otherwise provided by *law*, the burden of proof requires proof by a preponderance of the evidence." (Emphasis added.) Evidence Code Section 160 defines "law" to include constitutional, statutory, and decisional law.

The Revenue and Taxation Code allows for civil penalties and even criminal sanctions for persons committing fraud or intent to evade the tax. California's Evidence Code does not specifically provide for the standard of proof with regard to civil tax fraud. However, the standard of proof has been defined through decisional (case) law. Specifically, the California Court of Appeal in *Marchica v. State Board of Equalization* (1951) 107 Cal.App.2d 501 determined that the standard of proof in civil tax fraud cases was the clear and convincing evidence standard. A 2002 decision of the Ninth Circuit Court of Appeals, *California State Board of Equalization v. Renovizor's, Inc.*, 282 F.3d 1233, relied on the *Marchica* decision in concluding that "clear and convincing evidence must be shown to establish civil tax fraud under California law." Effective January 9, 2003, the BOE amended its Regulation 1703(c)(3)(C) to state this agency's existing standard of proof: "Fraud or intent to evade shall be established by clear and convincing evidence." The 2002 *Renovizor's* decision was the impetus for the BOE's amendment of Regulation 1703(c)(3)(C). However, the *Renovizor's* opinion, as a federal court decision, is not controlling on matters of state law. (See, e.g., *Howard Contracting v. G.A. MacDonald Constr. Co* (1998) 71 Cal.App. 4th 38, 52.)

AMENDMENT

This bill adds Section 524 to the Evidence Code to provide that in any civil proceeding to which the BOE is a party, the BOE shall have the burden of proof by clear and convincing evidence in sustaining its assertion of penalties for intent to evade or fraud against a taxpayer, with respect to any factual or legal issue relevant to ascertaining the liability of a taxpayer.

The provisions of this bill are effective January 1, 2011.

IN GENERAL

As a matter of law, fraud is never presumed, but must be proven and the burden of proof is on the BOE. (*Marchica v. Board of Equalization, supra*, 107 Cal.App.2d 501.)

However, the standard of proof in administrative and civil tax cases is not “beyond a reasonable doubt,” as it is in a criminal prosecution. (See *Helvering v. Mitchell* (1938) 303 U.S. 391.) Rather, the standard of proof is the “clear and convincing” standard as set forth in the BOE’s Regulation 1703(c)(3)(C). It is rare to find direct evidence that fraud has occurred, and thus it is often necessary and appropriate to make the determination based on circumstantial evidence. In addition, it would be difficult and unreasonable for the BOE to assert fraud and then require the taxpayer to prove it never occurred.

BACKGROUND

Previous measures which included the Evidence Code change proposed in this bill, as well as provisions that shifted the burden of proof in court or administrative tax proceeding with respect to any factual issue relevant to ascertaining the tax liability of a cooperating taxpayer, were introduced in the 2007-08 Legislative Session ([AB 1600](#) and [AB 2727](#), La Malfa) and in 2009 ([AB 1387](#), Tran). The Assembly Revenue and Taxation Committee held all three measures.

Also, during the 2005-06 Legislative Session, a similar bill to those described above was introduced ([SB 633](#), Dutton). That measure was never heard in committee.

In the 1997-98 Legislative Session (after the California Court of Appeal’s 1951 decision in *Marchica*, but before the Ninth Circuit Court of Appeals’ 2002 decision in *Renovizor’s*), [AB 1631](#) (Sweeney, et al.) was amended on April 15, 1998, to, among other things, clarify that the FTB and BOE have the burden of proof by “clear and convincing evidence” regarding penalties for intent to evade or fraud cases against the taxpayer. This measure died in the Assembly Appropriations Committee.

COMMENTS

1. **Purpose.** To codify the clear and convincing standard set forth in the BOE’s Regulation 1703.
2. **Amendments.** The April 21, 2010 amendment deleted the provision that would have shifted the burden of proof from taxpayers to the BOE and the Franchise Tax Board in collecting taxes or fees in any court or administrative tax proceeding as specified, under certain conditions. This amendment was suggested by the Assembly Revenue and Taxation Committee.
3. **The Evidence Code change is consistent with the BOE’s current practice as well as case law, and makes sense.** It is appropriate that the standards for asserting penalties for fraud or intent to evade be the same at both the administrative and judicial levels. This bill codifies the decision in the *Marchica* case so that the Evidence Code is clear that in the case of civil tax fraud, the standard of proof shall be the clear and convincing standard. It also codifies the BOE’s Regulation 1703(c)(3)(C), which states the BOE’s existing practice that, in asserting fraud, the BOE has to prove fraud or intent to evade by clear and convincing evidence.

Assembly Bill 2433 (Ruskin) Chapter 139

Use of Employment Development Department Information

Effective January 1, 2011. Amends Section 1095 of the Unemployment Insurance Code.

BILL SUMMARY

This BOE-sponsored bill authorizes the BOE to admit into evidence Employment Development Department's confidential employment tax information in hearings and court proceedings to resolve disputes regarding the BOE's administration of a fee or tax law, the amount owed by a tax or feepayer, or the amount to be refunded.

Sponsor: Board of Equalization

LAW PRIOR TO AMENDMENT

Under existing Unemployment Insurance Code (UIC) Section 322, the Employment Development Department (EDD) may exchange information with state agencies, as specified. The BOE is an authorized receiver of the EDD confidential information and has an existing reciprocal sharing agreement for the exchange of information.

Section 1094 of the UIC specifies that unless specifically provided, the information obtained by the EDD in the administration of the UIC is confidential, not open to the public, and shall be for the exclusive use and information of the director of EDD in discharge of his or her duties. Additionally, Section 1094 provides that the information released to authorized entities, such as the BOE, is not admissible as evidence in any action or special proceeding, other than those actions or special proceedings described in Section 1095 or provided for in the UIC. Wages and amounts to be deducted and withheld, as specified in the UIC, may be disclosed in the administration of franchise and income tax laws.

Section 1095 of the UIC authorizes certain state, local, and federal government agencies to use the EDD confidential information as evidence in an action or special proceeding. Some of the current authorized uses include determining entitlement to general assistance, investigating disability income, administering child support programs, investigating workers comp insurance fraud, and verifying employment history.

As an authorized receiver, the BOE uses the EDD's confidential information to verify a feepayer's reported number of employees for both the environmental fee and the occupational lead poisoning prevention fee. The applicability and amount of the fee for both programs is based, in part, on the size of a feepayer's employee workforce. The BOE also uses EDD's information to discover unregistered feepayers and underreported taxes and/or fees, and to verify refunds. In addition, the EDD's information is useful for collection purposes and as a basis for claims in bankruptcy. Consequently, the EDD's information is critical to arriving at the correct resolution of a fee dispute heard by the BOE in an administrative hearing or litigated in a court proceeding.

BACKGROUND

Beginning January, 1, 2007, [Assembly Bill 1803](#) (Ch. 77, Stats. 2006) expanded the environmental fee to include general partnerships, limited partnerships, limited liability partnerships, limited liability companies and sole proprietorships, as well as corporations. The expansion of the fee was intended to address the erosion in the annual environmental fee base, which was occurring in part because fewer businesses were being classified as corporations. The implementation of this legislation resulted in an increase in the number of registrants by approximately 7,700. Thus there was a corresponding increase in revenue and an increase in appealed assessments, thereby placing greater pressure on limited audit resources to review payroll records in spite of the fact that the program only received one audit position to manage the increased workload.

Moreover, in the past, the BOE had relied upon an interagency agreement with the EDD in which the BOE believed that the EDD information could be used in “any action or special proceeding,” as long as it was presented in summary form. Recently, the EDD reiterated to BOE staff that Section 1094 provisions specify that the confidential information released to authorized entities cannot be admitted as evidence in “any action or special proceeding” unless specifically authorized by Section 1094 or 1095, or some other statutory provision in the UIC.

The most recent information sharing agreement with EDD, which covers the period November 1, 2008 through June 30, 2011, specifies that the EDD will provide access to its confidential information, provided the BOE “maintains confidentiality of the information as required by UIC Section 1094.” There is no ambiguity in the most recent agreement, which has prompted the BOE to change its practices in using the information, and in the case of both the environmental fee and the occupational lead poisoning prevention fee, ensures that the BOE would need to audit an employer’s actual payroll records. However, even examination of the actual payroll records does not eliminate the need for the BOE to access and compare actual payroll to that reported to EDD, which still results in the potential for a BOE assessment to be based on EDD payroll records. Auditing actual payroll records is intrusive to the feepayer, costly to the state, and inefficient, when this same information is readily available to the BOE by directly accessing EDD information.

AMENDMENT

This measure amends UIC Section 1095 to specifically authorize the BOE to admit into evidence EDD’s confidential employment tax information in BOE hearings and court proceedings to resolve disputes regarding the BOE’s administration of a fee or tax law, the amount owed by a tax or feepayer, or the amount to be refunded.

The use of this information to sustain a taxpayer liability, or verify a refund, is consistent with the use of other confidential information obtained by the BOE. This bill also eases the compliance burden on employers, as the use of EDD information is less burdensome than providing access to their payroll records. This measure clarifies in statute that the BOE may efficiently and effectively use the information it currently obtains from the EDD to enforce the tax and fee laws it administers.

COMMENTS

1. **Purpose.** To clarify in statute that the BOE may admit as evidence in any action or special proceeding the information it currently obtains from the EDD.
2. **The BOE currently has access to EDD confidential information.** As stated, the BOE is an authorized receiver of the EDD confidential information. In September 2009 the BOE completed its most recent information sharing agreement for the exchange of confidential information with the EDD. This bill allows the BOE to use the confidential information it already received from the EDD. The BOE views this bill as being an efficient and effective use of information sharing and believes it is less burdensome on affected taxpayers.

If the BOE is unable to use the EDD information as evidence in a BOE hearing, then we may need to request the actual payroll records from the taxpayer. This alternative places an additional compliance burden on the taxpayer and increases the workload for both the BOE and the taxpayer.

3. **The environmental fee and the occupational lead poisoning prevention fee are directly affected by the EDD information.** The applicability and amount of the fee for both programs is based, in part, on the size of a feepayer's employee workforce. The BOE uses the data obtained from EDD as a basis for an audit or assessment, for failing to file a return, for a refund request, or to identify businesses that failed to register as a feepayer with the BOE. Without passage of this bill the BOE would still be able to perform these functions, but would be prohibited from using that same information in an appeal to be heard and decided by the BOE. In those situations, the BOE would need to request the employer records from the feepayer.
4. **It is the intent of the BOE to continue to protect the confidentiality of the EDD information.** The BOE takes seriously its responsibility to protect the confidential employment information and intends to make it policy that, with respect to employee information gathered and used by the BOE in administering the above fee programs, we will include only the last four digits of the social security number and the first two initials of the first and last name, along with other relevant compensation or employment information for the employees. The BOE worked in collaboration with the EDD on the proposed language and we will continue to work cooperatively in addressing our reciprocal responsibilities and concerns regarding taxpayer confidentiality.

Assembly Bill 2496 (Nava) Chapter 265

***CIGARETTE AND TOBACCO PRODUCTS: TOBACCO DIRECTORY LAW (TDL)
MANUFACTURING & IMPORTER ADDITIONAL LICENSING REQUIREMENTS
EXPANDS INSPECTION AUTHORITY – VIOLATIONS OF TDL
PROHIBITIONS: ACQUIRING CIGARETTES WITH STAMP IN VIOLATION OF TDL
RETAILER 60 DAY PERIOD: PRODUCTS SUBJECT TO SEIZURE
EXPANDS ACTIONS FOR VIOLATIONS OF TOBACCO DIRECTORY
FOREIGN TOBACCO PRODUCT MANUFACTURERS: REQUIREMENTS TO SUBMIT FORMS
FACE-TO-FACE SALES: ADDITIONAL RESTRICTIONS***

Effective January 1, 2011. Among its provisions, amends Sections 22979, 22980, and 22980.1 of the Business and Professions Code, and amends Sections 30101.7 and 30165.1 of, and adds Section 30165.2 to, the Revenue and Taxation Code.

BILL SUMMARY

Among other things, this bill makes the following Board of Equalization (BOE) related changes:

- Imposes additional licensing requirements upon every manufacturer and every importer for the purpose of enforcement of the Model Statute¹ and Tobacco Directory Law in order to be eligible to obtain and maintain a license under the Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act);
- Expands the BOE's inspection authority under the Licensing Act to any site where evidence of activities involve violations of the Tobacco Directory Law;
- Prohibits for purposes of the Licensing Act an importer, distributor, wholesaler, distributor functioning as a wholesaler, or retailer from purchasing, obtaining, or otherwise acquiring any package of cigarettes to which a stamp is affixed in violation of the Tobacco Directory Law;
- Allows a licensed retailer a 60-day period to possess, transport, and sell cigarettes removed from the Tobacco Directory before such products become subject to seizure and destruction;
- Expands the actions the BOE may take for violations of the Tobacco Directory's prohibitions from a distributor to any person for, in part, selling, acquiring and possessing cigarettes of a tobacco product manufacturer or brand family not included in the Tobacco Directory;
- Requires a foreign tobacco product manufacturer to submit to the BOE certain Alcohol and Tobacco Tax and Trade Bureau forms; and
- Adds to the Cigarette and Tobacco Products Tax Law additional non-face-to-face sales restrictions, including new delivery seller requirements.

Sponsor: California Attorney General

¹ Article 3 (commencing with Section 104555), Chapter 1, Part 3, Division 103 of the Health and Safety Code.

LAW PRIOR TO AMENDMENT

Cigarette and Tobacco Products Tax Law (Tax Law). Under existing law, the BOE administers the Tax Law (Part 13 commencing with Section 30001) of Division 2 of the Revenue and Taxation Code). Revenue and Taxation Code Section 30451 specifically provides that the BOE shall enforce the provisions of the Tax Law and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement.

The current excise tax on cigarettes is 87 cents per package of 20 (43 ½ mills per cigarette). The cigarette tax is paid through the use of stamps or meter impressions. An appropriate stamp is affixed to, or an appropriate meter impression is made on, each package of cigarettes prior to the distribution of the cigarettes.

The tobacco products tax rate is determined annually by the BOE and based on the March 1 wholesale cost of cigarettes. Currently, the surcharge rate for fiscal year 2010-11 is 33.02 percent. The tobacco products tax is paid through the use of a return on which the distributor reports the wholesale cost of the tobacco products distributed and calculates the tax due.

Face-to-Face Sale. Section 30101.7 defines a “face-to-face sale” to mean a sale in which the purchaser is in the physical presence of the seller or the seller’s employee or agent at the time of the sale. A face-to-face sale does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller’s physical presence.

Persons may engage in a non-face-to-face sale of cigarettes to a person in California provided that both of the following conditions are met:

- The seller has fully complied with all of the requirements of Chapter 10A (commencing with Section 375) of Title 15 of the United States Code, otherwise known as the Jenkins Act.
- The seller has fully complied with either of the following requirements:
 - (1) All applicable California taxes on the cigarettes have been paid.
 - (2) The seller includes on the outside of the shipping container for any cigarettes shipped to a resident in California from any source in the United States an externally visible and easily legible notice located on the same side of the shipping container as the address to which the package is delivered stating as follows:

"IF THESE CIGARETTES HAVE BEEN SHIPPED TO YOU FROM A SELLER LOCATED OUTSIDE OF THE STATE IN WHICH YOU RESIDE, THE SELLER HAS REPORTED PURSUANT TO FEDERAL LAW THE SALE OF THESE CIGARETTES TO YOUR STATE TAX COLLECTION AGENCY, INCLUDING YOUR NAME AND ADDRESS. YOU ARE LEGALLY RESPONSIBLE FOR ALL APPLICABLE UNPAID STATE TAXES ON THESE CIGARETTES."

Tobacco Directory Law. Also incorporated in the Tax Law is the **Tobacco Directory Law**, which more effectively enforces and promotes the purpose of the Model Statute. The Tobacco Directory Law, which can be found in Section 30165.1, requires, in part, the Attorney General to develop and publish on its Internet web site a directory listing the following:

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- All tobacco manufacturers that have provided current, timely, and accurate certifications that certify the tobacco manufacturer is either a participating manufacturer under the Master Settlement Agreement (MSA), or is a non-participating manufacturer (NPM) that has made all required escrow payments.
- All brand families that are listed in the certifications, except as specified.

No person may affix, or cause to be affixed, any tax stamp or meter impression to a package of cigarettes, or pay the tax levied on a tobacco product defined under Section 30165.1 as a cigarette, unless the brand family of cigarettes or tobacco product, and the tobacco product manufacturer that makes or sells the cigarettes or tobacco product, are included on a compliance list posted by the Attorney General.

The Tobacco Directory Law also prohibits a person from:

- Selling, offering, or possessing for sale in this state, or importing for personal consumption in this state, cigarettes of a tobacco product manufacturer or brand family not included in the Attorney General's directory, and
- Selling, distributing, acquiring, holding, owning, possessing, transporting, importing, or causing to be imported cigarettes that the person knows or should know are intended to be distributed in violation of the Tobacco Directory's stamping prohibitions or are not included in the Attorney General's directory.

Section 30435 authorizes an employee of the BOE, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of any place for which there is evidence of failure to comply with the requirements of the MSA, including, but not limited to, the Tobacco Directory Law. Any cigarette or tobacco products that are stamped or to which a meter impression is affixed, or for which tax is paid, in violation of the Tobacco Directory Law, is subject to seizure and forfeiture, pursuant to Section 30436 regardless of whether the violation is subject to a defense, as provided. The seized cigarettes or tobacco products are forfeited to the state and must be destroyed.

Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act). Division 8.6 of the Business and Professions Code established the Licensing Act, which created a statewide licensure program for the sales of cigarettes and tobacco products to address the unlawful distribution and untaxed sales of cigarettes and tobacco products.

In part, Sections 22979 and 22979.21 require every manufacturer and every importer to obtain and maintain a license to engage in the sale of cigarettes or tobacco products. In order to be eligible for a license, a manufacturer or importer is required to meet specified requirements, such as consenting to jurisdiction of the California courts for the purpose of enforcement of the Licensing Act, appoint a registered agent for service of process in this state, and identify the registered agent to the BOE.

The Licensing Act also authorizes, pursuant to Section 22980, any peace officer or BOE employee granted limited peace officer status to enter any place, as described, and conduct inspections. In part, inspections may be at any place at which cigarettes or tobacco products are sold, produced, or stored, or at any site where evidence of activities involving evasion of cigarette or tobacco products may be discovered.

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The Licensing Act also imposes specified prohibitions and penalties in Business and Professions Code Sections 22980.1 through 22982. Among the prohibitions, subdivision (g) of Section 22980.1 provides that no importer, distributor, or wholesaler, or distributor functioning as a wholesaler, or retailer, shall purchase, obtain, or otherwise acquire any package of cigarettes to which a stamp or meter impression may not be affixed in accordance with the Tax Law, or any cigarette obtained from a manufacturer or importer that cannot demonstrate full compliance with all requirements of the federal Cigarette Labeling and Advertising Act (15 U.S.C. Sec. 13335a et seq.) for the reporting of ingredients added to cigarettes. Section 22981 provides that any violation of the Licensing Act by any person, except as otherwise provided, is a misdemeanor. Each offense is punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

Federal Jenkins Act. Chapter 10A of Title 15 of the United States Code (also known as the Jenkins Act) requires any person that sells, transfers, or ships cigarettes or smokeless tobacco for profit in interstate commerce and ships the cigarettes or smokeless tobacco into a state that imposes a tax on cigarettes or smokeless tobacco to:

- File with the Attorney General and the state's tobacco tax administrator a statement setting forth certain information, including name, address and telephone number.
- Not later than the 10th of each calendar month, file with the tobacco tax administrator a memorandum or a copy of the invoice for each and every shipment of cigarettes or smokeless tobacco made during the previous calendar month in that state. This information is required to show, among other things, the name and address of the person to whom the shipment was made, the brand, and quantity of the shipment.

The Jenkins Act also requires each delivery seller to comply with specified shipping (labeling requirements, weight restrictions, age verification) and recordkeeping requirements, all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the state, and tax collection requirements. A delivery seller is defined as any person who makes a sale of cigarettes or smokeless tobacco to a consumer if: (1) the consumer submits the order by telephone or other method of voice transmission, mail, Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase is made, and (2) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

The Jenkins Act was recently amended by S. 1147, known as the Prevent All Cigarette Trafficking Act or PACT Act. The PACT Act became operative July 1, 2010 and expanded the Jenkins Act to include smokeless tobacco and incorporated "delivery seller" provisions, which among other things require delivery sellers to comply with the state's laws imposing excise taxes, licensing, and stamping requirements.

AMENDMENT

Among other things, this bill makes changes to the Licensing Act and Tax Law to enhance enforcement of the MSA and subsequent legislation (Model Statute and Tobacco Directory Law).

Licensing Act. This bill amends Business and Professions Code Section 22979 to require a manufacturer or importer to consent to the jurisdiction of the California courts and waive any sovereign immunity defense for the purpose of enforcement of the Model Statute and the Tobacco Directory Law and regulations adopted pursuant thereto. In lieu of waiving any sovereign immunity defense, a manufacturer or importer is allowed to file with the Attorney General a surety bond written in favor of the state of California and conditioned on the performance by the manufacturer or importer of all its duties and obligations under the Licensing Act, Model Statute, and the Tax Law, and the regulations adopted thereto.

This bill also amends Section 22980 to allow any peace officer or BOE employee granted limited peace officer status, upon presentation of appropriate credentials, to enter any site where evidence of activities involving violations of the Tobacco Directory Law may be discovered. Such inspections must be performed in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered.

And lastly, this bill amends Section 22980.1 to prohibit an importer, distributor, wholesaler, distributor functioning as a wholesaler, or retailer from purchasing, obtaining, or otherwise acquiring any package of cigarettes to which a stamp or meter impression may not be affixed in accordance with the Tobacco Directory Law.

Tax Law. This bill amends Section 30101.7 to prohibit a person from making a delivery sale of cigarettes or tobacco products, as defined, to a consumer in California unless the delivery seller fully complies with the Jenkins Act, obtains and maintains a Licensing Act license, complies with the Model Statute, and reports its delivery sales to the Attorney General. The BOE is authorized to provide to the Attorney General information relative to a seller's failure or attempt to comply with the PACT Act and the Jenkins Act. The bill provides that the BOE will be required to enforce only the licensing and tax provisions of Section 30101.7.

The bill also makes numerous amendments to Section 30165.1, the Tobacco Directory Law. Those amendments impacting the BOE's administration of the Tax Law are as follows:

- Requires a distributor or wholesaler, within seven days of receiving (1) a notice of pending administrative action, (2) a notice of removal of any tobacco product manufacturer or brand family from the Tobacco Directory, or (3) a notice declining to remove a tobacco product manufacturer or brand family from the directory, to provide a copy of the notice to each of its existing customers. A licensed distributor and wholesaler could continue to purchase, stamp (distributor), or sell products affected by the notice of pending administrative action for no more than 40 days following the issuance of that notice.

A licensed retailer will be provided a 60 day period from the effective date of the manufacturer or brand family's removal from the directory to possess, transport, and sell the affected tax-stamped cigarettes. On and after the 61st day, the

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cigarettes are contraband and become subject to seizure and destruction by the BOE.

- Expands the prohibition for any person selling, offering, or possessing for sale in this state or import for personal consumption in this state, to also include shipping or otherwise distributing into or within this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory.
- Expands from a distributor to any person the imposition of penalties for violating the Tobacco Directory Law. In the case of the first offense, the BOE will be authorized to revoke or suspend the license or licenses issued to the person by the BOE. In addition to distributors, this amendment will now subject wholesalers and retailers to license revocation and suspension. And the licenses subject to suspension and revocation will be expanded from licenses issued to distributors and wholesalers under the Tax Law to also include a retailer, distributor and wholesaler licenses issued under the Licensing Act. In the case of a second or any subsequent offense, the BOE will be authorized to impose a civil penalty in an amount not to exceed the greater of five times the retail value of the cigarettes, as defined, or five thousand dollars (\$5,000).

This bill also adds Section 30165.2 to the Revenue and Taxation Code to require as a condition of selling cigarettes in the state, every tobacco product manufacturer, as defined in the Tobacco Directory Law, whose cigarettes are to be sold in the state whether directly or through a distributor, importer, retailer, or similar intermediary or intermediaries to, at the election of the tobacco product manufacturer, either:

- Submit to the Attorney General a true and correct copy of each and every applicable return of the tobacco product manufacturer.
- Submit to the United States Treasury a request or consent under Internal Revenue Code Section 6103(c) authorizing the Alcohol and Tobacco Tax and Trade Bureau to disclose the applicable returns of manufacturer to the Attorney General.

A foreign tobacco product manufacturer whose cigarettes are imported into the United States by an importer or importers will be required to submit, or cause each of its importers to submit, to the Attorney General and the BOE each and every applicable return, form, or report filed with the Alcohol and Tobacco Tax Trade Bureau and the United States Customs and Border Patrol that includes any information about cigarettes of that foreign tobacco product manufacturer imported into the United States, and a report of the sales of each brand family in this state, as specified. The Attorney General and the BOE will be prohibited from disclosing any applicable returns or any information contained therein, except as necessary to carry out the functions and duties of the Department of Justice or BOE, or as otherwise provided.

A tobacco product manufacturer who does not comply with the above requirements will, after 30 days notice by the state to the tobacco product manufacturer of the failure to comply, be removed, along with its brand families, from the tobacco directory unless the tobacco product manufacturer has brought itself into compliance by the end of the 30-day period.

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Any tobacco manufacturer or importer that intentionally provides any applicable return containing materially false information shall be liable for a civil penalty in an amount not to exceed the greater of either of the following:

- Five times the retail value of the cigarettes or tobacco products defined as cigarettes under this section and about which false information was provided.
- Five thousand dollars (\$5,000).

The Attorney General will be authorized to promulgate regulations to implement and carry out proposed Section 30165.2.

Tax Law. This measure also includes Legislative declarations and findings that provide the following:

- Cigarette smoking and tobacco products present serious public health concerns to the state and to the citizens of the state.
- Cheap cigarettes and tobacco products are being made available through the evasion of state taxes, fees, payments, and deposits required for sales of cigarettes and tobacco products in this state.
- Cheap cigarettes and tobacco products pose a public health hazard because their lower price makes them more accessible and affordable to youth to become addicted to smoking and tobacco products.
- It is the policy of the state to require that cigarettes and tobacco products be sold at prices that reflect the payment of all state taxes, fees, payments, and deposits required by law on sales of cigarettes and tobacco products in this state in order to prevent the public health hazard posed by cheap cigarettes and tobacco products, especially to our youth.

This bill is effective January 1, 2011.

IN GENERAL

Under the November 1998 MSA between the State of California, other states, and tobacco product manufacturers, each tobacco company must make annual payments to the participating states in perpetuity, totaling an estimated \$206 billion through 2025. California's share of the revenue is projected to be \$25 billion over the next 25 years, based on receiving approximately 12.8% of the total payments. The payments will be split 50/50 between state and local governments under a Memorandum of Understanding negotiated by the Attorney General and various local jurisdictions (cities and counties) which had also sued the tobacco companies.

The payment provisions of the MSA apply to "participating manufacturers" which include both original signatories to the MSA, as well as other companies which subsequently agree to be bound by the MSA. In return for these payments, the states have agreed to release the cigarette manufacturers from all claims for damages, penalties, and fines. In addition, the participating manufacturers have agreed to certain non-economic terms that restrict their advertising and marketing practices and control their corporate behavior. The primary purpose of these restrictions is to prevent marketing of cigarettes to minors and thereby reduce smoking by minors.

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The MSA prompted states to enact the Model Statute by creating a significant financial incentive: Settling States that enact and “diligently enforce” the Model Statute would not be subject to severe reductions to their MSA payments. All Settling States have enacted Model Statutes requiring NPM reserve (escrow) funds, including California. California’s “Model Statute” was enacted in 1999 pursuant to [Senate Bill 822](#) (Escutia, Chapter 780). That bill, among other things, authorized the BOE to adopt any regulations necessary to ascertain, based on the amount of state excise tax paid on cigarettes, the number of tax paid cigarettes sold by tobacco products manufacturers who do not participate in the MSA.

While the Settling States, such as California, have been aggressively enforcing the provisions of the Model Statutes, enforcement has proved costly and cumbersome. Accordingly, almost every state has enacted Complementary Legislation to make state enforcement of the Model Statutes more effective and thereby promote the purposes for which the Model Statutes were enacted.

In 2003, California enacted Complementary Legislation (Tobacco Directory Law) pursuant to [Assembly Bill 71](#) (Horton, Chapter 890). Generally, these statutes:

- Require the Attorney General to develop and publish on its Internet web site a directory of all tobacco manufacturers that have provided current, timely, and accurate certifications that certify the tobacco manufacturer is either a participating manufacturer under the MSA, or is a NPM that has made all required escrow payments, and all brand families that are listed in the certifications, except as specified.
- Prohibit a person from affixing, or cause to be affixed, any tax stamp or meter impression to a package of cigarettes, or pay the tax levied on a tobacco product defined as a cigarette, unless the brand family of cigarettes or tobacco product, and the tobacco product manufacturer that makes or sells the cigarettes or tobacco product, are included on a compliance list posted by the Attorney General.
- Subject violators, principally manufacturers and distributors, to civil and criminal penalties and license suspension or revocation.

COMMENTS

1. **Purpose.** This measure is intended to allow for better enforcement of Internet and other delivery sales of cigarettes and tobacco products in this state, strengthen the Attorney General’s and BOE’s ability to diligently enforce the Model Statute and Tobacco Directory Law, and provide retailers relief of any financial hardship resulting from cigarettes and tobacco product inventory that immediately becomes illegal to sell upon removal from the Tobacco Directory.
2. **Key amendments.** The **August 18, 2010 amendments**, among other things, (1) provided that surety bonds required in lieu of a sovereign immunity defense or for elevated-risk nonparticipating manufacturers would be filed with the Attorney General, (2) clarified the BOE’s role with respect to delivery sales, (3) aligned the allowable actions by a retailer during the sell-off period with the prohibitions, (4) revised the findings and declarations, and (5) made other clarifying, non-substantive technical changes. The amendments also added double jointing language to prevent chaptering out the amendments to Business and Professions Code Section 22979, which is also proposed to be amended by [AB 2733](#) (Ruskin), in the event both AB 2733 and [AB 2496](#) are enacted. The

July 15, 2010 amendments related to the BOE (1) allowed a manufacturer or importer to post a surety bond in lieu of waiving sovereign immunity and remove the requirement to provide a copy of any corresponding federal permit for purposes of granting or maintaining a Licensing Act license, (2) made a manufacturer or importer license subject to revocation if the licensee raises a sovereign immunity defense, (3) incorporated the delivery sales provisions into existing face-to-face sale provisions, (4) revised the notification provisions for pending administrative action and removal from the Tobacco Directory, and (5) deleted the provisions that would have expanded the BOE's seizure authority. The **May 20, 2010 amendments** made corrections to the Legislative Counsel's Digest and other non-substantive changes. The **May 13, 2010 amendments**, among other things, (1) clarified that the Attorney General shall transmit a written notice of a tobacco manufacturer or brand family removed from the Tobacco Directory to each licensed wholesaler, (2) deleted the refund provisions for distributors, wholesalers, and retailers in possession of removed cigarettes on the effective date of their removal from the directory, (3) required foreign tobacco product manufacturers, or their importers, to submit each and every applicable return, as defined, to the BOE, and (4) made changes to the delivery sales order provisions, such as removing references to "track and trace" and revising definitions. The **April 14, 2010 amendments**, among other things, (1) added additional manufacturer and importer requirements to obtain and maintain a Licensing Act license, (2) deleted the requirement for an appropriate stamp or meter impression to be made upon any rolls of tobacco described as a little cigar, (3) required the BOE to file a lien for a tax penalty in the same amount as the unpaid refund against, and to revoke the Licensing Act license of, a manufacturer, importer, distributor or wholesaler that fails to provide a refund of all moneys paid for product removed from the Tobacco Directory, (4) incorporated delivery seller provisions for specified non-face-to-face sales of cigarettes or tobacco products to a consumer, and (5) expanded the cigarettes subject to seizure by the BOE and forfeiture to the state to include packages that fail to meet the marking, labeling, and stamping requirements or provide or affix the information in the manner specified.

3. **What is the BOE's enforcement role for the Model Statute?** The BOE has several responsibilities with respect to "diligent enforcement" of the Model Statute, which protects the state's approximately \$900 million annual revenue payment stream from the MSA. The BOE's enforcement role, which coincides with administration of the Tax Law, is as follows:

- The Model Statute requires NPMs to place into a qualified escrow fund by every April 15 an amount, as specified, based on units sold during the previous year. "Units sold" is generally defined to mean the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer as measured by excise taxes collected by the state on packs bearing the excise tax stamp of the state. The BOE is authorized to adopt any regulations necessary to ascertain, based on the amount of state excise tax paid on cigarettes, the number of tax paid cigarettes sold by NPMs.

As a result of this provision, the BOE provides the Attorney General with annual statistics of cigarettes sold in California by NPMs. The BOE compiles this information measured by the excise tax reported to the BOE, which is

adjusted by BOE staff to remove brands that are considered a “cigarette” for tax purposes, but not for purposes of the Model Statute.

- The Tobacco Directory Law prohibits a distributor from affixing a tax stamp to a package of cigarettes, or paying the tax on a tobacco product defined as a cigarette, unless the brand family of cigarettes or tobacco product, and the tobacco product manufacturer that makes or sells the cigarettes or tobacco product, are included on Tobacco Directory². A violation of this prohibition could result in the revocation or suspension of the license or licenses of the distributor and/or a civil penalty and subject such products to seizure and forfeiture by the BOE.
- The Licensing Act requires every manufacturer or importer required to obtain and maintain a license to engage in the sale of cigarettes. In order to be eligible to obtain and maintain a license, a manufacturer or importer that is a “tobacco products manufacturer” pursuant to the Model Statute must 1) certify to the BOE that it is a “participating manufacturer” or is in compliance with the Model Statute, and 2) submit to the BOE a list of all its brand families. AB 71 also gave the authority to the BOE to revoke or suspend the license of a distributor for selling product not listed on the California Tobacco Directory.
- The Tax Law allows an employee of the BOE, upon presentation of the appropriate identification and credentials, is authorized to enter into, and conduct an inspection of, any building, facility, site, or place, for which there is evidence of the failure to comply with the requirements of the Model Statute or the Tobacco Directory Law. The Tax Law also authorizes the BOE to seize cigarettes or tobacco products to which a tax stamp is affixed, or tax paid, in violation of the Tobacco Directory.

4. **Should the Tobacco Directory Law and related enforcement provisions be in the Tax Law?** Revenue and Taxation Code Section 30451 requires the BOE to enforce the provisions of the Tax Law. The Tobacco Directory Law was added to the Tax Law in 2003 pursuant to [AB 71](#) (Ch. 890, J. Horton). Although the Tobacco Directory Law contains mostly non-tax provisions enforced by the Attorney General, it also includes provisions that appropriately tie-in with the Tax Law enforced by the BOE.

However, this bill proposes to expand the Tobacco Directory Law, much of it unrelated to the BOE’s enforcement and administration of the Tax Law. Since the Tobacco Directory Law is primarily related to enforcement of the Model Statute, it is suggested that the bill be amended to place the Tobacco Directory Law in the Health and Safety Code along with the Model Statute, which is located in Article 3 (commencing with Section 104555), Chapter 1, Part 3, Division 103 of the Health and Safety Code. It is further suggested that the current BOE Tobacco Directory Law responsibilities, which are tax-related, remain in the Tax Law.

In addition to maintaining only tax-related provisions within the Tax Law, these suggested amendments would more clearly define the BOE’s and Attorney General’s role for enforcement of the Model Statute and funding for those costs.

² Tobacco products commonly known as “little cigars” currently do not have to be listed in the tobacco directory in order to be lawfully sold in California. The AG may decide in the future to require that certain brands of little cigars be listed in this Directory.

Funding under the Tax Law is provided by the cigarette and tobacco products tax funds, specifically, the General Fund, Breast Cancer Fund, Cigarette and Tobacco Products Surtax Fund (Proposition 99), and the California Children and Families Trust Fund (Proposition 10).

5. **Notification of brand family or manufacturer removal from the Tobacco Directory.** Under current law, cigarettes or tobacco products to which a tax stamp is affixed, or for which tax is paid, is subject to seizure and forfeiture by the BOE at the time the manufacturer or any of its brand families are removed from the tobacco directory. When a manufacturer or brand family is removed from the Tobacco Directory, only distributors are notified of the removal by e-mail. Wholesalers and retailers must check the Tobacco Directory, which is located on the Attorney General's website, for recent changes to the directory, such as removals. As such, wholesalers and retailers are typically not aware that a manufacturer or a brand family has been removed from the directory when found by BOE inspectors to be selling, offering, or possessing for sale removed product. Cigarettes and tobacco products of a manufacturer or its brand families become illegal to sell, offer, or possess for sale upon removal from the Tobacco Directory, and are subject to seizure and forfeiture to the state.

To provide better notification of any action taken against manufacturers or brand families, this bill requires the Attorney General to provide notice to distributors and wholesalers of a pending administrative action, if the Attorney General declines to remove a manufacturer or brand family, or removal of a manufacturer or brand family from the directory, and within seven days of receiving such a notice from the Attorney General, to provide each existing customer with a copy of that notice. This provision is intended to ensure that all sellers receive a copy of the notices; however, there is no specific penalty or enforcement action for a distributor or wholesaler that fails to provide a copy of the removal notice to existing customers.

But even with proper notice of such removal, it is a financial hardship on retailers who have an inventory of the removed products that they can no longer sell. To address this hardship, this bill provides a licensed retailer a 60 day "sell off period" from the effective date of the removal notice to sell the affected tax-stamped product. A licensed retailer will also be allowed to possess and transport the removed product during that 60 day period.

6. **Penalty expanded beyond distributor for violations.** Under existing law, the Tobacco Directory, pursuant to Section 30165.1(i), imposes civil or criminal penalties upon a distributor for violations of the Tobacco Directory and authorizes the BOE to suspend or revoke the distributor's license. This bill expands those penalties to any person for violations, including all license holders (manufacturer, importer, distributor, wholesaler, and retailer). It also expands the licenses subject to suspension or revocation to include those issued under the Tax Law.

The expanded penalty provisions also includes consumers who purchase and/or import cigarettes not appearing on the directory, which could be tracked and enforced through the BOE's Cigarette and Tobacco Product Internet Program. That program focuses on the collection of California state excise taxes and use taxes from California consumers purchasing untaxed cigarettes and/or tobacco products from out-of-state Internet retailers, and/or by way of mail or telephone, for self-consumption in California.

7. **Suggested amendments.** BOE staff has suggested to the sponsor the following clarifying amendments:
- **Tax Law Section 30101.7.** This section contains a definition for the term “interstate commerce” that is not referenced within the section and therefore appears unnecessary. In addition, the term “Indian country” is only referenced within the definition of “interstate commerce” and appears unnecessary as well.
 - **Tax Law Section 30165.1(c)(3).** This paragraph, in part, requires that the Attorney General notify all licensed distributors and wholesalers of its recommendation to remove a manufacturer or brand family from the Tobacco Directory for cause. The distributor and wholesaler will be allowed to continue purchasing, stamping (distributor), and selling products subject to action for no more than 40 days following issuance of the notice of pending administrative action. Is it possible for the Attorney General action to remove or decline to remove a manufacturer or brand family to take more than 40 days? If administrative action exceeds that 40 day period, a distributor and wholesaler will be prohibited from purchasing, stamping, and selling products prior to a final determination by the Attorney General. What if the Attorney General ultimately declines to remove the manufacturer or brand family from the directory after the 40 day period has elapsed?

Assembly Bill 2733 (Ruskin) Chapter 607

**CIGARETTE AND TOBACCO PRODUCTS LICENSING ACT – SUSPENSION AND REVOCATION
PRODUCTS REMOVED FROM CLEAR AND EASILY VISIBLE DISPLAY
PUBLIC NOTICE
PROHIBITS GIFTING OF PRODUCTS**

Effective January 1, 2011. Amends Sections 22971, 22973.1, 22977.2, 22979, 22980.2, and 22980.3 of, and adds Sections 22971.5, 22980.4, and 22980.5 to, the Business and Professions Code.

BILL SUMMARY

This BOE-sponsored bill makes the following changes to the Cigarette and Tobacco Products Licensing Act of 2003 (Licensing Act):

- Requires all cigarettes and tobacco products to be removed from clearly and easily visible retail stock during a period of suspension or after a license has been revoked.
- Requires a suspended or revoked licensee to post a notice of that suspension or revocation at each public entrance and each cash register, as provided.
- Prohibits licensees who purchased cigarettes or tobacco products for resale under their license from gifting such products during the period of suspension or after a license has been revoked.

Sponsor: Board of Equalization (BOE)

LAW PRIOR TO AMENDMENT

The Licensing Act (Division 8.6 (commencing with Section 22970) of the Business and Professions Code) requires the BOE to administer a statewide cigarette and tobacco products license program to regulate the sale of cigarettes and tobacco products in the state. Every retailer, distributor, wholesaler, manufacturer and importer is required 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 BOE may take one of the following actions:

- First offense: the BOE 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 BOE 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.

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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 constitute 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 BOE'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 in which cigarettes or tobacco products are found to be in retail stock and clearly visible to customers. In such cases, BOE 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 bill provides 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 after revocation.

BOE 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. BOE 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.

AMENDMENT

Gifting and Displaying for Sale. This bill amends Business and Professions Code Section 22980.3 to require the BOE, upon updating a record for a violation triggering a suspension or revocation, to serve the licensee with a notice of suspension or revocation and order the licensee to cease the sale, gifting, and displaying for sale of cigarettes or tobacco products for the period of the suspension or after the license has been revoked. The notice of suspension must inform the licensee of the effective dates of the suspension or the effective date of the revocation. Continued sales or gifting of cigarettes or tobacco products after the effective date of suspension will constitute a violation of the Licensing Act and result in the revocation of a license.

Section 22980.2 is amended to provide that continued gifting of cigarettes and tobacco products without a valid license or after a notification of suspension or revocation will constitute a violation of the Licensing Act, which will be punishable by specified penalties and result in the seizure and forfeiture of all cigarettes and tobacco products in the possession of the person.

In addition, the bill adds Section 22980.4 to provide that a person who, after receiving a notice of suspension or revocation, continues to display for sale cigarettes or tobacco products will be subject to a civil penalty of one thousand dollars (\$1,000) for each offense and will not be subject to Section 22981.

This bill amends Section 22971 to alphabetize the defined terms and to define “displaying for sale” and “gifting” to mean the following:

- “Displaying for sale” means the placement of cigarettes or tobacco products in a vending machine or in retail stock for the purpose of selling or gifting the cigarettes or tobacco products. For purposes of this definition, the clear and easily visible display of cigarettes or tobacco products creates a rebuttable presumption that either were displayed for sale
- “Gifting” means any transfer of title or possession without consideration, exchange, or barter, in any manner or by any means, of cigarettes or tobacco products that have been purchased for resale under a license issued pursuant to the Licensing Act if the transfer occurs while the license is suspended or after the effective date of its revocation.

Notification. With respect to notices, this bill adds Section 22971.5 to consolidate the BOE’s notice requirements currently provided in Sections 22973.1(b)(5), 22977.2(b)(5), and 22979(f)(5). Section 22971 defines “notice” or “notification” to mean, unless as otherwise provided, the written notice or notification provided to a licensee by the BOE by either actual delivery to the licensee or by first-class mail addressed to the licensee at the address on the license.

Post a Notice of Suspension or Revocation. The bill adds Section 22980.5 to require a suspended or revoked retailer to post a notice of that suspension or revocation at each public entrance and each cash register, as specified. A retailer whose license is suspended will be required to post the notice at the retail location that is the subject of the suspension for the duration of the suspension, while a retailer whose license is revoked will be required to post the notice at the retail location that is the subject of the revocation for a 30-day period from the effective date of the revocation. A violation of these provisions will subject the suspended or revoked retailer to a one thousand dollar (\$1,000) penalty.

This bill also includes non-substantive housekeeping amendments to the Licensing Act.

This bill is effective January 1, 2011.

COMMENTS

1. **Purpose.** To prevent unintended sales or gifting of cigarettes or tobacco products 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. In addition, the bill is intended to prohibit any transfer of cigarettes or tobacco products while the license is suspended or after revocation.
2. **Key Amendments.** The **August 18, 2010** amendments added double jointing language to prevent chaptering out the amendments to Business and Professions Code Section 22979, which is also proposed to be amended by [AB 2496](#) (Nava), in the event both [AB 2733](#) and AB 2496 are enacted. The **July 15, 2010, amendments** made technical, non-substantive corrections.
3. **Preventing mistaken sales during suspension or after revocation of a license.** As previously explained, selling cigarettes or tobacco products during suspension or after revocation of a license is a violation of the Licensing Act and subjects such products to seizure.

When appealing the violation, the suspended retail license holder typically argues that no sale occurred because it was a mistake by their employee. To forestall such arguments, this bill requires all cigarettes and tobacco products to be removed from being clearly and easily visible as retail stock, which would indicate that such products are being displayed for sale. Furthermore, this bill requires a suspended or revoked licensee to post a notice of that suspension or revocation at each public entrance and each cash register to make it clear to both employees and customers that cigarettes or tobacco products cannot be sold while the license is suspended or after a license has been revoked.

4. **All transfers of cigarettes and tobacco products should cease during suspension and after revocation of a license.** This bill prohibits licensees who purchase cigarettes or tobacco products for resale under their Licensing Act license from gifting such products during the period of suspension or after a license has been revoked. This will address cases in which suspended or revoked licensees continue to engage in transferring cigarettes or tobacco products combined with other products or to their customers without compensation for those cigarettes or tobacco products as an incentive to continue patronizing their business.
5. **Related legislation.** [AB 2496](#) (Ch. 265, Nava), among other things, amends the Cigarette and Tobacco Products Tax Law and Licensing Act to enhance enforcement of the Model Statute and Tobacco Directory Law, which are implementing statutes of the Master Settlement Agreement.

Senate Bill 858 (Committee on Budget and Fiscal Review) Chapter 721

Collection Cost Recovery Fee

Urgency measure, effective October 19, 2010, but operative January 1, 2011. Among its provisions adds Sections 9035, 30354.7, 32390, 40168, 41127.8, 43449, 45610, 46466, 50138.8, 55211, and 60495 to the Revenue and Taxation Code.

BILL SUMMARY

In part, this budget trailer bill authorizes the Board of Equalization (BOE) to impose and collect a collection cost recovery fee on any person that fails to pay amounts due and owing.

Sponsor: Committee on Budget and Fiscal Review

LAW PRIOR TO AMENDMENT

Existing Chapter 4.3 (commencing with Section 16580) of Part 2 of Division 4 of Title 2 of the Government Code (GC), known as the Accounts Receivable Management (ARM) Act, provides that a participant, including the BOE, may have certain requirements, or be able to utilize certain methods, related to collections. Specifically, GC Section 16583.1 allows a state agency to impose a reasonable fee, not to exceed the actual costs, to recover the agency's collection costs on a past due account.

Existing law authorizes the BOE to use various collection actions to collect delinquent accounts receivables, including, but not limited to: bank levies, liens, wage garnishments, till-tap and keeper warrants, permit revocations, alcoholic beverage license suspensions, seizure and sale of assets, offsets, and court actions. The BOE's use of these tools is consistent with its established collection policies and procedures as provided in the Compliance Policy and Procedures Manual, Chapter 7, [Collections](#).

The State's procedures for collection of delinquent accounts are detailed in the State Administrative Manual (SAM) Section 8776 et seq.

Penalty relief provisions that are included in the various tax, fee, and surcharge laws in the Revenue and Taxation Code permit the BOE to provide penalty relief in those cases where the BOE finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect.

AMENDMENT

This bill adds Sections 6833 (Sales and Use Tax Law), 9035 (Use Fuel Tax Law), 30354.7 (Cigarette and Tobacco Products Tax Law), 32390 (Alcoholic Beverage Tax Law), 40168 (Energy Resources Surcharge Law), 41127.8 (Emergency Telephone Users Surcharge Law), 43449 (Hazardous Substances Tax Law), 45610 (Integrated Waste Management Fee Law), 46466 (Oil Spill Response, Prevention, and Administration Fees Law), 50138.8 (Underground Storage Tank Maintenance Fee

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Law), 55211 (Fee Collection Procedures Law), and 60495 (Diesel Fuel Tax Law), to the Revenue and Taxation Code to authorize the BOE to impose and collect a collection cost recovery fee on any person that fails to pay amounts due and owing. The collection fee shall be in an amount equal to the BOE's costs for collection, as reasonably determined by the BOE.

The fee may only be imposed if the BOE has mailed a demand notice to that person requiring payment and advising the person that continued failure to pay may result in collection action, including the addition of a collection fee. The fee is operative with respect to a demand notice for payment which is mailed on or after January 1, 2011.

Interest will not accrue on the collection fee, but the fee shall be collected in the same manner as the related unpaid tax or fee liability is collected.

The BOE may relieve the taxpayer of the fee if the BOE finds that a person's failure to pay the amount being collected is due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. Any person requesting relief from the collection fee must file a statement with the BOE, under penalty of perjury, stating the facts upon which the person bases the request for relief.

Funds received by the BOE will be deposited into the same tax or fee fund that the revenues derived from those taxes or fees are deposited.

The measure is effective immediately, but the collection fee is operative with respect to a demand notice for payment which is mailed on or after January 1, 2011.

IN GENERAL

Fees for collection of past due accounts are imposed by the Franchise Tax Board (FTB) and taxing agencies in other states. The FTB currently imposes a flat rate fee for collecting liabilities greater than \$100. As of July 2009, the fee was \$217 for individuals and \$413 for corporations.

The BOE contacted six other state taxing agencies to obtain information regarding collection fees. In general, the taxing agencies imposed a fee when a liability remained unpaid for 90-100 days. They also imposed the fee retroactively to all unpaid liabilities, and most taxing agencies have been imposing collection fees since 1988; the FTB's collection fee started in 1993.

BACKGROUND

Senate Bill SBx4 16 (Chapter 23, Stats. 2009), among other things, added GC Section 16583.1, which authorized state agencies to impose a fee to recover collection costs on past due liabilities.

COMMENTS

- 1. Purpose.** To provide specific authority within BOE's tax laws to collect a cost recovery fee using our normal collection actions.
- 2. This bill allows the BOE to collect the fee using our normal collection actions.** Government Code Section 16583.1 allows a state agency to impose a reasonable fee, not to exceed the actual costs, to recover the collection costs on a past due account. However, there are no current provisions that allow the BOE to obtain payment of the fee through involuntary collection actions, such as liens, levies, wage garnishments, and other collection actions.

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This bill is effective immediately, but the collection fee is operative with respect to a demand notice for payment which is mailed on or after January 1, 2011. The actual implementation date, amount of the fee, programming, notices, and other important administrative details will be addressed administratively by the BOE.

- 3. The relief of the collection fee is similar to the current relief of penalty provisions.** As mentioned previously, taxpayers may be relieved of a penalty in those cases where the BOE finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. The BOE will administer a request for relief from the collection fee in a manner that is consistent with the current relief of penalty provisions.

Senate Bill 1028 (Correa) Chapter 316

Interest: Daily Basis

Effective January 1, 2011. Adds Sections 6591.6, 7655.5, 8876.5, 12631.5, 30281.5, 32252.5, 40101.5, 41095.5, 43155.5, 45153.5, 46154.5, 50112.1, 55042.5, 60207.5 to the Revenue and Taxation Code.

BILL SUMMARY

This BOE-sponsored bill imposes interest on a daily basis in cases where the BOE, itself, meeting as a public body finds, taking into account all facts and circumstances, that it would be inequitable to impose an entire month's interest on a prepayment or payment made one day late, under specified circumstances.

Sponsor: Board of Equalization (BOE)

LAW PRIOR TO AMENDMENT

Under existing law, persons who pay their tax and fee (hereinafter tax) obligations after the date they are due are required to pay a penalty of 10 percent of the tax, plus monthly, simple interest on those unpaid taxes. In the case of a late prepayment, the law imposes a 6 percent penalty. The current rate of interest for late payments is seven percent annually. Under current law, interest accrues on any unpaid tax, from the date the tax was due to the last day of the month in which it is paid. For example, if a taxpayer makes a late payment on the third of the month, interest would accrue to the end of that month.

Regardless of whether a taxpayer makes a tax payment two days after the return due date or at the end of the month following the due date, the taxpayer, under current law, is charged interest for the entire month. In the case of electronic funds transfers (EFT), a payment made after the 3:00 p.m. deadline is likewise subject to an entire month's interest charge.

Under existing law, the BOE has authority to relieve a late payment penalty when the BOE finds that the taxpayer's failure to make a timely payment is due to reasonable cause and circumstances beyond the person's control. However, interest on the late payment is generally not relievable (except in cases of a disaster or where the failure to pay the tax timely was due to an unreasonable error or delay by a BOE employee or a Department of Motor Vehicles employee under specified circumstances). Consequently, aside from these exceptions, and regardless of the reason, whether a taxpayer is 10 minutes late, as in the case of an EFT taxpayer, or 28 days late, current law requires that an entire month's interest be assessed.

AMENDMENT

This bill adds Sections 6591.6, 7655.5, 8876.5, 12631.5, 30281.5, 32252.5, 40101.5, 41095.5, 43155.5, 45153.5, 46154.5, 50112.1, 55042.5, and 60207.5 to the sales and use tax and special tax and fee laws in the Revenue and Taxation Code to provide that, if the Members of the BOE, meeting as a public body, find, taking into account all facts and circumstances, that it is inequitable to compute interest on a monthly basis when a taxpayer is only one day late in making an electronic payment, interest shall be computed on a daily basis, provided all of the following apply:

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- 1) The payment of the tax or prepayment was made one day after the date the tax or prepayment was due.
- 2) The person was granted relief from all penalties that applied to that payment of tax or prepayment.
- 3) The person files a request for an oral hearing before the BOE.

The provisions of the bill become effective January 1, 2011.

BACKGROUND

During a 47-year period ending in 1997, the BOE's administrative policy was, in essence, to allow a 1-day grace period in cases where a mailing of a return or payment was postmarked one day after the due date. For example, if a remittance was due by law on April 30, and postmarked May 1, the payment was nevertheless deemed timely. This policy recognized the complications in the U.S. Postal Service and gave the taxpayer the benefit of the doubt that the mailing was actually timely made, but the postmark did not reflect the actual date in which it was placed in the mail. However, the BOE's legal staff reviewed this policy and opined that there was no legal basis on which the BOE could legally provide this 1-day grace period. The BOE therefore eliminated the 1-day grace period policy. As a consequence of the BOE's change in policy, staff workload increased significantly. This change resulted in a large increase in late billings, followed by hundreds of taxpayers filing declarations of timely mailing requesting that the penalty and interest be cancelled, with over half of the declarations filed attributable to a mailing that was postmarked only one day after the due date. This change in policy has also had a negative impact with taxpayers who are usually otherwise in compliance with the law.

Many taxpayers are required to file returns on a monthly basis, or a quarterly basis, or on a quarterly basis with two prepayments within each quarter. Due to the frequency of the return filings, it seemed logical to authorize the BOE to adopt a uniform policy of acceptance of returns based on considerations such as current U.S. Postal Service and technology available for filing. Therefore, in the 1999 Legislative Session, the BOE sponsored AB 1638 (Stats. 1999, Ch. 929) to allow the BOE to reinstate its prior practice of allowing taxpayers a uniform grace day with respect to their filings under all BOE-administered taxes and fees. However, this uniform grace day is only allowed with respect to remittances, claims for credit or refund, documents, or returns that are delivered to the BOE by United States mail or through a bona fide commercial delivery service, and does not apply to electronic payments of tax.

Similar bills were sponsored by the BOE for the last two years ([AB 1901](#), Silva, 2008 and [AB 693](#), Silva, 2009). AB 1901 passed the Assembly on a 75 to 0 vote, but failed passage in the Senate Revenue and Taxation Committee. AB 693 died in the Assembly Revenue and Taxation Committee.

COMMENTS

1. **Purpose.** To provide some limited flexibility for the Members of the BOE to address the inequity of applying an entire month's interest to a liability when the liability is paid only one day late and the late payment is due to reasonable cause or circumstances beyond the taxpayer's control. Both the Franchise Tax Board and the Employment Development Department compute interest on a daily basis, and the BOE should have that ability, when the facts and circumstances warrant.

Also, unlike income tax return due dates, most of the taxpayers to which this bill applies are required to make EFT payments each month to the BOE, and the due dates of these payments vary. For example, for sales tax, a payment is required every month, and for seven months of the year, the due date is the 24th. For four of the months, the due date is the end of the month. And for the June payment, the due date is the 15th of the month. A payment only 10 minutes late for these taxpayers automatically results in an entire month's interest charge – currently at a seven percent annual rate.

2. **The August 2, 2010 amendments** clarified that the provisions of the bill only apply to electronic payments, and added a sunset date of January 1, 2016.
3. **Bill could encourage taxpayers paying late to pay more promptly.** Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. Enactment of this bill is consistent with that principle, as the bill continues to require the imposition of interest on the late payment, but only for the one day that the payment was late. Moreover, it encourages those otherwise law-abiding taxpayers who, due to unique situations, inadvertently missed by one day the payment deadline to pay the tax promptly so that they could be considered for relief of the entire remaining month's interest charge. (Currently, if a taxpayer is late in making his or her payment, there's no real financial incentive to quickly remit the payment, since an entire month's interest is charged regardless if the payment arrives one day late or 28 days late.)
4. **Bill will not undermine the filing deadline.** The sanctions imposed in current law for making payments after the due date far outweigh the limited relief this bill provides.

Generally, a taxpayer who is only one day late in making a tax payment is not making a conscious decision to be late. Usually, such late payments are a result of an inadvertent error or circumstances beyond the taxpayer's control. However, when any taxpayer is late in making a payment, delinquency charges (penalty and interest) automatically apply. These delinquency charges are mandatory, i.e., they are imposed in every case and regardless of the facts behind the late payment (e.g., an accounting error, an incorrect judgment or a willful act). The taxpayer can request relief of the imposed penalty, but not every request is granted, and ongoing, repeated requests are rarely granted. This proposal does not change the imposition of these sanctions.

The most severe delinquency charge for persons who make a payment one day after the due date is the late payment penalty – 10% for a late tax payment and 6% for a late prepayment. Taxpayers who remit their late payment within one month of the due date are, in addition to the penalty, required to pay the monthly interest charge of less than 1/2 of one percent. A taxpayer who makes a conscious decision to pay one day beyond the due date runs the risk of having to pay the late payment penalty as well as having to pay the entire monthly interest charge. These risks far outweigh the possible benefit of the bill's daily computation of interest. Thus, enactment of this bill does not undermine compliance with the filing deadlines imposed by law.

Senate Bill 1494 (Committee on Revenue and Taxation) Chapter 654

**CORRECT A STATE AGENCY REFERENCE IN THE IWM FEE LAW
DELETE INCORRECT STATE AGENCY REFERENCE IN THE eWASTE ACT**

Effective January 1, 2011. Among its provisions, amends Sections 45855, 45863, 45981, and 45982 of the Revenue and Taxation Code, and amends Section 42463 of the Public Resources Code.

BILL SUMMARY

Among the various **Board of Equalization** (BOE) sponsored provisions:

Related to Special Taxes and Fees:

Amends Sections 45855, 45863, 45981, and 45982 to correct the responsible state agency reference in the **Integrated Waste Management (IWM) Fee Law** to conform to statutory changes, and

Amends Public Resources Code (PRC) Section 42463 to delete reference to the California Integrated Waste Management Board (CIWMB) in the **Electronic Waste Recycling Act of 2003** (eWaste Act).

Sponsor: Board of Equalization

LAW PRIOR TO AMENDMENT

IWM Fee. Under current law, PRC Section 48000 imposes an IWM fee on each operator of a disposal facility based on the amount, by weight or volumetric equivalent, as determined by the Department of Resources Recycling and Recovery (DRRR), of all solid waste disposed of at each disposal site.

The IWM fee is collected and administered by the BOE in cooperation with the DRRR pursuant to the IWM Fee Law (Part 23 (commencing with Section 45001) of Division 2 of the RTC).

Covered Electronic Waste Recycling Fee (eWaste fee). Under existing law, the eWaste Act (Chapter 8.5 (commencing with Section 42460) of Part 3 of Division 30 of the PRC) requires a consumer to pay a fee of a specified amount upon the purchase of a new or refurbished covered electronic device.

The BOE collects and administers the eWaste fees in partnership with the DRRR. For purposes of the eWaste Act, PRC Section 42463 contains definitions for various terms, including, but not limited to, the term "board," which is defined to mean the CIWMB. The term "board" is also defined as the DRRR in PRC Section 40110, which governs the California Integrated Waste Management Act of 1989³, including the eWaste Act.

AMENDMENT

This bill is a housekeeping measure that would amend Sections 45855, 45863, 45981, 45982 of the RTC to simply make the necessary state agency reference correction (from CIWMB to the DRRR) in the IWM Fee Law to conform to Senate Bill 63.

³ Division 30 (commencing with Section 40000) of the Public Resources Code

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This bill would also amend Section 42463 of the PRC, to delete the definition of “board” contained in the eWaste Act in the PRC. The term is already correctly defined in the California Integrated Waste Management Act of 1989 (Section 40110), which governs the eWaste Act.

BACKGROUND

Effective January 1, 2010, [Senate Bill 63](#) (Chapter 21, Statutes of 2009), among other things, abolished the CIWMB and transferred its duties and responsibilities to the DRRR, within the California Natural Resources Agency, which the bill also created.

Among other things, [Senate Bill 63](#) amended various sections of the PRC and the Government Code to replace “CIWMB” with “DRRR,” including PRC Section 40400, which now reads, in part: “Any reference in any law or regulation to the ... California Integrated Waste Management Board shall hereafter apply to the Department of Resources Recycling and Recovery.” Section 40401 was likewise amended to read, in part: “Except as otherwise specified by statute, the Department of Resources Recycling and Recovery succeeds to and is vested with all of the authority, duties, powers, purposes, responsibilities, and jurisdiction of the former California Integrated Waste Management Board.”

Senate Bill 63 did not, however, amend any of the RTC sections of the Integrated Waste Management Fee Law that reference the CIWMB. Senate Bill 63 also did not revise the definition of “board” for purposes of the eWaste Act.

COMMENT

Purpose. This provision simply makes the necessary state agency reference correction (from IWMB to the DRRR) to the Integrated Waste Management Fee Law in the RTC to conform to [Senate Bill 63](#).

This bill would also delete the definition of “board” contained in the eWaste Act in the PRC. The term is already correctly defined in the California Integrated Waste Management Act of 1989 (Section 40110), which governs the eWaste Act.

ASSEMBLY BILLX8 6 (COMMITTEE ON BUDGET) CHAPTER 11
SENATE BILL 70 (COMMITTEE ON BUDGET & FISCAL REVIEW) CHAPTER 9

Fuel Tax Swap

ABx8 6: Urgency measure, effective March 22, 2010. Amends Sections 7360 and 60050 of, and adds Sections 6051.8, 6201.8, 6357.7, 7361.1 and 7653.1 to, the Revenue and Taxation Code.

SB 70: Urgency measure, effective March 23, 2010. Amends Sections 7360, 7361.1, 7653.1, and 60050 of the Revenue and Taxation Code.

BILL SUMMARY

This bill implements provisions related to the 2009-10 Special Session budget agreement. The provisions which impact the Board of Equalization (BOE):

- Beginning July 1, 2010, **exempt from the State General Fund (6%) portion sales and use tax rate sales and purchases of motor vehicle fuel (gasoline)** and aviation gasoline.
- Beginning July 1, 2010, impose an **additional excise tax on gasoline** of 17.3 cents (\$0.173) per gallon, with an equivalent floor stock tax, as specified. The bill also provides a **rate adjustment** mechanism that seeks to balance the revenues from the additional excise taxes on gasoline against the proposed state General Fund sales and use tax exemption on gasoline.
- Beginning July 1, 2011, **impose an additional 1.75 percent sales and use tax on diesel fuel**, the revenues of which would be estimated by the BOE and deposited into the Public Transportation Account.
- **Beginning July 1, 2011, decrease the excise tax rate on diesel fuel** to \$0.136 per gallon. Also provides for a **rate adjustment** that would balance the decreased excise tax revenues on diesel fuel against the proposed state sales and use rate increase of 1.75% on diesel fuel.

Sponsor: Budget Committee

**Sales and Use Tax Exemption on Gasoline;
Additional Sales and Use Tax on Diesel Fuel**
Revenue and Taxation Code Sections 6051.8, 6201.8, and 6357.1

LAW PRIOR TO AMENDMENT

Existing law imposes a sales or use tax on the gross receipts from the sale of, or the storage, use, or other consumption of, tangible personal property, unless specifically exempted by statute. Under existing law, sales of gasoline and diesel fuel are generally subject to state and local sales or use tax (sales of diesel fuel used in certain farming activities are exempt from the state rate of 6.25 percent).

Under existing law, an excise tax of 18 cents per gallon is imposed on gasoline and diesel fuel, and under Section 6011(b)(3) and Section 6012(a)(4) of the Sales and Use Tax Law, the 18 cents per gallon excise tax on gasoline is includable in the

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computation of sales and use tax. The 18 cents per gallon excise tax imposed on diesel fuel is *not* subject to sales or use tax.

Under current law, the statewide sales and use tax rate is 8.25 percent and is imposed on the sale and purchase of both motor vehicle fuel and diesel fuel. The components of this rate are as follows:

- 6 percent state tax allocated to the state's General Fund (Sections 6051, 6051.3, 6051.7, 6201, 6201.3, and 6201.7)
- 0.25 percent state tax allocated to the Fiscal Recovery Fund (Section 6051.5 and 6201.5)
- 0.50 percent state tax allocated to the Local Revenue Fund which is dedicated to local governments for program realignment (Section 6051.2 and 6201.2)
- 0.50 percent state tax allocated to the Local Public Safety Fund which is dedicated to local governments to fund public safety services (Section 35 of Article XIII of the California Constitution).

In addition to the state portion of sales use tax rate, the following local taxes are imposed by cities and/or counties and are administered by the BOE:

- 1 percent Bradley-Burns Uniform Local Sales and Use Tax which is allocated to cities and counties (Part 1.5, commencing with Section 7200).
- Voter approved Transactions and Use Tax levied at varying rates from 0.10 to 1 percent by some cities, counties, and special taxing jurisdictions in various cities and counties within the state and which are distributed to those local agencies (Parts 1.6 and 1.7, commencing with Section 7251).

AMENDMENT

These bills add Sections 6051.8 and 6201.8 to the Sales and Use Tax Law to impose an additional 1.75 percent state sales and use tax operative July 1, 2011 on sales of diesel fuel, as defined in Section 60022 of the Diesel Fuel Tax Law.

Further, these bills provide an exemption, operative July 1, 2010, from the state General Fund portion (6%) of the sales and use tax rate on sales and purchases of gasoline, as defined in Section 7326 of the Motor Vehicle Fuel Tax Law (gasoline and aviation gasoline).

The bills require the BOE and the Department of Finance to recognize that the state no longer receives state sales and use tax revenues from the sale and purchase of motor vehicle fuel for purposes of making specified estimates.

As an urgency measure, [ABx8 6](#) became effective March 22, 2010, while [SB 70](#) was effective March 23, 2010.

COMMENTS

- 1. An additional tax on diesel fuel sales adds complexity.** Imposing a different rate of tax on sales of diesel fuel adds another level of administrative complexity. A segregation for sales of diesel fuel will be required on sales and use tax returns, with a separate calculation to account for the proposed tax. This will result in added workload and administrative costs for the BOE.

- 2. Exemption for purchases of diesel fuel for qualifying farming activities will not be affected.** Section 6357.1 of the Sales and Use Tax Law currently contains an exemption from the state General Fund rate of 6 percent and the Fiscal Recovery Fund rate of .25 percent for sales and purchases of diesel fuel used in farming activities, as defined. As Section 6357.1 reads, sales of diesel fuel qualifying for the exemption under Section 6357.1 will *not* be subjected to this additional 1.75 percent sales and use tax.
- 3. BOE is required to recognize that the state no longer receives sales and use tax revenues on motor vehicle fuel.** The bill requires the BOE to recognize that the state no longer receives “state” sales and use tax revenues from the sale and purchase of motor vehicle fuel for purposes of making specified estimates in Section 7102 of existing law. We will assume “state” for purposes of this section, only means state General Fund revenues.
- Further, since state sales and use tax revenues on sales of motor vehicle fuel can continue to be reported to the BOE for years through such means as audits, installment payment agreements, and through other voluntary or involuntary payments, it appears any such payments the BOE receives on and after July 1, 2010 shall not be counted for purposes of estimating the amount of sales and use tax revenues that are transferred pursuant to Section 7102 of existing law.
- 4. These bills have a companion measure – [ABx8 9](#).** Another measure, ABx8 9, provides for the expenditure and non-tax implementation provisions of this fuel tax swap proposal.

<p>Additional Excise Tax on Gasoline and Annual Rate Adjustment <i>Revenue and Taxation Code Sections 7360, 7361.1, and 7653.1</i></p>
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LAW PRIOR TO AMENDMENT

Under the **Motor Vehicle Fuel Tax Law** (Part 2 (commencing with Section 7301) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon on the removal of gasoline at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under this same law (Chapter 12 (commencing with Section 8500)) the Metropolitan Transportation Commission (Commission) has the authority to levy a local tax on motor vehicle fuel to fund transportation projects. The Commission is made up of nine Bay Area members that include the City and County of San Francisco, and the counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma.

Under the **Diesel Fuel Tax Law** (Part 31 (commencing with Section 60001) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon on the removal of diesel fuel at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under the **Use Fuel Tax Law** (Part 3 (commencing with Section 8601) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon for use of fuels. For liquefied petroleum gas (LPG), liquid natural gas (LNG), compressed natural gas (CNG), ethanol, and methanol, which are types of use fuels, the excise tax rates are \$0.06, \$0.06, \$0.07, \$0.09, and \$0.09, respectively. In lieu of the specified tax rates, an annual flat rate fuel tax may be paid by the owner or

operator of vehicles powered by LPG, LNG, or CNG. The flat rate is based on the vehicles weight.

Additionally, Parts 1, 1.5, and 1.6 of Division 2 of the Revenue and Taxation Code impose state, local, and transactions **sales and use taxes** on all tangible personal property, including gasoline and diesel, sold at retail. The rates in the different cities and counties throughout the state range from 8.25% to 10.75%, depending upon the jurisdiction in which the tangible personal property is purchased.

Lastly, the **Local Motor Vehicle Fuel Tax Law**, as contained in Part 4 (commencing with Section 9501) of Division 2 of the Revenue and Taxation Code, authorizes counties to impose countywide excise taxes on motor vehicle fuel at increments of one cent per gallon, provided a majority of the voters approve the proposition. The funds collected must be used only for purposes authorized by Article XIX of the California Constitution, such as transportation planning and construction. To date, however, no county imposes a local fuel tax under this authority.

AMENDMENT

Additional Excise Tax on Gasoline. This bill amends Sections 7360 of, and adds Sections 7361.1 and 7653.1 to, the Motor Vehicle Fuel Tax Law to:

- Beginning July 1, 2010, impose an additional 17.3 cent surtax on each gallon of gasoline subject to the tax in Sections 7362, 7363, and 7364.
- On July 1, 2010, impose a floor stock tax of \$0.173 per gallon on tax-paid gasoline in storage of 1,000 gallons or more.
- Require each supplier, wholesaler, and retailer meeting the floor stock tax requirements to file a floor stock tax return with the BOE by August 31, 2010, payable to the State Controller.

Gasoline Tax Rate Adjustment. Section 7360(b)(2): For the 2011-12 fiscal year and each fiscal year thereafter, the BOE will be required to adjust the surtax rate on gasoline, on or before March 1 of the fiscal year immediately preceding the applicable fiscal year, so that the adjusted rate would generate an amount of revenue that would equal the amount of revenue loss attributable to the proposed state General Fund sales and use tax exemption for gasoline (hereinafter referred to as “proposed Section 6357.7 exemption”), based on estimates made by the BOE.

The rate adjustment for the 2011-12 fiscal year will then be based on the estimated amount of excise tax gasoline revenue that would equal the estimated amount of revenue loss attributable to the proposed Section 6357.7 exemption.

Section 7360(b)(3) For the 2012-13 fiscal year and each fiscal year thereafter, beginning with the rate adjustment on or before March 1, 2012, the BOE will continue to adjust the surtax rate on gasoline as described in Section 7360 (b)(2), and will also take into account the extent to which the actual amount of revenues from the excise tax on gasoline, and, as applicable, the revenues from the one-time floor stock tax on gasoline, and the associated revenue loss attributable to the proposed Section 6357.7 exemption **resulted in a net revenue gain or loss** for the fiscal year ending prior to the rate adjustment date on or before March 1.

The rate adjustment for the 2012-13 fiscal year will then be based on:

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- (a) the estimated amount of excise tax gasoline revenue that equals the estimated amount of revenue loss attributable to the proposed Section 6357.7 exemption, and
- (b) taking into account the actual excise tax revenues from the one-time floor stock tax as specified in Section 7361.1, and also
- (c) taking into account the extent to which the actual excise tax gasoline revenue for the 2011-12 fiscal year and the associated revenue loss attributable to the proposed Section 6357.7 exemption for that fiscal year resulted in a net revenue gain or loss for the 2011-12 fiscal year.

Subsequent fiscal years will follow the format of estimates as described in Section 7360(b)(2) and reconciling the estimates as described in (b)(3).

The revenues imposed by the rate increase will be deposited into the Motor Vehicle Fuel Account.

The provisions of these bills become effective immediately.

Diesel Tax Rate Reduction and Annual Rate Adjustment

Revenue and Taxation Code Section 60050

LAW PRIOR TO AMENDMENT

As previously explained, under the Diesel Fuel Tax Law, the state imposes an excise tax of \$0.18 per gallon in the same manner.

The Sales and Use Tax Law imposes a sales or use tax on the gross receipts from the sale of, and on the sales price of, tangible personal property, unless specifically exempted by statute. Existing law *excludes* from the definition of “gross receipts” and “sales price” the amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

Therefore, under the existing Sales and Use Tax Law, the computation of sales tax on the sale of diesel fuel includes only the 24.4 cents per gallon imposed at the federal level.

AMENDMENT

Diesel Fuel Tax Rate Reduced. This bill amends Section 60050 of the Diesel Fuel Tax Law to reduce, beginning July 1, 2011, the diesel fuel excise tax rate to 13.6 cents on each gallon of diesel fuel subject to the tax in Sections 60051, 60052, and 60058.

Diesel Fuel Tax Rate Adjustment. Section 60050(b)(2): For the 2012-13 fiscal year and each fiscal year thereafter, the BOE will be required to adjust the reduced excise tax rate on diesel fuel, on or before March 1 of the fiscal year immediately preceding the applicable fiscal year, so that the adjusted rate will generate a revenue loss that equals the amount of revenue gain attributable to the 1.75% sales and use tax rate increase on sales of diesel fuel, based on estimates made by the BOE.

The rate adjustment for the 2012-13 fiscal year will then be based on:

- (a) determining the difference between the estimated amounts of state excise tax diesel revenue at the previous rate of \$0.18 and the reduced rate of \$0.136, and

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comparing that difference to the estimated amount of revenue gain attributable to the 1.75% sales and use tax increase on sales of diesel fuel, then,

- (b) adjusting the rate so that the estimated amount of revenue loss attributable to the state excise tax diesel fuel rate equals the estimated revenue gain from the increased state sales and use tax on sales of diesel fuel.

Section 60050(b)(3): For the 2013-14 fiscal year and each fiscal year thereafter, beginning with the rate adjustment on or before March 1, 2013, the BOE will continue to adjust the excise tax rate on diesel fuel as described in Section 60050 (b)(2), and will take into account the extent to which the actual amount of revenues from the increased sales and use tax on sales of diesel fuel and the associated revenue loss attributable to the state excise tax diesel fuel rate **differed from the estimates** used in making the adjustments (Section 60050(b)(2)) for the fiscal year ending prior to the rate adjustment date on or before March 1.

The rate adjustment for the 2013-14 fiscal year will then be based on:

- (a) determining the difference between the estimated amounts of state excise tax diesel revenue at the previous rate of \$0.18 and the rate as adjusted for the previous fiscal year, and comparing that difference to the estimated amount of revenue gain attributable to the 1.75% sales and use tax increase on sales of diesel fuel, then,
- (b) adjusting the rate so that the estimated amount of revenue loss attributable to the state excise tax diesel fuel rate equals the estimated revenue gain from the 1.75% sales and use tax increase of sales of diesel fuel, and
- (c) taking into account the extent to which the actual revenue from the 1.75% sales and use tax increase on sales of diesel fuel for the 2011-12 fiscal year and the associated revenue loss attributable to the state excise tax diesel fuel rate for that fiscal year differed from the estimated amounts used to set that rate for the 2011-12 fiscal year.

Subsequent fiscal years will follow the format of look-forward estimates as described in Section 60050(b)(2) and the look-back reconciling of the estimates as described in (b)(3).

The revenues imposed by the rate increase will be deposited into the Motor Vehicle Fuel Account.

The provisions of these bills become effective immediately.

BACKGROUND

In 1990, voters approved Senate Constitutional Amendment 1 (Proposition 111) in the June direct primary election. Approval of this measure made operative Assembly Bill 471 (Ch. 106, Stats. 1989) and Senate Bill 300 (Ch. 105, Stats. 1989). These bills, among other things, increased the rate of tax imposed on most motor vehicle fuels from \$0.09 to \$0.14 per gallon, effective August 1, 1990. Further, on January 1, 1991, and each January 1 thereafter through 1994, the excise tax increased by \$0.01 per gallon to the current \$0.18 per gallon.

In 2000, [Assembly Bill 2114](#) (Ch. 1053, Longville) changed the point of imposition of the tax up the chain of distribution from the first distribution of the fuel to the removal of the fuel from the refinery or terminal rack. The bill also provided for a backup tax, which applies to the sale and/or delivery of gasoline into the fuel tank of a motor

vehicle on which the tax has not been paid or the tax on the fuel has been refunded. The bill also provided for a floor stock tax.

COMMENTS

1. **The bill contains a one-time floor stock tax for the surtax on gasoline.** A floor stock tax serves to equalize the excise tax paid on those gallons of fuel held in inventory by a supplier, wholesaler or retailer prior to the effective date of a tax increase and on those gallons purchased after the tax increase. Having a large fuel inventory before a tax rate increase takes effect can bring about a small windfall to a seller, who can raise the selling price of the fuel purchased prior to the increase and attribute the increase in price to the tax rate increase. However, the additional funds collected are profit to the seller and not excise tax paid to the state. A floor stock tax mitigates this windfall.
2. **The gasoline tax rate is increased and the diesel fuel tax rate is reduced.** The current gasoline tax rate of \$0.18 remains in effect. This act adds a surtax of \$0.173 per gallon. The total combined state excise tax rate for gasoline would be \$0.353 per gallon, operative July 1, 2010.

The diesel fuel tax rate would be reduced, from \$0.18 per gallon to only \$0.136 per gallon, operative July 1, 2011.
3. **The BOE currently co-administers the state's excise tax on gasoline.** The BOE handles various administrative functions that would be affected by a gasoline rate increase and floor stock tax, including, but not limited to the following: identifying and notifying taxpayers, developing floor stock tax returns, revising existing returns, modifying computer programming, carrying out compliance and audit efforts to ensure proper reporting, revising publications and internet information, and increasing investigative activities. While the BOE processes the payments and refunds for the diesel fuel taxes, the Controller processes gasoline tax payments and refunds. BOE staff will continue to evaluate and identify tax and industry related issues that arise from the additional gasoline tax and the diesel fuel rate reduction.
4. **Rate adjustments for the surtax on gasoline and the excise tax on diesel fuel.** In general, and as described in their respective sections, the BOE will have the responsibility of attempting to balance revenue losses against the revenue gains. For gasoline, the BOE will adjust the surtax rate, up or down, so that the revenues equal the amount of General Fund revenue losses attributable to the state General Fund sales and use tax exemption on gasoline. For diesel fuel, the BOE will adjust the excise tax rate, up or down, so that the revenue loss equals the amount of revenue gain from the sales and use rate increase of 1.75% on diesel fuel.

Rate adjustments will be determined by March 1, and will be effective during the state's next fiscal year, beginning July 1. In general, rate adjustments will be based on forward-looking estimates, subject to consumption and price volatility, and look-back reconciling of those estimates.
5. **With a gasoline tax increase, local jurisdictions could see an increase in sales and use tax revenues.** Existing Sales and Use Tax Law expressly includes within the definition of "gross receipts" and "sales price" the amount of any tax imposed by the state under the Motor Vehicle Fuel Tax Law.

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Accordingly, retailers are required to include within their computation of sales or use tax on their sales or purchases of gasoline, any such state excise tax imposed. Accordingly, any increase in the state excise tax on motor vehicle fuel imposed under the Motor Vehicle Fuel Tax Law results in an increase in sales and use tax revenues. Although this bill provides a state General Fund sales and use tax exemption on sales of gasoline, a statewide base sales and use tax rate of 2.25% that is dedicated to local governments will continue to apply (with higher tax rates in certain districts with voter-approved district tax rates: <http://www.boe.ca.gov/sutax/pdf/districtratelist.pdf>)

Accordingly, under this bill, with a proposed 17.3 cent excise tax increase on each gallon of gasoline beginning on July 1, 2010, for every 10 gallons of gasoline sold, an additional four cents in local sales and use tax revenue will be generated, with additional amounts for those districts imposing district taxes.

TABLE OF SECTIONS AFFECTED

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code				
<i>Motor Vehicle Fuel Tax Law</i>				
§7360	Amend	ABx8 6	Ch. 11	Levy of tax
§7360	Amend	SB 70	Ch. 9	Levy of tax
§7361.1	Add	ABx8 6	Ch. 11	Floor stock tax
§7361.1	Amend	SB 70	Ch. 9	Floor stock tax
§7653.1	Add	ABx8 6	Ch. 11	Return; floor stock tax
§7653.1	Amend	SB 70	Ch. 9	Return; floor stock tax
§7655.5	Add	SB 1028	Ch. 316	Interest: daily basis
<i>Use Fuel Tax Law</i>				
§8876.5	Add	SB 1028	Ch. 316	Interest: daily basis
§9035	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Tax on Insurers Law</i>				
§12631.5	Add	SB 1028	Ch. 316	Interest: daily basis
<i>Cigarette and Tobacco Products Taxes</i>				
§30101.7	Amend	AB 2496	Ch. 265	Face-to-face sale
§30165.1	Amend	AB 2496	Ch. 265	Master Settlement Agreement compliance
§30165.2	Add	AB 2496	Ch. 265	Tobacco product manufacturers: requirements to submit forms
§30281.5	Add	SB 1028	Ch. 316	Interest: daily basis
§30354.7	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Alcoholic Beverage Tax</i>				
§32252.5	Add	SB 1028	Ch. 316	Interest: daily basis
§32390	Add	SB 858	Ch. 721	Collection cost recovery fee

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code				
<i>Energy Resources Surcharge</i>				
§40101.5	Add	SB 1028	Ch. 316	Interest: daily basis
§40168	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Emergency Telephone Users Surcharge</i>				
§41030	Amend	AB 2408	Ch. 404	Determination of rate
§41031	Amend	AB 2408	Ch. 404	Determination time
§41032	Amend	AB 2408	Ch. 404	Publication of rate
§41095.5	Add	SB 1028	Ch. 316	Interest: daily basis
§41127.8	Add	SB 858	Ch. 721	Collection cost recovery fee
§41136.1	Amend	AB 2408	Ch. 404	Funds held for future appropriation
§41137	Amend	AB 2408	Ch. 404	Payments to suppliers
§41137.1	Amend	AB 2408	Ch. 404	Payments to local agencies
§41138	Amend	AB 2408	Ch. 404	Conditions for payment
§41139	Amend	AB 2408	Ch. 404	Date of commencement payments
§41140	Amend	AB 2408	Ch. 404	Payment for previous costs
§41141	Amend	AB 2408	Ch. 404	Claims for payment
§41142	Amend	AB 2408	Ch. 404	Failure of Legislature to appropriate funds
<i>Hazardous Substances Tax</i>				
§43155.5	Add	SB 1028	Ch. 316	Interest: daily basis
§43449	Add	SB 858	Ch. 721	Collection cost recovery fee

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code				
<i>Integrated Waste Management Fee</i>				
§45153.5	Add	SB 1028	Ch. 316	Interest: daily basis
§45610	Add	SB 858	Ch. 721	Collection cost recovery fee
§45855	Amend	SB 1494	Ch. 654	Disclosure of information
§45863	Amend	SB 1494	Ch. 654	Plan to timely resolve claims and petitions
§45981	Amend	SB 1494	Ch. 654	Disclosure of information
§45982	Amend	SB 1494	Ch. 654	Divulging of information to unauthorized parties forbidden
<i>Oil Spill Response, Prevention, and Administration Fee</i>				
§46154.5	Add	SB 1028	Ch. 316	Interest: daily basis
§46466	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Underground Storage Tank Maintenance Fee</i>				
§50112.1	Add	SB 1028	Ch. 316	Interest: daily basis
§50138.8	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Fee Collection Procedures Law</i>				
§55042.5	Add	SB 1028	Ch. 316	Interest: daily basis
§55211	Add	SB 858	Ch. 721	Collection cost recovery fee
<i>Diesel Fuel Tax Law</i>				
§60050	Amend	ABx8 6	Ch. 11	Levy of tax
§60050	Amend	SB 70	Ch. 9	Levy of tax
§60207.5	Add	SB 1028	Ch. 316	Interest: daily basis
§60495	Add	SB 858	Ch. 721	Collection cost recovery fee

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Business and Professions Code				
<i>Cigarette and Tobacco Products Licensing Act</i>				
§22979	Amend	AB 2496	Ch. 265	Cigarette manufacturer and importer license; eligibility
§22980	Amend	AB 2496	Ch. 265	Inspection authority
§22980.1	Amend	AB 2496	Ch. 265	Prohibitions
§22971	Amend	AB 2733	Ch. 607	Definitions
§22971.5	Add	AB 2733	Ch. 607	Service of notice
§22973.1	Amend	AB 2733	Ch. 607	License issuance
§22977.2	Amend	AB 2733	Ch. 607	License issuance
§22979	Amend	AB 2733	Ch. 607	Cigarette manufacturer and importer license; eligibility
§22980.2	Amend	AB 2733	Ch. 607	Penalty for unlicensed persons
§22980.3	Amend	AB 2733	Ch. 607	License suspension and revocation
§22980.4	Add	AB 2733	Ch. 607	Civil penalty
§22980.5	Add	AB 2733	Ch. 607	Public notice
Evidence Code				
§524	Add	AB 2195	Ch. 168	Burden of proof
Government Code				
§9795	Amend	AB 1585	Ch. 7	State government reporting requirement: required repeal date
§10242.5	Amend	AB 1585	Ch. 7	State government reporting requirement: required repeal date
§10231.5	Add	AB 1585	Ch. 7	State government reporting requirement: required repeal date

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Public Resources Code				
<i>Covered Electronic Waste Recycling Fee</i>				
§42463	Amend	SB 1494	Ch. 654	Definitions
Solid Waste Postclosure Fee				
§48000	Amend	AB 1004	Ch. 417	Solid Waste Postclosure Fee
§48010	Amend	AB 1004	Ch. 417	Election to participate
§48012	Amend	AB 1004	Ch. 417	Report on expenditures
§48013	Amend	AB 1004	Ch. 417	Operator of multiple landfills
Unemployment Insurance Code				
§1095	Amend	AB 2433	Ch. 139	Use of Employment Development Department information