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THIRD READING

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Bill No: SB 491  
Author: Nielsen (R)  
Amended: 4/5/21  
Vote: 21

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SENATE GOVERNANCE & FIN. COMMITTEE: 5-0, 3/25/21  
AYES: McGuire, Nielsen, Durazo, Hertzberg, Wiener

SENATE PUBLIC SAFETY COMMITTEE: 5-0, 4/27/21  
AYES: Bradford, Ochoa Bogh, Kamlager, Skinner, Wiener

SENATE APPROPRIATIONS COMMITTEE: 7-0, 5/20/21  
AYES: Portantino, Bates, Bradford, Jones, Kamlager, Laird, Wieckowski

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**SUBJECT:** Cigarette and Tobacco Products Licensing Act of 2003

**SOURCE:** Author

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**DIGEST:** This bill prohibits the California Department of Tax and Fee Administration (CDTFA) from issuing a license to, and requires them to suspend or revoke the current tobacco license of, retailers convicted of violations of Penal Code provisions relating to selling or distributing nitrous oxide. This bill also directs courts to revoke local business licenses of retailers convicted of violation the same provisions.

**ANALYSIS:**

Existing law:

- 1) Requires the Board of Equalization (BOE) to license manufacturers, distributors, wholesalers, importers, and retailers of cigarette or tobacco products who are engaged in business in California (AB 71, Horton, Chapter 890, Statutes of 2003).

- 2) Transferred duties, powers, and responsibilities related to the administration of taxes and fees from BOE to the CDTFA (AB 102, Committee on Budget, Chapter 16, Statutes of 2017).
- 3) Requires tobacco retailers to possess and maintain a license to sell cigarettes or tobacco products to purchasers. A retailer that owns or controls more than one retail location where cigarette and tobacco products are sold must obtain a separate license for each retail location.
- 4) Directs CDTFA to issue a license upon receipt of an application and the fee, unless any of the following occur:
  - a) CDTFA had previously issued the retailer a license that it subsequently revoked or suspended.
  - b) The location on the application is the same as the location of a previously revoked license, or one currently subject to revocation proceedings, unless five years have passed from the date of revocation, or the applicant has acquired the location in an arm's length transaction.
  - c) The retailer has been convicted of felony counterfeiting or tobacco tax evasion with intent to defeat or evade the determination of an amount due.
  - d) The retailer does not possess all required permits and licenses.
- 5) Permits CDTFA to also suspend or revoke a retail tobacco license for violations of the Act, the Cigarette and Tobacco Products Tax Law, or the Stop Tobacco Access for Kids Enforcement Act (STAKE Act), specifically:
  - a) CDTFA may suspend a license for 30 days for a first violation.
  - b) CDTFA must revoke the license if the retailer has a second violation within four years of the date of the first violation.
- 6) Allows a city or county to "make and enforce within its limits, all local, police, sanitary and other ordinances and regulations not in conflict with general laws, known as the police power (California Constitution, Article XI, Section 7).
- 7) Permits cities and counties to require businesses operating in their jurisdictions to obtain a license and impose related licensing fees.
- 8) Makes possession of nitrous oxide with the intent to ingest for the purposes of intoxication a misdemeanor, and also provides that intentionally being under

the influence of nitrous oxide is a misdemeanor, except pursuant to legitimate medical or dental use.

- 9) Provides that the sale or furnishing of nitrous oxide to a minor is a misdemeanor (AB 1015, Torlakson, Chapter 266, Statutes of 2009).
- 10) Requires the suspension of the business license of a person who has been convicted of this crime for a second time for up to one year, unless the business license owner demonstrates good faith efforts to prevent sales of nitrous oxide to minors by the business license owner's employees.
- 11) Makes it a misdemeanor for any person to dispense or distribute nitrous oxide to a person, if it is known or should have been known that it will be ingested or inhaled by the person for the purposes of causing intoxication, and that person proximately causes great bodily injury or death to themselves, or any other person (AB 1735, Hall, Chapter 458, Statutes of 2014).
- 12) Requires persons distributing or selling nitrous oxide to record each transaction involving the dispensing or distribution of nitrous oxide in a written or electronic document, among other record-keeping requirements.
- 13) Does not apply criminal sanctions to a California licensed medical or dental practitioners administering nitrous oxide for medical or dental care, or as a propellant in a food product.

This bill:

- 1) Adds to the list of conditions that preclude CDFTA from issuing a tobacco license to include a conviction for:
  - a) The sale or furnishing of nitrous oxide to a minor.
  - b) Dispensing and distributing nitrous oxide to a person, if it is known or should have been known that it will be ingested or inhaled by the person for the purposes of causing intoxication, and that person proximately cause great bodily injury or death to themselves or any other person.
  - c) Failure to comply with record-keeping requirements established by AB 1735 for persons who dispense or distribute nitrous oxide.
- 2) Provides that convictions for any of the above acts are also considered violations for purposes of revoking or suspending current tobacco licenses.

- 3) Requires CDTFA to provide a licensee with at least 10 days' written notice of a pending suspension or revocation under this bill, and an opportunity to appeal the suspension or revocation only to correct a mistake or clerical error.
- 4) Prohibits CDTFA from considering an appeal of suspension or revocation if the appeal is founded upon the grounds of whether the retailer violated the Penal Code sections giving rise to the suspension or revocation.
- 5) Directs courts to revoke the business licenses of persons convicted for up to one year for:
  - a) Dispensing and distributing nitrous oxide to a person, if it is known or should have been known that it will be ingested or inhaled by the person for the purposes of causing intoxication, and that person proximately caused great bodily injury or death to himself/herself, or any other person.
  - b) Failure to comply with record-keeping requirements established by AB 1735 for persons who dispense or distribute nitrous oxide.

## **Background**

Nitrous oxide combined with oxygen is commonly used for sedation of patients and pain relief during dental procedures. Nitrous oxide is commercially sold in a steel cylinder or cartridge primarily as a whipping agent for use in a whip cream dispenser and in some cooking sprays, as well as in coffee shops and restaurants to make a lighter, fluffier whipped cream. Nitrous oxide can also be used as an oxidizer in model rockets and motor vehicle racing due to its low temperature and high oxygen content. Since it may produce a feeling of giddiness or euphoria, it is often called "laughing gas." As a result, nitrous oxide is used as a recreational drug, and outlawed in some states and countries when used for intoxication.

The National Survey on Drug Use and Health provides data on substance use, including inhalant use. The 2018 survey found that approximately two million people aged 12 or older—or 0.7 percent of the population—had used an inhalant in the past year, and inhalant use was more common among adolescents aged 12 to 17. (<https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf>) The survey also found the following data regarding the percentages of people in different age groups who were past year users of inhalants: 2.7 percent of adolescents, 1.5 percent of young adults aged 18 to 25, and 0.4 percent of adults aged 26 or older. (Id.)

## Comments

Currently, CDTFA can deny an applicant a tobacco license, or suspend or revoke an existing license, if the applicant or licensee violated the Cigarette and Tobacco Products Licensing Act or provisions of the Revenue and Taxation Code relating to cigarettes and tobacco products. CDTFA administers both the Act and the Cigarette and Tobacco Products Law, so is aware from its enforcement actions of all such violations necessitating changes in licensing, including violations of the STAKE Act, where the California Department of Public Health is required to notify CDTFA of violations. SB 491 sets a precedent by adding convictions outside CDTFA's regulatory scope – misdemeanors relating to nitrous oxide sales and distribution – onto the list of conditions that prevent it from issuing a tobacco license, or suspending or revoking an existing one. CDTFA does not normally monitor criminal courts to identify these violations, and this bill does not specify an alternative process for it to become aware of these convictions. As a result, CDTFA will incur additional costs implementing SB 491 should it be enacted. Because CDTFA cannot fund licensing enforcement from tobacco tax revenue since 2017 (AB 2770, Nazarian, Chapter 699, Statutes of 2016), costs will need to be paid for by increasing licensing fees, or decreasing enforcement costs.

**FISCAL EFFECT:** Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- This bill would result in additional costs to CDTFA related to license suspension and revocation. Specifically, CDTFA would incur costs (1) to develop a notice of, and issue a suspension for, nitrous oxide sale convictions, (2) computer programming; and (3) inspecting suspended licensee locations to ensure cigarettes or tobacco products are not being sold and issuing any violations as appropriate. The magnitude of these costs would depend on the number of nitrous oxide sale convictions, which cannot be determined in advance.
- In addition, this bill's requirement related to the suspension of business licenses would result in additional workload to the courts. In 2020-01, the average hourly cost to operate a court (excluding the judge's wages and court security) is \$1,004. While courts are not funded on a workload basis, an increase in workload resulting from this bill could lead to delayed services and would result in cost pressures to increase the backfill amount appropriated from the General Fund for trial court operations.

**SUPPORT:** (Verified 5/21/21)

Los Angeles County Sheriff's Department  
Milestones Ranch Malibu  
West Shield Adolescent Services  
Multiple individuals

**OPPOSITION:** (Verified 5/21/21)

None received

**ARGUMENTS IN SUPPORT:** According to the author, “In October of 2016, a constituent contacted my office upon learning that his 20-year-old son had been using nitrous oxide, also known as ‘whippits’” which he legally purchased through a smoke shop. The substance abuse degraded his health to the point that he was unable to walk without assistance and was confined to a wheelchair. Although this case is the catalyst for SB 491, it is far from an isolated incident. In addition to the numerous people for whom nitrous oxide use has been fatal or caused long-lasting health problems, it has also been the cause of multiple recent drugged driving fatalities, claiming the innocent lives of Camille Rand, Christopher and Robert Ohlander, and others. Most Californians will encounter nitrous oxide at the dentist in the form of ‘laughing gas,’ or as the aerosol spray propellant in pre-made whipped cream (e.g., Reddi-Wip). The small pressurized cartridges are also sold with the intended use of aerating homemade whipped cream. Strikingly, nitrous oxide cartridges are also sold in smoke shops or tobacco shops – stores that specialize in selling inhalants—for underground purposes of recreational intoxication. Well known as a party drug, nitrous oxide is dispensed from the canisters into a balloon from which it is inhaled yielding a short burst of euphoria. Unlike the ‘laughing gas’ administered by dentists, who carefully control and monitor its use to ensure that there is a safe amount of oxygen mixed in with the gas, nitrous oxide abuse is dangerous. According to the National Institute on Drug Abuse, recreational use of nitrous oxide can lead to ‘death from lack of oxygen to the brain, altered perception and motor coordination, loss of sensation, limb spasms, and blackouts caused by blood pressure changes, [and] depression of heart muscle functioning.’”

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5/22/21 12:59:29

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