

Date of Hearing: April 11, 2023

ASSEMBLY COMMITTEE ON HEALTH
Jim Wood, Chair
AB 935 (Connolly) – As Introduced February 14, 2023

SUBJECT: Tobacco sales: phased tobacco ban.

SUMMARY: Implements a phased tobacco ban by prohibiting a tobacco retailer from selling tobacco products, as defined, to any person born on or after January 1, 2007. Clarifies that this bill does not authorize the sale of tobacco products to any person born before January 1, 2007, that is otherwise prohibited. Specifically, **this bill:**

- 1) Prohibits a tobacco retailer from selling any tobacco product to any person born on or after January 1, 2007.
- 2) Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers, to establish the date of birth of the purchaser, if the purchaser reasonably appears to have been born on or after January 1, 2007. Makes a good faith effort to comply with this provision an affirmative defense to a violation of 1) above.
- 3) Requires Department of Public Health (DPH) to enforce the provisions of this bill.
- 4) Authorizes DPH to assess civil penalties against any person, firm, or corporation that violates 1) above, according to the following schedule:
 - a) A civil penalty of four hundred dollars (\$400) to six hundred dollars (\$600) for the first violation;
 - b) A civil penalty of nine hundred dollars (\$900) to one thousand dollars (\$1,000) for the second violation within a five-year period;
 - c) A civil penalty of one thousand two hundred dollars (\$1,200) to one thousand eight hundred dollars (\$1,800) for a third violation within a five-year period;
 - d) A civil penalty of three thousand dollars (\$3,000) to four thousand dollars (\$4,000) for a fourth violation within a five-year period; and,
 - e) A civil penalty of five thousand dollars (\$5,000) to six thousand dollars (\$6,000) for a fifth violation within a five-year period.
- 5) Requires DPH, in addition to the civil penalties described in 4) above, upon the assessment of a civil penalty for the third, fourth, or fifth violation, within 60 days of the date of service of the final administrative adjudication on the parties or payment of the civil penalty for an uncontested violation, to notify the State Board of Equalization (BoE) of the violation. Requires the BoE to then assess a civil penalty of two hundred fifty dollars (\$250) and suspend or revoke the license in accordance with the following schedule:
 - a) A 45-day suspension of the license for a third violation at the same location within a five-year period;
 - b) A 90-day suspension of the license for a fourth violation at the same location within a five-year period; and,
 - c) Revocation of the license for a fifth violation at the same location within a five-year period.

- 6) Prohibits, in the case of a corporation or business with more than one retail location, to determine the number of accumulated violations for purposes of the penalty schedules set forth in 4) and 5) above, the violations by one retail location from being accumulated against other retail locations of that same corporation or business.
- 7) Prohibits, in the case of a retail location that operates pursuant to a franchise, violations accumulated and assessed against a prior owner of a single franchise location from being accumulated against a new owner of the same single franchise location for purposes of the penalty schedules set forth in 4) and 5) above.
- 8) States that this bill does not authorize the sale of any tobacco products to any person born before January 1, 2007, that is otherwise prohibited by law.
- 9) Defines the following terms for purposes of this bill:
 - a) "Tobacco product" means a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, vaping liquid, or snuff. "Tobacco product" does not include a product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose; and,
 - b) "Tobacco retailer" means a person who engages in this state in the sale of tobacco products directly to the public from a retail location.

EXISTING LAW:

- 1) Requires DPH to establish and develop a program to reduce the availability of "tobacco products," as defined, to persons under 21 years of age through authorized enforcement activities, as specified, pursuant to the Stop Tobacco Access to Kids Enforcement Act (STAKE Act). [Business and Professions Code (BPC) §22952]
- 2) Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 21. [BPC §22956]
- 3) Permits an enforcing agency, as specified, to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under 21 any tobacco product, instrument, or paraphernalia that is designed for the smoking or ingestion of tobacco products, as specified, ranging from \$400 to \$6,000 for a first, second, third, fourth, or fifth violation within a five-year period. [BPC §22958]
- 4) Defines "tobacco product" as a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, as specified, including an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, and any component, part, or accessory of a tobacco product, whether or not sold separately. Prohibits any product approved by the federal Food and Drug Administration (FDA) for sale as a tobacco cessation product or for other therapeutic purposes, as specified, from being deemed a tobacco product. [BPC §22950.5]

FISCAL EFFECT: Unknown. This bill has not yet been analyzed by a fiscal committee.

COMMENTS:

- 1) **PURPOSE OF THIS BILL.** According to the author, smoking tobacco is widely recognized as the leading preventable cause of death in the world. These products are lethal, known to cause cancer, and significantly decrease both the longevity and quality of life. Preventing the next generation of Californians from becoming addicted to smoking should be a priority for anyone who cares about the public health of our state and the well-being of our children. The author concludes this bill is a measured solution to address the widespread issue of youth tobacco addiction.
- 2) **BACKGROUND.** Cigarette smoking causes more than 480,000 deaths each year in the United States (U.S.), or nearly one in five deaths. Smoking causes more deaths each year than the following causes combined: Human immunodeficiency virus, illegal drug use, alcohol use, motor vehicle injuries, and firearm-related incidents. More than 10 times as many U.S. citizens have died prematurely from cigarette smoking than have died in all the wars fought by the U.S. Smoking causes about 90% (or nine out of 10) of all lung cancer deaths. More women die from lung cancer each year than from breast cancer. Smoking causes about 80% (or eight out of 10) of all deaths from chronic obstructive pulmonary disease. Cigarette smoking increases the risk for death from all causes in men and women. In California, smoking-related health care costs \$13.29 billion per year and smoking-related losses in productivity totals \$10.35 billion per year.
 - a) **Centers for Disease Control and Prevention (CDC) data on tobacco use.** African American youth and young adults have significantly lower prevalence of cigarette smoking than Hispanics and Whites, and although the prevalence of cigarette smoking among African American and White adults is the same, African Americans smoke fewer cigarettes per day. On average, African Americans initiate smoking at a later age compared to Whites; however, they are more likely to die from smoking-related diseases than Whites.

American Indian/Alaska Native youth and adults have the highest prevalence of cigarette smoking among all racial/ethnic groups in the U.S, however, it is important to note that some American Indians use tobacco for ceremonial, religious, or medicinal purposes. Regional variations in cigarette smoking exist among American Indians/Alaska Natives, with lower prevalence in the Southwest and higher prevalence in the Northern Plains and Alaska.

Hispanic/Latin adults generally have lower prevalence of cigarette smoking and other tobacco use than other racial/ethnic groups, with the exception of Asian Americans. However, prevalence varies among sub-groups within the Hispanic population, for example, 50% of Cuban men and more than 35% of Cuban women report smoking 20 or more cigarettes per day, and Mexican men and women are less likely than other Hispanic/Latinx groups to report that they smoke 20 or more cigarettes per day.

Although Asian Americans, Native Hawaiians, and Pacific Islanders are often combined together as one group in survey data due to smaller numbers of the individual groups surveyed, they are actually three distinct groups. Cigarette smoking among Asian

American/Pacific Islander adults is lower than other racial ethnic groups, however, prevalence among Asian sub-groups varies and can be higher than that of the general population. Like many other minority groups, the LGBTQ+ community has been the target of tobacco industry marketing for several decades. As a result, smoking rates are disproportionately higher among LGBTQ+ individuals than the general population. About one in four LGBTQ+ adults smoke cigarettes compared with about one in six heterosexual/straight adults. More than twice as many LGBTQ+ students report having smoked a cigarette before the age of 13 compared to heterosexual students.

- b) **Effectiveness of tobacco control policies.** According to a 2017 *Journal of Public Health Management & Practice* report (the report), “The Impact of Implementing Tobacco Control Policies,” raising cigarette taxes; implementing comprehensive smoke free air laws; banning all tobacco advertising, promotions, and sponsorships; and, funding comprehensive tobacco control programs, particularly those that include media campaigns, are highly effective strategies for reducing smoking prevalence. Cessation treatment policies and prominent graphic health warnings are likely to be especially effective in increasing quit success when combined with other policies that increase quit attempts. According to the report, while research has focused on the effects of implementing individual policies, the impact of a new intervention depends on the existing tobacco control environment and on whether any other policies are simultaneously implemented. Interventions implemented in settings with strong existing tobacco control legislation and strong anti-tobacco social norms may yield smaller gains than those implemented in settings that have limited or no existing tobacco policies. For this reason, simultaneously implemented policies may have overlapping effects. To estimate the combined effect of implementing more than policy intervention, the report recommends applying effect sizes as constant relative reductions, that is, for policy and with effect sizes and would be applied to the current smoking prevalence. This formulation confines the resulting smoking prevalence to positive levels and implies slightly smaller absolute reductions for each policy when implemented in combination with other policies than if implemented alone.
- c) **Recent federal actions.** According to the American Lung Associations’ “State of Tobacco Control” 2023, several significant steps were taken by the federal government in 2022 to prevent and reduce tobacco use. Of key importance, was the FDA’s proposed rules released in April 2022 to eliminate menthol cigarettes and end the sale of flavored cigars. Menthol cigarettes and flavors in cigars make it easier for kids to start smoking and harder for them to quit. These rules, when finalized, will benefit many people who use menthol cigarettes or flavored cigars at disproportionately higher rates, especially Black Americans. Congress also took important action in March 2022 to extend FDA authority over tobacco products to include e-cigarettes and other products containing synthetic, or non-tobacco, nicotine. This legislation was intended to close the so-called “PuffBar loophole” that allowed e-cigarette products claiming to contain synthetic nicotine, such as PuffBar - one of the brands of e-cigarettes most used by kids, to evade FDA’s authority. The legislation set out clear deadlines for FDA to take action and remove illegally sold synthetic nicotine products from the market. However, the timelines laid out in the law for enforcement action were missed, allowing an untold number of e-cigarettes containing synthetic nicotine, many in kid-friendly flavors, to remain on the market. It will take significantly more federal enforcement action aimed at manufacturers, distributors, wholesalers and importers to end the youth vaping epidemic.

Actions recommended by the American Lung Association include legal remedies by the U.S. Department of Justice on behalf of FDA against manufacturers selling illegal products and stopping the importation of illegal products from other countries by U.S. Customs and Border Protection to ensure that no unauthorized and illegal products remain on the marketplace.

- d) **California's flavored tobacco ban.** In 2020 the Legislature passed, and Governor Newsom signed, SB 793 (Hill), Chapter 34, Statutes of 2020. The law prohibits a tobacco retailer, or any of its agents or employees from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer. It exempts the sale of Hookah water pipes and flavored shisha tobacco products, pipe tobacco, and premium cigars from the prohibition. Fueled by kid friendly flavors like cotton candy and bubblegum, 3.6 million more middle and high school students started using e-cigarettes in 2018. The disturbing rates of teen e-cigarette use continued to rise in 2019 with the overwhelming majority of youth citing use of popular fruit and menthol or mint flavors and there are now 5.3 million young Americans who use e-cigarettes regularly. SB 793 also included menthol flavor, which was excluded from the original FDA ban, because, as the author of SB 793 noted during his bill presentation, unless action is taken, an estimated 1.6 million African Americans alive today, who are now under the age of 18, will become regular smokers; and about 500,000 of those will die prematurely from a tobacco-related disease.

Immediately after the passage of SB 793, the tobacco industry qualified a referendum for the ballot asking the voters to decide whether or not SB 793 should take effect, and enforcement of the ban was halted pending the November 8, 2022 election. The ballot measure, Proposition 31, was approved, thus upholding SB 793. The next day, R.J. Reynolds, the maker of Newport menthol cigarettes and top-selling vaping products filed a federal lawsuit challenging California's ban on flavored tobacco. However, in December of 2022 the Supreme Court refused to block the law, clearing the way for the ban to take effect the next week. The law states that a tobacco retailer, or agent or employee of a tobacco retailer, who violates this section is guilty of an infraction and will be punished by a fine of two hundred fifty dollars (\$250) for each violation of this section. This law does not specify where the enforcement authority of this statute resides, which implies local jurisdictions have authority to enforce this law.

- e) **Tribal Governments.** There are currently 109 federally recognized Indian tribes in California and more than 70 entities petitioning for recognition. Tribes in California currently have nearly 100 separate reservations or Rancherias. In general, under federal law, states are limited in their ability to regulate certain activities that occur within the borders of federally recognized tribal lands, including taxation of tobacco sales. Sales made by anyone (including tribal members) off reservation land are subject to state taxes, as are those made on-reservation to customers who are not tribal members. While federal law requires remittance of state taxes to the state for sales to non-members, a state cannot force a tribe to do so.
- f) **Tobacco taxes.** The California Cigarette and Tobacco Products Tax Law imposes a tax of \$2.87 per package of 20 cigarettes. Distributors pay the tax by purchasing tax stamps from the California Department of Tax and Fee Administration, which are then affixed to a cigarette package. While a base tax rate of \$0.10 per pack of 20 cigarettes has been in

place since 1967, with revenue flowing to the General Fund, the Legislature and voters have adopted four tobacco tax measures directing revenue for specific programs:

- i) In 1988, voters approved Proposition 99, which imposed a surtax of \$0.25 cents per package, and created an equivalent tax on tobacco products. Proceeds from the tax fund health education, disease research, hospital care, fire prevention, and environmental conservation;
- ii) AB 478 (Friedman), Chapter 660, Statutes of 1993, added an excise tax of \$0.02 per packet of 20 cigarettes for breast cancer research and early detection services;
- iii) In 1998, California voters approved Proposition 10, which imposed an additional surtax of \$0.50 per pack, and created a proportionately larger increase in the tax on tobacco products. The revenues are used to fund early childhood development programs, called First 5 programs;
- iv) In 2016, voters approved Proposition 56, which imposed an additional surtax of \$2 per pack and expanded the definition of "tobacco products" to include e-cigarettes when sold in combination with nicotine for a single price, and liquids containing nicotine used in those products. The additional tax revenues are deposited into the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund, which is used to backfill revenue losses for the above programs that result from reduced consumption due to the increased tax rate; and,
- v) SB 395 (Caballero), Chapter 489, Statutes of 2021, enacts the Healthy Outcomes and Prevention Education Act, which imposes the California Electronic Cigarette Excise Tax on the sale of electronic cigarettes, and creates the Health Careers Opportunity Grant Program in the Department of Health Care Access and Information, and directs proceeds of the tax to various purposes.

California collected approximately \$1.8 billion in tobacco tax revenue in fiscal year 2021-22, down from \$2.1 billion in 2018-2019.

- g) **Tax Evasion.** The Prevent All Cigarette Trafficking (PACT) Act is a federal law that governs tax collection and cigarettes and smokeless tobacco products trafficking by requiring Internet and other remote sellers of these products to comply with the same laws that apply to in-state cigarette and tobacco products sellers. These provisions apply to California's tribal reservations, as well as to both in-state and out-of-state distributors shipping cigarettes and smokeless tobacco into California. On December 27, 2020, federal legislation (Consolidated Appropriations Act, 2021) enacted the Preventing Online Sales of E-Cigarettes to Children Act, which extends the PACT Act to cover all Electronic Nicotine Delivery System products, including related electronic cigarette components, liquids, parts, and accessories regardless if it contains nicotine. Due to the PACT Act requirements, out-of-state sellers making sales of electronic cigarettes directly to consumers in California will be required to register with the California Department of Tax and Fee Administration as a distributor, post a minimum \$1,000 security, pay the required annual licensing fee, and the existing tobacco products tax.

According to a 2017 California Tax Association report, California ranks second in the nation for purchases of smuggled cigarettes, with approximately 44% of cigarettes consumed being smuggled cigarettes.

- 3) **SUPPORT.** The American Academy of Pediatrics, California (AAP-CA) supports this bill and states that According to the CDC, preventing tobacco product use among youth is critical to ending the tobacco epidemic in the United States. Tobacco product use is started and established primarily during adolescence. Nearly nine out of 10 adults who smoke cigarettes daily first try smoking by age 18, and 99% first try smoking by age 26.2 Each day in the U.S., about 1,600 youth smoke their first cigarette and nearly 200 youth start smoking every day. In 2022, about 4 of every 100 middle school students (4.5%) and about one of every six high school students (16.5%) reported current use of a tobacco product. There are many factors associated with youth tobacco product use, including social and physical environments, biological and genetic factors, mental health, and personal views.

AAP-CA notes that while current use of tobacco products among middle and high school students decreased between 2019 and 2020, the CDC highlights the importance of continuing the work to prevent and reduce the use of all forms of tobacco product use among youth. According to a study by Tobacco Free Kids, 441,000 kids now under 18 in California will ultimately die prematurely from smoking. Smoking kills more people than alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined — and thousands more die from other tobacco-related causes — such as fires caused by smoking (more than 1,000 deaths/year nationwide) and smokeless tobacco use.

- 4) **OPPOSITION.** The California Statewide Law Enforcement Association (CSLEA) is opposed to this bill and notes that every time there is a restriction on access to products that millions of adult consumers want and use, we create increased demand for contraband product. That unmet demand leads to larger illegal markets, which in turn result in greater burdens on law enforcement. CSLEA states that dedicated peace officers should focus on reigning in the surge of serious crimes like murders, violence with weapons, domestic terrorism, human trafficking, theft, rape, assaults and drugs. California has the second highest tobacco smuggling rate in the country. Existing taxes are so high that *smuggling from lower-tax areas, including foreign countries, accounts for a staggering 43% of cigarettes smoked in California*, according to a November 2020 report from the Washington, D.C.-based Tax Foundation. Nevada is already a net exporter of cigarettes with nearly 12% of the state's cigarette volume being consumed and discarded, outside of Nevada. Research also indicates a net inbound smuggling rate of 18% from Mexico to California. CSLEA concludes that this bill would move California from a 43% smuggling rate to 100%.

The Neighborhood Market Association (NMA) is opposed to this bill and states that throughout history, bans on legal products have created unforeseen, more grave consequences. This bill would create a phased-in prohibition which does not actually change consumer behavior, only leading to increases of the likelihood of black market and other unregulated sources to endanger consumers. Nearly half of cigarettes consumed in California come from smuggled sources, which may contain unsafe chemicals and dangerous chemicals that will further harm consumers. With the passage of this bill, all tobacco products consumed by individuals born after 2006 will be from black market industries that will be completely unregulated and dangerous.

NMA also notes that the phased-in prohibition of tobacco sales is a violation of personal rights, and the law will unfairly treat different sets of consumers throughout the years. Every individual should be able to decide what to do with their bodies and what they would like to consume. Additionally, it will create a long-lasting and difficult environment for both

retailers and enforcement officers to abide and regulate this law as the law imposes an arbitrary age restriction. NMA concludes, with the passage of this bill, the government will drastically overstep their jurisdiction of tobacco usage and personal rights.

- 5) **PREVIOUS LEGISLATION.** SB 793 prohibits a tobacco retailer, or any of its agents or employees from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer. Exempts from this prohibition the sale of Hookah water pipes and flavored shisha tobacco products, pipe tobacco, and premium cigars.
- 6) **DOUBLE REFERRAL.** This bill is double-referred, upon passage of this committee, it will be referred to the Assembly Committee on Governmental Organization.
- 7) **POLICY COMMENT.** In 2020, 8.9% of adults in California smoked. Nationally, the rate was 15.5 percent. In 2019, 18.2% of high school students in California used electronic vapor products on at least one day in the past 30 days. Nationally, the rate was 32.7%. With California adult smoking rates on the lower end of the spectrum; the Legislature may want to consider whether it would be more effective to focus on enforcing the flavored tobacco ban rather than engaging on a new front, and attempting to prevent a product that is legal in 49 other states, as well as on sovereign Tribal lands, from entering the state.

REGISTERED SUPPORT / OPPOSITION:

Support

Action on Smoking and Health

AFSCME

American Academy of Pediatrics, California

California Health+Advocates, Subsidiary of The California Primary Care Association

Equity and Wellness Institute

International Youth Tobacco Control

North East Medical Services

Public Health Advocates

San Francisco Marin Medical Society

Union of American Physicians and Dentists

Opposition

American Petroleum and Convenience Store Association

California Chamber of Commerce

California Distributors Association

California Hispanic Chambers of Commerce

California Manufacturers and Technology Association

California Retailers Association

California Statewide Law Enforcement Association

California Taxpayers Association

Central Valley Taxpayers Association

Cigar Association of America

Kern County Taxpayers Association

Los Angeles County Taxpayers Association

Neighborhood Market Association

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