

Date of Hearing: April 26, 2023

ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION

Miguel Santiago, Chair

AB 935 (Connolly) – As Amended April 13, 2023

SUBJECT: Tobacco sales: flavored tobacco ban

SUMMARY: Existing law prohibits a tobacco retailer, or any of the tobacco retailer’s 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, as those terms are defined, except as specified. Under existing law, a violation of this prohibition is punishable as an infraction (\$250 for each violation of the state law).

This bill would instead make the provisions of the flavored tobacco ban punishable by civil penalties in the same manner as the Stop Tobacco Access to Kids Enforcement (STAKE) Act with primary enforcement of the Act as the responsibility of the State of California Department of Public Health (CDPH). See Existing Law for specifics of STAKE Act. (California Business and Professions Code § 22950 – 22964)

EXISTING LAW:

- 1) Requires the California Department of Tax and Fee Administration (CDTFA), under the Cigarette and Tobacco Products Licensing Act, to administer a statewide program to license cigarette and tobacco products manufacturers, importers, distributors, wholesalers, and retailers. Prohibits selling tobacco products without a valid license, and makes violations punishable as a misdemeanor. Retailers are required to obtain a separate license for each retail location that sells cigarettes and tobacco products and pay to an annual license fee.
- 2) Defines “Tobacco retailer” to mean a person who engages in this state in the sale of tobacco products directly to the public from a retail location. “Tobacco retailer” includes a person who operates vending machines from which tobacco products are sold in this state. (California Business and Professions Code § 104559.5)
- 3) 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. (California Business and Professions Code § 22950.5)
- 4) States that it is illegal for retailers and clerks to sell tobacco products to anyone under the age of 21. This law applies to the sale of traditional tobacco products like cigarettes as well as to the sale of electronic smoking devices like e-cigarettes and tobacco product paraphernalia. The federal minimum age of sale for tobacco products is now 21 with no exemption for military personnel. If an employee sells tobacco to an underage individual, the business owner can be penalized under the STAKE Act and the employee can be penalized under Penal Code Section 308.

- 5) Provides under California law, it is not illegal for individuals of any age to purchase, receive, or possess any tobacco products or paraphernalia.
- 6) Requires the CDPH 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 STAKE Act. The STAKE Act is primarily enforced by the CDPH, Food and Drug Branch, among other state and local law enforcement agencies, to restrict tobacco product sales to persons under 21 years of age. This law may be enforced only against a business owner and not against an employee who sold the tobacco product or paraphernalia. (California Business and Professions Code § 22950 – 22964)
- 7) Provides the STAKE Act may be enforced by any defined enforcing agency (not limited to, a city attorney, district attorney, or county counsel) and also includes the CDPH, office of the Attorney General, and local law enforcement agencies. The law instructs enforcing agencies to use youth decoys in on-site inspections to determine whether retailers are making illegal sales of tobacco products. The law authorizes enforcing agencies to use youth decoys to investigate illegal sales to underage individuals by telephone, mail, or the internet. (California Business and Professions Code § 22952 and Penal Code § 308(a)(1)(A)(i))
- 8) Permits an enforcing agency, under the STAKE Act, 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. (California Business and Professions Code § 22958)

In addition, the STAKE Act requires suspension or revocation of a retailer’s license upon a civil penalty assessment for a third, fourth, or fifth violation of sales to minors, in accordance with the following schedule:

- a) A 45-day suspension for a third violation at the same location within five years,
- b) A 90-day suspension for a fourth violation at the same location within five years, and,
- c) Revocation of the license for a fifth violation at the same location within five years.

Additional civil penalties in the amount of \$250 each for the third, fourth, and fifth violations are assessed by CDTFA and deposited, as defined.

- 9) The STAKE Act further provides: (California Business and Professions Code § 22956)
- a) Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 21 years of age.
 - b) Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or appliances are located at least 15 feet away from the entrance of a premises issued an on-sale public premises license, as defined.
 - c) Prohibits advertising of any tobacco product on any outdoor billboard, as specified.

d) Prohibits a person engaged in the retail sale of tobacco products from selling, offering for sale, or displaying for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted. Retailers of blunt wraps cannot place or maintain, or cause to be placed or maintained, any blunt wraps advertising display within two feet of candy, snack, or nonalcoholic beverage displayed inside any store or business or that is less than four feet above the floor.

e) Sales of tobacco products made over the phone, via mail or via the Internet to persons under 21 are also investigated and prosecuted.

10) States that it is unlawful for any person, firm, or corporation to sell, give, or in any way furnish to a minor any tobacco product or paraphernalia if that person, firm, or corporation knows or should otherwise have grounds to know that the recipient is a minor. This law may be enforced against a business owner or an employee. A city attorney, county counsel, or district attorney may bring a civil action to enforce the law. Local law enforcement agencies have the general authority to enforce this law. Misdemeanor or a civil action punishable by a fine of \$200 for 1st offense, \$500 for 2nd offense, and \$1,000 for 3rd offense. (California Penal Code § 308)

11) Prohibits a tobacco retailer, or any of the tobacco retailer's 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, as those terms are defined, except as specified. Under existing law, a violation of this prohibition is punishable as an infraction (\$250 for each violation of the state law).

FISCAL EFFECT: This bill is keyed fiscal by Legislative Counsel

COMMENTS:

Purpose of the bill. According to the author's office, "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. This bill can help to achieve this goal, but only if the law is properly enforced. AB 935 will make explicit enforcement by CDPH and the AG in addition to local agencies, to ensure compliance and protection of public health."

Under existing law, any retailer, their agents or employees, who sells or possesses with the intent to sell any of the flavored tobacco products covered by the state law is guilty of an infraction and fined \$250 for each violation of the state law. Instead, AB 935 would make the provisions of the flavored tobacco ban subject to civil penalties in the same manner as the STAKE Act.

Background.

According to the United States Department of Health and Human Services, about 80% of adult smokers began smoking before the age of 18. Youth smoking is associated with greater likelihood of adult smoking, heavier use of cigarettes, and more difficulty in quitting. According to survey data, around 10 percent of adults and youth in California use tobacco products. Surveys suggest that adults are much more likely than youth to smoke cigarettes regularly, while youth are more likely than adults to use electronic nicotine delivery systems (ENDS), also called electronic cigarettes, e-cigarettes, e-cigs, or vape pens. Tobacco use and secondhand smoke

increase the risk of many health problems, such as cancer, heart disease, stroke, respiratory diseases, and complications during pregnancy.

A "Tobacco product" is defined by California law as any of the following: 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, or snuff, as specified.

The federal, state, and local governments have implemented various laws and regulations aimed at protecting the public from the harmful health effects of tobacco. According to the U.S. Food and Drug Administration (FDA), every day, nearly 1,500 kids smoke their first cigarette and about 200 kids become daily cigarette smokers. Additionally, the CDC and FDA found that in 2020, 19.6 percent of high school students currently used e-cigarettes. Many of these children will become addicted before they are old enough to understand the risks.

As of June 9, 2016, under California law it is no longer illegal for individuals of any age to purchase, receive, or possess any tobacco products or paraphernalia. However, California law prohibits selling, giving, or in any way furnishing tobacco products or paraphernalia, including electronic smoking devices, to any individual under the age of 21. The sale of tobacco products to people under 21 years old is also banned by federal law. Effective December 21, 2022, retailers, their agents or employees can no longer sell, offer for sale, or possess with the intent to sell most flavored tobacco products (includes mint and menthol) and tobacco product flavor enhancers, as specified.

The California Department of Public Health, Food and Drug Branch, STAKE Program has the primary responsibility to enforce California's minimum age of tobacco sales law. In addition, another enforcing agency, such as a local enforcement agency including city attorney, district attorney, or county counsel, may conduct inspections and assess penalties for violations. Additionally, any local law enforcement agencies have received enforcement grants from the California Department of Justice as a result of Proposition 56, the California Healthcare, Research and Prevention Tobacco Tax Act of 2016. The STAKE Act also sets requirements pertaining to minimum sales age, signage, and self-service displays.

The law instructs enforcing agencies to use youth decoys in on-site inspections to determine whether retailers are making illegal sales of tobacco products. The law also authorizes enforcing agencies to use youth decoys to investigate illegal sales to underage individuals by telephone, mail, or the internet. An enforcing agency may conduct such inspections or investigations at random, in response to public complaints, or at retail sites where violations have previously occurred. The law contains a detailed protocol for an enforcing agency to follow in its undercover operations.

If an employee sells tobacco to an underage individual, the business owner can be penalized under the STAKE Act and the employee can be penalized under Penal Code Section 308. This is because the owner and employee are not legally the same violator.

Retailers convicted of illegal sales to underage individuals, a STAKE Act violation, are subject to license-related penalties. The CDTFA is charged with administering this provision of the law.

The following penalties apply:

- Upon a first conviction, the retailer shall be fined \$400 to \$600.
- Upon a second conviction within a five-year period, the retailer shall be fined \$900 to \$1,000.
- Upon a third conviction within a five-year period, the retailer shall be fined \$1,200 to \$1,800 and the California Department of Public Health is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall suspend the retailer's license for 45 days.
- Upon a fourth conviction within a five-year period, the retailer shall be fined \$3,000 to \$4,000 and the California Department of Public Health is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall suspend the retailer's license for 90 days.
- Upon a fifth conviction within a five-year period, the retailer shall be fined \$5,000 to \$6,000 and the CDPH is required to notify the CDTFA. The retailer shall be assessed an additional \$250 penalty by the CDTFA, and the CDTFA shall revoke the retailer's license.

Convictions by a retailer at one retail location are not accumulated against other locations owned by that retailer. Convictions accumulated against a prior retail owner of a franchise location are not accumulated against a new retail owner of the same franchise location.

Additionally, local law enforcement agencies have received enforcement grants from the DOJ, as a result of Proposition 56, the California Healthcare, Research and Prevention Tobacco Tax Act of 2016. The California Food and Drug Branch within the CDPH is required to conduct random, onsite inspections at tobacco retail locations with the assistance of persons under the age of 21 to ensure that retailers and their associates comply with California law. State and local enforcement agencies are also authorized to conduct enforcement activities.

The federal Food and Drug Agency (FDA) is also authorized to enforce the federal minimum tobacco age of sale law in California. The FDA conducts inspections of tobacco product retailers to determine a compliance with federal laws and regulations. Fines and penalties for violations of the federal age of sale law may range from \$297 to \$11,904 and may include a tobacco license suspension or revocation (Family Smoking Prevention and Tobacco Control Act Section 103(q)(2)(A)).

CA Prohibits Retailers from Selling Flavored Tobacco Products. In 2020, the Legislature passed, and Governor Newsom signed, SB 793 (Hill), Chapter 34, Statutes of 2020. The law prohibits the sale of most flavored tobacco products, including flavored e-cigarettes and menthol cigarettes, as well as tobacco product flavor enhancers in retail locations, including stores and vending machines, in California. (Health and Safety Code Section 104559.5). The bill 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.

The provisions of the SB 793 do not apply to flavored premium cigars with a wholesale price of \$12 or more and flavored loose-leaf pipe tobacco. Flavored shisha/hookah tobacco may only be

sold in licensed stores that only allow people 21 or older on the premises at any time. Licensed stores must also operate in accordance with all state or local laws relating to the sale of tobacco and consumption of tobacco on the premises (for hookah retailers that permit consumption of tobacco on the premises).

Supporters of the ban pointed to kid-friendly flavors such as cotton candy and bubble gum that spurred more than 3.6 million middle and high school students to use e-cigarettes in 2018. Supporters also noted that the 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.

A tobacco retailer, their agents, or their employees who sell, offer for sale, or possess with intent to sell or offer for sale most flavored tobacco products, including e-cigarettes that deliver nicotine or other vaporized liquids and menthol cigarettes, as well as tobacco product flavor enhancers, will be found guilty of an infraction and fined \$250 for each violation of the law.

This law does not punish or criminalize anyone for purchasing, using, or possessing with the intent to use a flavored tobacco product or tobacco product flavor enhancer. Current law does not specify where the enforcement authority of this statute resides, which implies local jurisdictions have authority to enforce this law.

For instance, prior to the passing of SB 793, roughly one-third of Californians resided in areas where the sale of specific flavored tobacco products was restricted. Some of these local regulations prohibited the sale of menthol cigarettes.

After SB 793 was signed into law on August 28, 2020, the tobacco industry qualified a veto referendum for the ballot (Proposition 31) asking voters whether or not the law should go into effect. As a result, enforcement of the ban was suspended until the November 8, 2022 election. Proposition 31 was approved (63.42% to 36.58%) on the ballot, 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 following week.

Regarding the sale and distribution of tobacco products in California, it is the retailer's responsibility to be aware of and compliant with all applicable federal, state, and local laws.

Local ordinances. Many local cities and counties in California have adopted local tobacco retailer licensing laws, which require a retailer to pay an annual licensing fee and be subject to suspension or revocation of that license if they are found selling tobacco to minors. Therefore, a California retailer who sells cigarettes or tobacco products and is located in a city or county that adopts local tobacco retailer licensing laws has two licenses (state and city/county). Existing local ordinances in some jurisdictions require cigarette and tobacco product retailers to comply with specific provisions of the jurisdiction's land use and zoning ordinances, including provisions that regulate the location of these retailers.

The California Healthcare, Research and Prevention Tax Act of 2016 (Proposition 56). Prop 56 provides local public agencies with funding to promote a healthier California by reducing illegal sales and marketing of cigarettes and tobacco products to minors. The Office of the Attorney

General makes these annual funds available to local law enforcement agencies through the California Department of Justice Tobacco Grant Program. Approved by voters in 2016, Prop 56 increased taxes on cigarettes and other tobacco products by \$2.00 starting in April 2017. The Proposition specifically allocates \$30 million of annual revenue to the California Department of Justice. These funds support local agencies to enforce tobacco-related statutes and ordinances, including to reduce the illegal sale of tobacco products to minors. Grantees may use grant funds to enforce state and local laws related to the illegal sale and marketing of tobacco products to minors and youth including: Retailer compliance checks, retailer training programs, installation of signage, youth outreach, tobacco retail license inspections, and/or preventing and deterring use of tobacco products on school premises.

States & localities that have restricted the sale of flavored tobacco products. Currently, two states (California and Massachusetts) have banned the sale of flavored tobacco products, including flavored e-cigarettes and menthol cigarettes. New Jersey, New York and Rhode Island have banned the sale of flavored e-cigarettes, but not menthol cigarettes. Over 360 localities have passed restrictions on the sale of flavored tobacco products, although laws differ in their application to specific products and store types. At least 170 of these communities—restrict the sale of menthol cigarettes, in addition to other flavored tobacco products.

Types of tobacco products. People use different types of tobacco products, including:

- Cigarettes. Smoking cigarettes is a common way to use tobacco.
- Electronic Nicotine Delivery Systems (ENDS). These battery-operated devices (such as e-cigarettes, e-cigars, vapes, vape pens, cartridges, tanks, and mods) turn special liquid, which contains nicotine, into an aerosol. The user inhales the aerosol.
- Other Tobacco Products. Other tobacco products can be used by smoking, inhaling, chewing, or other ways. These products include cigars, chewing tobacco, loose leaf tobacco, shisha tobacco (typically used in hookahs, a type of waterpipe), smokeless tobacco, heated tobacco, and nicotine pouches. Similar to ENDS, these products might have nontobacco flavors.

The Federal government also regulates tobacco products. Federal law approved in 2009 gives the federal FDA authority to regulate the manufacture, marketing, sale, and distribution of tobacco products. Federal law also requires the FDA to review and authorize new tobacco products, such as ENDS, before they can be sold legally. Federal regulations specifically affecting flavored tobacco products include:

- Federal Law Banned Cigarettes with Flavors, Except Menthol. Federal law banned cigarettes with nontobacco flavors, except menthol, beginning in 2009.
- FDA Recently Proposed Rules Banning Menthol From Cigarettes. In April 2022, the FDA proposed (1) banning menthol-flavored cigarettes and (2) banning all nontobacco flavored cigars. The FDA now is deciding whether to finalize these bans.
- FDA Continues to Review Applications to Sell New Tobacco Products Legally. As of June 2022, the FDA had authorized 42 new tobacco products—23 ENDS products (tobacco flavored or unflavored) and 19 other tobacco products (menthol, mint, or wintergreen

flavored or unflavored). It has denied more than 1 million nontobacco-flavored ENDS products.

- FDA Has Taken Some Steps to Limit Access to ENDS Products. In 2020, the FDA began stepping up enforcement against certain unauthorized ENDS products, including ENDS products targeted toward youth.

In support. The African American Tobacco Control Leadership Council writes, “This bill takes important steps in this direction by providing the AG and the CDPH with the necessary tools to educate retailers and bring an end to illicit flavored tobacco product sales in California, per the will of voters through the passage of SB 793. It is significant that there will be no criminal penalties for the possession and use of cigarettes. The CDPH has championed the goal of reaching the Tobacco Endgame by 2035, ending the sales of all combustible cigarettes in California by then. AB 935 will accelerate progress towards that important goal by strengthening SB 793, ultimately protecting children and youth. We still have much work to do to achieve our endgame goals, but this is a monumental step in the right direction.”

The Action on Smoking and Health writes, “Despite the overwhelming support from voters to pass SB 793, flavored tobacco products continue to be sold in many stores across the state, which allows many teenagers to continue accessing these dangerous products. SB 793 can prevent the next generation of Californians from becoming addicted to smoking, but only if the law is properly enforced. AB 935 will make explicit enforcement by CDPH and the AG in addition to local agencies, to ensure compliance and protection of public health.”

Prior legislation. AB 1742 (R. Rivas), Chapter 454, Statutes of 2022. This bill revised the Cigarette and Tobacco Products Tax Law to provide the AG and the Department of Justice enhanced ability to enforce the Tobacco Master Settlement Agreement. The bill also stated that the California Cigarette Fire Safety and Firefighter Protection Act is to be administered by the AG instead of the State Fire Marshal, and that proposed markings of cigarette manufacturers are deemed approved if the AG fails to act within 30 days instead of the existing requirement of 10 days.

SB 793 (Hill), Chapter 34, Statutes of 2020. This bill bans the sale or possession with the intent to sell flavored tobacco products or tobacco product flavor enhancer, including flavored “vaping” products and menthol cigarettes, with exemptions for the sales of flavored shisha tobacco product for use in a hookah (a type of water pipe), loose leaf tobacco and premium cigars.

SB 8 (Glazer), Chapter 761, Statutes of 2019). Made it an infraction punishable by a fine of up to \$25 for a person to smoke, as defined, on a state coastal beach or in a unit of the state park system, as defined, or to dispose of used cigar or cigarette waste on a state coastal beach or in a unit of the state park system unless the disposal is made in an appropriate waste receptacle.

AB 739 (McCarty and Wood) prohibits a tobacco retailer from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product, as defined. This bill makes a violation of this prohibition an infraction punishable by a fine of \$250 for each violation, and states the intent of the Legislature that these provisions not be construed to preempt or prohibit the adoption and implementation of local ordinances related to the

prohibition on the sale of flavored tobacco products. (Never heard by the Assembly Committee on Governmental Organization)

AB 1639 (Gray) requires a person engaged in the retail sale of tobacco to use age verification software, decreases the period for calculating civil penalties and license suspensions and increases the penalty amounts, prohibits retailers from selling non-tobacco-flavored vapor products, as defined, and from selling any non-cannabis-flavored vapor product, as defined. AB 1639 also imposes an additional tax on electronic cigarettes at a rate of \$2.40 per every 40 milligrams of base product nicotine contained in the electronic cigarette. (Never heard by the Senate Committee on Health)

SBX2 5 (Leno), Chapter 7, Statutes of 2016. Recasts and broadens the definition of “tobacco product” to include Electronic Smoking Devices (ESDs), and extends current restrictions and prohibitions against the use of tobacco products to ESDs.

SBX2 7 (Hernandez), Chapter 8, Statutes of 2016. Increased the minimum legal age to purchase or consume tobacco from 18 to 21. Removes penalty provisions for those under 21 in possession of tobacco and exempts military personnel from the age increase.

ABX2 7 (Stone), Chapter 4, Statutes of 2016. Extended the workplace-smoking ban and closes loopholes, among other things, to address secondhand smoke.

SB 977 (Pan), Chapter 537, Statutes of 2016. Prohibits a person from smoking a tobacco product, as defined, within 250 feet of a youth sports event, as defined. Broadens the definition of “smoke or smoking” in existing law.

SB 591 (Pan) of 2015. Would have imposed an additional cigarette tax at a rate of \$2.00 per package of 20 cigarettes, and a corresponding rate for a cigarette tax stamp. SB 591 was placed on the Inactive File on the Senate Floor and no further action was taken.

AB 768 (Thurmond), Chapter 779, Statutes of 2015. Prohibits the use or possession of smokeless tobacco products, as defined, on the playing field of a baseball stadium during a professional baseball game or practice.

SB 648 (Corbett) of 2013. Would have extended the restrictions and prohibitions against the smoking of tobacco products to include restrictions or prohibitions against ENDS in various places, including, but not limited to, places of employment, school campuses, public buildings, day care facilities, retail food facilities, and health facilities. (Failed passage in the Assembly Appropriations Committee)

AB 1301 (Hill), Chapter 335, Statutes of 2012. Repeals and recasts the Board of Equalization’s existing penalty structure for violations of the STAKE Act, a statewide enforcement program related to the illegal sales of tobacco products to persons under the age of 18.

REGISTERED SUPPORT / OPPOSITION:

Support

Action on Smoking and Health
African American Tobacco Control Leadership Council
American Academy of Pediatrics, California
California Dental Association
Equity and Wellness Institute
International Youth Tobacco Control
North East Medical Services
Osborn Strategies, LLC
Public Health Advocates
San Francisco Marin Medical Society
Union of American Physicians and Dentists

Oppose

None on file

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