

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**Michael J. Aguirre**  
CITY ATTORNEY

April 7, 2005

REPORT TO THE COMMITTEE ON PUBLIC  
SAFETY AND NEIGHBORHOOD SERVICES

TOBACCO ORDINANCE

**INTRODUCTION**

On June 9, 2004, the Public Safety and Neighborhood Services Committee [“the Committee”] met to discuss a proposed ordinance requiring all tobacco retailers in the City of San Diego to possess a police permit to sell tobacco products. The Committee directed that several questions related to the ordinance be answered and that “stakeholders” be brought into the drafting process of the proposed ordinance. This report answers several questions: (1) what current laws deal with sales of tobacco products to minors and are they sufficient to reduce tobacco sales to minors; (2) what is AB 3092 and what other legislation dealing with sales of tobacco products to minors is currently before the state Legislature; (3) may the cost recovery fee be based on the size of the business; (4) which businesses were surveyed in the American Lung Association Survey; and (5) how many prospective applicants are covered by the proposed tobacco ordinance.

**DISCUSSION**

**I. What Current Laws Impact the Sales of Tobacco Products to Minors and Are They Sufficient?**

The Committee has asked what the current laws governing the sale of tobacco products to minors and whether such laws are sufficient in deterring the sales of tobacco products to minors. A review of the existing tobacco control laws reveals that they have limitations that hinder their effectiveness to deter illegal sales of tobacco products to minors.

The following is a description of relevant State laws that deal with the sales of tobacco products to minors:<sup>1</sup>

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<sup>1</sup> Copies of California Penal Code section 308, the STAKE Act, and AB 71 are attached as Attachment 1.

**A. California Penal Code Section 308 et seq**

- Penal Code section 308(a) makes it unlawful to knowingly sell, give, or in any way furnish cigarettes or tobacco products or paraphernalia to persons under 18 years of age. In the case of vending machines, the person who authorizes the installation or placement of a tobacco vending machine is liable for any sale to a minor.
- Penal Code section 308(a) provides that each offense is subject to either a criminal action as a misdemeanor or to civil action, punishable by a fine of \$200 for the first offense, \$500 for the second offense, and \$1,000 for the third offense. Twenty-five percent of each civil and criminal penalty collected is to be paid to the Office of the City Attorney, County Counsel, District Attorney, or whoever is responsible for bringing the successful action and 25 percent is to be paid to the City or County for administration of the cost of community service work. Cal. Penal Code § 308(a).
- Penal Code section 308(b) provides that a minor who purchases, receives or possesses any tobacco products may be punished by a fine of \$75 or 30 hours of community service.
- Penal Code section 308(c) provides that businesses that sell tobacco products must post the notice required by California Business and Professions Code section 22952, also known as “The Stop Tobacco Access to Kids Enforcement [STAKE] Act”. Such notices include a warning sign posted at each point of sale stating that selling tobacco products to minors is illegal and subject to penalties and that minors will be asked for identification. Warning signs must include a toll-free telephone number [1-800-ASK-4-ID] that customers may use to report observed tobacco sales to youths under the age of 18. The section imposes a fine of \$50 for the first offense, \$100 for the second offense, \$250 for the third offense, and \$500 for the fourth offense and each subsequent violation of the provision, or by imprisonment for not more than 30 days.
- Penal Code section 308(d) treats each franchise location or seller of tobacco products as a separate entity for purposes of determining liability for violations.
- Penal Code section 308.2 makes it illegal to sell one or more cigarettes separately. Cigarettes must be sold in the manufacturer’s package, sealed and properly labeled, according to federal requirements.

**B. Stop Tobacco Access to Kids Enforcement (STAKE) Act  
California Business & Professions Code Sections 22950 – 22963.**

- The STAKE Act created a statewide enforcement program to take regulatory action against businesses that illegally sell tobacco to minors. Authority for enforcement and responsibility for implementation of the program was delegated to the Department of Health Services [DHS], Food and Drug Branch.
- The STAKE act requires retailers of tobacco products to post a conspicuous notice at each point of sale and on each vending machine stating that selling tobacco products to minors is illegal and subject to penalties, that retailers are required to check the identification of anyone attempting to buy tobacco that appears under 18 years of age, and must include a toll-free number (1-800-5-ASK-4-ID) that customers may use to report sales to under age youth. Cal. Bus. & Prof. Code §§ 22952(b) and 22956.
- Investigators from DHS, Food and Drug Branch, may conduct on-site compliance checks with the assistance of minors 15 to 16 years of age who are granted immunity from prosecution. The STAKE Act requires DHS to adopt and publish guidelines for the use of persons less than 18 years of age in inspections. DHS may also conduct investigations based on complaints in addition to random checks. Cal. Bus. & Prof. Code §§22952(c)-(d)
- Section 22957 of the Act permits DHS to enter into “delegation agreements” with local law enforcement agencies to assist in the enforcement of the STAKE Act. Local agencies must agree to comply with state regulations in enforcement efforts.
- The STAKE Act provides that any civil penalties imposed pursuant to Section 22958 be enforced against the owner(s) of the retail business and not the employees. Cal. Bus. & Prof. Code § 22952(f).
- Civil penalties according to the schedule stated (ranging from \$200 to \$6,000) may be assessed against the owner of a business that violates the statute by selling or providing tobacco products to minors. This includes a civil penalty of from \$200 to \$300 for the first violation; a civil penalty of from \$600 to \$900 for the second violation within a five-year period; a civil penalty of from \$1,200 to \$1,800 for a third violation within a five-year period; a civil penalty of from \$3,000 to \$4,000 for a fourth violation within a five-year period; or a civil penalty of from \$5,000 to \$6,000 for a fifth or subsequent violation within a five-year period. Cal. Bus. & Prof. Code § 22958.

- Violations at one retail location are not accumulated against other retail locations of the same owner. Cal. Bus. & Prof. Code § 22958 (e).
- The STAKE Act requires any tobacco product distributor or wholesaler and any vending machine operator to annually provide DHS with the names and addresses of the tobacco product retailers that they supply and the name and address of each location where cigarette vending machines are placed. Cal. Bus. & Prof. Code § 22954.
- Business and Professions Code section 22967 of the STAKE Act prohibits tobacco billboards within 1,000 feet of schools and public playgrounds.
- The STAKE Act requires the annual transfer of \$2 million dollars from the Department of Alcohol and Drug Programs' [ADP] SAPT Block Grant to the Sale of Tobacco to Minors Control Account. These funds are used by DHS to administer and enforce the provisions of the Synar Amendment, which requires states to implement programs to curb underage tobacco use.
- The STAKE Act also requires DHS to prepare an annual report regarding its enforcement activities and their effectiveness for the federal government, state legislature, and Governor. Cal. Bus. & Prof. Code § 22952(e).

**C. California Cigarette and Tobacco Products Licensing Act of 2003 [Assembly Bill 71] California Business & Professions Code section 22970 et seq.**

- The California Cigarette and Tobacco Product Licensing Act of 2003 [AB 71] mandates that retailers, wholesalers, distributors, cigarette manufacturers and importers cannot sell tobacco products in California unless they are licensed by the California State Board of Equalization [BOE]. AB71, intended to decrease tax evasion on the sale of cigarettes and tobacco products in California, also includes provisions for new recordkeeping requirements, inspection and seizure of any untaxed cigarettes or tobacco products, and imposes civil and criminal penalties for violations. The law provides for suspending or revoking a tobacco retailer's license if they are convicted a certain number of times for selling tobacco to minors. The Act provides for the following.
- AB71 assigns to the BOE the administration of a statewide program to license manufacturers, importers, distributors, wholesalers, and retailers of cigarettes and tobacco products. Cal. Bus. & Prof. Code § 22970.2.
- Retailers of cigarettes or tobacco products must apply for and obtain a license by June 30, 2004, for each retail location owned or controlled by the retailer.

The license must be conspicuously displayed at each retail location and renewed annually. Cal. Bus. & Prof. Code §§ 22972 (a)-(d).

- A one-time license fee of \$100 is required with each application. Cal. Bus. & Prof. Code § 22973 (d).
- Licensing will be monitored by the BOE. Cal. Bus. & Prof. § 22971.2.
- Local law enforcement officers are authorized to enter and conduct inspections at retail locations no more than once in a 24-hour period. Cal. Bus. & Prof. Code § 22980 (a).
- A person or entity that engages in the business of selling cigarettes without a license is guilty of a misdemeanor punishable as provided in Section 22981. Cal. Bus. & Prof. Code § 22980.2.
- Any violation of the division is a misdemeanor. Each offense shall be punished by a fine not to exceed \$5,000, or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment. Cal. Bus. & Prof. Code § 22981.
- Any prosecution for a violation of any of the penal provisions of the division must be instituted within four years after commission of the offense. Cal. Bus. & Prof. Code § 22982.
- Administrative action that could lead to revocation or suspension of a retailer's license for selling tobacco to minors only go into effect in years when the statewide sales to minors rate is greater than 13 percent or more, as determined by the DHS survey pursuant to Business and Professions Code section 22952. Cal. Bus. & Prof. Code § 22974.8 (d).
- In years when the illegal sales rate of tobacco products to minors is greater than 13 percent, upon a first conviction of either the STAKE Act or Penal Code Section 308, the retailer shall receive a warning letter from the BOE delineating the circumstances under which the retailer's license may be suspended or revoked. Upon a second conviction within a 12 month period, the retailer is subject to a \$500 fine. Upon a third conviction, the retailer is subject to a fine of \$1,000. Upon a fourth through seventh violation, a retailer's license can be suspended for a period of 90 days. After an eighth violation of the STAKE Act or Penal Code section 308, a license shall be revoked. Cal. Bus. & Prof. Code § 22974.8 (b).

- The Act specifically does not preempt local governments from passing their own tobacco control laws. Cal. Bus. & Prof. Code § 22971.3.

The above described state tobacco control laws have several limitations which constrain their effectiveness in curbing sales of tobacco products to minors. First, most of the state tobacco control laws are fine based. For example, Penal Code section 308 has fines that range from \$250 to \$1000. The STAKE Act has civil penalties that range from \$200 to \$6000, based on the number of violations. Finally, the first three violations of AB 71, has fines that range from \$500 to \$1000, based on the number of violations. The use of fine based sanctions has limited effectiveness, given that paying the fines may be seen by violators as a cost of doing business, particularly given the profits made from the selling of tobacco products. Proponents of the proposed ordinance have stated that there is about a forty-five cent profit made on each package of cigarettes sold and that an average retailer makes about \$160 per day in tobacco sales. Accordingly, laws which rely solely on fines as a means to deter tobacco sales have significant limitations. The proposed ordinance would resolve this limitation by focusing on stopping the retailer's ability to sell tobacco products, either by suspension or revocation.

Second, the STAKE Act is limited because enforcement is primarily vested with the Department of Health Services, Food and Drug Branch. This is a problem because local law enforcement agencies may not assist the state in enforcing the STAKE Act absent a delegation agreement. However, even if a delegation agreement were to exist, the local agency would be bound to follow state rules when assisting the State. State Legislators have recognized this weakness and considered amendments to the STAKE Act to permit law enforcement agencies other than DHS to enforce the STAKE act. *See* State Assembly Bill [AB] 2443 described further below. However, AB 2443 did not pass. The proposed ordinance would further the STAKE Act's intended purpose by providing a mechanism by which local entities could hold violators accountable.

Third, both the STAKE Act and the AB 71 Licensing program are limited because the State is responsible for pursuing administrative action and/or civil penalties for violations of these laws. A local agency is excluded from determining whether administrative action should be taken and what the appropriate sanction should be. The proposed ordinance allows the City of San Diego to determine whether administrative action should be taken and what the appropriate sanction should be for violations of tobacco control laws.

In sum, existing state laws have significant limitations which reduce their effectiveness in curbing illegal tobacco sales to minors. In addition, given the various high rates of illegal sales of tobacco products, the proposed ordinance would assist reducing illegal sales of tobacco products to minors.

## **II. What is AB 3092 and What State Legislation Exists That Deals With Sales of Tobacco Products to Minors?**

At the Committee hearing, a speaker stated that State Assembly Bill [AB] 3092 would address what the proposed ordinance sought to achieve. As a result, the Committee requested a summary of AB 3092 and other pending state legislation. In both the 2003-2004 and the 2005-2006 State Legislative Sessions the State Legislature examined various bills dealing with tobacco sales to minors. The following is a summary of the State's legislative efforts:

### **A. 2004-2005 Legislative Session:**

#### **1. AB 3092 - Amends Sections of the Cigarette and Tobacco Products Licensing Act**

Assembly Bill 3092 was chaptered on September 27, 2004. The bill exempts any person or entity from AB71 who is exempt from regulation under the U.S. Constitution, federal law, or the California Constitution. It requires a distributor subject to the act to specify in each invoice that all taxes on cigarette and tobacco products are included in the total amount of the invoice. Existing law authorizes the BOE, effective January 1, 2005, to replace stamp or meter impressions with ones that can be read by a scanning device. It further states the intent of the Legislature that the authority of the BOE to implement these changes by regulation does not affect commerce within the state. Every business must post the required notice of fines for failure to comply. The bill also increases the amounts of the fines to \$50 for the first offense; \$100 for the second offense, \$250 for the third offense, and \$500 for the fourth offense and each subsequent offense. It incorporates additional changes made to Penal Code section 308, as proposed to be made by AB 384, discussed below, to be operative only if AB 384 and this bill are both enacted and take effect.

#### **2. AB 384 - Prohibits tobacco use at youth correctional facilities**

Assembly Bill 384 was chaptered on September 27, 2004. The bill prohibits possession or use of tobacco products by inmates and wards under the jurisdiction of the Department of Corrections and Department of Youth Authority.

#### **3. SB 1173 - Tobacco products self-service display**

Senate Bill 1173 was chaptered on September 27, 2004. The bill amends Business and Professions Code section 22962. Currently, the STAKE Act is designed to reduce the availability of tobacco products to minors through sales restrictions and enforcement activities. Specifically, the STAKE Act prohibits a person engaged in the retail sale of tobacco products to sell, offer for sale, or display for sale, cigarettes by self-service display, as defined. This bill broadens that prohibition to include the sale of any tobacco product or tobacco paraphernalia by self-display and exempts certain products, including cigars, not generally sold in a sealed package. Violation of the section is subject to civil penalties specified in the schedule in Section 22958(a).

**4. SB 1016 – Jenkins Act and sale of cigarettes in interstate commerce**

Senate Bill 1016 was chaptered on September 29, 2004. The bill requires that all tobacco sales be vended assisted face to face sales unless: (1) the vender fully complies with the federal Jenkins Act, which requires that any person who ships cigarettes subject to state taxes into the state provide a copy of the invoice to the BOE; and (2) that all applicable taxes are paid or posts a notice stating the purchaser is responsible for the payment of taxes. The bill further authorizes the BOE to provide information related to a failure to comply by a seller with the bill's requirements to the Attorney General.

**5. AB 2491 - Amends Cigarette and Tobacco Products Licensing Act**

Assembly Bill 2491 was chaptered on June 30, 2004. The bill amended Business and Professions Code sections 22971, 22974.7, 22979, 22979.4 and 22980.2 and adds sections to the Revenue and Taxation Code. The bill authorizes the BOE to issue temporary license to retailers and allow posting on its website of the identity of wholesalers or distributors whose licenses have been suspended or revoked. The Cigarette and Tobacco Products Tax Law requires a tax to be imposed on distributors through the use of stamps or meter register settings affixed to each package sold. The BOE is authorized under the current law to seize products that do not have the stamp or have not paid the tax and to give notice by registered mail or publication. The bill changes the requirement allowing the BOE to give notice by certified mail and by posting on the BOE's website.

**6. AB 1666 -Taxation and distributors of tobacco products**

Assembly Bill 1666 was chaptered on October 12, 2003. The bill amends sections of Cigarette and Tobacco Products Tax Law and Revenue Code sections requiring distributors to pay taxes through use of stamps or meter register settings with reference to dates for filing payment and reporting of payments. It further allows distributors who defer payments to remit payments either on a monthly or twice-monthly basis. Until January 1, 2007, it requires distributors of cigarettes and tobacco products to elect to file returns and remit taxes, as specified, either on a monthly or twice-monthly basis.

**7. SB 1821 - Raises minimum legal age to 21; advertising, display, and distribution limitations**

Senate Bill 1821 was considered but failed because of the end of the legislative session. The bill would have raise the minimum legal age required to purchase cigarettes and tobacco products from 18 to 21 years and make corresponding changes in the STAKE Act. These conforming changes would have also be applicable to the restrictions on tobacco promotions and enforcement of tobacco sales bans. The STAKE Act authorizes the assessment of civil penalties for violations of the Act and makes the violation of certain provisions of the Act a criminal offense. Existing law also makes it a crime to engage in activities for which civil penalties may



be imposed under the Act. This bill would have extended the applicability of the Act and the criminal law described above to persons under the age of 21 years, except for those who were born before January 1, 1987. In addition, the measure would have authorized DHS to enlist the assistance of 15 and 16 year olds for onsite sting inspections until January 1, 2007, and after that to use anyone under the age of 21

**8. AB 2443 - Tobacco products and minors**

Assembly Bill 2443 was considered but failed because of the end of the legislative session. The bill would have authorized an enforcing agency, other than DHS, to conduct inspections and assess penalties for violations. The bill would have made changes to the civil penalty amounts for the first and second violation and would have authorized not only DHS, but any enforcing agency to assess those civil penalties. The bill would have required all civil penalties collected under the act by local law enforcement to be used to pay their costs of enforcement. Local enforcing agencies would have included District Attorney, City Attorney, and County counsel. Finally, the bill would have made changes in the STAKE Act regarding the published guidelines for using minors in sting operations.

**9. SB 676 - Tobacco manufacturer fees; Tobacco Mitigation Trust Fund**

Senate Bill 676 was considered but failed because of the end of the legislative session. The bill would have imposed a fee, to be determined by the State Department of Health Services, by regulation, on specified cigarette manufacturers who did not sign the Master Settlement Agreement [MSA] entered into between Attorney General and various tobacco product manufacturers in settlement of litigation. The State has entered into a Memorandum of Understanding providing for allocation of the state's share to be received under the MSA. Existing law requires any tobacco product manufacturer that sells cigarettes in California and who does not participate in the MSA to place specified amounts into a qualified escrow fund by April 15th of each year. The proposed bill would have established the Tobacco Mitigation Trust Fund, to receive moneys derived from the imposition of the fee.

**10. SB 433 - Licensing of retailers**

Senate Bill 433 was considered but failed because of the end of the legislative session. The Cigarette and Tobacco Products Licensing Act of 2003 requires the State Board of Equalization to take certain actions prior to suspending or revoking a retailer's license to sell cigarettes. Existing law prescribes penalties for the fourth through eighth convictions and limits when the Board has authority to take action against retailers. The bill would have made changes to those penalties for convictions by requiring the Board to revoke a licensee's license for specified periods upon multiple convictions. The bill would have provided that convictions for violations at one retail location or against a prior retail owner could not be accumulated against other locations of the licensee or against a new retail owner. The bill would have repealed the limitations on the board's authority to take action against retailers.

**11. AB 1276 - Tobacco Settlement Agreement; escrow compliance**

Assembly Bill 1276 was considered but failed because of the end of the legislative session. The bill would have required the Attorney General to post a website identifying tobacco product manufacturers who complied with requirements of the Cigarette and Tobacco Products Tax Law and the requirement for non-participants under the Tobacco Settlement Agreement to make payments into a qualified escrow fund, and would have prohibited any stamp or meter to be affixed to a product not included on the list. The bill would have given the Attorney General specified authority and duties in this regard, and would have imposed specified penalties for failure to comply. The bill would have also made it a misdemeanor for a tobacco manufacturer to make false representations, or to sell, distribute, or import cigarettes in violation of the bill. The bill would have further deemed it unfair competition for any person to affix a tax stamp or meter impression in violation of the bill's requirements, and would have added to the existing forfeiture list products to which cigarette tax stamps or meter impressions are affixed in violation of the prohibition specified.

**12. AB 221 - Tobacco products, minimum age, advertising**

Assembly Bill 221 failed because of the end of the legislative session. The bill would have extended the prohibitions of the STAKE Act to persons under 21 years of age, except those born before January 1, 1986. In addition to increasing the buying age for tobacco products, the bill would also restrict advertising or sale of promotional items to persons less than 21 years of age. The bill would have changed the definition of a crime, creating a state-mandated local program. The STAKE Act currently requires DHS to enlist 15 and 16 year olds in sting inspections. The bill would have authorized DHS until January 1, 2007, to enlist the assistance of persons who are 15 and 16 years of age, and after January 1, 2007, to enlist the assistance of persons less than 21 years of age for the inspections.

**13. AB 1040 - Cigarette taxes**

Assembly Bill 1040 failed because of the end of the legislative session. Existing law authorizes local government entities to levy specified taxes, but prohibits imposition of taxes by any charter city, or counties with regard to sale, use, ownership, holding, or other distribution of cigarettes and tobacco products, except as provided. The bill would have authorized the board of supervisors of a county to impose a tax, in addition to other local taxes, on the privilege of selling cigarette and tobacco products within their boundaries.

**14. AB 1239 - Cigarette taxation**

Assembly Bill 1239 failed because of the end of the legislative session. The bill would have imposed after January 1, 2004, a fee, to be determined by DHS as prescribed on specified tobacco manufacturers who did not sign the Master Settlement Agreement (MSA), creating the

Nonparticipating Tobacco Manufacturing Mitigation Trust Fund to receive monies derived from the fee. Fund monies are to be used to reimburse DHS and to fund smoking cessation programs.

**B. 2005-2006 Legislative Session:**

**1. SB 400:**

Senate Bill 400 is currently set for a hearing on April 6, 2005. The bill would allow the BOE to validate state, local, and county convictions for violation of the cigarette licensing laws under Business and Professions Code sections 22950 *et seq.* The BOE could then impose the following penalties: first violation: 30-day suspension; second violation: 90-day suspension; third violation: 120-day suspension; fourth violation: 365-day suspension; and, fifth violation: Permanent revocation. A party would then have 30 days to appeal the administrative action. The violations are applied to the location and not the person and thus are not cumulative as to other retail locations owned by the same owner. Violations by a previous owner at one location cannot be accumulated against a new owner of the same location. The bill would further require local law enforcement agencies to contact the State Board within 30 days of any judgment finding a seller, retailer, etc., to be in violation. The bill also provides for a State-mandated program to supervise the implementation of this bill. The bill also provides for reimbursements to local agencies and school districts.

**2. AB 1749 :**

Assembly Bill 1749 is currently set for a hearing on April 8, 2005. The bill would require tobacco vendors, distributors, etc. to provide the correct excise tax, instead of an itemized list of sales, along with their sales invoices verifying to the BOE the amount of their total sales of tobacco products in California. The bill further empowers the BOE or any state or local agency to seize any tobacco products that do not comply with the invoice reporting requirements. The section allows the BOE to revoke or suspend licenses of distributors, wholesalers, importers or manufacturers and, upon further offenses, to impose a fine of five times the value of the retail cigarettes in question or \$5000, whichever is less. The bill requires all manufacturers and importers to pay a fee proportional to their market share as of January 1, 2004. Finally, the bill requires a refund or remission to the State of all excess taxes/fees collected

**3. AB 1612:**

The bill is in the Assembly Natural Resources Committee. The bill would enact the Cigarette Pollution and Litter Act of 2005 and add Public Resources Code section 19000, *et. seq.* The bill would require that an additional fee be paid by manufacturers to the BOE starting July 1, 2006 to fund cigarette pollution prevention and education measures and educational programs. Under Public Resources Code section 19003, the manufacturer will pay a cigarette pollution and litter prevention fee to the State Board of Equalization for each pack sold. Under section

19004(a) the moneys collected will go into a fund managed by the State Treasury to be used by both the Department of Health and the Department of Conservation as per section 19004(b.) The purpose of this fund as per section 19004(b)(1)-(8) is to assist local governments in clean-up and educational efforts relating to smoking and cigarette pollution; to reimburse the expenses incurred by the Board for collecting the fees; and, to pay for implementing this statute.

**4. AB 17:**

The bill was referred to the Assembly Committee on Governmental Organization. The bill would add section 516 to Public Resources Code and make it an infraction punishable by \$100 fine to smoke within 25 feet of playgrounds and on State beaches. The bill would exclude adjacent parking lots or campgrounds that are not on the sand.

**5. AB 1029:**

The bill was referred to the Assembly Committee on Revenue and Taxation. The bill would amend Revenue and Taxation Code section 30101.7 by requiring the vendor of non-face-to-face sales to comply with all federal (Jenkins Act) and state requirements involving the sale of cigarettes including providing the State Board of Equalization with a verification of all taxes having been paid as per Revenue and Taxation section 30101.7(d)(3); verification that the seller is in compliance with the provisions of Health and Safety Code section 104557(a)(2); requiring an out-of-state seller to include a printed label informing the buyer that their identity has been reported to the Board and that the buyer is responsible for all unpaid state taxes. The bill further allows for a separate cause of action by local entities and the Attorney General against retail sellers who fail to pay taxes on face to face transactions.

**III. Because the Cost to Administer and Enforce the Proposed Ordinance Does Not Change Because of the Size of the Business, the Fee Must Be the Same for Small and Large Businesses**

The Committee was concerned about the equity of assessing the same permit fee for small and large businesses. As a result, it asked whether the fee for a permit may be based on the size of the business - where a smaller business would pay a lower permit fee. The cost in administering and enforcing the proposed ordinance is the same for both large and small businesses. As a result, any permit fee imposed must be the same for both large and small businesses.

Government Code section 66016 states, in pertinent part: "Unless there has been voter approval, as prescribed by [Government Code] [s]ection[s] 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service

charge is levied.” *See also Sinclair Paint Co. v. Board of Equalization*, 15 Cal.4<sup>th</sup> 866 (1997) [Fees may include costs of enforcement]. As a result, the sole criteria that may be considered to determine the cost of a fee is the cost to administer and enforce the service.

Permit fees for the proposed ordinance will be used to pay for the processing of the permit applications, and to provide for administrative appeals. The costs for these activities are the same for all businesses regardless of size, particularly because each location which sells tobacco products will be required to possess a permit. As a result, a fee based on the size of the business in this case would not be proper.

#### **IV. American Lung Association Survey Results**

At the Committee meeting the results of the American Lung Association survey were discussed. In the course of the discussion, the Committee asked which businesses were surveyed and how did those businesses fare. Attachment 4 contains the survey results requested by the Committee. The survey results identify which businesses were surveyed and which sold tobacco products to minors. Also, attached is a copy of the American Lung Association report generated as a result of the survey.

#### **V. Number of Prospective Applicants**

The Committee also asked how many tobacco retailers would be required to obtain the proposed police permits. At the meeting, based on information from the Palaver Tree Organization, an estimate of 3500 applicants was given. However, it was cautioned that the number was solely an informal estimate. The Committee directed that efforts be made to obtain more accurate information related to the number or prospective applicants.

In response to the Committee’s query, the City Attorney’s Office contacted the State Board of Equalization, which is tasked with ensuring that tobacco retailers obtain State Tobacco Retailer licenses [AB 71 licenses]. After conversations with Victor Day, Principal Compliance Supervisor, the Board of Equalization provided to the City Attorney’s Office, a list of all persons who had been issued a state tobacco retailer license in the City of San Diego, which numbered in March 2005 at 1363. Accordingly, because tobacco retailers required to obtain a state license would also be required to obtain a City permit, the number of prospective City permittees is the same and numbers about 1363.

#### **VI. Illegal Sale Rates to Minors Supports the Need for the Proposed Ordinance**

A review of the tobacco sales rates of tobacco products to minors supports the conclusion that the proposed ordinance would assist in reducing tobacco sales to minors. There are at least three tobacco sales rates to minors which may be examined. The first is found in the State of

California's 2004 Youth Tobacco Survey.<sup>2</sup> In that survey, the sales of tobacco products rate to minors is currently at 14 percent, a slight increase from the prior year which was at 12.2 percent. The second is a rate calculated by DHS. DHS has reported an illegal sales rate, as of June 24, 2004, of 29 percent.<sup>3</sup> The rate they calculated for Fiscal Year 2003-2004 was at 34 percent. However, they caution that the rates they have developed are not official statewide results. Nonetheless, they are significantly high rates. Finally, the American Lung Association conducted a survey of tobacco retailers in the City of San Diego.<sup>4</sup> They determined that 43.8 percent of 244 surveyed businesses sold tobacco products to minors. Accordingly, in light of the above rates, which range from 14 percent to 43.8 percent, additional efforts, such as the proposed ordinance, to hold retailers who sell tobacco products to minors accountable, are needed to assist in reducing the rate of illegal sales to minors.

The San Diego Tobacco Free Communities Coalition is opposed to the ordinance as written because it does not provide the Police Department with adequate funds to enforce the proposed ordinance and sales to minor laws. The Coalition strongly believes the ordinance should be adopted in a more viable form.

### CONCLUSION

This memorandum was intended to address the questions presented by the Committee. The information provided further supports the conclusion that the proposed tobacco ordinance is a lawful and proper exercise of the City's police power.

Respectfully submitted,

MICHAEL J. AGUIRRE  
City Attorney

SS:jrp  
Attachments  
RC-2005-08

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<sup>2</sup> A copy of the "California Department of Health Services, Tobacco Control Section, 2004 California Youth Purchase Survey, Executive Summary" is attached as Attachment 2.

<sup>3</sup> A copy of DHS's findings, obtained from their website is attached as Attachment 3.

<sup>4</sup> A copy of the American Lung Association survey results, including an identification of surveyed businesses, is attached as Attachment 4.