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Tobacco Reform in the Special Session: Vaporized? The Cloudy Status of New Restrictions and Taxes for the Tobacco Industry

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Tobacco Reform in the Special Session: Vaporized? The Cloudy Status of New Restrictions and Taxes for the Tobacco Industry

Anna Curry

Code Sections Affected

Business and Professions Code §§ 22964, 22971.7, 22973.3 (new), §§ 17537.3, 22950.5, 22951, 22952, 22956, 22958, 22962, 22963, (amended), §§ 22973, 22980.2 (amended, repealed, and added); Civil Code § 1947.5 (amended); Education Code § 48901 (amended); Government Code § 7597 (amended); Health and Safety Code § 119406 (new), §§ 1234, 1286, 1530.7, 1596.795, 104495, 114332.3, 114371, 118910, 118925, 118948 (amended), § 119405 (repealed); Labor Code § 6404.5 (amended); Penal Code § 308 (amended); Public Utilities Code §§ 561, 99580 (amended); Revenue and Taxation Code § 7284.8 (new), §§ 30111, 30462 (amended); Vehicle Code § 12523 (amended).
 ABX 2-10 (Bloom); pending action by the Governor.
 SBX 2-5 (Leno); pending action by the Governor.
 SBX 2-7 (Hernandez); pending action by the Governor.

TABLE OF CONTENTS

I.	INTRODUCTION	477
II.	LEGAL BACKGROUND	478
	<i>A. The History of Federal Smoking Regulations</i>	<i>478</i>
	<i>B. The History of Similar Regulations in Other Parts of the Country</i>	<i>479</i>
	<i>C. The History of California’s Smoking Regulations.....</i>	<i>480</i>
	<i>D. The History of Taxing Smoking</i>	<i>481</i>
	<i>E. The History of Tobacco Reform from the Regular Session</i>	<i>482</i>
III.	SBX 2-7, SBX 2-5, AND ABX 2-10.....	482
IV.	ANALYSIS.....	483
	<i>A. Will the Tobacco Reform Bills Fulfill Their Intended Health Benefits?</i>	<i>483</i>
	<i>B. Social Effects and Possible Equal Protection Challenges</i>	<i>486</i>
	<i>C. The Economic Effects of SBX 2-7, SBX 2-5, and ABX 2-10</i>	<i>488</i>
V.	CONCLUSION.....	489

I. INTRODUCTION

Forty thousand Californians die from smoking-related illnesses every year.¹ These illnesses include cancer, stroke, and heart disease.² Electronic cigarette use among adults ages eighteen to twenty-nine rose from 2.3 percent in 2012 to 7.6 percent in 2013, and in 2014, 17 percent of high school seniors admitted to smoking electronic cigarettes.³ While California was once a leader in smoking regulations, in recent years, efforts to further regulate the tobacco industry have failed.⁴ Members introduced a wide-ranging package of bills in the regular session, only to see them hit familiar roadblocks.⁵ In a renewed effort, and with the unwitting help of the Governor, the bills were revived in a special session initially meant to tackle problems with MediCal.⁶ Senator Ed Hernandez introduced SBX 2-7 to raise the legal smoking age, Senator Mark Leno introduced SBX 2-5 to apply greater restrictions to electronic cigarettes, and Assembly Member Richard Bloom introduced ABX 2-10 to increase taxes on cigarettes and tobacco products.⁷

1. Patrick McGreevy, *New Bills Renew California's Anti-Smoking Effort*, L.A. TIMES (Apr. 14, 2015), <http://www.latimes.com/local/politics/la-me-pol-tobacco-legislature-20150415-story.html> [hereinafter McGreevy *Anti-Smoking Effect*] (on file with *The University of the Pacific Law Review*).

2. See generally U.S. DEP'T OF HEALTH AND HUM. SERV., A REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS iii (2014) [hereinafter THE HEALTH CONSEQUENCES OF SMOKING] (showing the documented illnesses and causes of death directly attributable to smoking which include but are not limited to various forms of cancer, heart disease, and stroke).

3. RON CHAPMAN, STATE HEALTH OFFICER'S REPORT ON E-CIGARETTES-A COMMUNITY HEALTH THREAT 4 (2015).

4. McGreevy *Anti-Smoking Effect*, *supra* note 1.

5. E.g., BILL STATUS OF SB 151, at 1 (July 8, 2015) (showing that a regular session bill meant to raise the smoking age to 21 was stalled and abandoned in the Assembly Governmental Organizations Committee).

6. See Patrick McGreevy & Chris Megerian, *California Lawmakers Revive Measures on Assisted Suicide, Smoking Age*, L.A. TIMES (Aug. 18, 2015), <http://www.latimes.com/local/political/la-me-pc-california-lawmakers-bring-back-aid-in-dying-bill-for-special-session-20150817-story.html> (on file with *The University of the Pacific Law Review*) (discussing the special health sessions on financing healthcare being used as a platform to bring back the tobacco legislation, among other bills).

7. Press Release, Senator Ed Hernandez, Senator Hernandez Re-Introduces Legislation to Raise Smoking Age (July 16, 2015), available at <http://sd22.senate.ca.gov/news/2015-07-16-senator-hernandez-re-introduces-legislation-raise-smoking-age> [hereinafter Hernandez Re-Introduces Legislation] (on file with *The University of the Pacific Law Review*); Press Release, Senator Mark Leno, Sen. Leno Issues Statement on New Push for Statewide E-Cigarette Laws (July 16, 2015), available at <http://sd11.senate.ca.gov/news/2015-07-16-sen-leno-issues-statement-new-push-statewide-e-cigarette-laws> [hereinafter Leno Statement on New Push] (on file with *The University of the Pacific Law Review*); SENATE FLOOR ANALYSIS OF ABX 2-10, at 2 (Mar. 9, 2016) [hereinafter ANALYSIS OF ABX 2-10] (addressing the raising of the tax bill in the special session).

II. LEGAL BACKGROUND

Part A examines the history of smoking regulations on the federal level.⁸ Part B contains a brief look at the history of similar smoking regulations in individual states.⁹ Part C discusses the history of smoking regulations in California.¹⁰ Part D examines the history of taxation surrounding smoking in California.¹¹

A. *The History of Federal Smoking Regulations*

The recognition of the health consequences of tobacco use began in 1965 with the Federal Cigarette Labeling and Advertising Act, which required a health warning on cigarette packages; in 1969 that warning was updated to include that the Surgeon General had determined that smoking was a health hazard.¹² In 1984 the labels were again updated to include a rotation of four health warnings, including a warning about the dangers of lung cancer and heart disease and a warning about dangers to fetal development.¹³

In 1992, Congress passed the Synar Amendment to the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act.¹⁴ This Amendment required all states to implement restrictions on tobacco sales to minors in order to receive federal funds for substance abuse treatment.¹⁵ In 2010, the FDA issued a rule stating that retailers could only sell cigarettes and smokeless tobacco to those over eighteen with valid photo identification.¹⁶

Far less federal regulation applies to electronic cigarettes.¹⁷ The FDA is only authorized to regulate electronic cigarettes that are marketed as having therapeutic benefits.¹⁸ However, electronic cigarette companies merely claiming to be a healthier alternative to traditional smoking circumvents this regulation.¹⁹

8. *See infra* Part II.A (The History of Federal Smoking Regulations).

9. *See infra* Part II.B (The History of Similar Regulations in Other Parts of the Country).

10. *See infra* Part II.C (The History of California's Smoking Regulations).

11. *See infra* Part II.D (The History of Taxing Smoking).

12. THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 2 at 23–24.

13. 15 U.S.C. § 1331 (1984).

14. 42 U.S.C. § 300x-26 (1992).

15. *Id.*

16. *See* 21 C.F.R. § 1140.14 (a)–(b) (2010) (illustrating the provision regarding photo identification does not apply if the prospective purchaser is over twenty-six and the provisions regarding smokeless tobacco referred to chewing tobacco).

17. *See generally* Smoking Everywhere, Inc. v. FDA, 680 F. Supp. 2d 62, 72 (D.C. Cir. 2010) (discussing the difficulty of regulating electronic cigarettes).

18. *Id.*

19. *Id.* at 75.

B. The History of Similar Regulations in Other Parts of the Country

States have historically regulated the minimum age of tobacco consumption, although the federal government has expressed approval for a minimum age of eighteen.²⁰ Most states have restricted the sale and consumption of tobacco products to persons age eighteen or nineteen;²¹ however, some cities, like New York City, have increased the age through local ordinances to twenty-one.²² Citing concerns of addiction among young people, the Hawaiian legislature broke from tradition and became the first state to raise the statewide minimum age to twenty-one.²³ In the process, Hawaii also raised the minimum age for smoking electronic cigarettes to twenty-one by redefining “tobacco products” to include electronic cigarettes.²⁴

States have also taken the initiative to prevent large tobacco companies from targeting young people.²⁵ In 1998, forty-six states, including California, entered into an agreement with the four largest tobacco manufacturers: Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard.²⁶ This agreement, referred to as the Master Settlement Agreement, settled all lawsuits states brought against those companies for the damage caused by cigarettes to the general population of the states, and consequently, the costs to the state health care systems.²⁷ In return, the four companies agreed to a variety of regulations, including a stipulation that they would not directly or indirectly target sales to young people residing in those forty-six states.²⁸

Due to the lack of federal regulation, states have implemented age restrictions on the sale and use of electronic cigarettes.²⁹ Forty-four states currently offer some prohibition on the sale of electronic cigarettes to minors under the age of eighteen.³⁰ Some states even extend the traditional tobacco

20. See 42 U.S.C. § 300x-26 (1992) (explaining that federal grants will only be given to states that restrict the sale of tobacco to those under eighteen).

21. E.g., N.J.S.A. 2A:170-51.4 (2010) (stating that the minimum legal age in New Jersey is nineteen); see also C.R.S.A. § 18-13-121 (2014) (stating that the minimum legal age in Colorado is eighteen).

22. N.Y. CITY ADMIN. CODE § 17-706 (2015).

23. Jeff Guo, *Alarmed at Rising Teen E-Cigarette Use, Hawaii Raises Smoking Age to 21*, WASH. POST (June 23, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/06/23/alarmed-at-rising-teen-e-cigarette-use-hawaii-raises-smoking-age-to-21/> (on file with *The University of the Pacific Law Review*).

24. *Id.*

25. MASTER SETTLEMENT AGREEMENT 10 (ed. July 2014), available at <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf> (on file with *The University of the Pacific Law Review*).

26. *Id.* at 8.

27. *Id.* at 1.

28. *Id.* at 10.

29. *Alternative Nicotine Products/Electronic Cigarettes*, NAT'L CONF. OF STATE LEGIS. (Oct. 9, 2015), <http://www.ncsl.org/research/health/alternative-nicotine-products-e-cigarettes.aspx> (on file with *The University of the Pacific Law Review*) (listing the states that have regulations for electronic cigarettes based on age).

30. *Id.*

product prohibitions to electronic cigarettes, even though electronic cigarettes do not contain tobacco.³¹ For instance, Colorado defines electronic cigarettes as tobacco products and regulates them accordingly.³² New Jersey restricts the sale of all electronic cigarettes in the same way as it restricts tobacco products.³³ South Dakota treats all vapor products like tobacco products.³⁴

C. *The History of California's Smoking Regulations*

In compliance with the 1992 federal Synar Amendment, California adopted the Stop Tobacco Access to Kids Enforcement Act (STAKE).³⁵ This set the legal age for smoking tobacco products at eighteen.³⁶ It also set the legal age for purchasing and possessing tobacco and related tobacco products.³⁷ Additionally, it made it a crime to sell tobacco products to anyone under the age of eighteen, and it permitted law enforcement to use individuals under the age of eighteen in undercover operations to attempt to uncover persons selling tobacco products to the underage.³⁸

Although the majority of the state retained the provisions of the STAKE Act, smaller cities and counties in California raised the legal age to twenty-one.³⁹ Effective in January 2016, Santa Clara County raised the purchase age for tobacco and electronic cigarettes to twenty-one.⁴⁰ Last year, the city of Healdsburg voted to raise the legal purchase age for all tobacco products and electronic cigarettes to twenty-one.⁴¹ Earlier this year, San Francisco also voted to raise the legal purchase age.⁴²

31. See Patrick McGreevy, *California Bills to Raise Smoking Age and Regulate E-Cigarettes Stall*, L.A. TIMES (July 8, 2015), <http://www.latimes.com/local/political/la-me-pc-bill-to-raise-smoking-age-stalls-20150708-story.html> [hereinafter McGreevy *California Bills*] (on file with *The University of the Pacific Law Review*) (discussing California's attempt to implement more stringent regulation).

32. C.R.S. § 18-13-121 (2014).

33. N.J.S. 2A:170-51.4 (2010).

34. SDCL § 34-46-20 (2014).

35. CAL. BUS. & PROF. § 22950 (West 1994).

36. CAL. PENAL CODE § 308(b) (West 2014).

37. *Id.*

38. *Id.*

39. See Jenna Lyons, *Santa Clara County Boosting Age to Buy Tobacco to 21*, S.F. CHRONICLE (June 10, 2015), <http://www.sfgate.com/bayarea/article/Santa-Clara-County-boosting-age-to-buy-tobacco-to-6317379.php> (on file with *The University of the Pacific Law Review*) (discussing a California county raising the minimum age); see also Clark Mason, *Minimum Age to Buy Cigarettes Goes Up in Healdsburg*, PRESS DEMOCRAT (June 30, 2015), <http://www.pressdemocrat.com/news/4135237-181/minimum-age-to-buy-cigarettes> (on file with *The University of the Pacific Law Review*) (discussing a California city raising the minimum age).

40. Lyons, *supra* note 39.

41. Mason, *supra* note 39.

42. See Associated Press, *The Latest: San Francisco Raises Tobacco Buying Age to 21*, S.F. GATE (Mar. 1, 2016), <http://www.sfgate.com/news/article/The-Latest-San-Francisco-raises-tobacco-buying-6864111.php>

Prior California law restricted the sale of electronic cigarettes.⁴³ However, prior law only defined electronic cigarettes as devices that allowed the user to inhale vaporized nicotine.⁴⁴ The age requirement for purchasing nicotine vapor products was eighteen.⁴⁵ However, there was no age restriction on non-nicotine vapor products.⁴⁶ Therefore, prior to SBX 2-5, a person of any age could purchase vapor products as long as they did not contain nicotine.⁴⁷

The state legislature has tried and failed to raise the smoking age before.⁴⁸ In 2001, Assembly Member Paul Koretz introduced Assembly Bill 1453, seeking to raise the smoking age to twenty-one.⁴⁹ Unfortunately, the bill went through substantial revisions, and Assembly Member Koretz ultimately amended the bill to address a different subject.⁵⁰ In the 2003 legislative session, Assembly Bill 221—which Assembly Member Koretz also authored—sought to apply STAKE to people who were twenty-one;⁵¹ however, that bill died in the Assembly Governmental Organizations Committee.⁵² During that same session, Senator Joe Dunn introduced a duplicate bill of AB 221, Senate Bill 1821.⁵³ The state legislature held SB 1821 in the Senate Appropriations suspense file.⁵⁴

D. The History of Taxing Smoking

In 1989, Californians passed Proposition 99 implementing a broad increase, in cigarette taxes, raising them to twenty-five cents a package and mandating that five of those cents would be put towards tobacco prevention programs.⁵⁵ In 1999, Californians passed Proposition 10, the Children and Families First Act which implemented an increase in the surtax of about fifty cents per pack of cigarettes and which guaranteed that a portion of that tax would go towards programs funding early childhood development.⁵⁶

(on file with *The University of the Pacific Law Review*) (discussing San Francisco raising the smoking age to 21).

43. CAL. HEALTH & SAFETY CODE § 119405 (West 2010).

44. *Id.*

45. *Id.*

46. *Id.* (restricting sales of nicotine products only).

47. *Id.*

48. See generally SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 151, at 6 (May 31, 2015) [hereinafter ANALYSIS OF SB 151] (listing briefly the prior legislation similar to SBX 2-7 that failed).

49. AB 1453, 2002 Leg., 2001–2002 Reg. Sess. (Cal. 2002).

50. ANALYSIS OF SB 151, *supra* note 48, at 6.

51. AB 221, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003).

52. ANALYSIS OF SB 151, *supra* note 48, at 6.

53. SB 1821, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003).

54. ANALYSIS OF SB 151, *supra* note 48, at 6.

55. Cal. Proposition 99 (1989).

56. Cal. Proposition 10 (1999).

In total, under the prior law, the Cigarette and Tobacco Products Tax Law charged distributors a primary tax of \$0.006 per cigarette—approximately three to ten cents per package.⁵⁷ In addition, the state imposed one surtax of \$0.0125 per cigarette⁵⁸ and an additional surtax of \$0.025 per cigarette.⁵⁹ These taxes were in lieu of local taxes on cigarettes.⁶⁰

E. The History of Tobacco Reform from the Regular Session

Tobacco related legislation has also experienced difficulty passing during this current legislative session.⁶¹ Senator Hernandez introduced the precursor to SBX 2-7 in the regular legislative session, but pulled it “from consideration for lack of votes.”⁶² Senator Leno had also introduced a precursor to SBX 2-5 in the regular session, but was ultimately stalled in the Assembly Governmental Organizations Committee.⁶³ In an effort to still create tobacco reform, a group of legislators re-drafted the bill for a previously scheduled special session on healthcare and creating a larger package of bills, including tax reform.⁶⁴

III. SBX 2-7, SBX 2-5, AND ABX 2-10⁶⁵

SBX 2-7 raises the legal age for smoking tobacco products in California from eighteen to twenty-one.⁶⁶ It also makes it a crime to sell or otherwise furnish tobacco products to anyone under the age of twenty-one, instead of eighteen.⁶⁷ This law additionally makes it a crime to purchase or possess tobacco products or paraphernalia under the age of twenty-one.⁶⁸ There is an exemption allowing for the sale of tobacco products to active military personnel who are over eighteen.⁶⁹

SBX 2-5 redefines tobacco in the STAKE act to include vapor products, criminalizing the sale of any inhalable vapor products to persons under age

57. CAL. REV. & TAX. CODE § 30101 (West 1994).

58. *Id.* § 30123 (2001).

59. *Id.* § 30131.2.

60. *Id.* § 30111 (1989).

61. *See generally* Hernandez Re-Introduces Legislation, *supra* note 7 (stating that “previous attempts to protect California’s youth from this deadly drug came up just short”).

62. McGreevy *California Bills*, *supra* note 31.

63. Leno Statement on New Push, *supra* note 7.

64. Hernandez Re-Introduces Legislation, *supra* note 7.

65. Editors’ Note: At the time of publication, the three bills were awaiting action by the governor, but all three were expected to be signed into law.

66. Hernandez Re-Introduces Legislation, *supra* note 7.

67. SBX 2-7, 2015 Leg., 2015–2016 Second Extraordinary Sess. (Cal. 2015).

68. *Id.*

69. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SBX 2-7, at 2 (Mar. 4, 2016).

eighteen, including products that do not contain nicotine.⁷⁰ It does not prohibit the sale, purchase, or possession of licensed vapor drugs and vaporizing medical equipment.⁷¹ It also requires e-cigarettes to be sold in child-proof packaging.⁷²

ABX 2-10 allows California localities to set their own cigarette taxes.⁷³ Specifically, it allows the board of supervisors for any county or city and county, to set its own tax on cigarette distribution.⁷⁴

IV. ANALYSIS

The minimum age bills, the electronic cigarette reforms, and the new smoking taxes all take important steps towards decreasing the tobacco industry.⁷⁵ Part A analyzes whether SBX 2-7, SBX 2-5, and ABX 2-10 were drafted such that they would accomplish their stated health goals.⁷⁶ It also examines the extent to which the new tobacco package regulates the tobacco industry as compared to other states.⁷⁷ Part B discusses whether lowering the legal smoking age could cause potential constitutional issues and will also briefly look into the social opposition to the tobacco package.⁷⁸ Part C analyzes the economic effects of the tobacco reform bills with an emphasis on whether the language of the bills will cause the least detrimental economic impact possible.⁷⁹

A. Will the Tobacco Reform Bills Fulfill Their Intended Health Benefits?

According to Senator Ed Hernandez, one of the authors of the bills to raise the minimum age, SBX 2-7 raises the minimum tobacco purchasing age to prevent early initiation to tobacco use.⁸⁰ Regardless of the well-published dangers, around forty million Americans smoke.⁸¹ Several reports conducted

70. Leno Statement on New Push, *supra* note 7.

71. *Id.*

72. *Id.*

73. ANALYSIS OF ABX 2-10, *supra* note 7.

74. *Id.*

75. Leno Statement on New Push, *supra* note 7; *see also* Hernandez Re-Introduces Legislation, *supra* note 7; ANALYSIS OF ABX 2-10, *supra* note 7.

76. *See infra* Part IV.A (analyzing the impact raising the legal smoking age will have on health).

77. *See infra* Part IV.A (analyzing whether or not these regulations over-reach their intended health goals).

78. *See infra* Part IV.B (analyzing social opposition to these regulations, including whether or not the regulations raise equal protection issues).

79. *See infra* Part IV.C (analyzing the economic effects of the regulations).

80. Hernandez Re-Introduces Legislation, *supra* note 7.

81. RICHARD J. BONNIE ET AL., PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 1 (2015). These health risks include an increased risk for cancer, heart disease, stroke, and generalized poor health. THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 2, at iii. As a consequence, smokers have higher mortality rates than non-smokers. *Id.* Non-smokers who inhale the smoke

under prior law indicate that many lifelong smokers take up the habit when they are young; eighty-eight percent of lifelong smokers first smoke before age eighteen.⁸² At the FDA's request, the Institute of Medicine conducted a study to determine if raising the minimum legal age would have any effect on health.⁸³ The Institute found that raising the minimum legal access age to twenty-one would delay the initiation of tobacco smokers, which in turn would likely decrease the amount of smokers in the population.⁸⁴ Similarly, the Institute predicted a drop in tobacco and secondhand smoke related illnesses.⁸⁵ Notwithstanding this, the Institute suggested there was no significant improvement that warranted a further increase in age to twenty-five.⁸⁶ This means that, although raising the legal smoking age to twenty-one will likely improve the health of many Californians, there would be no significant health benefits to raising the legal age to over twenty-one.⁸⁷

SBX 2-7 criminalizes the sale or furnishing of tobacco products to anyone under the age of twenty-one, and it also makes it a crime to purchase, receive, or possess any tobacco products or paraphernalia.⁸⁸ This suggests that SBX 2-7 will successfully improve public health since it raises the age to twenty-one without causing extraneous regulation that shows no particular benefits.⁸⁹ Because it criminalizes tobacco sales and purchases to those under twenty-one, SBX 2-7 seriously restricts young people's access to the tobacco industry.⁹⁰ Thus, in accordance with the Institute's suggestions, the legislation will drastically reduce access to tobacco for those under twenty-one, which should effectively cut off the exposure to tobacco at a young age and result in far less tobacco dependency.⁹¹

Although not much is known about the long-term effects of vaping, particularly with non-nicotine products, there has been concern that manufacturers are marketing non-nicotine vapor products to a younger crowd by packaging the e-cigarettes in bright colors and boasting diverse and interesting

secondhand also suffer health consequences, including increased risks of cancer and heart attacks due to inhaling toxins in cigarettes. *Id.*

82. THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 2, at iii; see BONNIE ET AL., *supra* note 81, at 3 (summarizing several studies on the effects of youth and young adult smoking).

83. THE HEALTH CONSEQUENCES OF SMOKING, *supra* note 2, at iii.

84. BONNIE ET AL., *supra* note 81.

85. *Id.* at 8.

86. *Id.* at 5.

87. *Id.*

88. SENATE COMMITTEE ON PUBLIC HEALTH AND DEVELOPMENTAL SERVICES, COMMITTEE ANALYSIS OF SBX 2-7, at 1 (Sept. 2, 2015) [hereinafter SENATE HEALTH ANALYSIS].

89. Hernandez Re-Introduces Legislation, *supra* note 7.

90. SENATE HEALTH ANALYSIS, *supra* note 88, at 1.

91. *Id.* at 2; see also BONNIE ET AL., *supra* note 81, at 201 (explaining the health implications for raising the minimum access age).

flavors.⁹² This causes concern that younger individuals would begin smoking non-nicotine electronic cigarettes and eventually transition to smoking nicotine vapor or traditional tobacco products.⁹³ This inspired SBX 2-5, which made California's laws more comparable to those of other states with stringent regulation of electronic cigarette sales.⁹⁴ Both Colorado and South Dakota increased the regulations on electronic cigarettes, treating them in the same way as they treat tobacco products; South Dakota even went so far as to define tobacco products as including electronic cigarettes, although South Dakota's law only applies to nicotine products.⁹⁵ SBX 2-5 has also extended the definition of tobacco products to include electronic cigarettes.⁹⁶ Furthermore, SBX 2-5 extends the restrictions to all vapor products, even those that are not used for nicotine products.⁹⁷ This is a rather dramatic distinction from similar regulations on vapor products in other states, which might suggest overregulation.⁹⁸

Unlike SBX 2-7 and SBX 2-5, ABX 2-10 will not have a direct effect on health.⁹⁹ ABX 2-10 does not directly regulate who may or may not purchase or consume tobacco products, cigarettes, or electronic cigarettes.¹⁰⁰ However, it does allow localities to enact their own tax rates on cigarettes in addition to the existing state taxes.¹⁰¹ This will result in higher taxes and higher cigarette prices overall.¹⁰² Evidence suggests that cigarette smoking correlates to cigarette prices, particularly among young people.¹⁰³ When cigarette prices drop, smoking among young people goes up, and when the prices rise, fewer young people smoke.¹⁰⁴ California has had success with similar legislation in the past.¹⁰⁵ For example, when Proposition 99 raised cigarette taxes to twenty-five cents per package, there

92. Leno Statement on New Push, *supra* note 7.

93. *Id.*

94. *See generally* COLO. REV. STAT. ANN. § 18-13-121 (West 2015) (demonstrating how states have handled vaporizers and e-cigarettes); S.D. Codified Laws § 34-46-20 (West 2015) (demonstrating how states have handled vaporizers and e-cigarettes).

95. COLO. § 18-13-121; S.D. § 34-46-20.

96. Leno Statement on New Push, *supra* note 7.

97. *Id.*

98. *See generally* COLO. § 18-13-121(banning only nicotine cartridges); S.D. § 34-46-20 (banning only nicotine cartridges).

99. *Compare* BONNIE ET AL., *supra* note 81 (showing the direct effect raising the tobacco age has on health), with Jonathan Gruber, *The Economics of Tobacco Regulation*, 21 HEALTH AFFAIRS 146, 158 (2002) (demonstrating the effect higher taxes has on personal decisions to purchase cigarettes and the effect that has on health).

100. McGreevy *California Bills*, *supra* note 31.

101. McGreevy *Anti-Smoking Effect*, *supra* note 1.

102. *See generally id.* (summarizing opposition's view that tax would hurt consumers).

103. Gruber, *supra* note 99, at 156.

104. *Id.*

105. Caroline M. Fichtenberg & Stanton A. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality From Heart Disease*, 343 NEW ENG. J. MED. 1772 (2000).

was a significant decrease in smokers.¹⁰⁶ In fact, the number of smokers in California declined more rapidly than in states that did not have such high taxes on cigarettes, which correlated to a drop in the number of deaths in California from heart disease.¹⁰⁷ However, Proposition 99 worked at a statewide level, raising taxes equally across the board.¹⁰⁸ Because ABX 2-10 works at a local level, it could have a disproportionate effect when some localities tax at higher rates than others do.¹⁰⁹ This will lessen its statewide impact, since it will only affect smokers living in areas with higher taxes who cannot travel to lower tax areas to purchase cigarettes.¹¹⁰

B. *Social Effects and Possible Equal Protection Challenges*

The social effects of SBX 2-7, SBX 2-5, and ABX 2-10 have caused some backlash.¹¹¹ Responding to pressure from veteran's groups, SBX 2-7 was amended to include an exemption for active duty military.¹¹² However, this different treatment of eighteen to twenty-one year olds based on whether or not they are serving in the military could lead to a 14th Amendment equal protection challenge for age discrimination.¹¹³ Minimum age regulations have been upheld and even promoted, particularly concerning legal drinking age.¹¹⁴

In *Manuel v. State*, Louisiana became the only state in which a party has challenged the legal drinking age on an equal protection argument.¹¹⁵ Due to a particular clause in Louisiana's constitution, the court applied an intermediate scrutiny standard and found that the legal drinking age did not violate equal protection because it substantially served the state's interest in improving highway safety.¹¹⁶ Because California's constitution does not provide age discrimination protections, a court would likely only apply the lower rational

106. *Id.*

107. *Id.* This study focused on the decrease in deaths from heart disease because a decrease in heart disease would have been noticed in the first year, while the effects on cancer and lung disease would take longer to set in. *Id.*

108. Cal. Proposition 99 (1988).

109. *See generally* CAL. STATE BD. OF EQUALIZATION, PUBLICATION 95, SALES AND USE TAX RATES (2015) (listing the differing tax rates by county in California).

110. *See generally id.* (listing the differing tax rates by county in California).

111. ANALYSIS OF SB 151, *supra* note 48, at 8.

112. Patrick McGreevy & Melanie Mason, *21 to Smoke? California Assembly Approves Raising Smoking Age*, L.A. TIMES (Mar. 3, 2016), <http://www.latimes.com/politics/la-pol-sac-raising-smoking-age-20160303-story.html> (on file with *The University of the Pacific Law Review*).

113. *Cf. Manuel v. State*, 692 So. 2d 320, 323 (1996) (examining such an argument in the context of the legal drinking age).

114. *See generally Manuel*, 692 So. 2d at 323 (promoting a minimum drinking age in Louisiana).

115. *Id.*

116. *Id.* at 324, 325 (to pass intermediate scrutiny, the law must further an important government interest by substantially related means).

relation standard to an equal protection challenge to the smoking age, making it even more likely that the regulation would not violate the equal protection clause.¹¹⁷

The opposition to SBX 2-5 claims that vaping is a safer alternative to smoking that helps long-time smokers quit, and they fear that over-regulating vaping will hinder the use of this alternative.¹¹⁸ Furthermore, studies suggest that while teenage use of electronic cigarettes is on the rise, teenage tobacco use is not.¹¹⁹ Thus, there are concerns that regulating teenagers' access to electronic cigarettes will increase their traditional tobacco use.¹²⁰ Furthermore, raising the legal age for the purchase of electronic cigarettes to twenty-one could also result in an equal protection challenge.¹²¹ However, as with the potential challenge on tobacco, it is unlikely to succeed.¹²²

ABX 2-10 also raises equal protection concerns.¹²³ In *California Association of Retail Tobacconists v. State*, the Court of Appeals for the 4th District examined whether or not to overturn Proposition 10 based upon equal protection challenges under the federal and state constitutions.¹²⁴ Cigarette retailers claimed an equal protection violation occurred because Proposition 10 taxed cigarettes at a higher rate than other tobacco products.¹²⁵ The court held that no such violation occurred because cigarettes were defined differently, packaged and sold differently, and used differently than other tobacco products, so the distinction between the classes was reasonable.¹²⁶

ABX 2-10 allows localities to set a tax on both cigarettes and tobacco products; however, it does not address the taxation of electronic cigarettes, as they are not classified as tobacco products for the purposes of the Revenue and

117. *Cf.* Cal. Ass'n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 263–64 (4th Dist. 2003) (applying a rational relation test, wherein the court looked at whether there was a legitimate government purpose and the means to achieve that purpose were rationally related, to the equal protection argument against higher tobacco taxes, and easily surpassing it).

118. Editorial Board, *How to Regulate E-Cigarettes*, WASH. POST (Apr. 15, 2015), https://www.washingtonpost.com/opinions/how-to-regulate-e-cigarettes/2015/04/18/b590b962-e531-11e4-b510-962fcfab310_story.html (on file with *The University of the Pacific Law Review*).

119. *Id.*

120. *See generally id.* (implying that regulating e-cigarette use may lead teenagers back to conventional, more harmful, cigarettes).

121. SENATE HEALTH ANALYSIS, *supra* note 88, at 4.

122. *Cf.* South Dakota v. Dole, 483 U.S. 203, 208 (1987) (examining such an argument in the context of the legal drinking age).

123. *Cf.* Cal. Ass'n of Retail Tobacconists v. State, 109 Cal. App. 4th 792, 841–42 (4th Dist. 2003) (examining equal protection on previous cigarette taxes).

124. *Id.*

125. *Id.*

126. *Id.* at 841.

Taxation Code.¹²⁷ This parallels past tobacco taxes, like Proposition 99, which also ignored electronic cigarettes.¹²⁸ Thus, any challenge will likely fail due to a determination that tobacco products are sufficiently different from electronic cigarettes because they are packaged and used differently.¹²⁹

C. *The Economic Effects of SBX 2-7, SBX 2-5, and ABX 2-10*

The Senate Appropriations Committee predicts a drop in tobacco tax revenue because of SBX 2-7, both as an initial response to the loss in sales to people between eighteen and twenty-one and as a long-term result of fewer people becoming addicted to smoking.¹³⁰ This loss in tax revenue is estimated to be around \$143 million a year.¹³¹ These taxes support tobacco health-related programs, disease research, fire prevention, wildlife conservation, and park improvement.¹³² Some of the money from cigarette taxes also goes to the California Children and Families Trust Fund, which supports early child development and care.¹³³ The Committee predicts a drop in health care costs; although the exact amount of the decrease is unknown, the current estimates of health care costs related to smoking nationally are between \$130 billion and \$180 billion a year.¹³⁴ High estimates for the savings the state will accrue long-term are \$2 billion per year.¹³⁵ Regardless of these projected savings, SBX 2-7 itself does not address the loss in tax revenue, nor does it address how to fill the gap in funding.¹³⁶

The Assembly Appropriations Committee expects SBX 2-5 will have a limited fiscal impact.¹³⁷ The legislation imposes a fine on sellers who violate the law: \$500, \$1,000, and \$1,500 for the first, second, and third violations respectively.¹³⁸ The Committee also predicts that there will be minor implementation costs for local law enforcement; however, the Committee expects those costs will be offset by the revenue the state gets from the fines.¹³⁹

127. CAL. REV. & TAX. CODE § 30121 (West 1989) (explaining that tobacco products must include tobacco, and making no special provisions for electronic cigarettes).

128. Cal. Proposition 99 (1988).

129. *Cal. Ass'n of Retail Tobacconists*, 109 Cal. App. 4th at 841.

130. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 151 (Apr. 27, 2015).

131. ANALYSIS OF SB 151, *supra* note 48, at 6.

132. CAL. STATE BD. OF EQUALIZATION, *supra* note 109.

133. *Id.*

134. SENATE COMMITTEE ON APPROPRIATIONS, *supra* note 130, at 2.

135. *Id.*

136. ANALYSIS OF SB 151, *supra* note 48, at 8.

137. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 216 (Apr. 13, 2015).

138. *Id.*

139. *Id.*

ABX 2-10 will likely increase tax revenue.¹⁴⁰ In effect, ABX 2-10 adds a local tax to the existing state tax.¹⁴¹ However, as previously discussed, because the prices of tobacco products will be higher, there is also likely to be a decrease in purchases, which may result in lower tax revenues to both the state and localities.¹⁴² Because localities will collect the tax, they will likely determine how the taxes are spent since the language of ABX 2-10 does not discuss where to spend the revenues.¹⁴³ Supporters of ABX 2-10 argue that the revenue will help minorities and lower income sectors in those local cities and counties who are most affected by smoking.¹⁴⁴ However, without the bill explicitly stating this, it is impossible to tell whether the money will be spent in a beneficial manner or if it will be used for purposes that are more corrupt.¹⁴⁵ The opposition, however, fears that SBX 2-7 will not help lower income sectors and minorities, but instead create a greater burden on those communities by adding to the regressive nature of cigarette taxes.¹⁴⁶

V. CONCLUSION

There can be no doubt that California faces serious problems with smoking-related health complications, many of which could be improved by creating a higher initiation age.¹⁴⁷ Achieving meaningful regulation was difficult and required the move to the special session.¹⁴⁸ Ultimately, SBX 2-7 and SBX 2-5 will likely have positive health results and will largely survive equal protection challenges.¹⁴⁹ The largest concern with SBX 2-7 is the failure to compensate for the lost tax revenue funding for important purposes.¹⁵⁰ On the other hand, the biggest issue with SBX 2-5 is whether regulating non-nicotine vapor products is a step too far when compared to other states' regulations of electronic cigarettes.¹⁵¹ Although ABX 2-10 effectively promotes health, it is more likely to

140. *See generally* CAL. STATE BD. OF EQUALIZATION, *supra* note 109 (explaining how the increased cigarette tax revenue is used currently).

141. ANALYSIS OF ABX 2-10, *supra* note 7, at 2.

142. Gruber, *supra* note 99, at 156.

143. ANALYSIS OF ABX 2-10, *supra* note 7, at 2.

144. *Id.*

145. *Id.*

146. *Id.*

147. BONNIE ET AL., *supra* note 81.

148. *See* McGreevy & Megerian, *supra* note 6 (discussing the special health sessions on financing healthcare being used as a platform to bring back the tobacco legislation, among other bills).

149. *Cf.* Manuel v. State, 692 So. 2d 320, 323 (1996) (examining such an argument in the context of the legal drinking age in Louisiana, analogous to the legal smoking age).

150. CAL. STATE BD. OF EQUALIZATION, PUBLICATION 93 LDA, CIGARETTE AND TOBACCO PRODUCTS TAXES (2015).

151. *Cf.* COLO. REV. STAT. ANN. § 18-13-121 (West 2015) (regulating only nicotine products); S.D. Codified Laws § 34-46-20 (West 2015) (regulating nicotine products and ignoring non-nicotine products).

struggle to survive an equal protection challenge given its failure to tax electronic cigarettes in the same manner as it taxes traditional tobacco products.¹⁵² Although this is in line with previous tobacco taxes,¹⁵³ much of the previous taxing on tobacco occurred before electronic cigarettes came on the market.¹⁵⁴

152. *See* Cal. Ass'n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 264–65 (4th Dist. 2003) (declaring that a tax distinction must be reasonable).

153. Cal. Proposition 99 (1988).

154. CHAPMAN, *supra* note 3.