

_____ **BILL**

No. ____

Introduced by _____

February ____, 2014

An Act to add Sections _____ to the _____ Code, and amending Sections _____ and _____ of the _____ Code.

The people of the State of California do enact as follows:

SECTION 1. Findings.

The Legislature finds and declares that:

(a) Cigarette smoking and the use of Tobacco Products present serious public health concerns to the state, the Indian tribes located within the state's borders and all Californians;

(b) Cigarette smoking and the use of Tobacco Products cause heart disease, lung cancer and other cancers and diseases, and hundreds of thousands of people in the United States die prematurely from such diseases;

(c) Cigarette smoking and the use of Tobacco Products present serious financial concerns to the state, to the Indian tribes located within the state's borders and to all Californians;

(d) Cigarette smoking and the use of Tobacco Products costs Californians billions of dollars each year in medical expenses and lost productivity;

(e) The state has an interest in enforcing the Tobacco Master Settlement Agreement against Participating Manufacturers and the state's tobacco escrow law (Health & Saf. Code, §§ 104555-104557) against Non-Participating Manufacturers;

(f) The state and Indian tribes share a common interest in ensuring that the financial burdens imposed on state and tribal governments by Cigarette smoking and the use of Tobacco Products are borne by Cigarette and Tobacco Product manufacturers;

(g) Taxation of Cigarettes and Tobacco Products raises essential revenue for state and tribal governments;

(h) Because taxes raise the cost of Cigarettes and Tobacco Products, they lead to lower rates of Cigarette smoking and Tobacco Products use and discourage initiation of Cigarette smoking and Tobacco Products use, especially by youth;

(i) Evasion of applicable taxes on Cigarettes and Tobacco Products leads to higher Cigarette smoking and Tobacco Products usage among adults and youth;

(j) Long-standing disagreements exist between the state and Indian tribes concerning the state's ability to tax the distribution and sale of Cigarettes and Tobacco Products by Indian tribes and their members to non-tribal members in Indian Country;

(k) Federal Indian law and policy recognize the right and the importance of self-determination for Indian tribes, the authority of Indian tribes to tax certain activities, and the need for economic development in Indian Country by Indian tribes;

(l) Federal law precludes the state from taxing an Indian tribe or its members for the distribution, sale or purchase of Cigarettes or Tobacco Products within such Indian tribe's Indian Country;

(m) Federal law also recognizes the right of the state to tax non-tribal members who distribute, sell or purchase Cigarettes and Tobacco Products in Indian Country;

(n) Absent a waiver by an Indian tribe or abrogation by Congress, tribal sovereign immunity presents a barrier to the state's enforcement and collection of state taxes on the distribution, sale or purchase of Cigarettes and Tobacco Products by an Indian tribe or its members to non-tribal members in Indian Country; and

(o) The Agreements authorized by this Act will promote the shared interests of the state and Indian tribes in addressing the health effects of Cigarette smoking and Tobacco Products use, lowering rates of Cigarette smoking and Tobacco Products use and prohibiting underage Cigarette smoking and Tobacco Products use while avoiding burdensome, lengthy and uncertain litigation.

(p) This Act imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

The state needs access to confidential tribal records and information received pursuant to Agreements authorized by this Act in order to accurately monitor compliance with this Act and to enforce the Tobacco Master Settlement Agreement. Therefore, it is necessary that this Act take effect.

SECTION 2. Definitions

The definitions contained in this section shall govern the construction of this Act.

(a) "Agreement" means a Cigarette and Tobacco Products agreement authorized pursuant to this Act.

(b) "Cigarette," unless otherwise indicated, means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of tobacco and such roll weighs over three pounds per thousand.

(c) "Distribution" and "Distributor" shall have the same meaning set forth in Sections 30008 and 30011 of the Revenue and Taxation Code, as such sections appear as of the date of the enactment of this bill.

(d) "Essential Governmental Services" means services provided by an Indian tribe that has entered into an Agreement, including, but not limited to, health care, early childhood development programs, smoking prevention programs, tobacco-related health education and disease research, education, elder care, social services, administration, public facilities, fire, police, courts, sewer, water, environmental and land use, park and wildlife restoration, transportation, utility services, community development and economic development.

(e) "Indian Country" shall have the meaning given in 18 U.S.C. § 1151.

(f) "Indian Retailer" means a Licensed Tribal Retailer, as defined in subdivision (i) of this section, or a Tribe, as defined in subdivision (s) of this section, that engages in retail sales of Cigarettes or Tobacco Products within its Indian Country.

(g) "Licensed Tribal Importer" means an importer that:

(1) Is owned by a Tribe or a member or members of a Tribe;

(2) Imports into Indian Country Cigarettes or Tobacco Products Manufactured by a foreign manufacturer that is a Licensed Tribal Manufacturer, as defined in subdivision (h) of this section;

(3) Is in possession of any necessary federal permits and is otherwise in compliance with applicable federal laws related to the importation of Cigarettes and Tobacco Products into the United States;

(4) Is licensed by a Tribe that is a party to an Agreement and that exercises governmental jurisdiction over the Indian Country in which the retail sales of the Licensed Tribal Importer's Cigarettes and Tobacco Products occur; and

(5) Is in full compliance with the Agreement and implementing tribal law.

(h) "Licensed Tribal Manufacturer" means any person that:

(1) Manufactures Cigarettes or Tobacco Products, as defined in subdivision (k) of this section;

(2) Is owned by a Tribe or a member or members of a Tribe;

(3) Is authorized by a Tribe to Manufacture and who does Manufacture Cigarettes or Tobacco Products within the authorizing Tribe's Indian Country;

(4) Is in possession of any necessary U.S. or Canadian permits and is otherwise in compliance with applicable U.S. or Canadian laws related to the Manufacture of Cigarettes or Tobacco Products;

(5) Is licensed by a Tribe that is a party to an Agreement and that exercises governmental jurisdiction over the Indian Country in which the retail sales of the Licensed Tribal Manufacturer's Cigarettes and Tobacco Products occur; and

(6) Is in full compliance with the Tribe's Agreement and implementing tribal law.

(i) "Licensed Tribal Retailer" means a retailer that is (1) owned by a member of a Tribe that is a party to an Agreement and (2) licensed by such Tribe to engage in retail Cigarette or Tobacco Product sales from a business located within that Tribe's Indian Country.

(j) "Licensed Tribal Wholesaler" means a wholesaler that is owned by a Tribe or that is owned by a member of a Tribe and that is licensed by a Tribe that is a party to an Agreement and that exercises governmental jurisdiction over the Indian Country in which retail sales of the Licensed Tribal Wholesaler Cigarettes and Tobacco Products occur.

(k) "Manufacture" means to physically manufacture, fabricate, or assemble Cigarettes or Tobacco Products.

(l) "Master Settlement Agreement" means the settlement agreement entered into on November 23, 1998, by the state and leading United States tobacco manufacturers, including all present and future amendments.

(m) "Non Participating Manufacturer" or "NPM" shall have the same meaning as provided for that term in the Master Settlement Agreement.

(n) “Participating Tribe” means a Tribe that has entered into an Agreement and caused tribal fee revenue to be deposited into the California Tribal Health and Education Fund pursuant to subdivision (l) of Section 3 of this Act.

(o) “Roll Your Own Tobacco” means roll-your-own tobacco or tobacco that, because of the tobacco’s appearance, type, packaging, or labeling, is suitable for use in making Cigarettes and is likely to be offered to or purchased by a consumer for that purpose.

(p) “State Licensed Distributor” means an entity that is licensed by the state of California to distribute Cigarettes or Tobacco Products within the state.

(p) “State Tobacco Directory” means the directory of Cigarettes and Roll Your Own Tobacco and their manufacturers maintained by the Attorney General pursuant to Section 30165.1 of the Revenue and Taxation Code.

(q) "Tobacco Products" include, but are not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least fifty percent (50%), tobacco, but does not include Cigarettes.

(r) “Tribal Retailer” means a retailer that is (1) owned by a Tribe that is a party to an Agreement and (2) engages in retail Cigarette and Tobacco Products sales within that Tribe’s Indian Country.

(s) “Tribe” means an Indian tribe that is recognized by the United States Department of Interior and is eligible to receive funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

SECTION 3. Cigarette and Tobacco Products Agreements Authorized; Requirements.

The Governor may enter into Cigarette and Tobacco Products Agreements with Tribes located within the state. All Agreements must meet the requirements of this Section.

(a) Agreements shall provide that the state will not tax or regulate the distribution, purchase or sale of Cigarettes and Tobacco Products by Licensed Tribal Wholesalers and Indian Retailers that fully comply with the terms of such Agreements. Agreements shall provide that the state reserves its right, consistent with federal law, to tax and regulate any distribution, purchase or sale that does not fully comply with the terms of such Agreements

(b) Agreements shall address the distribution of Cigarettes and Tobacco Products into Indian Country for resale by Indian Retailers and the retail sale of Cigarettes and Tobacco Products by Indian Retailers within Indian Country.

(c) Agreements shall provide that Indian Retailers shall not sell or give, or permit to be sold or given, Cigarettes or Tobacco Products to any person under the age of eighteen years.

(d) Agreements shall provide for the imposition of tribal Cigarette taxes and tribal sales taxes in an amount equivalent to the state's Cigarette taxes and state and local sales and use taxes on sales of Cigarettes in Indian Country by Indian Retailers. Agreements shall allow tribes to exempt sales to tribal members that are for personal consumption.

(e) Agreements shall provide for the imposition of tribal Tobacco Products taxes and tribal sales taxes in an amount equivalent to the state's Tobacco Products taxes and state and local sales and use taxes on sales of Tobacco Products in Indian Country by Indian Retailers. Agreements shall allow tribes to exempt sales to tribal members that are for personal consumption.

(f) Agreements may provide for the sale of Cigarettes and Roll Your Own Tobacco Manufactured within Indian Country by a Licensed Tribal Manufacturer that are not included in the State Tobacco Directory, but only if the Agreement provides that:

(1) The Tribe shall impose a tribal fee upon the sale of such Cigarettes and Roll Your Own Tobacco into the Tribe's Indian Country in an amount equivalent to the escrow deposit amount required of Non-Participating Manufacturers under Sections 104555 through 104557 of the Health and Safety Code, and the tribal fee shall be paid by the State Licensed Distributor or Tribally Licensed Wholesaler on behalf of the Licensed Tribal Manufacturer;

(2) Upon a determination by a data clearinghouse performing duties relating to the Master Settlement Agreement that a tribal fee provision results in a reduction of the state's payments from Participating Manufacturers under the Master Settlement Agreement or precludes findings in the state's favor under subdivision (d)(2) of Section IX of the Master Settlement Agreement, require that all tribal fee revenue be deposited into an escrow account acceptable to the state pending a final decision;

(3) If an arbitration panel convened pursuant to the Master Settlement Agreement or a court of competent jurisdiction issues a final decision concluding that a tribal fee provision results in a reduction of the state's payments from Participating Manufacturers under the Master Settlement Agreement or precludes findings in the state's favor under subdivision (d)(2) of Section IX of the Master Settlement Agreement; the tribal fee provision in the Agreement is null and void; and

(4) Upon the issuance of a final decision concerning whether a tribal fee provision is compliant with the Master Settlement Agreement, require that escrowed funds shall either revert to tribal fees consistent with the Agreement or convert to state escrow deposits made on behalf of the manufacturer pursuant to Section 104557 of the Health and Safety Code.

(g) Agreements shall provide that all Cigarettes possessed, offered for sale or sold by an Indian Retailer shall bear a uniform tribal Cigarette tax stamp affixed by a Licensed Tribal Wholesaler or a State Licensed Distributor and obtained from a bank or other suitable stamp vendor upon payment of applicable tribal Cigarette taxes. Tribal Cigarette tax stamps must have serial numbers or some other discrete identification so that each stamp can be traced to its source.

(h) Agreements shall provide that Indian Retailers shall purchase Cigarettes and Tobacco Products only from:

(1) State Licensed Distributors that are also licensed by the Tribe; and

(2) Licensed Tribal Wholesalers that meet the requirements of the Agreement and implementing tribal law.

(i) Agreements shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audits.

(j) Agreements shall be renewable for periods of no more than eight years.

(k) Agreements shall require that a Tribe may only use tribal Cigarette and Tobacco Products tax revenues for the following purposes:

(1) Tobacco-related health education and disease research;

(2) Health care;

(3) Fire prevention;

(4) Environmental protection;

(5) Parks and recreation;

(6) Promotion, support and improvement of the early development of children from the prenatal stage to five years of age; and

(7) Essential Governmental Services.

(l) Agreements shall require the deposit of tribal fees into a fund entitled the "California Tribal Health and Education Fund," which shall be maintained by a bank and distributed by an independent committee consisting of representatives of the Governor and Participating Tribes pursuant to the following requirements:

(1) Revenues must be distributed no earlier than one year after deposit.

(2) Up to 50% of each Participating Tribe's contribution shall be distributed directly to each Participating Tribe to be used solely for public safety on such Participating Tribe's reservation and/or social services for tribal members and not for any function that could directly or indirectly promote or reduce the costs of Cigarette production, marketing or sales, and must not be used in any way for the benefit of an NPM or to facilitate NPM sales.

(3) If the amount distributed to Participating Tribes pursuant to this subdivision would exceed \$1 million in the aggregate for any given distribution year, then each Participating Tribe shall receive an amount equal to its percentage contribution to the Fund for that distribution year multiplied by \$1 million, provided that in no event shall a Participating Tribe receive more than 50% of its contribution for any given distribution year.

(4) The remaining revenue shall be distributed by award based on competitive grants, as follows:

(A) 20% awarded to smoking prevention programs, tobacco-related health education efforts and disease research targeted at California's Indian Country;

(B) 40% awarded to fund educational scholarships for members of each Participating Tribe; and

(C) 40% awarded to elder care programs and services operating within each Participating Tribes' Indian Country.

(m) Agreements shall prohibit the use of tribal Cigarette taxes, Tobacco Products taxes or tribal fees to subsidize the sale of Cigarettes or Tobacco Products.

(n) Agreements shall contain dispute resolution provisions, which shall allow for termination upon a determination of significant and/or continued violation of the Agreement.

(o) Agreements shall provide that tribal records, information and copies received confidentially by the state under the terms of an Agreement shall be and remain the property solely of the Tribe. The state shall not disclose such confidential tribal records, information and copies, or information compiled by the state from those confidential records to third parties. Tribal records and information include, but are not limited to, the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any report or copy thereof, the business affairs, operations, or information obtained by an investigation of records and equipment of any person visited or examined in the discharge of official duty. The state may retain such confidential information and records and copies as is reasonably necessary to assure a Tribe's compliance with an Agreement, to protect the state's rights under the Master Settlement Agreement, or to complete any investigation of suspected criminal activity; and provided further that the state may disclose such confidential information and records and copies to federal law enforcement and other agencies of the state or consultants that the state deems

reasonably necessary in order to assure a Tribe's compliance with an Agreement, in order to renegotiate any provision thereof, in order to protect the state's rights under the Master Settlement Agreement, or in order to conduct or complete any investigation of suspected criminal activity in connection with an Agreement.

(p) Agreements shall provide that the Tribe will comply with all federal laws applicable to the taxation, distribution, sale, and shipment of Cigarettes and Tobacco Products.

(q) Agreements shall provide that the Board of Equalization and the Attorney General are responsible for administering the Agreements on behalf of the state.

SECTION 4. Effect on Non Participating Manufacturer Obligations

(a) Notwithstanding subdivision (a), paragraph (2) of section 104557 of the Health and Safety Code, an NPM licensed by a Tribe as a Licensed Tribal Manufacturer shall receive a dollar-for-dollar credit for tribal fees paid pursuant to an Agreement against any obligation that the NPM would otherwise have to deposit money into a qualified escrow account pursuant to subdivision (a), paragraph (2) of Section 104557 of the Health and Safety Code.

SECTION 5. Offsets Authorized

Within one year of the passage of this Act and periodically thereafter as reasonably appropriate, the State Board of Equalization shall determine whether Agreements entered into pursuant to this Act have resulted in a net decrease in tax revenues collected pursuant to Section 30123 and Section 30131.2 of the Revenue and Taxation Code. To the extent that the State Board of Equalization determines that Agreements entered pursuant to this Act result in a net decrease in tax revenues collected pursuant to Section 30123 or to Section 30131.2 of the Revenue and Taxation Code, funds shall be transferred from the General Fund to the California Children and Families Trust Fund (Section 130105 of the Health and Safety Code) and Cigarette and Tobacco Products Surtax Fund (Section 30122 of the Revenue and Taxation Code) as necessary to offset any revenue decreases. These reimbursements shall occur, and at any times, as determined necessary to further the intent of this Section.

Add Section 30101.3 to the Revenue and Taxation Code to read:

30101.3. If the state enters into a Cigarette and Tobacco Products Agreement with a federally recognized Indian tribe under [reference the language authorizing the governor to enter into agreements], the terms of the contract or agreement take precedence over any conflicting provisions of this part while the Cigarette and Tobacco Products Agreement is in effect.

Add Section 30102.7 to the Revenue and Taxation Code to read:

30102.7. The taxes imposed by this part shall not apply to the sale of cigarettes or tobacco products by a licensed distributor sold and delivered directly to a Licensed Tribal Wholesaler, a Licensed Tribal Retailer, or a Tribe pursuant to a Cigarette and Tobacco

Products Agreement entered under [reference the language authorizing the governor to enter into agreements].

Amend Section 30106 to the Revenue and Taxation Code to read:

30106. (a) The taxes imposed by this part shall not apply to the use or consumption of untaxed cigarettes transported or brought into this state in a single lot or shipment of not more than 400 cigarettes by an individual for his own use or consumption, or of not more than 400 untaxed cigarettes obtained at one time from any of the instrumentalities listed in Section 30102.

(b) The taxes imposed by this part shall not apply to the use or consumption of untaxed cigarettes or untaxed tobacco products purchased by an individual for his or her own use or consumption from a tribal retailer where a tribal cigarette tax or tribal tobacco products tax is imposed on the cigarettes or tobacco products by a tribe that has entered into a Cigarette and Tobacco Products Agreement pursuant to [reference the language authorizing the governor to enter into agreements].

Add Section 30165.3 to the Revenue and Taxation Code to read:

30165.3. (a) The obligations imposed by sections 30165.1 and 30165.2 on nonparticipating tobacco product manufacturers and importers of cigarettes manufactured by foreign nonparticipating tobacco product manufacturers shall not apply to the sale or distribution of cigarettes into or in the Indian Country of a federally recognized Indian tribe that has entered into a Cigarette and Tobacco Products Agreement pursuant to _____ by non-participating tobacco product manufacturers and importers that are licensed by such tribe and are in full compliance with the applicable ordinances adopted by such tribe.

(b) Notwithstanding subdivision (e) of section 30165.1 of the Revenue and Taxation Code,

(1) A licensed tribal manufacturer, a licensed tribal importer a licensed tribal wholesaler, a federally recognized Indian tribe that has entered into a cigarette and tobacco products agreement pursuant to _____ and is acting as a tribal wholesaler, and a distributor licensed pursuant to Part 13 (commencing with Section 30001) of Division 2 of the Revenue and Taxation Code may affix or cause to be affixed a uniform tribal cigarette tax stamp on packs of cigarettes and pay the tax levied by such tribe on tobacco products in connection with and/or in furtherance of such agreement; and

(2) A licensed tribal manufacturer, a licensed tribal importer, a licensed tribal wholesaler, an Indian retailer of a federally recognized tribe that has entered into a cigarette and tobacco products agreement pursuant to _____, such Indian tribe acting as a tribal wholesaler pursuant to such agreement, and a distributor licensed pursuant to Part 13 (commencing with Section 30001) of Division 2 of the Revenue and Taxation Code may sell, offer, or possess for sale in this state, ship or otherwise distribute into or within this state cigarettes and tobacco products defined as cigarettes under section 30165.1 that are

not included on the list posted by the Attorney General pursuant to subdivision (c) of section 30165.1, provided that such sale, shipment or other distribution is in or into such tribe's Indian country and is authorized by such tribe's Cigarette and Tobacco Products Agreement and implementing tribal legislation.