



California Department of Public Health

It Needs to Improve Accuracy in Accounting and Charging for Compliance Inspections Designed to Reduce Youth Access to Tobacco and It Could Enhance Its Compliance Inspections

Report 2012-111

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June 18, 2013

2012-111

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report concerning the California Department of Public Health's (Public Health) administration of the Stop Tobacco Access to Kids Enforcement Act (STAKE Act).

This report concludes that Public Health lacks adequate fiscal processes to accurately account for the expenditures related to statewide and local compliance inspections it conducts and that it could enhance its compliance inspections. In particular, Public Health does not have a process to identify how much time its investigators spend on statewide compliance inspections as opposed to local compliance inspections it conducts on behalf of local entities. As a result, it cannot be certain that the costs it charges various funding sources for statewide and local compliance inspections are accurate. In fact, because the procedures Public Health uses to conduct statewide and local compliance inspections are the same for both, we expected the average cost Public Health recorded for statewide and local compliance inspections to be similar. However, the average cost Public Health recorded for statewide compliance inspections varied substantially from the average cost it recorded for local compliance inspections. Additionally, the rates that Public Health charged local entities for conducting local compliance inspections during fiscal years 2009–10 through 2011–12 resulted in reimbursements that were at least \$207,000 less than what was needed to cover its costs.

We also noted that Public Health is missing an opportunity to enhance its enforcement efforts of the STAKE Act because its Tobacco Control Branch does not share the data on potential violators identified through annual, random, unannounced inspections of tobacco retailers (annual retailer assessment) with the Food and Drug Branch. Specifically, Public Health has entered into an agreement with a third party to conduct the annual retailer assessment. The third party identified 61, 57, and 42 retailers that sold tobacco to minors during each of the three annual retailer assessments it conducted for federal fiscal years 2010, 2011, and 2012, respectively. However, because the purpose of the annual retailer assessment does not include taking enforcement action against the violating retailers, Public Health's Tobacco Control Branch does not notify these retailers or take action against those who sold tobacco to minors. Finally, Public Health could revise its youth consent form to provide greater specificity regarding the use of the data it collects with the help of boys and girls 15 and 16 years of age.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

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Summary

Results in Brief

Our review of the California Department of Public Health's (Public Health) administration of the Stop Tobacco Access to Kids Enforcement Act (STAKE Act) revealed that it lacks the fiscal processes to accurately account for the expenditures related to the statewide and local compliance inspections it conducts. These compliance inspections help it identify and later issue citations to retailers that sell tobacco to youth under the age of 18, in violation of the law. Additionally, the amounts that Public Health charged local entities were at least \$207,000 less than what Public Health needed to cover its costs for the 2,500 local compliance inspections it conducted during the period we reviewed. Further, although as part of the required annual random, unannounced inspections of tobacco retailers (annual retailer assessment) its contractor measures overall levels of compliance and identifies violations, Public Health does not obtain the names of these retailers so that it can include them in future compliance inspections. Thus, it is missing an opportunity to enhance its enforcement efforts. Finally, Public Health could revise its youth consent form to provide greater specificity regarding any future use of the data it collects with the help of boys and girls 15 and 16 years of age (youth decoys).

California state law requires retailers to obtain a license from the State Board of Equalization in order to sell tobacco and prohibits those retailers from selling tobacco to any person under 18. In 1992 the United States Congress enacted the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, which includes an amendment, commonly known as the Synar Amendment, aimed at restricting youth access to tobacco. Under the Synar Amendment, the United States Department of Health and Human Services may issue a Substance Abuse Prevention and Treatment Block Grant (federal block grant) to states that have laws prohibiting the sale of tobacco to individuals under the age of 18. As a condition of receiving federal block grant funds, federal law requires states to conduct an annual retailer assessment. Part of this annual retailer assessment involves determining the percentage of retailers statewide that do not comply with laws restricting youth access to tobacco.

In response to the federal Synar Amendment, California enacted the STAKE Act, which took effect in January 1995. The STAKE Act designates Public Health as the state agency responsible for the annual retailer assessment. In addition, the STAKE Act requires Public Health to conduct undercover compliance inspections of tobacco retailers throughout the State using youth decoys. To meet the requirements of the Synar Amendment, Public Health

Audit Highlights . . .

Our audit of the California Department of Public Health's (Public Health) administration of the Stop Tobacco Access to Kids Enforcement Act (STAKE Act) highlighted the following:

- » *It lacks the fiscal processes to accurately account for the expenditures related to the statewide and local compliance inspections it conducts.*
- » *It charged local entities at least \$207,000 less than what it actually needed to cover its costs for conducting 2,500 local compliance inspections.*
- » *It is missing an opportunity to enhance its enforcement efforts because it does not obtain the names of retailers who violate state laws during annual statewide assessments so that it can include them in its compliance inspections.*
- » *It could provide greater specificity on the youth consent form regarding any future use of the data it collects with the help of youth decoys.*

has entered into an agreement with the San Diego State University Research Foundation (research foundation) to conduct the annual retailer assessment, which also uses youth decoys. In addition, Public Health entered into an agreement with the American Lung Association of California to recruit the youth decoys used in these compliance inspections and assessments.

Although Public Health conducts the annual retailer assessment to satisfy the federal requirement, it pays for this effort with funds from the California Tobacco Tax and Health Protection Act of 1988 (Proposition 99)—which became effective in 1989 and imposes additional taxes on tobacco products. Public Health pays for the assessment using these funds because the implementing legislation for Proposition 99 allows Public Health to conduct statewide surveillance of tobacco-related behaviors, knowledge, and attitudes and to evaluate its local and statewide tobacco control program, which is consistent with the purpose of the annual retailer assessment. In addition to the annual retailer assessment, Public Health conducts statewide compliance inspections using the federal block grant funds. It also conducts additional local compliance inspections on behalf of local entities that contract with it to further enforce the STAKE Act. The local entities reimburse Public Health for these additional inspections. Although the annual retailer assessment does not result in any further actions, the statewide and local compliance inspections result in civil penalties for retailers who violate the law.

We found that Public Health lacks the processes necessary to track costs related to the statewide and local compliance inspections. Public Health explained that its investigators are assigned to work on either the statewide compliance inspections or the local compliance inspections. Public Health charges the time and associated costs of investigators assigned to statewide compliance inspections to the Sale of Tobacco to Minors Control Account. It charges the time and associated costs of investigators assigned to local compliance inspections to its General Fund appropriation. Public Health explained that although some investigators may occasionally work on both statewide and local compliance inspections, when this occurs, it does not adjust the funding sources it charges for the investigators' time and related costs. In addition, because Public Health uses the same procedures when conducting statewide and local compliance inspections, we expected the average cost of a statewide compliance inspection to be similar to the average cost of a local compliance inspection during our period of review—fiscal years 2009–10 through 2011–12. However, we found the average cost charged for statewide compliance inspections varied substantially from the average cost charged for local compliance inspections. For example, during fiscal year 2009–10, the Food and Drug Branch of Public Health, which conducts

the compliance inspections, charged an average of \$667 per statewide compliance inspection compared to \$204 for conducting a local compliance inspection. Without adequate accounting processes to track these costs, Public Health cannot ensure that it charges the appropriate funding source for the costs of conducting statewide and local compliance inspections.

Moreover, our review found that the rate that Public Health charged local entities during fiscal years 2009–10 through 2011–12 for conducting local compliance inspections was not adequate to cover its costs during those years. Public Health charged the cities of Los Angeles and Santa Ana \$460 for each compliance inspection it conducted on their behalf and it charged Contra Costa County \$485 for each such inspection. However, Public Health noted that these rates were established in 2005 and had only been adjusted for travel, if necessary. Based on its total expenditures for conducting statewide and local compliance inspections, we calculated that the average cost was \$568, \$584, and \$784, respectively, to conduct a compliance inspection, including those conducted on behalf of three local entities, during fiscal years 2009–10 through 2011–12. Public Health agrees that its costs were higher than the reimbursements it received from local entities and it has recently increased its reimbursement rate for a new contract with the city of Los Angeles, which was executed in November 2012. However, we found that it overstated some of the costs it used to develop the rate for the new contract and would thus be overcharging the city of Los Angeles for any local compliance inspections Public Health conducts under that new contract.

In addition, Public Health is missing an opportunity to enhance its enforcement of the STAKE Act because its Tobacco Control Branch does not share the data on potential violators identified through the annual assessment with the Food and Drug Branch. Specifically, the research foundation identified 61, 57, and 42 retailers that sold tobacco products to minors during each of the three annual retailer assessments it conducted for federal fiscal years 2010, 2011, and 2012, respectively. Because the purpose of the annual retailer assessments does not include taking enforcement action against the violating retailers, Public Health's Tobacco Control Branch does not notify these retailers or take action against those who sold tobacco to minors. However, if the Tobacco Control Branch were to share this information with the Food and Drug Branch, which can impose civil penalties, the Food and Drug Branch could expand the pool of data on potential violators that would allow it to more effectively use its resources when conducting compliance inspections.

The Tobacco Control Branch stated that it does not share this information with the Food and Drug Branch because it is complying with assurances the research foundation made in its request for approval from the San Diego State University Institutional Review Board (review board)—the entity that reviews the research involving human subjects that the research foundation conducts. Although not required by the Synar Amendment or the agreement Public Health has with the research foundation, in developing its assessment protocols the research foundation sought and received approval from its review board before conducting the annual retailer assessment. The research foundation believed this approval was necessary in the event it later published research based on the data from the assessment. In its request for approval, the research foundation made several assurances to the review board, including that the identities of the retailers would not be made available to law enforcement.

Finally, we noted that although it generally complied with applicable laws related to obtaining informed consent from youth decoy participants and their parents or guardians, Public Health could expand its youth decoy and parental consent form to describe more specifically the potential use of the annual assessment data for future research. The consent form provides a description of the annual assessment and explains that participation is voluntary. However, because the research foundation has the right, based on its agreement with Public Health, to use the annual retailer assessment data for other research purposes, in the interest of full disclosure we believe—and Public Health agrees—that Public Health should include a statement on the consent form notifying the youth decoys and their parents or guardians that assessment data may be used in later research in a form that does not disclose the identity of the youth.

Recommendations

To ensure that it can support its labor costs, Public Health should implement a process to accurately track the time its staff spends conducting statewide compliance inspections and local compliance inspections. Further, it should allocate its expenses associated with local compliance inspections to the appropriate funding source, based on the time staff spends conducting those activities, and it should maintain accurate accounting records to reflect actual costs of statewide and local compliance inspections.

When Public Health enters into new contracts with local entities to conduct compliance inspections, it should do the following:

- Evaluate its historical costs of conducting these inspections to ensure that the existing rates are adequate to recoup its costs. If it determines that the existing rates are not adequate, it should develop a new rate that accurately reflects its true costs.
- Ensure that it maintains adequate documented support for the rate it charges for a compliance inspection.

Public Health should amend its recent contract with the city of Los Angeles to correct the rate it charges for a local compliance inspection to reflect its true cost.

To ensure that Public Health can more effectively monitor and enforce compliance with the STAKE Act, it should do the following:

- Take appropriate steps to ensure that there are no restrictions placed on the use of the data acquired during the annual retailer assessment that would preclude its use for compliance inspection purposes.
- Annually obtain the identifying information regarding the retailers that sold tobacco to minors during the annual retailer assessment and provide that information to the Food and Drug Branch.
- Include the retailers that sold tobacco to minors during the annual retailer assessment when selecting the retailers it plans to inspect as part of the statewide compliance inspections.

Public Health should add language to its youth decoy and parent or legal guardian consent form to clarify that the data obtained from the youth's participation may be used in future research in a way that will not reveal the identity of the youth.

Agency Comments

Public Health agrees with our recommendations and outlined steps that it will take to implement them.

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Introduction

Background

California state law requires retailers to obtain a license from the State Board of Equalization to sell tobacco and it prohibits retailers from selling tobacco to any person under the age of 18. Studies show that in the late 1980s and early 1990s, children ages 12 to 17 years were successful at purchasing cigarettes 60 percent to 90 percent of the time, purchasing approximately 1 billion packs of cigarettes each year. In 1992 the United States Congress enacted the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, which includes an amendment aimed at restricting youth access to tobacco. This amendment, commonly known as the Synar Amendment, requires states to enact and enforce laws prohibiting the sale or distribution of tobacco products to individuals under 18. Under the Synar Amendment, the United States Department of Health and Human Services may issue a Substance Abuse Prevention and Treatment Block Grant (federal block grant) to states that have laws prohibiting the sale of tobacco to individuals under 18. In addition, federal law requires states that receive federal block grant funds to conduct annual random, unannounced inspections of tobacco retailers to measure overall levels of compliance and to identify violations (annual retailer assessment).

In response to the Synar Amendment, California passed the Stop Tobacco Access to Kids Enforcement Act (STAKE Act), effective January 1, 1995. The STAKE Act designates the California Department of Public Health (Public Health) as the state agency responsible for conducting the annual retailer assessment. In addition, the STAKE Act requires Public Health to establish and develop a program to reduce the availability of tobacco products to persons under 18 through enforcement activities. These activities include conducting undercover compliance inspections of tobacco retailers, imposing civil penalties on retailers who violate the STAKE Act, and requiring tobacco retailers to display a notice at each physical point of sale stating that selling tobacco products to anyone under 18 years of age is illegal and subject to penalties (STAKE Act signs). The STAKE Act signs must also state that the law requires all persons selling tobacco products to check the identification of purchasers of tobacco products who reasonably appear to be younger than 18.

Funding Sources for Implementing the STAKE Act

Public Health uses several funding sources to administer and enforce the Synar Amendment and the STAKE Act, as described in Table 1 on page 9. Specifically, the California Tobacco Tax and

Health Protection Act of 1988 (Proposition 99)—which became effective in January 1989—imposes additional taxes on tobacco products. Subsequent legislation established the Tobacco Control Program within Public Health for the purpose of implementing Proposition 99 (implementing legislation). Funding available through Proposition 99 allows Public Health to fund various activities related to preventing tobacco use and tobacco-related diseases in California, including reducing access to tobacco for children and school-aged youth. According to Public Health, during fiscal year 2010–11, it allocated nearly \$5 million in Proposition 99 funds to support the goals of the STAKE Act program.

Further, Public Health receives funding from the federal block grant. Although the California Department of Alcohol and Drug Programs receives the federal block grant funds, Public Health is responsible for meeting the federal Synar Amendment’s requirement to conduct the annual retailer assessment and for enforcing the provisions of the STAKE Act. State law requires that \$2 million be transferred annually from the federal block grant to the Sale of Tobacco to Minors Control Account, established by the STAKE Act and administered by Public Health, to ensure that tobacco retailers comply with federal and state laws related to restricting youth tobacco access.

In addition to these primary funding sources, Public Health leverages smaller amounts of funds to support its administration of the STAKE Act. For example, the STAKE Act requires Public Health to impose civil penalties on retailers who illegally sell tobacco to minors. Public Health can use the funds generated from these civil penalties to further administer and enforce the STAKE Act. Moreover, Public Health supplements its statewide STAKE Act efforts by conducting STAKE Act compliance inspections on behalf of local entities, as we describe in detail later. These local entities reimburse Public Health for expenses related to the local compliance inspections.

Statewide Annual Retailer Assessment

The STAKE Act designates Public Health as the state agency responsible for meeting the requirements of the Synar Amendment, which requires the State to conduct a retailer assessment annually as a condition of receiving the federal block grant funds. Public Health has entered into an agreement with the San Diego State University Research Foundation (research foundation) to perform the annual retailer assessment. Using the list of tobacco retailers licensed by the State Board of Equalization, Public Health’s Tobacco Control Branch randomly selects between 800 and 1,200 retailers to observe each year during the assessment. The sampling

Table 1
Funding Sources for Synar Amendment and Stop Tobacco Access to Kids Enforcement Act Activities

FUNDING SOURCE	PURPOSES FOR WHICH FUNDS CAN BE USED	PURPOSES RELATED TO OUR SCOPE FOR WHICH THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH (PUBLIC HEALTH) USES THE FUNDS
California Tobacco Tax and Health Protection Act of 1988 (Proposition 99)	<p>This proposition and its implementing legislation, allows Public Health to use Proposition 99 funds for a variety of activities, including the following:</p> <ul style="list-style-type: none"> • Conduct statewide surveillance of tobacco-related behaviors, knowledge, and attitudes and evaluate its local and state tobacco control programs. • Award and administer grants for projects directed at the prevention of tobacco-related diseases. • Appropriate at least \$150,000 per year to county or city health departments (local lead agencies) to provide services directed at preventing tobacco use and smoking cessation to target populations. 	<p>Public Health uses Proposition 99 funds to pay for the following activities:</p> <ul style="list-style-type: none"> • Conduct annual random, unannounced compliance inspections to ensure compliance with state tobacco laws (annual retailer assessments) through grant agreements with the San Diego State University Research Foundation. • Recruit students 14 to 16 years old to participate in the annual retailer assessment and Stop Tobacco Access to Kids Enforcement Act (STAKE Act) compliance inspections as youth decoys through grant agreements with community-based organizations. • Provide grants to local lead agencies to conduct tobacco-related activities, some of which include local youth tobacco purchase assessments.
Substance Abuse Prevention and Treatment Block Grant (federal block grant)	<p>The federal block grant provides funding for states with youth tobacco access laws. These funds can be used to conduct various activities, including the following:</p> <ul style="list-style-type: none"> • Annual retailer assessments. • Annual report describing the activities carried out by the State to enforce tobacco laws, including the extent of the success the State achieved in reducing the availability of tobacco products to individuals under the age of 18. • Programs to educate and counsel individuals on substance abuse and to provide activities to reduce the risk of such abuse by the individuals. <p>These funds cannot be used to pay for enforcement activities, such as imposing civil penalties against retailers that violated state tobacco laws.</p>	<p>According to Public Health, it uses federal block grant funds to pay for the following:</p> <ul style="list-style-type: none"> • Conduct statewide compliance inspections through Public Health's Food and Drug Branch. • Coordinate STAKE Act activities within Public Health's Tobacco Control Branch.
STAKE Act civil penalties	<p>State law requires any civil penalties collected by Public Health under the STAKE Act to be deposited into the Sale of Tobacco to Minors Control Account. Public Health can use funds in this account to administer and enforce the STAKE Act.</p>	<p>Public Health uses the STAKE Act civil penalties it collects from violating retailers for activities related to the assessment and collection of penalties.</p>
Reimbursements from local entities	<p>Local entities reimburse Public Health based on an agreed-upon rate for conducting supplemental compliance inspections in the respective jurisdictions.</p>	<p>Public Health uses local funds to pay for costs associated with local compliance inspections. These funds reimburse its General Fund where the expenditures are initially charged.</p>

Sources: California State Auditor's analysis of relevant laws and regulations, Public Health's accounting records, and statements from key Public Health staff.

methodology, including the sample size, is approved in advance by the United States Department of Health and Human Services. Once Public Health selects the sample, it provides a list of retailers to the research foundation, which conducts the assessment on behalf of Public Health. In developing its assessment protocols, the research foundation sought and received approval from its institutional review board, which is the entity that reviews research involving human subjects that the research foundation conducts. To conduct the assessment, staff members and research assistants from the research foundation accompany boys and girls 15 and 16 years of age (youth decoys) while they visit the selected retailers and attempt to purchase tobacco products, as Figure 1 depicts. During our audit period, Public Health had entered into an agreement with the American Lung Association of California (lung association) to recruit and train the youth decoys that the research foundation used to conduct the annual retailer assessment.

Figure 1

Overview of Activities Related to the Synar Amendment and the Stop Tobacco Access to Kids Enforcement Act



Sources: Applicable state and federal laws, Public Health's federal Synar reports, Public Health's policies and procedures, and the research foundation's annual retailer assessment training materials.

Immediately following a retailer observation, the research foundation representative and the youth decoy complete a data form describing the observation. Data collected about the observations include whether the youth decoy successfully purchased tobacco products and whether the sales clerk asked for

the youth decoy's identification or confirmation of age. The research foundation also collects data on the type of retail establishment, characteristics about the clerk, and the number of other individuals in the general proximity of the attempted purchase. After the research foundation conducts the observations of all selected retailers, it compiles the results of the annual retailer assessment and forwards them to Public Health.

The data that the research foundation provides to Public Health do not include identifying information for the retailers that sold tobacco to the youth decoys during the assessment. Instead, Public Health receives a list of retailers the research foundation visited and a separate list of the outcomes of each observation that does not contain the identities of the retailers. Public Health uses the data it receives from the research foundation to compile the annual report the Synar Amendment requires. That report includes the official rate of illegal tobacco sales to individuals under the age of 18 (official sales rate), based solely on the annual retailer assessment. According to federal law, if the official sales rate is greater than 20 percent, the United States Department of Health and Human Services, after notice to the state and an opportunity for a hearing, shall reduce the state's federal block grant award by 40 percent. During our audit period, the official sales rate decreased from 8.6 percent in federal fiscal year 2010 to 5.6 percent in federal fiscal year 2012.

Although Public Health conducts the annual retailer assessment to comply with the requirements for receiving the federal block grant funds, it does not use the federal block grant funds to pay for this activity. Rather, Public Health pays for the assessment using Proposition 99 funds. It does so because the implementing legislation for Proposition 99 allows it to conduct statewide surveillance of tobacco-related behaviors, knowledge, and attitudes and to evaluate its local and state tobacco control program, which is consistent with the purpose of the annual retailer assessment. The implementing legislation specifies that those funds are to be expended for surveillance and evaluation, such as the annual retailer assessment. By using the Proposition 99 funds for the annual retailer assessment, Public Health preserves the federal block grant funds to pay for additional compliance inspections, which we discuss later. Further, Public Health uses Proposition 99 funds to pay for the youth recruitment costs related to the annual retailer assessment and the statewide compliance inspections.

Activities by Local Entities

Public Health generally allocates Proposition 99 funds to county and city health departments (local lead agencies). State law requires Public Health to allocate Proposition 99 funds to local lead agencies

to administer programs aimed at preventing the use of tobacco and tobacco-related diseases. Some local lead agencies elect to use a portion of the Proposition 99 funds to conduct evaluation activities of programs designed to reduce the availability or illegal sale of tobacco products to youth. Between fiscal years 2009–10 and 2011–12, Public Health allocated Proposition 99 funds to 37 local lead agencies to conduct these activities. We reviewed two of these local lead agencies and found that the methodologies they employ vary. For example, one local lead agency contracts with local community-based organizations and uses youth decoys to assess whether illegal sales occur; it also may assess penalties in accordance with local licensing policies. Although local lead agencies use this information to evaluate local tobacco-related programs, the results of these local assessments are not incorporated into the annual retailer assessment the Tobacco Control Branch conducts annually. The other local lead agency we reviewed focuses on retailer education through face-to-face interaction between retailers and local lead agency staff.

Statewide Compliance Inspections

The STAKE Act requires Public Health to conduct inspections of tobacco retailers statewide to ensure compliance with federal and state tobacco laws. In accordance with state law, Public Health's Food and Drug Branch annually chooses retail establishments using a combination of randomly selected tobacco retailers, retailers against whom it has received complaints, and retailers with prior violations. Once the Food and Drug Branch selects the retail establishments to inspect, it chooses youth decoys from among the pool the lung association has recruited. Unlike the annual retailer assessment, the

compliance inspections use sworn peace officers (investigators) to supervise the youth decoys, as the STAKE Act requires. Investigators document the appearance of the youth decoys before an inspection and use video recording equipment during the inspection, as state law permits. The investigators accompany the youth decoys when they visit the establishments in an attempt to purchase tobacco products. The investigators also observe whether the retailers have posted the required STAKE Act signs.

If a retailer sells tobacco products to a youth decoy during one of these inspections, state law requires Public Health to notify the violating retailer of the compliance inspection and the violation within two working days and to impose a civil penalty. The amount of the civil penalty is based on the number of violations a retailer has had within the previous five-year period, as the text box shows.

Fines Imposed for Illegally Selling Tobacco to a Minor

An enforcing agency may assess civil penalties against any person, firm, or corporation that furnishes tobacco products to a person who is under 18. These penalties are based on the number of violations within the previous five-year period.

- First violation: \$400 to \$600
- Second violation: \$900 to \$1,000
- Third violation: \$1,200 to \$1,800
- Fourth violation: \$3,000 to \$4,000
- Fifth violation: \$5,000 to \$6,000

Source: California Business and Professions Code, Section 22958.

Further, Public Health can impose additional penalties for failure to post STAKE Act signs at each point of purchase. Specifically, state law allows Public Health to impose civil penalties of \$200 for the first STAKE Act sign violation and \$500 for each additional violation. During fiscal years 2009–10 through 2011–12, the Food and Drug Branch conducted over 11,500 compliance inspections and issued more than 1,700 penalties in accordance with the STAKE Act. Public Health has successfully collected about 89 percent of the nearly \$1.1 million in penalties it imposed.

Until January 1, 2013, state law did not allow the State Board of Equalization to levy fines or suspend or revoke a violating retailer's license unless the official statewide sales rate to minors, derived from the annual retailer assessment, was above 13 percent. However, the official sales rate has not exceeded 13 percent since 2006. Effective January 1, 2013, changes to state law eliminated the restriction that previously prohibited the State Board of Equalization from taking action, and Public Health is now required to notify the State Board of Equalization of a retailer's third, fourth, and fifth violations it identifies through compliance inspections. As the text box shows, the State Board of Equalization must take additional actions against the violating retailer, including revoking its retail license, depending on the number of prior violations.

Retail License Sanctions for Illegal Tobacco Sales to Minors

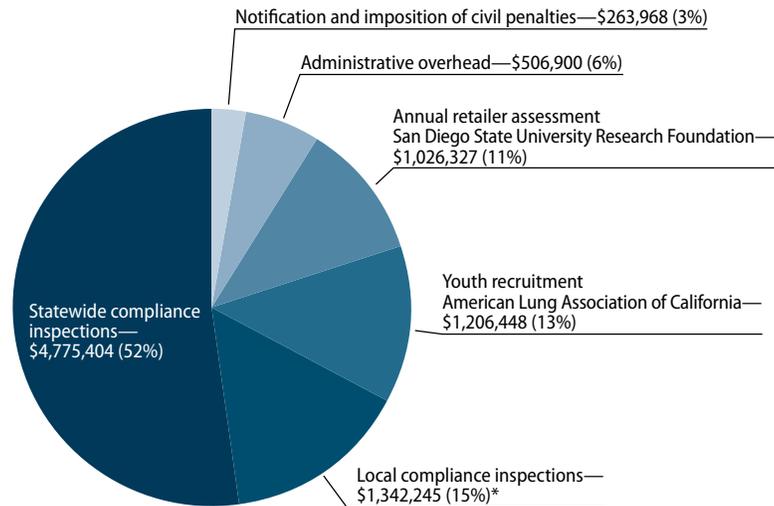
Upon the assessment of a civil penalty for the third, fourth, or fifth violation within a previous five-year period, the California Department of Public Health must notify the State Board of Equalization within 60 days of the date of the final adjudication of the violation or payment of the civil penalty. The State Board of Equalization must assess an additional penalty of \$250 and suspend or revoke the license at the same location.

- Third violation: 45-day suspension
- Fourth violation: 90-day suspension
- Fifth violation: revocation

Source: California Business and Professions Code, Section 22958.

According to the chief of the STAKE unit, Public Health pays for its statewide compliance inspections primarily through the federal block grant funds it receives, as permitted by the Synar Amendment. However, it does not seek reimbursement from the federal block grant for the cost of youth recruitment, which is charged to its Proposition 99 appropriation. Moreover, the federal block grant prohibits Public Health from using funds to pay for enforcement activities, such as notifying retailers of a violation or imposing or collecting civil penalties. Therefore, Public Health uses the civil penalties it collects from violating retailers to pay for these enforcement activities, including legal costs associated with defending Public Health against retailer appeals. As Figure 2 on the following page shows, most of Public Health's total expenditures for administering the Synar Amendment and the STAKE Act during fiscal years 2009–10 through 2011–12 were related to conducting statewide compliance inspections.

Figure 2
Synar Amendment and Stop Tobacco Access to Kids Enforcement Act
Expenditures by Category for Fiscal Years 2009–10 Through 2011–12



Source: California State Auditor's analysis of data obtained from the California Department of Public Health's (Public Health) California State Accounting and Reporting System.

Note: Public Health provides the California Tobacco Tax and Health Protection Act of 1988 (Proposition 99) funds to county and city health departments or community-based organizations (local lead agencies) to conduct a variety of activities. Some local lead agencies may use these funds to conduct evaluations of programs designed to reduce the availability or illegal sales of tobacco products to youth as part of those activities. According to Public Health, its accounting records do not separately identify the amount of funds local entities spend on conducting these assessments. Therefore, the expenditures shown here do not include these costs.

* Public Health initially charges expenditures for these local compliance inspections to its General Fund appropriation. These expenditures are offset when Public Health deposits the reimbursements it receives from performing these inspections into its General Fund. These expenditures include some applicable youth recruitment costs.

Local Compliance Inspections

In addition to conducting statewide compliance inspections, Public Health conducts compliance inspections for certain local entities within their jurisdictions under the authority of the STAKE Act. During fiscal years 2009–10 through 2011–12, Public Health had active contracts with the cities of Los Angeles and Santa Ana and Contra Costa County to conduct local compliance inspections. These contracts specified a targeted number of compliance inspections that Public Health must conduct within the respective jurisdictions. The purpose of these contracts is to supplement, and not replace, the statewide compliance inspections Public Health already conducts within these local jurisdictions. According to Public Health, it uses the same procedures to conduct these local compliance inspections as it does to conduct the statewide compliance inspections.

For its services, Public Health charges the local entity a fixed rate for each local compliance inspection it conducts, and it bills the local entity quarterly as specified in the contract. When Public Health incurs expenses for conducting the local compliance inspections, including youth recruitment costs, it initially charges those expenses to its General Fund appropriation. These expenses are offset when Public Health receives reimbursements from the local entity for conducting these inspections.

Scope and Methodology

The Joint Legislative Audit Committee (audit committee), directed the California State Auditor to perform an audit of the State’s compliance with federal and state laws to reduce youth access to tobacco. Specifically, the audit committee requested that we audit Public Health’s administration of the STAKE Act. Table 2 shows the audit objectives approved by the audit committee as well as the methods we used to address those audit objectives.

Table 2
Audit Objectives and the Methods Used to Address Them

	AUDIT OBJECTIVE	METHOD
1	Review and evaluate the laws, rules, and regulations significant to the audit objectives.	Reviewed relevant laws, regulations, and other background materials.
2	Determine whether the State is in compliance with applicable federal and state laws regarding the sale of tobacco to minors. Further, to the extent possible, determine whether the State’s implementation of these laws has resulted in the reduction of tobacco sales to minors in California by performing, at a minimum, the following: a. For the past three-year period, review and evaluate the methodology used by the California Department of Public Health (Public Health) and its contractor in conducting the youth tobacco purchase surveys (annual retailer assessment), including the collection of data. This evaluation should include:	Interviewed key staff at Public Health to determine how it conducts the annual retailer assessment, including its methods for selecting retail establishments.

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AUDIT OBJECTIVE	METHOD
i. The reasonableness of the factors used to determine the number and location of jurisdictions surveyed, the retailer selection process, and the steps taken by Public Health to ensure that the collection and reporting of data are accurate.	<ul style="list-style-type: none"> • Obtained guidance documents issued by the United States Department of Health and Human Services that describe the approved methods for selecting retailers for the annual retailer assessment. • Obtained documentation related to Public Health's communication with and annual reports submitted to the United States Department of Health and Human Services. • Obtained and reviewed the contract and progress reports submitted by the San Diego State University Research Foundation (research foundation) to ensure that Public Health was monitoring the research foundation's administration of the retailer violation assessment. • We found the factors used to determine the number and location of jurisdictions surveyed, the retailer selection process, and the steps taken by Public Health to ensure the accuracy of the collection and reporting of data were reasonable.
ii. Whether the information collected in the retailer assessment is confidential or otherwise protected from public review.	<ul style="list-style-type: none"> • Interviewed key staff at Public Health and the research foundation to understand whether and why they believe data collected as part of the annual retailer assessment are confidential. • Reviewed applicable federal and state laws to determine whether the law requires data collected as part of the annual retailer assessment to be treated as confidential.
iii. Whether the information collected as part of the annual retailer assessment is used to conduct any additional research.	<ul style="list-style-type: none"> • Interviewed key staff at the research foundation to determine whether the data collected as part of the annual retailer assessment are used to conduct any additional research. • Interviewed key staff at Public Health to determine whether Public Health was aware of additional research conducted by the research foundation.
iv. Whether participants, including minors and their parents, are sufficiently informed in cases where additional research is conducted beyond the scope of the annual retailer assessment, using information collected in the assessment.	<ul style="list-style-type: none"> • Interviewed key staff at the research foundation and Public Health to determine the extent to which minors and their parents are made aware that additional research is conducted beyond the scope of the annual retailer assessment. • Obtained consent forms used by the youth recruitment contractor and the research foundation. • Determined whether the consent form complies with applicable laws related to obtaining informed consent from youth participants and their parents.
v. Whether any additional research conducted using the information collected in the annual retailer assessment is also funded through other sources.	<ul style="list-style-type: none"> • Interviewed key staff from the research foundation to determine the sources of funding for additional studies and presentations it conducted using the data from the retailer violation assessment. • Obtained and reviewed documentation related to the funding for presentations conducted using the data from the annual retailer assessment. We found that this funding was limited to reimbursements for the principal investigator's expenses, such as travel and lodging.
b. For the past three-year period, review and evaluate a selection of expenditures of state and federal funds from all sources designated for the purpose of reducing youth access to tobacco to determine:	
i. The source and purpose for which expenditures were made and whether the expenditures were reasonable and consistent with relevant laws, rules, regulations, and policies. This includes expenditures made from the Sale of Tobacco to Minors Control Account (control account) received from state or federal sources or collected from civil penalties.	<p>Selected 12 transactions for each year of our audit period—fiscal years 2009–10 through 2011–12—for a total of 36 transactions and performed the following:</p> <ul style="list-style-type: none"> • Obtained relevant documentation for each transaction to determine the purpose of the transaction. • Reviewed applicable federal and state laws to determine whether each transaction was allowable based on the source of the funds used. • We did not identify any expenditures that were not allowable.

AUDIT OBJECTIVE	METHOD
<p>ii. The ratio of funds expended from the control account on research or other studies compared to the funds expended on compliance checks and enforcement activities.</p>	<ul style="list-style-type: none"> • Interviewed key staff at Public Health to identify all activities relevant to its administration of the STAKE Act and to understand its accounting records. • Obtained Public Health’s accounting records for fiscal years 2009–10 through 2011–12. • Calculated the total funds spent by type of expenditure to administer the STAKE Act. • Although this objective specifically asked about expenditures out of the control account, we included some expenditures funded by the California Tobacco Tax and Health Protection Act of 1988 (Proposition 99) that were directly related to the audit. Specifically, Public Health’s contracts with the American Lung Association of California to conduct youth recruitment and with the research foundation to conduct the annual retailer assessment are funded by Proposition 99 funds, not funds from the control account.
<p>iii. Whether any compliance, enforcement activities, or other studies funded through the control account were also funded by other sources, such as the State’s General Fund.</p>	<p>Interviewed key staff and reviewed the accounting records to identify the funding sources for activities related to the STAKE Act.</p>
<p>c. Determine what, if any, action is taken by Public Health during the performance of the annual retailer assessment, when a tobacco retailer is found to be selling tobacco to minors. For example, determine whether Public Health refers these retailers to local or state enforcement authorities.</p>	<p>Interviewed key staff at Public Health’s Tobacco Control Branch to determine whether it refers to law enforcement any retailers that are found to be selling tobacco to minors identified during the annual retailer assessment.</p>
<p>3 Determine which local jurisdictions conducted youth tobacco purchase assessments during the past three-year period, either independently or through contract with Public Health. For a selection of these jurisdictions, determine:</p> <p>a. The funding source and cost of conducting the assessment.</p> <p>b. The methodology used to conduct the assessment.</p> <p>c. Whether the data collected from any local assessments are consistent with the data reported in the annual retailer assessment by Public Health and its contractor.</p> <p>d. Whether the results of any local assessments are included in the annual retailer assessment.</p>	<p>Reviewed Public Health’s documents to identify all local jurisdictions that conducted youth tobacco purchase assessments or compliance inspections. Selected four such local jurisdictions—two local health departments (local lead agencies) that conduct activities to evaluate programs designed to reduce the availability or illegal sales of tobacco to youth and two local entities that contract with Public Health to conduct local compliance inspections, as described in the Introduction. For the selected local jurisdictions, performed the following:</p> <ul style="list-style-type: none"> • Interviewed key staff at the local jurisdictions to determine how each activity is funded. • Obtained and reviewed progress reports to estimate the cost of conducting the activities. • Obtained and reviewed the contracts between the local entities and Public Health to determine the cost of conducting the local compliance inspections. <ul style="list-style-type: none"> • Interviewed key staff from and reviewed progress reports submitted by the local lead agencies to determine the methodologies used to conduct the evaluation activities. • Interviewed key staff at Public Health and reviewed the contracts between the local entities and Public Health to determine the methodologies Public Health used to conduct the local compliance inspections. <ul style="list-style-type: none"> • Obtained the rate of illegal sales of tobacco to minors calculated for each type of youth tobacco activity—annual retailer assessment, statewide compliance inspections, and local compliance inspections. • The methodologies and purposes for conducting the various statewide and local assessments and compliance inspections vary significantly. As a result, the illegal sales rates derived from those activities cannot be compared. <ul style="list-style-type: none"> • Interviewed key staff at Public Health to determine whether the results from any of the other youth tobacco purchase assessments are included in the annual retailer assessment. • Reviewed guidance from the United States Department of Health and Human Services describing the approved methodology for conducting the annual retailer assessment.

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AUDIT OBJECTIVE	METHOD
<p>4 For the past three-year period, review any contracts Public Health has entered into for the purpose of conducting the annual retailer assessment to determine if the contract terms including, but not limited to, the duration and value, are reasonable.</p>	<ul style="list-style-type: none"> • Interviewed key staff at Public Health to determine the process by which it entered into the agreements to conduct the annual retailer assessment and youth recruitment. • Reviewed applicable state laws related to entering into contracts and grant agreements. • Compared the processes used by Public Health with the applicable state laws to determine if Public Health had appropriately entered into the agreements. • Reviewed prior agreements Public Health entered into with the research foundation to determine how the cost of these agreements changed over time. <p>We found the duration and value of the contracts to be reasonable.</p>
<p>5 Review and assess any other issues that are significant to Public Health's administration of the STAKE Act.</p>	<ul style="list-style-type: none"> • Selected 18 cases (15 closed cases and three open cases) from the Food and Drug Branch's compliance inspections and determined whether the Food and Drug Branch conducted the inspections and subsequent enforcement actions in accordance with applicable laws. • Determined whether the Food and Drug Branch successfully collected the penalties it assessed by reviewing the total amount of penalties assessed by the Food and Drug Branch during fiscal years 2009–10 through 2011–12 and the total amount of those penalties it collected as of January 16, 2013. • We found that Public Health conducted its inspections and enforcement actions in accordance with applicable laws.

Sources: California State Auditor's analysis of Joint Legislative Audit Committee audit request number 2012-111, planning documents, and analysis of information and documentation identified in the column titled *Method*.

Assessment of Data Reliability

In performing this audit, we relied on various electronic data files obtained from Public Health. The U.S. Government Accountability Office, whose standards we follow, requires us to assess the sufficiency and appropriateness of computer-processed information that is used to support findings, conclusions, or recommendations. Table 3 shows the results of this analysis.

Table 3
Methods of Assessing Data Reliability

INFORMATION SYSTEM	PURPOSE	METHOD AND RESULT	CONCLUSION
Department of Public Health (Public Health) California State Accounting and Reporting System (CALSTARS) Data related to Public Health for the period July 1, 2009, through June 30, 2012	<ul style="list-style-type: none"> Determine the amount of Stop Tobacco Access to Kids Enforcement Act (STAKE Act) expenditures for the period July 2009 through June 2012. Determine the amount of funds paid to the San Diego State University Research Foundation and the American Lung Association of California for activities related to the STAKE Act program during the period July 2009 through June 2012. 	<ul style="list-style-type: none"> We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. To test the accuracy of the CALSTARS data, we randomly selected a sample of 31 transactions and verified that key data elements matched source documentation. This testing did not note any errors. To test the completeness of the CALSTARS data for the Sale of Tobacco to Minors Control Account, we compared fund totals from the Controller's Budgetary/Legal Basis system to CALSTARS. We did not note any material exceptions. To test the completeness of the CALSTARS data for the General Fund revenues and expenditures for activities related to the STAKE Act, we compared the total payments reported by the contracting organizations to the CALSTARS data. We did not note any material exceptions. 	Sufficiently reliable for the purposes of this audit.
Public Health STAKE Demand/Legal Database Data related to penalty assessments and collections as of January 16, 2013	<ul style="list-style-type: none"> Determine the amount of STAKE Act penalties assessed between July 2009 and June 2012. Of those penalties, calculate the amount collected as of January 16, 2013. 	<ul style="list-style-type: none"> We performed data-set verification procedures and electronic testing of key data elements and did not identify any issues. To test the accuracy of Public Health's STAKE Demand/Legal Database data, we randomly selected a sample of 29 penalty assessment cases and verified that key data elements matched source documentation. This testing did not note any errors. We verified completeness by tracing a haphazard selection of penalty assessment cases to the data and found no errors. 	Sufficiently reliable for the purposes of this audit.

Sources: California State Auditor's analysis of data obtained from Public Health.

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Audit Results

The California Department of Public Health's Processes Are Inadequate to Ensure Accurate Accounting of and Charges to Various Funding Sources for Compliance Inspections

The California Department of Public Health (Public Health) does not have adequate processes in place to ensure that it accurately accounts for expenditures related to local and statewide compliance inspections. In particular, Public Health does not have a process to identify how much time its staff spends on local contract compliance inspections, as opposed to statewide compliance inspections. Additionally, the rates Public Health charged local entities during our audit period to conduct compliance inspections on their behalf were not adequate to recoup its costs of conducting those local compliance inspections. Because the procedures Public Health used are the same for both, we expected the average cost of statewide and local compliance inspections to be similar. However, the average cost Public Health charged for statewide compliance inspections varied substantially from the average cost it charged for local compliance inspections. Although it has recently increased this rate for local compliance inspections in its new contract with one local entity, we found that Public Health overstated some costs when developing this new rate.

Public Health Could Not Adequately Support the Amounts It Charged Various Funding Sources for Compliance Inspections

Public Health was unable to support the labor costs it charged for statewide and local compliance inspections. Specifically, Public Health lacks the processes necessary to track how much time its employees spend performing statewide compliance inspections that are initially paid for by the Sale of Tobacco to Minors Control Account (control account) and later reimbursed by the Substance Abuse Prevention and Treatment Block Grant (federal block grant) money, as opposed to the local compliance inspections that are initially paid for by its General Fund appropriation and later reimbursed by local entities based on an agreed-upon rate. Because Public Health uses the same procedures to conduct statewide and local compliance inspections, we expected the average cost it charged to conduct these inspections to generally be the same. However, we found that the average cost Public Health charged for statewide compliance inspections was substantially different from the average cost it charged for local compliance inspections. Therefore, Public Health may not be accurately charging the appropriate funding sources for the costs of conducting statewide and local compliance inspections.

Public Health does not accurately track the time its investigators spend on statewide and local compliance inspections.

As we discussed in the Introduction, Public Health conducts both statewide and local compliance inspections. Because it receives reimbursements for statewide and local compliance inspections from the federal block grant and local entities, respectively, it charges expenditures related to statewide compliance inspections separately from those related to local compliance inspections. Specifically, it charges youth recruitment expenditures related to statewide compliance inspections to its California Tobacco Tax and Health Protection Act of 1988 (Proposition 99) appropriation and all other expenditures for statewide compliance inspections to the control account. Public Health accounts for the expenditures related to local compliance inspections, including costs related to youth recruitment, by charging them to its General Fund appropriation.

However, Public Health does not have adequate processes in place to accurately track its costs related to statewide and local compliance inspections. Specifically, Public Health does not accurately track the time its investigators spend on statewide and local compliance inspections. According to Public Health, it assigns investigators to work on either statewide or local compliance inspections. For example, according to Public Health, during fiscal year 2011–12, it assigned seven employees to perform statewide inspections and two employees to perform inspections on behalf of local entities. Public Health explained that when investigators work primarily on statewide compliance inspections, their time and related costs are charged exclusively to the control account. Conversely, if the investigators work primarily on local compliance inspections, all of their time and related costs are charged to its General Fund appropriation. The Food and Drug Branch told us that occasionally a staff member dedicated to either statewide compliance inspections or local compliance inspections may perform both types of inspections if it is more efficient to do so. However, in these instances, Public Health does not adjust its charges to the two funding sources; instead, it continues to charge these investigators' time and associated costs as originally assigned. As a result, it cannot be certain that it accurately charges its investigators' time and related costs for statewide and local compliance inspections to the appropriate funding sources.

In fact, when we reviewed its accounting records, we found that the expenditures Public Health charged for its statewide and local compliance inspections were not as we expected. According to Public Health's Food and Drug Branch staff, the Food and Drug Branch uses the same procedures when conducting local and statewide compliance inspections. Thus, the costs it incurs for conducting one statewide compliance inspection should essentially be the same as the costs it incurs for conducting a local compliance inspection. As such, we expected the average cost of

a statewide compliance inspection to be similar to the average cost of a local compliance inspection during fiscal years 2009–10 through 2011–12. However, we found that this was not the case.

Table 4 shows that the average cost that Public Health charged to the control account and its Proposition 99 appropriation for statewide compliance inspections during a given year of our audit period varied substantially from the average cost of local compliance inspections it charged to its General Fund appropriation during the same year. For example, as shown in Table 4, during fiscal year 2009–10, the Food and Drug Branch charged \$2.2 million in expenditures for conducting 3,288 statewide compliance inspections, which is an average of \$667 per statewide compliance inspection. However, during the same year, its accounting records indicate that the Food and Drug Branch charged an average cost of only \$204 for conducting 900 local compliance inspections, which is \$463 less than the average cost of a statewide compliance inspection. Conversely, during fiscal year 2010–11, the average cost the Food and Drug Branch charged its General Fund appropriation for a local compliance inspection was \$265 more than the average cost of a statewide compliance inspection. The acting chief of the Food and Drug Branch could not explain the significant differences in the average cost of a statewide compliance inspection and the average cost of a local compliance inspection.

Table 4
Number of Statewide and Local Compliance Inspections and Related Expenditures

FISCAL YEAR	STATEWIDE COMPLIANCE INSPECTIONS CONDUCTED	EXPENDITURES CHARGED FOR STATEWIDE INSPECTIONS*	AVERAGE COST CHARGED FOR A STATEWIDE COMPLIANCE INSPECTION	LOCAL COMPLIANCE INSPECTIONS CONDUCTED	EXPENDITURES CHARGED FOR LOCAL COMPLIANCE INSPECTIONS†	AVERAGE COST CHARGED FOR A LOCAL COMPLIANCE INSPECTION
2009–10	3,288	\$2,194,356	\$667	900	\$183,668	\$204
2010–11	3,489	1,822,602	522	1,050	826,609	787
2011–12	2,236	1,851,301	828	550	331,969	604

Source: California State Auditor’s analysis of data obtained from the California Department of Public Health’s (Public Health) California State Accounting and Reporting System and billing records.

* These expenditures include roughly \$132,000 in administrative overhead costs and approximately \$960,500 in prorated youth recruitment costs. Public Health initially charges the expenditures related to statewide compliance inspections to the Sale of Tobacco to Minors Control Account and later seeks reimbursement from the Substance Abuse Prevention and Treatment Block Grant through the California Department of Alcohol and Drug Programs. Further, Public Health pays for costs associated with youth recruitment using funds from the California Tobacco Tax and Health Protection Act of 1988.

† Public Health charges the expenditures related to local compliance inspections to its General Fund appropriation and later seeks reimbursement from appropriate local entities based on an agreed-upon rate per compliance inspection completed.

A closer review of Public Health's accounting and billing records provides even more evidence that Public Health may not be accurately charging the appropriate funding source for its costs related to local and statewide compliance inspections. For example, during fiscal year 2010–11, the Food and Drug Branch conducted 100 inspections for the city of Santa Ana, as required by its contract with the city. Public Health's accounting records show that it charged expenditures of roughly \$4,000—an average of \$40 per compliance inspection—to its General Fund appropriation for conducting those 100 compliance inspections. Considering that Public Health has estimated that the average cost of youth recruitment alone during this period was \$80 per compliance inspection, the expenditures charged to its General Fund appropriation for these 100 local compliance inspections appear grossly understated. Without adequate accounting processes, Public Health cannot ensure that it charges the appropriate funding source for the costs of conducting statewide and local compliance inspections.

Public Health Did Not Ensure That Reimbursements for Local Compliance Inspections Were Adequate

The fixed rate Public Health charged local entities for a compliance inspection was not adequate to recoup its costs of conducting local compliance inspections. According to Public Health, the rates that it charged local entities were established in 2005 and did not reflect the increased costs of labor and youth recruitment over the years since then. Our review of its expenditures found that Public Health's average cost per compliance inspection during fiscal years 2009–10 through 2011–12 was significantly higher than the rates it charged local entities. In addition, although it has recently increased its rate for local compliance inspections in its new contract with the city of Los Angeles, we found that it overstated some costs when developing the new rate.

Our review of its expenditures found that Public Health's average cost per compliance inspection during three fiscal years was significantly higher than the rates it charged local entities.

The reimbursements Public Health received for its contracts with the cities of Los Angeles and Santa Ana during fiscal years 2009–10 through 2011–12 were based on a rate of \$460 per compliance inspection. Its contract with the county of Contra Costa during fiscal years 2010–11 through 2011–12 specified a rate of \$485 per compliance inspection. Public Health stated that these rates were determined in 2005 and were only adjusted for travel, if necessary. However, Public Health staff noted that the costs had increased since 2005 because of factors such as a restructuring of its investigator classifications as well as an increase in the cost of youth recruitment. Yet Public Health staff indicated that the rates it negotiated with local entities for local compliance inspections were not adjusted to reflect these changes in costs.

Using the total expenditures for conducting statewide and local compliance inspections and the number of such inspections Public Health conducted during fiscal years 2009–10 through 2011–12, we estimated that it cost Public Health an average of \$568, \$584, and \$784, respectively, during those fiscal years to conduct either statewide or local compliance inspections. These rates are substantially higher than the rates Public Health charged local entities during those years. Although we estimated a cost of \$784 per compliance inspection during fiscal year 2011–12, this increase was because the Food and Drug Branch conducted fewer compliance inspections while its costs remained relatively unchanged. Public Health indicated that because of turnover in the Food and Drug Branch’s management, it was unable to determine the reasons for this increased rate. As a result of these differences, we estimate that Public Health charged at least \$207,000 less than what was needed to cover its costs for the 2,500 local compliance inspections it conducted during the period we reviewed.

We estimate that Public Health charged at least \$207,000 less than what was needed to cover its costs for the 2,500 local compliance inspections it conducted during the period we reviewed.

Public Health believes that it incurred more costs to perform these contracted services than the reimbursements it received from these local government entities. As a result, Public Health has increased its rate per compliance inspection from \$460 to \$723 for a new two-year contract with the city of Los Angeles executed in November 2012. Public Health determined the new reimbursement rate based on an estimate of costs related to staff salaries and benefits, travel, youth recruitment, overhead, and indirect expenses. Based on staff productivity, Public Health estimated the number of personnel years required to perform the compliance inspections for the new contract with the city of Los Angeles. In its estimate, Public Health used the mid-range of the salary for each classification. Further, Public Health estimated the cost of associated benefits and indirect expenses using rates provided by its budget office. Finally, it used a per compliance inspection cost of \$167 for youth recruitment.

However, we found that Public Health did not use accurate information when developing the new rate. Specifically, Public Health overstated the per compliance inspection cost of youth recruitment by approximately \$87 when developing the new rate of \$723 per compliance inspection for the contract with the city of Los Angeles. According to the Food and Drug Branch, it used the per compliance inspection cost of \$167 for youth recruitment based on the information it received from the Tobacco Control Branch, which administered the youth recruitment contract. However, an analysis the Tobacco Control Branch performed after it provided the youth recruitment cost information to the Food and Drug Branch shows that the average cost of youth recruitment per compliance inspection was \$80. In fact, our calculation of Food and Drug Branch’s historical cost for youth recruitment for

fiscal years 2009–10 and 2010–11 was \$81 and \$80, respectively. By not ensuring that the rate it charges to local entities is adequately supported, Public Health leaves itself open to criticism. In addition, Public Health would overcharge the city of Los Angeles for any local compliance inspections Public Health conducts under its new contract.

Public Health Does Not Provide the Names of Violators Identified During the Annual Retailer Assessment to Its Investigators for Inspection

Public Health is missing an opportunity to enhance its enforcement of the STAKE Act because its Tobacco Control Branch does not share with the Food and Drug Branch the data on known violators identified through the federally required annual, random, unannounced inspections of tobacco retailers (annual retailer assessment). Public Health currently has a five-year agreement with the San Diego State University Research Foundation (research foundation) to conduct the annual retailer assessment required to comply with the Synar Amendment. The Food and Drug Branch could more effectively identify retailers who may have violated the law when conducting statewide compliance inspections if the Tobacco Control Branch were to share the information related to potential violators the research foundation identifies. The reason Public Health gave us for not sharing this information is that it is complying with the assurances the research foundation made in its request for approval from the San Diego State University Institutional Review Board (review board), the entity that reviews research involving human subjects. One of these assurances stated that it would not share the identities of retailers with law enforcement. However, neither the provisions of federal law that require the annual retailer assessment nor Public Health's agreement with the research foundation expressly calls for approval by a review board.

Although Public Health selects the retailers for the annual retailer assessment, the research foundation performs the assessment, which involves a visit to the selected retailers by a boy or girl 15 and 16 years of age (youth decoy) accompanied by a research assistant. The research foundation identified 61, 57, and 42 retailers who sold tobacco products to minors during the annual retailer assessments it conducted for federal fiscal years 2010, 2011, and 2012, respectively. The research foundation provides the results of the annual retailer assessment to the Tobacco Control Branch, which then prepares and submits a report to the federal government to satisfy the requirement for receiving the federal block grant. As a result, under Public Health's current practice, retailers found to have sold tobacco products to minors are not notified of the violation nor are they penalized.

Under Public Health's current practice, retailers found to have sold tobacco products to minors during the annual retailer assessment are not notified of the violation nor are they penalized.

Although the purpose of the annual retailer assessment does not include taking enforcement action against the violating retailers, we believe that Public Health should be able to obtain the names of the violating retailers and refer those names to its Food and Drug Branch for inclusion in the statewide compliance inspections. The compliance inspections that the Food and Drug Branch conducts could result in progressively greater penalties for violating retailers, and help reduce the sales of tobacco products to those under 18. The Food and Drug Branch conducts as many as 4,500 statewide compliance inspections each year and assesses penalties against those retailers who are found to have violated state laws by selling tobacco to minors. When selecting the retailers to include in its statewide compliance inspections, the Food and Drug Branch uses a combination of random selection, public complaints, and prior violations. Having the names of the retailers who are known to have illegally sold tobacco to minors during the annual retailer assessment would expand the pool of data and would likely allow the Food and Drug Branch to more effectively use its resources when conducting statewide compliance inspections.

However, Public Health's Tobacco Control Branch does not obtain or provide the Food and Drug Branch with the names of the retailers that violated the STAKE Act during the annual retailer assessment. As a result, the Food and Drug Branch is unable to include the known violators in its statewide compliance inspections. The Tobacco Control Branch explained that the results it receives from the research foundation do not contain the names of retailers that sold tobacco to minors during the annual retailer assessment. However, in accordance with the agreement between Public Health and the research foundation, all the data the research foundation gathers is the property of Public Health. As such, Public Health could require the research foundation to provide the names of the retailers that sold tobacco to minors during the annual retailer assessment.

Although not required by the Synar Amendment or the agreement, in developing its assessment protocols, the research foundation sought and received approval from its review board, which the research foundation believed was necessary in the event it later published research based on the data. The review board's approval included an assurance by the research foundation that the identities of the retailers will not be made available to law enforcement. Generally, a review board reviews certain research projects to ensure the protection of individuals involved in the research. Review board approval may be required when the primary intent of the research activity is to create generalizable knowledge. In its request for approval for conducting the annual retailer assessment, the research foundation stated that it considered the tobacco retailers to be the human subjects and stated that it would not

Public Health could require the research foundation to provide the names of the retailers that sold tobacco to minors during the annual retailer assessment because the data is the property of Public Health.

release any information on any retailer that could bring the retailer to the attention of enforcement agencies. Although Public Health acknowledged that there is no legal or contractual requirement to abide by the research foundation's review board approval, it stated that it is complying with the assurances the research foundation made to its review board.

Based on the federal guidance implementing the Synar Amendment, we do not believe review board approval would be required if Public Health were to limit its use of the data to Synar Amendment purposes and did not use it for other research. The guidance from the federal entity that administers the federal block grant indicates that human subject issues are not relevant if the inspection activity is solely to implement the Synar regulations and is not related to other non-Synar-regulation-specific activities. Although Public Health has chosen to conduct the annual retailer assessment separately from the compliance inspections, the Synar regulations make no such distinction. We believe conducting compliance inspections is part of Public Health's responsibilities under the Synar Amendment. In fact, the State of New York relies on data obtained as part of its compliance inspections to fulfill its Synar Amendment reporting obligation. Therefore, we believe sharing the identities of the potential violators identified through the annual retailer assessment with the Food and Drug Branch to incorporate into its plans for future compliance inspections does not qualify as additional research.

We believe that Public Health should ensure that it is able to obtain the identities of retailers that violated state laws and provide that information to its Food and Drug Branch for inclusion in the pool of retailers it considers for compliance inspections.

Although Public Health publishes additional research, which is not part of the Synar regulations, based on the data from the annual retailer assessment, its primary responsibility is to implement the Synar regulations and the STAKE Act for the purpose of preventing the sale and distribution of tobacco products to individuals under 18. Therefore, we believe that Public Health should ensure that it is able to obtain the identities of retailers that violated state laws during the annual retailer assessment and provide that information to its Food and Drug Branch for inclusion in the pool of retailers it considers for compliance inspections.

Public Health has expressed concerns about protecting the identities of the retailers. Specifically, Public Health expressed concern that if it were to receive the identities of violators from the research foundation, it would have to disclose the information in the event of a California Public Records Act request. Public Health may have reasonable concerns over maintaining the confidentiality of the assessment violators' identities. However, we believe, given the sensitivity of the data, that there are exemptions to the California Public Records Act that likely would allow Public Health to withhold such information from the public while still forwarding it to its Food and Drug Branch for compliance inspections.

Although Public Health Generally Informs Youth Decoys of the Purpose of Their Participation in the Annual Retailer Assessments, Additional Clarity Is Needed

Public Health generally complied with applicable laws related to obtaining informed consent from youth participants and their parents or legal guardians. However, Public Health could include additional information in its consent form to provide even greater specificity surrounding the potential use of the annual retailer assessment data for future research. Beyond the scope of the annual retailer assessment, the research foundation used the assessment data to make additional presentations. For example, according to the principal investigator for the annual retailer assessment, who is also a director of clinical training at San Diego State University, in 2012 she delivered presentations using the annual retailer assessment data—in a form that does not disclose the identity of the youth (de-identified data)—to the University of Alabama and the American Psychological Association.

With respect to whether the youth decoys or their parents or guardians were sufficiently informed about the use of the data collected through the annual retailer assessment when they consented to participate, we found that the informed consent form generally complied with applicable legal requirements. However, we believe—and Public Health agrees—that the consent form ideally should contain language specifically informing the youth decoys that the de-identified data acquired from the annual retailer assessment may be used in later research.

The research foundation, which carries out the annual retailer assessment on behalf of Public Health, believes that it must comply with review board standards set forth in federal law. These standards require the consent form to, among other things, state the purpose of the research. We reviewed the consent form and found that it provided a description of the annual retailer assessment, explained that participation was voluntary, and covered other relevant matters. Thus, the consent form generally appears to meet the review board requirements. However, we also noticed that statements the research foundation made in its agreement with Public Health suggest that the research foundation may use the data obtained from the annual retailer assessment in subsequent research and analysis, with the understanding that it will use only de-identified data. However, the consent form does not expressly notify the youth decoys or their parents or legal guardians of this possibility. The review board has the authority under law to waive the informed consent requirements when only de-identified data are used in the research. Nonetheless, in the interest of full disclosure, regardless of whether the law requires it, we believe that the consent form should include a plain statement notifying the

The consent form should ideally contain language specifically informing the youth decoys that the de-identified data acquired from the annual retailer assessment may be used in later research.

youth decoys and their parents or legal guardians of the possibility that de-identified data acquired from the annual retailer assessment may be used in future research and analysis.

Recommendations

To ensure that it can support its labor costs, Public Health should implement a process to accurately track the time its staff spends conducting statewide and local compliance inspections. Further, it should allocate expenses associated with statewide and local compliance inspections to the appropriate funding source, based on the time staff spends conducting those activities, and it should maintain accurate accounting records to reflect actual costs of statewide and local compliance inspections.

When Public Health enters into new contracts with local entities to conduct compliance inspections, it should do the following:

- Evaluate its historical costs of conducting these inspections to ensure that the existing rates are adequate to recoup its costs. If it determines that the existing rates are not adequate, it should develop a new rate that accurately reflects its true costs.
- Ensure that it maintains adequate documented support for the rate it charges for a compliance inspection.

Public Health should amend its recent contract with the city of Los Angeles to correct the rate it charges for a local compliance inspection to reflect its true cost.

To ensure that Public Health can more effectively monitor and enforce compliance with the STAKE Act, it should do the following:

- Take appropriate steps to ensure that there are no restrictions placed on the use of the data acquired during the annual retailer assessment that would preclude its use for compliance inspection purposes.
- Annually obtain the identifying information regarding the retailers that sold tobacco to minors during the annual retailer assessment and provide that information to the Food and Drug Branch.
- Include the retailers that sold tobacco to minors during the annual retailer assessment when selecting the retailers it plans to inspect as part of the statewide compliance inspections.

Public Health should add language to its youth decoy and parent or legal guardian consent form to clarify that the data obtained from the youth's participation may be used in future research in a way that will not reveal the identity of the youth.

We conducted this audit under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the scope section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA
State Auditor

Date: June 18, 2013

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RON CHAPMAN, MD, MPH
Director & State Health Officer

State of California—Health and Human Services Agency
California Department of Public Health



EDMUND G. BROWN JR.
Governor

May 21, 2013

Elaine M. Howle
State Auditor
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Howle:

Enclosed is the California Department of Public Health's (CDPH) response to the Bureau of State Audits draft report entitled, "Department of Public Health: It Needs to Improve Accuracy in Accounting and Charging for Compliance Inspections Designed to Reduce Youth Access to Tobacco and Could Enhance Its Compliance Inspections," Report 2012-111, June 2013.

Thank you for the opportunity to respond. If you have questions, please contact Jean Iacino, Acting Chief, Internal Audits, at 916-445-0938.

Sincerely,

(Signed by: Dan Kim for)

Ron Chapman, MD, MPH
Director & State Health Officer

Enclosure

**California Department of Public Health Response to Draft Report:
"Department of Public Health: It Needs to Improve Accuracy in Accounting and
Charging for Compliance Inspections Designed to Reduce Youth Access to
Tobacco and Could Enhance Its Compliance Inspections," Report 2012-111,
June 2013**

Recommendation 1

To ensure that it can support its labor costs, Public Health should implement a process to accurately track time spent conducting statewide compliance inspections and local compliance inspections. Further, it should allocate its expenses associated with local compliance inspections to the appropriate funding source based on the time staff spent conducting those activities, and maintain accurate accounting records to reflect actual costs of statewide and local compliance inspections.

Response 1A

The California Department of Public Health (CDPH) agrees that it should implement a process to accurately track time spent conducting statewide compliance inspections and local compliance inspections. Beginning July 1, 2013, the Food and Drug Branch (FDB), which conducts the compliance inspections, will implement a detailed timekeeping process to track time spent conducting compliance inspections to a specific funded activity in the California State Accounting and Reporting System (CALSTARS). This process will record time spent on each statewide and local compliance inspection, allocate expenditures to the appropriate funding source, and produce a monthly activity report by funding source. FDB management will monthly review the time reporting process to ensure staff is adhering to the changes in procedures.

Response 1B

CDPH agrees that it should allocate its expenses associated with local compliance inspections to the appropriate funding source based on the time staff spent conducting those activities, and maintain accurate accounting records to reflect actual costs of statewide and local compliance inspections. The new timekeeping process described in response to Recommendation 1A will allocate expenditures to the appropriate funding source and maintain records to reflect actual costs.

Recommendation 2

When Public Health enters into new contracts with local entities to conduct compliance inspections, it should do the following:

- **Evaluate its historical costs of conducting these inspections to ensure that the existing rates are adequate to recoup its costs. If it determines that the existing rates are not adequate, it should develop a new rate that accurately reflects its true costs.**

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June 2013**

- **Public Health should ensure that it maintains adequate support for the rate it charges per compliance inspection.**

Response 2A

CDPH agrees that it should evaluate its historical costs of conducting these inspections to ensure that the existing rates are adequate to recoup its costs. If it determines that the existing rates are not adequate, it should develop a new rate that accurately reflects its true costs. FDB will use the new monthly activity report to determine actual costs for compliance inspections for local entities and reconcile with the CalSTARS records on a monthly basis. CDPH bases the cost per inspection on the estimated number of inspections per year performed by staff. If the actual number of inspections is more or less than the estimate, it will result in an over- or under-collection of funds. If warranted, CDPH will adjust the rate with the local agencies when it renews the contract to better align revenues with expenditures. In addition, FDB will explore the possibility of a future time and expense contract.

Response 2B

CDPH agrees that it should ensure that it maintains adequate support for the rate it charges per compliance inspection. FDB will reconcile its monthly activity report for labor with CALSTARS to ensure it has captured and allocated expenditures to the appropriate cost center. FDB will use the actual expenditures, in conjunction with updated estimates of the number of compliance inspections to be performed, to determine if FDB should adjust the rate.

Recommendation 3

Public Health should amend its recent contract with the City of Los Angeles to correct the rate it charges for a local compliance inspection to reflect its true cost.

Response 3

CDPH agrees that it should amend its recent contract with the City of Los Angeles to correct the rate it charges for a local compliance inspection to reflect its true cost, if FDB determines the rate it currently charges is not reflective of its true cost. FDB will ensure it has accurately budgeted each position and derived an appropriate rate based on the standard time it takes to perform a compliance inspection. FDB will also reconcile to CALSTARS to assess the accuracy of the current rate.

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June 2013**

Recommendation 4

To ensure that Public Health can more effectively monitor and enforce compliance with the STAKE Act, it should do the following:

- Take appropriate steps to ensure that there are no restrictions placed on the use of the data acquired during the annual retailer assessment that would preclude its use for compliance inspection purposes.
- Annually obtain the identifying information regarding the retailers that sold tobacco to minors during the annual retailer assessment and provide it to the Food and Drug Branch.
- Include the retailers that sold tobacco to minors identified during the annual retailer assessment when selecting the retailers it plans to inspect as part of the statewide compliance inspections.

Response 4A

CDPH agrees that it should take appropriate steps to ensure that there are no restrictions placed on the use of the data acquired during the annual retailer assessment (annual scientific youth tobacco survey) that would preclude its use for CDPH compliance inspection purposes.

By July 1, 2013, the Tobacco Control Branch (TCB) Evaluation Unit Chief will develop a plan and process for sharing the data in coordination with FDB. Beginning with the upcoming 2014 scientific youth tobacco purchase survey, TCB will begin providing the information to FDB.

Response 4B

CDPH agrees that it should annually obtain the identifying information regarding the retailers that sold tobacco to minors during the annual retailer assessment (annual scientific youth tobacco survey) and provide it to the Food and Drug Branch.

By July 1, 2013, the TCB Evaluation Unit Chief will develop a plan and process in coordination with FDB for obtaining and sharing the data. TCB will begin providing the information to FDB following the 2014 survey, to be completed by June 30, 2014.

Response 4C

CDPH agrees that it should include the retailers that sold tobacco to minors during the annual retail assessment when selecting the retailers it plans to inspect as part of the statewide compliance inspections. TCB will work with FDB to provide a list of retailers that can be added to the annual FDB work plan.

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June 2013**

Recommendation 5

Public Health should add language to its youth decoy and parent or legal guardian consent forms to clarify that the data obtained from the youth's participation may be used in future research in a way that will not reveal the identity of the youth.

Response 5

CDPH agrees that it should add language to its youth decoy and parent or guardian consent forms to clarify that the data obtained from the youth's participation may be used in future research in a way that will not reveal the identity of the youth. By July 1, 2013, the TCB Evaluation Unit Chief will revise the youth decoy and parental/guardian consent forms as recommended. Effective January 2014, the youth tobacco purchase survey contractor will utilize the revised consent forms.

cc: Members of the Legislature
Office of the Lieutenant Governor
Little Hoover Commission
Department of Finance
Attorney General
State Controller
State Treasurer
Legislative Analyst
Senate Office of Research
California Research Bureau
Capitol Press