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**Comprehensive Tobacco**

**Retailer Licensing Ordinance**

**A Model California Ordinance**

**Regulating the Tobacco Retail Environment**

**“Plug-in” Policy Options**

Revised August 2018 *(Originally issued June 2008)*

These supplemental policy options are intended to be incorporated into ChangeLab Solutions’ *Model Comprehensive Tobacco Retailer Licensing Ordinance*.

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### Introduction

ChangeLab Solutions’ *Model* *Comprehensive Tobacco Retailer Licensing Ordinance* (“Model Ordinance”) is designed to assist California cities and counties interested in establishing or strengthening a local tobacco retailer licensing (“TRL”) program and further regulating the tobacco retail environment. Communities have adopted TRL laws to ensure compliance with local business standards, reduce youth access to tobacco products, limit the negative public health and equity effects associated with tobacco use, and enforce local, state, and federal tobacco control laws. The Model Ordinance can be used as a vehicle for optional “plug-in” policies that enhance the ordinance. For example, communities can use the plug-ins to control the density or location of tobacco retailers, to prohibit certain types of businesses from selling tobacco, or to regulate sales of certain products (the June 2018 revision of the Model Ordinance incorporates many of these plug-ins).

The plug-ins were developed to address a variety of concerns reported by communities throughout California. For each plug-in, we have provided model findings that support the adoption of the policy, as well as model language that can be incorporated into your community’s existing tobacco retailer licensing ordinance.

Although the plug-in provisions are intended to be incorporated into the Model Ordinance, some of them can be enacted independently, with revisions. Adopting a plug-in provision both as part of a licensing ordinance and as a separate ordinance may provide additional enforcement options. Please consult ChangeLab Solutions or your local government attorney if you want to incorporate any of the plug-in provisions into your existing licensing ordinance and/or adopt the provisions as a separate ordinance.

### How to Use These Plug-ins

When adding these plug-ins to ChangeLab Solutions’ Model Ordinance, fill in any blanks that have been provided (e.g., [ \_\_\_\_ ] ) to customize the language to your local code. Some options are followed by comments describing the legal provisions in more detail. Some degree of customization is always necessary to make an ordinance consistent with a community’s existing laws. Note that if a term is capitalized in the plug-in, it is a term that is defined in that provision or in ChangeLab Solutions’ Model Ordinance.

After adding these plug-in provisions to the tobacco retailer licensing ordinance, please verify that all the internal references to other sections are correct. Your city attorney or county counsel will likely be the best person to accomplish this for you. If you have questions about how to adapt these plug-ins for your community, please contact ChangeLab Solutions through our website at *www.changelabsolutions.org/tobaccoquestions*.

There are four categories of plug-ins, which are described below: (1) policies that limit the businesses eligible for a tobacco retailer license; (2) policies that further restrict the products that tobacco retailers can sell and the purchasers to whom they can sell; (3) policies that provide additional options for enforcing licensing laws; and (4) policies that regulate the price of tobacco products.

### Part I: Which Businesses Are Eligible for a Tobacco Retailer License?

Part I contains several plug-ins that restrict the types of businesses and locations eligible for a tobacco retailer license. For example, a jurisdiction could restrict tobacco sales near schools or prohibit pharmacies from selling tobacco products. Limiting where tobacco is sold can curtail youth access to tobacco products, target enforcement of the licensing provisions, and combat social perceptions that tobacco use is normal or acceptable.

Several of these plug-ins restrict tobacco sales based on a retailer’s proposed location. As a result, they may affect how your city or county implements its zoning ordinance. It may be appropriate for an ordinance adopting these plug-ins to amend the community’s zoning ordinance to reflect, or perhaps to cross-reference, the language of the plug-ins. Such integration will ensure that planning decisions take tobacco retailing restrictions into account when considering convenience stores, gas stations, and other uses that could involve tobacco sales. For more information, see ChangeLab Solutions’ memo *Municipal Authority to Regulate the Location and Operation of Tobacco Retailers*, available at *www.changelabsolutions.org/publications/location-tobacco-retailers*.

The eligibility plug-ins can add new restrictions on retailers who currently have licenses to sell tobacco products. Communities will need to decide how to treat these existing license-holders. There are several approaches. For example, a community could “grandfather” existing tobacco retailers—that is, allow them to continue to operate until the retailer lets its license lapse, closes for more than 60 days, or changes its business operation significantly. Alternatively, communities can phase out existing retailers through a lottery system or other mechanism. Communities that want to explore alternatives to grandfathering existing retailers should contact ChangeLab Solutions at *www.changelabsolutions.org/tobaccoquestions*.

### Part II: What Are the Additional Requirements for Licensed Tobacco Retailers?

As a condition of selling tobacco products, local governments can require retailers to comply with provisions that may help further reduce the initiation of tobacco use among young people. Part II of this document includes plug-ins that create additional requirements for tobacco retailers. These plug-ins address drug paraphernalia and signage.

### Part III: What Are Other Options for Enforcing Tobacco Retailer Licensing Laws?

Part III of this document includes a plug-in that provides additional options for enforcing a tobacco retailer licensing ordinance. ChangeLab Solutions’ Model Ordinance includes mandatory penalties for violations of the licensing provisions. This plug-in is designed to assist cities and counties that want discretion to impose penalties that are different from those in the Model Ordinance, such as fining a retailer instead of suspending the retailer’s license.

### Part IV: What are Pricing-Related Requirements for Licensed Tobacco Retailers?

Part IV of this document includes three additional options for regulating the price of tobacco products. The three policy options are:

1. A prohibition on redemption of tobacco discounts, coupons, and promotions;
2. An establishment of a minimum package size for little cigars and cigars; and
3. An establishment of a minimum price for cigarettes, little cigars, and cigars.

### Changes in the November 2014 Version

This version includes an update to the Plug-In *Establishment of a Minimum Pack Size for Little Cigars and Cigars.* The Plug-In was updated to: (1) require little cigars to be sold in packages of 20 little cigars; and (2) allow an exception for cigars that are above a certain price threshold (e.g., “premium cigars”).

### Changes in the July 2018 Version

This version includes technical amendments to align with recent changes to state and federal tobacco control laws. It also incorporates the pricing-related plug-ins previously maintained in a separate document and removes the plug-ins to: (1) limit tobacco sales to off-sale alcohol retailers; and (2) prohibit significant tobacco retailers. These plug-ins remain available upon request. Importantly, this version does *not* include substantive revisions to the relevant background information, findings, or citations. For the most current background information, findings, and citations, please see the ChangeLab Solutions’ *Model* *Comprehensive Tobacco Retailer Licensing Ordinance,* available at <http://changelabsolutions.org/publications/model-TRL-Ordinance>. Please [contact](http://changelabsolutions.org/changelab-solutions-contact-us) ChangeLab Solutions if you have questions regarding these plug-in policies.

**Part I:**

**Which Businesses Are Eligible for a Tobacco Retailer License?**

## Tobacco Free Pharmacies\*

## Restricting Tobacco Retailers Near Schools\*

## Reducing Density of Tobacco Retailers, by Location\*

## Reducing Density of Tobacco Retailers, by Population\*

## No Tobacco Sales at Restaurants and Bars

## No Tobacco Sales at Businesses That Allow Smoking

## \* Plug-in included in the June 2018 Model Ordinance

## Tobacco Free Pharmacies\*

The sale of tobacco products at stores containing pharmacies may convey a mixed message to consumers, who rely on these businesses for health-related services. Because stores containing pharmacies provide health-related information to the public, communities may be concerned that the sale of tobacco at these stores conveys an implied approval of these products. Further, stores containing pharmacies often stock tobacco products near cessation aids, compromising the efforts of people who are trying to quit. This plug-in addresses these concerns by prohibiting businesses that contain pharmacies from obtaining a tobacco retailer license.

Several court cases have established that a California city or county may enact a law banning the sale of tobacco in stores that contain pharmacies so long as the law does not treat similar stores containing pharmacies differently from one another. San Francisco’s law prohibiting tobacco sales in pharmacies, enacted in 2008, survived several lawsuits, including constitutional challenges based on the First Amendment and Equal Protection guarantees. *Philip Morris USA v. City and County of San Francisco*, 345 F. App’x 276 (9th Cir. 2009); *Safeway Inc. v. City & County of San Francisco*, 797 F. Supp. 2d 964 (N.D. Cal. 2011); *Walgreen Co. v. City & County of San Francisco*, 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010).

**\*Note: The June 2018 Model Ordinance incorporates this plug-in.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** by selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey implied approval of tobacco use, and send a message that it is not so dangerous to smoke;[[1]](#endnote-1) and

**WHEREAS,** The Tobacco Education and Research Oversight Committee for California, as well as the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drug stores and pharmacies;[[2]](#endnote-2) and

**WHEREAS,** more than 95 percent of consumers have said they would continue shopping at drugstores that became tobacco-free as much or more often;[[3]](#endnote-3) and

**WHEREAS,** children are particularly influenced by cues suggesting that smoking is acceptable;[[4]](#endnote-4) and

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| **COMMENT:** Additional findings could include local information regarding tobacco sales by businesses containing pharmacies, such as the number of such businesses that have illegally sold tobacco products to youth. |

*In* **SECTION II:**

*In* **Sec. [ \_\_\_\_ (\*5) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

(\_\_) PHARMACIES. No license may issue, and no existing license may be renewed, to authorize Tobacco Retailing in a Pharmacy. For the purposes of this subsection, “Pharmacy” means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

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| **COMMENT:** The sale of tobacco products at stores containing pharmacies may convey a mixed message to consumers, who rely on these businesses for health-related services. Because stores containing pharmacies provide health-related information to the public, communities may be concerned that the sale of tobacco products at these stores conveys a implied approval of these products. Further, stores containing pharmacies often stock tobacco products near cessation aids, compromising the efforts of people who are trying to quit. This plug-in addresses these concerns by prohibiting businesses that contain pharmacies from obtaining or renewing a tobacco retailer license. |

## Restricting Tobacco Retailers Near Schools\*

This plug-in prohibits a tobacco retailer license from being issued to or renewed for a business operating too close to a school or other area frequented by youth. Research shows that children are more likely to experiment with tobacco products when tobacco retailers are located near schools. Restricting tobacco sales within a certain distance of schools, playgrounds, libraries, and similar venues can help reduce youth initiation.

The plug-in establishes “tobacco-free zones” around schools and other Youth-Populated Areas. The suggested setback of 1,000 feet can be increased or decreased according to community needs. Further, a city or county can customize the definition of Youth-Populated Areas so that it covers the places in a community where children frequently gather.

**\*Note: The June 2018 Model Ordinance incorporates this plug-in.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** the density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates;[[5]](#endnote-5) and

**WHEREAS,** a study of California high school students found that the prevalence of smoking was higher at schools in neighborhoods with five or more tobacco outlets than at schools in neighborhoods without tobacco outlets;[[6]](#endnote-6) and

**WHEREAS,** a California study found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking;[[7]](#endnote-7) and

*In***SECTION II, Sec. [ \_\_\_\_ (\*5) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

(\_\_) SCHOOLS AND YOUTH-POPULATED AREAS. Tobacco Retailing is prohibited near schools and areas with youth populations as follows:

(1) No license may issue, and no existing license may be renewed, to authorize Tobacco Retailing within [ one thousand (1,000) ] feet of a Youth-Populated Area as measured by a straight line from the nearest point of the property line of the parcel on which the Youth-Populated Area is located to the nearest point of the property line of the parcel on which the applicant’s business is located. For the purposes of this subsection and subsection (2), a “Youth-Populated Area” means a parcel [ in the [ City / County ] ] that is occupied by:

(i) a private or public kindergarten, elementary, middle, junior high, or high school;

[ (ii) a library open to the public; ]

[ (iii) a playground open to the public; ]

[ (iv) a youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities; ]

[ (v) a recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or temporarily for community recreation, even though it may be used for other purposes. “Recreation facility” includes, but is not limited to, a gymnasium, playing court, playing field, and swimming pool;]

[ (vi) an arcade open to the public; ]

[ (vii) a park open to the public or to all the residents of a private community; ]

[ (viii) a licensed child-care facility or preschool [ other than a small-family day care facility [ or a large-family day care facility ] as defined in California Health & Safety Code § 1596.78 ] ; ]

[ (ix) \_\_\_\_\_\_\_\_\_\_ ].

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| **COMMENT:** Small-family day care facilities are allowed on residentially zoned property and are limited to 8 or fewer children under age 10. Large-family day care facilities with up to 14 children under age 10 are also allowed on residentially zoned property. Depending on the number and location of these facilities, some communities might consider excluding them from the limitations where Tobacco Retailers may locate. |

(2) A Tobacco Retailer operating lawfully on the date this ordinance is adopted that is ineligible to receive or renew a Tobacco Retailer’s license for a location pursuant to subsection (1), and any Tobacco Retailer operating lawfully that becomes ineligible to receive or renew a Tobacco Retailer’s license due to the creation of a new Youth-Populated Area, may apply for and receive a one-time, non-renewable license for the location pursuant to the standard licensing application procedure.

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| **COMMENT:** As Youth-Populated Areas are created in the future, existing retailers may later become ineligible to renew a license. In addition, if this plug-in is incorporated into an existing tobacco retailer licensing system, some existing retailers may also become ineligible to renew a license. An “amortization” provision like the one described above could allow existing tobacco retailers in good standing to obtain a special, one-time license to continue selling tobacco for the period of the license (typically one year) despite being too close to a school or Youth-Populated Area, essentially “grandfathering” for a limited time. |

## Reducing Density of Tobacco Retailers, by Location\*

The number of tobacco retailers in a neighborhood (something land use planners call “density”) affects youth smoking behaviors and youth access to tobacco products. Additionally, in some communities, disadvantaged neighborhoods are disproportionately impacted by high tobacco retailer density. To prevent the concentration of tobacco retailers in particular neighborhoods, this plug-in restricts how close tobacco retailers may be to one another. Communities may want to lower the density of tobacco retailers as one tool to help reduce the overall availability of tobacco products, especially for youth.

This plug-in limits the proximity of new tobacco retailers to existing tobacco retailers. Many California cities use a similar approach to prevent overconcentration of alcohol retailers. These cities have ordinances that require new alcohol retailers to be located a specified minimum distance from existing businesses that sell alcohol. This plug-in adapts this strategy to tobacco retailers by prohibiting tobacco retailer licenses from being issued to businesses that are near existing tobacco retailers.

The plug-in applies only to new tobacco retailers and “grandfathers” existing tobacco retailers, even if the existing retailers are too close together to meet the new standards. However, once a tobacco retailer stops selling tobacco for 60 days, allows the license to lapse, or substantially changes business operations, the retailer loses the “grandfathered” status and can obtain a new license only if the proximity regulation allows it. Essentially such a retailer is viewed as a “new” retailer wishing to sell tobacco for the first time. The plug-in does not otherwise provide language to “phase out” one of two (or more) legal, pre-existing tobacco retailers that are located too close to one another. If “phase-out” language is important to your community, contact ChangeLab Solutions.

**\*Note: The June 2018 Model Ordinance incorporates this plug-in.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** a high density of tobacco retailers has been associated with increased smoking rates, particularly among youth;[[8]](#endnote-8) and

**WHEREAS,** a study of California neighborhoods found that the density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day;[[9]](#endnote-9) and

**WHEREAS,** studies show that the number and density of tobacco retailers serving areas of economic disadvantage are disproportionately high;[[10]](#endnote-10) and

**WHEREAS,** if tobacco retailers concentrate in a particular geographic area, market conditions could impact community health. For example, competition among retailers can lead to special promotions such as sales or discounts that drive additional demand and increase smoking by youth, who are particularly sensitive to the cost of tobacco products.[[11]](#endnote-11) And, manufacturers may offer discounts on their products more frequently in saturated markets;[[12]](#endnote-12) and

*In***SECTION II, Sec. [ \_\_\_\_ (\*5) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

( ) PROXIMITY TO OTHER RETAILERS.

1. No license may issue, and no existing license may be renewed, to authorize Tobacco Retailing within [ five hundred (500) ] feet of a Tobacco Retailer location already licensed pursuant to this [ article / chapter ] as measured by a straight line from the nearest point of the property line of the parcel on which the applicant’s business is located to the nearest point of the property line of the parcel on which an existing licensee’s business is located.

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| **COMMENT:** A high density of tobacco retailers has been associated with increased smoking rates, particularly among youth, and studies show that the number of tobacco retailers in underserved areas is disproportionately high. This plug-in limits the proximity of new tobacco retailers to existing tobacco retailers.  The distance between tobacco retailers should be determined based on the needs of your community and the location of existing tobacco retailers. For example, a community that wants no more than one tobacco retailer per city block could examine whether a 500-foot buffer zone between retailers would sufficiently control the density of retailers. The density of existing tobacco retailers may vary significantly throughout a city or county. This provision could be further tailored to your community’s needs by restricting tobacco retailer density in specified areas or neighborhoods. |

1. Notwithstanding subsection (1), a Tobacco Retailer operating lawfully on the date this ordinance is adopted that would otherwise be eligible for a Tobacco Retailer license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:
2. the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);
3. the Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days;
4. the Tobacco Retailer does not substantially change the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transferring of a location:
   1. to a new Proprietor(s) in an Arm’s Length Transaction; or
   2. for which a significant purpose is avoiding the effect of violations of this [ article / chapter ]; and
5. the Tobacco Retailer retains the right to operate under other applicable laws.
6. If the [ City / County ] determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of evidence that such change(s) do not constitute a substantial change.

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| **COMMENT:** This subsection “grandfathers” existing tobacco retailers, meaning that a tobacco retailer lawfully operating on the date this ordinance is adopted and who meets the conditions enumerated in this subsection may continue to renew their tobacco retailer license regardless of their proximity to other tobacco retailers. A tobacco retailer will lose this “grandfathered” status if they, for example, close their business or suspend tobacco retailing for more than sixty (60) consecutive days. They will also lose their grandfathering status if they substantially change the business premises or operations. For these purposes, a substantial change to the business operation includes the transfer of the business in an Arms-Length Transaction (defined in the Model Ordinance). However, so long as the transfer is not intended to avoid the effects of violations of the ordinance, a tobacco retailer will not lose their grandfathered status for transferring the business to a relative or related companies or partners. |

## Reducing Density of Tobacco Retailers, by Population\*

This plug-in caps the total number of tobacco retailer licenses that can be issued in a city or county based on population. This strategy is similar to the regulation of alcohol licenses under California Business and Professions Code section 23817.5, which limits the number of retailers in a city or county that may sell alcohol for consumption off the premises to one per 2,500 inhabitants. There is no similar cap on tobacco retailer licenses. Communities may be concerned about the number of tobacco retailers in their city or county because greater tobacco retailer density may lead to higher smoking rates. This plug-in provides one tool for restricting the number of tobacco retailers in a community.

If a community already has reached its cap on licenses, the plug-in “grandfathers” existing tobacco retailers. However, if an existing retailer stops selling tobacco for 60 days, allows its license to lapse, or substantially changes its business, the retailer loses the “grandfathered” status and can obtain a new license only if the density regulation allows it. Essentially such a retailer is viewed as a “new” retailer wishing to sell tobacco for the first time. As a result, some “grandfathered” retailers will eventually be eliminated through attrition as businesses close and cannot be replaced.

If you do not want to “grandfather” all existing retailers, your community could proactively “phase out” excess tobacco retailers. Alternative language could provide an amortization period for all existing retailers (essentially “grandfathering” for a limited time), but eventually bring down the number of retailers through a lottery system. For alternative language to phase out excess retailers, please contact ChangeLab Solutions.

**\*Note: The June 2018 Model Ordinance incorporates this plug-in.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** a high density of tobacco retailers has been associated with increased smoking rates, particularly among youth;[[13]](#endnote-13) and

**WHEREAS,** the density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day;[[14]](#endnote-14) and

**WHEREAS,** the presence of tobacco in retail settings normalizes the use of tobacco products and triggers smoking urges among former smokers and those attempting to quit;[[15]](#endnote-15) and

**WHEREAS,** there are approximately 36,700 licensed tobacco retailers in California;[[16]](#endnote-16) and

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| **COMMENT:** Further findings could address the current number of tobacco retailers in the city or county as compared with its population. Population estimates are available from the California Department of Finance at www.dof.ca.gov/research/demographic/reports/estimates/e-1/. |

*In***SECTION II, Sec. [ \_\_\_\_ (\*5) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

( ) POPULATION AND DENSITY. The issuing of Tobacco Retailer licenses is limited as follows:

1. The total number of Tobacco Retailer licenses within the [ City / County ] shall be limited to one for each [ 2,500 ], or fraction thereof, inhabitants of the [ City / County ].

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| **COMMENT:** Statewide, there is approximately one tobacco retailer for every 1,000 people. This provision provides a default of one tobacco retailer for every 2,500 people to reduce retailer density below the current statewide average. Setting the benchmark at 2,500 also makes the number of tobacco retailers in a community consistent with the number of off-sale alcohol retailers. A community will need to compare its population with the current number of tobacco retailers to determine whether the suggested benchmark will result in a reduction in retailers. |

1. For the purposes of this subsection, the total population of the [ City / County ] shall be determined by the most current published total available from the U.S. Census Bureau or the California State Department of Finance, whichever has been more recently updated, as of the date the license application is filed.

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| **COMMENT:** This subsection is similar to California Business and Professions Code Section 23817.9, which dictates how the population will be measured to assist in determining the number of off-sale beer and wine retailers in a community. |

1. No new license may be issued to authorize Tobacco Retailing if the number of Tobacco Retailer licenses already issued equals or exceeds the total number authorized pursuant to subsection (1).
2. Notwithstanding subsections (1) through (3), a Tobacco Retailer operating lawfully on the date this ordinance is adopted that would otherwise be eligible for a Tobacco Retailer license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:
3. the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);
4. the Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days;
5. the Tobacco Retailer does not substantially change the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transferring of a location:
   1. to a new Proprietor(s) in an Arm’s Length Transaction; or
   2. for which a significant purpose is avoiding the effect of violations of this [ article / chapter ]; and
6. the Tobacco Retailer retains the right to operate under other applicable laws.
7. If the [ City / County ] determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of evidence that such change(s) do not constitute a substantial change.

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| **COMMENT:** This subsection “grandfathers” existing tobacco retailers, meaning that a tobacco retailer lawfully operating on the date this ordinance is adopted and who meets the conditions enumerated in this subsection may continue to renew their tobacco retailer license regardless of the total number of tobacco retailers licensed in the jurisdiction. A tobacco retailer will lose this “grandfathered” status if they, for example, close their business or suspend tobacco retailing for more than sixty (60) consecutive days. They will also lose their grandfathered status if they substantially change the business premises or operations. For these purposes, a substantial change to the business operation includes the transfer of the business in an Arms-Length Transaction (defined in the Model Ordinance). However, so long as the transfer is not intended to avoid the effects of violations of the ordinance, a tobacco retailer will not lose their grandfathered status for transferring the business to a relative or related companies or partners. |

## No Tobacco Sales at Restaurants and Bars

This plug-in prohibits bars, restaurants, and other businesses that offer food or alcohol for on-site consumption from obtaining a tobacco retailer license. In recent years, “non-traditional” retailers such as restaurants have illegally sold tobacco products to youth at higher rates than the statewide average. Further, communities may be concerned that selling tobacco products in restaurants conveys a message, particularly to children, that tobacco use is commonplace and acceptable.

With regard to bars, young adults who patronize these businesses have particularly high smoking rates. Communities may be concerned that selling tobacco at these venues further encourages smoking among a demographic that already has a high rate of tobacco use.

If a community decides that it is most appropriate to focus its efforts on one type of business—for example, if local data show illegal sales by businesses selling food for on-site consumption—the plug-in can be amended to prohibit tobacco sales by those businesses only.

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** young people’s perceptions of smoking behaviors in social environments influence whether they begin to smoke;[[17]](#endnote-17) and

**WHEREAS,** children and young people are particularly influenced by cues suggesting smoking is acceptable;[[18]](#endnote-18) and

**WHEREAS,** restaurants are more likely to sell tobacco illegally to underage youth than other retailers;[[19]](#endnote-19) and

**WHEREAS,** the recent increase in illegal tobacco sales to youth is largely a result of an increase in illegal sales at non-traditional retailers such as restaurants and markets;[[20]](#endnote-20) and

**WHEREAS,** young adult bar patrons in one California study reported a current smoking rate of 47 percent, nearly four times the 2010 state smoking prevalence for young adults;[[21]](#endnote-21)

**WHEREAS,** social environments such as bars and clubs are important venues for public health efforts to address young adult smoking;[[22]](#endnote-22) and

*In* **SECTION II, Sec. [ \_\_\_\_ (\*5) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

(\_\_) BARS AND RESTAURANTS. No license may issue, and no existing license may be renewed, to authorize Tobacco Retailing at any location that is (i) licensed under state law to serve alcoholic beverages for consumption on the premises (eg, an “on-sale” license issued by the California Department of Alcoholic Beverage Control); or (ii) offering food for sale for consumption on the premises. For example, and without limitation, Tobacco Retailing is prohibited in bars and restaurants.

## No Tobacco Sales at Businesses That Allow Smoking

This plug-in prohibits a business from obtaining a tobacco retailer license if it allows smoking anywhere on the premises. Although state law prohibits smoking in most businesses, smoking is still permitted in tobacco shops, private smokers’ lounges, and unenclosed outdoor areas, such as bar patios. This plug-in applies only to these venues. One purpose of this plug-in is to separate places where smoking is permitted from places where tobacco is sold to minimize impulsive tobacco use, such as “social smoking” at bars. Another purpose is to regulate businesses, such as hookah bars, whose primary profit is directly derived by actively inducing and encouraging people to smoke. For more information on limiting secondhand smoke exposure, see ChangeLab Solutions’ *Model Ordinance: Comprehensive Smokefree Places*, available at www.changelabsolutions.org/publications/comp-smokefree-places.

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** social environments such as bars and clubs are important venues for public health interventions to reduce young adult smoking;[[23]](#endnote-23) and

**WHEREAS,** a California study found that nearly half of young adults who patronize bars and clubs reported seeing people smoking at these establishments;[[24]](#endnote-24) and

**WHEREAS,** efforts to decrease perceptions of smoking as a socially acceptable behavior in bars and nightclubs may help reduce smoking among young adults;[[25]](#endnote-25)

**WHEREAS,** exemptions from smokefree air laws have facilitated the emergence of niche tobacco markets, such as hookah bars and tobacco shops;[[26]](#endnote-26) and

**WHEREAS,** [ City Council / Board of Supervisors ] finds that separating places where smoking is permitted from places where tobacco is sold is necessary to promote the health of our residents by reducing impulsive smoking and social pressure to smoke; and

*In* **SECTION II, Sec. [ \_\_\_\_ (\*3) ]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE,** *add the following subsection:*

(\_\_) SMOKING ON PREMISES. No license may issue, and no existing license may be renewed, to authorize Tobacco Retailing at any location where Smoking is permitted inside the premises or in any adjacent outdoor area owned, leased, or operated by the Person to be licensed. In addition, no license may issue, and no existing license may be renewed, to authorize Tobacco Retailing at any location where Smoking is permitted within [ twenty-five (25) ] feet of any doorway, window, opening, or other vent into the licensed premises. For purposes of this subsection, “Smoking” means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, electronic device, or any other device that delivers nicotine or other substances to a person.

**Part II:**

**What Are the Additional Requirements for Licensed Tobacco Retailers?**

## No Drug Paraphernalia Sales

## Signage Requirements

## No Drug Paraphernalia Sales

This plug-in helps local agencies enforce state laws regulating the sale of drug paraphernalia. Stores that sell drug paraphernalia commonly sell cigarettes or other tobacco products. These retailers often claim that their drug paraphernalia, such as bongs or pipes used to smoke methamphetamine or other illicit drugs, is in fact tobacco paraphernalia.

California law regulates the sale of drug paraphernalia and preempts local ordinances on the subject. However, a provision can be incorporated into a local tobacco retailer licensing ordinance to make violations of state laws regarding drug paraphernalia or controlled substances a violation of a tobacco retailer license as well. Under this approach, if a retailer is found to have violated state laws regarding drug paraphernalia or controlled substances, that retailer will also be in violation of the local tobacco retailer license, and the penalties of the licensing ordinance will apply.

For additional information on this topic, see ChangeLab Solutions’ fact sheet, *Pipe Down! How to Address Drug Paraphernalia in Your Community*, available at www.changelabsolutions.org/publications/drug-paraphernalia.

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** state law prohibits sales of “drug paraphernalia”;[[27]](#endnote-27) and

**WHEREAS,** many retailers nevertheless sell items that are commonly known to be “drug paraphernalia,” including bongs and pipes used to smoke methamphetamine and other illicit drugs, claiming that such items are intended for tobacco use; and

**WHEREAS,** several California cities require compliance with state drug paraphernalia laws as a condition of obtaining and maintaining a local tobacco retailer license;[[28]](#endnote-28) and

*In* **SECTION II, Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS,** *add the following definition in alphabetical order:*

(\_\_) “Drug Paraphernalia” has the meaning set forth in California Health and Safety Code section 11014.5, as that section may be amended from time to time.

*In* **SECTION II, Sec. [ \_\_\_\_ (\*2) ]. GENERAL REQUIREMENTS AND PROHIBITIONS,** *after subsection (g), add the following subsection:*

( ) DRUG PARAPHERNALIA. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this [ article / chapter ] for any licensee or any of the licensee’s agents or employees to violate any local, state, or federal law regulating controlled substances or Drug Paraphernalia, such as, for example, California Health and Safety Code section 11364.7, as that section may be amended from time to time.

*In***Sec. [ \_\_\_\_ (\*6) ]. APPLICATION PROCEDURE,** *add the following subparagraph in subsection (a):*

(\_\_) A statement signed by each Proprietor that no Drug Paraphernalia is or will be sold at the location for which the license is sought.

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| **COMMENT:** To provide retailers notice of which items are considered drug paraphernalia, communities should give retailers a copy of California Health and Safety Code section 11014.5, which lists products that are considered drug paraphernalia under state law. |

## Signage Requirements

This plug-in prohibits tobacco retailers from covering more than 15 percent of windows and clear doors with signs to ensure visibility into stores by law enforcement. The percentage can be adjusted to fit the needs of the community. This strategy is similar to California Business and Professions Code section 25612.5(c)(7), which is intended to promote public safety in liquor stores by restricting the amount of signage that these retailers can display on windows.

As with alcohol retailers, requiring tobacco retailers to limit signage helps law enforcement view store interiors. Maintaining visibility inside tobacco retail outlets can deter robberies and violations of other laws, such as those prohibiting tobacco sales to underage youth, self-service displays of tobacco products, and sales of drug paraphernalia. Additionally, this plug-in can help address aesthetic concerns that the community may have regarding the appearance of retailers’ storefronts.

This plug-in does not address or affect the signs required by the STAKE Act (California Business & Professions Code section 22950 *et seq.*).

Many sign ordinances or sign provisions of zoning ordinances include a general restriction on the percentage of window area that can be devoted to signage. Communities that use this plug-in should ensure it is made consistent with any broader signage restriction that already appears in the community’s code. Communities wishing to restrict storefront signage for all retailers, including retailers that do not sell tobacco or alcohol, can use ChangeLab Solutions’ *Model California Ordinance for Reducing Storefront Window Signage*, available at <http://changelabsolutions.org/publications/storefront-signage-ordinance>.

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** restricting the area of signage that tobacco retailers display on windows promotes community safety by ensuring law enforcement can easily view store interiors from public rights of way; and

**WHEREAS,** to prevent workplace violence, the U.S. Occupational Safety and Health Administration recommends that retailers ensure that customer service and cash register areas are visible from outside the establishment;[[29]](#endnote-29) and

**WHEREAS,** a number of communities have enacted ordinances to improve natural surveillance—in other words, increasing visibility inside areas most likely to be the target of crime—to promote community safety;[[30]](#endnote-30)

*In* **SECTION II, Sec. [ \_\_\_\_ (\*2) ]. GENERAL REQUIREMENTS AND PROHIBITIONS,** *after subsection (g), add the following subsection:*

(\_\_) SIGNAGE.

(1) In the course of Tobacco Retailing or in the operation of a business or maintenance of a location for which a license issued, it shall be a violation of this [ article / chapter ] for a licensee, or any of the licensee’s agents or employees, to cover more than [ 15 ] percent of the area of each window and clear door of the location with signs of any sort [ , excluding signage mandated by local, state, or federal law ]. For the purposes of this subsection, the area covered shall be computed to include (i) all clear areas within signs; and (ii) signs that are not attached to windows or clear doors but are visible from exterior public rights of way in the same manner as if they were attached to windows or clear doors.

(2) All signs shall be placed and maintained to ensure law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from exterior public rights of way or from the entrance. However, this subsection shall not apply to premises where there are no windows, or where the design or location of windows or landscaping precludes a view of the interior of the premises from exterior public rights of way or from the entrance.

**Part III:**

**What Are Other Options for Enforcing Tobacco Retailer Licensing Laws?**

## Alternatives to License Suspension

## Alternatives to License Suspension

The Model Ordinance contains mandatory penalties for violations. However, a city or county may want discretion to impose a different penalty in some circumstances. This plug-in contains language to guide the exercise of this discretion. The plug-in enables a local government representative to establish a fine amount without approval by the local legislative body, while at the same time providing guidelines to ensure that an appropriate penalty is levied. This plug-in provides some flexibility in what is otherwise a mandatory penalty system. Minimum stipulated penalties are provided to ensure that the agreement does not fail to deter future violations. The minimum terms can be changed to suit a particular community.

Note that cities and counties generally cannot impose *fines* in excess of $1,000 per violation. See Government Code section 36901. This plug-in provides for an *agreed penalty*, which is agreed to voluntarily by the retailer, rather than imposed by the local agency, and may exceed $1,000. However, the government may choose to reduce the penalty to $1,000 per violation.

*In* **SECTION II.** *add a new* **Sec. [ \_\_\_\_ (\*17) ]** *to read as follows:*

**Sec. [ \_\_\_\_ (\*17) ]. AGREED PENALTY IN LIEU OF HEARING.** For a first or second alleged violation of this [ article / chapter ] within any [ sixty-month (60) ] period, the [ local government representative ] may allow a Tobacco Retailer alleged to have violated this [ article / chapter ] to agree to the penalties provided in this section in lieu of the penalties that would otherwise apply under this [ article / chapter ] and to forego a hearing on the allegations. Notice of any agreement shall be provided to the Department and no hearing shall be held. Agreements shall not be confidential and shall contain the following terms as well as any other non-criminal provisions established by the [ local government representative ] in the interests of justice:

(a) After a first alleged violation of this [ article / chapter ] at a location:

(1) an agreement to stop acting as a Tobacco Retailer for [ one (1) day ];

(2) an administrative penalty of [ one thousand dollars ($1,000) ]; and

(3) an admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violation.

(b) After a second alleged violation of this [ article / chapter ] at a location within any [ sixty-month (60) ] period:

(1) an agreement to stop acting as a Tobacco Retailer for [ ten (10) days ];

(2) an administrative penalty of at least [ five thousand dollars ($5,000) ]; and

(3) an admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violations.

**Part IV:**

**Pricing-Related Requirements for Licensed Tobacco Retailers**

## Legal Issues Related to Pricing Plug-ins

## Findings Applicable to All Pricing Plug-ins

## Prohibition on Redemption of Tobacco Discounts, Coupons, and Promotions\*

## Establishment of a Minimum Package Size for Little Cigars and Cigars\*

## Establishment of a Minimum Price for Cigarettes, Little Cigars, and Cigars\*

## \* Plug-in included in the June 2018 Model Ordinance

## Legal Issues Related to Pricing Plug-ins

Local governments considering these plug-in policy options should review legal issues related to the local government’s authority as well as the relevant federal laws. These issues are discussed below.

### *Police Power*

“Police power” describes the power of government to regulate private conduct to protect and further the public’s health, safety, or general welfare.[[31]](#endnote-31) It is the primary source of authority for nonfederal health-related statutes, regulations, and ordinances.[[32]](#endnote-32) Courts have generally held that tobacco minimum price laws and related restrictions are proper exercises of a state’s police power.[[33]](#endnote-33)

### *Relevant Federal Laws*

**Antitrust – The Sherman Act.** Federal antitrust laws prohibit monopolistic behavior and collusion between private businesses in setting prices. Whether a minimum price law is preempted by the Sherman Act depends largely on whether the minimum price is set by the government itself. Laws that require or facilitate collusion among private market participants in setting prices violate the Sherman Act and are generally preempted.[[34]](#endnote-34) Government laws that regulate a market and establish baseline prices are generally not preempted.[[35]](#endnote-35) A minimum price law must be carefully crafted to ensure that it does not foster or facilitate collusion among tobacco companies. The minimum price plug-in clearly establishes a minimum price and does not require or facilitate collusion among private businesses.

**The Federal Family Smoking Prevention and Tobacco Control Act**. Although the Federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) gives the FDA regulatory authority over tobacco products, the act contains language that expressly reserves certain areas of tobacco regulation to state and local governments:

Except as provided in paragraph (2)(A),[[36]](#endnote-36) nothing in this chapter, or rules promulgated under this chapter, shall be construed to limit the authority of […] a State or political subdivision of a State […] to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age […].[[37]](#endnote-37)

This non-preemption is very broad and expressly allows state and local regulation of tobacco sales, distribution, advertising, and promotion. We conclude that the Tobacco Control Act likely does not preempt the policy options available in this publication.

**First Amendment – Freedom of Speech**. The First Amendment to the U.S. Constitution forbids the government from making any law “abridging the freedom of speech.” It also provides some degree of protection for corporate advertising and promotion—in legal terms, “commercial speech.”[[38]](#endnote-38) Under Supreme Court case law, “commercial speech” has come to mean that the right of corporations to advertise and promote their products and services can outweigh the government’s right to regulate commercial speech to safeguard public health, safety, and welfare.[[39]](#endnote-39)

Our plug-in prohibiting redemption of tobacco discounts and coupons focuses on sales practices: the sale of tobacco products through discounts and coupons, including those that reward consumers who purchase multiple packs at once. Insofar as it regulates sales practices, the policy should not be viewed as implicating any right to free speech. That said, the tobacco industry may argue that the First Amendment is implicated by a pricing policy that prohibits coupons and multi-pack offers.

In September 2013, the First Circuit Court of Appeals analyzed a First Amendment challenge in an analogous context involving a Providence, Rhode Island, ordinance that prohibits the redemption (but not distribution) of coupons and sales of tobacco multi-packs.[[40]](#endnote-40) The appellate court upheld the district court’s ruling, finding no First Amendment violation. Because the restrictions were intended to control the price of tobacco products, they did not implicate commercial speech at all—the tobacco companies were still able to distribute coupons and otherwise advertise and promote their products.[[41]](#endnote-41) New York City’s ordinance, which was largely modeled after the ordinance in Providence, was challenged in court on similar grounds and ruled constitutional by a federal district court in the Second Circuit.[[42]](#endnote-42) Similarly, the policy options in this publication address sales practices and not advertising.

**Federal Cigarette Labeling and Advertising Act (FCLAA)**. Before it was amended by the Tobacco Control Act in 2009, the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted any state or local law related to cigarette advertising and promotion if the law was based on health-related concerns. (As noted earlier, existing cigarette minimum price laws were enacted to protect economic competition, whereas these plug-ins are intended to promote public health.)

The FCLAA states, “[n]o requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes...”[[43]](#endnote-43) The Tobacco Control Act leaves that part of the FCLAA language unchanged, but adds language to expressly allow state or local governments to impose “specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”[[44]](#endnote-44)

Even if the plug-ins establishing a minimum price or prohibiting coupon redemption were found to fall within the scope of FCLAA (i.e., if a court finds that the provisions regulate advertising or promotion), they stand a good chance of being upheld under the exceptions added by the Tobacco Control Act as regulations affecting the “manner, but not the content” of promotion.[[45]](#endnote-45) The appellate court that upheld the Providence pricing ordinance discussed the “manner” exception at length and concluded that the ordinance does not regulate the “content” of the promotional materials, but merely the “manner” of how cigarettes may be sold and purchased.[[46]](#endnote-46) The district court analyzing New York City’s ordinance came to the same conclusion.[[47]](#endnote-47)

Likewise, these plug-ins do not regulate the content of any advertising or promotional materials. And even if FCLAA is implicated by some provisions, the “manner” exception should apply.

## Findings Applicable to All Three Plug-ins

*In* **SECTION I. FINDINGS**, *add the following findings to the Model Ordinance prior to the clause beginning with “NOW THEREFORE”:*

**WHEREAS,** the health effects of non-cigarette tobacco products such as cigars, cigarillos, smokeless tobacco, and shisha are substantial and life-threatening as demonstrated by research that shows that non-cigarette tobacco products have addictive levels of nicotine, harmful toxins, and dangerous carcinogens;[[48]](#endnote-48),[[49]](#endnote-49),[[50]](#endnote-50),[[51]](#endnote-51),[[52]](#endnote-52),[[53]](#endnote-53),[[54]](#endnote-54)

**WHEREAS,** unlike cigarette use which has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and in some cases actually increased among youth;[[55]](#endnote-55),[[56]](#endnote-56),[[57]](#endnote-57),[[58]](#endnote-58),[[59]](#endnote-59)

**WHEREAS,** in addition to cigarettes, non-cigarette tobacco products are widely available across the state. For example:

* 83.7 percent of California tobacco retailers sell cigars/cigarillos;[[60]](#endnote-60)
* 79.4 percent sell flavored non-cigarette tobacco products;[[61]](#endnote-61)
* 56.1 percent sell chewing tobacco;[[62]](#endnote-62)
* 45.7 percent sell electronic smoking devices;[[63]](#endnote-63)

**WHEREAS,** in California the cheapest available cigarettes sell for an average of only $4.30 per package;[[64]](#endnote-64)

**WHEREAS,** the availability of inexpensive tobacco products leads to increased tobacco use[[65]](#endnote-65) as evidenced by more than one hundred academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use;[[66]](#endnote-66),[[67]](#endnote-67),[[68]](#endnote-68),[[69]](#endnote-69),[[70]](#endnote-70),[[71]](#endnote-71)

**WHEREAS,** for every one percent increase in the cost of tobacco products there is a decrease in consumption,[[72]](#endnote-72) and a 20 percent price increase would reduce:

* Demand for cigarettes by approximately 10.4 percent;[[73]](#endnote-73)
* The prevalence of adult tobacco use by 3.6 percent;[[74]](#endnote-74)
* Initiation of tobacco use by young people by 8.6 percent;[[75]](#endnote-75)

**WHEREAS,** youth under age 18 are particularly responsive to changes in tobacco prices.[[76]](#endnote-76),[[77]](#endnote-77) For example:

* When cigarettes cost more, fewer adolescents start smoking;[[78]](#endnote-78)
* Price reductions can offset the effects of price increases on youth smoking initiation, especially among youth aged 14 to 17 years;[[79]](#endnote-79),[[80]](#endnote-80)
* The evidence is suggestive that tobacco companies deliberately target youth with price reductions;[[81]](#endnote-81),[[82]](#endnote-82),[[83]](#endnote-83)

**WHEREAS,** price reduction strategies are used by the tobacco industry to counter state and local tobacco control efforts and appeal to price-sensitive consumers;[[84]](#endnote-84),[[85]](#endnote-85)

**WHEREAS,** tobacco companies spend considerably to decrease the price of their products in order to increase demand for cigarettes.[[86]](#endnote-86) For example:

* Tobacco companies spend the majority of their marketing budgets on price discounts, accounting for nearly $7 billion of $8.4 billion advertising and promotional expenditures in 2011;[[87]](#endnote-87)
* Tobacco companies spend hundreds of millions – nearly $758 million in 2011 – on promotional allowances requiring tobacco retailers and wholesalers to reduce prices at the point of sale;[[88]](#endnote-88)
* Tobacco companies use a variety of promotional strategies including off-invoice discounts, buy downs, and voluntary price reductions;[[89]](#endnote-89)

**WHEREAS,** the tobacco industry’s price discounting strategies, such as coupons, multiple-package discounts, and cartons, are popular among consumers. For example:

* An estimated 55.4 percent of adults use some price minimizing strategy;[[90]](#endnote-90)
* In California, those who use price minimizing strategies save an average of $1.04 per pack (or 18.6 percent off the total);[[91]](#endnote-91)
* The 19.8 percent of adults who smoke cigarettes report that they use coupons to purchase cigarettes;[[92]](#endnote-92)
* The tobacco industry spent over $171.2 million in 2011 on consumer coupons;[[93]](#endnote-93)

**WHEREAS,** approximately half of stores in California that sell cigarettes advertise cigarette price promotions;[[94]](#endnote-94)

**WHEREAS,** although federal and state law ban the sale of individual cigarettes,[[95]](#endnote-95),[[96]](#endnote-96) neither federal nor state laws restrict the sale of individual little cigars and cigars;

**WHEREAS,** many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth.[[97]](#endnote-97) For example:

* 78.1 percent of California tobacco retailers sell cigarillos for less than $1;[[98]](#endnote-98)
* From 1995 to 2008, annual sales of cigarillos increased by 255 percent, and sales of little cigars increased by 316 percent;[[99]](#endnote-99)
* Cigar smoking is the second most common form of tobacco use among youth;[[100]](#endnote-100) and

**WHEREAS,** a 10 percent increase in cigar prices significantly reduces cigar use among youth;[[101]](#endnote-101) and

**WHEREAS,** a simple flat rate minimum price, if high enough, would eliminate the sale of low-cost cigarettes.[[102]](#endnote-102)

## Prohibition on Redemption of Tobacco Discounts, Coupons, and Promotions\*

This policy option is intended to prohibit the redemption of tobacco discounts, coupons, and promotions. The purpose of this policy option is to prohibit price discrimination and increase the cost of low-cost tobacco products. Price discrimination allows retailers to capture sales from consumers at a regular price without losing sales from more price-sensitive consumers. This plug-in effectively diminishes the tobacco industry’s ability to capture more price-sensitive consumers, including youth and individuals with lower incomes.

**\*Note: The June 2018 Model Ordinance incorporates this plug-in.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION II, Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS,** *add the following definitions in alphabetical order among the existing definitions of the Model Ordinance:*

(\_\_) “Cigarette” means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its Packaging and Labeling, is likely to be offered to, or purchased by, Consumers as a Cigarette described herein.

(\_\_) “Consumer” means a Person who purchases a Tobacco Product for consumption and not for Sale to another.

(\_\_) “Coupon” means any voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue; whether in paper, digital, or other form; used for commercial purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.

(\_\_) “Full Retail Price” means the price listed for a Tobacco Product on its Packaging or on any related shelving, advertising, or display where the Tobacco Product is sold or offered for Sale, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.

(\_\_) “Manufacturer” means any Person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a Tobacco Product; or imports a finished Tobacco Product for sale or distribution into the United States.

(\_\_) “Package” or “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for Sale to a Consumer.

(\_\_) “Sale” or “Sell” means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

*In* **SECTION II, Sec. [ \_\_\_\_ (\*2) ]. GENERAL REQUIREMENTS AND PROHIBITIONS,** *after subsection (g), add the following subsection:*

(\_\_) PACKAGING AND LABELING. No Tobacco Retailer shall Sell any Tobacco Product to any Consumer unless such product: (1) is sold in the original Manufacturer’s Packaging intended for Sale to Consumers; and (2) conforms to all applicable federal Labeling requirements.

(\_\_) DISPLAY OF PRICE. The price of each Tobacco Product offered for Sale shall be clearly and conspicuously displayed to clearly indicate the price of the product.

(\_\_) PROHIBITION OF TOBACCO COUPONS AND DISCOUNTS. No Tobacco Retailer shall:

1. honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase a Tobacco Product for less than the Full Retail Price;
2. Sell any Tobacco Product to a Consumer through a multiple-Package discount or otherwise provide any such product to a Consumer for less than the Full Retail Price in consideration for the purchase of any Tobacco Product or any other item; or
3. provide any free or discounted item to a Consumer in consideration for the purchase of any Tobacco Product.

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| **COMMENT:** This plug-in prohibits the following types of discounts:   1. Redemption of any Coupons, whether the Consumer obtains the Coupon in the store or elsewhere (eg, magazine, online printout, mailer, or phone app); 2. Discounts to reward Consumers for buying more than one Tobacco Product (eg, “Buy two packs of cigarettes, get one free,” “buy five Cigars, get a pack of Cigarettes for half price”); and 3. Discounts for other items (eg, “Buy a pack of Cigarettes and get a free lighter”). |

## Establishment of a Minimum Pack Size for Little Cigars and Cigars\*

This plug-in requires that little cigars be sold in packages of at least 20 little cigars. It also requires cigars to be sold in packages of a certain size (with an exception for premium cigars at the discretion of the local jurisdiction). Requiring that little cigars and cigars be sold in packs of a certain size raises the cost barrier to purchase these products. This does not mean that the products themselves are more expensive, but consumers will still have to pay more to get more. Raising the cost barrier is expected to deter youth from purchasing these products. Though this policy does not lead to an actual price increase for cigars, it nevertheless raises the cost barrier for purchase and can have a similar public health impact.

For more information, see ChangeLab Solutions’ fact sheet, *Limiting ‘Teen-Friendly’ Cigars: What Communities Can Do*, available at *[www.changelabsolutions.org/publications/limiting-teen-friendly-cigars](http://www.changelabsolutions.org/publications/limiting-teen-friendly-cigars).*

**\*Note: This plug-in is already incorporated in the Model Ordinance.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION II:** *In* **Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS***, add the following definitions in alphabetical order among the existing definitions of the Model Ordinance:*

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| **COMMENT:** The definitions of “Little Cigar” and “Cigar” are adapted from federal classification for federal tax purposes. California’s definitions of little cigar and cigar for state tax purposes conform to the federal definitions. Localities are necessarily concerned with enforcement. This plug-in’s definitions of little cigar and cigar allow local jurisdictions to leverage existing federal enforcement of tobacco product packaging to identify tobacco products in stores. Federal law requires little cigars and cigars, as defined under federal law, to be designated as such on packaging. Please note that the following definitions are already included in ChangeLab Solutions’ Model *Comprehensive Tobacco Retailer Licensing Ordinance*, available at <http://changelabsolutions.org/publications/model-TRL-Ordinance>. |

(\_\_) “Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

(\_\_) “Consumer” means a person who purchases a Tobacco Product for consumption and not for Sale to another.

(\_\_) “Little Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. “Little Cigar” includes, but is not limited to, any tobacco product known or labeled as “small cigar” or “little cigar.”

(\_\_) “Package” or “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for Sale to a Consumer.

(\_\_) “Sale” or “Sell” means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

*In***Sec. [ \_\_\_\_ (\*2) ]. GENERAL REQUIREMENTS AND PROHIBITIONS*,*** *after subsection (g), add the following subsection:*

(\_\_) PACKAGING AND LABELING. No Tobacco Retailer shall Sell any Tobacco Product to any Consumer unless such product: (1) is sold in the original manufacturer’s Packaging intended for Sale to Consumers; and (2) conforms to all applicable federal Labeling requirements.

(\_\_) MINIMUM PACKAGE SIZE FOR LITTLE CIGARS AND CIGARS. No Tobacco Retailer shall Sell to a Consumer:

1. Any Little Cigar unless it is sold in a Package of at least [ twenty ] Little Cigars; or
2. Any Cigar unless it is sold in a Package of at least [ six ] Cigars [ ; provided, however, that this subsection shall not apply to a Cigar that has a price of at least [ $X.00 ] per Cigar, including all applicable taxes and fees ].

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| **COMMENT:** This plug-in requires a minimum pack size for little cigars and cigars. Requiring little cigars and cigars to be sold in packs of a certain size raises the cost barrier to purchase these products. The purpose of this subsection is not to directly raise the price of little cigars and cigars; rather, the purpose is to raise the cost of any single transaction. For language to establish a price floor for cigarettes, little cigars, and cigars, see page 37 or ChangeLab Solutions’ Model *Comprehensive Tobacco Retailer Licensing Ordinance*, available at <http://changelabsolutions.org/publications/model-TRL-Ordinance>.  The minimum package size of twenty (20) little cigars is consistent with the minimum package size for cigarettes established by federal law. An option is provided to set a different minimum package size for little cigars; however, because little cigars and cigarettes are very similar, establishing different minimum package sizes may simply encourage the substitution of one product for the other.  Subsection (2) provides an option to exempt cigars that meet a certain price threshold. Because the policy goal of a minimum package size requirement is to raise the cost barrier for any single transaction, the requirement may not be necessary for products that are already expensive enough to deter sales to youth. For example, a single cigar that costs $10 may not need to be sold in a pack of six to deter youth sales. |

### Establishment of a Minimum Price for Cigarettes, Little Cigars, and Cigars\*

Establishing a minimum price for certain tobacco products can raise prices and reduce demand; however, the public health impact will depend on prevailing tobacco prices in the local jurisdiction and the minimum price that is set.

Excise taxes remain the most commonly used and most proven strategy for regulating the prices of tobacco products. Through taxation, governments raise the price of tobacco products to decrease consumption; however, governments also receive additional revenue from the increased taxes. However, such a policy may not be politically feasible. In California, it is not an option for local jurisdictions due to state preemption. Thus, local jurisdictions may wish to raise tobacco prices by other means.

**\*Note: This plug-in is already incorporated in the Model Ordinance.**

**Amendments to ChangeLab Solutions’ Model Ordinance**

*In* **SECTION II, Sec. [ \_\_\_\_ (\*1) ]. DEFINITIONS,** *add the following definitions in alphabetical order among the existing definitions of the Model Ordinance:*

(\_\_) “Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

(\_\_) “Cigarette” means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its Packaging and Labeling, is likely to be offered to, or purchased by, Consumers as a Cigarette described herein.

(\_\_) “Consumer” means a Person who purchases a Tobacco Product for consumption and not for Sale to another.

(\_\_) “Little Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. “Little Cigar” includes, but is not limited to, Tobacco Products known or labeled as small cigar, little cigar, or cigarillo.

(\_\_) “Manufacturer” means any Person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a Tobacco Product; or imports a finished Tobacco Product for sale or distribution into the United States.

(\_\_) “Package” or “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for Sale to a Consumer.

(\_\_) “Sale” or “Sell” means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

*In* **SECTION II, Sec. [ \_\_\_\_ (\*2) ]. GENERAL REQUIREMENTS AND PROHIBITIONS,** *after subsection (g), add the following subsection:*

(\_\_) PACKAGING AND LABELING. No Tobacco Retailer shall Sell any Tobacco Product to any Consumer unless such product: (1) is sold in the original Manufacturer’s Packaging intended for Sale to Consumers; and (2) conforms to all applicable federal Labeling requirements.

(\_\_) DISPLAY OF PRICE. The price of each Tobacco Product offered for Sale shall be clearly and conspicuously displayed to clearly indicate the price of the product.

(\_\_) MINIMUM PRICES FOR CIGARETTES, LITTLE CIGARS, AND CIGARS. No Tobacco Retailer shall Sell to a Consumer:

1. Cigarettes at a price that is less than [ $X.00 ] per Package of 20 Cigarettes, including all applicable taxes and fees;
2. Little Cigars at a price that is less than [ $X.00 ] per Package of 20 Little Cigars, including all applicable taxes and fees; or
3. Cigars at a price that is less [ $X.00 ] per Cigar, including all applicable taxes and fees.

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| **COMMENT:** This provision directly sets a price floor for the Sale of Cigarettes, Little Cigars, and Cigars. For Cigarettes and Little Cigars, the price floor is set as a minimum price required (eg, $7) for a *Package* of Cigarettes or Little Cigars. The price floor is set differently for Cigars (*per Cigar* vs. *per Package*) because the number of Cigars in a Package varies greatly.  An option is provided to set different price floors for Cigarettes and Little Cigars; however, because these products are very similar, different price floors may simply encourage purchase of the cheaper alternative. Importantly, this plug-in is drafted with the expectation that the minimum pack size plug-in is also being adopted. Local jurisdictions interested in adopting a minimum price for Little Cigars without a corresponding minimum Package size should contact ChangeLab Solutions for assistance.  Setting a minimum price for other types of Tobacco Products such as smokeless tobacco, pipe tobacco, and electronic smoking devices requires more careful deliberation due to the manner in which these other products are packaged and sold. Local jurisdictions interested in additional minimum pricing options should contact ChangeLab Solutions for assistance. |

1. The minimum prices established in this section shall be adjusted annually (percent change in the annual average, not seasonally adjusted) by the Department in proportion with the Consumer Price Index: all urban consumers for all items for the [ *Insert Statistical Area* ] statistical area as reported by the United States Bureau of Labor Statistics or any successor to that index.

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| **COMMENT:** This provision specifies that the minimum price for Cigarettes, Little Cigars, and Cigars established by subsections (1) through (3) will be adjusted annually in proportion with the Consumer Price Index. This annual adjustment occurs automatically without further action by the city council or board of supervisors and ensures that the effectiveness of the minimum prices do not diminish over time due to inflation.  The federal Bureau of Labor Statistics releases CPI data specific to particular regions or metropolitan areas, referred to as “statistical areas.” For California, these statistical areas include: (1) Los Angeles–Long Beach-Anaheim, (2) Pacific Division (includes all Pacific states), (3) Riverside–San Bernardino–Ontario, (4) San Diego–Carlsbad, and (5) San Francisco–Oakland–Hayward. Local jurisdictions should choose the nearest statistical area and insert it into the subsection above. More information on regional resources for the Consumer Price Index are available at <https://www.bls.gov/cpi/regional-resources.htm>. If your community has questions about selecting the appropriate statistical area, please contact ChangeLab Solutions for assistance. |

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32. *Id.* [↑](#endnote-ref-32)
33. *See generally*, Francis M. Dougherty, *Validity, Construction, and Application of State Statutory Provisions Prohibiting Sales of Commodities Below Cost – Modern Cases*, 41 A.L.R. 4th 612 (1985); *see, e.g., Simonetti v. State*, 132 So.2d 252 (Ala. 1961) (upholding an Alabama statute prohibiting any wholesaler or retailer to sell, offer to sell, or advertise cigarettes at less than cost under the state’s general police power). [↑](#endnote-ref-33)
34. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc*., 445 U.S. 97 (1980) (the Supreme Court held that California’s wine pricing law was preempted by the Sherman Act because it gave wine producers the power to eliminate competition by setting minimum prices). [↑](#endnote-ref-34)
35. *See* *Fisher v. City of Berkeley*, 475 U.S. 260, 270 (1986) (Unilateral action by government in setting rent ceilings does not violate antitrust laws.); *Flying J, Inc. v. Hollen*, 621 F.3d 658, 662–3 (7th Cir. 2010) (the Seventh Circuit held that Wisconsin’s gasoline pricing law was not preempted by the Sherman Act because the law did not require the businesses to act together to set prices and the amount of the minimum gasoline markup was established within the law itself). [↑](#endnote-ref-35)
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37. *Id.* at § 387p(a)(1) (emphasis added). [↑](#endnote-ref-37)
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39. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565–66 (2001). [↑](#endnote-ref-39)
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41. *Id.* [↑](#endnote-ref-41)
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