



ChangeLab Solutions

Law & policy innovation for the common good.

Model California Ordinance Requiring a Tobacco Retailer License

“Plug-in” Policy Options

Revised November 2014 (*Originally issued June 2008*)

These supplemental policy options are intended to be incorporated into ChangeLab Solutions' *Model California Ordinance Requiring a Tobacco Retailer License*.

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Introduction

ChangeLab Solutions' *Model California Ordinance Requiring a Tobacco Retailer License* is designed to help cities and counties enforce federal, state, and local tobacco control laws. The Model Licensing Ordinance contains the basic elements needed to establish a local tobacco retailer licensing law. From there, the licensing 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 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 Licensing 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 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 Licensing 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 Licensing Ordinance.

After adding these Plug-in provisions to the basic 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 three 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; and (3) policies that provide additional options for enforcing licensing laws.

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 that go beyond the basic standards of the Model Licensing Ordinance. These Plug-ins address single cigars, drug paraphernalia, and signage.

For cities and counties that want to limit the free or low-cost distribution of tobacco products, ChangeLab Solutions has a separate ordinance, *Model California Ordinance Regulating Cigarette and Tobacco Product Sampling*, available at www.changelabsolutions.org/publications/model-ord-tobacco-sampling.

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 Licensing 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 Licensing Ordinance, such as fining a retailer instead of suspending the retailer's license.

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").

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 License for Retailers That Primarily Will Sell Tobacco

No Tobacco Sales at Restaurants and Bars

Only Off-Sale Alcohol Retailers May Sell Tobacco

No Tobacco Sales at Businesses That Allow Smoking

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 a tacit 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).

Amendments to ChangeLab Solutions' Model Licensing 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 tacit approval of tobacco use, and send a message that it is not so dangerous to smoke;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 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 and

WHEREAS, children are particularly influenced by cues suggesting that smoking is acceptable;⁴ and

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. [____ (*3)]. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE**, *add the following subsection:*

(☐) **PHARMACIES.** No license may be issued 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.

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.

Amendments to ChangeLab Solutions’ Model Licensing 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 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 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 and

*In SECTION II, Sec. [____ (*3)]. 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) Except as provided in subsection (2), no new 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, 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) _____].

COMMENT: Small-family day care facilities are allowed on residentially zoned property and are limited to eight or fewer children under age ten. Large-family day care facilities with up to 14 children under age ten are also allowed on residentially zoned property. Depending on the number and location of these facilities, some communities might consider excluding them from limiting where tobacco retailers may locate.

- (2) A Tobacco Retailer operating lawfully on the effective date of this ordinance 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.

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. Alternatively, your community could decide to permanently “grandfather” all existing retailers. To do this, the language in this Plug-in must be further customized to allow all existing retailers to continue to operate. Contact ChangeLab Solutions for assistance.

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.

Amendments to ChangeLab Solutions’ Model Licensing 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 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 and

WHEREAS, studies show that the number and density of tobacco retailers serving areas of

economic disadvantage are disproportionately high;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 And, manufacturers may offer discounts on their products more frequently in saturated markets;¹² and

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

(☐) **PROXIMITY TO OTHER RETAILERS.** No license may issue to authorize Tobacco Retailing within [____] 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.

Notwithstanding the forgoing, a Tobacco Retailer operating lawfully on the effective date of this ordinance that otherwise would 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: (i) the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension); (ii) the Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days; (iii) the Tobacco Retailer does not substantially change the business premises or business operation; and (iv) the Tobacco Retailer retains the right to operate under other applicable laws [including without limitation the [e.g., zoning ordinance, building codes, and business license tax ordinance]].

COMMENT: 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 Plug-in could be further tailored to your community's needs by restricting tobacco retailer density in specified areas or neighborhoods.

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.

Amendments to ChangeLab Solutions’ Model Licensing 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 and

WHEREAS, the density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day;¹⁴ and

WHEREAS, the widespread 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 and

WHEREAS, there are approximately 36,700 licensed tobacco retailers in California—one for every 254 children;¹⁶ and

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. [____ (*3)]. 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].

COMMENT: Statewide, there is approximately one tobacco retailer for every 1,000 people. The Plug-in 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.

- (2) 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.

COMMENT: This section is similar to 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.

- (3) So long as the number of Tobacco Retailer licenses issued equals or exceeds the total number authorized pursuant to subsection (1), no new license may issue to authorize Tobacco Retailing.

Notwithstanding the foregoing, a Tobacco Retailer operating lawfully on the effective date of this ordinance 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: (i) the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension); (ii) the Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days; (iii) the Tobacco Retailer does not substantially change the business premises or business operation; and (iv) the Tobacco Retailer retains the right to operate under other applicable laws [including without limitation the [*e.g., zoning ordinance, building codes, and business license tax ordinance*]].

No License for Retailers That Primarily Will Sell Tobacco

This Plug-in restricts new “Significant Tobacco Retailers”—which can include head shops, discount cigarette stores, and smoke shops. Under this Plug-in, businesses that primarily seek to sell tobacco products cannot obtain a tobacco retailer license. State reports have shown that these businesses illegally sell tobacco to minors at a higher rate than the statewide average. Further, cities or counties may want to restrict these businesses because they often sell items that are commonly known to be drug paraphernalia while claiming that such items are intended for tobacco use.

The Plug-in provides a definition of Significant Tobacco Retailer based on either the amount of floor space or percentage of sales that a business devotes to tobacco products, as is commonly the practice when regulating sales of sexually explicit products to adults. However, determining which businesses meet the minimum percentage of gross sales receipts or floor space is a difficult and labor-intensive process, and the enforcing agency should develop a procedure for determining these minimums. Local agencies have the power to require license applicants and licensees to provide the financial data necessary to establish whether the applicant or licensee is a Significant Tobacco Retailer, but they must maintain that data in confidence. This duty is familiar to local governments that impose gross receipts and other license taxes on businesses.

Amendments to ChangeLab Solutions’ Model Licensing Ordinance

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

WHEREAS, over 8 percent of all tobacco retailers statewide were witnessed unlawfully selling to minors in 2012, and tobacco stores (defined as businesses in which at least 80 percent of merchandise was tobacco products) sold to minors at a much higher rate than the statewide average, as high as 20.5 percent;¹⁷ and

WHEREAS, many cigarette, tobacco, and head shops sell items that are commonly known to be drug paraphernalia, including bongs and pipes used to smoke methamphetamine and other illicit drugs, and claim that such items are intended for tobacco use; and

In SECTION II:

In Sec. [____ (*1)]. DEFINITIONS, add the following definition in alphabetical order:

(__) “Significant Tobacco Retailer” means any Tobacco Retailer for which the principal

or core business is selling Tobacco Products, Tobacco Paraphernalia, or both, as evidenced by any of the following: [twenty percent (20%)] or more of floor or display area is devoted to Tobacco products, Tobacco Paraphernalia, or both; [sixty-seven percent (67%)] or more of gross sales receipts are derived from Tobacco Products, Tobacco Paraphernalia, or both; or [fifty percent (50%)] or more of completed sales transactions include Tobacco Products or Tobacco Paraphernalia.

COMMENT: The percentages and categories used to define a “Significant Tobacco Retailer” can be changed to fit the community’s policy objectives.

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

(☐) **SIGNIFICANT TOBACCO RETAILERS.** No license may issue to authorize Tobacco Retailing by a Significant Tobacco Retailer, provided that a Significant Tobacco Retailer operating legally on the date the ordinance enacting this [article / chapter] was first introduced which otherwise would be entitled to receive a license may receive a license and may continue to operate so long as (1) the license is renewed without lapse or revocation; (2) the Significant Tobacco Retailer is not closed for business and does not otherwise suspend Tobacco Retailing for more than sixty (60) consecutive days; (3) the Significant Tobacco Retailer does not substantially change the business premises or business operation; and (4) the Significant Tobacco Retailer retains the right to operate under other applicable laws [including without limitation the [e.g., zoning ordinance, building codes, and business license tax ordinance]]. If the Department determines that a Significant Tobacco Retailer no longer qualifies to be licensed to continue Tobacco Retailing under the standards of this section, it shall revoke the license for the Significant Tobacco Retailer in the manner, and subject to the appeal rights, specified in Section [____ (*11)] of this [article / chapter].

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 Licensing 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;¹⁸ and

WHEREAS, children and young people are particularly influenced by cues suggesting smoking is acceptable;¹⁹ and

WHEREAS, restaurants are more likely to sell tobacco illegally to minors than other retailers: 13.1 percent of restaurants, donut shops, and meat and produce markets sold tobacco to minors compared with 8.7 percent of all retailers statewide;²⁰ 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, donut shops, and meat and produce markets;²¹ 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;²² and

WHEREAS, social environments such as bars and clubs are important venues for public health efforts to address young adult smoking;²³ and

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

() BARS AND RESTAURANTS. No license may issue to authorize Tobacco Retailing at any location that is (i) licensed under state law to serve alcoholic beverages for consumption on the premises (e.g., 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.

Only Off-Sale Alcohol Retailers Can Sell Tobacco

Under this Plug-in, only businesses that have a state license to sell alcohol for consumption off the premises are permitted to sell tobacco. In other words, businesses that do not have an “off-sale” alcohol license cannot sell tobacco products. Restricting tobacco sales in this manner helps ensure that tobacco sales are limited to retailers who already are accustomed to verifying that purchasers are of legal age to buy certain products. Further, applicants for “off-sale” alcohol licenses are already subject to several state law requirements regarding retailer density and location that are similar to requirements that a city or county may want to apply to tobacco retailers. For example, state law regarding off-sale alcohol licenses prohibits license-holders from being too close to private residences, restricts licenses to one per 2,500 residents of a city or county, and requires applicants to identify all schools, churches, hospitals, public playgrounds, parks, and youth facilities located within 600 feet of a proposed point of sale.

Depending on the number of current tobacco retailers that lack an off-sale alcohol license, this Plug-in could significantly reduce tobacco retailers in a community. A city or county will need to determine the number of tobacco retailers who currently have an off-sale alcohol license to assess how many retailers will become ineligible to sell tobacco products. Information regarding retailers in a city or county who currently hold off-sale alcohol licenses can be obtained from the California Department of Alcoholic Beverage Control.

Because many businesses will be required to stop selling tobacco under this provision, communities may want to delay the effective date of the ordinance to provide a transition period. Contact ChangeLab Solutions for more information on implementing a phase-in period.

Amendment to ChangeLab Solutions’ Model Licensing Ordinance

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

WHEREAS, the widespread presence of tobacco in retail settings normalizes the use of tobacco products and triggers smoking urges among former smokers and those attempting to quit;²⁴ and

WHEREAS, the Institute of Medicine recommends restricting the number and location of tobacco outlets to discourage tobacco use and to reduce tobacco-related disease;²⁵ and

WHEREAS, retailers that have state licenses to sell alcohol are accustomed to complying with state law licensing requirements and laws requiring age verification because they face fines,

license suspension, and license revocation if they sell alcohol to persons under age 21; and

WHEREAS, retailers that have a state license to sell alcohol for consumption off the premises must be approved through a state application process. Factors examined upon such applications—including whether there is an overconcentration of retailers in an area and whether a retailer is too close to residences or areas frequented by youth—are also relevant to whether a retailer should be granted a tobacco retailer license; and

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

(__) No license may issue to authorize Tobacco Retailing at any location that is not licensed under state law to sell alcoholic beverages for consumption off the premises (e.g., an “off-sale” license issued by the California Department of Alcoholic Beverage Control). This provision shall take effect on [date (e.g., one (1) year after the effective date of the ordinance adopting this section)].

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 in areas that are not covered by the state law, see ChangeLab Solutions' *Model Ordinance: Comprehensive Smokefree Places*, available at www.changelabsolutions.org/publications/comp-smokefree-places.

Amendments to ChangeLab Solutions' Model Licensing 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;²⁶ and

WHEREAS, a California study found that nearly half of young adults who patronize bars and clubs reported seeing people smoking at these establishments, including on outdoor patios where smoking is permissible;²⁷ and

WHEREAS, efforts to decrease perceptions of smoking as a socially acceptable behavior in bars and nightclubs may help reduce smoking among young adults;²⁸

WHEREAS, exemptions from smokefree air laws have facilitated the emergence of niche tobacco markets, such as hookah bars and tobacco shops;²⁹ 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 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 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.

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

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

No Drug Paraphernalia Sales

Signage Requirements

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. Communities interested in other pricing-related tobacco control strategies can also see ChangeLab Solution's *TRL "Plug-in" Policy Options Regulating Price*, available at www.changelabsolutions.org/publications/model-TRL-Ordinance.

Amendments to ChangeLab Solutions' Model Licensing Ordinance

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

WHEREAS, although federal and state law ban the sale of individual cigarettes,^{30,31} 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.³² For example:

- 78.1 percent of California tobacco retailers sell cigarillos for less than \$1;³³
- From 1995 to 2008, annual sales of cigarillos increased by 255 percent, and sales of little cigars increased by 316 percent;³⁴
- Cigar smoking is the second most common form of tobacco use among youth;³⁵ and

WHEREAS, a 10 percent increase in cigar prices significantly reduces cigar use among youth.³⁶

In SECTION II:

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

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.

- ☐ “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)]. 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.
- (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.

COMMENT: This subsection requires a minimum pack size for Cigars, except that it does not apply to Cigars that meet a certain price threshold. 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 example, tobacco retailers may be required to sell Cigars in packs of six (instead of individually), but retailers would be free to maintain the effective price per Cigar. Instead of selling a single Cigar for \$1, a tobacco retailer could then sell a pack of six for \$6. For information on how to directly establish a price floor for tobacco products, see *TRL “Plug-in” Policy Options Regulating Price*, available at www.changelabsolutions.org/publications/model-TRL-Ordinance.

Subsection (2) has an exception for Cigars that meet a certain price threshold. Because the policy goal of this minimum pack requirement is to raise the cost barrier for any single transaction, this section may not be necessary for products that are already expensive enough to deter sales to youth. In other words, a single Cigar that costs \$10 may not need to be sold in a pack of six to deter youth sales. This is why an exception for Cigars that meet a certain price threshold may be appropriate. If the price threshold is set too low, however, the exception may be too broad for the local jurisdiction to accomplish its policy goals.

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 Licensing 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";³⁷ 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;³⁸ and

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

(__) "Drug Paraphernalia" has the meaning set forth in California Health & Safety Code section 11014.5, as that section may be amended from time to time.

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

- (__) DRUG PARAPHERNALIA. 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, except that conduct authorized pursuant to the state Medical Marijuana Program (California Health and Safety Code sections 11362.7 *et seq.*) shall not be a violation of this [article / chapter].

*In Sec. [____ (*4)]. 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.

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 advertising 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 minors, 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.

Amendments to ChangeLab Solutions' Model Licensing 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;³⁹ 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;⁴⁰

*In SECTION II, Sec. [____ (*2)]. 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 Tobacco Retailer License 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. [____ (*14)] to read as follows:*

Sec. [____ (*14)]. 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.

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