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**Model California Ordinance**

**Requiring a Tobacco Retailer License**

**“Plug-in” Policy Options**

**Regulating Price**

September 2014

Developed by ChangeLab Solutions

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 and Report

This Introduction and Report summarizes our analysis and study of the public health problem surrounding tobacco use. It also provides a rationale for adopting pricing strategies to address this problem. It is intended for broad distribution to the public. Our presentation of these plug-in policy options, including this Introduction and Report, is based on our independent and objective analysis of the relevant law, evidence, and available data. As we explain in this Introduction and Report, there are arguments on all sides of the debate about tobacco price regulations. Readers should consider all of the evidence and decide for themselves what approach is appropriate for their local jurisdiction.

These plug-ins provide California municipalities with different policy options. Each is explained in this Introduction and Report. The three policy options are:

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

### Background

Tobacco use remains a significant public health problem in California and the U.S. generally. Each year, tobacco-related diseases cause the deaths of approximately 34,000 Californians[[1]](#endnote-2) and 480,000 individuals in the U.S.,[[2]](#endnote-3) making tobacco use the nation’s leading cause of preventable death.[[3]](#endnote-4) It is largely undisputed that tobacco use is extremely harmful. For decades, governments at the federal, state, and local levels have advanced various policies to tackle this significant public health problem. State and local governments have developed educational and media campaigns on the risks of tobacco use, offered resources to help smokers quit, increased cigarette excise taxes, and adopted restrictions on the sale and public use of cigarettes and other tobacco products. Although tobacco use has decreased over the years, it is estimated that 440,600 Californians under age 18 today will die from tobacco-related diseases.[[4]](#endnote-5)

### Tobacco Use Burden on Low-Income and Minority Populations

Tobacco use disproportionately affects low-income and minority populations. Smoking rates among low-income populations are significantly higher than among high-income populations. 16.9 percent of low-income populations smoke versus only 3.9 percent of high-income populations.[[5]](#endnote-6) Smoking rates among racial/ethnic minorities are also higher: 18.9 percent of African-American men and 15.5 percent of Hispanic men smoke versus only 14.3 percent of white men.[[6]](#endnote-7) And 15.2 percent of African-American women smoke versus 11.2 percent of white women.[[7]](#endnote-8) Because the problems associated with tobacco use fall disproportionately on low-income and minority populations, policy interventions that reduce consumption also have a greater impact on these vulnerable populations. Policies that regulate tobacco products can therefore help improve health equity. But these policies can also be seen as unfairly targeting these groups, particularly because pricing strategies that increase tobacco prices can impose a significant financial burden on low-income smokers.[[8]](#endnote-9) To the extent that low-income smokers continue to smoke, higher tobacco prices decrease their purchasing power for other goods and services (e.g., daily needs).

### Tobacco Price and Consumption

The link between the price of tobacco products and consumption is well established. Many academic studies have shown that when tobacco products cost more, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.[[9]](#endnote-10),[[10]](#endnote-11),[[11]](#endnote-12),[[12]](#endnote-13),[[13]](#endnote-14),[[14]](#endnote-15) In California, the cheapest available cigarettes cost an average of only $4.30 per pack.[[15]](#endnote-16) It is estimated that a 20 percent price increase on a pack of cigarettes reduces demand by 10.4 percent,[[16]](#endnote-17) decreases the prevalence of adult tobacco use by 3.6 percent,[[17]](#endnote-18) and decreases initiation of tobacco use among young people by 8.6 percent.[[18]](#endnote-19) Youth under 18 are particularly affected by changes in tobacco prices;[[19]](#endnote-20),[[20]](#endnote-21) fewer adolescents start smoking when cigarettes cost more.[[21]](#endnote-22) But to the extent that tobacco control policies are adopted to deter youth sales, the tobacco industry argues that there are already laws in place prohibiting the sale of tobacco products to minors. Nevertheless, local jurisdictions have found that minimum age laws alone are not enough to prevent underage sales.

Evidence suggests increasing prices for tobacco products can encourage a black market for these products.[[22]](#endnote-23),[[23]](#endnote-24) A black market of cheap tobacco products negates, at least to some degree, the beneficial public health impact of increased prices. Ultimately, this is a balancing act. Local governments are responsible for weighing the public health benefits of higher tobacco prices against the unintended consequences of a potential black market for tobacco products. Local governments may address black market issues with appropriate enforcement, though this requires adequate resources.

### Government Regulation of Tobacco Pricing

Government efforts to regulate any product or industry are often met with resistance and assertions that the market should be allowed to operate free of government intrusion. This stems from the theory that free markets are most effective and government intervention creates inefficiencies. Some question whether it is appropriate for government to discourage the use of a legal product by devising a regulatory scheme with the specific intent of decreasing sales. But the government does this in many industries. For example, liquor taxes discourage alcohol consumption, grocery bag fees discourage the purchase of disposable plastic bags, and public transit subsidies encourage transit use.

The issue then may be one of degree. The extent to which government seeks to curb tobacco sales may seem excessive compared to other goods and services. But tobacco is unique; there are significant public health risks caused directly by tobacco use. When used as intended, tobacco harms and kills hundreds of thousands of individuals each year in the U.S.[[24]](#endnote-25)

Tobacco use has significant negative externalities, including a profound impact on the nation’s health care system. In California, the combined medical costs and productivity losses amount to approximately $27.07 per cigarette pack,[[25]](#endnote-26) well above the average cost of cigarettes.[[26]](#endnote-27) The price of cigarettes and other tobacco products therefore do not reflect their actual costs, which are borne by government and, ultimately, taxpayers.[[27]](#endnote-28)

Government regulation of tobacco prices is not new. Federal, state, and local governments have an established history of adopting policies to increase tobacco prices. The federal government, and all 50 states and Washington, D.C., currently impose excise taxes on cigarettes[[28]](#endnote-29) to both decrease tobacco use and generate revenue.[[29]](#endnote-30) Excise taxes remain the most commonly used and most proven strategy for regulating the prices of tobacco products. But even when a state does increase its tax on tobacco, a state tax does not take into consideration the degree to which tobacco use may impact particular local jurisdictions throughout the state. Local policies are therefore well suited to complement tobacco control pricing policies at the state level. Local governments can and may still wish to act even when the state already has a pricing strategy in place.

Another way that government has regulated tobacco prices is with the establishment of minimum price laws. However, these laws have generally been enacted to prohibit unfair competition rather than to protect public health. The existing minimum price laws merely prohibit selling tobacco at a loss or require only a small percentage markup.[[30]](#endnote-31) As of the date of publication, California did not have a minimum price law for tobacco products.

### Tobacco Industry Tactics

Tobacco companies invest millions of dollars each year to heavily promote and strategically price their products to attract specific groups. Evidence suggests that tobacco companies deliberately target youth with price discounts and coupons.[[31]](#endnote-32),[[32]](#endnote-33),[[33]](#endnote-34) These price reduction strategies can offset the effects of price increases on youth smoking initiation, especially among youth aged 14 to 17 years.[[34]](#endnote-35),[[35]](#endnote-36) Price reductions both attract new customers and retain existing customers. But brand loyalty is important for many companies, including those in the tobacco industry. Maintaining brand loyalty through price reductions may be considered a legitimate business tactic.

Although price reduction strategies have a particularly profound effect on youth, they also appeal to a significant portion of adult tobacco users. This can be a reason both for and against regulation. Nearly 20 percent of adults who smoke cigarettes report using coupons to purchase cigarettes.[[36]](#endnote-37) In 2011, the tobacco industry spent over $171.2 million on coupons for consumers.[[37]](#endnote-38) In the same year, the tobacco industry spent nearly $7 billion of their $8.4 billion advertising and promotional expenditures on price discounts for cigarette retailers and wholesalers, including off-invoice discounts, buy downs,[[38]](#endnote-39) “master type” programs,[[39]](#endnote-40) voluntary price reductions, volume rebates, incentive payments, and value-added services.[[40]](#endnote-41) The extent to which tobacco marketing reaches adults is a public health concern, but many people believe that adults are less impressionable, and therefore responsible for their own decisions. The fact that a large portion of adult smokers use coupons may be a reason not to regulate coupons and discounts.

### Discussion of Policy Options

This publication provides local California jurisdictions with three policy options to regulate the price of tobacco products. Each is explained below.

1. ***Prohibition on Redemption of Tobacco Discounts and Coupons***

Two local governments are now prohibiting tobacco discounts and coupon redemption. This is a new policy approach in Providence, RI, and New York City. This policy option is intended to prohibit the discounts in Table 1 below. The policy language in the table applies only to cigarettes, but the plug-in language provides options for other tobacco products as well.

## Table 1: Prohibiting Redemption of Coupons and Discounts

|  |  |
| --- | --- |
| **Policy language prohibiting the following** | **Examples of coupons/discounts** |
| Honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase a Package of Cigarettes for less than the Full Retail Price | * $1 off manufacturing coupon attached to package * $1 off coupon on cell phone app * $1 off coupon received in the mail |
| Sell any Package of Cigarettes to a Consumer through a multiple-package discount or otherwise provide any Package of Cigarettes to a Consumer for less than the Full Retail Price in consideration for the purchase of any Tobacco Product or any other item | * Buy 3 cigarette packages get one free * Buy 3 cigarette packages get one at half price |
| Provide any free or discounted item to a Consumer in consideration for the purchase of a Package of Cigarettes | * Get a free 2-liter soda with any cigarette purchase * Get a free lighter with any cigarette purchase |

Many companies in different industries use discounts and coupons to promote products. To prohibit pricing strategies in the tobacco market would be to restrict the ability of this industry to use marketing tools that are widely used by all types of manufacturers. But the extent to which tobacco harms public health may be a reason for local jurisdictions to treat this class of products differently.

The purpose of this policy option is to prohibit price discrimination and increase the cost of low-cost tobacco products. Price discrimination is a method by which manufacturers and retailers draw in more consumers by selling the same product at different prices to different consumers. Price discrimination allows retailers to capture sales from consumers at a regular price without losing sales from more price-sensitive consumers.

In the tobacco context, youth are particularly price-sensitive,[[41]](#endnote-42),[[42]](#endnote-43) and evidence suggests that tobacco companies deliberately target youth with price discounts and coupons.[[43]](#endnote-44),[[44]](#endnote-45),[[45]](#endnote-46) A uniform pricing policy – i.e., a prohibition on price discrimination – effectively diminishes the tobacco industry’s ability to capture more price-sensitive consumers, including youth and low-income individuals. This approach targets populations particularly affected by tobacco use; this policy is expected to have less impact on higher-income individuals who may not rely on coupons and discounts. Some people may view this as unfair.

This plug-in provides local jurisdictions with the option to prohibit discounts and coupons for both cigarettes and non-cigarette tobacco products (commonly referred to as “other tobacco products” or “OTPs”). The term “Tobacco Products” is defined broadly in our Model Licensing Ordinance and encompasses a wide variety of products, such as smokeless tobacco, nicotine gel, nicotine lollipops, and electronic smoking devices that contain nicotine.

In response to efforts to regulate OTPs, the tobacco industry has cited research that suggests that OTPs do not pose the same health hazards as cigarettes, and therefore should not be regulated in the same manner. For instance, in a 2011 citizen petition to the U.S. Food and Drug Administration (FDA), R.J. Reynolds Tobacco Company objected to a particular warning required on smokeless tobacco products. It asserted that the warning “This product is not a safe alternative to cigarettes” is misleading because “it implies that [smokeless tobacco] products and cigarettes present equal risks.”[[46]](#endnote-47)

The tobacco industry has also challenged proposals to regulate the use and sale of electronic cigarettes on the grounds that these products are less harmful than cigarettes. There is an ongoing debate about how dangerous electronic smoking devices are for users and those around them. Some smokers claim to use electronic smoking devices as a quitting tool even though no electronic smoking device has yet been approved by the FDA as a cessation aid. Some researchers believe that electronic smoking devices may “serve as a gateway out of smoking.”[[47]](#endnote-48) Early research found that electronic smoking devices had the same level of toxins and carcinogens as nicotine replacement therapy products, making electronic smoking devices significantly safer than traditional tobacco products.[[48]](#endnote-49),[[49]](#endnote-50) But ultimately, electronic smoking devices have been on the market for a relatively short period of time compared with other tobacco products. Thus, the long-term health effects of these products are not yet known. Treating these products like traditional cigarettes may be viewed as premature and unwarranted.

While there is an ongoing debate about whether OTPs present lesser health risks than cigarettes, it has been shown that products like cigars, smokeless tobacco, and electronic smoking devices contain addictive levels of nicotine, harmful toxins, and dangerous carcinogens.[[50]](#endnote-51),[[51]](#endnote-52),[[52]](#endnote-53),[[53]](#endnote-54),[[54]](#endnote-55),[[55]](#endnote-56),[[56]](#endnote-57) Smokeless tobacco, for example, contains at least 28 carcinogens, and there is strong evidence that users have an increased risk of developing oral cancers.[[57]](#endnote-58) Even though some OTPs may be viewed as less harmful than cigarettes, jurisdictions may wish to treat these products similarly because they still contain nicotine and other dangerous substances.

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

The popularity of little cigars and cigars has skyrocketed in the past decade. From 1995 to 2008, annual sales of cigarillos increased by 255 percent, and sales of little cigars increased by 316 percent.[[58]](#endnote-59) This may be because tax rates for these products are less than tax rates for cigarettes.[[59]](#endnote-60) Federal law prohibits the sale of flavored cigarettes, and cigarettes sold singly, but these types of sales are not prohibited for other tobacco products. Many retailers currently sell cigars, little cigars, and cigarillos individually, making them more affordable and appealing to youth.[[60]](#endnote-61) In California, 78.1 percent of tobacco retailers sell cigarillos for less than $1. Not surprisingly, cigar smoking is the second most common form of tobacco use among youth.[[61]](#endnote-62)

Requiring little cigars and cigars to 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 nevertheless have to pay more to get more. This may seem counterintuitive – to force consumers to buy more of a dangerous product in any one transaction. But the goal is protect price-sensitive youth.[[62]](#endnote-63),[[63]](#endnote-64) Raising the cost barrier is expected to deter youth from purchasing these products. Though this policy does not actually increase the price of cigars, it nevertheless raises the cost barrier for purchase. This can have a positive public health impact.

### *3. Establishment of a Minimum Price for Cigarettes and Little Cigars*

Excise taxes remain the most commonly used and most proven strategy for regulating the price of tobacco products. Through taxation governments raise the price of tobacco products to decrease consumption. Thus, the benefits of a tobacco excise tax are twofold: a potential decrease in tobacco product consumption (which results in government cost savings)[[64]](#endnote-65) and additional government revenue from the increased taxes.

Despite the benefits of a tobacco excise tax increase, such a policy may not be politically feasible; in California, it is not a legal option for local jurisdictions due to state preemption. Thus, local jurisdictions may wish to adopt an alternative strategy to raise tobacco prices. Establishing a minimum sale price for certain tobacco products can accomplish the goal of raising prices and reducing demand. However, the public health impact will depend on prevailing tobacco prices in the local jurisdiction and the minimum price that is set.

There is more than one way to establish a minimum price requirement, but the most practical option for a local jurisdiction is to set a flat price floor for the sale of certain tobacco products (e.g., cigarettes and little cigars). For example, a local jurisdiction can specify that cigarettes and little cigars must not be sold below $7. Another option is to require tobacco retailers to mark up tobacco products by a certain percentage. Enforcing this type of mark-up provision can be extremely difficult for local jurisdictions, so the latter option is not included in our minimum price plug-in. Minimum pricing in this publication refers to a flat price floor for local jurisdictions.

A criticism of minimum pricing is that it does not necessarily achieve the benefits of a tobacco excise tax. Unlike a tax on an entire class of products (e.g., cigarettes), an established minimum price arguably only affects low-cost brands. Cigarette brands that are more expensive may not be directly affected by the minimum price.

An effective minimum pricing policy may mean that tobacco retailers and manufacturers actually make more money from tobacco sales. This may sound counterintuitive for local policymakers. Nevertheless, it may simply be a side effect of increasing tobacco prices through minimum pricing.

Although the government may benefit from cost savings due to decreased tobacco product consumption, it will not gain additional revenue through minimum pricing. This may be a factor that local policymakers may wish to consider. They should also think about the added benefits of a tobacco tax increase and the likelihood of achieving such a policy in the near- or medium-term. But a state excise tax may not sufficiently curb tobacco use in particular local jurisdictions. Accordingly, a local government can adopt suitable pricing strategies for their community to complement state policies.

A minimum price policy is subject to the same criticism of all tobacco pricing strategies – namely, that government uses these policies to needlessly interfere with free markets and that these policies impact low-income communities disproportionately. The analysis of these issues has been presented above and is not repeated here. Tobacco manufacturers that primarily market low-end tobacco products may also be impacted more significantly than other manufacturers.

## Legal Issues

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.

### *1. 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.[[65]](#endnote-66) It is the primary source of authority for nonfederal health-related statutes, regulations, and ordinances.[[66]](#endnote-67) Courts have generally held that cigarette minimum price laws and related restrictions are proper exercises of a state’s police power.[[67]](#endnote-68)

### *2. 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.[[68]](#endnote-69) Government laws that regulate a market and establish baseline prices are generally not preempted.[[69]](#endnote-70) 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),[[70]](#endnote-71) 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 […].[[71]](#endnote-72)

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.”[[72]](#endnote-73) 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.[[73]](#endnote-74)

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, RI, ordinance that prohibits the redemption (but not distribution) of coupons and sales of tobacco multi-packs.[[74]](#endnote-75) 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.[[75]](#endnote-76) 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.[[76]](#endnote-77) 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...”[[77]](#endnote-78) 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.”[[78]](#endnote-79)

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.[[79]](#endnote-80) 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.[[80]](#endnote-81) The district court analyzing New York City’s ordinance came to the same conclusion.[[81]](#endnote-82)

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.

**How to Use These Plug-ins**

ChangeLab Solutions’ *Model California Ordinance Requiring a Tobacco Retailer License* (Model Licensing Ordinance) 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. The licensing ordinance can be used as a vehicle for optional plug-in policies that strengthen the ordinance. For example, communities can use plug-ins to control the density or location of tobacco retailers, prohibit certain types of businesses from selling tobacco, or regulate the sale of certain products.

This set of plug-in policy options is specific to **tobacco product pricing**. This publication is based on ChangeLab Solutions’ legal research and analysis, as well as the research and evidence base linking the price of cigarettes and other tobacco products with use and initiation prevalence. For each plug-in, we provide 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 can be revised to be enacted independently. 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 in a separate ordinance.

* When adding these plug-ins to ChangeLab Solutions’ Model Licensing Ordinance, fill in any blanks that have been provided to customize the language to your local code. Brackets that are blank and underlined (e.g., [ ]) must be filled in. Brackets surrounding non-underlined text indicate optional language that the local jurisdiction may adopt at its discretion. Some options are followed by comments describing the legal provisions in more detail. Some degree of customization is 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 specifically defined in that plug-in or in ChangeLab Solutions’ Model Licensing Ordinance.
* The plug-ins in this publication include the following: (1) a prohibition on redemption of tobacco discounts and coupons; (2) an establishment of a minimum pack size of little cigars and cigars; and (3) an establishment of a minimum price for cigarettes and little cigars. The plug-in for minimum price is designed to be adopted alongside the plug-in for minimum pack size. These plug-ins may be adopted independently or together as a collection, except that local jurisdictions adopting a minimum price requirement should also adopt a minimum pack size requirement.
* The findings included in this publication (pg. 16 - 18) are applicable to – and should be used for – all three plug-in policy options (except when specifically noted otherwise). If a jurisdiction is incorporating more than one plug-in in its tobacco retailer licensing ordinance, each applicable finding needs to be included only once in the ordinance.
* Some definitions and subsections appear in more than one plug-in. If a jurisdiction is incorporating more than one plug-in in its tobacco retailer licensing ordinance, each applicable definition and subsection needs to be included only once in the ordinance.
* The definitions in this publication supplement definitions contained in our Model Licensing Ordinance. For example, the term “Tobacco Product” is referenced but not defined in this publication’s plug-ins. This is because the definition is already included in the Model Licensing Ordinance. “Tobacco Product” is defined as “any product that contains tobacco, is derived from tobacco, or contains synthetically produced nicotine and intended for human consumption. ‘Tobacco Product’ does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.” This definition is written broadly to include nontraditional tobacco and nicotine products such as electronic cigarettes, nicotine gel, and nicotine lollipops, but so as not to interfere with the FDA’s mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.

After adding these plug-in options 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*.

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

**Findings Applicable to All Three Plug-ins**

**Prohibition on Redemption of Tobacco Discounts and Coupons**

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

**Establishment of a Minimum Price for Cigarettes and Little Cigars**

## **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”:*

**comment:** These findings supplement the findings in the Model Licensing Ordinance and therefore do not include other general information about cigarettes and tobacco retailer licensing.

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;[[82]](#endnote-83),[[83]](#endnote-84),[[84]](#endnote-85),[[85]](#endnote-86),[[86]](#endnote-87),[[87]](#endnote-88),[[88]](#endnote-89)

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;[[89]](#endnote-90),[[90]](#endnote-91),[[91]](#endnote-92),[[92]](#endnote-93),[[93]](#endnote-94)

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;[[94]](#endnote-95)
* 79.4 percent sell flavored non-cigarette tobacco products;[[95]](#endnote-96)
* 56.1 percent sell chewing tobacco;[[96]](#endnote-97)
* 45.7 percent sell electronic smoking devices;[[97]](#endnote-98)

WHEREAS, in California the cheapest available cigarettes sell for an average of only $4.30 per package;[[98]](#endnote-99)

WHEREAS, the availability of inexpensive tobacco products leads to increased tobacco use[[99]](#endnote-100) 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;[[100]](#endnote-101),[[101]](#endnote-102),[[102]](#endnote-103),[[103]](#endnote-104),[[104]](#endnote-105),[[105]](#endnote-106)

WHEREAS, for every one percent increase in the cost of tobacco products there is a decrease in consumption,[[106]](#endnote-107) and a 20 percent price increase would reduce:

* Demand for cigarettes by approximately 10.4 percent;[[107]](#endnote-108)
* The prevalence of adult tobacco use by 3.6 percent;[[108]](#endnote-109)
* Initiation of tobacco use by young people by 8.6 percent;[[109]](#endnote-110)

WHEREAS, youth under age 18 are particularly responsive to changes in tobacco prices.[[110]](#endnote-111),[[111]](#endnote-112) For example:

* When cigarettes cost more, fewer adolescents start smoking;[[112]](#endnote-113)
* Price reductions can offset the effects of price increases on youth smoking initiation, especially among youth aged 14 to 17 years;[[113]](#endnote-114),[[114]](#endnote-115)
* The evidence is suggestive that tobacco companies deliberately target youth with price reductions;[[115]](#endnote-116),[[116]](#endnote-117),[[117]](#endnote-118)

WHEREAS, price reduction strategies are used by the tobacco industry to counter state and local tobacco control efforts and appeal to price-sensitive consumers;[[118]](#endnote-119),[[119]](#endnote-120)

WHEREAS, tobacco companies spend considerably to decrease the price of their products in order to increase demand for cigarettes.[[120]](#endnote-121) 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;[[121]](#endnote-122)
* 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;[[122]](#endnote-123)
* Tobacco companies use a variety of promotional strategies including off-invoice discounts, buy downs, and voluntary price reductions;[[123]](#endnote-124)

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;[[124]](#endnote-125)
* In California, those who use price minimizing strategies save an average of $1.04 per pack (or 18.6 percent off the total);[[125]](#endnote-126)
* The 19.8 percent of adults who smoke cigarettes report that they use coupons to purchase cigarettes;[[126]](#endnote-127)
* The tobacco industry spent over $171.2 million in 2011 on consumer coupons;[[127]](#endnote-128)

WHEREAS, approximately half of stores in California that sell cigarettes advertise cigarette price promotions;[[128]](#endnote-129)

WHEREAS, although federal and state law ban the sale of individual cigarettes,[[129]](#endnote-130),[[130]](#endnote-131) 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.[[131]](#endnote-132) For example:

* 78.1 percent of California tobacco retailers sell cigarillos for less than $1;[[132]](#endnote-133)
* From 1995 to 2008, annual sales of cigarillos increased by 255 percent, and sales of little cigars increased by 316 percent;[[133]](#endnote-134)
* Cigar smoking is the second most common form of tobacco use among youth;[[134]](#endnote-135) and

WHEREAS, a 10 percent increase in cigar prices significantly reduces cigar use among youth;[[135]](#endnote-136) and

**comment:** The finding below is specific to the plug-in establishing a minimum price for cigarettes and little cigars.

WHEREAS, a simple flat rate minimum price, if high enough, would eliminate the sale of low-cost cigarettes.[[136]](#endnote-137)

## **Prohibition on Redemption of Tobacco Discounts and Coupons**

This policy option is intended to prohibit the redemption of tobacco discounts and coupons. 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 low-income individuals.

**Amendments to ChangeLab Solutions’ Model Licensing Ordinance**

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

(\_\_) “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) ]. 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.

**comment:** The provision below requires the display of prices for tobacco products, thereby assisting the local jurisdiction in its enforcement efforts.

(\_\_) 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.

**comment:** This subsection prohibits the following types of discounts:

1. Redemption of any coupons, whether the consumer obtains the coupon in the store or elsewhere (e.g., magazine, online printout, mailer, or phone app);

2. Discounts to reward consumers for buying more than one tobacco product (e.g., “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 (e.g., “Buy a pack of cigarettes and get a free lighter”).

(1) Cigarettes. No Tobacco Retailer shall:

i. Honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase a Package of Cigarettes for less than the Full Retail Price;

ii. Sell any Package of Cigarettes to a Consumer through a multiple-package discount or otherwise provide any Package of Cigarettes to a Consumer for less than the Full Retail Price in consideration for the purchase of any Tobacco Product or any other item;

iii. Provide any free or discounted item to a Consumer in consideration for the purchase of a Package of Cigarettes.

[ (\*2) Tobacco Products Other Than Cigarettes. No Tobacco Retailer shall:

**comment:** The provisions in subsection (\*2) are substantively similar to the provisions set forth in subsection (1). This is a separate section to allow severability. The tobacco industry may argue that subsection (1) is preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA); however, this is not an argument that can be made for subsection (\*2) because FCLAA applies only to Cigarettes. At the time of publication, courts in two federal circuits had ruled that a prohibition on tobacco discounts and coupons was not preempted by federal law. *See Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of New York*, 14 CIV. 00577, 2014 WL 2766593 (S.D.N.Y. June 18, 2014). But in the event that a different court reaches the opposite conclusion, subsection (\*2) allows the prohibition to survive for tobacco products other than Cigarettes. A local jurisdiction should include this section if it is interested in prohibiting discounts and coupons not just for Cigarettes, but also for other tobacco products. As defined in the Model Licensing Ordinance, tobacco products other than Cigarettes include little cigars, cigars, smokeless tobacco, shisha, and pipe tobacco. They also include electronic smoking devices that contain nicotine. Jurisdictions have the option to adopt an ordinance targeting a narrower category of products. Jurisdictions may narrow the scope of the ordinance by listing, and defining, the specific tobacco products they want incorporated into the ordinance.

i. Honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase a Tobacco Product other than a Cigarette for less than the Full Retail Price;

ii. Sell any Tobacco Product other than a Cigarette 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 other than a Cigarette or any other item; or

iii. Provide any free or discounted item to a Consumer in consideration for the purchase of any Tobacco Product other than a Cigarette. ]

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

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.

**Amendments to ChangeLab Solutions’ Model Licensing Ordinance**

*In* **SECTION II, 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* **SECTION II, 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. It is the following plug-in (Establishment of a Minimum Price for Cigarettes and Little Cigars), and not this plug-in, that *directly* establishes a price floor for tobacco products.   
  
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.

### **Establishment of a Minimum Price for Cigarettes and Little 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.

**Amendments to ChangeLab Solutions’ Model Licensing Ordinance**

*In* **SECTION II, 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. The definition of Cigar is optional and only needs to be included if a jurisdiction seeks to set a minimum price for Cigars.

[ (\_\_) “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” 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* **SECTION II, 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.

**comment:** The subsection below requires the display of prices for tobacco products, thereby assisting the local jurisdiction in its enforcement efforts.

(\_\_) 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 PRICE FOR CIGARETTES & LITTLE CIGARS [ ADD CIGARS AS APPROPRIATE ]. No Tobacco Retailer shall Sell to a Consumer:

**comment:** This subsection on minimum pricing directly sets a price floor for the sale of Cigarettes and Little Cigars. The price floor is set as a minimum price required (e.g., $7) for a package of Cigarettes or Little Cigars. 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. Local jurisdictions may therefore decide to set the same price floor for Cigarettes and Little Cigars. A price floor can also be set for the sale of Cigars. Setting a minimum price for the remaining tobacco products (e.g., smokeless tobacco, pipe tobacco, etc.) requires more careful deliberation due to the manner in which these other products are sold and packaged. Local jurisdictions interested in additional minimum pricing options may contact ChangeLab Solutions for assistance.

(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.

[ (\*3) Cigars at a price that is less than [ $X.00 ] per Cigar, including all applicable taxes and fees. ]

**comment:** This plug-in is designed to be adopted along with the plug-in “Establishment of a Minimum Package Size for Little Cigars and Cigars.” Subsections (1) and (2) are drafted with the expectation that the minimum pack size plug-in is also being adopted. This is why subsections (1) and (2) set a minimum price based on package (as opposed to a minimum price based on each Cigarette or Little Cigar). The price floor is set differently for Cigars (*per Cigar* vs. *per package*) because the number of Cigars in a package varies greatly.

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30. *See* Minn. H. R. Research Dept., *The Unfair Cigarette Sales Act*, (Sept. 2000). [*www.house.leg.state.mn.us/hrd/pubs/ucsa.pdf*](http://www.house.leg.state.mn.us/hrd/pubs/ucsa.pdf), for a useful summary of other states’ minimum pricing laws. (“The state purpose of the act is to prevent unfair competition from sales below cost.”) [↑](#endnote-ref-31)
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38. A “buy-down” is a reimbursement program that allows retailers to provide customers an immediate price reduction on certain brands for a specific period of time, e.g., 50 cents off each pack of Marlboro sold from the store’s inventory for 30 days. The consumer gets an instant price reduction and, at the end of the incentive period, the retailer gets reimbursed by the manufacturer for the price reduction on the cigarettes sold at the reimbursed price. [↑](#endnote-ref-39)
39. A “master-type” program is a promotional program sponsored by the manufacturer and administered through a cigarette wholesaler. The wholesaler agrees to pay the retailer a rebate and is later reimbursed by the manufacturer. The wholesaler may also be paid a fee to administer the program. The payments are not deducted from the manufacturer’s list price shown on the invoice from the manufacturer but are paid or credited separately after the sale to the retailer. [↑](#endnote-ref-40)
40. Federal Trade Commission. 2013. *Federal Trade Commission Cigarette Report for 2011*. *www.ftc.gov/os/2013/05/130521cigarettereport.pdf.* [↑](#endnote-ref-41)
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