Public Health and Tobacco Policy Center

Tobacco Retail Licensing: Promoting Health Through Local Sales Regulations

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Local policies that promote health fulfill a core government function of advancing public health, safety, and wellbeing. Federal, state, and local governments carry out this responsibility through regulations that balance private interests and public welfare. This includes promoting healthy environments by regulating the sale, marketing, and use of inherently dangerous and addictive products, such as tobacco products. The tobacco industry's retail marketing has a profound effect on local communities, and sensible and effective regulation like tobacco retail licensing can reduce this harmful industry influence and improve health equity.

Tobacco use is the leading cause of preventable death in the U.S. and in New York. The tobacco industry has modeled its business around keeping consumers using their addictive products and enticing new (overwhelmingly youth) users to "replace" those users who quit or die from tobacco's effects. To accomplish this, tobacco companies heavily invest in ensuring easy access to retail outlets overstocked with products and pro-tobacco messaging, creating an environment which normalizes tobacco use and maintains addiction.

High exposure to tobacco marketing, which tobacco companies achieve through high retail density, creates an illusion of inevitable tobacco use, impacting consumer decision making. Exposure to marketing drives youth initiation and addiction, and thwarts cessation efforts by the two-thirds of users who want to quit. In this dense tobacco retail environment, flavored products and price-discounted products are especially prominent and appealing to consumers.

The tobacco industry also drives health inequities. Tobacco companies heavily market their products to socioeconomically disadvantaged groups, primarily through local stores. Those living in lower-income and lower-educated communities are exposed to more retailers, more advertising within those retailers, and more frequent and steeper price discounts. Not coincidentally, these low-SES populations use tobacco at higher rates, and suffer disproportionately from tobacco-related diseases. Evidence of industry-driven disparities across races and income/education levels supports policies that reduce exposure to tobacco marketing, reduce secondhand smoke exposure, and otherwise combat differential tobacco use within marginalized communities.

Tobacco is different from every other widely available consumer product. Commercial tobacco is an unreasonably dangerous and defective product that addicts its users and causes premature death in up to half of those who use it as directed. Tobacco products should therefore be treated differently, and access to and marketing for these products should be carefully regulated to promote health and reduce morbidity and mortality.

State and local governments can limit the tobacco industry's control of community environments through evidence-based public health interventions. Effective implementation of a tobacco retail license that regulates the sale of tobacco products—including how many and what type of outlets can sell which tobacco products, in what locations, and at what price—will reduce the industry's influence and advance health equity. Indeed, a comprehensive retail license system that includes multiple sales regulations of all types of tobacco products has the potential to transform the retail environment, making it healthier for all residents.

Part I. The Case for Regulating Tobacco Sales

The Duty of Government to Promote Public Health

A core government function (and obligation) is to advance the population's health and wellbeing[1] and safeguard citizens from unreasonable risk of harm.[2] To fulfill this function, state and local governments exercise their inherent authority to protect and promote public health and safety.[3] State and local governments regularly devise and implement public health interventions to reduce death and disease, thus saving lives and preventing illness.

Governments routinely regulate businesses in the furtherance of public health and safety: Environmental laws regulate sales of toxic substances;[4] health regulations restrict sales of hazardous products;[5] and land use regulations shape the built environment and foster safer communities by regulating placement of retail signs[6] and restricting the location of hazardous product sales.[7] Business regulations restrict sales of dangerous products, such as firearms,[8] liquor,[9] and prescription medication[10] often by requiring a license to sell such products.

Tobacco products are inherently dangerous and addictive and their sale deserves significant oversight by local communities. Unique among consumer products, tobacco kills up to half of all regular users when used as intended.[11] Each year approximately 28,000 New Yorkers die due to smoking-related disease,[12] and New Yorkers spend $10.4 billion on tobacco-related healthcare,[13] and forego more than $7.33 billion in lost productivity.[14] Significantly, the health burden is uneven: those of lower socioeconomic status,[15] and those with cognitive or other disabilities,[16] among others, disproportionately experience tobacco use and tobacco-related disease and death.

Through a prolific retail presence, tobacco companies drive tobacco use by fabricating an environment that makes tobacco use appear common and inevitable. Indeed, the tobacco industry's business model relies on enticing status-conscious young people with the lure of a luxury product—one which youth mistakenly believe they'll use short-term.[17] With their products engineered to maximize addiction,[18] companies proceed to make its marketing and availability ubiquitous.

Highly visible, pervasive retail tobacco marketing on every street corner creates an environment conducive to tobacco use: it induces youth experimentation and addiction, and undermines quit attempts by current users—the vast majority of whom wish to quit.[19]

This impact is most acute in communities facing heightened challenges to health and well-being,[20] and drives the growing health disparities throughout the country.[21] This environment will not change on its own: **Regulation of tobacco sales is necessary** to promote public health, reduce health risks, promote health equity, and counter the significant influence tobacco marketing wields over the community.

State and local governments may regulate tobacco sales by limiting where and how the products are sold. Evidence supports implementing tobacco controls that prohibit the sale of flavored tobacco products, limit the density of tobacco outlets (through regulating the number, location, and type of tobacco retailers), and maintain high product prices.

Tobacco Industry Marketing (Not "Choice") Drives Tobacco Use

While opponents of government regulation often argue that smoking is a personal choice, U.S. courts have determined that the addictiveness of nicotine in conjunction with tobacco companies' deceitful practices and influential marketing create conditions that dismantle the element of personal choice.[22] Youth are particularly vulnerable to tobacco companies' marketing tactics (largely directed to stores),[23] and are generally more willing to engage in risky behaviors. Consequently, youth are at increased risk of tobacco addiction: It is this impaired behavioral control, not free choice, which drives continued tobacco use. Opponents also argue a Constitutional right to use tobacco, however tobacco use is not a right protected by the U.S. or any state Constitution.[24]

These tobacco regulations can be effective tools for reducing the prevalence of tobacco use, particularly among youth and disadvantaged populations most burdened by tobacco use. Appendix C provides in-depth discussion on these regulations and their evidence-base.

Why Focus on Sales?

Tobacco companies model their business around recruiting "replacement smokers" (overwhelmingly youth)[25] to replace those who quit smoking or die from its effects.[26] The tobacco industry has long relied on marketing to entice experimentation with and, consequently, lifelong addiction to their products. Marketing within the retail environment is a particularly effective recruitment tactic: Evidence shows that tobacco retail marketing increases the likelihood that adolescents will initiate tobacco use and thwarts cessation attempts by current users.[27]

Because retail marketing is indispensable to addicting new users, tobacco companies engage as many retailers as possible in coercive sales contracts through which retailers yield control of the marketing in their stores.[28] These contracts dictate where and how storeowners display tobacco products and ads. Contracts may require, for example, designating significant shelf space to tobacco products, and clustering products for maximum visual impact behind the registers to create a "power wall" that is impossible to miss[29]—marketing techniques used to perpetuate the perception of tobacco use normalcy and popularity.[30]

The reality is the retail environment remains quite permissive of tobacco product marketing. In fact, tobacco companies spend more than 95 percent of their marketing budget—more than $9 billion in 2014[31]—on shaping the retail environment. Tobacco companies have a history of manipulating to their advantage (and the public's detriment) both product addictiveness, and public perception of the health risks of tobacco use. As a result, the law has, over time, attempted to reign in this distorting, pervasive tobacco product marketing.[32] Reducing exposure to tobacco marketing is not a new policy strategy; rather, it is a continuation of successful policies implemented over decades.

Tobacco Marketing Leads to Youth Use and Addiction

There is a direct causal relationship between youth seeing tobacco marketing, and youth trying tobacco products and ultimately progressing to regular use.[33] Most tobacco marketing occurs in the retail environment, and the number of stores, store location, and store type (*e.g.*, a pharmacy) selling and marketing tobacco products each independently influence youth tobacco use. Specifically, tobacco outlet prevalence, location, and type affect youth perceptions of product accessibility

and acceptability—and ultimately—perceptions of risk, all of which are factors in tobacco use.[34] Yet in New York, there are 18,219 tobacco retailers—1 for every 223 persons under age 18.[35] Astonishingly, New York tobacco outlets outnumber even fast food outlets, which total 15,418 or 1 for every 272 juveniles.[36] Moreover, the vast majority of New York retailers are located within 1,000 feet of another tobacco retailer, indicating clustering of outlets in certain areas.[37]

This is unacceptable given the evidence that youth exposure to tobacco marketing causes youth tobacco use.[38] Studies reveal an association between higher tobacco outlet **density** and higher rates of youth tobacco use,[39] including a finding that youth living in areas with the highest tobacco outlet **density** were 20 percent more likely to have smoked in the past month than those in areas with the lowest density.[40] The **location** of a tobacco retailer is also a factor in youth use: tobacco companies have used this to their advantage, acknowledging "a strategic interest in placing youth oriented brands, promotion, and advertising in locations where young people congregate," including locations near high schools.[41] Unsurprisingly, the result is that even today tobacco advertising is more prevalent in stores located near schools and where adolescents are more likely to shop.[42] The **type** of retailer selling and marketing tobacco products also influences tobacco use: Tobacco products in pharmacies send a mixed message about the healthfulness of tobacco use and signal community acceptance of tobacco—factors that contribute to tobacco use.[43]

Tobacco Marketing Interferes with Cessation

In 2015, fewer than one in ten smokers successfully quit using tobacco in the past year, despite nearly 70 percent of smokers reporting a desire to do so.[44] Tobacco quit rates differ across populations: Research illustrates the role the retail environment plays in creating and maintaining these disparities. Tobacco marketing dilutes the resolve to quit, serving as a smoking cue, and triggering both the urge to smoke and impulse tobacco purchases, and thus undermines quit attempts.

For example, one study found that a third of recently quit smokers experienced urges to buy cigarettes after seeing retail displays, and that a quarter of current smokers purchased tobacco on impulse when shopping for other items.[45] In high-poverty neighborhoods with more tobacco outlets, residents are less likely to succeed in quitting, and their attitudes are less likely to be pro-cessation.[46] New York smokers with less than a high school education are 34 percent more likely to try to quit than better-educated smokers, but are less successful in achieving long-term cessation.[47] Community norms, including rates of exposure to retail marketing, are likely factors in cessation disparities. Further, African-Americans have reported greater attention to smoking cues than whites, perhaps due to differences in the retail environment.[48]

Tobacco Marketing Is Highly Concentrated in Disadvantaged Communities

While smoking rates have declined nationally and in New York, persistent disparities remain, with higher tobacco use recorded among smokers with lower

incomes, lower educational attainment and/or poor mental health.[49] While the reasons for tobacco use disparities are complex, physical and social environments shape health behavior and produce disease.[50] Tobacco companies play an unmistakable (yet adjustable) role in shaping the retail environment in a manner that promotes tobacco use among already disadvantaged consumers.

Tobacco companies sell and market their products more aggressively in low-SES communities, which drives higher use rates in those communities.[51] Tobacco company tactics include contracting with more retailers in target communities to sell tobacco products, and incentivizing these stores owners to display more numerous and more prominent tobacco advertisements, product displays, and price promotions, typically for products most attractive to youth.[52]

Tobacco industry marketing strategies differ across neighborhoods according to demographics. The **density** of tobacco retailers is higher in low-SES communities,[53] whether rural or urban, even when accounting for population density.[54] Low-SES youth are more likely than their more affluent peers to live within walking distance of a tobacco retailer[55] and use tobacco at higher rates.[56]

Further, tobacco companies more **heavily advertise** and offer **steeper price discounts** in stores located in ethnic-minority and low-income neighborhoods than in majority white and more affluent neighborhoods.[59] Price, like exposure to tobacco marketing, is an important factor in use rates: When prices increase, consumers purchase fewer tobacco products, and more users quit.[60] This is especially dramatic among price-sensitive groups, including youth and people of low socioeconomic status.[61] Lower prices and price promotions are associated with youth progression to regular smoking[62] and also make it harder for price-sensitive users to quit.[63] The industry is well aware of the influence of price and employs targeted discounting strategies, including price reductions to counter the effects of taxes or other price increases.[64]

In short, low-SES populations are exposed to more retail marketing and have more access tobacco products. The prominence of tobacco marketing creates an environment that contributes to youth tobacco experimentation, and in which successful quit attempts are exceedingly difficult.

Tobacco Companies Drive the Problem; Only Policy Intervention Will Effectively Curb It

Importantly, this discussion focuses on marketing strategies employed by tobacco companies. The messenger is an integral

Did you know…?

Tobacco outlets are more highly concentrated in disadvantaged communities, including low-SES and racial and ethnic minority neighborhoods. In New York State, areas with higher proportions of African Americans or Hispanics generally have far higher tobacco outlet density.[57] Further, there are 32 percent more tobacco outlets in urban versus non-urban areas, even controlling for population size, and poverty confers a greater risk for high tobacco retailer density in both urban and rural settings.[58] Taking measures to reduce tobacco retailer density are viable for all communities – urban, suburban, and rural communities will benefit from policies that reduce retail density.

component of any marketing strategy, and here, tobacco companies rely upon tobacco retailers. As detailed above, tobacco companies wield tremendous influence, both real and perceived, over retailers: Through the billions of dollars tobacco companies spend on retail marketing,[65] the tobacco industry coerces retailers into contracts that dictate a store's layout to benefit tobacco sales.[66] Tobacco outlets located in so-called "focus communities"—rural and urban communities of color, high percentage of youth and persons of low-SES[67]— are particularly incentivized to aggressively promote tobacco products and essentially serve as tobacco recruitment centers.[68] This attention to focus communities helps account for the persistent disparities in tobacco retail density between similar communities of varying income levels, and for persistent disparities in the amount of marketing in stores in different communities.

Given that **tobacco companies drive these disparities**, government interventions that reduce Tobacco Industry influence are appropriate and necessary. Improving the health of disadvantaged populations disproportionately burdened by tobacco use and tobacco-related disease improves the health status of all[69] and may greatly reduce public healthcare spending.[70] Moreover, addressing the conditions known to obstruct people from reaching their full potential is consistent with our governing principle that everyone should have at least the opportunity to be healthy.[71]

Without government implementation of strategies to counter industry control over the environment, tobacco companies will continue to exploit those with the fewest resources, as they have no independent motivation to voluntarily change their business practices. Tobacco retail licensing is a tool New York communities may use to reduce industry influence on disadvantaged communities and to improve health equity.[72]

Part II. Licensing as a Tool for Regulating Tobacco Sales

Local tobacco retail licensing is a powerful tool for a community to shape its retail environment to reflect community values and impede tobacco industry control. Retail licensing furthers government objectives of preventing disease and promoting health and health equity. Through tobacco retail licensing, local government is better equipped to control where and by whom tobacco products are being sold, and to better understand how the sales environment impacts community health behavior and outcomes. Tobacco retail licensing also permits local enforcement with meaningful consequences for violations of federal, state, and local laws.

The Institute of Medicine (IOM) recommends local licensing to regulate the sale of tobacco products:[73]

> All states should license retail sales outlets that sell tobacco products. . . . Repeat violations of laws restricting youth access should be subject to license suspension or revocation. States should not preempt local governments from licensing retail outlets that sell tobacco products.[74]

The IOM further recommends that governments should explore more innovative uses of licensing systems that could "transform . . . the retail environment for tobacco sales," such as *"restricting the number and location of the retail outlets."*[75]

The IOM contends that public health agencies should be responsible for determinations concerning the acceptable level of retail density and where tobacco retail outlets may be located.[76]

Regulating tobacco sales through retail licensing can also help communities improve health equity.[77] The tobacco industry tailors its retail marketing strategies based on community demographics: Tobacco is more accessible, more prominently marketed and more cheaply sold in low-income communities and neighborhoods with more minority residents.[78] Regulating where and how tobacco may be sold, therefore, has the potential to reduce disparities by changing the environment in disadvantaged communities, meaningfully reducing residents' exposure to tobacco marketing and creating an environment that better promotes health.[79]

Tobacco retail licensing systems are also cost-effective: a local government may assess a fee for licenses in order to recover the costs of implementing, administering and enforcing the license requirements.[80] This includes but is not limited to the costs of hiring staff, purchasing necessary equipment, developing an application, conducting initial inspections of applicant premises, creating education materials for licensees, training enforcement staff, and conducting regular compliance inspections. Thus, tobacco retail licensing is a powerful enforcement mechanism for tobacco control programs that *pays for itself***.**

Licensing Enhances Enforcement of Tobacco Control Laws

State and local governments may use tobacco retail licensing not only to implement effective local public health regulation, but also to increase compliance with existing federal, state, and local law—particularly those imposed to reduce the risk of harm posed by the tobacco industry to youth.[81] Licensing helps state and local governments track tobacco product sales and make sure that sales comply with federal and state requirements such as the federal Synar Amendment, which requires states to monitor underage tobacco sales with compliance checks,[82] and New York State's Adolescent Tobacco Use Prevention Act, which prohibits tobacco sales to minors.[83] A well-enforced licensing system provides strong incentive to tobacco outlets to comply with tobacco control laws, because they may face fines or revocation of their licenses as a consequence of violating those laws. Tobacco retail licensing systems are economically feasible and sustainable for states and local governments; license fees may be used to fund both the administration of the licensing system and related tobacco control enforcement efforts.

Tobacco Retail Licensing Is Catching On

Many communities have recognized the value of retail licensing as a tobacco control and have implemented license eligibility restrictions to limit the number, location, and/or type of outlets through which the tobacco industry may sell its products. For example, the City of Newburgh, NY implemented a retail licensing system that caps (and gradually reduces) the number of its tobacco retail outlets, and restricts new outlets from locating within 1,000 feet of any school.[84] New York's Ulster and Cayuga Counties have also implemented tobacco licensing which limit the location of new

tobacco outlets, creating a tobacco sales-free buffer zone around schools.[85]

In California, several communities have successfully implemented retail number, location, type restrictions through tobacco retail licensing.[86] For example, San Francisco amended its tobacco permitting regulation to include a cap on the number of outlets at 45 per supervisor district, restrict the location of new outlets relative to schools and other permitted sales outlets, and limit the type of businesses eligible for sales permits.[87] Santa Clara County implemented a tobacco retail licensing system that prohibits pharmacies from receiving tobacco licenses, and prohibits the licensing of any new outlet within a minimum distance of a school or another tobacco sales outlet.[88] Other jurisdictions have implemented density regulation based on population size and/or distance from youth-centered or community facilities (beyond schools).[89]

Importantly, each community has found a strategy that is not only effective in reducing residents' exposure to tobacco marketing, but is also tailored to suit the community geography and population. Business licenses may even address other concerns, such as ensuring outlets maintain a safe property and comply with other local laws.

These examples demonstrate that a tobacco retail licensing system can be a useful and malleable tool in reducing residents' exposure to tobacco marketing. **Specifically, a community may require retail licensing to prohibit the sale of flavored tobacco products, reduce the density of tobacco outlets (through regulating the number, location, and type of tobacco retailers), and maintain high prices on tobacco products.**

Part III. Current Law Related to Tobacco Retail Licensing

This section provides an overview of existing federal, state, and local laws related to the licensing of tobacco retailers. Federal and state law do not prevent local licensing of tobacco retailers, nor is a local license redundant with federal and state law. Rather, local tobacco retail licensing aids local enforcement of all applicable tobacco controls, in addition to broader local laws.

Federal Law

Congress granted the U.S. Food and Drug Administration (FDA) authority to regulate tobacco products in the 2009 Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act").[90] In this same statute, Congress made explicit that the law does not restrain local governments from adopting tobacco controls related to the sale of tobacco products. Section 387(p) states that despite FDA's new authority, the law does not "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" by the Act, including "requirements relating to the sale, distribution, . . . [or] access to . . . tobacco products by individuals of any age . . . ." Requiring a license to sell tobacco products and setting criteria on licensure (*e.g.*, limiting the products sold, the sales transaction, and/or the number, location and/or type of retailer issued a sales permit) are recognized as requirements relating to the sale of tobacco products.

New York State Law

New York State has a statewide licensing and taxation regime for tobacco sales.[91] The State also restricts sales of tobacco products in specified ways, including a program of measures designed to prevent tobacco use by young people.[92]

Yet, state law permits more stringent local laws, including tobacco retail licensing requirements. As the website of the state department of health website puts it, "Some local governments have enacted local laws regulating the sale of tobacco or herbal cigarettes. In these cases, the stricter law (state or local) must be followed."[93] In fact, many state requirements may be integrated into local licensing requirements.

Retail Product Dealer Registration, Tax Compliance

New York State requires retailers offering tobacco products and retailers offering e-cigarettes to (separately) register with the state.[94] Registrations are valid for one year and a current certificate of registration must be publicly displayed where tobacco products or e-cigarettes are sold.[95] The application fee for the "tobacco product retail dealer" registration is $300 per retail location and $100 per vending machine.[96] The application fee for the "vapor product dealer" registration is $300.[97] A retailer offering both e-cigarettes and other types of tobacco products must apply for both types of retail registration.

A retailer in violation of relevant state law, including the Public Health Law (*e.g.*, selling to an individual under age 21 years), criminal, and tax laws, jeopardizes its registrations to sell tobacco products and/or e-cigarettes.[98] The Department of Taxation and Finance issues certificates of registration and is charged with enforcing the registration requirements. A retail dealer that violates state tax law may also incur significant fines (up to $35,000 for repeat violations) and risks certificate suspension and revocation.[99] Finally, violations resulting in cancellation or suspension of a tobacco product retail dealer's registration can also result in cancellation or suspension of its other state licenses, including lottery or alcohol licenses.[100]

Adolescent Tobacco Use Prevention

Article 13-F of the New York Public Health Law is referred to as "ATUPA," the Adolescent Tobacco Use Prevention Act. ATUPA prohibits the sale of tobacco products, including e-cigarettes, to persons under 21 years, and restricts retailers from distributing free tobacco products or coupons for free products.[101] The state tax law also requires that cigarettes are sold in packs of at least 20 cigarettes, and that tobacco product packaging include all federally mandated health warnings.[102]

Local departments of health are charged with enforcing ATUPA, and retail dealers are subject to ATUPA provisions. Local enforcement officers may assess penalty points to the certificate of registration of a tobacco product retail dealer found in violation of ATUPA.[103]

Existing Local License Requirements

State and local licensing systems can complement one another. When a local government implements a licensing system, tobacco retailers in the municipality need to comply with both state registration and local licensure requirements. Note that local requirements may be stricter than state requirements.

As of January 2020, New York City, the City of Newburgh, the Village of Dolgeville, and Dutchess, Cayuga, and Ulster Counties have enacted local laws requiring tobacco retailers to obtain a local license in addition to the state registration requirement. Some of these licenses include additional restrictions on the sale of tobacco products (see Table 1 below for more information).

Table 1: Tobacco Sales Restrictions in New York Localities that Require a Local License for Tobacco Product Sales (enacted as of January 2020)

Jurisdiction and Hyperlink to Local Law	Reduces Exposure to Tobacco Marketing by Restricting:				
	Outlet Number	Outlet Location	Outlet Type	Use of Price Promotions	Flavored Tobacco Sales
CAYUGA COUNTY, N.Y., LOCAL LAW 5 (2013)		☑			
VILLAGE OF DOLGEVILLE N.Y., LOCAL LAW 2 (2019)	☑	☑		☑	
DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25 § 25.3 (2017)					
NEW YORK CITY, N.Y., ADMIN. CODE § 17-176.1 (2017); NEW YORK CITY, N.Y., ORDINANCES 1131-B; 1547-A; 1532-A (Aug. 9, 2017)	☑		☑	☑	☑*
CITY OF NEWBURGH, N.Y., CODE §§ 276-2, 276-4, and 276-5 (2017)	☑	☑			
ULSTER COUNTY, N.Y., LOCAL LAW 6 §4 (2015)		☑			

**Excludes menthol–flavored tobacco products other than e-cigarettes*

For the most recent local sales restrictions in NYS, including those that do not require a local license, visit our Story Map at tobaccopolicycenter.org/tobacco-control/retail-environment/pos-policy-implementation/.

Part IV. Comprehensive Model Policy: Overview

The Public Health and Tobacco Policy Center has developed a model policy for use by New York local governments. The annotated model is found in Appendix A, followed by findings of fact in Appendix B. Appendix C summarizes the evidence base for the model policy's sales provisions, namely restrictions that reduce the density of tobacco outlets and keep tobacco product prices high. Appendix C also links to Regulating Sales of Flavored Tobacco Products, which details the evidence and legal authority in support of a sales regulation to reduce tobacco use.

The model local law requires a license for the retail sale of tobacco products. It then identifies parameters on the issuance of those licenses, followed by requirements on a licensee. The issuance of licenses is limited by number, outlet location, and outlet type. License holders are restricted from selling flavored tobacco products, and from redeeming coupons and other price promotions for discounted tobacco products.

As a model, the policy is intended to be modified or tailored to fit the particular needs of a community. Policy variables such as desired number of issued licenses, size and scope of buffer zones, and administrative fees have been offset in **[bold, bracketed]** text to highlight decision points.

This portion of the report provides an overview of the significant components of the model policy, and identifies in which section of the policy they appear. We first discuss the administrative licensing provisions necessary to implement a local licensing system. Next we discuss the substantive sales provisions the license requires. Finally, we discuss inclusion of findings of fact justifying the sales provisions in Appendix B.

Licensing Provisions

Definitions (§ 2)

The second section of the model policy defines terms that are critical to a strong licensing system. If adopted as a local ordinance integrated into a larger body of law, adjust the model to eliminate redundant definitions (*e.g.*, "Person") and ensure consistent, logical meaning of defined terms. The model's defined terms are capitalized and sometimes referenced in a separately defined term. Below is a description of selected terms the model policy defines and incorporates.

Department. The policy delegates administration and enforcement of the tobacco retail licensing system to a government entity, generically referred to as "Department." An enacting jurisdiction will designate this entity, typically a health-oriented agency or another agency with experience issuing licenses and conducting inspections. Policymakers may consult with the identified enforcement entity while

drafting the law to ensure its enforcement capacity.

Covered Product. This term is defined to encompass other defined terms, including Tobacco Product, Electronic Aerosol Delivery System, and a Component or Part to those products. The policy requires a license for the retail sale of any product containing tobacco leaf or nicotine ("Tobacco Product"), any e-cigarette ("Electronic Aerosol Delivery System"), or any other product restricted by ATUPA. For ease of reference, the model policy refers to any of these as a "Covered Product."

Component or Part. The policy refers to tobacco-free and nicotine-free products that are intended or reasonably foreseen to be used with a tobacco product or e-cigarette as a "Component or Part." Examples include pipes and other smoking paraphernalia, batteries for e-cigarettes, and mouthpieces.

Accessory. The definition of Covered Product does NOT capture products that are not fundamental to the use of a Tobacco Product or Electronic Aerosol Delivery System. This includes a lighter or carrying case, and is referred to as an "Accessory."

Likewise, "Covered Product" is defined to exclude FDA-approved tobacco cessation products, such as nicotine gum and patches, and therefore these products are not subject to license or sales provisions of the model policy.

License Requirement (§ 3)

The model policy requires a Department-issued license to engage in the retail sale of a Covered Product in the municipality. A license is valid only for the Applicant and location listed on the license.

License Application and Application Fee (§ 4)

The model policy authorizes the Department to collect a license application fee to support processing the initial application. Processing may include verifying applicant information and conformity with the license requirements; reviewing historical compliance with federal, state, local laws; and inspecting retailers to determine applicant eligibility.

Tobacco Retail Licenses are non-transferrable. A change of ownership or location invalidates a license, and a new owner or new business must submit a new application for a retail license. Each Applicant must be independently eligible for a license, including with respect to restrictions on the number, location, or any other condition incorporated into the licensing law.

Issuance of Licenses (§ 5)

This section lists specific circumstances in which the Department may choose to deny a license, such as finding the Applicant provided false information on the application, failed to submit the fee, or violated business laws in the past.

License Term and Annual License Fee (§ 6)

The model policy requires annual license renewal. Policymakers will identify the annual expiration date. This date may consider the optimal time of year for the Department to annually process applications, which includes inspecting applicant retailers. The license fee supports enforcement of the local law, which may include staff training, retailer and community education, periodic retail inspections, and evaluation of products, retailers, and sales transactions regulated by the retail license.

Policymakers will identify the initial fee, and the model policy authorizes the Department to adjust the fee over time to reflect administration costs. *(The Public Health and Tobacco Policy Center can assist local governments in determining appropriate fees.)*

License Display (§ 7)

A licensed Tobacco Retailer must publicly display a valid local license, and, where applicable, also display its valid state certificate(s) of registration as a retail dealer. This helps customers and inspectors verify that an establishment is authorized to sell a Covered Product.

Violations and Enforcement & Revocation of Licenses (§§ 13-14)

These sections address enforcement and penalties. Violations of the licensing system's requirements could result in the suspension or revocation of the license to sell tobacco products. The Department also may suspend or revoke a license for violations of other federal, state, or local tobacco control laws.

Policymakers will identify penalties. The model outlines graduated fines for a first violation, for a second violation within two years, and for a third or subsequent violation within two years. Violations are calculated on a per-day basis. (Note that state law limits fines for violations of county sanitary code to $500.)

The model policy cumulates violations of a licensee possessing multiple tobacco retail licenses. For example, an individual possessing three local licenses for three distinct stores will accumulate three violations when one violation occurs at each of those stores.

Rules and Regulations (§ 15)

The model policy makes it plain that the Department can create further guidance, requirements, and procedures not addressed in the local, in order to effectively implement and run the licensing system.

Severability & Effective Date (§§ 16-17)

The final sections of the model policy are technical provisions included in many laws. The first is a severability provision, which provides that if any part of the law is ruled invalid, the remaining portions of the law remain in effect. Accordingly, if a court determines that one of the sales provisions is invalid, a jurisdiction may continue to enforce the remaining sales provisions.

The final section identifies the effective date of the policy. The effective date of the law can be a specified period after its filing with the Secretary of State.[104] When selecting this time period, policymakers will consider sufficient time between the enactment and enforcement of the law to institute the licensing system, educate retailers, review the first round of applications, and issue the licenses.

Sales Provision: Outlet Number

(Discussion on the rationale in Appendix C)

This sales provision reduces the density of tobacco outlets by regulating the number of outlets through which tobacco products may be sold to consumers.

Limitation on Number of Licenses Issued (§ 8)

The policy caps the number of initially issued licenses and winnows the number over time. Factors influencing the determination of an initial number of licenses a jurisdiction may issue in the first year include the number of existing tobacco

outlets in the community, population size, and retail trends (both historical and projected), among others. To serve the municipality's public health objectives, the license cap should be equal to or lower than the number of likely Applicants (*e.g.*, number of known tobacco retailers).

The model policy maintains a community's status quo for the first year by authorizing issuance of the same number of licenses as the number of existing retailers the law will require to hold a license. After the first year, the Department will issue only one new license for every two that are not renewed. This strategy will gradually reduce the number of tobacco retailers.

When the number of applications exceeds the number of available licenses, priority is given first to retailers that restrict entry to persons age 21 years and over, and second, to retailers locating at least 1,500 feet from an existing retailer (preventing clustering). Remaining licenses will be issued to other eligible applicants by lottery.

Tailoring the number restriction

A community may consider alternatives to the 2-for-1 approach that also reduce the number of tobacco retailers over time. A jurisdiction may set an aspirational cap and initially issue a license to all eligible outlets, while issuing no new licenses until that number cap on licenses is reached (through natural attrition). For example, a jurisdiction with 40 existing tobacco retailers may issue 40 initial licenses, set a future cap of 25, and issue no new licenses until there are fewer than 25 tobacco retailers.

Communities may set a "forever cap," in which they issue no new licenses after the first round.[105] Larger communities concerned with uneven distribution of tobacco retailers may subdivide their boundaries and apply a number cap per specific geographic subdivisions.[106]

The Public Health and Tobacco Policy Center is available to assist jurisdictions in developing an effective policy to suit community circumstances.

Sales Provision: Outlet Location

(Discussion on the rationale in Appendix C)

This sales provision reduces the density of tobacco outlets by regulating the location of outlets through which tobacco products may be sold to consumers. Specifically, the model policy establishes a tobacco sales-free buffer zone around places youth frequent, and sets a minimum distance between tobacco retailers.

Definition (§ 2)

Youth-Centered Facility. The model restricts the sale of a Covered Product near locations frequented by youth, including schools, parks, playgrounds, and recreation centers. An enacting jurisdiction may broaden the definition to include additional youth-centered places of concern.

Retailer Location (§ 9)

The model language renders a retailer within a minimum distance of a school or other youth-centered facility immediately ineligible for a tobacco retail license. This creates a buffer zone around places youth frequent in which no tobacco sales are permitted. This approach reduces adolescent access to tobacco products, and reduces exposure to associated marketing and environmental cues to use tobacco.

The model policy further reduces tobacco retail density by, after the first year, issuing no new licenses to a retailer within a specified distance of an existing tobacco retailer. Accordingly, density is gradually reduced through attrition as clustered

tobacco retailers stop selling Covered Products.

Tailoring the location restriction

Municipalities may tailor the limitation on a licensed retailer's proximity to schools, other youth-centered areas, and existing licensed tobacco outlets to fit their communities' needs. The policy may specify how the Department will measure the buffer zone (*e.g.*, using the perimeter or the center of a property boundary), or leave this determination to Department.

Where immediate density reduction through buffer zones are not feasible, localities may impose the distance requirement through a sunset provision or amortization period. By permitting tobacco sales to continue in the affected areas for a finite time period (*e.g.*, 18 months), policymakers provide notice and time to retailers within those zones to transition to tobacco-free outlets.

The Public Health and Tobacco Policy Center is available to assist jurisdictions in developing an effective policy to suit community circumstances.

Sales Provision: Outlet Type

(Discussion on the rationale in Appendix C)

This sales provision reduces the density of tobacco outlets by regulating the type of outlets through which tobacco products may be sold to consumers. By prohibiting retail pharmacies from selling tobacco products, the model policy resolves the especially unacceptable sale of tobacco products by businesses positioned as healthcare providers.

Definition (§ 2)

Pharmacy. This term identifies stores that are registered pursuant to New York State Education Law § 6802. Thus, the affected businesses are clearly identified and do not include retailers that incidentally sell small amounts of over-the-counter medications, such as convenience stores. The Policy Center can assist with identifying state-registered pharmacies located in your community.

Retailer Type (§ 9)

The model language prohibits retail pharmacies from selling a Covered Product by rendering those businesses ineligible for a tobacco retail license.

Sales Provision: Price-Discounted Sales

(Discussion on the rationale in Appendix C)

This sales provision prohibits a retailer from providing free samples of a Covered Product, which closes some gaps in state and federal law. Further, the model language prohibits a retailer from selling a Covered Product at a price lower than the price advertised by that retailer. By limiting the discounts and price promotions that a retailer may redeem, the policy removes opportunities for tobacco companies to circumvent existing price controls and manipulate the consumer price for Covered Products.

Definitions (§ 2)

Coupon. This term is defined to apply to a voucher presented at the point of sale that would reduce the price a consumer pays for a Covered Product.

Listed or Non-Discounted Price. This is the price (inclusive of taxes) at which the retailer offers the product, before the application of any discounts.

Discounted Sales Restricted (§§ 10 - 11)

The policy requires a retailer to display the price of each Covered Product and prohibits the sale of a Covered Product for less than

that advertised ("List") price. The retailer may not distribute a free sample of a Covered Product, and may not accept discount coupons for the purchase of a Covered Product, offer bulk discounts (*e.g.*, buy-one-get-one discounted), or otherwise charge less than the non-discounted per-unit price. The prohibition extends to providing a non-Covered Product in exchange for the purchase of a Covered Product.

Sales Provision: Flavored Products

(Discussion on the rationale in separate technical report, "Regulating Sales of Flavored Tobacco Products")

This provision prohibits the sale of a Tobacco Product or Electronic Aerosol Delivery System that imparts a Perceptible flavor other than the flavor of tobacco. The sales prohibition can extend to these products in the absence of marketing signaling the product's flavor characteristics. Identifying a Flavored Product can be complex, and the policy provides explicit authority to the enforcing entity to generate rules to assist enforcement.

Definitions (§ 2)

Flavored Product. This term is defined to include a Tobacco Product or Electronic Aerosol Delivery System that has a noticeable (Perceptible) non-tobacco flavor. The term does not reach a product that is in its unfinished form (*i.e.*, still undergoing the manufacturing process). Likewise, a Flavored Product is defined to capture a product when its perceivable non-tobacco flavor is innate, and not caused by an additive (or "Constituent").

Finally, the term does may not capture flavored iterations of all the products regulated by New York's ATUPA—namely, herbal cigarettes, herbal shisha, bidis, and gutka. While the policy requires a license to sell these products, a retailer may be authorized to sell these products, even if they impart a perceptible non-tobacco flavor.

A product that is marketed as having a flavor (other than tobacco flavor), is a "Flavored Product" under the policy. This marketing includes public statements by the manufacturer or its agents, or the licensed retailer. A product is not considered a Flavored Product based on its ingredients; a product is determined to be flavored based on how it smells or tastes.

Accordingly, a product does not *have to be* marketed as imparting a non-tobacco flavor in order to satisfy the definition of "Flavored Product." Rather, if a consumer tastes or smells a non-tobacco flavor in a product, then by definition that product is a "Flavored Product."

Perceptible. This term is defined to support the definition of Flavored Product. This helps to clarify that a product may be determined to be flavored when a smell or taste other than natural tobacco is evident, no matter whether tobacco flavor is also present.

Constituent. The policy extends to products where the source of the Perceptible flavor (other than tobacco flavor) is an additive, rather than innate to the product. In other words, the noticeable flavor must come from an ingredient that was added during the manufacturing process or produced during consumption of the product. A Constituent includes a substance added by a manufacturer, other than tobacco, water, or reconstituted tobacco sheet, or propylene

glycol or vegetable glycerin (two common ingredients in vapor products).

For a *leaf tobacco* product this means that the Flavored Product has a Perceptible flavor other than tobacco, and that flavor is not derived from the natural or cured tobacco leaf alone, but rather from a Constituent.

In contrast to products containing tobacco leaf, e-cigarettes are entirely synthetic. Accordingly, any taste or smell must be the result of a constituent, meaning that only tobacco-flavored or flavorless e-cigarettes remain permissible for sale under the model provision.

Some components or parts, such as a glass pipe, plastic mouthpiece, battery, or metal vaporizer, do not taste or smell like tobacco; any smell or taste a product like this has would not be coming from a "Constituent." For these items, it is not problematic for them to taste or smell "different from tobacco."

Other types of components or parts—such as separately sold flavoring, rolling papers, flavor cards, or flavor capsules—are typically flavored by a Constituent. In those cases, the only versions permitted for sale would be those that impart a tobacco flavor.

Emission. The policy reaches products that themselves impart a perceivable flavor other than tobacco, and also products where that perceivable flavor is in a byproduct (such as smoke, vapor, or spit).

Limitation on the Sale of Flavored Products (§12)

By relying on the definitions described above, this section prohibits the sale of a Flavored Product by a locally-licensed Tobacco Retailer.

Findings of Fact (§ 1)

Appendix B contains findings of fact that can express a municipality's purpose in adopting the policy. These findings are important because, upon challenge, a reviewing court may look to the findings to help justify and to interpret the government-imposed restrictions. The findings focus on explaining the problem of tobacco (and other Covered Products) use, exposure to retail tobacco marketing, including price promotions and flavored products (and in particular on youth and disadvantaged populations), and how the policy addresses the problems.

The model findings may be supplemented with localized findings of fact detailing the problem. These findings may come from local surveillance of tobacco use rates; the number, type, or location of existing tobacco retailers in the community; local rates of compliance with ATUPA and other federal, state or local laws; or differential pricing of products across the community. Additional supporting information and exhibits may be introduced at public hearings and become part of the record supporting the local policy.

Part V. Legal Considerations and Potential Challenges

The State of New York possesses broad authority to promote the public health and welfare of its residents. Through state law, New York has conveyed its authority to municipalities, giving them the authority to promote health by regulating the sale of tobacco products through means such as tobacco retail licensing requirements.[107]

This section addresses pertinent New York court decisions about licenses and other

tobacco sales restrictions. It also discusses potential legal challenges to the implementation of a licensing system that incorporates tobacco retail outlet density reduction and other tobacco control measures. Tobacco companies have consistently used litigation (or the threat of litigation) to thwart the implementation of effective public health regulations that may harm their bottom line. The model policies have been developed with New York local legal authority and potential legal challenges in mind.

Licenses Are Not Property: Potential "Takings" Challenges

Legal challenges to licensing systems can occur when a license application is denied, or a license is revoked. Under the system presented in this report, licenses are indeed restricted to outlets satisfying number, location, or type criteria and compliance with other laws. A "takings" challenge may result, brought on the grounds that the license is property and the government cannot take a person's property without offering due process protections and/or compensation. Yet there is no "right" to sell tobacco, and New York courts have consistently held that licenses are *not* property[108]—they are personal privileges that do not carry any property rights.[109] Because a license is not considered a property right in New York, a person denied licensure for objective reasons is unlikely to convince a court that an illegal taking occurred, or that the taking was achieved in an unconstitutional manner.

New York's highest court held in 1907 that "a license is not a contract or property, but merely a temporary permit issued in the exercise of the [government's inherent] powers to do that which otherwise would be prohibited."[110] In that case, the New York City Department of Health had revoked a milk vendor's permit to sell and deliver milk after the vendor was convicted four times for selling unsafe milk.[111] The vendor sued, arguing he was entitled to notice and a hearing.[112] The vendor claimed that his milk distribution business was his property, and that through the revocation of the permit he was deprived of his property.[113] The Court rejected this argument, explaining that:

> [H]e knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it become [sic] the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted.[114]

In a subsequent case, a New York City ordinance set distance requirements between garages holding certain hazardous substances and specific buildings, such as schools.[115] As a result of the ordinance, an applicant was denied a license for his garage.[116] The applicant challenged the license denial, arguing that the denial unfairly impacted his economic and property interests.[117] New York's highest court held that the law and the corresponding license denial were valid, even if the garage had been issued past licenses while holding the restricted hazardous substances.[118]

In yet another case, the New York State Liquor Authority denied a restaurant owner's application for a liquor license because the restaurant was associated with illegal gambling.[119] A New York appeals court held, "[a] license to sell alcoholic beverages is not a property right, but simply permission granted in the State's discretion after weighing the dangers posed to the community if the license is issued."[120] In a factually similar case, the New York State Liquor Authority denied an application for a liquor license due to past violations of the Alcoholic Beverage Control Law.[121] Again, the court determined that a license to sell liquor is not a property right, and grants the applicant authority to sell alcohol without creating a contractual relationship.[122]

New York courts have never ruled on the precise issue of whether the revocation or refusal to issue a tobacco retailer license constitutes a taking, yet it appears likely that the courts would similarly conclude that tobacco registrations or licenses are not property and that the refusal to issue or renew a retail tobacco license does not raise taking issues, even if existing retailers are rendered ineligible under a new licensing system (either immediately or after a prescribed period of time).

Denial of a license is not even a partial taking.

Some opponents to local retail licensing may claim that a denial, revocation, or prohibition on transfers of a retail license reduces the value of his or her property (*e.g.*, the business as a whole). Notwithstanding such a claim, a well-crafted licensing system is likely to survive the balancing test employed by the court. A party challenging a law as a regulatory taking must meet a high threshold to overcome the "presumption of constitutionality" of government regulation.[123] A property owner may allege a regulation resulted in diminished property value, therefore taking *some* of the property to which the owner is entitled to compensation. A court would evaluate this claim by weighing the extent of the "intrusion" on the private property interests against the government interest served by the regulation.[124]

A municipality should be able to demonstrate that the government interest served by a tobacco retailer licensing system far outweighs any diminution in value of the business itself. Specifically, given the abundance of evidence that the mere presence of tobacco products (and the associated marketing) in retailer outlets—particularly near schools and in disadvantaged communities—influences tobacco use, the government has a significant interest in limiting the availability of this lethal and addictive product. When balanced against the intrusion of such a sales restriction on retailers, the government interest should prevail.

License Fees

In New York, a municipality may seek to fund the licensing regulation through revenue from licensing fees. Unlike a tax, which may be used to raise revenue to fund general operations (but which most New York municipalities may not impose without special permission), a license fee must correspond to the cost of administering and enforcing the licensing system. Care should be taken with tobacco licensing-related fee calculation to ensure that the fees are not challenged as an illegal "tax" for general revenue-generating purposes.

Tip: License Fees Critical to Support Program

Municipalities should carefully consider the resources necessary to support its license program. This will require compiling a list of all tobacco outlets in the community; departments that will be involved in (and incur costs due to) the administration or enforcement of the licensing system; staff that will be involved in implementation and enforcement; basic information for each position including salary and benefits; the number of hours that will be spent by each staff on license-related tasks (including, but not limited to, identifying outlets not required to register with the state; inspecting applicant premises; developing educational materials and educating licensees; identifying locally regulated products (*e.g.*, e-cigarettes), and enforcing license conditions); and estimated non-payroll costs, including overhead and program evaluation costs. The Policy Center maintains a license fee calculator, and municipalities may contact the Center for support for gathering the appropriate information.

New York case law is instructive and directs governments to set a licensing fee at an amount that will fund the cost of administering and enforcing the licensing system.[125] For example, when building permit fees set by the Commissioner of Health Services were challenged, New York's highest court found that the fee was valid because it was based on a study that established the department's costs in issuing the permits.[126] The study calculated the number of inspections conducted, related enforcement services, and department expenses.[127] Since there was a "reasonable correspondence" between the cost of enforcement and the amount of the permit fee, the court upheld that the fee.[128]

A lower New York court held that an ordinance that required the payment of a license fee by peddlers and transient merchants was valid because "[a] license fee may be imposed under such an ordinance which is sufficient to compensate the municipality for the expense of issuing and recording the license, for securing police control over the matter licensed, and for the cost of inspecting and regulating such business. To that extent any fee imposed is not a tax on the business."[129] Because the fee specifically funded the municipality's costs in implementing and enforcing the licensing program, the court found that the fee was not a tax.

In another New York case regarding the legality of license fees, medical doctors challenged registration fees required by the Department of Health for X-ray equipment and radioactive materials installations.[130] In that instance, the court found that license fees must be narrowly tailored to fund the cost of enforcement, reasoning:

> In dealing with a licensing or registration fee imposed by an administrative agency . . . such a fee may not exceed the sum which will compensate the licensing or registration authority, for issuing and recording the license or registration and pay for the inspection to see the enforcing of the licensing or registration provisions.[131]

When it cannot be established that a fee is used to satisfy the cost of the licensing program, the court may find it to be an illegal tax. For instance, when a village in New York increased a residential permit fee and the fee was challenged, an appeals court found that because the village did not provide sufficient supporting documentation to justify the new fee, the fee was not valid.[132]

These cases highlight the importance of documenting licensing and enforcement costs in order to determine a reasonable license fee. Note that a reasonable license fee can be used to fund a wide range of activities that are necessary to successfully maintain a tobacco retail licensing program. For example, fees may be used, among many other things, to fund the issuance of licenses, education of the regulated businesses and the public, new or additional staff, inspector training, enforcement inspections, and production of related signage and materials.[133]

Prohibiting the Sale of Flavored Products

Nationwide, local policy solutions to the problem of flavored Tobacco Products and other Covered Products are gaining attention and momentum. Generally, federal law does not prohibit state and local governments from regulating the sale of tobacco. Federal courts have affirmed this broad authority in legal challenges brought by the tobacco industry, including ordinances restricting flavored tobacco sales currently in effect in New York City, NY and Providence, RI. [134]

This said, there are many legal considerations to be aware of when drafting a flavored tobacco sales regulation. Our separate technical report, "Local Regulation of Flavored Tobacco Product Sales," identifies interventions, considerations, as well as legal risks and best practices.

Restricting Price Promotions

Courts have upheld restrictions on the sale of discounted tobacco products.[135] Most relevant, in 2014, tobacco companies and retailers unsuccessfully challenged New York City's restriction on selling tobacco products below the advertised price, implemented through a restriction on the redemption of coupons and other price promotion. The U.S. District Court upheld the local law, finding:

- the sales restriction does not impermissibly hinder tobacco companies' ability to communicate with adult consumers about product price and value in violation of the First Amendment;
- the local law is a content-neutral regulation on the time, place, or manner of cigarette promotions, and thus is not preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA); and
- the local law restricts the sale of discounted products, and is not preempted by ATUPA, which addresses the distribution of free tobacco products.[136]

An earlier similar law was adopted by Providence, RI and upheld on similar grounds by the U.S. Court of Appeals for the First Circuit.[137]

For more detailed analysis of legal arguments opposing local price promotion restrictions and courts treatment of them, review our report, Tobacco Price Promotion: Local Regulation of Discount Coupons and Certain Value-Added Sales.

Pharmacy Sales Restrictions

In 2008, the City and County of San Francisco became first in the U.S. to prohibit tobacco sales by stores with pharmacies. The ordinance was challenged on several grounds, and ultimately prevailed, with a modified version of the original remaining in effect. Phillip Morris first brought suit, claiming that the sales restriction violated tobacco companies' First Amendment free speech protections. The

District Court rejected the First Amendment claim and the lawsuit failed. Walgreens then filed a lawsuit against the city alleging that restriction's exemption of pharmacies located in grocery and "big box" stores violated the equal protection right of stand-alone pharmacies to be treated the same as pharmacies that operate as departments. The lower court agreed with Walgreens, and found that the sales restriction violated the fourteenth amendment. In response to the court's decision, San Francisco amended the law and removed the exemptions. The amended law subsequently survived a Due Process claim. Below is a more detailed summary of the three litigated claims.

First Amendment

Philip Morris filed a lawsuit in federal court claiming that San Francisco's pharmacy sales restriction infringed on the company's ability to communicate with customers, thus, violating the company's freedom of speech.[138] The free speech claim was based on the First Amendment of the U.S. Constitution, which protects a business's ability to legitimately communicate truthful information about its products.[139] Philip Morris contended that the "product itself is a form of advertisement" and therefore, should be considered speech. In addition, the company argued, the law's ban on pharmacies carrying its products would impact the company's decision to include pharmacies in its "'Retail Leaders' program, which provides retailers with advertising and promotional materials."[140] The District Court agreed with the city that the ordinance only "prohibits conduct, tobacco sales, not speech about tobacco," explaining there was "nothing inherently expressive about selling tobacco products in pharmacies that would warrant First Amendment protection."[141] Further, the court found that it was a "voluntary business decision" for Philip Morris to stop paying to advertise (such as, its Retail Leaders' program) in pharmacies.[142]

Equal Protection

Walgreens filed a lawsuit in state court challenging San Francisco's 2008 ordinance prohibiting Walgreens, as a stand-alone pharmacy, from selling tobacco products while exempting pharmacies located within larger stores from the prohibition.[143] Walgreens argued the city's ordinance violated the federal and state constitutions' equal protection clauses, which require "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."[144] Specifically, the pharmacy argued that the ordinance's different treatment of a stand-alone drug store versus a pharmacy department inside a retail store was unreasonable because the differential treatment was "not rationally related to a legitimate legislative end."[145]

San Francisco justified the different treatment based on the "implied message" sent by a stand-alone pharmacy selling tobacco products alongside healthcare-related goods. The district court dismissed the case however, the California Court of Appeals decided in favor of Walgreens and found that the restriction's exemptions could be unconstitutional under the fourteenth amendment. In 2010, San Francisco's Board of Supervisors amended its health code "to eliminate the exemptions for general grocery stores and big box stores from the general ban on the sale of tobacco products in pharmacies."[146]

Due Process

Safeway, a chain grocery store containing a pharmacy, challenged San Francisco's newly amended pharmacy sales restriction

(without exemptions) alleging that the ban deprived the chain of its property rights without due process. The store, Safeway argued, had been issued permits to sell both pharmaceuticals and tobacco products, however, the new law would require that Safeway choose between selling pharmaceuticals or tobacco. The court held that San Francisco's restriction did not violate the Due Process Clause, but rather, was a reasonable and permissible use of its police powers.[147] This 2010 tobacco-free pharmacy ordinance remains in effect, today joined by several California jurisdictions, hundreds of Massachusetts communities,[148] and most recently, New York City and Albany, Erie, Rockland, and Suffolk Counties in New York State.[149] While tobacco-free pharmacy laws have not faced further legal challenge, interested state and local governments should consult local legal counsel to assess special considerations associated with restricting tobacco sales by current tobacco retailers.

Part VI. Implementation, Funding, Enforcement

It is important for municipalities to carefully plan each aspect of the implementation and enforcement of a tobacco retail licensing system. The municipality will need to address (a) which agency will be in charge of implementing the system and issuing the licenses, (b) from where the financial resources to support the program will come, (c) how the tobacco retail licensing system will be enforced and (d) how the municipality will educate retailers about the new requirements.

Implementation

In New York, a tobacco retail licensing system could be enacted at the county level or by a city, village, or town.[150] In addition, local boards of health have some authority to pass regulations "necessary and proper for the preservation of public health."[151] The powers and limitations of the particular government entity seeking to implement a licensing system must be carefully considered when determining the shape and substance of the system. The licensure process will also depend on the type of government enacting the measure, and the specifics of the local government's procedures.

Regardless of the level of government involved, a public hearing of the law will occur before approval. This provides an opportunity for public comment on the proposed law. This is also an opportunity for tobacco control advocates to provide research and data—including local data—demonstrating the value of implementing tobacco retail licensing to regulate tobacco sales to safeguard youth and public health. While the economic concerns of retailers should not be dismissed, paramount are the law's objectives of reducing the leading cause of preventable disease, disability and death, specifically through preventing youth from starting to use tobacco, supporting tobacco users' efforts to quit, and narrowing tobacco-related health disparities across subpopulations.

Once the public hearings have taken place and the measure has been approved, there should be a period of time, as specified in the law, between enactment and enforcement of the law. Each municipality or county must decide who will issue the tobacco retail licenses. In several communities that license tobacco retailers, a single agency took a lead role in addressing the implementation challenges.[152] For example, in Los Angeles,

California, the city attorney's office took the lead on implementing its local tobacco retail licensing ordinance.[153] Some municipalities chose to have an agency that already administers commonly held licenses—like business licenses or police or fire permits—administer tobacco retail licenses.[154] The Policy Center strongly recommends that a local health agency run the licensing system, since that agency has the strongest public health interests and related expertise.

The licensing agency should begin educating retailers about the law immediately after the law is adopted. A list of local conventional tobacco product retailers can be compiled from state tobacco retail registration records (available at www.health.data.ny.gov). Local retailers who are not required to register with the state (*e.g.*, hookah bars) may be more difficult to identify; municipalities may use internet resources (crowd sourcing/business listing)[155] and community surveys, but should consider other resources to assist with that task. Describe and circulate what is required and what is permissible under the new law; this communication may be published online and also sent to all retailers via post and email. Be sure to communicate the rationale behind the licensing system and otherwise place the law in the proper health context. Finally, invite retailers to contact the overseeing agency for details on compliance with the law, and prepare the enforcing agency to assist retailers with compliance questions and activities.

Funding

In order to implement a tobacco retail licensing program, each municipality must establish a funding source for the administration of the licenses. The bulk of the financial support for a licenses system can be license fees. Recall that a municipality may impose a license fee adequate to reimburse the costs associated with implementing and enforcing the license system. These costs include, but are not limited to, developing the license, purchasing office equipment, hiring and training staff, developing and distributing educational material about the license requirement.

In addition to the license fee itself, some assistance may be available from federal sources. Under the Synar Amendment, which Congress enacted in 1992, the states must enforce certain tobacco control laws and report the status of enforcement to the Secretary of the U.S. Department of Health and Human Services.[156] The Substance Abuse and Mental Health Administration, the federal agency responsible for implementing the Synar Amendment, collaborates with states to identify funding opportunities for enforcement of tobacco control laws like tobacco retail licensing.[157]

Tip: Tracking and Monitoring

When setting up the licensing system, consider what kind of information is necessary or important to collect and how best to set up the system to evaluate its effectiveness and its impact on public health. Carefully think about what information should be requested on the license application and what information needs to be gathered during compliance checks. Best practices include assigning the same license tracking number for the same applicant and location during the renewal process and requiring regular compliance reporting from the licensing agency. Speak with enforcement, evaluation, and public health policy experts during the planning and implementation processes in order to create the most effective and sustainable licensing system possible.

Further resources may be available through the Food and Drug Administration via a provision in the Tobacco Control Act.[158]

Other funding sources for municipalities may include state grants, funds from local/county health departments, city funds, litigation settlement funds, or some combination of these funding sources.[159]

Enforcement

A licensing system by its nature includes strong mechanisms for enforcement of its restrictions and other ancillary laws. License fees may pay for periodic inspections to ensure compliance. To conserve resources and reduce additional costs, consider whether the enforcement agency can collaborate with other agencies or combine the tobacco retail licensing inspections with other mandatory inspections. For example, explore whether inspections could be combined with ATUPA inspections.

Licensing systems are powerful tools in part because the two most common penalties employed—fines and the suspension or revocation of the tobacco retail license—provide substantial incentives to comply with the law. Regular, consistent, and fair enforcement of the law is required to ensure that the licensing system works effectively to deter illegal conduct.

Identifying Challenges

Municipalities face various challenges when implementing and enforcing a tobacco licensing system. Fortunately, with communication and forethought, these challenges need not become obstacles.

Despite the local licensure requirement for tobacco retailers to identify themselves to the administering agency, many retailers fail to do so, making it difficult for the agency to find those retailers.[160] It is especially hard to find unconventional tobacco retailers, like delicatessens or doughnut shops, selling tobacco products without a license.[161] It also might be difficult for the enforcement agency to keep track of retailers in larger municipalities, where keeping an updated list is more challenging.

Some common challenges to implementing a retail licensing system include lack of communication between enforcement agencies, failure to follow through on citations issued to and prosecutions of violators, failure to make enforcement a priority, inaccurate and incomplete retailer lists, lack of retailer education about the new requirements, and lack of program funding. Tobacco control policies often bring to a head tensions between competing interests, and for this reason it is essential that local governments planning to enact tobacco control laws bring together key stakeholders and define a strategy to implement and enforce these local laws. Throughout enactment and enforcement, tobacco control advocates and local government representatives may be receptive to legitimate concerns of retailers, yet the focus must remain on achieving the public health objectives of the licensing system.

Conclusion

Tobacco retail licensing is a powerful tool that can help ensure compliance with youth access restrictions and other tobacco-related laws. Further, local tobacco retail licensing can bolster equity-promoting sales policies, by reducing exposure to harmful tobacco marketing.

In sum, local governments have compelling reasons to utilize their police powers to:

- Limit the number of retail outlets selling tobacco products;
- Reduce retail clustering and restrict the sale of tobacco products near youth-centered places;
- Bar retail pharmacies from selling tobacco products;
- Prohibit the sale of flavored products; and
- Restrict tobacco industry price manipulation.

Local tobacco retail licensing laws are an effective way to achieve these objectives. New York communities interested in learning more about their options may contact The Public Health and Tobacco Policy Center.

[1] Lawrence O. Gostin, Lindsay F. Wiley & Thomas R. Frieden, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, xvii and xx (3rd edition ed. 2016) [hereinafter, PUBLIC HEALTH LAW]; N.Y. Const. art. 17, § 3.
[2] PUBLIC HEALTH LAW, *supra* note 1 at 8, 10-11 ("The first thing public officials owe to their constituents is protection against natural and human made hazards."); Lawrence O. Gostin, A THEORY AND DEFINITION OF PUBLIC HEALTH LAW, (Georgetown Law Fac. Publ. Works 2008), http://scholarship.law.georgetown.edu /facpub/95; *see id*. at xxiii ("We also have an obligation to protect and defend the community as a whole against threats to health, safety, and security.").
[3] Royce v. Rosasco, 287 N.Y.S., 692, 703 (N.Y. Sup. Ct.1936); PUBLIC HEALTH LAW, *supra* note 1 at 11; People v. Buyce, 97 A.D.2d 632, 632 (N.Y. App. Div.1983).
[4] *E.g.*, N.Y. ENVTL. CONSERV. LAW § 33-1301(1) (restricting sale of unregistered, mislabeled or improperly packaged pesticides).
[5] *E.g.*, N.Y. ENVTL. CONSERV. LAW § 37-0505 (restricting sale of products containing bisphenol A).
[6] N.Y. DIVISION OF LOCAL GOV'T SERVICES, Creating the Community You Want: Municipal Options for Land Use Control 13 (2009).
[7] *E.g.*, TOWN OF GLEN, N.Y. ZONING CODE § 4.03(B)(8) (restricting fuel sales and storage to commercial zones by special permit).
[8] N.Y. PENAL LAW § 400.00 (McKinney 2020) (requiring license to sell firearms as gunsmith or dealer).
[9] N.Y. ALCO. BEV. LAW § 100 (McKinney 2020) (requiring license for manufacture and sale of alcoholic beverages).
[10] N.Y. EDUC. LAW § 6803 (McKinney 2020) (requiring license to practice pharmacy).
[11] Robert N. Proctor, *Why ban the sale of cigarettes? The case for abolition*, 22 TOB. CONTROL i27, i27 (2013).
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[95] *Id.* at §§ 480-a(1) and §§ 1183(b)-(c).
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[102] *Id.* at § 1399-gg.
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[104] N.Y. MUN. HOME RULE LAW § 27 (requiring filing with Secretary of State with 20 days of enactment).
[105] *E.g.* VILLAGE OF DOLGEVILLE, N.Y., LOCAL LAW 2 OF 2019.
[106] *E.g.* NEW YORK CITY, N.Y., ADMIN. CODE § 20-202 d(1)(D), SAN FRANCISCO, CAL. ORD. § 19H.5.
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[108] People *ex rel.* Lodes v. Dep't of Health of City of N.Y., 82 N.E. 187 (N.Y. 1907); New York *ex rel.* Lieberman v. Van De Carr, 67 N.E. 913 (N.Y. 1903); Clubhouse, Inc. v. N.Y. State Liquor Auth., 521 N.Y.S.2d 190 (N.Y. App. Div. 1987).
[109] Lodes, 82 N.E. at 192; *see also* Clubhouse, 521 N.Y.S.2d at 190-191 ("A license to sell alcoholic beverages is not a property right, but simply permission granted in the State's discretion after weighing the dangers posed to the community if the license is issued[.]" (internal citations omitted)).

[110] Lodes, 82 N.E. at 192.
[111] *Id.* at 189.
[112] *Id.* at 190.
[113] Ibid.
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[115] In re McIntosh, 105 N.E. 414, 415 (N.Y. 1914).
[116] Ibid.
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[119] Clubhouse, 521 N.Y.S.2d at 190.
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[121] Pizzaguy Holdings, L.L.C. v. N.Y. State Liquor Auth., 833 N.Y.S.2d 769, 770 (N.Y. App. Div. 2007).
[122] *Id.* at 771.
[123] Dawson v. Higgins, 197 A.D.2d 127, 135-136 (1994).
[124] Friedenburg v. New York State Dept. of Environmental Conservation, 3 A.D. 3d 86, 96 (2003); *see also* Metropolitan Ass'n of Private Day Schools, Inc. v. Maumgartner, 41 Misc.2d. 560, 566 (1963) (reduced income does not establish denial of due process).
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[126] Suffolk Cnty Builders Ass'n, 389 N.E.2d at 134-37.
[127] *Id.* at 134.
[128] *Id.* at 137.
[129] Dugan Bros., 269 N.Y.S. at 845.
[130] Nitkin v. Adm'r of Health Servs. Admin. of N.Y., 91 Misc. 2d 478, 479 (N.Y. Sup. Ct. 1975).
[131] Id.
[132] ATM One, 714 N.Y.S.2d at 722.
[133] Suffolk Cnty Builders Ass'n, 389 N.E.2d, *supra* note 134 at 621 (holding licensing fees are permissible when there is "reasonable correspondence" between the cost of enforcement and amount of the fee).
[134] U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 703 F. Supp. 2d 329 (S.D.N.Y. 2010); National Association of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (2013); *see also* SAN FRANCISCO, CAL., HEALTH CODE, ORD. 140-17 (Aug. 6, 2017) (prohibiting the sale of menthol flavored tobacco and e-liquids); MINNEAPOLIS, MINN., CODE § 281.15 (2017) (restricting the sale of menthol cigarettes to adult-only tobacco shops and liquor stores).
[135] Nat'l Assoc. of Tobacco Outlets, Inc. v. Providence, 731 F.3d 71 (2013).
[136] Nat'l Assoc. of Tobacco Outlets, Inc. v. New York, 27 F. Supp.3d 415 (2014).
[137] *See supra* 135.
[138] Ibid.
[139] Philip Morris USA, Inc. v. City & County of S.F., No. C 08-04482, 2008 WL 5130460 at 2 (N.D. Cal. Dec. 5, 2008), *aff'd*, 345 Fed. App'x. 276 (9th Cir. 2009).
[140] Ibid.
[141] *Id.* at 3.
[142] *Ibid; see also* Philip Morris USA Inc. v. San Francisco, 345 Fed. App'x. 276, 277 (9th Cir. 2009) (selling cigarettes isn't protected activity "because it doesn't involve conduct with a 'significant expressive element'" (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 701-02 (1986))).
[143] Walgreen Co. v. San Francisco, 110 Cal. Rptr. 3d 498 (Cal. Ct. App. 2010).
[144] *Id.* at 504 & 506 (challenging that the ordinance violates equal protection guarantees of the U.S. CONST. amend. XIV and CAL. CONST., art. I, §7.).
[145] *Id*. at 506.

[146] Board of Supervisors, City and County of San Francisco, Meeting Minutes (Draft) (Sept. 28, 2010), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/minutes/2010/m092810.pdf (last visited Jan 28, 2020).
[147] Safeway Inc. v. City and County of San Francisco, 797 F.Supp.2. 964, 971 (2011).
[148] *See e.g.*, BOSTON PUB. HEALTH COMM'N, Boston, MA, Boston Pub. Health Comm'n, Regulation Restricting the Sale of Tobacco Products in the City of Boston, § 3 (2008); EVERETT, MASS. REGULATION RESTRICTING THE SALE OF TOBACCO PRODUCTS (2010); NEEDHAM, MASS., BOARD OF HEALTH REGS. art. 1 (2009); NEWTON, MASS., ORD. no. Z-55 (2012). MASS. MUNICIPAL ASSOC., LOCAL SUMMARY ON TOBACCO SALES BANS IN PHARMACIES (April 21, 2017) (on file with author) (reporting 152 municipalities in Massachusetts had adopted prohibitions on pharmacy tobacco sales); MARIN CNTY, CAL., CODE OF ORDINANCES, § 5.80.040, § I, (2014); RICHMOND, CAL., Ord. 38-09 (Nov. 17, 2012).
[149] ROCKLAND CNTY, N.Y., LOCAL LAW 1 OF 2017; ERIE CNTY, N.Y., LOCAL LAW 6 OF 2018; ALBANY CNTY, N.Y., LOCAL LAW A OF 2018; SUFFOLK CNTY, N.Y., ADMIN. CODE § 792-42; NEW YORK CITY, N.Y., ADMIN. CODE § 20-202.
[150] N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (McKinney 2020).
[151] N.Y. PUB. HEALTH LAW § 308 (McKinney 2020).
[152] TECHNICAL ASSISTANCE LEGAL CTR., Case Studies: On the Implementation and Enforcement of Local Tobacco Retailer Licensing Ordinances in California 8 (2006) *available at* https://www.changelab solutions.org/product/case-studies-implementation-and-enforcement-local-trl-ordinances-california (last visited Jan 28, 2020).
[153] Ibid.
[154] *Id.* at 11.
[155] *See* Hongying Dai & Jianqiang Hao, *Geographic Density and Proximity of Vape Shops to Colleges in the USA*, 26 TOB. CONTROL 379, 380 (2016) (locating stores using guidetovaping.com, yellowpages.com, yelp.com); *see also* Joseph G. L. Lee et al., *Identification of Vape Shops in Two North Carolina Counties: An Approach for States without Retailer Licensing*, 13 INT. J. ENVIRON. RES. PUBLIC. HEALTH 1050, 1052-1053 (2016) (locating stores using Google maps, Reference USA, YellowPages.com, Yelp.com).
[156] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 82 at 3.
[157] *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., Substance Abuse and Mental Health Block Grants (April 22, 2019), *available at* https://www.samhsa.gov/grants/block-grants (last visited Jan 28, 2020).
[158] Ibid.
[159] TECHNICAL ASSISTANCE LEGAL CTR., *supra* note 165 at 10.
[160] *Id.* at 11.
[161] Ibid.

Notes about the model policy:

Policy variables (e.g. names, dates, fees, outlet caps, buffer zones, agencies) are offset with bolded, bracketed text that is intended to be replaced with the variable appropriate for the implementing community. Other decision points are flagged throughout the model by the orange icon (shown left), indicating accompanying commentary that will appear in a speech bubble when hovering a cursor over the icon. Note that this function is supported by PDF viewers such as Adobe Acrobat and Google Chrome; when using other Internet browsers, a reader may need to first download the document in order to view the commentary.

This model provides guidance on policy language, and is intended for use in consultation with local counsel and a public health attorney. Check our website and contact the Policy Center for the most current legal and policy information, as well as how these impact the policy language.

Appendix A: New York Model Policy for Tobacco Retail Licensing

Regulating sales of tobacco products by regulating tobacco retailer number, location, and type; the sale of price-discounted products; the sale of flavored products

A LOCAL LAW

To amend the [referenced chapter], in relation to regulating the sale of tobacco products in the [Municipality]

Be it enacted by the **[Council/Legislature]** as follows:

Section 1. Findings of Fact *[see Appendix B]*

§ 2. Definitions. As used in this local law, the following terms shall have the meanings indicated:

ACCESSORY means a product that is intended or reasonably expected to be used with or for the human consumption of a Tobacco Product or Electronic Aerosol Delivery System; does not contain tobacco and is not made or derived from tobacco; and meets either of the following: (1) is not intended or reasonably expected to affect or alter the performance, composition, Constituents, or characteristics of a Tobacco Product or Electronic Aerosol Delivery System; or (2) is intended or reasonably expected to affect or maintain the performance, composition, Constituents, or characteristics of a Tobacco Product or Electronic Aerosol Delivery System but (a) solely controls moisture and/or temperature of a stored Tobacco Product or Electronic Aerosol Delivery System, or (b) solely provides an external heat source to initiate but not maintain combustion of a Tobacco Product. “Accessory” includes, but is not limited to, carrying cases, lanyards, lighters, and holsters.

APPLICANT means an individual, partnership, limited liability company, corporation, or other business entity seeking a Tobacco Retail License.

COMMISSIONER means the Commissioner of the Department.

COMPONENT OR PART means software or assembly of materials intended or reasonably expected: (1) to alter or affect the Tobacco Product's or Electronic Aerosol Delivery System's performance, composition, Constituents, or characteristics, or (2) to be used with or for the human consumption of a Tobacco Product or Electronic Aerosol Delivery System. "Component or Part" excludes a Constituent and an Accessory, and includes, but is not limited to e-liquids, cartridges, certain batteries, heating coils, programmable software, rolling papers, and flavorings for Tobacco Products or Electronic Aerosol Delivery Systems, whether they are sold together or separately.

CONSTITUENT means an ingredient, substance, chemical, or compound, other than tobacco, water, reconstituted tobacco sheet, or propylene glycol or vegetable glycerin that is added by the manufacturer to a Covered Product during the processing, manufacture, or packing of the Covered Product.

COUPON means a card, paper, note, form, statement, ticket, voucher, image, or other article, whether in paper, digital or any other format, distributed for commercial purposes to be later surrendered, displayed, or scanned by the bearer so as to receive an item without charge or at a discount.

COVERED PRODUCT means a Tobacco Product, Electronic Aerosol Delivery System, or another product regulated by section 1399-cc of the public health law.

DEPARTMENT means the **[Department of XXX]**.

ELECTRONIC AEROSOL DELIVERY SYSTEM means an electronic device that, when activated, produces an aerosol that may be inhaled, whether or not the aerosol contains nicotine. Electronic Aerosol Delivery System includes a Component or Part but not Accessory, and a liquid or other substance to be aerosolized, whether or not separately sold. Electronic Aerosol Delivery System does not include drugs, devices, or combination products authorized for sale by the state or U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

EMISSION means a substance, chemical, or compound released or produced during use of a Covered Product. "Emission" includes, but is not limited to, smoke, aerosol, saliva, and sputum.

FLAVORED PRODUCT means a Tobacco Product or an Electronic Aerosol Delivery System containing a Constituent that imparts a Perceptible taste or aroma different from tobacco, or produces an Emission or byproduct that imparts a Perceptible taste or aroma different from tobacco.

A Tobacco Product or Electronic Aerosol Delivery System is presumed to be a Flavored Product if a Tobacco Retailer, manufacturer, or a manufacturer's agent or employee has: (1) made a statement or claim directed to consumers or the public, whether expressed or implied, that the Tobacco Product or Electronic Aerosol Delivery System, or an Emission or byproduct thereof, smells or tastes different from tobacco, or (2) taken action that would be reasonably expected to result in consumers receiving the message that the Tobacco Product or Electronic Aerosol Delivery System, or an Emission or byproduct thereof, smells or tastes different from tobacco. Provided that, however, no Tobacco Product or Electronic Aerosol Delivery System shall be

determined to be a Flavored Product solely because of the use of additives or flavorings or the provision of ingredient information.

Flavored Products shall not include tobacco-flavored or flavorless products.

LISTED OR NON-DISCOUNTED PRICE means the highest displayed price, before the application of any discounts, of a Covered Product, at the place where the Covered Product is sold or offered for sale, plus all applicable taxes if not included in the displayed price.

NEW TOBACCO RETAIL LICENSE means a Tobacco Retail License that is not a Renewed Tobacco Retail License.

PERCEPTIBLE means perceivable by the sense of taste or smell.

PERSON means a natural person, company, corporation, firm, partnership, business, organization, or other legal entity.

PHARMACY means a registered pharmacy as defined in section 6802 of the education law.

RENEWED TOBACCO RETAIL LICENSE means a Tobacco Retail License issued to an Applicant for the same location at which the Applicant possessed a valid Tobacco Retail License during the previous 12 months.

SCHOOL means a public or independent kindergarten, elementary, middle, junior high, or high school.

TOBACCO PRODUCT means a product made or derived from tobacco or which contains nicotine, marketed or sold for human consumption, whether consumption occurs through inhalation, or oral or dermal absorption. Tobacco Product includes a Component or Part, but not Accessory. Tobacco Product does not include drugs, devices, or combination products authorized for sale by the state or U.S. Food and Drug Administration as those terms are defined in the Federal Food, Drug and Cosmetic Act.

TOBACCO RETAIL LICENSE means a license issued pursuant to Section 3 of this local law by the Department to a Person to engage in the retail sale in **[Municipality]** of a Covered Product.

TOBACCO RETAILER means a retailer licensed pursuant to this local law.

YOUTH-CENTERED FACILITY means a School, park, playground, recreation center and **[any other facility frequented by youth]**.

§ 3. Tobacco Retail License Required.

(A) No Person shall sell, offer for sale, or permit the sale of a Covered Product by retail within **[Municipality]** without a valid Tobacco Retail License. A Tobacco Retail License is not required for a wholesale dealer who sells products to retail dealers for the purpose of resale only and does not sell a Covered Product directly to consumers.

(B) Notwithstanding the requirements set forth in **Section 3(A)**, this local law shall not apply to registered organizations pursuant to section 3364 of the public health law.

(C) A Tobacco Retail License issued pursuant to this local law is nontransferable and non-assignable and valid only for the Applicant and the specific address indicated on the Tobacco Retail License. A separate Tobacco Retail License is required for each address where a Covered Product is sold or offered for sale. A change in business ownership or business address requires a New Tobacco Retail License.

§ 4. License Application and Application Fee.

(A) An application for a New Tobacco Retail License or a Renewed Tobacco Retail License shall be submitted to the Department in writing upon a form provided by the Department and shall contain information as required by the Department. The Department may require the forms to be signed and verified by the Applicant or an authorized agent thereof.

(B) Each application for a Tobacco Retail License shall be accompanied by a nonrefundable application fee of **[$ApplicationFeeAmount]**, or as determined by the Commissioner.

(C) Upon the receipt of a completed application for a Tobacco Retail License and the application fee required by **Section 4(B)**, the Department shall inspect the location at which sales of a Covered Product are to be permitted. The Department may ask the Applicant to provide additional information that is reasonably related to the determination of whether a Tobacco Retail License may issue.

§ 5. Issuance of Licenses.

(A) No Tobacco Retail License shall be issued to a seller of a Covered Product that is not in a fixed, permanent location.

(B) The issuance of a Tobacco Retail License pursuant to this local law is done in **[Municipality's]** discretion and shall not confer upon licensee any property rights in the continued possession of the license.

(C) The Department shall collect from the Applicant the Tobacco Retail License fee proscribed in **Section 6(B)** prior to issuing a Tobacco Retail License.

(D) The Department may refuse to issue a Tobacco Retail License to an Applicant if it finds that one or more of the following bases for denial exists:

(1) The information presented in the application is incomplete, inaccurate, false, or misleading;

(2) The fee for the application has not been paid as required;

(3) The Applicant does not possess a valid certificate of registration required by state or federal law for the sale of a Covered Product;

(4) The Department has previously revoked a Tobacco Retail License issued under this local law to the Applicant;

(5) The Department has previously revoked a Tobacco Retail License issued under this local law for the same address or location;

(6) The Applicant has been found by a court of law or administrative body to have violated a federal, state, or local law pertaining to (a) trafficking in contraband Tobacco Products or illegal drugs, (b) the payment or collection of taxes on a Covered Product, (c) the display of a Covered Product or of health warnings pertaining to a Covered Product, or (d) the sale of a Covered Product;

(7) The Applicant has not paid to **[Municipality]** outstanding fees, fines, penalties, or other charges owed to **[Municipality]**, including the fee for the Tobacco Retail License required by **Section 6**; or

(8) The Department determines, in accordance with written criteria established to further the purposes of this local law, that the Applicant is otherwise not fit to hold a Tobacco Retail License.

§ 6. License Term and Annual Fee.

(A) A Tobacco Retail License issued pursuant to this local law shall be valid for no more than one year and shall expire on **[Date]**. As set forth in **Section 14**, a Tobacco Retail License may be revoked for cause by the Department prior to its expiration.

(B) The Department shall charge an annual Tobacco Retail License fee of **[$LicenseFeeAmt]**.

(C) The Commissioner may discount the Tobacco Retail License fee required by **Section 6(B)** for an application received within **[10]** months of the expiration date.

(D) Beginning two years from the effective date of this local law, the Department may annually revisit and modify the Tobacco Retail License fee required pursuant to **Section 6(B)**. This fee shall be calculated so as to recover the cost of administration and enforcement of this local law. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

§ 7. License Display.

(A) A Tobacco Retail License issued pursuant to this local law shall be conspicuously displayed at the location where a Covered Product is sold so that it is readily visible to customers.

(B) Selling, offering for sale, or permitting the sale of a Covered Product without a valid Tobacco Retail License displayed in accordance with **Section 7(A)** constitutes a violation of this local law.

§ 8. Number of Issued Licenses.

(A) The Department shall not issue more than **[X]** New Tobacco Retail Licenses within the first year of the effective date of this local law.

(B) For the first year after the effective date of this local law, the Department shall accept an application for a Tobacco Retail License only from:

(1) an Applicant for the same location at which the Applicant possessed a valid certificate of registration as a tobacco retail dealer or vapor products dealer from the New York State Department of Taxation and Finance 180 days prior to the effective date of this local law; or

(2) an Applicant for a location at which the Applicant exclusively sells non-tobacco shisha (hookah) and was in operation 180 days prior to the effective date of this local law.

(C) Thereafter, whenever the number of valid applications for a New Tobacco Retail License exceeds the maximum number of New Tobacco Retail Licenses that may be issued pursuant to this section, the Department shall grant Tobacco Retail Licenses using the following priorities:

(1) A Tobacco Retail License shall be granted, first, to an Applicant who will sell a Covered Product at an establishment where the operator takes reasonable steps to restrict entry to persons 21 years and older. If there are more valid applications from these Applicants than the number of available New Tobacco Retail Licenses, the New Tobacco Retail License(s) shall be granted to these Applicants by lottery;

(2) A Tobacco Retail License shall be granted, second, to an Applicant located **[1000]** feet or more from an existing Tobacco Retailer. If there are more valid applications from these Applicants than the number of available New Tobacco Retail Licenses, the New Tobacco Retail License(s) shall be granted to these Applicants by lottery;

(3) Any remaining New Tobacco Retail Licenses shall be granted to Applicants by lottery.

(D) Beginning one year from the effective date, the Department shall issue only one New Tobacco Retail License for every two Tobacco Retail Licenses that are not renewed.

§ 9. Retailer Location and Type.

(A) The Department shall not issue a Tobacco Retail License to an Applicant within **[1000 feet]** of the nearest point of the property line of a Youth-Centered Facility.

(B) Beginning one year from the effective date of this local law, the Department shall not issue a New Tobacco Retail License to an Applicant within **[1500 feet]** of the nearest point of the property line of another Tobacco Retailer.

(C) The Department shall not issue a Tobacco Retail License to an Applicant that contains a Pharmacy.

§ 10. Flavored Product Sales.

No Tobacco Retailer shall distribute without charge, sell, offer for sale, or possess with intent to sell a Flavored Product.

§ 11. Product Price Display.

A Tobacco Retailer must display the Listed or Non-Discounted Price of each Covered Product on each package or on easy-to-read shelf tags, or signs, located directly above or below or immediately adjacent to each Covered Product in accordance with section 197-b(2)(a) of the agriculture and markets law.

§ 12. Price Discounted Sales.

(A) No Tobacco Retailer shall distribute without charge, sell, offer for sale, or possess with intent to sell a Covered Product.

(B) No Tobacco Retailer, or employee or agent of same, shall accept or redeem a Coupon that reduces the price a consumer pays for a Covered Product to less than the Listed or Non-Discounted Price;

(C) No Tobacco Retailer, or employee or agent of same, shall accept or redeem a Coupon that permits the sale of a Covered Product to consumers through multi-pack discounts (*e.g.*, the sale of three packages for less than the combined price of each package), or otherwise allow a consumer to purchase a Covered Product or combination of Covered Products for less than the sum of the Listed or Non-Discounted Price for each Covered Product; or

(D) No Tobacco Retailer, or employee or agent of same, shall sell, offer for sale, distribute without charge, or otherwise provide a product other than a Covered Product to a consumer in exchange for the purchase of a Covered Product by the consumer.

§ 13 Violations and Enforcement.

(A) The Department or its authorized designee(s) shall enforce the provisions of this local law. The Department may conduct periodic inspections to ensure compliance with this local law.

(B) In addition to the penalties provided for in **Section 14**, a Person found to be in violation of this local law shall be liable for a civil penalty of not more than [**$250]** for the first violation, not more than [**$500]** for the second violation within a two-year period, and **not more than [$1000]** for the third and each subsequent violation within a two-year period, or as determined by the Commissioner. Each day on which a violation occurs shall be considered a separate and distinct violation

§ 14. Revocation of Licenses.

(A) The Department may suspend or revoke a Tobacco Retail License issued pursuant to this local law for violations of the terms and conditions of this local law or for violation of a federal, state, or local law or regulation pertaining to (a) trafficking a contraband Covered Product or illegal drug, (b) the payment or collection of taxes on a Covered Product, (c) the display of a

Covered Product or of health warnings pertaining to a Covered Product, or (d) the sale of a Covered Product.

(B) The Department may revoke a Tobacco Retail License if the Department finds that one or more of the bases for denial of a license under **Section 5** existed at the time application was made or at any time before the license issued.

§ 15. Rules and Regulations.

The Department may issue and amend rules, regulations, standards, guidelines, or conditions to implement and enforce this local law.

§ 16. Severability.

The provisions of this local law are declared to be severable, and if a section of this local law is held to be invalid, the invalidity shall not affect the other provisions of this local law that can be given effect without the invalidated provision.

§ 17. Effective Date.

This local law shall take effect **[45]** days after filing with the Secretary of State as required by section 27 of the municipal home rule law.

Appendix B: Findings of Fact

for New York Model Policy for Tobacco Retail Licensing

Section 1: Findings

The **[Common Council]** of **[City]** hereby finds and declares that:

Tobacco use causes death and disease and continues to be an urgent public health challenge:

- Tobacco-related illness is the leading cause of preventable death in the United States,[1] accounting for about 480,000 deaths each year;[2]
- Each day in the United States, more than 3,200 youth smoke their first cigarette, and another 2,100 youth and young adults become daily smokers;[3]
- Smoking kills about 28,000 New York adults each year;[4]
- Tobacco use can cause chronic disease, such as lung, heart, and eye disease; diabetes, stroke, ectopic pregnancy, arthritis, infertility; and leukemia and cancers of the lungs, larynx, colon, liver, esophagus, pancreas, kidney, cervix, bladder, stomach, mouth;[5]
- About 750,000 New York adults live with serious smoking-caused illness and disability;[6]
- While smoking rates have declined steadily in New York, there are persistent disparities that reveal higher tobacco use among those of lower socioeconomic (low-SES) status;[7]
- Tobacco-related health care annually costs New Yorkers $10.4 billion, including $3.3 billion in Medicaid expenses.[8]

Tobacco companies sell and aggressively market products that are addictive and unreasonably dangerous,[9] causing cancer, heart disease, and other serious illnesses:[10]

- Cigarettes are designed and manufactured to be addictive, such that smoking initiation leads to dependence and difficulty quitting;[11]
- Cigarette and smokeless tobacco manufacturers spent a combined $9.36 billion marketing their products in 2017;[12]
- Tobacco marketing is a cause of youth smoking initiation;[13]
- Retail marketing may contribute to socioeconomic and racial disparities in tobacco use.[14]

Tobacco product marketing causes youth initiation[15] and thwarts cessation attempts by the majority of users who want to quit:

- Youth frequently exposed to retail tobacco promotions are 1.6 times more likely to try smoking and 1.3 times more likely to be susceptible to smoking in the future;[16]
- The odds of beginning to smoke may double for teens who visit a store with retail tobacco advertising at least twice per week;[17]
- Tobacco product displays and other retail marketing trigger impulse purchases both among current smokers and recent quitters (those trying to avoid use).[18]

Tobacco use is a pediatric epidemic:

- An overwhelming majority of Americans who use tobacco products begin use during adolescence and become addicted to the product before reaching the age of 18;[19]
- The average age of a new smoker in New York State is 13 years;[20]
- E-cigarette use among high schoolers in New York is rapidly increasing, and is far more prevalent than cigarette use;[21]

- Nearly 1 in 10 adolescents in New York State use tobacco products other than cigarettes or e-cigarettes;[22]
- 37 percent of high school seniors in 2018 nationwide reported using an e-cigarette in the past year,[23] and the U.S. Surgeon General and U.S Food and Drug Administration (FDA) have identified youth e-cigarette use as an epidemic;
- The rise in vapor product use by high school students from 2017 to 2018 represents an unprecedented spike in youth use of any monitored substance or drug.[24]

E-cigarettes may contribute to youth smoking and reduce cessation success:

- Nicotine-containing e-cigarettes are the most common nicotine products used by students, and 3.6 million middle and high school students reported using them in 2018;[25]
- Nicotine is a highly addictive drug, and interferes with adolescent brain development;[26]
- Youth nicotine addiction can develop at low levels of exposure, well before established daily smoking;[27]
- Adolescents are particularly susceptible to the "rewarding" effects of nicotine.[28] Evidence shows the younger the age of nicotine initiation, the greater the risk of addiction, heavy daily smoking, and difficulty quitting, and also of developing other health problems;[29]
- Youth use of e-cigarettes is associated with future cigarette use;[30]
- E-cigarette companies aggressively and successfully market their products to youth, using tactics now unavailable to cigarette companies precisely because they were found to recruit youth;[31]
- Adults who might otherwise quit smoking combustible cigarettes instead dually use e-cigarettes and cigarettes;[32]
- E-cigarettes are often marketed for use in places where traditional smoking is prohibited, facilitating continued addiction;[33]
- E-cigarettes are not approved by the FDA as smoking cessation aids;[34]
- In fact, the FDA extended its regulatory authority over e-cigarettes in part because of the health risks of adolescent nicotine exposure and the agency's concern that youth are initiating tobacco use with e-cigarettes.[35]

E-cigarettes and similar devices pose health hazards and renormalize tobacco use, regardless of nicotine content:

- E-cigarettes and similar devices contain or produce chemicals other than nicotine known to be toxic, carcinogenic, and causative of respiratory and heart distress;[36]
- E-cigarettes can be filled with substances other than nicotine; no matter their constituents, their use renormalizes tobacco addiction and use of tobacco products;
- Normalization undermines tobacco control efforts and may contribute to smoking initiation and reduced cessation;
- E-cigarette manufacturers currently enjoy minimal oversight and some products labeled as "nicotine-free" contain nicotine.[37]

Hookah is not a safe alternative to cigarette smoking:

- Hookah smokers are exposed to doses of nicotine sufficient to cause addiction;[38]
- A one-hour hookah use session generates secondhand smoke that contains carcinogens and toxicants equal to the amount generated by 2-10 cigarette smokers during the same period;[39]
- Charcoal used to heat shisha releases carbon monoxide and other toxic agents known to increase the risks for cancer and chronic diseases;[40]
- Infectious disease can be spread if the hookah is not cleaned properly.

Tobacco products are highly addictive and inherently toxic and should not be treated as a benign consumer product, readily available in every store;[41]

- Reducing the density of retail outlets reduces exposure to tobacco marketing, and helps to de-normalize both the purchase and sale of tobacco products;
- Higher tobacco retail density increases the susceptibility of young people to future tobacco use;[42]
- Restricting the number of tobacco retailers in **[City]** will reduce tobacco outlet density and is necessary for the public health, safety, and welfare of our residents;[43]
- Restricting the location of tobacco retailers will reduce density and exposure to sales in **[City]** and is necessary to protect the public health, safety, and welfare of our youth;[44]
- Tobacco retailers are concentrated near schools and other areas with more youth;[45]
- Studies have found a higher prevalence of current smoking among students at schools near tobacco outlets, and researchers suggest that limiting the proximity of tobacco outlets to schools may be an effective strategy to reduce youth smoking rates;[46]
- Nearly 75 percent of New York retailers were located within 1,000 feet of an elementary or secondary school in 2016;[47]
- In addition to decreasing access to tobacco products, the absence of tobacco retailers in areas children frequent may help prevent young people from picking up on "environmental cues" to start smoking sent by an abundance of retail outlets that offer access to tobacco and exposure to tobacco marketing.[48]

Tobacco sales and marketing are concentrated in low-SES and minority neighborhoods:

- Low-SES youth are twice as likely as their more affluent counterparts to live within walking distance of a tobacco retailer[49] and are at higher risk of starting to smoke;[50]
- There is a higher density of tobacco outlets in communities with lower income and higher proportions of ethnic/racial minorities than in more affluent, white communities,[51] even when accounting for population density, and in both urban and rural communities;[52]
- Retailers located in minority and low-income neighborhoods display substantially more storefront advertising and offer more price promotions compared with retailers located in more affluent, non-minority neighborhoods;[53]
- Two to three times more cigarette advertisements, particularly those for menthol products, are found in minority and low-SES communities than in more affluent, non-minority communities;[54]
- Stores located in low-income, predominantly Black neighborhoods receive more discount incentives from tobacco manufacturers than those in other communities.[55]

The sale of tobacco products is incompatible with the mission of pharmacies because tobacco product sales are detrimental to the public health:[56]

- Pharmacies are increasing their role as direct healthcare providers, dramatically expanding the number and scope of their retail clinics;[57]
- Tobacco products are the most deadly product sold in America, killing up to half of its users when used exactly as intended;[58]
- Tobacco products stand in stark contrast to pharmacies' health care mission and permitting their sale incorrectly broadcasts that tobacco products pose little risk;[59]
- Tobacco products themselves cause numerous diseases for which pharmacies sell medications and treatments, thus pharmacies are simultaneously selling products that cause and cure the same diseases;[60]
- Selling tobacco products alongside tobacco cessation aids and health-promoting medications can interfere with cessation efforts;[61]

- The American Pharmacists Association and the New York State Council of Health-system Pharmacists have called for the adoption of local laws prohibiting tobacco sales in pharmacies;[62]
- Banning tobacco sales in pharmacies is an effective way to reduce overall tobacco retailer density, a factor in tobacco use.[63]

Price is a major factor impacting smoking initiation and cessation:

- Higher tobacco prices lead to a reduction in tobacco use, even when accounting for the addictive properties of nicotine;[64]
- A 10 percent increase in the price of cigarettes causes a 3-5 percent decrease in purchases, on average;[65]
- Receipt of discount coupons is associated with higher susceptibility to beginning smoking and less confidence in being able to quit among youth;[66]
- Problematically, a 2012 study found that over one in ten youth, including one in three youth smokers, had been exposed to tobacco coupons in the past month.[67]

Higher tobacco prices decreases smoking initiation among youth:

- Higher product prices lead to reduced smoking initiation among youth, reduced consumption among current tobacco users, and an increase in cessation with fewer relapses among former smokers;[68]
- Price increases have a greater effect on youth, with one study concluding that smoking rates among teens were three times more responsive to price increases in comparison to adult smoking rates;[69]
- A 10 percent price increase reduces smoking prevalence among youth by nearly 7 percent, reduces average cigarette consumption among young smokers by over 6 percent, cuts the probability of starting to smoke by about 3 percent, reduces initiating daily smoking by nearly 9 percent, and reduces heavy daily smoking by over 10 percent;[70]

Tobacco companies undermine price increases through promotions and discounts and target youth and marginalized groups with these strategies:[71]

- Tobacco companies often undermine taxes or other price increases that deter tobacco purchases, through aggressive discounting strategies at the point of sale;[72]
- Youth, African-Americans, women, and low-SES consumers tend to be more price-sensitive and are more likely to take advantage of price promotions;[73]
- Retailers located in minority and low-income neighborhoods contain substantially more storefront advertising and offer lower prices and more price promotions compared with retailers located in more affluent, non-minority neighborhoods;[74]
- Stores located near schools or in which adolescents frequently shop display nearly three times the amount of tobacco advertisements and promotional materials[75] and tend to offer significantly lower cigarette prices[76] than other stores in the community.

Price promotions are widespread and cigarette and smokeless tobacco companies spent nearly 88 percent of their total marketing budget on retail price promotions in 2017:[77]

- Most (about two-thirds of) tobacco retailers participate in a manufacturer incentive program;[78]
- The majority of tobacco retailers participate in manufacturers' multi-pack discount promotions (when available);[79]
- Cigarette companies spend about 50 cents per pack on promotional price discounting;[80]

- In 2009, 70 percent of stores in New York were found to offer at least one price promotion, averaging 4.4 promotions per store;[81]
- While New York State presently restricts the distribution of free tobacco products, it does not restrict retailer redemption of coupons discounting the price of tobacco products.[82]

Flavors appeal to youth and drive youth tobacco experimentation with tobacco products:

- Flavors mask the harsh taste of tobacco, making flavored products easier to use;
- Beyond improving palatability, characterizing flavors provide an avenue for youth marketing;[83]
- Youth tobacco users typically begin with flavored products and, overall, use flavored products at higher rates than their older peers;[84]
- The majority of youth who use tobacco choose flavored tobacco products; [85]
- 81 percent of youth who have tried a tobacco product report their first product was flavored;[86]
- Flavored tobacco products promote youth tobacco initiation and drive young occasional smokers to daily smoking.

Menthol drives lifelong tobacco use and tobacco-attributable health disparities:[87]

- Menthol products are more addictive,[88] and both youth and racial/ethnic minorities find it harder to quit smoking menthol cigarettes;[89]
- More than half of youth who use cigarettes use mentholated cigarettes;[90]
- Racial/ethnic minorities, LGBT groups, groups with severe psychological distress and/or substance abuse disorders, and groups with fewer years of education and lower income use menthol products at far higher rates; [91]
- In recognition of predatory Tobacco Industry marketing practices, in 2016 the NAACP adopted a unanimous resolution supporting state and local efforts to restrict the sale of menthol cigarettes and other flavored tobacco products.[92]

Non-menthol flavors drive lifelong tobacco use, across product categories:

- Flavorants seem to likewise facilitate maintenance of non-cigarette tobacco product use (impeding cessation by making products more appealing);[93]
- Flavorants mask the harsh taste of tobacco and e-cigarette liquid solvents and facilitate deeper inhalation, longer duration of use and more frequent use, and thereby, increased nicotine dependence, across product categories.[94]

Flavors themselves may be hazardous to human health, and consumers incorrectly perceive flavored tobacco products to be less harmful:

- Sweet and fruit flavor compounds found in e-cigarettes induce oxidative stress and inflammatory responses in lung cells;[95]
- The FDA evaluates only the health risks of ingesting flavor compounds, and not risks of inhaling them, which is how exposure occurs with e-cigarette use;[96]
- Flavoring compounds appear to be the primary toxicants within e-cigarettes.[97]
- The presence of characterizing flavors signals product palatability, which is incorrectly associated with lower relative harm, influencing consumer brand preference and use;[98]
- Adolescents are more likely to believe that fruit and chocolate or other sweet flavors are less harmful than flavors like alcohol, tobacco, and spice flavors;[99]
- Youth e-cigarette users perceive lower harm from flavored e-cigarettes than from unflavored e-cigarettes despite research documenting harmful constituents present in e-cigarette flavorants.[100]

[City] has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;[101]

[City] has a substantial and important interest in ensuring that existing state and local tobacco sales regulation is effectively enforced:[102]

- Although it is unlawful to sell tobacco products to minors, more than 4 percent of New York retailers sold to minors between 2015 and 2016;[103]
- A local tobacco retail licensing system will help ensure that tobacco sales comply with the Adolescent Tobacco Use Prevention Act, other tobacco control laws, and the business standards of the **[City]**;[104]
- Licensing laws in other communities have been effective in reducing the number of illegal tobacco sales to minors.[105]

A local licensing system for retailers of tobacco products, electronic cigarettes, and other products regulated by Article 13-F of New York State Public Health Law is necessary and appropriate for the public health, safety, and welfare of our residents;

It is the intent of the **[City]** to implement effective measures through this Chapter to stop sales to youth of tobacco products, e-cigarettes, and other products regulated by the New York Adolescent Tobacco Use Prevention Act, prevent the sale or distribution of contraband tobacco products, reduce the proliferation of tobacco outlets and marketing, prevent the tobacco industry from undermining public health law through price promotions, and facilitate the enforcement of tax laws and other applicable laws relating to tobacco products.

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Appendix C: Effective Sales Regulations to Reduce Tobacco Use

Regulating where and how tobacco products may be sold is an effective means to reduce tobacco use, and may be especially impactful in communities burdened by the highest rates of tobacco use. As discussed throughout the accompanying report, tobacco retail licensing is a powerful, inherently flexible tool for implementing sales restrictions that reduce tobacco retail density, limit access to flavored tobacco products, and keep tobacco product prices high. Tobacco retail licensing transfers control over the retail environment from tobacco companies to the community.

Appendices A and B present a model policy for regulating sales of tobacco products through a local license. The model policy relies on a retail license to restrict the density of tobacco retailers by limiting (1) the **number** of tobacco retailers, (2) the **type** of store that may sell tobacco products, (3) the **location** of stores that may sell tobacco products, and also restrict sales of tobacco products through limiting (4) sales of **flavored tobacco products**, and (5) retailer redemption of **price promotions**.

This Appendix C details the evidence supporting four of these priority interventions as effective strategies for reducing exposure to tobacco marketing, and thereby decreasing tobacco use: regulating tobacco product sales through restricting tobacco retailer number, type, location and redemption of price promotions. The rationale for regulating sales of flavored tobacco products is presented in a separately published report, Regulating Sales of Flavored Tobacco Products, available via the "Point of Sale Policy Solutions" section of our website.

Reduce the Density of Tobacco Outlets

There are about 375,000 stores that sell cigarettes in the U.S., and each store contains an average of 30 tobacco advertisements.[1] One study of 97 counties from all 48 contiguous U.S. states found that average tobacco retail density is about 1.3 stores per 1,000 residents—a rate that increases in neighborhoods with more African-American residents and/or low-income households.[2] Policy interventions can address these inequities by reducing tobacco outlet density through limits on the number, location, and type of tobacco stores.

Regulate Tobacco Sales by Outlet Number

A locality may reduce residents' exposure to retail tobacco marketing by regulating the number of outlets permitted to sell tobacco products. The locality can adopt such a sales regulation immediately, over a definite time (*e.g.*, within a year of implementation), or over an indefinite time (*i.e.*, exempting from the restriction outlets operating at the time of implementation).

Nationwide, municipalities are capping the number of tobacco outlets not only to prevent an increase in the number of tobacco outlets, but also to ultimately reduce the prevalence of tobacco product sales in the community. Newburgh, New York, for instance, caps and gradually reduces the density of outlets (and, therefore, the prominence of tobacco

Sensible caps on the number of outlets reduce exposure to tobacco marketing

In 2014, San Francisco limited the number of permissible tobacco outlets permitted in each supervisorial district. Specifically, the city imposed a cap of 45 tobacco retail permits on each of its 11 districts.[3] While existing outlets are allowed to retain their tobacco retail permit, no new permits will be issued in a supervisorial district with 45 or more tobacco outlets. Thus, the number of permits will be reduced through attrition until the cap is reached.

The law had a rapid effect—in the first 15 months, the number of San Francisco tobacco outlets decreased by 10.2 percent. The declines were especially impactful in districts with the highest baseline density (often overlapping with high percentages of low-SES communities and communities of color).[4]

marketing) located near schools by rendering retail outlets within a "buffer zone" of 1,000 feet around each school ineligible for tobacco retail licenses upon new ownership.[5] Newburgh is also reducing the overall number of outlets by issuing only one new license for every two non-renewed or revoked licenses.[6]

The city of San Francisco issues no new tobacco retail permits for outlets located within a set distance of a school or another permitted tobacco outlet.[7] Additionally, no new permits may be issued to locations in Supervisorial Districts that already contain 45 tobacco outlets.[8]

Exposure to tobacco marketing is a significant factor in youth initiation: It is critical to forming early impressions of tobacco's normalcy and appeal, factors leading to eventual use.[9] Tobacco companies rely on outlets to aggressively advertise their addictive, deadly products; reducing the density of tobacco outlets reduces youth exposure to tobacco marketing. Further, limiting the number of tobacco outlets reduces the oversaturated tobacco product marketplace, and signals that tobacco need not be more accessible than true necessities (*e.g.*, food, medicine, cash) or common consumer products (*e.g.*, coffee, office and health care supplies). This reduction helps to de-normalize tobacco and ultimately reduce use.[10]

Exposure to tobacco outlets and marketing is a factor in failed quit attempts, as well as increased and prolonged tobacco use: When a consumer must expend greater effort to find and obtain tobacco products, that consumer will decrease (and even stop[11]) using tobacco. This is particularly true for youth.[12] Higher retail density is associated with higher lifetime use of tobacco by youth.[13] Outlet density can have a persistent effect on behavior: Tobacco marketing triggers tobacco cravings and impulse tobacco purchases, increasing use prevalence and thwarting attempts to quit.[14]

Reducing outlet density and, thus, the prominence of tobacco's presence in the community, is critical to tobacco control, particularly for price-sensitive consumers.

Successfully limiting the number (thereby reducing density) of outlets has similarly led to reduced consumption of alcoholic beverages. Specifically, reducing the number of alcohol outlets has been shown to lower consumption of wine and spirits.[15] One study showed that a 10 percent reduction in density of alcohol outlets led to a 1-3 percent decrease in the consumption of spirits and a 4 percent decrease in the consumption of wine.[16] Another study examining the effects of retail regulations on consumption of distilled spirits over a 25-year period found that stricter regulation of

density of retail outlets contributed to a decrease in consumption.[17]

Regulate Tobacco Sales by Outlet Location

Minimize Tobacco Sales near Youth-Centered Places

States and local governments may reduce the risk of youth tobacco use by setting limits on the location of tobacco sales. This can be accomplished by prohibiting sales in particular areas, such as outlets within a specified distance of K–12 schools and other youth-oriented places. As with capping the number of outlets, a municipality may apply location restrictions immediately or over time. Restricting sales locations will reduce tobacco outlet density, prevalence of tobacco marketing, and the overall impact of tobacco companies on the community. According to a study of active New York tobacco outlets, prohibiting tobacco product sales within 1,000 feet of schools would "reduce or eliminate existing disparities in tobacco retailer density by income level and by proportion of African American" residents.[18] If applied immediately, the lowest-income communities would see tobacco eliminated from about three times as many retailers as the most affluent neighborhoods.[19]

Reducing the number of tobacco outlets near youth-centered places furthers a primary goal of tobacco control efforts to prevent youth tobacco addiction by reducing youth exposure to pro-tobacco marketing (shown to lead to tobacco initiation). In New York, 21.8 percent of high school students use tobacco products, including e-cigarettes[27] (shy of New York's goal of reducing high school tobacco use to 15 percent by 2017).[28]

Setting a minimum distance between permissible tobacco sales and places youth congregate is one way to reduce the density of tobacco marketing within children's environments, which may in turn reduce the likelihood that youth will initiate tobacco use.[29] High density of outlets near youth-centered places has been shown to have an effect on youth smoking regardless of current smoker status; high density increases the susceptibility of young people to future tobacco use.[30]

A 2009 study published in the *American Journal of Public Health* found a "small but nonetheless significant relationship between the density of outlets within one mile of a school and students' report of smoking initiation."[31] Researchers concluded that the study's findings support the use of legal tools to address the proximity of tobacco outlets to schools.[32] Another study "report[ed] that retail tobacco outlet density was significantly associated with youth smoking."[33] A 2007 study showed that higher tobacco retail density near schools

Did you know…?

Tobacco outlets are more highly concentrated in areas with a high proportion of youth,[20] and tobacco advertising is more prevalent in stores located near schools.[21] Tobacco outlets near schools also tend to offer significantly lower cigarette prices than other stores in the community.[22] Schools with higher rates of student smoking tend to be surrounded by a larger number of tobacco outlets.[23] Notably, more than three-quarters of schools were within 800 meters of a tobacco outlet in a 2011 study of 97 counties distributed across the U.S.[24] In 2011 New York State registered 23,000 tobacco retail stores, one for every 185 kids.[25] Over half of these outlets were located within 1,000 feet of an elementary or secondary school.[26]

correlates to higher student smoking prevalence.[34]

A decrease in access to tobacco outlets in areas youth frequent may help prevent adolescents from both accessing tobacco products and absorbing "environmental cues" to smoke. An abundance of retail outlets offers easier access to tobacco products and increased exposure to pro-tobacco messaging.[35] Conversely, limiting tobacco retail outlets, especially near youth facilities, sends a message that the community does not support marketing or selling tobacco to youth.[36]

Limiting tobacco retail outlets at or near places youth congregate not only reduces the appeal of smoking, but also helps limit opportunities for youth purchases, which include underage students enlisting adults to purchase tobacco products for them. A restriction on tobacco outlets near schools will also benefit the community as a whole, reducing retail density in and the tobacco industry's influence on the neighborhood surrounding the school.[37]

Some communities have begun to take steps to reduce tobacco sales near places youth frequent. Boston has restricted the sale of tobacco products on educational institutions' property since 2009.[39] Several California and New York communities use licensing to restrict tobacco sales near schools or other youth-populated places.[40] Others in New York restrict tobacco sales locations through zoning.[41]

Reduce Clustering of Tobacco Outlets

Another permissible sales restriction limits the clustering of tobacco outlets by preventing new stores (or a store with a new owner) from selling tobacco within a certain distance of an established tobacco outlet.[42] For instance, San Francisco prohibits issuing new tobacco retail licenses to outlets within 500 feet of another licensed tobacco outlet.[43] Over time, through attrition of tobacco outlets that change ownership, stop selling tobacco, or close altogether, this sales restriction promotes a decrease in overall retail density of tobacco outlets.

Such a sales restriction may particularly impact urban communities and those experiencing rapid economic development. Urban areas that are already experiencing high density of tobacco sales and/or differential density that affects certain (*i.e.*, low-SES) neighborhoods can promote health equity by implementing a proximity restriction to meaningfully reduce density over time. Communities experiencing or anticipating rapid economic development may wish to prevent an increase in tobacco outlet density and/or disparate impact of tobacco sales and marketing on certain neighborhoods by implementing a proximity restriction before development.

Sensible location restrictions reduce exposure to tobacco marketing

A California study observed that smoking prevalence among high school students is higher when there are more walkable tobacco retail outlets—and thus, more environmental cues and retail advertising—near their schools.

"Regulating the minimum distance between schools and tobacco outlets could effectively reduce their density in school neighborhoods…*[L]imiting the density of tobacco outlets, their proximity to schools, and the quantity of cigarette advertising that these stores contain, may all be plausible strategies to reduce adolescent smoking."*[38]

Regulate Tobacco Sales by Outlet Type

Because tobacco products present an unreasonable risk to the population, local governments may also limit the types of outlets permitted to sell them. Specifically, localities may consider prohibiting tobacco sales by certain *types* of outlets, such as pharmacies.

The primary rationale for prohibiting the sale of tobacco products in pharmacies is that such sales send an incongruent message.[44] Pharmacies focus on offering products and services to help consumers lead healthier lives, and market themselves as a healthcare resource. In fact, pharmacies are increasing their role as part of a health-promoting environment; they are routinely acting as direct healthcare providers, dramatically expanding the number and scope of their retail clinics, which provide health services such as immunizations and diabetes treatment.[45] Additionally, customers visit pharmacies to purchase medicines to treat their tobacco-related diseases and obtain assistance with tobacco product cessation. Despite pharmacies' changing role in the community, however, many continue to sell cigarettes and other tobacco products and permit tobacco companies to market their products alongside medications and smoking cessations aids, which is contradictory and detrimental to smoking cessation efforts and public health.[46] New research also suggests that in some communities, pharmacies may discount cigarettes more steeply than other types of stores.[47] Finally, because tobacco use is inherently dangerous and deadly, it is a conflict of interest (and clearly sends a "mixed message") for a community health care resource to sell tobacco products.[48] In effect, pharmacies that sell tobacco products simultaneously sell products that cause and cure the same diseases.[49]

Tobacco sales in pharmacies also imply that pharmacists approve of tobacco use.[50] Despite the large number of pharmacies that sell tobacco products, pharmacists have historically and consistently been opposed to the sale of tobacco products in pharmacies, including in New York.[51] In fact, in 2014, the New York State Council of Health-system Pharmacists issued a policy statement in support of prohibiting the sale of tobacco products in New York pharmacies.[52] In 2010, the American Pharmacists Association similarly announced its policy in favoring discontinued tobacco sales in pharmacies and restrictive retail licensing, stating that the Association "urges state boards of pharmacy to discontinue issuing and renewing licenses to pharmacies that sell tobacco products and to pharmacies that are in facilities that sell tobacco products."[53] As of June 2018, there were more than 5,452 pharmacies in New York State;[54] chain pharmacies comprise the great majority (6 out of 7) of retail pharmacies selling tobacco products.[55]

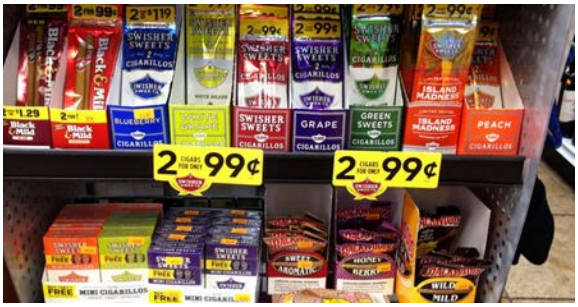
Tobacco-free pharmacy laws have the added benefit of decreasing tobacco's overall community presence; California and Massachusetts municipalities which prohibit pharmacy tobacco sales realized relative reductions of outlet density that were 1.44 and 3.18 times greater, respectively, than municipalities in those states that have not enacted such laws.[56] When implemented in conjunction with other sales restrictions, prohibiting pharmacy tobacco sales can be especially effective. For instance, when researchers added a pharmacy sales restriction to a simulated model restricting tobacco sales near schools, they found that density of outlets would fall by even more (26.3 to 35.6 percent) than if the buffer zone around schools was implemented alone.[57]

Many communities have already implemented pharmacy tobacco sales restrictions. In 2008, San Francisco, CA became the first city in the nation to prohibit the sale of tobacco products in pharmacies. Boston, MA followed in 2009 and prohibited tobacco sales by all pharmacies finding that "[t]he sale of tobacco products is incompatible with the mission of health care institutions because it is detrimental to the public health and undermines efforts to educate patients on the safe and effective use of medication[.]"[58] As of April 2017, 152 Massachusetts municipalities had restricted tobacco sales in pharmacies, and a statewide law was enacted in 2019.[59] New York City and four New York counties have enacted tobacco-free pharmacy laws.[60]

Some major retail chains have voluntarily stopped selling tobacco products, including Target,[61] Costco,[62] Wegmans supermarkets,[63] and CVS Pharmacy,[64] among others. However, many more continue to sell and market tobacco products. Importantly, an end to all pharmacy tobacco sales and, ultimately, real change to the community environment, is unlikely to be realized without public policy change.

Prohibit the Sale of Flavored Tobacco Products

In conjunction with regulating outlet density and discounted sales, local governments may regulate the sale of flavored tobacco products. Flavored tobacco products are increasingly important to the tobacco industry's strategy of recruiting new youth users and retaining customers who might otherwise quit.



For more on this topic, visit our technical report, Regulating Sales of Flavored Tobacco Products.

Reduce Price Manipulation by Tobacco Companies

State and local regulatory authority extends to business activities such as manufacturer price promotions.[65] Government intervention in tobacco product price promotions and discounting can hamper tobacco company efforts to recruit and retain customers through artificially lowering the price of their tobacco products. Importantly, price regulation may particularly reduce the tobacco industry's impact on disadvantaged, price-sensitive populations, such as low-SES and youth.

The price of tobacco products is strongly correlated with tobacco use: Tobacco consumption decreases in response to price increases.[66] Price-sensitive populations such as youth, people trying to quit, and low-income communities are often targeted by tobacco company pricing schemes.

The tobacco industry's marketing budget reveals its aggressive strategy of saturating the market with discounted tobacco products: tobacco companies designated nearly 85 percent ($7.68 billion) of their combined 2014 marketing budget to reducing the price consumers pay for tobacco products.[67] Price promotions include not only direct discounts such as coupons and multipack discounts, but also special marketing and displays associated with indirect promotions (*e.g.*, retailer and wholesaler incentive programs).[68] Price discounting undermines high retail prices resulting from federal, state, and local tobacco excise taxes.[69]

Youth in particular are sensitive to cigarette prices, meaning they generally purchase fewer cigarettes as the cost increases.[70] Tobacco companies, keenly aware that tobacco product prices influence tobacco use, routinely manipulate product prices to influence youth progression from experimentation to regular use and undermine quit attempts by current users. There are more offers and steeper discounts on multipacks of best-selling name brand cigarettes (those most often used by youth) in outlets located in neighborhoods with a high proportion of youth (under 18 years old).[71] These efforts are therefore an integral part of tobacco companies' retail marketing strategy.

Price promotions likewise adversely and disproportionately impact other price sensitive populations. Tobacco products are priced lower in low-SES communities,[77] and tobacco companies design product promotions to especially appeal to subgroups of low-SES tobacco consumers.[78] These groups include women,[79] persons of lower educational attainment,[80] African-Americans[81] and Hispanics.[82] Price-sensitive populations such as women and heavy smokers are more likely to report receiving and redeeming coupons,[83] and exposure to tobacco price promotions is associated with financial stress (impeding cessation).[84]

Tobacco companies offer more price promotions for premium menthol cigarettes in neighborhoods with more African-American youth, the demographic most likely to use premium menthol cigarettes.[85]

Product Price is Important

Studies have repeatedly demonstrated the important role of price in tobacco product use.[72] Tobacco companies are well aware of this and dedicate significant resources to planning and implementing price discounting strategies to circumvent price increases from tobacco taxes, minimum package size laws, and other price policies.[73] For example, an internal Philip Morris memo from 1990 detailed a plan for reducing the impact of a proposed increase in the federal excise tax by increasing "value-added" sales and coupon values.[74] An R.J. Reynolds report from 1984 recommended strategically targeting multi-pack discounts to "younger adults" in "selected sites" (such as convenience stores and military exchanges) to instill brand loyalty as an "investment program."[75] More recently, after California voters approved an increased cigarette tax in 2016 ("Prop 56"), Marlboro cigarette manufacturer Philip Morris sent an email blast to its California customers with the subject ""What Prop 56 Means for You," offering three mobile coupons a week for the express purpose of offsetting the recent state tax increase.[76]

Additionally, menthol cigarettes are sold at lower prices near schools with more African-American students.[86] Lower-priced other tobacco products, such as little cigars and cigarillos (which are sold in smaller quantities and taxed at a lower rate than cigarettes) appeal to price-sensitive customers and are likewise heavily marketed and discounted in lower-income and predominantly African-American neighborhoods.[87]

Local New York governments can thwart the tobacco industry's price manipulation by restricting use of their price promotions. Specifically, they may prohibit the redemption of discount coupons and certain discounted sales (*e.g*, multipack discounts). In fact, in 2013 New York City adopted such a law to address the persistent availability of low-priced cigarettes and tobacco products in New York City." Tobacco retailers licensed by the City may not redeem coupons for most tobacco products, nor offer "value-added" sales (such as multi-pack discounts or gifts given in exchange for the purchase of tobacco products).[88]

For more detailed information about the effectiveness of restricting price promotions, and for our model stand-alone policy, see Tobacco Price Promotion: Local Regulation of Discount Coupons and Certain Value-Added Sales.

Finally, visit our website for resources discussing the evidence for including all tobacco products in a comprehensive policy restricting the sale of tobacco products:

- E-cigarettes
- Hookah /Shisha

[1] Joseph G. L. Lee, et al., *Inequalities in tobacco outlet density by race, ethnicity and socioeconomic status, 2012, USA: results from the ASPiRE Study*, 71 J EPIDEMIOL COMMUNITY HEALTH 487, 487 (2017).
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Public Health and Tobacco Policy Center

TRL CHECKLIST

Local governments may choose where and how tobacco products are sold. To promote health equity and reduce overall tobacco use, first understand your community's particular needs and know where tobacco marketing and sales are concentrated. A local tobacco retail license (TRL) helps a community understand its retail tobacco landscape and promotes retailer compliance with tobacco controls.

RESTRICT THE DENSITY OF TOBACCO RETAILERS

- ☑ Limit the number of outlets selling tobacco
- ☑ Regulate the location of outlets selling tobacco
- ☑ Prohibit tobacco sales by pharmacy outlets

REDUCE THE APPEAL OF TOBACCO PRODUCTS

- ☑ Prohibit the sale of flavored tobacco products

MAINTAIN HIGH PRICES ON TOBACCO PRODUCTS

- ☑ Restrict the sale of discounted tobacco products

The Policy Center is available to help tailor these policy options to fit your community. Visit tobaccopolicycenter.org for more information.

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Public Health and Tobacco Policy Center

Providing legal expertise to support policies benefiting the public health.

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What we do

Research & Information Services

- provide the latest news on tobacco and public health law and policy through our legal and policy reports, fact sheets, quarterly newsletters, and website

Policy Development & Technical Assistance

- respond to specific law and policy questions from the New York State Tobacco Control Program and its community coalitions and contractors, including those arising from their educational outreach to public health officials and policymakers
- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

Education & Outreach

- participate in conferences for government employees, attorneys, and advocates regarding critical initiatives and legal developments in tobacco and public health policy
- conduct smaller workshops, trainings webinars, and presentations focused on particular policy areas
- impact the development of tobacco law through *amicus curiae* (“friend of the court”) briefs in important litigation

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The Center’s website provides information about recent tobacco news and case law, New York tobacco-related laws, and more. Current project pages include: tobacco-free outdoor areas; tobacco product taxation; smoke-free multiunit housing; and retail environment policies. The website also provides convenient access to reports, model policies, fact sheets, and newsletters released by the Center.

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The Center is funded to support the New York State Tobacco Control Program, the New York State Cancer Prevention Program and community coalitions and educators. The Center also assists local governments and other entities as part of contractor-submitted requests. If we can help with a tobacco-related legal or policy issue, please contact us.

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