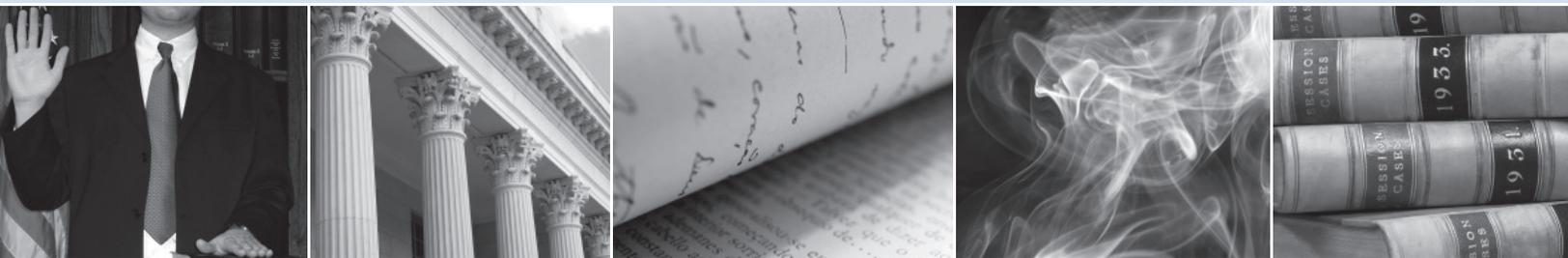


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## License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool

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*Law. Health. Justice.*

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# License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool

Ian McLaughlin

## Introduction

Cigarettes and other tobacco products (“OTPs”) are heavily regulated throughout the United States, at all levels of government. Federal, state and local laws and binding agreements govern nearly every aspect of the tobacco industry from leaf to lip. Tobacco manufacturing, distribution, sales, promotion, marketing, use and possession all must meet a variety of restrictions and legal requirements. Many of these activities are subject to several layers of regulation.

Every state, for example, has established age restrictions for tobacco purchases, and many have smoke-free air laws. In addition, the federal government and every state taxes cigarettes and other tobacco products to raise revenue for general operations and public health programs and to reduce demand and consumption through price elasticity.

The public health rationale for these laws and regulations is well developed. Tobacco is a hazardous product that causes disease and death when used as directed. As a result, government has a strong interest in ensuring that tobacco products are not sold or marketed to minors, that taxes are paid, and that the general public is not exposed to secondhand smoke—which has been classified a toxic air contaminant.<sup>1</sup>

In addition to substantive laws governing specific aspects of tobacco production, sales and use, many states and local governments require businesses selling tobacco products to obtain a special license.<sup>2</sup> Often these laws require separate licenses for tobacco wholesalers, distributors and retailers.

This legal synopsis focuses on retailer licensing.

## Key Points

- Tobacco retailer licensing rests on the simple concept that retailers selling tobacco products must comply with all relevant laws or risk losing the privilege of selling these products.
- Tobacco retailer licensing is generally used to help enforce tobacco tax and point-of-sale laws, but can also be used to help state and local officials control the location and concentration of tobacco retailers.
- Some states, such as California, Massachusetts and New York, and several local communities, use tobacco retailer licensing to impose additional restrictions on the sale and promotion of tobacco products. Retailers who violate these licensing conditions often face the same penalties as when they violate a tobacco control law—suspension or revocation of their licenses.
- State and local governments should continue to look for ways to use tobacco retailer licensing as a mechanism to ensure responsible retailing and compliance with important public health laws.

The general concept of tobacco retailer licensing is simple: the government requires all businesses that sell tobacco products (or just cigarettes, in some cases) to purchase a license from the government for the privilege of selling these products to consumers.

While tobacco retailer licensing is primarily used to help enforce tobacco tax and point-of-sale laws, this synopsis also looks at other innovative uses for retailer licensing, including controlling the location and concentration of tobacco retailers and imposing additional restrictions on the sale and promotion of tobacco products. Section I of this synopsis explains the purpose of tobacco retailer licensing and the authority behind it. Section II provides an overview of state-level tobacco retailer licensing programs in California, New York and Massachusetts and Section III details local licensing programs in those states. Section IV discusses why retailer licensing is an effective tobacco control strategy. Section V describes how retailer licensing can be used as a legal tool to control the density and location of tobacco retailers and Section VI provides some creative examples of how licensing can be used to promote responsible retailing by facilitating enforcement of other laws.

## **Section I – Overview of Tobacco Retailer Licensing**

### **Purpose of Tobacco Retailer Licensing**

A tobacco retailer licensing program serves many governmental purposes. First, it helps a government identify all the businesses selling tobacco to consumers in the community or state, which in turn helps the government enforce existing retailer laws. In addition, through conditions imposed on the licensee, retailer licenses give government better control over where tobacco can be sold and what kinds of businesses can sell tobacco products. Government can also impose additional

conditions on licenses to help ensure responsible retailing.

Finally, and perhaps most importantly, retailer licensing provides government with an efficient enforcement mechanism to ensure that retailers comply with other applicable laws. If a retailer evades taxes, sells to minors or violates other tobacco control laws, the government can suspend or revoke the license in addition to (or in lieu of) enforcing the underlying violation.

### **Authority for Tobacco Retailer Licensing**

Tobacco retailer licensing is a function of the government’s “police power.” Police power is essentially the authority of the state (and, through delegation, local government) to enact laws and regulations to “protect, preserve, and promote the health, safety, morals, and general welfare of the people.”<sup>3</sup>

State governments have broad police power authority (subject to limitations of the U.S. Constitution, such as First Amendment free speech protections) pursuant to the “reserved powers” doctrine, under which states may exercise all powers that are neither expressly reserved for the federal government nor prohibited from state intervention by the United States Constitution.<sup>4</sup> As long as a state law does not unduly infringe on a person’s constitutional rights or attempt to regulate an area reserved for Congressional regulation, state governments can exercise their police powers widely.

With regard to local laws, most states follow some form of a “home rule” system, under which local governments have the authority to pass local laws that promote residents’ general health, safety and welfare—an authority akin to police power. In some states, this local authority is granted by the state constitution,<sup>5</sup> whereas other states grant such authority through legislation.<sup>6</sup> Regardless of the power’s origin, “[t]he requirement that a license first be obtained before conducting a business or activity has long

been recognized as a valid exercise of the police power.”<sup>7</sup> Like states, local governments must respect the constitutional rights of regulated persons and entities.

## **Section II – State-Level Licensing Programs**

Every state in the United States taxes cigarettes and other tobacco products.<sup>8</sup> Tobacco taxes are an important source of revenue for states, both for general operations and also for specific public health prevention and treatment programs. Many states have licensing programs designed primarily to aid in collecting these taxes and to prevent tax evasion. To a lesser extent, state retailer licensing laws also help to ensure compliance with other applicable laws.

### **California**

Finding that “the licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products,”<sup>9</sup> the California State Legislature enacted the Cigarette and Tobacco Products Licensing Act of 2003 (the “California Licensing Act”).<sup>10</sup> Under the California Licensing Act, all retailers selling or distributing cigarettes or tobacco products from a fixed location must obtain a nontransferable license from the California Board of Equalization (the “BOE”), and must pay a one-time fee of \$100 for the license.<sup>11</sup> The license is valid for a twelve-month period and must be renewed annually, though no additional fee is required for renewal.<sup>12</sup> According to the BOE, as of June 30, 2009, there were 37,615 state-issued tobacco retailer licenses in California.

Most of the restrictions and violations set forth in the California Licensing Act involve compliance with state tax laws. For example, retailers that have been convicted for any violations of the California Cigarettes and Tobacco Products

Tax Law, and retailers that do not have all of the permits and licenses required by that tax law, are ineligible to receive a license.<sup>13</sup>

In addition, it is a violation of the California Licensing Act for a retailer to possess cigarettes without a valid California tax stamp,<sup>14</sup> to possess untaxed other tobacco products<sup>15</sup> and to engage in transactions with unlicensed entities.<sup>16</sup> All of these provisions help ensure that untaxed tobacco products are not distributed in the stream of commerce. Unstamped cigarettes, and other tobacco products on which tax has not been paid, are subject to immediate seizure and other penalties.<sup>17</sup>

The California Licensing Act also provides separate penalties for licensees that violate California sales-to-minors laws and other point-of-sale regulations.<sup>18</sup> These penalties, however, remain inoperative unless the California youth purchase rate (the percentage of youth who are successful in purchasing tobacco products during an annual statewide youth purchase survey) exceeds 13 percent in the most recent survey,<sup>19</sup> which it did not in the years 2007 through 2009. Moreover, the penalties provided for sales-to-minors violations are relatively weak (compared to local licensing programs in California), with a first violation resulting only in a warning letter. For any fine to be imposed, a retailer must be convicted of a point-of-sale violation at least twice in a twelve-month period, which is not realistic given the time required to prosecute violations.<sup>20</sup> In fact, the BOE has never penalized a state licensee for a sale to a minor or for any other point-of-sale violation; the California Licensing Act, in practice, is not used to enforce anything other than tax laws.

Despite this weakness, the California Licensing Act finds strength in its efficient and varied enforcement mechanisms. Violations of the Act can be enforced either through the court system or through an administrative process overseen by the BOE. For example, the Act provides a range of criminal penalties for violations, including

graduated fines and potential imprisonment;<sup>21</sup> these penalties must be pursued in a court of law, prosecuted by a District Attorney or other law enforcement prosecutor and levied by a judge. In lieu of that process, however, the Act also authorizes administrative enforcement by the BOE, which has the authority to levy civil penalties and to suspend and revoke licenses. The BOE, after providing the retailer notice and an opportunity to be heard, may suspend or revoke a retailer's license for any violation and, for subsequent violations, may also assess a fine of up to \$5,000.<sup>22</sup> Alternatively, when the BOE receives notice of a judicial conviction or final adjudication of a violation, the Board may summarily suspend or revoke a license.<sup>23</sup>

The California Licensing Act itself does not establish specific time periods for suspension of a retailer's license. Instead, the BOE has promulgated administrative regulations establishing penalties for various violations, including specific periods of license suspension.<sup>24</sup>

The penalties range from a warning letter to suspension of the retailer's license (for ten, twenty or thirty days) to license revocation, depending on the number of previous violations and the severity of the violation.<sup>25</sup> License suspension or revocation can be a severe economic penalty for many retailers, since cigarette sales account for nearly one-third of all sales in California convenience stores and generate nearly \$500,000 in annual sales for the average convenience store.<sup>26</sup>

According to the BOE Investigations Division, in fiscal year 2008-2009 the BOE and law enforcement conducted approximately 9,500 inspections (including retailers, wholesalers, distributors and manufacturers), resulting in 533 separate seizures of cigarettes or other tobacco products. In addition, during the same time period 639 citations were issued, including 524 citations that the BOE processed, and 115 criminal citations that were prosecuted in court.

## New York and Massachusetts

The State of New York also has a strong statewide tobacco retailer licensing law (the "New York State Licensing Law"), which is similar to the California Licensing Act in many respects. New York requires "wholesale dealers" to obtain a license and "retail dealers" to obtain a nontransferable certificate of registration to engage in sales of cigarettes and other tobacco products.<sup>27</sup> Registrations are issued by the New York Department of Taxation and Finance and are valid for one calendar year.<sup>28</sup>

In 2009, the New York State Legislature raised the fee for a retail registration from a \$100 flat fee to a graduated fee schedule of between \$1,000 and \$5,000, depending on the gross sales of the applicant.<sup>29</sup> At the time of this writing, the increased fee is subject to a lawsuit brought by various retailers and retail associations challenging the fee increase as an unconstitutional tax.<sup>30</sup>



Retailers that violate the youth sales restrictions of New York Public Health Law Article 13-F (“Article 13-F”) can have their licenses suspended or revoked, and licensees are penalized for any violation of Article 13-F.<sup>31</sup> Among other things, Article 13-F prohibits sales to minors, sampling, sales of bidis and gutka, establishes requirements for location of vending machines and prohibits sales of cigarettes other than in a pack of twenty.<sup>32</sup> Unlike California, New York has no “youth purchase rate” threshold applying to license penalties for violations of Article 13-F.

Like the California Licensing Act, the New York State Licensing Law also facilitates the collection of state taxes and provides strong penalties for tax evasion. The New York Commissioner of Taxation and Revenue is specifically authorized to administer the state’s tobacco tax laws and the New York State Licensing Law, including joint reporting, assessment, and the collection of taxes and registration fees.<sup>33</sup>

In addition to receiving civil monetary penalties for violating the New York State Licensing Law, any retailer that possesses or sells unstamped cigarettes or unlawfully stamped cigarettes (i.e., products on which tax has not been paid) will have its registration suspended or revoked.<sup>34</sup> The suspension periods are established in the law itself and are relatively steep: up to six months for a first violation, up to thirty-six months for a subsequent violation within five years, and a five-year revocation for a third violation within five years.<sup>35</sup>

Also as with the California Act, the Commissioner of Taxation and Revenue can impose the penalties (both civil monetary fines and registration suspension) administratively. A retailer is given notice and an opportunity for a hearing prior to civil fine imposition.<sup>36</sup> A registration suspension or revocation, on the other hand, is effective immediately upon written notice from the Commissioner of Taxation and Revenue, but the retailer can request review of

the suspension and a hearing, and can seek judicial review of the final determination.<sup>37</sup> A registration suspension or revocation can also lead to a suspension of the retailer’s lottery license (at the discretion of the head of the Division of the Lottery) or the retailer’s alcoholic beverage license by the Division of Alcoholic Beverage Control.<sup>38</sup>

The Commonwealth of Massachusetts requires retailers of cigarettes (the definition of which includes smokeless tobacco), cigars and smoking tobacco to obtain a license to sell those products.<sup>39</sup> The Department of Revenue issues licenses and the tax commissioner may refuse to issue a license to any person who has violated Massachusetts’ Cigarette Excise Tax Law.<sup>40</sup> Licensees are subject to both criminal and civil penalties for tax violations, which include possession of unstamped cigarettes and other tobacco products, failure to deal with licensed entities, and dealing without a license.<sup>41</sup>

## **Section III – Local Licensing Programs**

While state licensing programs are particularly effective in administering and collecting tobacco taxes, many municipalities have also adopted local licensing programs to place other conditions on tobacco retailers to protect public health, safety and welfare.

### **California**

In many California cities, retailers must obtain both state and local licenses and must comply with the conditions (including paying the applicable fees) for both licenses. Local tobacco retailer licensing programs are specifically authorized by the California Licensing Act<sup>42</sup> and the BOE must share its database of licensees with local law enforcement agencies (and other designated enforcing agencies specified by law) for purposes of tobacco control law enforcement.<sup>43</sup>

In California, the primary purpose of local licensing ordinances is to provide effective enforcement of state and federal tobacco control laws, particularly those laws prohibiting sales of tobacco products to minors. As of January 2010, at least ninety-six cities and counties in California had adopted a local tobacco retailer licensing ordinance.<sup>44</sup>

The local ordinances in California generally are either considered “strong” or “weak” depending on four factors identified by the Center for Tobacco Policy & Organizing and the Technical Assistance Legal Center.<sup>45</sup> Local licensing ordinances are considered “strong” if they:

- (1) Require all tobacco retailers to obtain a license and renew it annually;
- (2) Provide that violation of any federal, state or local tobacco control law is also a violation of the license;
- (3) Authorize suspension or revocation of the license for any violation and identify a dedicated enforcement agency; and
- (4) Provide a license fee set high enough to fund all of the costs of administration, implementation and enforcement of the license.<sup>46</sup>

The fourth element, a sufficient fee, is particularly important. Under California law, a license fee to fund administration and enforcement is considered a “regulatory fee,” which can be charged to businesses to cover the costs associated with necessary government regulation of those businesses.<sup>47</sup> Fees for local licenses range from nominal<sup>48</sup> to as high as \$1,500.<sup>49</sup> Typical fee ranges for “strong” ordinances, which fund enforcement through the fee, are approximately \$150 to \$400 annually.<sup>50</sup> With a fee high enough to cover all of their costs, local licensing programs are self-funding and do not require independent expenditure of government

funds, making them very attractive to cash-strapped local governments. As of May 2009, sixty-three California communities had adopted “strong” local licensing ordinances.<sup>51</sup>

Strong local ordinances incorporating the above elements are particularly effective for preventing illegal sales of tobacco to minors. California has two state laws that prohibit sales to minors, but the penalties for violation are relatively small fines.<sup>52</sup> By conditioning a local license on compliance with existing tobacco control laws, a local jurisdiction can suspend or revoke a retailer’s license for selling to a minor, thus depriving the retailer of the privilege of selling tobacco during the suspension period. It is also important to note that a local license can be suspended for violations of other state tobacco control laws, such as illegal self-service displays and signage violations.

Enforcement of local licenses can be accomplished through either a judicial or an administrative proceeding.<sup>53</sup> This flexibility allows communities to adopt a system that fits local needs, and it promotes efficiency in communities that want to use an administrative proceeding both to prove the underlying violation of the license and to suspend the license.<sup>54</sup>

Local licensing in California has proven very effective in reducing sales rates to minors. In one study of twenty-six communities with strong licensing laws, the sales rate to minors decreased dramatically in all but one of the communities, and the decrease was often quite substantial; in eleven communities, the youth sales rate dropped by over 30 percent.<sup>55</sup>

## **New York**

New York City requires cigarette retailers<sup>56</sup> to obtain, in addition to the state license, a license from the city through its Department of Consumer Affairs and to pay a biennial license fee of \$110.<sup>57</sup> Like other local licensing

programs, the New York City licensure program is designed to facilitate enforcement of the city's tobacco tax and sales laws.

New York City has adopted its own Tobacco Product Regulation Act (the "Regulation Act"),<sup>58</sup> which establishes sales and use restrictions for all tobacco products and which is enforceable by the Department of Consumer Affairs (along with the Department of Mental Hygiene.)<sup>59</sup> Among other things, the Regulation Act prohibits out-of-package sales,<sup>60</sup> sets age restrictions for clerks,<sup>61</sup> prohibits sales to minors and requires the posting of signs warning against sales to minors.<sup>62</sup> The Regulation Act itself provides for civil penalties and criminal penalties for violations through an administrative proceeding. If a retailer is found liable for two violations within a two-year period, the retailer's license may be revoked.<sup>63</sup>

In addition to the specific penalties established in the Regulation Act itself, the New York City Commissioner of Consumer Affairs has



independent, broad authority to suspend or revoke all business licenses, and to levy fines and civil penalties, for any violation of a relevant law. Using an administrative procedure that provides due notice and hearing, the Commissioner may levy penalties against any business licensee for failure to comply with any law, rule or regulation that is enforced by the Department of Consumer Affairs when the violation is committed "in the course of and is related to the conduct of the business."<sup>64</sup> Because the Regulation Act is enforced by the Department, any violation of that act can trigger this broad authority.

Finally, the New York City licensing law itself provides additional authority to suspend or revoke licenses for failure to comply with the city's tobacco tax laws (in addition to the penalties authorized by the tax laws themselves) and the law prohibiting sales of herbal cigarettes.<sup>65</sup>

New York City's tobacco retailer license, tax and sales/use laws have several layers of enforcement, and much overlap, but the Department of Consumer Affairs is responsible for much of the enforcement. With many different enforcement mechanisms at its disposal, the city government can take action effectively against a licensee through various avenues depending on the circumstances of the violation. Suspension and revocation of the license is a strong supplement to monetary fines.

## Massachusetts

As in California, many municipalities in the Commonwealth of Massachusetts require that tobacco retailers have a local license in addition to a state license. Requirements and conditions vary depending on the particular town or city, though most require some form of the following:

- **Annual fee.** This varies widely, with many localities charging \$100<sup>66</sup> but others charging as much as \$500.<sup>67</sup>

- **Signing a statement.** Owners and operators of retail establishments must often sign a document acknowledging that they have read and understood statements about issues such as youth access, responsibility for violating tobacco control laws, compliance checks and inspections, employment of minors and sign posting.<sup>68</sup>
- **Non-transferability.** Permits generally cannot be transferred to a new owner or sold to another business. Some municipalities will issue a new permit to a business that moves locations.<sup>69</sup>
- **No loose or free cigarettes.** License holders are often prohibited from selling loose cigarettes or packages containing fewer than twenty cigarettes. They are also commonly restricted from distributing free products.<sup>70</sup>

## Section IV – Why Licensing is an Effective Tobacco Control Strategy

As these descriptions of tobacco retailer licensing programs demonstrate, licensing is primarily a mechanism to enforce other laws that apply to retailers such as tax and point-of-sale laws. Most of these laws contain independent penalties and enforcement procedures, but licensing rests on the simple concept that retailers engaging in tobacco sales must comply with all relevant laws or risk losing their license to sell this product. Other penalties, such as monetary fines, may apply as well, but for a profitable product such as tobacco, small fines can be absorbed as a cost of doing business. Licensing provides a more fundamental control, bearing directly on the right to transact any tobacco-related business.

Many tobacco retailer licensing programs also allow for more efficient enforcement against the licensee than do other enforcement actions. This enforcement can be accomplished through

a civil or criminal court proceeding or an administrative action. While court cases, both civil and criminal, are time-consuming for staff and often require attorneys, administrative proceedings typically are shorter (complete after a single hearing) and usually do not involve attorneys.

Finally, licensing laws that require retailers to comply with all federal, state and local tobacco control laws are dynamic and automatically incorporate newly adopted tobacco control laws. For example, in June 2009, President Obama signed the federal Family Smoking Prevention and Tobacco Control Act (the “FDA Law”),<sup>71</sup> which gave the FDA jurisdiction to regulate tobacco products and instituted sweeping new regulations. Existing licensing laws that require licensees to comply with all federal tobacco control laws now automatically require retailers to comply with the new FDA Law.

## Section V – Using Licensing to Control the Location and Density of Tobacco Retailers

For many years, states and local communities have sought to control the location and density of tobacco retailers as a way to reduce smoking and related health conditions. Greater availability of tobacco products results in increased youth smoking rates<sup>72</sup> as well as a higher incidence of tobacco-related death and disease, particularly in low-income communities.<sup>73</sup> Lowering the density of tobacco retailers and controlling their location reduces the overall availability of tobacco products in the community, especially to youth.

Density and location restrictions, which (like other tobacco control laws) stem from government’s police power, can be accomplished through traditional land use tools such as zoning ordinances and Conditional Use Permits (“CUPs”).<sup>74</sup> Increasingly, communities are also using licensing laws to achieve the same result.

## California

Prior to 2004, at least eight California communities had adopted ordinances prohibiting so-called “significant tobacco retailers” from being located too close to areas, such as schools and day care centers, frequented by children.<sup>75</sup> More recently, the cities of Oakland and Saratoga have adopted land use ordinances similarly restricting the location of all tobacco retailers.<sup>76</sup>

Largely because of the efficient enforcement mechanisms discussed in this synopsis, and because suspension or revocation of a tobacco retailer license is a strong penalty, a licensing law provides an effective means for restricting the location or density of retailers. For example, in 2009 the California Legislature considered a measure that would have limited the concentration of tobacco retailers to one retailer for every 2,500 persons in the community; later this bill was amended to prohibit tobacco retailers from locating within 600 feet of a school.<sup>77</sup> Although the legislation did not ultimately pass, it would have resulted in making nonconforming businesses ineligible for a state tobacco retailer license. Several California municipalities are considering local ordinances to use tobacco retailer licensing in a similar fashion.

Although density restrictions through licensure are just emerging in the context of tobacco control measures in California, they have long been used successfully in the context of alcohol retailers. For example, state law limits the total number of on-sale general liquor licenses (for consumption on premises) to one license for every 2,000 inhabitants in the county in which the license is sought.<sup>78</sup> Such restrictions are supported by the state legislature’s finding that they are necessary for the “public welfare and morals,” which is essentially a police power standard.<sup>79</sup> In fact, the legislature declared that the state’s Alcoholic Beverage Control laws are, in their entirety, “an exercise of the police

powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State.”<sup>80</sup> Comparable police power authority could be used to regulate the density of tobacco retailers at either the state or local level.

## Massachusetts

In Massachusetts, liquor license restrictions are also used to limit the density of alcohol retail points.<sup>81</sup> Similar limitations could be placed on tobacco retailers. Massachusetts boards of health largely rely on Chapter 111, Section 31 of the Massachusetts General Laws for their authority to regulate tobacco distribution.<sup>82</sup> Section 31, according to the Massachusetts Supreme Judicial Court, provides “boards of health plenary power to issue reasonable, general health regulations.”<sup>83</sup> The validity of a board of health regulation, therefore, depends on whether it is: (1) reasonable and (2) addresses an issue of general health.

Tobacco-related issues fall squarely within the rubric of general health. The Supreme Judicial Court has “recognized the ill effects of tobacco use, particularly when it involves minors, as a legitimate municipal health concern justifying municipal regulation of tobacco products.”<sup>84</sup> As to reasonableness, the Supreme Judicial Court stated in a 2001 case that it would accord a regulation adopted under Section 31 “the same deference granted to a legislative enactment.” Such regulations, the court continued, “have a strong presumption of validity, and, when assessing a regulation’s ‘reasonableness,’ all rational presumptions are made in favor of the regulation’s validity. A court may invalidate the regulation only when there is no rational relation between the regulation and its stated public health purpose.”<sup>85</sup>

To limit the number of tobacco retailer licenses would be consistent with Section 31’s purpose of promoting public health by reducing the availability of tobacco products, which can

result in reduced youth smoking rates and fewer tobacco-related diseases. Such a limit would thus be likely upheld even if a local health board does not provide proof that the regulation would definitively lead to a decrease in smoking.

## Section VI – Other Uses of Retailer Licensing

Although to date tobacco retailer licensing has been used primarily to facilitate enforcement of other tobacco tax and sales laws, and is now considered as a potential strategy to control the density and location of retailers, many communities are beginning to think of other innovative uses for licensing to ensure that tobacco retailers act responsibly.

The organization Public Health Law and Policy (“PHLP”) in Oakland, California has developed a “Model California Ordinance Requiring a Tobacco Retailer License” (the “Model Ordinance”), which was originally released in 1998 and has been revised five times since then.<sup>86</sup> PHLP’s Model Ordinance is intended to be used and adapted by local governments within California that want to establish a tobacco retailer licensure system.

PHLP’s Model Ordinance focuses on the core elements of a licensing system, which are outlined earlier in this synopsis (the elements common to “strong” California ordinances). In addition, PHLP has developed a series of “plug-ins” that can be incorporated into the Model Ordinance to impose additional conditions on the licensee.<sup>87</sup> Retailers who violate these conditions are subject to the same penalties as retailers who violate a tobacco control law—license suspension or revocation.

Using PHLP’s plug-ins, communities can:

- Further restrict where tobacco is sold, such as in residential zones;
- Restrict the types of businesses that sell tobacco, such as bars and restaurants;

- Impose additional conditions, such as prohibiting free distribution of tobacco product samples on licensed premises; and
- Incorporate different (non-tobacco control) laws into the licensing ordinance, such as authorizing suspension of the license for violating any laws relating to signage.

These concepts are already in use in California. In 2009, San Francisco became the first city in the nation to prohibit tobacco product sales in pharmacies.<sup>88</sup> The city implemented this prohibition by amending its existing tobacco retailer permit ordinance to provide that certain pharmacies are ineligible for a permit.<sup>89</sup> The ordinance, which has survived two legal challenges thus far, contains extensive legislative findings that demonstrate the prohibitions’ rational bases.<sup>90</sup> It serves as a strong demonstration of how retailer licensing can be used to control what types of businesses sell tobacco products.

Another innovative approach allows communities to use a tobacco retailer license to address illegal sales of drug paraphernalia in their communities. Sales of drug paraphernalia are illegal under California state law<sup>91</sup> and local governments are preempted from adopting ordinances further criminalizing such sales.<sup>92</sup> Despite the state law, sales of drug paraphernalia persist, in part because violations have proven difficult to obtain in court as retailers claim the merchandise is “tobacco paraphernalia.”<sup>93</sup>

Even though state law preempts local laws directly addressing drug paraphernalia sales, localities can impose a license condition as long as they do not expand or reduce the degree to which acts regulated by federal or state law are proscribed, or alter the penalties therein.<sup>94</sup> PHLP has thus developed an ordinance plug-in that conditions a tobacco retailer license on compliance with state drug paraphernalia

laws and authorizes license suspension or revocation for violations of those laws.<sup>95</sup> This approach has generated a lot of interest and has been adopted by several communities.<sup>96</sup> It is modeled after a similar state law that allows for suspension of an alcohol license for violations of drug paraphernalia laws.<sup>97</sup> Tying tobacco licensure to drug paraphernalia law compliance allows communities to take action against a business selling drug paraphernalia through an administrative proceeding without relying on the criminal courts. An additional benefit to this type of law is that it encourages coalitions fighting drug use to partner with tobacco control coalitions, thus allowing both groups to advocate their positions more forcefully.

Other creative uses of licensing are in place throughout the nation as well. As noted earlier, New York State law authorizes suspension of a retailer's lottery license and its alcohol license when the retailer violates the New York State Licensing Law. State and local governments should continue to look for ways to use tobacco retailer licensing as a mechanism to ensure responsible retailing more generally and to facilitate compliance with important public health laws.

## **Conclusion**

Although the tobacco control movement nationwide is mature, much work still needs to be done to control tobacco's availability to minors, to reduce exposure to secondhand smoke and to stem the tide of death and disease caused by tobacco. While the federal government is asserting more regulatory control over tobacco products with the passage of the FDA Law, most of the work in enforcing tax, sales, marketing and use laws will continue to be done at state and local levels.

Tobacco retailer licensing is an effective tool to help state and local officials control the retail environment and ensure that retailers comply with all tobacco control laws. States

and local governments should also consider using licensing in other ways to help ensure that tobacco retailers are responsible corporate citizens.

While this synopsis focuses on states with progressive tobacco retailer licensing laws, all states and local governments should consider their own regulatory authority to adopt and implement a licensing system. With a product as heavily regulated as tobacco, using licensure is a logical next step in the fight against the adverse effects of this dangerous product.

## **About the Author**

Ian McLaughlin is a senior staff attorney with Public Health Law & Policy (PHLP) in Oakland, California, focusing on tobacco retailer licensing, public financing, and code enforcement issues in public health.

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## Endnotes

- 1 U.S. Dep't of Health and Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke>.
- 2 Some governments require a “permit” for businesses that sell tobacco products; the terms “permit” and “license” have basically the same meaning in this context and this article will use “license” throughout.
- 3 LAWRENCE GOSTIN, *PUBLIC HEALTH LAW AND ETHICS: A READER* 185 (Lawrence Gostin ed., University of California Press 2002).
- 4 U.S CONST. amend. X.
- 5 See, e.g., CAL. CONST. art XI, § 7; MASS. CONST. AMEND. art. 2, § 6.
- 6 See, e.g., IND. ADMIN. CODE 36-1-3-1 (2010).
- 7 *Sunset Amusement Co. v. Bd. of Police Comm'rs*, 496 P.2d 840, 844 (1972).
- 8 CAMPAIGN FOR TOBACCO-FREE KIDS, *MAP OF STATE CIGARETTE TAX RATES* (2009), <http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>; CAMPAIGN FOR TOBACCO-FREE KIDS, *STATE EXCISE TAX RATES FOR NON-CIGARETTE TOBACCO PRODUCTS* (2009), <http://www.tobaccofreekids.org/research/factsheets/pdf/0169.pdf>.
- 9 CAL. BUS. & PROF. CODE § 22970.1 (West 2010).
- 10 *Id.* §§ 22970-22983.
- 11 *Id.* §§ 22970-22971.4. The BOE also requires a reinstatement fee of \$100 to reinstate an expired license. *Id.* § 22973).
- 12 *Id.* § 22972.
- 13 *Id.* § 22973.1.
- 14 *Id.* § 22974.3.
- 15 *Id.* § 22974.3.
- 16 *Id.* § 22908.1.
- 17 *Id.* § 22974.3.
- 18 *Id.* § 22974.7.
- 19 *Id.* § 22974.7(d).
- 20 *Id.* § 22974.
- 21 *Id.* § 22974.3.
- 22 *Id.* § 22974.7.
- 23 *Id.* § 22980.3.
- 24 CAL. CODE REGS. tit. 18, § 4603 (2010).
- 25 *Id.* § 4603, 4606 (regulation 4606 provides a list of mitigating circumstances for consideration by the BOE in determining the penalty to apply).
- 26 THE CENTER FOR TOBACCO POLICY & ORGANIZING, AMERICAN LUNG ASSOCIATION, *CIGARETTES GENERATE BIG REVENUE FOR CONVENIENCE STORES* (2009), [http://www.center4tobaccopolicy.org/\\_files/\\_files/Cigarettes Generate Big Revenue for Convenience Stores May 2009.pdf](http://www.center4tobaccopolicy.org/_files/_files/Cigarettes%20Generate%20Big%20Revenue%20for%20Convenience%20Stores%20May%202009.pdf).
- 27 N.Y. TAX LAW §§ 480, 480-a (McKinney 2010).
- 28 *Id.* § 480-a.
- 29 *Id.* § 480-a(2)(a)(ii), amended by The Health Care Improvement Act, 2009 N.Y. Sess. Law Serv. ch. 58 § 125(c).
- 30 See *Long Island Gasoline Retailers Ass'n, Inc. v. David A Paterson*, No. 09-018800 (N.Y. Sup. Ct. filed Sept. 16, 2009).
- 31 N.Y. TAX LAW § 480-a (McKinney 2010).
- 32 NEW YORK CITY, N.Y., PUB. HEALTH CODE art. 13F §§ 1399-bb, 1399-dd, 1399-gg, 1299-ll, 1399-mm (2010).
- 33 N.Y. TAX LAW § 480-a(2)(c) (McKinney 2010).
- 34 *Id.* § 480-a (4).
- 35 *Id.*
- 36 *Id.* § 480-a (3).
- 37 *Id.* § 480-a (4).

- 38 *Id.* § 480-a (4)(d).
- 39 MASS. GEN. LAWS ANN. ch. 62C § 67 (West 2010).
- 40 *Id.*
- 41 MASS. GEN. LAWS ANN. ch. 64C §§ 1-8 (West 2010).
- 42 CAL. BUS. & PROF. CODE § 22971.3 (West 2010).
- 43 *Id.* § 22973.2.
- 44 AMERICAN NONSMOKERS' RIGHTS FOUNDATION, CALIFORNIA MUNICIPALITIES WITH LAWS RESTRICTING YOUTH ACCESS TO TOBACCO (2010), [http://www.phlpnet.org/system/files/ANRF%20List%20of%20Communities%20with%20Licensing%20and%20Self-Service%20Display%20Ordinances%20\(PDF,%20Updated%201-10\)%20.pdf](http://www.phlpnet.org/system/files/ANRF%20List%20of%20Communities%20with%20Licensing%20and%20Self-Service%20Display%20Ordinances%20(PDF,%20Updated%201-10)%20.pdf) (PDF, Updated 1-10).
- 45 The Center for Tobacco Policy & Organizing, a division of the American Lung Association in Sacramento, California, specializes in community organizing and helps local communities develop tobacco policy campaigns. The Technical Assistance Legal Center, a project of Public Health Law & Policy in Oakland, California, provides legal technical assistance to support local tobacco control policies.
- 46 THE CENTER FOR TOBACCO POLICY & ORGANIZING, AMERICAN LUNG ASSOCIATION, MATRIX OF STRONG LOCAL TOBACCO RETAILER LICENSING ORDINANCES (2009), [http://www.center4tobaccopoly.org/\\_files/\\_files/Licensing Matrix May 2009 v2.pdf](http://www.center4tobaccopoly.org/_files/_files/Licensing%20Matrix%20May%202009%20v2.pdf).
- 47 See *Sinclair Paint Co. v. State Bd. Of Equalization*, 937 P.2d 1350, 1355-56 (Cal.1997).
- 48 EAST PALO ALTO, CAL., CODE § 5.80.040 (2007).
- 49 OAKLAND, CAL., CODE § 5.91.080 (2008).
- 50 THE CENTER FOR TOBACCO POLICY & ORGANIZING, *supra* note 46.
- 51 *Id.*
- 52 CAL. BUS. & PROF. CODE §§ 22952, 22958 (West 2010); CAL. PENAL CODE § 308 (West 2010) (although Penal Code 308 also authorizes criminal prosecution and application of misdemeanor penalties, including imprisonment, jail time is generally not pursued.)
- 53 See, e.g., TECHNICAL ASSISTANCE LEGAL CENTER, PUBLIC HEALTH LAW & POLICY, CASE STUDIES ON THE IMPLEMENTATION AND ENFORCEMENT OF LOCAL TOBACCO RETAILER LICENSING ORDINANCES IN CALIFORNIA (2006), <http://www.phlpnet.org/tobacco-control/products/retailerlicensingcasestudies>.
- 54 See, e.g., LOS ANGELES, CAL., CODE § 11.35.110 (2010).
- 55 CAL. PENAL CODE § 308 (West 2010); CAL. BUS. & PROF. CODE §§ 22952, 22958 (West 2010).
- 56 Retailers of other tobacco products are not required to obtain a license from the city.
- 57 NEW YORK CITY, N.Y., ADMIN. CODE § 20-202(c) (West 2010).
- 58 Tobacco Product Regulation Act, NEW YORK CITY, N.Y., ADMIN. CODE §§ 17-616 to 17-626 (West 2010).
- 59 *Id.* § 17-623.
- 60 *Id.* § 17-618.
- 61 *Id.* § 17-619.
- 62 *Id.* § 17-620.
- 63 *Id.* § 17-624.
- 64 NEW YORK CITY, N.Y., ADMIN. CODE § 20-104(e)(1) (West 2010).
- 65 *Id.* § 20-206.
- 66 See, e.g., DIV. OF PUB. HEALTH, CITY OF WORCESTER, MASS., APPLICATION TO SELL TOBACCO PRODUCTS (2010), <http://www.ci.worcester.ma.us/uploads/f9/7c/f97c041c5fbc09062a694f8c1725203/sell.pdf> (requiring a \$100 fee); BOSTON PUB. HEALTH COMM'N, CITY OF BOSTON, MASS., LOCATION AND SALES OF TOBACCO PRODUCTS PERMIT APPLICATION (2005), [http://www.bphc.org/programs/cib/healthyhomescommunitysupports/tobaccocontrol/tobaccoregs/Forms%20%20Documents/tobacco\\_permit-application.pdf](http://www.bphc.org/programs/cib/healthyhomescommunitysupports/tobaccocontrol/tobaccoregs/Forms%20%20Documents/tobacco_permit-application.pdf) (requiring a \$100 fee).
- 67 See, e.g., DEP'T OF HEALTH AND HUMAN SERVS, TOWN OF ARLINGTON, MASS., APPLICATION FOR PERMIT TO SELL TOBACCO PRODUCTS, [http://www.town.arlington.ma.us/public\\_documents/ArlingtonMA\\_Health/tobacco/tobaccoapp.pdf](http://www.town.arlington.ma.us/public_documents/ArlingtonMA_Health/tobacco/tobaccoapp.pdf) (requiring a \$500 fee).
- 68 See, e.g., BOSTON PUB. HEALTH COMM'N, CITY OF BOSTON, MASS., LOCATION AND SALES OF TOBACCO PRODUCTS RETAIL ESTABLISHMENT OWNER/OPERATOR STATEMENT (2005), [http://www.bphc.org/programs/cib/healthyhomescommunitysupports/tobaccocontrol/tobaccoregs/Forms%20%20Documents/tobacco\\_permit-application.pdf](http://www.bphc.org/programs/cib/healthyhomescommunitysupports/tobaccocontrol/tobaccoregs/Forms%20%20Documents/tobacco_permit-application.pdf).
- 69 See, e.g., BD. OF HEALTH, CITY OF SOMERVILLE, MASS., REGULATIONS AFFECTING ACCESS TO TOBACCO PRODUCTS BY MINORS, § 9.5 (2006), [http://www.ci.somerville.ma.us/CoS\\$Content/documents/SomervilleYARegs06-04-20.pdf](http://www.ci.somerville.ma.us/CoS$Content/documents/SomervilleYARegs06-04-20.pdf).

- 70 See, e.g., Bd. of Health, Town of Dartmouth, Mass., 2010 Annual Tobacco Sales Permit Application (2010), [http://www.town.dartmouth.ma.us/Pages/DartmouthMA\\_BComm/Health/files/TobaccoApp.pdf](http://www.town.dartmouth.ma.us/Pages/DartmouthMA_BComm/Health/files/TobaccoApp.pdf) (prohibiting sales of single cigarettes); Bd. of Health, Town of Uxbridge, Mass., Tobacco Access to Minors Control Regulation, §§ F & G (2009), <http://www.uxbridge-ma.gov/Documents/BOH/TobaccoAccessToMinorsControlRegulations.pdf> (prohibiting free product distribution, single-cigarette sales, and sales of packs containing fewer than twenty cigarettes.)
- 71 Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (2010).
- 72 Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 Am. J. Pub. Health 670, 673 (2006).
- 73 Ying-Chih Chuang et al., *Effects of Neighbourhood Socioeconomic Status and Convenience Store Concentration on Individual Level Smoking*, 59 J. Epidemiological Community Health 568, 570 (2005).
- 74 Randolph Kline, Tobacco Control Legal Consortium, *Local Land Use Regulation for the Location and Operation of Tobacco Retailers* (2004), available at <http://www.wmitchell.edu/tobaccolaw/resources/kline.pdf>.
- 75 A list of California communities with land use/zoning ordinances regulating the location of tobacco retailers is on file with the Technical Assistance Legal Center, Public Health Law & Policy. A “significant tobacco retailer” is one that specializes in sales of tobacco products and paraphernalia, and devotes a large amount of floor or shelf space to those products.
- 76 Oakland, Cal., Planning Code §§ 17.102.350, 17.09.040 (2008); Saratoga, Cal., Code §§ 15-19.020 (2009).
- 77 S. 603, 2009 Legis. Sess. (Cal. 2009) (not passed).
- 78 Cal. Bus. & Prof. Code § 23816 (West 2010). Different concentration limitations are established for different kinds of alcohol licenses. For example, for off-sale general licenses and off-sale beer and wine licenses, the limit is one license per 2,500 residents. Cal. Bus. & Prof. Code §§ 23817, 23817.5 (West 2010).
- 79 Cal. Bus. & Prof. Code §§ 23815, 23817.4 (West 2010).
- 80 *Id.* § 23001.
- 81 Mass. Gen. Laws Ann. ch. 138 § 17 (West 2010).
- 82 Mass. Gen. Laws Ann. ch. 111 § 31 (West 2010).
- 83 *Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 42 (Mass. 2001).
- 84 *Id.*
- 85 *Id.* at 41 (2001).
- 86 PHLP’s model ordinance is available on its website at [www.phlpnet.org/talc](http://www.phlpnet.org/talc). See Technical Assistance Legal Center, Public Health Law & Policy, *Licensing Ordinance (and Associated Plug-Ins)* (2008). [http://www.phlpnet.org/tobacco-control/products/Licensing\\_Ordinance](http://www.phlpnet.org/tobacco-control/products/Licensing_Ordinance). PHLP has also developed a “checklist” to accompany the ordinance, setting forth the recommended provisions and other policy options in the ordinance. Technical Assistance Legal Center, Public Health Law & Policy, *Licensing Ordinance Checklist*, [http://www.phlpnet.org/system/files/Licensing%20Ordinance-%20CHECKLIST\\_6\\_08.pdf](http://www.phlpnet.org/system/files/Licensing%20Ordinance-%20CHECKLIST_6_08.pdf).
- 87 At the time of this writing there are twelve plug-ins, with five more in development. All of the plug-ins are available on PHLP’s website at [http://www.phlpnet.org/tobacco-control/products/Licensing\\_Ordinance](http://www.phlpnet.org/tobacco-control/products/Licensing_Ordinance).
- 88 S.F., Cal., Health Code art. 19J, §§ 1009.91-1009.99 (2009).
- 89 *Id.*
- 90 *Walgreen Co. v. City and County of San Francisco*, Court of Appeal of the State of California, First Appellate District, Division Three, Case No. A123891 (preliminary injunction denied, in process of scheduling oral arguments); *Philip Morris USA Inc. v. City and County of San Francisco*, United States Court of Appeals, Ninth Circuit, Case No. 08-17649 (plaintiff dropped lawsuit against San Francisco).
- 91 Cal Health & Safety Code § 11364.5 (West 2010).
- 92 *A & B Cattle Company, Inc. v. City of Escondido*, 238 Cal. Rptr. 580, 584-89 (Cal. App. 1987).
- 93 Sarah Burge, *Smoke Shops Skirt Hazy Drug Laws*, THE PRESS-ENTERPRISE, Jan. 5, 2010, available at <http://www.allbusiness.com/crime-law/controlled-substances-cannabis/13687973-1.html>.
- 94 See, e.g., *Bravo Vending v. City of Rancho Mirage*, 20 Cal. Rptr. 2d 164, 172-74 (Cal. App. 1993); *EWAP, Inc. v. City of Los Angeles*, 158 Cal. Rptr. 579, 585-87 (Cal. App. 1979) (both citing findings for model licensing ordinance).
- 95 See TECHNICAL ASSISTANCE LEGAL CENTER, PUBLIC HEALTH LAW & POLICY, PLUG-IN: PENALTIES FOR VIOLATION OF STATE DRUG PARAPHERNALIA LAWS (2008), [http://www.phlpnet.org/tobacco-control/products/Licensing\\_Ordinance](http://www.phlpnet.org/tobacco-control/products/Licensing_Ordinance) (click link for Microsoft Word file). See also THE CENTER FOR TOBACCO POLICY & ORGANIZING, TECHNICAL ASSISTANCE LEGAL CENTER, USING TOBACCO RETAILER LICENSING TO PROVIDE PENALTIES FOR VIOLATION OF STATE PARAPHERNALIA LAWS (2009), <http://www.phlpnet>.

org/system/files/TALC%20Center%20Drug%20Paraphernalia%20and%20TRL%20Information\_FINAL\_090624.pdf.

96 See, e.g., OAKLAND, CAL., CODE §§ 5.91.010-5.91.140 (2008).

97 CAL. BUS. & PROF. CODE § 24200.6 (West 2010).

## **About the Tobacco Control Legal Consortium**

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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