

COUNCIL REQUESTED TOBACCO ITEMS

#	Information Requested by City Council	Regulatory Context	Implementation Strategies	Council Direction Needed	Staff Recommendation	LUD Recommendation
1	Implementing a local tobacco retail license (TRL) system, including maximum amount that can be charged, and how those fees will be spent	Local tobacco retailer licensing laws are specifically authorized by state law, in addition to any required state-level licenses, and City can also suspend/ revoke local license for any violation of local or state tobacco control law. (Cal. Bus. & Prof. Code § 22971.3; <i>Prime Gas, Inc. v. City of Sacramento</i> (2010) 184 Cal.App.4th 967.)	The City can adopt a comprehensive tobacco retail licensing ordinance, using nearby jurisdictions and ChangeLab Solutions/Public Health Law Center templates as examples of permissible scope of regulation. License fees can only cover the cost of administering license program. New fees would be adopted by Council either with adoption of a new ordinance or with other amendments to Cost Allocation Plan.	-Whether to implement a TRL Ordinance?	If TRL is implemented, require two annual inspections of licensees-one inspection for compliance and one decoy operation. Utilize outside counsel to draft new ordinance.	Yes, fee to cover implementation, 3 compliance checks and 1 decoy, revocation after 3 violations.
2	100% flavor ban on tobacco sales	Currently banned by state law. AB 935 (eff. 1/1/24) enacts more stringent penalties, up to \$6,000 per violation. City may impose greater local tobacco controls than the State Law.	The City could opt to adopt an ordinance supplementing the State's enforcement efforts, or opt to let the State enforce the law without additional City regulations.	Whether to implement TRL Ordinance? Alternatively, whether to implement a stand-alone ban on flavored tobacco?	If TRL is implemented, incorporate language suggested by Model Ordinance (p. 10)	Yes, include in TRL
3	Prohibiting vaping product sales	As of 2016, state law prohibits the use of Electronic Smoking Devices (ESDs) anywhere cigarette smoking is prohibited; local ordinance can further prohibit use of ESDs in places not already covered by state law. City can go further and ban the sale of ESDs outright (either along with, or separately from, all "smoking products" generally).	The City could adopt an ordinance defining "e cigarettes" and related paraphernalia, and prohibiting the sale of such products outright (with a phase-out period/hardship exemption process).	-Whether to prohibit ESDs. -What length of phase out period?	The Model Ordinance does not prohibit sales of ESDs. If Council would like to prohibit ESDs, staff recommends including the prohibition in a TRL ordinance drafted by outside counsel. Include a minimum one year phase out period.	Yes
4	Maximum distance between tobacco retailers and schools that's allowed by law	A tobacco retailer ordinance can include "buffer" distance between retailers and schools (and other youth-populated areas). No maximum is defined in law, but 1,000 feet is recommended for defensibility purposes. This approach (albeit with a 500 foot rather than 1,000 foot buffer) has been upheld by a US District Court (<i>Independent Gas & Service Stations Associations, Inc. v. City of Chicago</i> (N.D. Ill. 2015) Case No. 1:2014cv07536.) Other jurisdictions have adopted 1,000 foot buffer requirements since that case. And, these provisions can still apply to existing retailers who might be impacted (i.e., are within the buffer zone) - they can apply for a one-time, non-renewable license to give them time to phase out.	A TRL ordinance can define schools and impose a separation requirement between schools and specific types of tobacco retailers. The City could also go further by expanding this past just "schools" to also include "youth-oriented facilities" more broadly, such as libraries, day care centers, houses of worship that engage in youth activities, all types of educational facilities.	Whether to create a buffer and if so, how large?	Include a maximum 1,000 ft. buffer in a new TRL ordinance. Expand the separation requirements to other "youth-oriented facility" in addition to schools per the suggestions in model ordinance (p. 12).	1,000 ft. separation and no renewal of license after one year if business is non-compliant with new regulations.

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5	Minimum sales sizes (e.g. pack/carton)	A city is not preempted from enacting a local control on the minimum package size for little cigars or cigars (which might ordinarily be sold as individual units). (Cigarettes are already required to come in packs of at least 20 pursuant to federal law.) This approach has been endorsed by ChangeLab Solutions, the Public Health Law Center, and American Lung Association California.	The City could include this as part of its comprehensive TRL ordinance. This effort would be most successful in conjunction with a minimum <i>pricing</i> strategy (see #10). Because companies often sell cigars and little cigars at very low prices as "loss leaders," regulating pack size and cost through a tobacco retailing ordinance would help curb youth access to low-priced tobacco.	Whether to restrict pack size and if so, to what sizes?	Incorporate minimum pack sizes suggested by Model Ordinance (p. 10).	Require minimum pack size of 20 cigars/cigarettes.
6	Strictest laws for proximity between retailers	A city can enact proximity regulations, such as "no license may issue and no existing license may be renewed to authorize a tobacco retailer to operate within 500 [or more at City's discretion] feet of a tobacco retailer already licensed pursuant to this ordinance." Can either grandfather existing retailers who may violate this buffer, or can provide phase-out window/hardship exemption.	The City could adopt a TRL Ordinance including separation requirements between specific types of tobacco retailers.	-Whether to adopt proximity regulations and if so, what distance? -Whether to grandfather existing retailers or phase them out?	Incorporate maximum 1,000 ft. proximity regulations between retailers and add policies for existing retailers, to be drafted by outside counsel based on Council direction.	1,000 ft. separation and no renewal of license after one year if business is non-compliant with new regulations.
7	All tobacco sales banned at pharmacies	A city can enact a law banning the sale of tobacco in stores that contain pharmacies as long as the law does not treat similar stores containing pharmacies differently from one another	The City could adopt an ordinance banning sales of tobacco in stores containing pharmacies, this could include stand alone pharmacies and any retail outlet that also contains a pharmacy such as grocery stores.	Whether tobacco sales should be banned at all pharmacies?	IF TRL is implemented, include prohibition of sales at pharmacies suggested by Model TRL Ordinance (p. 11).	Yes, ban tobacco sales at all pharmacies.
8	Working with law enforcement on decoy purchasers	Decoy law enforcement operations are legal, and an effective way to reduce impermissible access to tobacco. Under the "Stop Tobacco Access to Kids Enforcement" (STAKE) Act, the state Department of Public Health can conduct these decoy operations, and local governments are also permitted to enforce with local police/youth decoys. Tobacco retailer licensing fees obtained through a local licensing ordinance can also be used to specifically support these types of enforcement efforts.	The Police Department has conducted decoy operations in the past. A TRL Ordinance should contain requirements for regularly monitoring licensees for compliance with requirements. Compliance checks can include monitoring for underage sales using decoy purchasers.	How often to monitor licensees for compliance?	If TRL is implemented, recommend 1 annual inspection for compliance with license requirements and 1 additional annual compliance check related to underage sales.	TRL should include 3 compliance checks and a minimum of 1 decoy operation per year.

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9	Any way to retroactively revoke licenses (if applicable)	Business & Professions Code § 22971.3 says local licensing laws can provide for suspension or revocation of a local license for violation of state or local tobacco retailing law. (See also <i>Prime Gas, Inc. v. City of Sacramento</i> (2010) 184 Cal.App.4th 697.)	Once a TRL program is in place, new businesses will have to abide by all local laws, and existing businesses may be grandfathered in to some provisions or there may be a phase-out window, as mentioned in various places throughout this report. In all cases, existing and new businesses will have to prospectively apply with all regulations from their effective date once adopted.	See direction need for #1 above.	The City does not currently have tobacco licenses it can revoke. If TRL is implemented, staff recommends revocation provisions suggested by Model TRL Ordinance (p. 17)	TRL should include a limit of 3 violations before a license is revoked.
10	Minimum prices on tobacco	City can establish minimum tobacco product prices pursuant to their police power; government laws regulating a market and setting a baseline price are generally not preempted, although the law must be carefully crafted to ensure it does not facilitate collusion among tobacco companies. (See <i>Fisher v. City of Berkeley</i> (1986) 475 U.S. 260, 270; <i>Flying J, Inc. v. Hollen</i> (7th Cir. 2010) 621 F.3d 658, 662-663.)	City ordinance can include a minimum price floor for certain tobacco products, such as cigarettes, e-cigarettes, little cigars, and cigars. Staff can rely on examples from Sonoma County, Windsor, and San Leandro (among others) for effective ordinance language. E.g., "No Tobacco Retailer shall sell to a consumer cigarettes at a price that is less than \$X per package of 20 cigarettes, including all applicable taxes and fees."	Whether to incorporate minimum prices as suggested by Model TRL Ordinance?	Include minimum price regulations suggested by Model TRL Ordinance. Staff recommends working with Contra Costa Health's Tobacco Prevention program to determine a minimum price that is consistent with others in the County and escalates by Consumer Price Index (CPI).	Require a minimum price of \$10.00 and add language to escalate the price annually per the CPI.
11	Prohibit coupons/discounts	Prohibitions on discounts/coupons/promotions would be valid for the same reason as the preceding strategy regarding minimum prices. (See also <i>Nat'l Assn of Tobacco Outlets, Inc. v. City of Providence et al.</i> (D.R.I. Dec. 10, 2012) Case No. 12-96-ML; <i>Nat'l Assn of Tobacco Outlets, Inc. v. City of Providence</i> (1st Cir. 2013) 731 F.3d 71.)	Because the tobacco industry focuses heavily on coupons and discounts as a marketing strategy, particularly aimed at youth and underserved communities, prohibiting the redemption of such coupons and discounts through ordinance can have a large impact on the behaviors of populations particularly affected by price increases. There is sample language from ChangeLabs and local jurisdictions that staff can rely on.	Whether to prohibit discounts/coupons/promotions as suggested by Model TRL Ordinance?	IF TRL is implemented, include suggested discount prohibition in the Model TRL Ordinance (p. 10).	Yes, prohibit coupons/discounts in TRL Ordinance.
12	Cap on smoke shops and tobacco retailers in total	This is permissible under the City's police power, and is also analogous to state law limiting the number of retailers licensed to sell alcohol for off-site consumption. Can either grandfather existing retailers who may exceed the cap when it is enacted, or can provide phase-out window/hardship exemption.	The City can adopt an ordinance implementing a cap on certain types of tobacco retailers. The City can also address overconcentration in certain areas, not just overall # of stores. E.g., establish a cap on total number of tobacco retail licenses for specific "districts" within the City, set out in a map.	-Whether to create a cap on tobacco retailers? -Whether to grandfather existing retailers or phase-out existing?	IF TRL is implemented, implement a cap on total number of tobacco retailers/licenses with requirements for existing retailers.	Cap and winnow-no more than current 42 licenses should be issued; licenses should be non-transferrable; include a 1 year grace period for non-compliant businesses.

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13	DOJ grants to support code enforcement	Cities are eligible to apply for Department of Justice (DOJ) grants that may be used to enforce local ordinances and/or state laws relating to sale or marketing of tobacco products, including e-cigarettes. Supported enforcement efforts may include (but are not limited to) retailer compliance checks, public education outreach, and retailer license inspections.	The earlier DOJ grant is no longer open for new applications this fiscal year and it is not clear that it has been funded for the next fiscal year. Staff will stay informed on additional funding opportunities that may arise.	None.	Staff will apply for future DOJ grants if the program is funded. Funds could be used for enforcement whether or not the City has a TRL.	Yes, staff should apply for DOJ grants.
14	Require CUP for tobacco sales	City can require new tobacco retailers to obtain a CUP, which can set restrictions such as limiting amount of storefront signage or banning sale of single cigars (among other things). (See California Constitution art. 20, § 22; Bus. & Prof. Code § 23790; <i>City of Oakland v. Superior Court</i> (1996) 45 Cal.App.4th 740.)	The City could amend the Zoning Ordinance Land Use Table to require a CUP for any type of tobacco sales. Or, amend the Zoning Ordinance to require a CUP for stand-alone "smoke shops" only.	Whether to require a CUP for new tobacco retailers?	Do not require a CUP, only a TRL. A TRL has strict operating standards and can be more easily revoked than a CUP.	No separate CUP requirement. Implement TRL instead.
15	Potential penalties available	Penalties can include civil or administrative fines, license suspension and revocation (subject to due process), ineligibility to apply for a new retailer license for specified periods of time, seizure and forfeiture of products offered for sale in violation of state or local law (subject to due process), treatment as public nuisance (allowing enforcement via nuisance abatement in local code).	City ordinance can include a program for monitoring compliance, plus establishment of whichever combination of penalties (listed in the "regulatory" column) Council deems appropriate.	None.	Adoption of any new ordinances as detailed above would include language related to license suspension, seizure of products, penalties, fines etc. as appropriate.	Fines should be as high as possible. Research if it is possible to repurpose fines for education or alternative purposes.
16	Bring other best practices from other cities for Council consideration	See staff report discussion of other cities' regulations				
ADDITIONAL INFORMATION REQUESTED BY LUD ON 3/18						
17	N/A	Whether to adopt additional regulations restricting tobacco advertisements and prohibiting the sale of drug paraphernalia?			Utilize outside legal to draft a TRL ordinance and update applicable sign regulations.	Provide recommendations on how to regulate sign content within the law. Prohibit the sale of drug paraphernalia in TRL.