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Solutions**

Law & policy innovation
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for Tobacco Policy
& Organizing

 AMERICAN LUNG ASSOCIATION.
IN CALIFORNIA

Beating Big Tobacco to the Punch: Regulating Emerging Products Early

September 25, 2012



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Jack Nicholl

Consultant

The Center for Tobacco Policy & Organizing



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AGENDA

- I. Introduction
- II. What is the Problem?
- III. Policy Options for Emerging Products
- IV. Organizing Tips for Your Efforts
- V. Conclusion



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Matthew Moore
Staff Attorney
ChangeLab Solutions

A panoramic view of the San Francisco skyline, featuring the Transamerica Pyramid in the center. The image is overlaid with a blue rectangular box containing white and yellow text.

Join us for a reception!
Change...with a Twist!
Monday, October 29
4 – 7 p.m.
Follow #twist4health

EMERGING PRODUCTS

1. What are the new products?
2. Why are they a public health issue?



“In line with our long-term strategy to transform the tobacco industry and reduce the harm caused by smoking, our companies have been hard at work on developing a pipeline of new smokeless and other product innovation.”

–RJR’ s chief executive and president
July 28, 2012

“In line with our **long-term strategy** to transform the tobacco industry and **reduce the harm** caused by smoking, our companies have been hard at work on developing a pipeline of **new smokeless and other product innovation.**”

–RJR’ s chief executive and president
July 28, 2012

TWO CATEGORIES OF NEW PRODUCTS

- Products containing tobacco
- Nicotine only products

PRODUCTS CONTAINING TOBACCO








VICEROY
Flex

12-DISSOLVABLE TOBACCO
NET WT 0.43 OZ.

WARNING:
This product can
cause gum disease
and tooth loss.


VICEROY
Pouches

15-TOBACCO POUCHES

WARNING:
This product can
cause gum disease
and tooth loss.

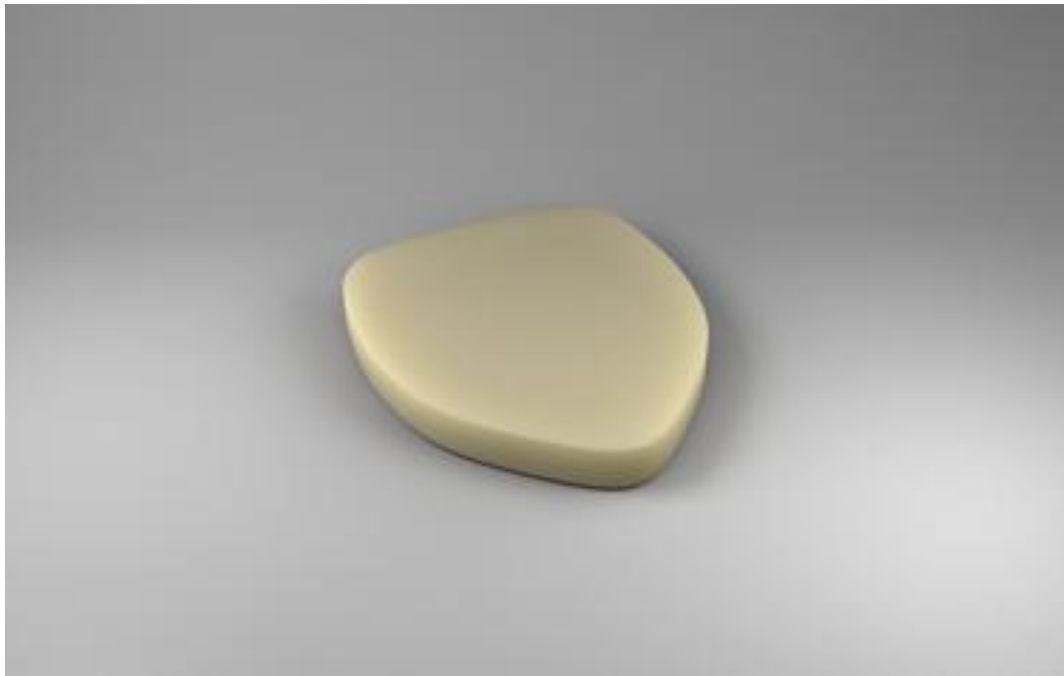
DIGITAL
VAPOR
CHAMBER

NICOTINE ONLY PRODUCTS











A laboratory setting with various glassware including test tubes, a graduated cylinder, and a flask, with the text 'PRODUCTS IN DEVELOPMENT' overlaid. The background is a blurred laboratory bench with shelves containing bottles and equipment. The lighting is warm and focused on the glassware in the foreground.

PRODUCTS IN DEVELOPMENT

**WHAT ARE THE
PUBLIC HEALTH HARMS
OF THE NEW PRODUCTS?**



**NO
SMOKING**

CITY OF OAKLAND
ORDINANCE NO. 10772

DEAR SMOKING BAN,



blu ELECTRONIC CIGARETTES

Take back your freedom to smoke anywhere with blu electronic cigarettes. It produces no smoke and no ash, only vapor, making it the same as regular cigarettes. It's the most satisfying way to tell the smoker you're okay. Okay, maybe the second-most satisfying way.

New blu Smart Pack

bluci

18+ only.

CALIFORNIA PROPOSITION 65 Warning: This product contains nicotine, a chemical known to cause birth defects or other reproductive harm.



WHY QUIT? SWITCH TO BLU

blu is the smart choice for smokers wanting a change. Take back your freedom to smoke when and where you want without ash or smell. blu is everything you enjoy about smoking and nothing else. Nobody likes a quitter, so make the switch today.

Visit blucigs.com



* New blu Smart Pack



SMOKELESS FOR SMOKERS

OR MARLBORO SNUS

DIFFERENT WAY TO ENJOY MARLBORO,
SEVERAL TASTES TO CHOOSE FROM.
NOW AVAILABLE IN A 15-POUCH TIN.

1-800-985-9889.

This product is not a
substitute for cigarettes.











69

BLUEBERRY

SWISS SWEETS

SWEETS

25900 15177 5

69

WHITE GRAPE

SWISS SWEETS

SWEETS

0 25900 15150 0

SWISS SWEETS

SWEETS

0 259973 4

SWISS SWEETS

SWEETS

0 25900 15150 1

69

SWEETS

0 25900 15150 1



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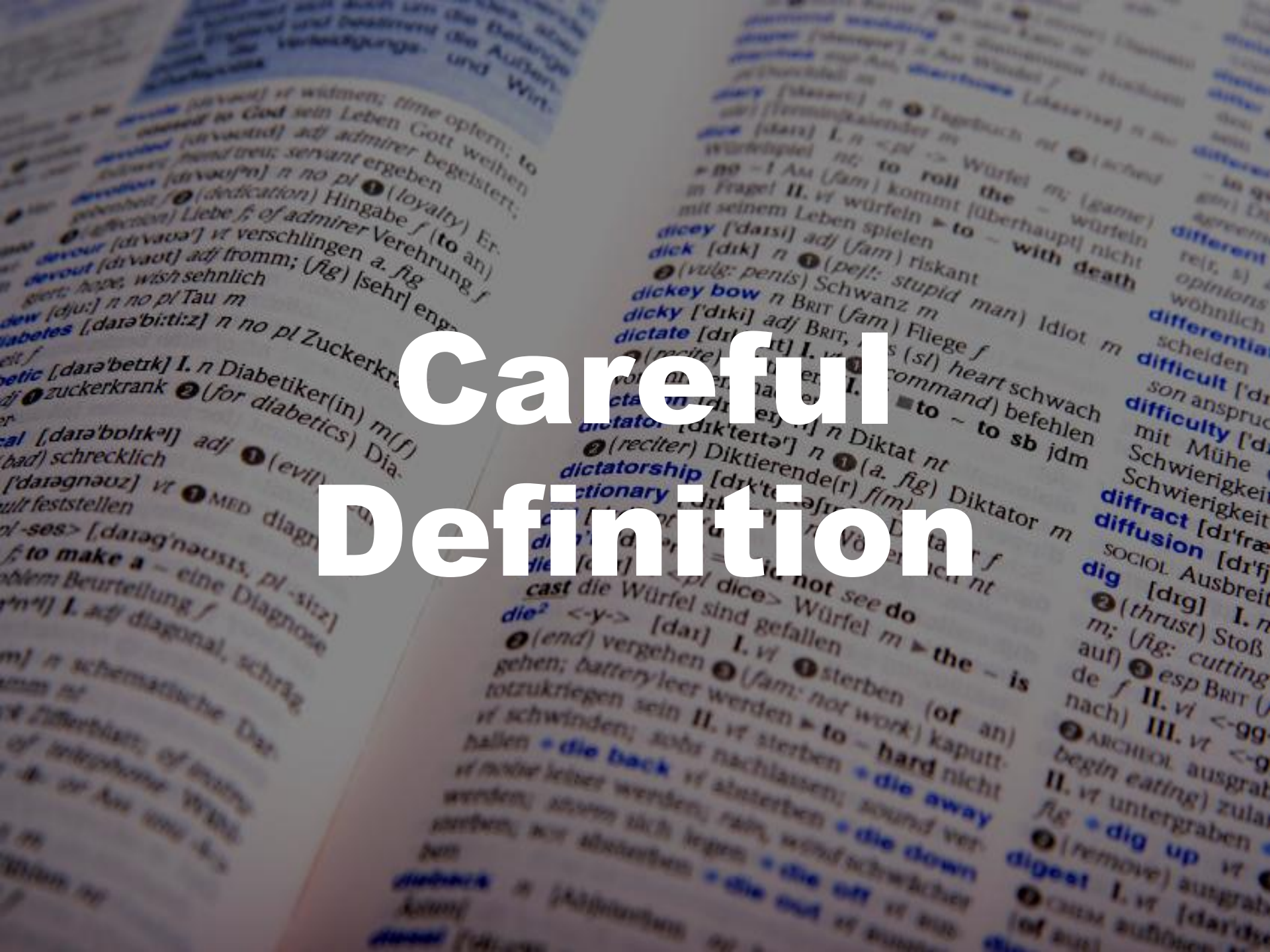
Catherine Mongeon
Staff Attorney
ChangeLab Solutions

EMERGING PRODUCTS

How can communities regulate them?



Careful Definition



“Tobacco Product” means ...


...and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.



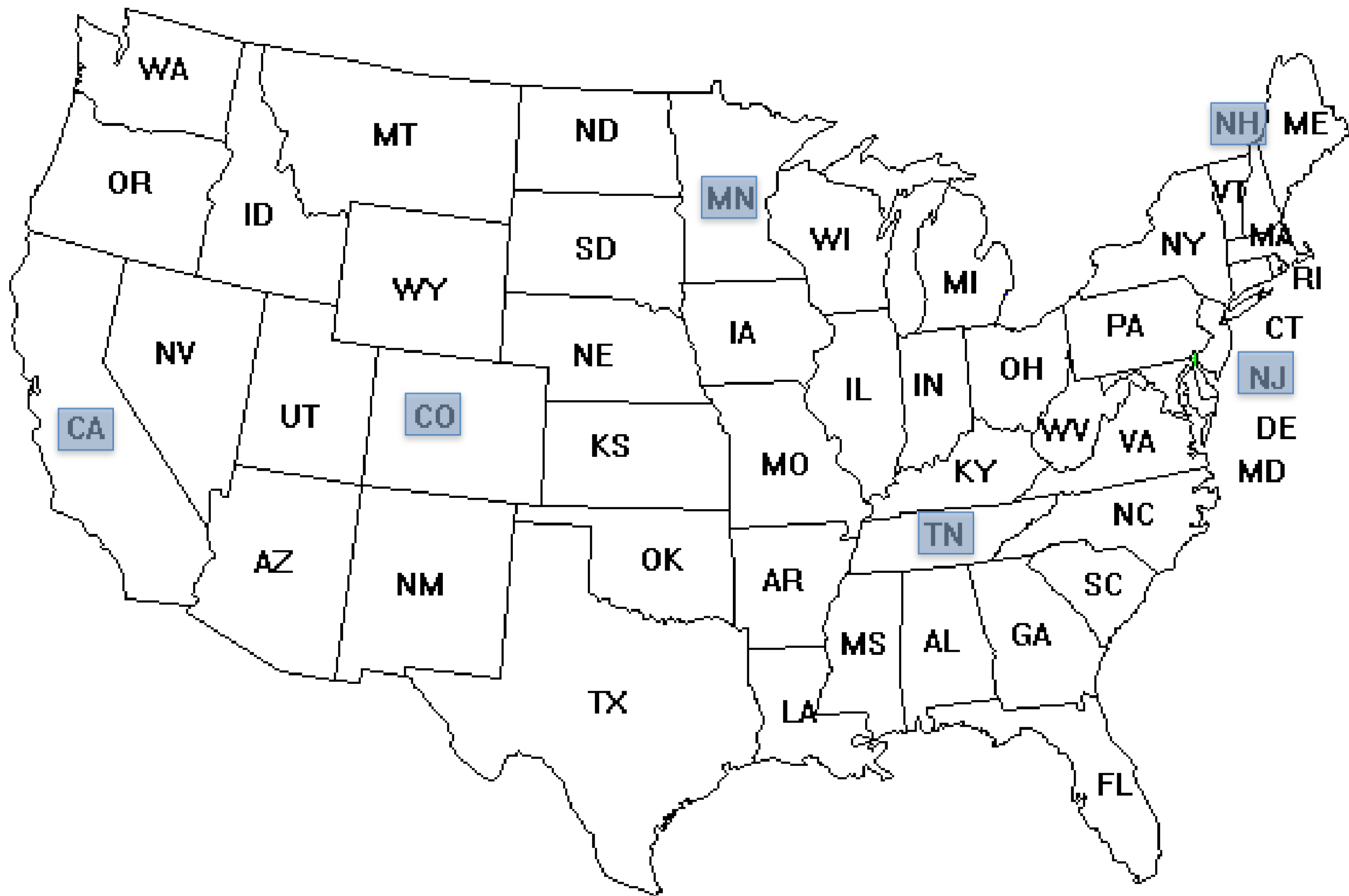
County of Monterey
Application for a Tobacco Retail License
Authority: Monterey County Code 7.80

Tobacco Retailer Licensing



A young boy with short blonde hair, wearing a white t-shirt, is working as a cashier in a convenience store. He is standing behind a counter, handing a bill to a customer whose hands are visible in the foreground. The counter has a cash register and some items on it. In the background, there are shelves with various products and another person wearing a red apron. The text "Age Restrictions" is overlaid in large white letters on the image.

Age Restrictions



Restrict Pack Size



Restrict Flavors

WHITE OWL F.F. UP 25
CIGARLO GRAPE
4.37 X 28
Retail \$21.25
JB \$19.75

WHITE OWL F.F. BONUS
CIGARLO GRAPE
4.37 X 28
Retail \$41.00
JB \$31.60

WHITE OWL F.F. BONUS
CIGARLO GRAPE
4.37 X 28
Retail \$57.00
JB \$39.80

WHITE OWL F.F. UP 25
CIGARLO STRAW
4.37 X 28
Retail \$21.25
JB \$19.75

WHITE OWL F.F. BONUS
CIGARLO STRAW
4.37 X 28
Retail \$41.00
JB \$31.60

WHITE OWL F.F. BONUS
CIGARLO STRAW
4.37 X 28
Retail \$54.00
JB \$39.80

WHITE OWL F.F. UP 25
CIGARLO PEACH
4.37 X 28
Retail \$21.25
JB \$19.75

WHITE OWL F.F. BONUS
CIGARLO PEACH
4.37 X 28
Retail \$41.00
JB \$31.60

WHITE OWL F.F. BONUS
CIGARLO PEACH
4.37 X 28
Retail \$57.00
JB \$39.80



PINEAPPLE

- Maine
- New York City
- Providence





Image: totallyvaporusa.com

The background of the image consists of several overlapping, blurred tax forms, likely 1041s, which are slightly out of focus to create a sense of depth and context. The forms show various columns and rows of data, typical of a tax return.

Uniform Taxation

In California:

No tax stamp
on cigars



Price:
\$1.50

Tax stamp
required for
cigarettes



Price:
\$6.00



COPENHAGEN
Territory

 Copenhagen

ENTER HERE
TO WIN!

ENTER HERE
TO WIN!

COPENHAGEN
Territory

WELCOME

MUST BE
18 YEARS
OR OLDER
TO ENTER

PHOTO ID REQUIRED. NO
THANK YOU FOR
COOPERATION

Frank & Gordon

Copenhagen

Copenhagen

JACK
YOUR PRIDE

DANIEL

DANIEL

**Ban
Sampling**

Restrict Use in Public





www.smokelessdelite.com



www.ecigator.net

Smokefree Recreational Areas

Local ordinances limiting exposure to secondhand smoke are the most direct and effective way to improve the public's health.

Increasingly, many California communities are interested in limiting secondhand smoke exposure and use in areas such as parks, playgrounds, and sports fields.

By addressing tobacco use outdoors, an ordinance prohibiting smoking or all tobacco use in recreational areas also helps limit tobacco-related litter.

TALC's *Model California Ordinance Regulating Smoking and Tobacco Product Use in Recreational Areas* provides a number of policy options to consider when designing a local ordinance.

prohibiting smoking or all tobacco use in recreational areas. The ordinance should be part of a comprehensive tobacco control strategy.

Campaign Trail START

Contact "The Center" for help planning your campaign steps and working through the phases.

Investigation & Assessment

Identify local issues and resources to build an understanding of what might influence decision makers. Determine your issue, a location (city or county), and a goal.

Strategy & Planning

Assess the political environment and decision makers. Develop a preliminary strategy and establish a rough timeline. This phase includes the development of the ordinance - this is the time to call on TALC.



The Technical Assistance Legal Center (TALC) helps advocates, city and county attorneys, and elected officials by providing and reviewing ordinance language, researching and analyzing state and federal legal issues, and providing training and consulting on legal strategies for tobacco control.

Technical Assistance Legal Center
(510) 444-8252
www.talc.phs.org

Made possible with funds received from the California Department of Public Health, under contract #04-33339. TALC is a project of Public Health Law & Policy and the Public Health Institute.

Tobacco Retailer Licensing

A local licensing ordinance can be used to encourage tobacco retailers to comply with all laws that apply to tobacco sales.

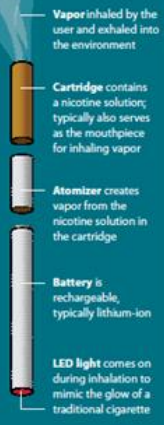
For retailers who continue to violate these laws, licensing offers a means to eliminate them from the tobacco product marketplace.

TALC's *Model California Ordinance Requiring a Tobacco Retailer License and its accompanying "plug-in" provisions* provide a range of policy options to consider when designing a local licensing ordinance. The ordinance language you select should be part of a larger strategy to have the ordinance adopted in your community.

To guide your planning, the Center for Tobacco Policy and Organizing has developed the five-phase model below.



Electronic Cigarettes: How They Are - and Could Be - Regulated



Electronic cigarettes, or e-cigarettes, are essentially nicotine-delivery products, relatively new to the market with a growing following. The battery-powered devices provide inhaled doses of nicotine through a vaporized solution contained in cartridges inserted into the apparatus. No smoke or combustion is involved; the device emits a vapor when used. For this reason, e-cigarette use is sometimes referred to as "vaping." E-cigarettes may be legally sold in the United States under federal law.

After a federal court ruled the Food and Drug Administration (FDA) does not have the authority to regulate e-cigarettes as drugs or drug delivery devices,¹ in April 2011 the FDA announced plans to regulate e-cigarettes as a tobacco product under the Tobacco Control Act.²

The Tobacco Control Act expressly allows state and local governments to regulate the sale and use of tobacco products, and authorizes them to enact measures that are more restrictive than federal law.³ This fact sheet explains what the FDA's decision means, and what additional steps state and local governments can take.

FDA's Initial Attempt to Regulate E-Cigarettes
In 2008, the FDA moved to establish authority over e-cigarettes as drugs or drug delivery devices by blocking new e-cigarette shipments into the United States. (The FDA has authority to regulate "drugs," "devices," or drug/device combinations through the Food, Drug and Cosmetic Act.)

In response, an e-cigarette manufacturer sued the FDA in federal court, claiming that the agency did not have authority over e-cigarettes as drugs or drug delivery devices and therefore could not stop the shipments.

In 2010, the court ruled in favor of the manufacturer, holding that the FDA may not regulate e-cigarettes as drugs or drug delivery devices if they are not marketed as tobacco cessation aids (such as nicotine gum or patches). However, the court found that the FDA does have the authority to regulate e-cigarettes as tobacco products.

Limitations on New FDA Regulations
The FDA decided not to appeal the decision to the U.S. Supreme Court, instead announcing that it plans to issue regulations on e-cigarettes as a tobacco product under the Tobacco Control Act. Although the FDA has the authority to create restrictions on e-cigarettes, there are substantial limits to what it can do.

First, issuing a regulation is a lengthy process requiring several steps: drafting the regulation, providing a public comment period, and considering the submitted comments before issuing a final regulation. Given this process, it is uncertain when the regulations would take effect and how broad in scope they may be. (For more information about the federal regulatory process, see PHLP's fact sheet "Getting Your Voice Heard: Commenting on Federal Regulations.")

In April 2011, the FDA announced plans to regulate e-cigarettes as a tobacco product under the 2009 Family Smoking Prevention and Tobacco Control Act (the Tobacco Control Act). This fact sheet explains what this announcement means, and what steps state and local governments can take to restrict e-cigarette sales and use.



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Vanessa Marvin

Director

The Center for Tobacco Policy & Organizing



California's Center for Tobacco Policy & Organizing

Center for Tobacco Policy & Organizing American Lung Association in California

Vanessa Marvin

MUNICIPAL
BUILDING





Albany

Baldwin Park

Culver City

Delano

El Monte

Firebaugh

Gardena

Hawaiian Gardens

Huntington Park

Menifee

Montebello

Monterey County

Palmdale

Parlier

Perris

Riverside County

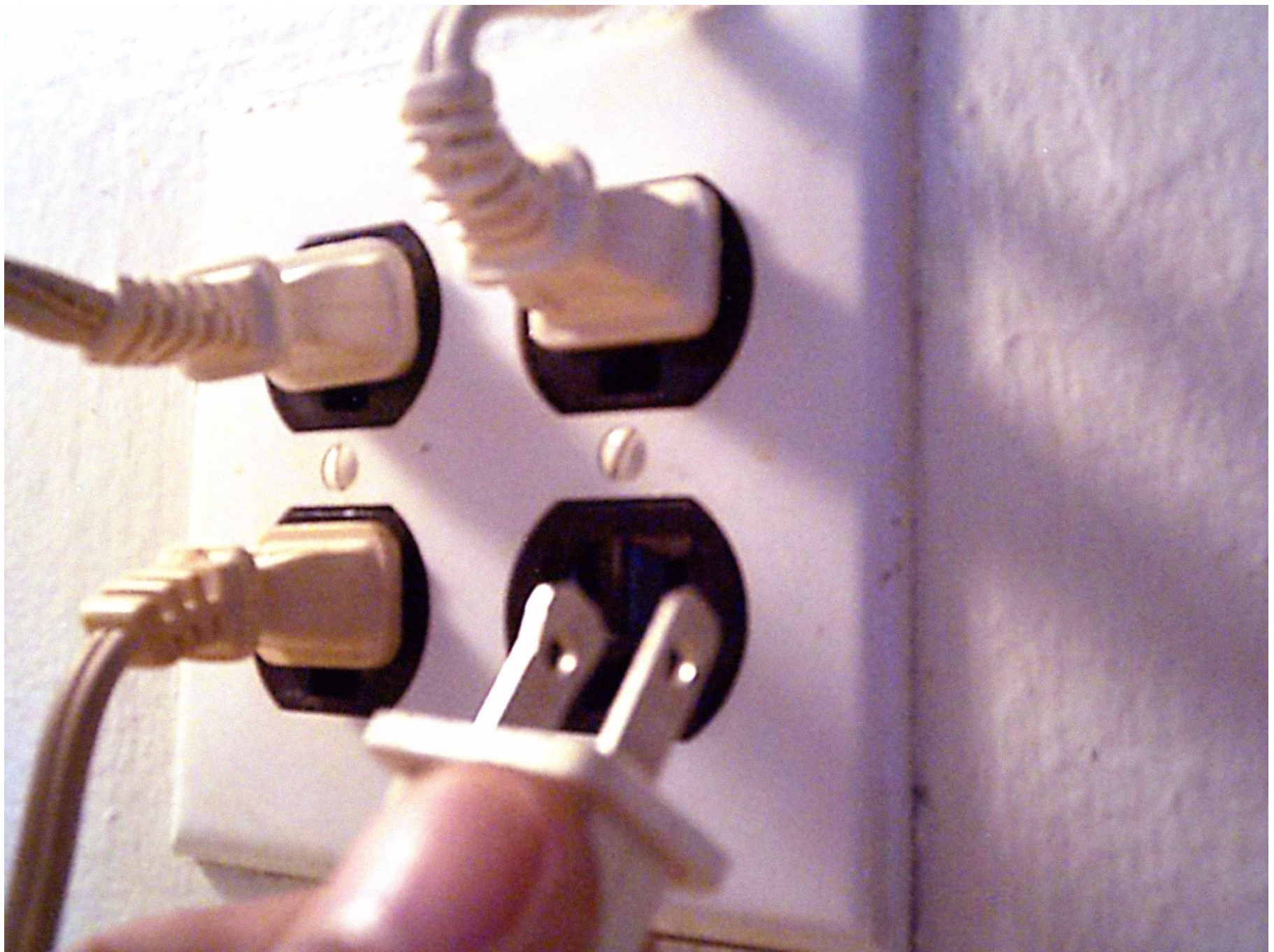
San Luis Obispo County

Santa Cruz County

Solana Beach

South Pasadena

Union City





Date: _____

SURVEY

STATEMENT	Strongly Agree	RATING (fill in circles completely)				Yes
		Agree	Neutral	Disagree	Strongly Disagree	
1. My supervisor recruited me _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
2. I had to wait a long time before I was _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
3. I am able to work with staff when I am _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
4. My current supervisor will tell when I _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
5. I would recommend my supervisor to _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
6. If I had a complaint, it was handled _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
7. I received services that were very helpful _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
8. The staff treated me with respect and _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
9. I received my services in a timely _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
10. I would recommend the time to return _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
11. My experience was better than _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
12. I would return here in the future if I had _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
13. I found the environment pleasant and _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
14. I would recommend working here _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
15. The people who helped me seemed _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
16. The representative I worked with made _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
17. The representative I worked with made _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
18. The representative I worked with made _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
19. The representative I worked with made _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
20. The representative I worked with made _____	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	

Please add any additional comments you may have below:









RESOURCES



The Neighborhood Market Association and Local Ordinances Related to Tobacco Retailer Licensing
November 2011

In the past year, the Neighborhood Market Association (NMA) has been active in opposing local tobacco retailer licensing ordinances in various communities. While organizations representing retailers (e.g., NMA) have coordinated efforts that show a more coordinated effort that actions show a more coordinated effort that claims and arguments against strong local policies are available at the NMA website.



National Association of Tobacco Outlets (NATO) Opposition to Local Tobacco Retailer Licensing
March 2011

The National Association of Tobacco Outlets (NATO) has become active in opposing local tobacco retailer licensing ordinances in various communities. While organizations representing retailers (e.g., NATO) have coordinated efforts that show a more coordinated effort that actions show a more coordinated effort that claims and arguments against strong local policies are available at the NATO website.



Tobacco Retailer Licensing

A local licensing ordinance can be used to encourage tobacco retailers to comply with all laws that apply to tobacco sales. A licensing ordinance not only requires retailers to obtain a license to sell tobacco products but also provides meaningful penalties if the merchant sells tobacco to minors or violates any other law related to tobacco sales. For retailers who continue to violate these laws, licensing offers a means to eliminate them from the tobacco product marketplace.

TALC's *Model California Ordinance Requiring a Tobacco Retailer License* and its accompanying "plug-in" ordinance provide a range of policy options to consider when designing a local licensing ordinance. The ordinance language you select should be part of a larger strategy to have the ordinance adopted in your community.

To guide your planning, the Center for Tobacco Policy and Organizing has developed the five-phase model below.



Licensing Ordinance Checklist

This ordinance has a range of policy choices to consider when designing a local tobacco retailer licensing ordinance. The options below are included in TALC's *Model California Ordinance Requiring a Tobacco Retailer License* and accompanying "plug-ins," all of which are available at www.phlp.org/tobacco-research. The provisions that TALC and the Center consider essential clearly include a check mark. Contact TALC for help deciding on ordinance based on your community's choice.

POLICY OPTIONS IN MODEL ORDINANCE

REQUIREMENTS AND PROHIBITIONS FOR LICENSEES

☑ For all retail licensing fees that fully cover all program costs, including administration and enforcement.

☑ For all retail licensing fees that fully cover all program costs, including administration and enforcement.



Becoming a Policy Wonk on Local Tobacco Retailer Licensing: Answers to Tough Questions from Opponents and Elected Officials

March 2011

Communities and coalitions working on tobacco retailer licensing campaigns will likely need to answer questions from opponents and elected officials about the effectiveness and necessity of strong local tobacco retailer licensing ordinances. Below are some common questions which have arisen in several local licensing campaigns. The suggested answers are meant to help effectively address opponents' arguments against a tobacco retailer licensing ordinance. For more materials on licensing ordinances, visit the Center's website at www.Center4TobaccoPolicy.org/localpolicies-licensing.

Why do we need a local licensing law? Aren't there state laws on licensing?

There is a state licensing law, but it does not effectively address reducing illegal tobacco sales to minors. The Cigarette and Tobacco Products Licensing Act (passed in 2003) created a statewide licensing program administered by the Board of Equalization that requires retailers to obtain a state license. However, this bill was enacted to prevent smuggling and does little to reduce underage sales.¹ Penalties for violating the statewide license are also so weak that retailers are at little risk of losing their licenses if they violate the law.

Selling tobacco products to minors is illegal under state and federal law, why can't state and federal agencies enforce these laws?

Enforcement of these laws by local agencies through adoption of a local licensing ordinance allows for consistent compliance checks of all retailers and is the most effective strategy for reducing illegal sales to minors. State laws (Penal Code 308 and the Stop Tobacco Access to Kids Enforcement (STAKE) Act) and federal law (Family Smoking Prevention and Tobacco Control Act) make it illegal to sell tobacco products to minors. However, the STAKE program can only do compliance checks annually in approximately eight percent of stores that sell tobacco.² On the federal level, the Food and Drug Administration has not been able to enforce its ban on

Is it legal to require a retailer to pay for a tobacco license from the state and from a city or county?

It is legal and fair. The two license fees pay for two different enforcement programs – the state fee pays to combat smuggling and black market cigarettes while a local fee would pay to prevent sales to youth. These fees cover the costs to regulate tobacco sales; they are not a punishment for selling tobacco.

Furthermore, the state tobacco license fee is only a one-time \$100 fee. Many other businesses in California must pay much larger license fees for the privilege of conducting their businesses. Examples of these fees include:

- State Liquor License for stores that sell beer, wine and spirits for consumption off premises: original fee – \$12,000; annual renewal fee – \$582.³
 - State Pharmacy License: original fee – \$400 application; annual renewal fee – \$250⁴
- The requirement to obtain both a local and a state license is also not unique to tobacco retailers. Many cities also require certain professionals (contractors, attorneys, dentists, engineers, insurance brokers, physicians, real estate brokers, etc.) to obtain a local license in addition to required state licenses.
- Now that Proposition 26 has passed, doesn't this mean a fee on tobacco retailers will have to be approved by the voters?**



Model California Ordinance Requiring a Tobacco Retailer License (with Annotations)

Revised November 2011
(Originally issued September 1998)

DISCLAIMER

The information provided in this discussion is for informational purposes only, and does not constitute legal advice. ChangeLab Solutions does not enter into attorney-client relationships.

ChangeLab Solutions is a non-partisan, nonprofit organization that educates and informs the public through objective, non-partisan analysis, study, and/or research. The primary purpose of this discussion is to address legal and/or policy options to improve public health. There is no intent to reflect a view on specific legislation.

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The American Lung Association
in California

(916) 554-5864

www.Center4TobaccoPolicy.org

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