RAISING THE TOBACCO SALE AGE TO 21:
BUILDING STRONG ENFORCEMENT INTO THE LAW

Raising the minimum legal sale age of tobacco products to 21 (Tobacco 21) is an important, emerging policy strategy to reduce smoking that complements and builds on proven approaches such as tobacco prevention and cessation programs, higher tobacco taxes and smoke-free air laws. Raising the tobacco sale age to 21 will have a substantial positive impact on public health and save lives.

Under federal law, and the law of every state, it is illegal for a retailer to sell tobacco products to persons younger than 18 years of age; a few states have set the minimum age at 19.[1] In recent years, over 350 localities in more than twenty states have enacted ordinances or issued regulations raising the minimum age for tobacco sales to 21. In 2015, Hawaii became the first state to enact such a law. California followed suit in 2016, followed by Maine, New Jersey, and Oregon in 2017, and Massachusetts in 2018.

The momentum for Tobacco 21 was strengthened in 2015 with the release of an Institute of Medicine report predicting that raising the tobacco sale age to 21 nationally would, over time, reduce the smoking rate by about 12 percent and smoking-related deaths by 10 percent, which translates into 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer and 4.2 million fewer years of life lost.

To be effective, youth access laws must be rigorously enforced. Unfortunately youth access laws are often poorly enforced. The national "Monitoring the Future" survey reports that over 60 percent of 10th grade students found cigarette access to be "fairly easy or very easy."[2] The most recent federally mandated retailer compliance rate survey under the Synar Program found that one in ten retailers sell to kids aged 14-17.[3] Moreover, too few retailers are fined or suffer license suspension. Because adolescents readily identify those retailers who will sell to them, an effective law must substantially reduce these levels of retailer non-compliance.

It is critical that age of sale laws are strictly enforced to ensure a high rate of compliance. **The most effective way to ensure compliance is to take enforcement into account in drafting an ordinance or regulation, rather than considering it only after a proposal is adopted.**

The purpose of this Memorandum is to provide recommendations for enforcement to localities considering raising the tobacco sale age to 21.

In part, these recommendations are drawn from ordinances that already have been adopted. They are also drawn from lessons learned from setting the sale age at 18.[4] Jurisdictions considering raising the sale age should review their current laws to identify weaknesses that can be addressed in new minimum age legislation. We have provided alternatives because each locality is unique and the best way to include language in any ordinance may vary from jurisdiction to jurisdiction. Nevertheless, these suggestions are based on common principles that apply to all situations and each suggested provision should be considered by any state, city or county in crafting language to raise the tobacco sale age.

Designate an Enforcement Agency

Designating an enforcement agency in advance and making clear who is responsible for enforcement, and the tools that will be available to the enforcement agency, always enhances enforcement, but not all existing ordinances do so.

Some existing sale-at-21 ordinances define violations and specify the penalties for violation, without designating a particular agency as responsible and accountable for enforcement of the ordinance. Practically, this may be less of a problem in jurisdictions that have existing youth access laws, have previously designated the enforcement agency for enforcing those laws, and are merely raising the age from 18 to 21 under the same authority. However most state and local authorities rely on compliance checks organized and funded by the FDA under the 2009 Family Smoking Prevention and Tobacco Control Act. Unfortunately the FDA can only enforce up to age 18. If the FDA or its contract agent does all of the youth access enforcement in a jurisdiction, an alternative arrangement may be needed to enforce age 21.

After understanding what agency or authority currently enforces youth access to tobacco, it is important to ascertain how successful the retailer compliance program has been. Enforcement programs often consist of compliance checks in which “decoy” underage purchasers test compliance with age-verification requirements as well as minimum-age restrictions under the supervision of an adult. Effective programs visit each retail tobacco outlet at least once or twice per year to conduct random unannounced inspections, with follow-up checks on non-compliant stores.

For those with no preexisting youth access law or for local jurisdictions in which enforcement of age 18 has been handled entirely by a state enforcement agency or the FDA, it is important to designate a local enforcement agency and to give that agency explicit authority to enforce the ordinance, in the text of the ordinance itself. This will provide certainty as to what entity is responsible for enforcement and, just as important, what agency is accountable for enforcement. Determining who will enforce, and how enforcement will be conducted, will require pre-planning to allow time to communicate with key stakeholders. It is advisable to identify the intended enforcing agency in advance, consult with the agency where possible, and then include its representatives in discussions as the language is drafted.

Some existing ordinances designate the local public health department or officer, some designate local law enforcement, and others designate both a public health enforcement entity and a law enforcement entity. The designation of more than one locus of enforcement responsibility may provide needed flexibility, as long as there is no confusion as to responsibility and accountability. When possible under state law, we advise using existing regulatory authorities such as health department inspectors or experienced contractors rather than relying on the police or sheriff's office where resources may be stretched. Enforcement should focus on the retailer who sells to a person under 21, not on the below-age purchaser. Generally enforcement does not take place at the time of the compliance check. Instead a violation letter is sent later describing the violation and stipulating the warning or penalty.

Identify a Dedicated Funding Source for Enforcement

Regardless of what agency is designated for enforcement duties, effective enforcement requires a consistent, dependable source of funding for enforcement efforts. Such a program of decoy-based compliance checks, of course, requires commitment and adequate resources.

A jurisdiction should not automatically assume that existing funding is adequate because a local authority already has funds to enforce the existing youth access law. For example, it may be that localities currently receive funding from state tobacco control programs or the FDA to enforce 18 as the minimum age under current state or local law, but this money may not be available to enforce local ordinances raising the age to 21 because selling tobacco products to 18-20 year olds does not violate state or federal law. Compliance checks to enforce Tobacco 21 ordinances necessarily involve decoys in the 18-20 age range and state or federal funding may not be available to recruit and deploy decoys of that age group.

Identifying funds is important for success and the source of such funds should be specified in the ordinance. Again, determining the source of funding will require a pre-drafting planning process to consult with stakeholders. For example, some localities specify that fines for non-compliance are to be used to fund compliance checks and other enforcement activities. When establishing the level of fines for violation of the ordinance, jurisdictions should consider not only the minimum necessary to encourage compliance, but also the level sufficient to provide a dependable source of enforcement funding going forward.

Where a jurisdiction requires a license to sell tobacco products, license fees can also be specified as a source of enforcement funds. Some jurisdictions (e.g. Boston, MA) provide for the use of both fines and fees. To the extent possible, it is desirable that tobacco enforcement and/or regulatory activity be self-funding (through the use of fines and fees) to ensure continuous and dependable funding. The ordinances of some jurisdictions identify a preexisting fund for enforcement not limited to tobacco enforcement (e.g. county or city general funds).

Require a Specified Number of Compliance Checks

Localities should also consider including a provision mandating a minimum number of compliance checks per retailer for a specific period of time. For example, the Minneapolis, MN licensing law enforces the minimum age of 18 for tobacco sales by requiring unannounced compliance checks to be conducted at least annually at each location where tobacco is sold and then, in the event of a first violation, mandating another check within the following six months and at least twice within a year of the first violation. The Santa Clara County, CA ordinance specifies a minimum standard of two decoy-based compliance checks each year for implementation of its age 21 law. This kind of requirement should be a substantial incentive for compliance, as well as making the enforcement authority easily accountable for a given level of enforcement activity.

License Tobacco Retailers or, Where There Is An Existing Licensing System, Use Threat of License Suspension or Revocation as an Enforcement Sanction

A tobacco retailer licensing system can be important in enhancing enforcement. Not only does a license fee provide a stable and reliable source of funding for enforcement, but also the threat of license suspension and revocation can be a powerful incentive for compliance. As example, Needham, MA, often cited as the progenitor city for Tobacco 21, developed excellent retailer compliance only after it issued a 60 day suspension to one retailer. The requirement of license renewal also allows local enforcement agencies to keep a current census of tobacco retailers. In several jurisdictions, including Boston, MA and Santa Clara County, CA, license suspension or revocation is expressly available as a sanction for non-compliance with the minimum legal sale age of 21. Most states already have a tax-license system for tobacco, but we suggest that age 21 ordinances contain a revocable local license that also funds enforcement efforts.

Provide for Citizen Complaints of Violations

The ordinances of several jurisdictions, including Bergenfield, NJ, Rutherford, NJ and Boston, MA, provide for citizen complaints of violations. While some citizens currently contact agencies in their community to report violations of laws, this type of provision may help invite the community to assist in enforcement of these ordinances, while providing an additional incentive for compliance and enhance accountability. Ordinances should make clear how, and with what agency, such complaints should be filed, as well as providing for public education to ensure general knowledge of the complaint mechanism.

Require Appropriate Signage at Retail Stores

Local Tobacco 21 ordinances also can enhance compliance by requiring retailers to post appropriate signage, or change existing signage, in prominent locations easily readable by consumers and the public, making it clear that 21 is the minimum age to purchase tobacco products. Cleveland's ordinance, for example, has an express provision for signage. In addition, if the public is more aware of the new minimum age, it will tend to encourage citizen complaints of violations. Signage should include information about state and local resources to help tobacco users quit. In the pre-drafting planning phase, it is important to determine who will be responsible for printing and distributing signs, including covering the cost. It also is important to work with the enforcing agency ahead of time to determine how the newly-required signs concerning the local 21 ordinance will relate to any preexisting signage required by state law for sales to persons under 18.

Provide for Retailer Education

Local ordinances should provide for the education of retailers as to the new minimum age and specify the agency responsible for conducting such education. Retailer education will prevent inadvertent non-compliance due to ignorance of the new age limit, as well as laying the groundwork for successful enforcement actions and the application of appropriate penalties when violations occur. It is important to build in time between enactment of the policy and its effective date to make sure there is enough time to educate retailers, adopt new signage, etc.

[1] The states with the tobacco sale age at 19 are Alaska, Alabama, and Utah.

[2] Johnston, L. D., et al. (2017). Monitoring the Future national survey results on drug use, 1975-2016: Overview, key findings on adolescent drug use. Ann Arbor: Institute for Social Research, The University of Michigan. http://monitoringthefuture.org/pubs/monographs/mtf-overview2016.pdf.

[3] Tobacco Sales to Youth. Annual Synar Reports FFY 2014. Substance Abuse and Mental Health Services Administration.

[4] DiFranza, Joseph R. "Best practices for enforcing state laws prohibiting the sale of tobacco to minors," *Journal of Public Health Management and Practice* November-December 11(6), 2005.