
SELECT AN ISSUE

Once you have documented the problem and assessed the political environment, the next step is to choose the preferred policy issue or intervention. The broad goals of *The STORE Campaign* are to:

- Mobilize communities throughout California to initiate local policy action to restrict and enforce tobacco sales and marketing practices;
- Facilitate better enforcement of local and state laws that focus on retail advertising and tobacco sales; and
- Advocate that the federal government grant authority to state and local governments to regulate cigarette advertising and marketing practices.

In choosing a preferred policy intervention, you may decide to work on enacting a new local policy, or you may wish to work on increasing enforcement of an existing local or state law. As previously noted, you may already have selected the focus of your intervention through the Communities of Excellence needs assessment process. If you have not done so, the following discussion provides a decision-making exercise and highlights the benefits and barriers to a policy versus enforcement approach. See [Checklist for Choosing an Issue](#), [Benefits and Barriers: Enacting Policies](#) and [Benefits and Barriers: Increasing Enforcement](#).

Making the Decision

You invest time and effort in selecting the right policy or intervention to pursue because so much depends on it. You want a winnable campaign that makes important improvements in tobacco control, helps build the organization and produces results that can be felt and appreciated in the community. It is a tall order.

The public health research coupled with the investigation of the political environment and the consideration of policy alternatives is designed to take much of the guess work out of the decision making process. Often all the research will point to a clear choice; for example, when the public health data and the political research support the same decision. But what happens when they are in conflict? What do you do when the public health data says that illegal sales is a huge problem, but the political research concludes it will be very difficult to pass a licensure ordinance, and that a self-service display ban for all tobacco products would be more likely to pass?

Or what if your top organizational goal is building new leadership and recruiting volunteers. A policy campaign that does neither, but simply

involves a few veteran activists meeting with the mayor and testifying at city council to produce a victory may not be the right campaign.

When the direction is not clear or when the core group needs to build consensus around a critical decision like selecting an issue, the following exercise can help.

Goal Setting* Exercise

The leadership group identified earlier (see *Who Will Lead Your Campaign* in Organize Your Campaign section.) are the participants of this exercise. They need to have read the results of earlier research and participated in the dialogue about alternative policies and interventions before this exercise can produce the best results. The goals of the exercise are to establish long range, intermediate issue goals and short-term goals for the campaign.

Supplies needed: Choosing an Issue Checklist (see below), butcher paper, easel and pad of paper, or chalkboard; dry-erase pens, markers, or chalk; tape.

▼ Step 1: Introduce the Exercise

Describe what you are going to do.

- a. You are going to take an hour to brainstorm what your campaign focus should be.
- b. Think about everything you have learned about the issues you have studied and what you have learned about the political environment.
- c. Do not hold back, throw out any ideas you have about what you should be doing, no matter how crazy.
- d. For the first 10–15 minutes you will just list ideas. This is NOT the time to evaluate an idea—you will do that later. (This is an important instruction.)
- e. Any questions? Let's get started.

▼ Step 2: List the Ideas

Encourage everyone to come up with as many ideas as possible about what the prior research suggests to them about what you do, including any new ideas and new goals. Write down everything. Be sure to watch the time. Identify a timekeeper if possible.

* Based on an exercise found in *A Guide for Local Action: New Organizing Approaches for the Tobacco Control Movement*, American Lung Association of California, pp. 9-10.

▼ Step 3: Group Various Ideas Together by Issue or Intervention

Break the issues down into ideas related to marketing, illegal sales, political concerns, non-policy organizational goals.

▼ Step 4: Discuss Pros and Cons of Each Issue and Use the Issue Selection Checklist

Ask yourselves the following questions:

- What are the political constraints?
- What's the social acceptance of each issue in your area regarding tobacco control policies?
- What is the greatest public health need in your community?
- What is winnable?
- Which issue will help build the organization the most?

▼ Step 5: Try to Reach Consensus

If you need to vote to narrow it down to one issue, do so. But if after the vote the group remains divided, it may be worthwhile to repeat the exercise with an eye on resolving the outstanding issues. In general, at least two-thirds of the group needs to be enthusiastic about any issue chosen.

Using a Checklist to Evaluate Issues

It may be helpful to use a checklist* to evaluate all of the issues under consideration. A good issue will receive a check next to most of these criteria.

1. *Result in real improvement in public health.* If you can see and feel the improvement, then you can be sure that it has actually been won.
2. *Give people a sense of their own power.* People should come away from the campaign feeling that the victory was won by them, not by experts, lawyers or politicians.
3. *Alter the relations of power.* Power relations between citizens and decision makers can be altered in three ways: (1) Building a strong, ongoing staffed organization to create a new center of power that changes the way the other side makes decisions; (2) Changing laws and regulations in ways that increase your power or diminish that of the other side; (3) Electing people to office who support your positions.

* This and other checklists are from Bobo K, Kendall J, Max S, *Organizing for Social Change, Midwest Academy Manual for Activists*, Seven Locks Press: Santa Ana, 2001.

The goal is to pursue a winnable issue that results in a real improvement in the public's health.

4. *Be worthwhile.* Members should feel that they are fighting for something worth fighting for. It is better to end the campaign having won less than to scale back the demands from the start and ask for too little.
5. *Be winnable.* The problem must not be so large or the solution so remote that the organization is overwhelmed and the issue is not winnable. It is useful to figure out how much money your victory will cost the people on the other side. Will their additional non-monetary costs make them want to hold out against you? How hard will they work to defeat you and how much will they spend?
6. *Be widely felt.* Many people must feel the issue is a problem and agree with the proposed solution.
7. *Be deeply felt.* Enough people must not only agree with the solution but feel strongly enough to participate in the campaign.
8. *Be easy to understand.* It should not require a lengthy and difficult explanation to convince someone the problem exists.
9. *Have a clear target.* The target, or decision-maker, is always a person (or in more complicated campaigns, several persons) who can give you what you want. It is not an institution or a company, nor is it the public. If you cannot identify the target, you probably have not defined your issue or goals correctly.
10. *Have a clear time frame that works for you.* An issue campaign has a beginning, middle and end. What are the approximate dates of those points? How do those dates fit with the life and commitments of your organization? A local initiative campaign that requires volunteers to collect signatures from mid-November through the holidays could be a problem. Also keep an eye on the electoral calendar because a citizen campaign usually has more power just before an election than just after one.
11. *Be non-divisive.* Avoid issues that divide your coalition. For example, do not decide to work for a local ordinance that imposes fines on underage smokers when half the coalition opposes that approach to reducing youth smoking.
12. *Build leadership.* The campaign should have many roles that people can play, and with planning and commitment, new people will end up filling those roles. The leadership group in a coalition is already composed of leaders, but these leaders often need to learn to work with each other and to use direct action.
13. *Set up your organization for the next campaign.* Your issue should set up your coalition for the next campaign in your list of issues or intermediate goals. Also consider the skills the group will develop in the current campaign and the contacts it will make for the next one.

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- 14. *Have a pocketbook angle.* Issues that gain people money or save people money are usually widely and deeply felt.
 - 15. *Raise money.* One big test of an issue is whether your constituents will contribute to the campaign.
 - 16. *Be consistent with your values and vision.* The issues you choose must reflect your values and vision. For example, you do want fewer illegal sales, but that does not mean you should promote the tobacco industry's "WE CARD" program or use other educational resources provided by tobacco companies.

The Choosing an Issue Checklist is useful for comparing issues using these criteria.

Choosing an Issue Checklist			
Issue 1	Issue 2	Issue 3	Will the Issue:
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Result in real improvement in people's lives?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Give people a sense of their own power?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Alter the relations of power?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be worthwhile?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be winnable?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be widely felt?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be deeply felt?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be easy to understand?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Have a clear target?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Have a clear time frame that works for you?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be non-divisive?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Build leadership?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Set up your organization for the next campaign?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Have a pocketbook angle?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Raise money?
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Be consistent with your values and vision?

Benefits and Barriers: Enacting Policies and Increasing Enforcement

Enacting a local law is an efficient way to set requirements that will affect a broad group of people. Because a law applies to all the residents and businesses of a particular city or county, it can be more efficient to pass a local law than to talk individually with every tobacco retailer in the community. Additionally, the advantage of a law over a voluntary agreement is that a law is enforceable. If someone violates a law, he/she faces consequences, such as a fine or potential jail time. And, the process of enacting a local law provides an important means of educating and involving the community on your chosen issue. The more that a city council or board of supervisors hears from members of the public who support a proposed policy, the more likely they may be to pass such an ordinance. At the same time, the city council or board of supervisors becomes educated on the issue. If passed, a local ordinance signifies a written and binding commitment by that city or county to a particular tobacco control policy.

Among the disadvantages to consider in passing a new law is that the process can be time-consuming and labor-intensive. Tobacco control advocates may meet opposition from retailer associations or local businesses. Finally, the city council or board of supervisors may oppose the policy and resist passing a new law if they aren't convinced of the law's merits.

The advantage of a law over a voluntary agreement is that a law is enforceable.

Of course, even the best policy will not be effective if it sits on the books with no enforcement. It is important to think about what agency is most appropriate to enforce any new local law. If these decisions are made before the policy is passed, then the chances of the policy being enforced will dramatically increase. For example, the local policy ideally should designate the agency that will be responsible for enforcing the law. If the agency's role is clearly defined, it will be easier for the agency to enforce the law and it also will be easier for community members to know which agency to hold accountable if the law is not being enforced. If the policy provides resources for enforcement, the chances of enforcement are greater.

The decision to enforce existing laws rather than to pass new laws comes with its own set of pros and cons. One advantage is that if existing laws, such as the state law prohibiting tobacco sales to minors, were enforced, then much of the youth access problem would be solved. In addition, because existing laws are already in effect, tobacco control advocates may be able to see a more immediate impact than by drafting a new law from scratch. Enforcing existing laws may be less politically charged because enforcement usually requires working with existing city or county agencies rather than going before elected officials in a public process. Often, procedures already exist for enforcing existing laws, which can help you educate and encourage enforcement agents. Finally, there is little chance that an existing law will be challenged in court.

Enforcing existing laws may be expedient, but the strategy comes with its potential disadvantages. Some laws can be enforced only by

the state or do not specify an enforcing agency at all. Other laws have designated enforcement agencies that are not interested in tobacco control or do not know they are the enforcing agency. Enforcement agencies may lack resources to enforce the law or consider enforcement of the law a low priority. These enforcement agencies (particularly police or sheriffs' departments) often face a large bureaucracy in making change. See [Benefits and Barriers: Enacting Policies](#) and [Benefits and Barriers: Increasing Enforcement](#).

Consider New Policy Options

For communities that want to influence the store environment through policy change, a number of options are available. Following is an explanation of four main strategies that are recommended as part of *The STORE Campaign*: (1) licensing tobacco retailers; (2) banning self-service tobacco displays; (3) strengthening local sign laws; and (4) imposing land use restrictions on tobacco retailers. A model policy is available from TALC in each of these areas.

Licensing/Permits

A licensing ordinance requires merchants to obtain a license to sell tobacco products and provides for the suspension or revocation of the license if the merchant sells tobacco to minors or violates other local, state, or federal laws related to tobacco. Some communities choose to require a "permit" instead of a "license." These terms are generally interchangeable. The decision of which term to use is up to your community. Because many local governments already issue licenses or permits for other types of businesses, they may have a preference about which term to use.

A licensing ordinance can serve several tobacco control purposes, including:

- Acting as a means of identifying and tracking those in a community who are selling tobacco;
- Acting as a tool to encourage compliance with all existing tobacco-related laws;
- Creating a greater financial deterrent than just a fine to discourage retailers from violating the law; losing the authority to sell tobacco products will cost far more than a fine in most cases (for many merchants, tobacco sales make up a large portion of their revenue and bring in customers who purchase other products);
- Creating the threat of license suspension or revocation, which is intended to encourage compliance with the state law against selling to minors.

Given that the illegal tobacco sales rate to minors is 24.7% for stores categorized as "Other" compared to the overall statewide rate of

illegal tobacco sales of 17.1%, the importance of identifying tobacco retailers is increasingly important.¹ (See TALC's [Model Licensing Ordinance](#).)

Nationwide, approximately 335 communities require a license to sell tobacco products and provide penalties such as suspension or revocation of the license for illegal conduct (e.g., selling tobacco to minors).² In California, twenty-four local governments have passed such ordinances, primarily in San Mateo and Contra Costa Counties. The largest city in California to require a license or permit to sell tobacco is Los Angeles.³

Currently, there is no statewide requirement for licensing tobacco retailers like there is for alcohol sales. However, the California Legislature may consider the issue during 2002. For more information on tobacco-related bills pending in the state legislature, please go to www.leginfo.ca.gov or contact TALC at talca@phi.org.

▼ Registration of Tobacco Retailers

Some communities have considered alternatives to licensing that are more limited in scope than a comprehensive licensing ordinance. For example, the City of San Jose in 1998 considered a requirement that all tobacco retailers register with the city. This proposal was designed to identify the number of tobacco retailers in the community but it did not provide consequences, such as license suspension or revocation, for violating tobacco-related laws. Instead, the goal of the city was to increase enforcement of existing laws against retailers who repeatedly sell tobacco to minors (such as Penal Code section 308 and the city's nuisance abatement law). Without a full licensing scheme in place, however, enforcement against retailers in San Jose has not increased.⁴

Identifying the number and type of tobacco retailers in a community is an important step, but it is not a solution to the problem of illegal tobacco sales to minors. Therefore, communities interested in the issue of licensing tobacco retailers should consider a comprehensive licensing ordinance rather than merely tobacco retailer registration.

▼ Ban Mobile Tobacco Sales

Other communities have expressed concern over tobacco sales by mobile vendors, e.g., from catering trucks, ice cream trucks, or through temporary stalls set up at community events. The TALC [Model Licensing Ordinance](#) addresses this problem by prohibiting a license at anything other than a "fixed location." Under this scheme, an ice cream truck would not be eligible for a tobacco retailer license and, therefore, would be prohibited from selling tobacco. Some communities may wish to address the problem of mobile vending through a separate ordinance. This might be the case if mobile sales are a

Enacting a local law is an efficient way to set a community standard that will affect a broad range of businesses.

serious problem in that community and there is insufficient political will to enact a comprehensive licensing scheme. If you are interested in a prohibition on mobile tobacco sales, please contact TALC for suggested language at talca@phi.org.

Self-Service Display Ban

A self-service display of tobacco means that the tobacco product is accessible to the public through, for example, a rack, shelf, or counter-top display. An ordinance prohibiting self-service tobacco displays makes the product inaccessible to the public except through the assistance of a clerk. Such an ordinance reduces youth access to tobacco by reducing tobacco theft. A self-service display ban also increases the level of interaction required before a clerk can sell tobacco to a minor by requiring the minor to specifically ask for tobacco and the clerk to consciously provide it.

Over 100 California local governments currently have ordinances restricting self-service tobacco displays. Additionally, as of January 1, 2002, California state law prohibits the self-service display of cigarettes. Although this law does not apply to other tobacco products, such as cigars or smokeless tobacco, it does specifically allow for stricter local ordinances.⁵ Therefore, local governments are free to enact a complete ban on the self-service display of tobacco products. TALC has a model ordinance available on this topic. (See [Model SSD Ordinance](#).)

Stronger Local Signage Law

Virtually all local governments have laws to regulate the placement and posting of signs in some manner. In most cases, these sign laws are part of a city's larger zoning laws, which define, for example, the boundaries of residential and commercial zones in any given community. Sign laws are generally designed to promote effective communication (through the posting of signs) while "protecting the public and preserving the aesthetic character of the city."⁶ Limits on storefront signage enhance public safety by helping to ensure that police can see inside a store if a robbery is taking place.

Generally, sign laws apply regardless of the content of the message. For example, a 10% limit on window signage is designed to reduce the overall amount of advertising on storefronts, rather than dictating which products may or may not be advertised. Despite the broad application of most sign laws, if these laws are strict and well-enforced, they may be an effective tool in limiting the amount of tobacco advertising in a community, since tobacco is one of the most heavily advertised products at the retail outlet.

For tips on how to find your city or county's sign law, see TALC's ["How to Strengthen Your Local Sign Laws" Memo](#) and [Sample Sign Law Amendments](#). Once you review your local government's existing sign code, you may realize that the city or county already places strict limits on signs that are not being enforced. If so, you may wish to work toward greater local enforcement of the sign laws. (See *Potential Strategies for Increased Enforcement* below.)

If your local sign code is weak, your city or county may wish to consider amendments that would limit the amount and type of signs that may be posted in your community. Two types of amendments will be described here: (1) strengthening limits on storefront signs; and (2) eliminating certain signs entirely, such as A-Frame sandwich board signs or signs on poles.

Keep in mind that strengthening a local sign code will impact signs for all products, not just tobacco advertising. For this reason, strong sign laws do not face the same legal problems as laws that single out and limit tobacco advertising. For more information on the legal issues, see *Legal Limits on Store Marketing Regulation* below.

▼ Require Lower Percentage of Window Coverage by Signs

Most local sign laws contain limits on the amount or size of "window signs." A window sign is generally defined as a sign that is posted or painted on or otherwise affixed to a display window. Window signs are a desirable form of communication to many merchants because the signs are visible to passersby. Window signs may include anything from signs advertising products sold on the premises to informational signs indicating the hours of business operation.

Current state law provides that no more than one-third of the square footage of windows and clear doors of an alcohol retailer may have advertising signs of any sort.⁷ This law restricts advertisements for everything from soft drinks to alcohol and tobacco products. (The law is sometimes known as the "Lee law" after its sponsor, Barbara Lee.) The law specifies that the state Department of Alcoholic Beverage Control and local law enforcement agencies are responsible for its enforcement of the state law. However, the law has not been widely enforced on a state level unless local groups or law enforcement officials have made it a priority.

Many cities and counties have passed laws stricter than state law. For example, the City of Los Angeles limits all storefront signs to no more than 10% of the window.⁸ Another way cities have strengthened the state law and rate of enforcement is by expanding the definition of a "window sign." Please see the TALC's ["How to Strengthen Your Local Sign Laws" Memo](#) and [Sample Sign Law Amendments](#) for suggestions and sample language.

▼ Ban Sidewalk and Other Types of Signs

In addition to strengthening a city or county's limit on window signs, a local government could consider eliminating certain categories of signs altogether. For example, some cities have prohibited sandwich-board type signs and signs on poles. See TALC's "[How to Strengthen Your Local Sign Laws](#)" Memo and [Sample Sign Law Amendments](#) for suggestions and sample language.

Land Use Restrictions and Conditional Use Permits (CUPs)

Many communities in California are seeing an increase in the number of stores that sell tobacco products. In particular, tobacco-only stores, such as the "Cigarettes Cheaper!" chain, have proliferated in recent years. These stores are able to sell a high volume of cigarettes at a lower price than convenience stores and supermarkets.

While licensing tobacco retailers can be an effective tool in regulating how *existing* retailers do business, communities may consider using land use tools to limit the number and location of *new* tobacco retailers in their communities. Unlike licensing, which regulates how a tobacco retailer does business, land use regulation dictates where a tobacco retailer may locate.

Land use controls are a long-recognized governmental function that falls within a city or county's broad "police power," which is the authority to enact ordinances and regulations to protect the health, safety and welfare of its citizens. Two main land use tools are available to control tobacco retailers: zoning ordinances imposing location restrictions on certain uses of property, and zoning ordinances requiring conditional use permits for certain purposes.

A land use ordinance can be used to:

- Require that tobacco retailers not locate in areas frequented by children. For example, the ordinance can prohibit tobacco retailers within a certain distance from youth-oriented activities such as schools, playgrounds, libraries, churches, youth centers, recreational facilities, and residential areas. TALC's model zoning ordinance proposes a 1,000-foot setback for significant tobacco retail stores.
- Restrict new significant tobacco retailers to areas zoned for light industrial or industrial use.
- Limit the number of all tobacco retailers in any community.
- Limit the proximity of all tobacco retailers to each other. For example, the TALC model ordinance includes a provision requiring that tobacco retailers locate no closer than 500 feet from each other.

The advantage of land use regulation is that tobacco retailing can be directed away from child-sensitive locations. In fact, it is legal for a community to prevent tobacco retailers from locating anywhere in the city. The disadvantage of land use regulation is that, unless the ordinance also seeks to amortize existing tobacco retailers (i.e., require closure after a set period of time), the ordinance applies only to retail stores that seek to open in the future.

Please see TALC's [Model Land Use Ordinance](#) and [Land Use Memo](#) for more detail.

Legal Limits on Store Marketing Regulation

Restricting tobacco marketing in stores involves a number of potential legal problems. In particular, a Supreme Court decision from 2001 severely restricts the options available to local governments in regulating tobacco advertising. As a result of this decision (described more fully below), the following types of limits on tobacco advertising are not advised at this time.

- Local ordinance limiting outdoor or storefront cigarette advertising (e.g., a prohibition on cigarette ads within 1,000 feet of schools and playgrounds);
- Local ordinance limiting indoor cigarette advertising (e.g., a prohibition on cigarette ads low to the ground or near to candy).

TALC will continue to monitor the law in this area and inform tobacco control projects if the law changes to allow such direct limits on cigarette advertisements.

Supreme Court Decision: *Lorillard v. Reilly*

In 2001, the U.S. Supreme Court issued a decision that limits the ability of local governments to regulate tobacco advertising. In the case of *Lorillard Tobacco Co. v. Reilly*, the Court struck down Massachusetts regulations that would have limited tobacco advertising inside and outside of retail outlets within 1,000 feet of schools and playgrounds.⁹

Because the *Lorillard* decision was issued by the U.S. Supreme Court, it applies in California and all states. As a result, as many as 40 California communities with ordinances regulating tobacco advertising may no longer be enforcing them. Additionally, the *Lorillard* decision means that local governments are not currently able to legally impose new limits on cigarette advertising near schools and playgrounds. At this time, TALC is no longer recommending its "Model California Ordinance Regulating Tobacco Advertising" and the CDHS/TCS is asking Proposition 99-funded projects to remove objectives related to mandatory limits on tobacco advertising from their workplans. Local

governments are not advised to enact local limits on tobacco advertising either outside or inside the store.

The Court found two reasons for ruling against Massachusetts in *Lorillard*:

1. That the Massachusetts regulations were preempted by Federal law; and
2. That they violated the First Amendment's right to free speech.

Federal Preemption

On the preemption issue, the Court found that state and local governments do not have the authority to pass laws regulating the location of cigarette advertising because of the Federal Cigarette Labeling and Advertising Act (FCLAA) of 1969. The FCLAA, which requires warning labels on cigarettes and eliminated cigarette ads on television, prohibits state or local governments from imposing a "requirement or prohibition based on smoking and health. . .with respect to the advertising or promotion of cigarettes."¹⁰

The Court rejected arguments that such ordinances should be allowed if they are not "based on smoking and health," an approach taken by most California ordinances. As Justice O'Connor wrote: "At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health."¹¹ Justice O'Connor went on to write: "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth."¹²

The Court found that although Massachusetts may have had an important interest in trying to limit tobacco advertising, the regulations were prohibited. As Justice O'Connor wrote: "From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products. . . . Federal law, however, places limits on policy choices available to the States."¹³

First Amendment

Even if Massachusetts had the authority to regulate tobacco advertising, a majority of the Court found that the Massachusetts regulations were too broadly written and, therefore, violated the First Amendment to the U.S. Constitution. In the First Amendment analysis, the Court found that the Massachusetts regulations prohibited advertising in too large an area of Massachusetts. Additionally, the Court was sympathetic to the argument of tobacco retailers that

Despite the Lorillard decision, there is still much local governments may do. They may license tobacco retailers, ban self-service tobacco displays, strengthen local sign laws and impose land use restrictions on tobacco retailers.

retailers have an interest in conveying truthful information about their products to adults, because tobacco is legal for adults to purchase. Therefore, the Court found that the Massachusetts regulations placed too great a burden on retailers who may have no alternative means of communicating to passersby on the street that they sell tobacco products.¹⁴

Other Court Decisions

While the *Lorillard* decision directly affects the ability of local governments to regulate tobacco “advertising,” a more recent court decision may further limit the ability of local governments to regulate tobacco “promotions.” In the case of *Jones v. Vilsack*, tobacco retailers challenged an Iowa law that prohibited retailers from giving away free cigarettes or free goods in exchange for cigarettes (e.g., free lighter with a pack of cigarettes or two-for-one sales).¹⁵

In *Vilsack*, the Eighth Circuit Court of Appeals ruled that, like the Massachusetts advertising regulations, the Iowa law was preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). Although decisions by the Eighth Circuit are not binding in California, the court makes a broad argument about what types of “promotions” are preempted by the FCLAA.

What You Can Do Legally Today

While direct regulation of tobacco advertising is not currently legally advisable, a number of policy options remain open to local governments, including the four policies summarized above: (1) licensing tobacco retailers; (2) banning self-service tobacco displays; (3) strengthening local sign laws; and (4) imposing land use restrictions on tobacco retailers. TALC will continue to monitor the law in this area and work with The STORE Campaign to investigate other ideas.

Tobacco control advocates also may wish to work to change federal law so that communities are given the authority to regulate tobacco advertising on the local level. (See [Sample Letter to Congress](#).) Currently, the FCLAA prohibits local regulation of tobacco advertising or promotions “based on smoking and health.” The Supreme Court in *Lorillard* found that the regulations proposed by the state of Massachusetts—to limit tobacco ads within 1,000 feet of schools and playgrounds—were “based on smoking and health.”

The current version of the FCLAA was passed by the U.S. Congress in 1969. It is unlikely at that time that Congress could have foreseen the exponential growth of tobacco advertising over the next 30 years. Nor could Congress have predicted that local governments would seek to limit where tobacco ads are placed in their community.

Because Congress passed the FCLAA, only Congress has the authority to change the FCLAA. If sufficient support for a change in the law is generated, Congress could amend the FCLAA to explicitly give local governments the authority to regulate tobacco advertising. A number of bills are pending in Congress that would either remove the preemption of the FCLAA or grant the federal Food and Drug Administration (FDA) the authority to regulate tobacco.¹⁶

Finally, because the preemption analysis in *Lorillard v. Reilly* is limited to cigarette advertising, local governments theoretically could still pass an ordinance to regulate non-cigarette advertising (e.g., cigars, pipe tobacco, and smokeless tobacco). Such an ordinance still must not violate the First Amendment. The Supreme Court considered many variables in concluding that the non-cigarette advertising regulations in Massachusetts violated the First Amendment, including that the regulations limited advertising in approximately 90% of major metropolitan areas; included a restriction on oral statements; covered advertising inside a store if visible from the outside; applied uniformly throughout the state; banned signs of all sizes; and, did not distinguish based on whether the message might have a particular appeal to youth. Therefore, while it may be possible to satisfy the Court's concerns, it is difficult to predict how a local government could best craft a regulation of non-cigarette advertising to do so. Please contact TALC for more information on this topic.

Potential Strategies for Increased Enforcement

When documenting the problem, you may have discovered a lack of enforcement for youth access and tobacco advertising laws and ordinances in your community. You documented the specific reasons why these laws are not being enforced (through the enforcement survey). You also developed an overall impression of your community's support for increased enforcement efforts. In this section we offer you suggestions on approaching and interacting with your enforcement agencies as well as developing effective strategies to build long-term, proactive enforcement in your community.

NOTE: It is strongly recommended that you review the following sections and associated tools: Develop a Strategy, Broaden Your Coalition and Communicate with Target. Familiarity with the Midwest Academy methods can broaden your options for developing and implementing successful strategies for increased enforcement.

Approach the Enforcement Agency

Your previous assessment may indicate that enforcement is possible in your community or it may lead you to conclude that the enforcement agency is firmly opposed to regular, proactive enforcement. If

you find that your enforcement agency is open to increased enforcement, it is time to develop a plan on how best to approach them. Consider the specific reasons your enforcement officers gave for why they were not enforcing your tobacco advertising and youth access laws. Develop strategies to address specific reasons for lack of enforcement. Prior to approaching your enforcement agency, prepare answers to the following questions:*

- Who are you approaching and why?
- Who among your group will attend the meeting and why?
- What are the roles of each attendee?
- What do you want to get out of the meeting?
- What are you going to say and how will you frame the issue?
- What arguments can you expect and how will you counter them?
- What are you willing to do (volunteer as a willing community participant)?
- What is your strategy (or fallback position), if you get a “no” (how can you leave the door open)?

Enforcement Issues and Potential Solutions

Here are possible solutions to specific reasons why enforcement is not being done:

▼ Insufficient Staffing

Enforcement agencies often comment that there is not enough staff to enforce the less important laws and ordinances including the ones relating to tobacco control issues. One straightforward way to address this complaint is to develop the fee structure or fine rates of a local ordinance so that it covers the cost of creating an additional full or part-time staff person for the local police department (or other enforcement agency). For example, setting the fees for a licensing ordinance at a rate sufficient to fund enforcement would enable a new part or fulltime enforcement officer to be hired, therefore eliminating staffing concerns as a barrier to effective enforcement. Be realistic about how much enforcement time is needed; for example, a community with only a dozen tobacco retail outlets will require less enforcement time than a community with several thousand tobacco retailers.

If you propose this type of solution, the enforcement agency may be excited about adding staff and may be more willing to enforce the new tobacco control ordinance. This method also simplifies the process of

* The questions to consider are from the “Strategic Approach to Stimulating Enforcement in Your Community” by Patricia Jensen and Ellen Feighery, May, 1996.

determining what a “reasonable” fee is, and it creates a “concrete” explanation for community leaders or city council members as to why the fees are set at a particular level. It is easy to justify a specific fee or fine rate when it results in additional staff for the enforcement agency. Another option to consider is the resources you can bring to the table, (e.g., volunteers to assist with enforcement, staff time to help organize an enforcement effort, or funding such as Master Settlement Agreement funds).

▼ Financial Issues

Not surprisingly, adequate funding is key to the success of developing an effective tobacco control policy for your community. Whether or not your group or agency was involved in the actual passage of the law(s), you should follow-up with the city or county manager to make sure the enforcement agency and the enforcement mechanisms have been clearly identified. When possible, an ordinance should be made self-supporting when it is initially written by assessing adequate fees for enforcement. Since this is not always the case, the challenge may be in finding funding to enhance enforcement even after the ordinance or policy has been passed.

Working to have existing laws enforced may be more expedient than trying to get a new law enacted and may be less politically charged.

If your enforcing agency has indicated that funding is the reason why existing laws are not being adequately enforced, consider going to your local city council or board of supervisors with a request to allocate Master Settlement Agreement money for additional enforcement. (Before going to your elected officials, be sure to develop a strategy to convince them that additional enforcement is a concern that affects the entire community, including them.)

Other possible solutions might include talking with your existing enforcement officers/agency to see if they might include some tobacco control tracking measures on their survey when they make their routine retailer compliance checks. This would allow them to make more thorough compliance checks with fewer staff and less expense.

Note, however, that arguments against proactive enforcement are often couched in terms of insufficient staff or funding. This is generally a reflection that enforcement of youth access or advertising ordinances is not a high priority. An effective strategy would be to mobilize the community to convey the importance of the issue to public officials and decision-makers.

▼ Perceived Importance of the Problem

Do your enforcement officers perceive the problem of youth access to be a real concern? If not, it is your responsibility to keep them informed of the local youth access and tobacco advertising problems

in the community through education and outreach efforts. Provide them with updated results from youth purchase surveys and STAKE Act compliance checks. When feasible, try developing relationships with your enforcement agency/officers; set regular meetings to discuss routine enforcement concerns and new local tobacco control ordinances in the community. Let your enforcement officer know that you and your coalition are willing to work with them to resolve problems that arise around enforcement. Provide quick reference sheets or brief “how to” materials and protocols to train enforcement officers on the specific aspects of tobacco control ordinances. (See [Tips on Working with Law Enforcement](#).)

When first attempting to work with your enforcement agency, remember that offering your assistance instead of criticism is often the best approach. You and your coalition’s dedication and willingness to participate in developing solutions for enforcement concerns can be extremely effective in gaining enforcement officers’ support. One community was able to increase enforcement simply by providing additional citation booklets along with educational materials for their officers. Understanding and respecting your law enforcement agency’s needs and limitations can be key to the success of your campaign.

If your enforcement officers are only allowed to respond to consumer complaints, consider mobilizing community members to submit violations in writing; it only takes a small group of people to carry out this effort. Most public agencies are obligated to respond to written complaints. You might also consider setting up a “hotline” for community members to report violations. When necessary, be willing to have the “hotline” staffed by someone in your department or coalition—do not expect the enforcement agency to provide staffing to answer the “hotline” complaints. Or consider setting up an “automated” hotline, on which callers can leave messages, thereby requiring fewer staff. Use local media to increase the community awareness about the hotline. Include television, radio and newspaper spots, letters to the editor, leafletting and public health web site announcements. (See other strategies in [Develop a Strategy](#) section, *Getting Media Coverage*.)

▼ Community Support for Enforcement

If you have not been successful in working with your enforcement agency or your initial assessment indicated that your enforcement agency is firmly opposed to regular, proactive enforcement, the next step is to start working with your coalition to publicize the issues. Share data showing how easy it is for youth to gain access to tobacco products or show how storeowners are not complying with existing advertising ordinances. Show how your enforcement agency is not conducting effective enforcement. Use the media and other targeted approaches to ensure that local laws really are enforced. This might be a great time to complete the [Strategy Chart](#) to help organize and

Include coalition and community members in your efforts to work with enforcement agencies.

prepare your coalition for more aggressive methods to achieve increased enforcement.

In most communities, effective enforcement is driven by citizen complaints, media attention, and/or concern of an elected official. Tobacco control advocates therefore, should educate and involve the community in efforts to stimulate enforcement, as it is so often a result of community pressure. Including coalition members and community leaders can be an effective way to stimulate interest in and increase enforcement of tobacco control laws. Very often increasing community support includes media outreach. (Review [Communicate with Target](#) and [Implement Activities](#) sections prior to developing your strategies on increasing community support.)

▼ **City or District Attorney Willingness to Prosecute Violations**

Some enforcement agencies have indicated that their city or district attorney will not prosecute, no matter how many tobacco control citations they write. In that case, you must include your city or district attorney in your strategy. First, approach your city or district attorney in a friendly, helpful manner, much like you did in approaching your enforcement agency. Try setting a meeting to raise your concerns, and include statistics that demonstrate youth access to tobacco and tobacco-advertising restrictions are not being enforced in your presentation. Be sure to include effective coalition and community members who may already have strong relationships with your city/district attorney and who are willing to advocate on your behalf in the meeting.

If after attempting to work in collaboration with your city or district attorney you still are not getting any support, consider stronger, more aggressive methods of encouragement. The same tactics that can be used to build community support for increased enforcement (building community support, broadening your coalition and increasing your allies, developing media and outreach strategies to increase community awareness and holding accountability sessions) can be used to increase your district or city attorney's interest in prosecuting tobacco control citations. (See [Communicate with Target](#) and [Implement Activities](#) sections.)

For more information on videos, sample protocols, and case studies on how increased enforcement has been accomplished in other communities, refer to [Implement Activities: Enforcement](#).

Consider Merchant Education

Prior to Conducting Merchant Education Interventions

While merchant education can be an important component of a successful intervention toward reducing youth access to tobacco and decreasing tobacco advertising in store environments, it has been

proven that, on its own, it is not an effective long-term strategy in preventing youth from smoking. A good example is the Santa Clara County merchant education intervention conducted in 1991. The intervention pre-test reported a 76% sales rate of cigarettes to minors. At the 6-month post-test, this rate had decreased to 39% (a significant decrease). However, at the one-year follow-up, it was found that sales rates to minors had rebounded to 59 percent.¹⁷ This is only one of the many findings which demonstrate that educational approaches tend to produce only temporary reductions in minors' access to tobacco.

As indicated, many merchant education efforts can be effective during the intervention period, but over time they prove to be less so. Some possible reasons for this rebound include:

- Low participation rates (voluntary for merchants to join the program)
- Staff intensive (developing relationships with merchants takes time)
- Cost prohibitive (providing incentives and training materials for retailers & clerks can be expensive)
- Difficult to sustain the effort (repeat visits to retailers are critical and yet time consuming)
- Loss of community momentum and interest in the intervention

Merchant education interventions often result in very little permanent behavioral change from either the merchant or the youth. Additionally, retailer interventions may not work if neighboring communities have policies that differ from one another. Retailers who make illegal sales to minors argue that youth will simply go elsewhere, ultimately depriving the merchant of revenue without benefiting the community.¹⁸ This is one reason why uniform enforcement policies may help retailers to comply by reassuring them that their competitors will do the same. Studies show that merchant education in combination with effective enforcement has proven to be more successful in reducing both youth access to tobacco and tobacco advertising in store environments.¹⁹

What Is Merchant Education?

Merchant education is a strategy to inform and update tobacco retailers about existing tobacco control laws in their community. Merchant education programs are voluntary—merchants are not required to participate. The goal is to have participating merchants voluntarily agree to change their behavior with regard to tobacco advertising and promotions, and/or sales of tobacco products to minors in their store(s). Behavioral changes may include:

- Removing or replacing tobacco advertising signs (especially if they target kids—3 feet or below or displayed next to candy and toys)

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- Obeying current federal, state and local tobacco control laws
 - Displaying appropriate signage (STAKE Act signs at each register)
 - Eliminating promotional items that advertise tobacco (clocks, penny cups, etc.)
 - Removing self-service tobacco displays (including chew, pipe and loose tobacco)
 - Eliminating all tobacco sales from their facility

Merchant Education Strategies: The First Step

Here are a few reasons why voluntary merchant education interventions are often the first approach a community takes when addressing high sales rates to minors or an abundance of tobacco advertisements in their retail outlets:

Merchant education may be a component of an overall strategy, but you should not rely on it as the sole strategy.

- Presents the path of least resistance (few will argue against providing educational materials to retailers to reduce youth access rates)
- Allows community leaders to remain “pro-business” (they work with their merchants on a voluntary basis—appealing to their better judgment and their concern for youth in the community)
- Encourages merchant involvement
- Provides an opportunity for merchants to become familiar with the laws and then to become compliant
- Creates good will and often garners broad community support
- Sets the stage for the more punitive action by an enforcement agency (by demonstrating to enforcement agencies that a serious effort was made to obtain voluntary compliance with the law. And when educational efforts fall short, enforcement agencies are often more willing to take action.)

If your community decides that it wants to provide its retailers with an opportunity to voluntarily reduce tobacco advertising and/or illegal sales to minors, develop your overall Strategy Chart so that merchant education is just the first step in your overall intervention plan. Include strategies to broaden and strengthen your tobacco coalition, increase community awareness and ultimately develop and implement strong enforcement measures. Remember, merchant education is not an outcome. Merchant education should only be pursued to complement a legislated policy or enforcement approach or with an eye toward moving key decision-makers along the strategy continuum.

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