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GUIDANCE DOCUMENT RELATIVE TO THE DEFINITION OF “INCIDENTAL” CONTAINED IN THE “ADULT-ONLY RETAIL TOBACCO STORE” DEFINITION

Amended 4/11/22

If a retailer is an “adult-only retail tobacco store” (called “Retail Tobacco Store” in state law, hereinafter referred to as RTS), the retailer may:

1. Permit smoking pursuant to the Smoke-Free Workplace Law, unless local regulation prohibits it; and
2. Sell unflavored tobacco/vape products;
3. Sell vape products with any nicotine strength.

The current definition of an RTS (from 105 CMR 665.005) reads as follows:

Retail Tobacco Store means an establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, in which the sale of other products is merely incidental, and in which the entry of persons under the age of 21 is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the appropriate authority in the city or town where the establishment is located.

The current definition of an RTS in the sample regulation, which is stricter, reads as follows:

Adult-Only Retail Tobacco Store (also known as “Retail Tobacco Store” in MGL Ch. 270): An establishment that does not share space with another business, that has a separate entrance, that does not sell food, beverages or alcohol, that does not have a restaurant license or lottery license, whose only purpose is to sell or offer for retail sale tobacco products and/or tobacco product paraphernalia, in which the entry of persons under the age of 21 is prohibited at all times, and which maintains a valid permit for the retail sale of tobacco products from the **[city/town]** Board of Health and applicable state licenses. Entrance to the establishment must be secure so that access to the establishment is restricted to employees and to those 21 years or older. The establishment shall not allow anyone under the age of 21 to work at the establishment.

If a retailer claims the above exemption, the retailer must meet the following requirements:

1. Prohibit anyone under the age of 21 years-old from entering the establishment at any time.
2. Have a valid local tobacco product sales permit, and all applicable valid DOR licenses.

3. The primary purpose of the store must be to sell tobacco/vape products and related paraphernalia. If your municipality uses an older definition or does not mention RTS in your sales measure then if non-related products or services are also sold, they must be no more than “incidental” to the tobacco/vape products and related paraphernalia sold.

The term “incidental” is not clearly definable. Using a minimum percentage of sales to define “incidental” is not advisable since it is difficult to obtain, and then verify, financial records provided by a retailer seeking the exemption. However, the sale of non-related products should in fact be minimal to provide a “bright line” between a qualifying RTS and a regular retailer who sells tobacco/vape products, like a gas station, grocery store or convenience store.

Some considerations:

1. At first observation, does the retailer sell only tobacco or vape products?
2. If not, are the “incidental” products or services available for sale related to using tobacco or vaping products? If so, then the retailer qualifies as an RTS. (See examples below).
3. If the retailer sells products or services unrelated to tobacco or vaping, determine if they are more than “incidental.”

A change in the requirement of a retail food permit: The Commonwealth underwent an update to the state’s food code which exempts a retailer who sells only pre-packaged food that does not require refrigeration from needing a retail food permit. Therefore, if a municipality wants to require a food service permit for a retailer that only serves this type of pre-packaged food, the municipality would have to have a local regulation in place that requires a permit. Historically, we have maintained that if a retailer sells any food, the retailer cannot be an RTS. Now that the food code changed, consult with your local health department about our interpretation of the existence of any food in an RTS.

Examples of “related paraphernalia” which means the amount of the product in the store does not matter because “related paraphernalia” is not incidental, but rather related:

- Pipes
- Bongs
- Other “marijuana accessories”
- Matches
- Rolling papers
- Ashtrays
- Humidors
- Cigar cutters
- RYO machines for home use

Examples of “incidental” products that need to be limited because they are not related:

- Writing instruments
- Clothing
- Jewelry
- Batteries
- Paper
- Legal synthetic marijuana products
- Maps
- Services (i.e., locksmith, parcel shipping, massage, etc.)

Examples of “non-related” product which require separate licensing, which can never be incidental because they change the “spirit of the business”:

- Alcohol (spirits, beer and/or wine)
- Lottery
- Prepared hot food and/or sandwiches

Store conversions: A tobacco retailer may claim that its store is actually two separate businesses – an RTS on one side, and a general convenience store on the other side. If that is the case, the two new businesses must have all of the necessary state and local permits and licenses for each business. Any division into two businesses should be the same as if the two businesses are across town from each other, instead of physically abutting. Therefore, there should be no sharing doors, utilities, cash registers, employees or products for sale.