CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

ITEM: **DATE:** November 18, 2024

Resolution approving a 28E Agreement between the Iowa Alcoholic Beverages Division and the City of West Des Moines for the purposes of providing and funding local tobacco, alternative nicotine and vapor product enforcement activities.

FINANCIAL IMPACT:

There will be limited positive financial impact to the City of West Des Moines when the City performs tobacco compliance checks in West Des Moines on behalf of the State of Iowa.

BACKGROUND:

Pursuant to state law and an intergovernmental agreement with the Iowa Department of Public Health, the Iowa Alcoholic Beverages Division (ABO) possess the authority and provides for the enforcement of the State of Iowa's tobacco laws. For a number of years, the Iowa ABO has delegated the responsibility to perform tobacco sale to minor compliance checks of local business to the City of West Des Moines and its Police Department. In return, the City receives a flat fee of $75.00 from the State of Iowa for each reported tobacco compliance check.

The Iowa ABO prepared a 28E Agreement for the local authorities to sign for purposes of these tobacco enforcement efforts to formally establish each party's respective obligations. This 28E Agreement is a renewal of the same agreement reviewed by the West Des Moines City Attorney's Office and approved by the City Council on December 4, 2023.

OUTSTANDING ISSUES (if any): None

RECOMMENDATION:

Approve the 28E Agreement between the Iowa Alcoholic Beverages Division and the City of West Des Moines for the purposes of providing and funding local tobacco enforcement activities.

Lead Staff Member: Chris Scott, Chief of Police

STAFF REVIEWS

Department Director	11-12-24
Appropriations/Finance	
Legal	
Agenda Acceptance	

PUBLICATION(S) (if applicable)

Published In	
Dates(s) Published	

SUBCOMMITTEE REVIEW (if applicable)

Committee			
Date Reviewed			
Recommendation	Yes	No	Split

RESOLUTION APPROVING A 28E AGREEMENT BETWEEN THE IOWA DEPARTMENT OF REVENUE AND THE CITY OF WEST DES MOINES FOR THE PURPOSES OF PROVIDING AND FUNDING LOCAL TOBACCO ENFORCEMENT ACTIVITIES

WHEREAS, the provision of tobacco enforcement efforts within the City of West Des Moines promotes the health and well-being of West Des Moines citizens and visitors; and

WHEREAS, the State of Iowa, through the Iowa Department of Revenue, has offered to reimburse the City of West Des Moines and the City's Police Department for performing tobacco sale to minor compliance checks of local businesses; and

WHEREAS, the Iowa Department of Revenue and the City of West Des Moines have negotiated an agreement under Iowa Code Chapter 28E to provide and fund local tobacco enforcement activities.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA:

1. The 28E Agreement between the Iowa Department of Revenue and the City of West Des Moines is hereby approved.

2. The Police Chief is authorized to sign the signature page to be attached to the 28E Agreement on behalf of the City of West Des Moines.

3. The Police Department is directed to forward the signed signature page to Jessica Ekman, Tobacco Program Coordinator, 1918 SE Hulsizer Road, Ankeny, Iowa 50021, with the executed signature page to be attached to the 28E Agreement, which the Iowa Department of Revenue will then electronically file with the Secretary of State of Iowa.

PASSED AND APPROVED this 18th day of November 2024.

_____
Russ Trimble, Mayor

ATTEST:

_____
Ryan T. Jacobsen, City Clerk

IOWA | Department of Revenue

Kim Reynolds, Governor Mary Mosiman, Director

November 5, 2024

Dear I-PLEDGE Partner,

The Iowa Department of Revenue (the Department) invites you to participate in the I-PLEDGE Tobacco, Alternative Nicotine and Vapor Product Enforcement Program. Together, law enforcement agencies and the Department have raised the tobacco retailer compliance rate to a remarkable 91%. We know the compliance success rate that Iowa has achieved would not be possible without the help of Iowa's law enforcement community.

What should you do?

Become an I-PLEDGE partner for FY2025 (July 1, 2024 - June 30, 2025):

- review the enclosed 28E Agreement
- verify the contact information for your agency
- sign and return the agreement in the postage paid envelope provided

Once the agreement is fully executed, a copy of the agreement and the FY2025 I-PLEDGE Tobacco, Alternative Nicotine and Vapor Product Enforcement Handbook will be returned to your office.

What you should know:

As mentioned in previous communications, the Department's technology modernization efforts to our customer-facing portals, including GovConnectIowa Home, as well as a new Law Enforcement portal will launch on November 12, 2024. Your agency will receive new login credentials with details to follow shortly after launch. Through the new Law Enforcement portal, the Department will assign a list of retailers to your agency. One compliance check at each tobacco, alternative nicotine, and vapor product retailer during FY2025 is required, with an additional compliance check conducted on any retailer that fails the first check. The 28E Agreement details the dates by which compliance checks need to be performed.

Iowa law reflects the federal minimum age to purchase. The state minimum age to purchase tobacco, alternative nicotine, and vapor products is 21 years of age. Underage purchasers from the age of 16 to 20 years old may be used in the program. If using multiple underage purchasers to perform compliance checks, please ensure that a representative mix of 16 to 20 year old underage purchasers are used when feasible.

Alternative nicotine and vapor products are age-restricted pursuant to Iowa Code section 453A.2 and are therefore included in the I-PLEDGE program. Attempts to purchase alternative nicotine and vapor products may be conducted at any retailer that sells these products.

Questions?

Contact 515.281.7434 or iapledge@iowaabd.com with questions regarding the enclosed agreement.

Sincerely,

Jessica Ekman

Jessica Ekman, I-PLEDGE Tobacco Program Coordinator
Alcohol & Tax Compliance Division

28E AGREEMENT FOR TOBACCO, ALTERNATIVE NICOTINE AND VAPOR PRODUCT ENFORCEMENT

This agreement ("Agreement") is made and entered into on the Effective Date by and between the Iowa Department of Revenue ("IDR"), and West Des Moines Police Department ("Department"). The parties agree as follows:

SECTION 1. IDENTITY OF THE PARTIES.

1.1 **IDR**. IDR is an agency of the State of Iowa is authorized, pursuant to Iowa Code chapter 453A and a memorandum of understanding with the Iowa Department of Health and Human Services, to provide enforcement for Iowa's tobacco, alternative nicotine, and vapor product laws. IDR's address for the purposes of this Agreement is: 1918 SE Hulsizer Road, Ankeny, Iowa 50021.

1.2 **Department**. The Department operates a duly-recognized Iowa law enforcement agency. The Department's address is: 250 George Mills Civic Parkway, West Des Moines, IA 50265.

SECTION 2. PURPOSE. The parties have entered into this Agreement for the purpose of providing and funding tobacco, alternative nicotine, and vapor product enforcement activities in compliance with Iowa Code section 453A.2. The legal authority for this agreement is Iowa Code chapter 28E, Iowa Code section 453A.2, and MOU-2025-ABD01 Memorandum of Understanding between the Iowa Department of Health and Human Services Division of Tobacco Use and Prevention and Control and Iowa Department of Revenue.

SECTION 3. TERM. The term of the Agreement shall be from the aforementioned date through June 30, 2025, unless earlier terminated in accordance with the terms of the Agreement.

SECTION 4. FILING. Pursuant to Iowa Code section 28E.8, IDR shall electronically file the Agreement with the Iowa Secretary of State, after the Parties have executed the Agreement.

SECTION 5. RESPONSIBILITIES OF THE PARTIES.

5.1 **Responsibilities of the Department.**

5.1.1 **Local Tobacco, Alternative Nicotine and Vapor Product Enforcement**. The Department shall provide tobacco, alternative nicotine, and vapor product enforcement of Iowa Code chapter 453A.

5.1.2 **Compliance Checks**.

5.1.2.1 "Compliance checks" means activity to enforce tobacco, alternative nicotine, and vapor product laws in accordance with Iowa Code section 453A.2 within the jurisdiction of the Department. Compliance checks also may include enforcement of Iowa Code section 453A.2 within additional jurisdictions upon agreement of the Parties. IDR shall make available to the Department the location of each tobacco, alternative nicotine, and vapor product permit holder subject to a compliance check by the Department at https://govconnect.iowa.gov/TAP/LawEnforcement/.

5.1.2.2 The Department shall perform one (1) **compliance check** of each tobacco, alternative nicotine and vapor product permit holder within the jurisdiction of the Department during the term of the Agreement. Please note that alternative nicotine, and vapor products are age-restricted pursuant to Iowa Code section 453A.2 and are therefore included in the I-PLEDGE program. Attempts to purchase alternative nicotine and vapor products may be conducted at any retailer that sells these products.

5.1.2.3 **The Department shall not begin to conduct any retailer compliance checks until October 1, 2024.**

5.1.2.4 The compliance check shall be completed and submitted for reimbursement to IDR by **February 15, 2025**. The Department should try to complete a compliance check of all seasonal businesses, such as golf courses, marinas, and bait shops, before the businesses close for the 2024 business year, but not before October 1, 2024. If the Department is unable to complete the compliance checks on seasonal businesses prior to the businesses close for the 2024 business year, the Department shall work with IDR to establish a plan for completing these compliance checks.

5.1.2.5 The Department shall conduct a second compliance check on any retailer that is found to be non-compliant during the first inspection. The second compliance check on the non-compliant retailer shall be completed and entered no later than **May 15, 2025**.

5.1.2.6 Clerks that fail compliance checks shall be ticketed criminally.

5.1.2.7 The Department shall, within seven (7) business days, notify the retail owner or manager of any violation. Within seventy-two (72) hours of the Department issuing a citation for a violation of Iowa Code § 453A.2(1) to a permit-holder or employee of a permit-holder, the Department must notify the local permit-issuing authority that issued the tobacco, alternative nicotine, and vapor product permit to the retailer where the offense was committed.

5.1.2.8 If the Department fails to complete and submit reimbursement for compliance checks to IDR by **February 15, 2025**, IDR will consult with the Department to establish a plan for completing the remaining compliance checks. In the event that the Department fails to execute the agreed upon plan, the Department agrees that IDR may authorize the Iowa State Patrol or other law enforcement agency to conduct any remaining compliance checks.

5.1.3 **Underage Purchaser Volunteers**. Utilization of underage purchaser volunteers is strongly encouraged, where feasible. The Department may compensate the underage purchasers involved in the compliance checks in a manner consistent with Section 6. Underage purchasers from the age of sixteen to twenty years old may be utilized in the program. Keep in mind that the federal government (SYNAR) ***will not allow underage purchasers under the age of sixteen*** to be used to conduct compliance checks. Please ensure that the officers assigned to conduct the compliance checks do not work with an underage purchaser younger than age of sixteen. If utilizing multiple underage purchasers to perform compliance checks, please ensure that a

representative mix of 16, 17, 18, 19 and 20 year old underage purchasers are used when feasible.

5.1.4 **Routine Enforcement**. In addition to conducting compliance checks, the Department agrees to regularly enforce underage tobacco, alternative nicotine and vapor product laws by ticketing underage offenders.

5.1.5 **Civil Proceedings**. The Department shall cooperate with city, county, and state prosecutors if civil permit proceedings are initiated against a tobacco, alternative nicotine, and vapor product permit holder. The Department shall also cooperate in proceedings against cited clerks and underage persons. Cooperation shall include, but not be limited to, sharing investigative reports and copies of issued citations, as well as providing witness statements and testimony.

5.1.6 **Compliance Reports**. The Department shall provide monthly reports to IDR in the manner prescribed by IDR.

5.1.7 **Miscellaneous**. The Department shall be responsible for the day-to-day administration of its tobacco, alternative nicotine, and vapor product enforcement activities. The Department shall provide all office space, equipment, and personnel necessary to conduct tobacco, alternative nicotine, and vapor product enforcement activities under the Agreement. The Department is solely responsible for the selection, hiring, disciplining, firing, and compensation of its officers.

5.2 **Responsibilities of IDR**.

5.2.1 **Enforcement Guidance**. IDR shall provide guidance on tobacco, alternative nicotine, and vapor product enforcement to the Department, if needed, and cooperate with the Department in the performance of the Agreement.

5.2.2 **Payment**. IDR shall pay the Department in the manner described in Section 6 of this Agreement.

5.2.3 **Cooperation**. If IDR believes that any officer of the Department fails to perform duties in a manner that is consistent with the Agreement, IDR shall notify the Department. The Department shall then take such action as necessary to investigate and, if appropriate, discipline or reassign the officer away from tobacco, alternative nicotine, and vapor product enforcement activities. IDR shall have no authority to discipline or reassign an officer, except that IDR shall have the authority to stipulate that a particular officer not be assigned to provide services under the Agreement.

5.2.4 **Insurance, Benefits, and Compensation**. IDR shall not provide for, nor pay, any employment costs of the Department's officers including, but not limited to, worker's compensation, unemployment insurance, health insurance, life insurance, and any other benefits or compensation, nor make any payroll payments with respect to the Department's officers. IDR shall have no liability whatsoever for all such employment costs or other expenses relating to, or for the benefit of, the Department's officers.

SECTION 6. PAYMENT TO DEPARTMENT.

6.1 **Method of Payment**. In consideration for providing the services required by the Agreement, the Department shall be paid on a flat fee basis of seventy-five dollars ($75) per reported compliance check. The flat fee payment for each compliance check constitutes the full and exclusive remuneration for the compliance checks. For

example, compensation of underage purchasers is the sole responsibility of the Department and is to be paid from the flat fee payment.

6.2 **Eligible Claims**. Compliance checks that are conducted on or after October 1, 2024 are eligible for payment provided that the results are reported in accordance with Section 5. Any compliance checks that were funded by a non-departmental entity are not eligible for payment.

6.3 **Allocations**. The costs of the services referred to in Section 6.1 shall be allocated as follows:

6.3.1 **Sole Activity**. Money paid to the Department, pursuant to the Agreement, shall be used to fund overtime of full- or part-time peace officer positions solely for tobacco, alternative nicotine and vapor product enforcement activities described in the Agreement. Money also shall be used for compensation, if any, of underage purchasers. In addition, the Department may use money paid pursuant to the Agreement for reasonable Department expenditures, including, but not limited to, officer training and equipment, provided that such expenditures do not impair the Department's ability to perform tobacco, alternative nicotine and vapor product enforcement activities.

6.4 **Payment in Arrears**. IDR shall verify the Department's performance and compliance with this Agreement before making payment. IDR shall pay all approved invoices in arrears and in conformance with Iowa Code section 8A.514. IDR may pay in less than sixty (60) days, but an election to pay in less than sixty (60) days shall not act as an implied waiver of Iowa Code section 8A.514. Unless otherwise agreed in writing by the Parties, the Department shall not be entitled to receive any other payment or compensation from IDR or the State of Iowa for any Compliance Checks not compliant with this Agreement. The Department shall be solely responsible for paying all costs, expenses, and charges it incurs in connection with its performance under this Agreement.

SECTION 7. ADMINISTRATION OF AGREEMENT. IDR and the Department shall jointly administer the Agreement.

SECTION 8. NO SEPARATE ADMINISTRATIVE ENTITY. No new or separate legal or administrative entity is created by the Agreement.

SECTION 9. NO PROPERTY ACQUIRED. IDR and the Department, in connection with the performance of the Agreement, shall acquire no real or personal property.

SECTION 10. TERMINATION.

10.1 **Termination for Convenience**. Following twenty (20) days written notice, either party may terminate the Agreement, in whole or in part, for convenience without the payment of any penalty or incurring any further obligation to the non-terminating party. Following termination for convenience, the non-terminating party shall be entitled to compensation, upon submission of invoices and proper proof of claim, for services provided under the Agreement to the terminating party up to and including the date of termination.

10.2 **Termination Due to Lack of Funds or Change in the Law**. Notwithstanding anything in this Agreement to the contrary, and subject to the limitations set forth below, IDR

shall have the right to terminate this Agreement without penalty and without any advance notice as a result of any of the following:

10.2.1 The legislature or governor fail in the sole opinion of IDR to appropriate funds sufficient to allow IDR to either meet its obligations under this Agreement or to operate as required and to fulfill its obligations under this Agreement;

10.2.2 If funds are de-appropriated, reduced, not allocated, or receipt of funds is delayed, or if any funds or revenues needed by IDR to make any payment hereunder are insufficient or unavailable for any other reason as determined by IDR in its sole discretion;

10.2.3 If IDR's authorization to conduct its business or engage in activities or operations related to the subject matter of this Agreement is withdrawn or materially altered or modified;

10.2.4 If IDR's duties, programs or responsibilities are modified or materially altered;

10.2.5 If there is a decision of any court, administrative law judge, or an arbitration panel or any law, rule, regulation, or order is enacted, promulgated, or issued that materially or adversely affects IDR's ability to fulfill any of its obligations under this Agreement. IDR shall provide the Department with written notice of termination pursuant to this section.

10.3 **Termination for Cause**. The occurrence of any one or more of the following events shall constitute cause for any party to declare another party in default of its obligations under the Agreement:

10.3.1 Failure to observe and perform any covenant, condition or obligation created by the Agreement;

10.3.2 Failure to make substantial and timely progress toward performance of the Agreement;

10.3.3 Failure of the party's work product and services to conform with any specifications noted herein;

10.3.4 Infringement of any patent, trademark, copyright, trade dress or any other intellectual property right.

10.4 **Notice of Default**. If there occurs a default event under Section 10.3, the non-defaulting party shall provide written notice to the defaulting party requesting that the breach or noncompliance be immediately remedied. In the event that the breach or noncompliance continues to be evidenced ten days beyond the date specified in the written notice, the non-defaulting party may either:

10.4.1 Immediately terminate the Agreement without additional written notice; or,

10.4.2 Enforce the terms and conditions of the Agreement and seek any available legal or equitable remedies.

SECTION 11. CONTACT PERSON. At the time of execution of the Agreement, each party shall designate, in writing, a Contact Person to serve until the expiration of the Agreement or the designation of a substitute Contact Person. During the term of the Agreement, each Contact Person shall be available to meet, as otherwise mutually agreed, to plan the services being provided under the Agreement.

SECTION 12. CONTRACT ADMINISTRATION.

12.1 **Amendments**. The Agreement may be amended in writing from time to time by mutual consent of the parties. All amendments to the Agreement must be fully executed by the parties.

12.2 **Third Party Beneficiaries**. There are no third party beneficiaries to the Agreement. The Agreement is intended only to benefit IDR and the Department.

12.3 **Choice of Law and Forum**. The laws of the State of Iowa shall govern and determine all matters arising out of or in connection with this Agreement without regard to the conflict of law provisions of Iowa law. Any and all litigation commenced in connection with this Agreement shall be brought and maintained solely in Polk County District Court for the State of Iowa, Des Moines, Iowa, or in the United States District Court for the Southern District of Iowa, Central Division, Des Moines, Iowa, wherever jurisdiction is appropriate. This provision shall not be construed as waiving any immunity to suit or liability including without limitation sovereign immunity in State or Federal court, which may be available to IDR or the State of Iowa.

12.4 **Assignment and Delegation**. The Agreement may not be assigned, transferred, or conveyed in whole or in part without the prior written consent of the other party.

12.5 **Integration**. The Agreement represents the entire Agreement between the parties and neither party is relying on any representation that may have been made which is not included in the Agreement.

12.6 **Headings or Captions**. The paragraph headings or captions are for identification purposes only and do not limit nor construe the contents of the paragraphs.

12.7 **Not a Joint Venture**. Nothing in the Agreement shall be construed as creating or constituting the relationship of a partnership, joint venture, association of any kind or agent and principal relationship between the parties. Each party shall be deemed an independent contractor acting toward the expected mutual benefits. No party, unless otherwise specifically provided for herein, has the authority to enter into any contract or create an obligation or liability on behalf of, in the name of, or binding upon the other party to the Agreement.

12.8 **Supersedes Former Agreements**. The Agreement supersedes all prior Agreements between IDR and the Department for the services provided in connection with the Agreement.

12.9 **Waiver**. Except as specifically provided for in a waiver signed by duly authorized representatives of IDR and the Department, failure by any party at any time to require performance by the other party or to claim a breach of any provision of the Agreement shall not be construed as affecting any subsequent breach, the right to require performance with respect thereto, or to claim a breach with respect thereto.

12.10 **Notices**. Any and all notices, designations, consents, offers, acceptances, or any other communication provided for herein shall be given in writing by a reliable carrier which shall be addressed to the person listed below at the address specified. From time to time, the Parties may change the name and address of an individual designated to receive notice. Such change of the designated person shall be in writing to the other Party and as provided herein. Such change shall not require an amendment to this Agreement. Each such notice shall be deemed to have been provided:

12.10.1 At the time it is actually received; or,

12.10.2 Within one day in the case of overnight hand delivery, courier or services such as Federal Express with guaranteed next day delivery; or,

12.10.3 Within five (5) days after it is deposited in the U.S. Mail in the case of registered U.S. Mail.

Party: IDR

Name: Jessica Ekman

Title:	I-PLEDGE Tobacco Program Coordinator
Address:	1918 SE Hulsizer Road
City, State Zip Code	Ankeny, Iowa 50021
Phone Number:	(515) 281-7434
E-mail Address	jessica.ekman@iowa.gov

Party:	The Department
Name:	Chris Scott
Title:	Chief
Address:	250 George Mills Civic Parkway
City, State Zip Code	West Des Moines,Iowa 50265
Phone Number:	515-222-3320
E-mail Address	chris.scott@wdm.iowa.gov

12.11 **Cumulative Rights**. The various rights, powers, options, elections and remedies of any party provided in the Agreement, shall be construed as cumulative and not one of them is exclusive of the others or exclusive of any rights, remedies, or priorities allowed any party by law, and shall in no way affect or impair the right of any party to pursue any other equitable or legal remedy to which any party may be entitled as long as any default remains in any way un-remedied, unsatisfied, or un-discharged.

12.12 **Severability**. If any provision of the Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of the Agreement.

12.13 **Time is of the Essence**. Time is of the essence with respect to the performance of the terms of the Agreement.

12.14 **Authorization**. Each party to the Agreement represents and warrants to the other that:

12.14.1 It has the right, power, and authority to enter into and perform its obligations under the Agreement.

12.14.2 It has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery, and performance of the Agreement, and the Agreement constitutes a legal, valid, and binding obligation upon itself in accordance with its terms.

12.15 **Successors in Interest**. All the terms, provisions, and conditions of the Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, and legal representatives.

12.16 **Record Retention and Access**. The Department shall maintain accurate, current, and complete records of the financial activity of this Agreement which sufficiently and properly document and calculate all charges billed to IDR throughout the term of this Agreement and for a period of at least three years following the date of final payment or completion of any required audit (whichever is later). If any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the three-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. The Department shall permit IDR, the Auditor of the State, or any other authorized representative of the State and, where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, to access and examine, audit,

excerpt, and transcribe any directly pertinent books, documents, papers, electronically or optically stored and created records, or other records of the Department relating to invoices or payments or any other documentation or materials pertaining to this Agreement, wherever such records may be located. The Department shall not impose a charge for audit or examination of the Department's books and records. Based on the audit findings, IDR reserves the right to address the Contractor's board or other managing entity regarding performance and expenditures.

12.17 **Additional Provisions**. The parties agree that any Addendum, Rider, or Exhibit, attached hereto by the parties, shall be deemed incorporated herein by reference.

12.18 **Further Assurances and Corrective Instruments**. The parties agree that they shall, from time to time, execute, acknowledge, and deliver, or cause to be executed, acknowledged, and delivered, such supplements hereto and such further instruments as may reasonably be required for carrying out the expressed intention of the Agreement.

SECTION 13. EXECUTION.

IN WITNESS WHEREOF, in consideration of the mutual covenants set forth above and for other good and valuable consideration, the receipt, adequacy and legal sufficiency of which are hereby acknowledged, the parties have entered into the Agreement and have caused their duly authorized representatives to execute the Agreement.

Iowa Department of Revenue	
Signature	**Date**
Name:	
Title:	

West Des Moines Police Department	
Signature	**Date**
Name:	
Title:	