

File No. 190312

Committee Item No. 6

Board Item No. \_\_\_\_\_

## COMMITTEE/BOARD OF SUPERVISORS

### AGENDA PACKET CONTENTS LIST

Comm: Public Safety & Neighborhood Services

Date: June 7, 2019

Board of Supervisors Meeting:

Date: \_\_\_\_\_

#### Cmte Board

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|-------------------------------------|--------------------------|--|
| <input type="checkbox"/>            | <input type="checkbox"/> | Motion                                       |
| <input type="checkbox"/>            | <input type="checkbox"/> | Resolution                                   |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Ordinance                                    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Legislative Digest                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Budget and Legislative Analyst Report        |
| <input type="checkbox"/>            | <input type="checkbox"/> | Youth Commission Report                      |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Introduction Form                            |
| <input type="checkbox"/>            | <input type="checkbox"/> | Department/Agency Cover Letter and/or Report |
| <input type="checkbox"/>            | <input type="checkbox"/> | MOU  |
| <input type="checkbox"/>            | <input type="checkbox"/> | Grant Information Form                       |
| <input type="checkbox"/>            | <input type="checkbox"/> | Grant Budget                                 |
| <input type="checkbox"/>            | <input type="checkbox"/> | Subcontract Budget                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Contract/Agreement                           |
| <input type="checkbox"/>            | <input type="checkbox"/> | Form 126 – Ethics Commission                 |
| <input type="checkbox"/>            | <input type="checkbox"/> | Award Letter                                 |
| <input type="checkbox"/>            | <input type="checkbox"/> | Application                                  |
| <input type="checkbox"/>            | <input type="checkbox"/> | Public Correspondence                        |

#### OTHER

- |                                     |                          |  |
|-------------------------------------|--------------------------|--|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <u>Small Business Commission Response - April 29, 2019</u> |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <u>Youth Commission Response - April 16, 2019</u>          |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | <u>FYI Referrals - March 27, 2019</u>                      |
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Prepared by: John Carroll

Date: May 31, 2019

Prepared by: John Carroll

Date: \_\_\_\_\_

1 [Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products,  
2 Including Electronic Cigarettes]

3 **Ordinance amending the Health Code to prohibit the sale by tobacco retail**  
4 **establishments of electronic cigarettes that require, but have not received, an order**  
5 **from the Food and Drug Administration (FDA) approving their marketing; and**  
6 **prohibiting the sale and distribution to any person in San Francisco of flavored**  
7 **tobacco products and electronic cigarettes that require, but have not received, an FDA**  
8 **order approving their marketing.**

9 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
10 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
11 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
12 **Board amendment additions** are in double-underlined Arial font.  
13 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
14 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
15 subsections or parts of tables.

16 Be it ordained by the People of the City and County of San Francisco:

17 Section 1. Findings.

18 (a) Despite progress in reducing smoking, tobacco use is still the leading cause of  
19 preventable death in the United States. Tobacco kills more than 480,000 people in this  
20 country annually – more than AIDS, alcohol, car accidents, illegal drugs, murders, and  
21 suicides combined. And beyond this large, impersonal statistic, are countless human beings,  
22 whose lives are forever devastated by the irreparable loss of a loved one caused by tobacco  
23 use, and the inevitable rupture of family that follows such a loss. And that is to say nothing of  
24 the huge financial costs tobacco use places on our health care system, and the constraints on  
25 productivity it imposes on our economic system.

1 (b) Electronic cigarettes (or “e-cigarettes”) entered the marketplace around 2007, and  
2 since 2014, they have been the most commonly used tobacco product among youth in the  
3 United States. The dramatic surge in youth e-cigarette use (“vaping”) is no accident. E-  
4 cigarettes are frequently marketed in a variety of flavors with obvious appeal to youth, such as  
5 gummy bear, cotton candy, and fruit punch. As of 2017, researchers had identified more than  
6 15,500 unique e-cigarette flavors available online. In addition, e-cigarette companies have  
7 effectively used marketing strategies, including celebrity endorsements, slick magazine  
8 advertisements, social media campaigns, paid influencers, and music sponsorships, to reach  
9 youth and young adults. A 2016 study found that 78.2% of middle and high school students—  
10 20.5 million youth—had been exposed to e-cigarette advertisements from at least one source,  
11 an increase from 68.9% only two years before, in 2014.

12 (c) According to the Centers for Disease Control and Prevention (“CDC”), the number  
13 of middle and high school students who reported being current users of tobacco products  
14 increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This  
15 dramatic increase, which has erased past progress in reducing youth tobacco use, is directly  
16 attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million  
17 more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were  
18 using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28  
19 percent in 2018 among current high school e-cigarette users.

20 (d) The widespread use of e-cigarettes by youth has significant public health  
21 consequences. As stated by the Surgeon General, “Most e-cigarettes contain nicotine – the  
22 addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure  
23 during adolescence can harm the developing brain – which continues to develop until about  
24 age 25. Nicotine exposure during adolescence can impact learning, memory, and attention.  
25 Using nicotine in adolescence can also increase risk for future addiction to other drugs. In

1 addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially  
2 expose both themselves and bystanders to other harmful substances, including heavy metals,  
3 volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”

4 (e) And while there is some evidence that the use of e-cigarettes by adults may  
5 support smoking cessation under certain circumstances, a 2018 National Academy of  
6 Sciences, Engineering, and Medicine report concluded that there was moderate evidence that  
7 e-cigarette use in fact *increases* the frequency and intensity of cigarette smoking in the future.

8 (f) In addition, there is a growing body of research concluding that there are significant  
9 health risks associated with electronic cigarette use. For example, daily e-cigarette use is  
10 associated with increased odds of a heart attack. And the American Lung Association has  
11 warned that the inhalation of harmful chemicals through vaping may cause irreversible lung  
12 damage and lung disease.

13 (g) To reduce the burden of tobacco use, the City and County of San Francisco (the  
14 “City”) licenses tobacco retail establishments. (Health Code Article 19H). In 2017, to address  
15 the appeal of flavored tobacco products to youth, the City enacted Ordinance No. 140-17,  
16 prohibiting tobacco retail establishments from selling flavored tobacco products. As a result of  
17 the referendum process, the ordinance was placed before the voters, who approved the  
18 ordinance in June 2018 (Proposition E) by a majority of 68.39%.

19 (h) Notwithstanding these efforts, San Francisco’s youth still access and use tobacco  
20 products. According to the most recent Youth Risk Behavior Survey for which local data are  
21 available, in 2017, 16.7% of San Francisco’s high school students had tried smoking, 25%  
22 had used an electronic cigarette (or “vaped”), and 7.1% reported current e-cigarette use,  
23 which is defined as use on at least one day in the past 30 days.

24 (i) Among San Francisco high school students who reported currently using electronic  
25 cigarettes, 13.6% reported that they usually purchased their electronic cigarette products in a

1 store. The remaining 86.4% reported that they obtained them from places other than the  
2 City's licensed tobacco retail establishments, including friends, other social sources, and  
3 internet e-cigarette vendors.

4 (j) To protect the public, especially youth, against the health risks created by tobacco  
5 products, Congress enacted the Family Smoking Prevention and Tobacco Control Act  
6 ("Tobacco Control Act") in 2009. Among other things, the Tobacco Control Act authorized the  
7 U.S. Food and Drug Administration ("FDA") to set national standards governing the  
8 manufacture of tobacco products, to limit levels of harmful components in tobacco products  
9 and to require manufacturers to disclose information and research relating to the products'  
10 health effects.

11 (k) A central requirement of the Tobacco Control Act is premarket review of all new  
12 tobacco products. Specifically, every "new tobacco product"—defined to include any tobacco  
13 product not on the market in the United States as of February 15, 2007—must be authorized  
14 by the FDA for sale in the United States before it may enter the marketplace. A new tobacco  
15 product may not be marketed until the FDA has found that the product is: (1) appropriate for  
16 the protection of the public health upon review of a premarket tobacco application; (2)  
17 substantially equivalent to a grandfathered product; or (3) exempt from substantial  
18 equivalence requirements.

19 (l) In determining whether the marketing of a tobacco product is appropriate for the  
20 protection of the public health, the FDA must consider the risks and benefits of the product to  
21 the population as a whole, including users and nonusers of the product, and taking into  
22 account the increased or decreased likelihood that existing users of tobacco products will stop  
23 using tobacco products and the increased or decreased likelihood that those who do not use  
24 tobacco products will start using them. Where there is a lack of showing that permitting the  
25

1 sale of a tobacco product would be appropriate for the protection of the public health, the  
2 Tobacco Control Act requires that the FDA deny an application for premarket review.

3 (m) Virtually all electronic cigarettes that are sold today entered the market after 2007,  
4 but have not been reviewed by the FDA to determine if they are appropriate for the public  
5 health. In 2017, the FDA issued Guidance that purports to give electronic cigarette  
6 manufacturers until August 8, 2022 to submit their application for premarket review. The  
7 Guidance further purports to allow unapproved products to stay on the market indefinitely,  
8 until such time as the FDA complies with its statutory duty to conduct a premarket review to  
9 determine whether a new tobacco product poses a risk to public health. In March 2019, the  
10 FDA issued draft guidance in which it considered moving the premarket application deadline  
11 up by one year for certain flavored e-cigarette products. It is not known when, if ever, this  
12 narrow adjustment will become final or will take effect.

13 (n) By the time e-cigarette manufacturers will be required to submit their premarket  
14 review applications, e-cigarettes will have been on the market for fifteen years without any  
15 FDA analysis of their safety and alleged benefit. If current trends continue, six million more  
16 youth in the United States will begin using e-cigarettes between now and then. Until such  
17 time as the FDA fulfills its statutory duty to conduct premarket reviews of new tobacco  
18 products, a generation of young people will become addicted to tobacco, resulting in an  
19 entirely preventable increase in the burdens and tragedies associated with tobacco use. San  
20 Francisco is not content to wait until then before addressing, for its residents, what appears  
21 from the evidence to be a major public health crisis that is going unattended.

22  
23 Section 2. The Health Code is amended by adding new Article 19R, consisting of  
24 Sections 19R.1 through 19R.5, to read as follows:

1 ARTICLE 19R: PROHIBITING THE SALE OF ELECTRONIC CIGARETTES LACKING FOOD  
2 AND DRUG ADMINISTRATION PREMARKET APPROVAL

3 SEC. 19R.1. DEFINITIONS.

4 For purposes of this Article 19R, the following terms have the following meanings:

5 "Director" has the meaning set forth in Health Code Section 19H.2.

6 "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue  
7 and Taxation Code, as may be amended from time to time.

8 "Establishment" has the meaning set forth in Health Code Section 19H.2.

9 "New Tobacco Product" has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be  
10 amended from time to time.

11  
12 SEC. 19R.2. SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING  
13 FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL PROHIBITED.

14 The sale or distribution by an Establishment of an Electronic Cigarette is prohibited where the  
15 Electronic Cigarette:

16 (a) Is a New Tobacco Product;

17 (b) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time;

18 and

19 (c) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be  
20 amended from time to time.

21  
22 SEC. 19R.3. ADMINISTRATIVE REGULATIONS.

23 The Director may adopt rules, regulations, or guidelines for the implementation and  
24 enforcement of this Article 19R.

1           **SEC. 19R.4. ENFORCEMENT.**

2           *The Director may enforce Section 19R.2 under Articles 19 et seq. of the Health Code, including*  
3 *but not limited to Article 19H.*

4  
5           **SEC. 19R.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**

6           *Nothing in this Article 19R shall be interpreted or applied so as to create any requirement,*  
7 *power, or duty that is preempted by federal or state law.*

8  
9           Section 3. Article 19H of the Health Code is amended by adding new Section 19H.14-  
10 3, to read as follows:

11  
12           **SEC. 19H.14-3. CONDUCT VIOLATING HEALTH CODE ARTICLE 19R**  
13 **(PROHIBITING THE SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING**  
14 **FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL).**

15           *(a) Upon a decision by the Director that the Permittee or the Permittee's agent or employee*  
16 *has engaged in any conduct that violates Health Code Section 19R.2 (Sale or Distribution of Electronic*  
17 *Cigarettes Lacking Food and Drug Administration Premarket Order of Approval Prohibited), the*  
18 *Director may suspend a Tobacco Sales permit as set forth in Section 19H.19.*

19           *(b) The Director shall commence enforcement under this Section 19H.14-3 by serving either a*  
20 *notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22.*

21  
22           Section 4. The Health Code is hereby amended by adding new Article 19S, consisting  
23 of Sections 19S.1 through 19S.6, to read as follows:



1 ARTICLE 19S. PROHIBITING THE SALE AND DISTRIBUTION OF TOBACCO PRODUCTS

2 IN SAN FRANCISCO

3 SEC. 19S.1. DEFINITIONS.

4 For purposes of this Article 19S, the following terms have the following meanings:

5 “Characterizing Flavor” has the meaning set forth in Health Code Section 19Q.2.

6 “Cigarette” has the meaning set forth in Health Code Section 19Q.2.

7 “City” means the City and County of San Francisco.

8 “Constituent” has the meaning set forth in Health Code Section 19Q.2.

9 “Director” means the Director of Health, or the Director’s designee.

10 “Distinguishable” has the meaning set forth in Health Code Section 19Q.2.

11 “Distribute” or “Distribution” means the transfer, by any Person other than a common carrier,  
12 of a Tobacco Product at any point from the place of Manufacture or thereafter to the Person who sells  
13 the Tobacco Product to an individual for personal consumption.

14 “Electronic Cigarette” has the meaning set forth in Section 30121 of the California Revenue  
15 and Taxation Code, as may be amended from time to time.

16 “Flavored Tobacco Product” has the meaning set forth in Health Code Section 19Q.2.

17 “Labeling” has the meaning set forth in Health Code Section 19Q.2.

18 “New Tobacco Product” has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be  
19 amended from time to time.

20 “Packaging” has the meaning set forth in Health Code Section 19Q.2.

21 “Person” has the meaning set forth in Health Code Section 19H.2.

22 “Sell,” “Sale,” and “to Sell” mean any transaction where, for any consideration, ownership of  
23 a Tobacco Product is transferred from one Person to another, including but not limited to any transfer  
24 of title or possession for consideration, exchange, or barter, in any manner or by any means.

25 “Tobacco Product” has the meaning set forth in Health Code Section 19H.2.

1  
2           **SEC. 19S.2. PROHIBITION ON SALE OR DISTRIBUTION OF TOBACCO PRODUCTS.**

3           (a) No Person shall Sell or Distribute any Flavored Tobacco Product to a Person in San  
4 Francisco. There shall be a rebuttable presumption that a Tobacco Product, other than a Cigarette, is  
5 a Flavored Tobacco Product if a manufacturer or any of the manufacturer’s agents or employees, in  
6 the course of their agency or employment, has made a statement or claim directed to consumers or to  
7 the public that the Tobacco Product has or produces a Characterizing Flavor, including, but not  
8 limited to, text, color, and/or images on the product’s Labeling or Packaging that are used to explicitly  
9 or implicitly communicate that the Tobacco Product has a Characterizing Flavor.

10           (b) No Person shall Sell or Distribute an Electronic Cigarette to a Person in San Francisco  
11 where the Electronic Cigarette:

12                     (1) Is a New Tobacco Product;

13                     (2) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time  
14 to time; and

15                     (3) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may  
16 be amended from time to time.

17  
18           **SEC. 19S.3. ADMINISTRATIVE REGULATIONS.**

19           The Director may adopt rules, regulations, or guidelines for the implementation of this Article  
20 19S.

21  
22           **SEC. 19S.4. ENFORCEMENT.**

23           (a) Violations of this Article 19S or of any rule or regulation issued under this Article shall be  
24 punishable by administrative fines imposed pursuant to administrative citations. Administrative Code  
25 Chapter 100 “Procedures Governing the Imposition of Administrative Fines,” as amended from time to

1 time, shall govern the issuance and enforcement of administrative citations, and collection and review  
2 of administrative fines, to enforce this Article and any rule or regulation adopted pursuant to this  
3 Article.

4 (b) The City Attorney may at any time institute civil proceedings for injunctive and monetary  
5 relief including civil penalties, against any Person for violations of this Article 19S, without regard to  
6 whether the Director has assessed or collected administrative penalties.

7 (c) At any time, the Director may refer a case to the City Attorney's Office for civil  
8 enforcement, but a referral is not required for the City Attorney to bring a civil action under subsection  
9 (b).

10 (d) Any Person that violates any provision of this Article 19S shall be subject to injunctive  
11 relief and a civil penalty in an amount not to exceed \$1,000 for each violation, which penalty shall be  
12 assessed and recovered in a civil action brought in the name of the people of the City and County of  
13 San Francisco by the City Attorney in any court of competent jurisdiction. In assessing the amount of  
14 the civil penalty, the court shall consider any one or more of the relevant circumstances presented by  
15 any of the parties to the case, including but not limited to, the following: the nature and seriousness of  
16 the misconduct giving rise to the violation, the number of violations, the persistence of the misconduct,  
17 the length of time over which the misconduct occurred, the willfulness of the misconduct, and the  
18 defendant's assets, liabilities, and net worth.

19 (e) The City may recover reasonable attorneys' fees and costs for civil actions brought  
20 pursuant to this Section 19S.4.

21 (f) Remedies under this Section 19S.4 are non-exclusive and cumulative to all other remedies  
22 available at law or equity.

23  
24 **SEC. 19S.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**  
25

1           Nothing in this Article 19S shall be interpreted or applied so as to create any requirement,  
2 power, or duty that is preempted by federal or state law.

3  
4           **SEC. 19S.6. SEVERABILITY.**

5           If any section, subsection, sentence, clause, phrase, or word of this Article 19S, or any  
6 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a  
7 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining  
8 portions or applications of the Article. The Board of Supervisors hereby declares that it would have  
9 passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not  
10 declared invalid or unconstitutional without regard to whether any other portion of this Article or  
11 application thereof would be subsequently declared invalid or unconstitutional.

12  
13           Section 5. Effective and Operative Dates.

14           (a) This ordinance shall become effective 30 days after enactment. Enactment occurs  
15 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not  
16 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the  
17 Mayor's veto of the ordinance.

18           (b) This ordinance shall become operative six months after the effective date.

19  
20           Section 6. Severability. If any section, subsection, sentence, clause, phrase, or word of  
21 this ordinance, or any application thereof to any person or circumstance, is held to be invalid  
22 or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not  
23 affect the validity of the remaining portions or applications of the ordinance. The Board of  
24 Supervisors declares that it would have passed this ordinance and each and every section,  
25 subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional

1 without regard to whether any other portion of this ordinance or application thereof would be  
2 subsequently declared invalid or unconstitutional.

3  
4 Section 7. Undertaking for the General Welfare. In enacting and implementing this  
5 ordinance, the City is assuming an undertaking only to promote the general welfare. It is not  
6 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it  
7 is liable in money damages to any person who claims that such breach proximately caused  
8 injury.

9  
10 APPROVED AS TO FORM:  
11 DENNIS J. HERRERA, City Attorney

12 By:   
13 ANNE PEARSON  
Deputy City Attorney

14 n:\legana\as2019\1900441\01345951.docx

## LEGISLATIVE DIGEST

[Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes]

Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.

### Existing Law

Local law requires that all retail establishments in San Francisco that sell tobacco products, including electronic cigarettes, obtain a permit from the Department of Public Health to do so. (Health Code Article 19H). Local law also prohibits permitted tobacco retail establishments from selling flavored tobacco products, including electronic cigarettes, to any person. (Health Code Article 19Q).

At the federal level, the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”) authorizes the U.S. Food and Drug Administration (“FDA”) to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products and to require manufacturers to disclose information and research relating to the products’ health effects.

A central requirement of the Tobacco Control Act is premarket review of all new tobacco products. Specifically, every “new tobacco product”—defined to include any tobacco product not on the market in the United States as of February 15, 2007—must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket tobacco application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements.

In determining whether the marketing of a tobacco product is appropriate for the protection of the public health, federal law requires that the FDA consider the risks and benefits of the product to the population as a whole, including users and nonusers of the product, and taking into account the increased or decreased likelihood that existing users of tobacco products will stop using tobacco products and the increased or decreased likelihood that those who do not use tobacco products will start using them. Where there is a lack of showing that permitting the sale of a tobacco product would be appropriate for the protection of the public health, the Tobacco Control Act requires that the FDA deny an application for premarket review.

### Amendments to Current Law

The proposed ordinance would amend the Health Code to prohibit permitted tobacco retail establishments located in San Francisco from selling electronic cigarettes that require premarket review by the FDA, but have not undergone such review. It would also prohibit the sale to any person in San Francisco, including via mail or internet, of: 1) flavored tobacco products, including electronic cigarettes; and 2) electronic cigarettes that require FDA premarket review, but have not undergone such review.

### Background Information

Despite progress in reducing smoking, tobacco use is still the leading cause of preventable death in the United States. Tobacco kills more than 480,000 people in this country annually – more than AIDS, alcohol, car accidents, illegal drugs, murders, and suicides combined.

Electronic cigarettes (or “e-cigarettes”) entered the marketplace around 2007, and since 2014, they have been the most commonly used tobacco product among youth in the United States. According to the Centers for Disease Control and Prevention (“CDC”), the number of middle and high school students who reported being current users of tobacco products increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is directly attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28 percent in 2018 among current high school e-cigarette users.

The widespread use of e-cigarettes by youth has significant public health consequences. As stated by the Surgeon General, “Most e-cigarettes contain nicotine – the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain – which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”

And while there is some evidence that the use of e-cigarettes by adults may support smoking cessation under certain circumstances, a 2018 National Academy of Sciences, Engineering, and Medicine report concluded that there was moderate evidence that e-cigarette use in fact increases the frequency and intensity of cigarette smoking in the future.

In addition, there is a growing body of research concluding that there are significant health risks associated with electronic cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. And the American Lung Association has

warned that the inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease.

Notwithstanding the City's efforts to reduce youth tobacco use, San Francisco's youth still access and use tobacco products. According to the most recent Youth Risk Behavior Survey for which local data are available, in 2017, 16.7% of San Francisco's high school students had tried smoking, 25% had used an electronic cigarette (or "vaped"), and 7.1% reported current e-cigarette use, which is defined as use on at least one day in the past 30 days.

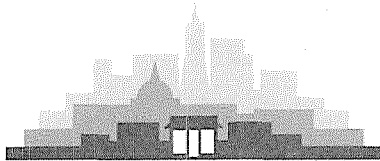
Among San Francisco high school students who reported currently using electronic cigarettes, 13.6% reported that they usually purchased their electronic cigarette products in a store. The remaining 86.4% reported that they obtained them from places other than the City's licensed tobacco retail establishments, including friends, other social sources, and internet e-cigarette vendors.

Virtually all electronic cigarettes that are sold today entered the market after 2007, but have not been reviewed by the FDA to determine if they are appropriate for the public health. In 2017, the FDA issued Guidance that purports to give electronic cigarette manufacturers until August 8, 2022 to submit their application for premarket review. The Guidance further purports to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health.

By the time e-cigarette manufacturers will be required to submit their premarket review applications, e-cigarettes will have been on the market for as much as fifteen years without any FDA analysis of their safety and alleged benefit. If current trends continue, six million more youth in the United States will begin using e-cigarettes between now and then.

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SAN FRANCISCO

## OFFICE OF SMALL BUSINESS

CITY AND COUNTY OF SAN FRANCISCO  
LONDON BREED, MAYOR

OFFICE OF SMALL BUSINESS  
REGINA DICK-ENDRIZZI, DIRECTOR

April 29, 2019

Ms. Angela Calvillo, Clerk of the Board  
City Hall Room 244  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

RE: BOS File No. 190312 – Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes

Small Business Commission Recommendations to the Board of Supervisors (BOS):

1. **Do not approve of the legislation as written. Motion passed (6-1); and,**
2. **In order to preserve the economic health of San Francisco small businesses, consider the following proposed amendments. Passed unanimously (7-0).**
  - a. Exempt existing compliant tobacco retailers from the ban on selling electronic cigarette products and prohibit new tobacco retailers from selling e-cigarette products until FDA pre-market review. However, if that is not considered, establish a reasonable period of enactment of the ban, not less than seven months, comparable to the flavored tobacco ban<sup>1</sup>;
  - b. Include declarative language that this legislation would be a temporary ban contingent upon a determination by the FDA regarding pre-market review;
  - c. Ensure that by mail or online e-cigarette retailers would be subject to the same fines or fees that brick and mortar retailers would be subject to;
  - d. Commission a formal study of black market activity and sales of e-cigarette products relating to this legislation and the flavored tobacco ban;
  - e. Determine a means for mitigating revenue losses incurred as a result of this legislation for brick and mortar retailers in San Francisco through compensation measures;
  - f. Include a requirement that an economic impact analysis be commissioned through the City Controller's office to determine what type of impact this ban would have on City losses (i.e. tax revenue and abatement fees) and brick and mortar business revenue loss in San Francisco.

Dear Ms. Calvillo,

On April 22, 2019 the Small Business Commission (SBC or the Commission) conducted a regularly scheduled and duly noticed public hearing to consider the proposed Ordinance, introduced by Supervisor Shamann Walton, which would amend the Health Code to restrict the sale, manufacture, and distribution of tobacco products, including electronic cigarettes. The SBC appreciated that Supervisor Walton took the time to address many questions and concerns regarding the legislation. At the hearing, the SBC consequently voted on two separate motions recommending that: 1) the Board of Supervisors not approve BOS File No. 190312 as written (6-1), and 2) the Board of Supervisors approve the legislation upon the consideration of six amendments (7-0).

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<sup>1</sup> The Commission recognizes that an operative date of six months from the effective date of the Ordinance is included in the legislation.

**Director's Note:**

There are approximately 738 San Francisco licensed tobacco retailers who may be economically impacted by this proposed Ordinance. As discussed during the meeting and cited below, these San Francisco licensed tobacco retailers also boast high rates of compliance with local tobacco control laws, which are some of the strictest in the country. Conservatively, a small business could stand to \$70,000-\$90,000 a year in revenue. Most severely, small businesses that only sell this product would have to close six months after enactment. The Commission highly recommends, thusly, that the BOS consider alternative measures (discussed by the Commission below) that would prevent youth access, especially where adult users will continue to be able to purchase e-cigarette products in neighboring localities. Additionally, where proposed BOS File No. 190311 will exempt JUUL, an e-cigarette product development company who currently leases City property and whose products are sold to 41 states with far less restrictive tobacco control laws, and will allow the continuance of their operations for the remainder of their lease (9.5 years), the same exemption should be afforded to existing San Francisco licensed retail establishments. Without extending an equivalent exemption, the small business community may infer that the City values JUUL's economic health, a company valued at \$38 billion, more highly than the economic health of San Francisco small businesses. [*End Director's note.*]

The Commission is supportive of the legislative intent of BOS File No. 190312 which is to ultimately reduce and prevent the consumption of tobacco products, particularly among youth. However, the Commission discussed myriad concerns relative to the means of achieving that policy goal. Specifically, that the policy goal of limiting youth access will likely not be met via a ban on the sale of electronic cigarette (e-cigarette) products by San Francisco licensed tobacco retailers, particularly where neighboring localities will continue to sell the product. **And, where the legislation will likely not have the intended effect of reducing youth access, it will have the untended and outsized harmful economic effect on San Francisco licensed tobacco retailers who are otherwise compliant with local tobacco control laws.**

The primary justification for this Ordinance is that e-cigarette products have not received a determination from the federal Food and Drug Administration (FDA) regarding whether or not they may be legally marketed. The Tobacco Control Act requires that manufacturers of new or modified tobacco products to submit a premarket application and obtain a market authorization order before they market their products (Tobacco Control Act Sec. 910 (b)). Responsive to *national* increases in youth e-cigarette use, the FDA issued draft guidelines on March 13, 2019 requiring that manufacturers of all flavored electronic cigarette products (other than tobacco-, mint-, and menthol-flavored) to submit premarket applications by Aug. 8, 2021. With regard to tobacco, mint, and menthol flavored e-cigarette products, the FDA noted that those flavors are preferred by adults and will have until August 8, 2022 to submit premarket applications<sup>2</sup>.

The Commission recognized that some e-cigarette companies did in fact market to youth populations, primarily flavored tobacco products. However, the Commission also identified that licensed tobacco retailers in San Francisco have been allowed by all governmental levels, since 2007, to sell this product and that they have been largely compliant with local, state, and Federal tobacco control laws<sup>3</sup>. **They**

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<sup>2</sup> Office of the Commissioner, Press Announcements - Statement from FDA Commissioner Scott Gottlieb, M.D., on advancing new policies aimed at preventing youth access to, and appeal of, flavored tobacco products, including e-cigarettes and cigars U S Food and Drug Administration Home Page (2019), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm633291.htm>.

<sup>3</sup> The FDA has conducted 222 Compliance Check Inspections in San Francisco since 2012. There have been eight total charges: two involved an e-cigarette product – one charge involved a formula retailers and one charge involved a San Francisco small business owner, both failed to verify the respective purchaser's age. And, the San Francisco Department of Public Health reported that in 2018, there were 21 instances by 20 businesses where it was found that a licensed tobacco retailer did not verify a purchaser's age, or just 3% of businesses were found not to be in compliance.

**additionally acknowledged that flavored tobacco products have already been banned by the City and County of San Francisco and the City does not yet know what, if any, impact this has had on youth use of those products.** The Commission asked the Supervisor to confirm that this proposed ban would be lifted if or when an e-cigarette product received market authorization from the FDA. The Supervisor confirmed that it would be a temporary ban.

The findings of BOS File No. 190312 referenced *local* data reported by the federal Centers for Disease Control's Youth Risk Behavior Survey (YRBS)<sup>4</sup>. It was reported that among San Francisco high school students who reported to currently use e-cigarettes [ $\sim 7\%$ ], 13.1% of them or usually got them from a store. The Commission then inquired, if approximately 1% of San Francisco high schoolers are accessing these products in stores, what additional or alternative efforts would the Supervisor consider to curb youth access. The Commission also asked if the Supervisor knew or had retrieved data on, specifically where San Francisco youth were accessing e-cigarette products. The Supervisor shared that there are many studies out there regarding youth access and his belief that if these products are not on store shelves, that youth will be less likely to access them. He also shared that it is just as important that adults will not be able to access them because they have not completed their premarket review as required by the FDA.

The Commission noted that the YRBS data source referenced in the legislative findings indicates that San Francisco youth use of e-cigarettes decreased significantly between 2015 and 2017<sup>5</sup>. They then asked the Supervisor that, given this, what specifically, in the current local tobacco control framework is not working. The Supervisor replied that youth and adults are continuing to use a product that has not yet received a premarket review determination by the FDA and, that if the product is less accessible they will be less likely to be used.

The Commission also shared their concerns that if a ban on e-cigarette products is authorized, that activity on the already vibrant black market would increase. They also shared that sales in neighboring localities would also likely increase and therefore also result in City losses via tax revenue and abatement fees. The Commission also postulated that where it appears that youth are accessing e-cigarette products on the black market<sup>6</sup>, more data should be collected to better understand how to prevent it. The Commission then asked whether youth access would be more controllable without an outright ban. The Supervisor did not specifically address the issue of control, however, he did share that local law enforcement would continue to enforce the local laws.

The Commission identified that e-cigarette products yield a higher revenue as compared to other products due to their high cost, and, that many stores will be left with large inventories that they will not be able to sell. And, where all levels of government have allowed the sale of these products, San Francisco small businesses rightfully relied on that revenue. They also shared that many small business owners may find themselves in positions where they will not be able to pay their commercial rent because they may not generate their projected revenue.

The Commission asked, where there is not a strong indication that youth are accessing them in stores, and where San Francisco licensed tobacco retailers boast high tobacco control law compliance rates, if the Supervisor would consider a more gradual implementation of the ban, or alternative strategies to the ban. The Supervisor indicated that he would not be amendable to any changes to the legislation as it is written,

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<sup>4</sup> San Francisco, CA 1997-2017 Tobacco Use Results, Centers for Disease Control High School YRBS, <https://nccd.cdc.gov/youthonline/App/Results.aspx?LID=CA> (last visited Apr 26, 2019).

<sup>5</sup> Between 2015 and 2017 youth reporting to have ever used e-cigarettes declined by 22%. Between 2015 and 2017, youth reporting to be currently using e-cigarettes declined by 47%

<sup>6</sup> 2017 San Francisco YRBS data indicates that the majority of youth currently using e-cigarette products (86.4% of 7.1%) acquire them from sources other than a store.

but would be open to additional legislation that would assist small businesses. The Commission reiterated that many San Francisco small businesses will likely, upon enactment, immediately find themselves in positions where they will not be able to make their mortgage or pay their commercial rents, and may have to move out of the City. When asked what additional legislation or adjustment tools might look like, the Supervisor welcomed suggestions from the small business community and reiterated his commitment toward providing assistance through a subsequent piece of legislation. He also indicated that stores could start preparing for the ban now.

Additionally, the Commission expressed concern that there are many products on the market that are not specifically deemed safe by the FDA but nonetheless, can have adverse health effects on consumers. For example: sugar, alcohol, and cannabis. The Commission questioned, what impacts could this legislation have on other products not specifically deemed safe for consumption. The Supervisor would not comment on any product other than e-cigarettes.

Data has also shown that e-cigarette products have helped many adults quit smoking cigarettes. Where evidence indicates that San Francisco licensed tobacco retailers are not selling to youth, and with numerous local tobacco control laws, **the Commission expressed concern that this ban would have the unintended consequence of driving adult e-cigarette users back to using cigarettes, which notably, are not banned.** The Supervisor shared that [national] data shows that tobacco use was down until e-cigarettes.

The Commission concurred that they held a number of concerns relative to the potential effectiveness of this proposed ban on e-cigarettes. The vast majority noted that, given that the majority of youth users are reporting to access these products through social sources and the black market, it is unlikely that this ban would have the intended effect on reducing youth use. More, in allowing this ban to move forward and given the close proximity of other localities that will continue to sell e-cigarette products, this legislation will have unintended yet harmful economic consequence for San Francisco small business owners who are otherwise compliant with the law. This will be especially true without also including an economic transition strategy for these businesses. The Commission concluded that historically, bans such as the one proposed, can have and have had severe and unintended societal consequences.

Thank you for considering the Commission's recommendations. Please feel free to contact me should you have any questions.

Sincerely,



Regina Dick-Endrizzi  
Director, Office of Small Business

cc: Shamann Walton, Member, Board of Supervisors,  
Sophia Kittler, Mayor's Liaison to the Board of Supervisors  
Lisa Pagan, Office of Economic and Workforce Development  
John Carroll, Clerk, Public Safety and Neighborhood Services Committee

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
Fax No. 554-5163  
TDD/TTY No. 554-5227

# MEMORANDUM

TO: Kiely Hosmon, Director, Youth Commission  
FROM: John Carroll, Assistant Clerk,  
Public Safety and Neighborhood Services Committee  
DATE: March 27, 2019  
SUBJECT: LEGISLATIVE MATTER INTRODUCED

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following ordinance, introduced by Supervisor Walton on March 19, 2019. This item is being referred for comment and recommendation.

**File No. 190312**

**Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.**

Please return this cover sheet with the Commission's response to John Carroll, Assistant Clerk, Public Safety and Neighborhood Services Committee.

\*\*\*\*\*

RESPONSE FROM YOUTH COMMISSION Date: April 16, 2019

No Comment  
 Recommendation Attached

  
\_\_\_\_\_  
Chairperson, Youth Commission

Youth Commission  
City Hall ~ Room 345  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4532



(415) 554-6446  
(415) 554-6140 FAX  
www.sfgov.org/youth\_commission

## YOUTH COMMISSION MEMORANDUM

**TO:** John Carroll, Clerk, Public Safety and Neighborhood Services Committee  
**FROM:** Youth Commission  
**DATE:** Tuesday, April 16, 2019  
**RE:** Referral response to BOS File No. 190312 – [Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes]

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At our **Monday, April 15, 2019, meeting**, the Youth Commission voted unanimously to support the following motion:

**To support BOS File No. 190312 – [Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes]**

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Youth Commissioners thank the Board of Supervisors for their attention to this issue. If you have any questions, please contact our office at (415) 554-6446, or your Youth Commissioner.

A handwritten signature in black ink, appearing to read "Bahlam Vigil".

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Bahlam Vigil, Chair  
Adopted on April 15, 2019  
2018-2019 San Francisco Youth Commission

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
Fax No. 554-5163  
TDD/TTY No. 554-5227

## MEMORANDUM

TO: Dr. Grant Colfax, Director, Department of Public Health  
Mark Morewitz, Commission Secretary, Health Commission

FROM: John Carroll, Assistant Clerk,  
Public Safety and Neighborhood Services Committee,  
Board of Supervisors

DATE: March 27, 2019

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following proposed legislation, introduced by Supervisor Walton on March 19, 2019:

**File No. 190312**

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If you have any comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

c: Greg Wagner, Department of Public Health  
Dr. Naveena Bobba, Department of Public Health  
Sneha Patil, Department of Public Health

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
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TDD/TTY No. 554-5227

## MEMORANDUM

TO: Regina Dick-Endrizzi, Director  
**Small Business Commission, City Hall, Room 448**

FROM: John Carroll, Assistant Clerk, Public Safety and Neighborhood Services  
Committee, Board of Supervisors

DATE: March 27, 2019

SUBJECT: REFERRAL FROM BOARD OF SUPERVISORS  
Public Safety and Neighborhood Services Committee

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following legislation, which is being referred to the Small Business Commission for comment and recommendation. The Commission may provide any response it deems appropriate within 12 days from the date of this referral.

**File No. 190312**

**Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.**

Please return this cover sheet with the Commission's response to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, California 94102.

\*\*\*\*\*  
**RESPONSE FROM SMALL BUSINESS COMMISSION - Date: \_\_\_\_\_**

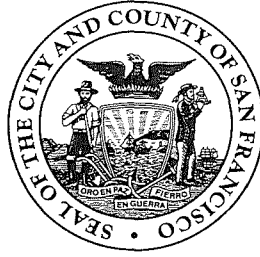
**No Comment**

**Recommendation Attached**

\_\_\_\_\_  
**Chairperson, Small Business Commission**



BOARD of SUPERVISORS



City Hall  
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San Francisco 94102-4689  
Tel. No. 554-5184  
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FROM: John Carroll, Assistant Clerk,  
Public Safety and Neighborhood Services Committee  
DATE: March 27, 2019  
SUBJECT: LEGISLATIVE MATTER INTRODUCED

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**File No. 190312**

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Please return this cover sheet with the Commission's response to John Carroll, Assistant Clerk, Public Safety and Neighborhood Services Committee.

\*\*\*\*\*

RESPONSE FROM YOUTH COMMISSION      Date: \_\_\_\_\_

No Comment  
 Recommendation Attached

\_\_\_\_\_  
Chairperson, Youth Commission

# Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp  
or meeting date  
RECEIVED  
SUPERVISORS  
SAN FRANCISCO

2019 MAR 19 PM 4:24  
BY

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor [ ] inquiries"
- 5. City Attorney Request.
- 6. Call File No. [ ] from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No. [ ]
- 9. Reactivate File No. [ ]
- 10. Topic submitted for Mayoral Appearance before the BOS on [ ]

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

**Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.**

Sponsor(s):

Walton

Subject:

Health Code-Restricting the Sale, Manufacture, and Distribution of Tobacco Products, Including Electronic Cigarettes

The text is listed:

Ordinance amending the Health Code to prohibit the sale by tobacco retain establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.

Signature of Sponsoring Supervisor: [Signature]