



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 ban¹;
 - 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).

¹ 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 applications².

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 laws³. **They**

² 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>.

³ 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)⁴. 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 2017⁵. 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 market⁶, 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,

⁴ 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).

⁵ 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%

⁶ 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