

BOARD of SUPERVISORS



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MEMORANDUM

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

FROM: Erica Major, Assistant Clerk, Public Safety and Neighborhood Services
Committee, Board of Supervisors

DATE: April 24, 2017

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. 170441

Ordinance amending the Health Code to prohibit tobacco retailers from selling flavored tobacco products, including menthol cigarettes.

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, CA 94102.

RESPONSE FROM SMALL BUSINESS COMMISSION - Date: _____

_____ **No Comment**

_____ **Recommendation Attached**

Chairperson, Small Business Commission

c: Menaka Mahajan, Small Business Commission

1 [Health Code - Banning the Sale of Flavored Tobacco Products]

2
3 **Ordinance amending the Health Code to prohibit tobacco retailers from selling flavored**
4 **tobacco products, including menthol cigarettes.**

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

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

13 Section 1. The Health Code is hereby amended by adding Article 19Q, entitled
14 “Prohibiting the Sale of Flavored Tobacco Products,” consisting of Sections 19Q.1 through
15 19Q.8, to read as follows:

16 **ARTICLE 19Q: PROHIBITING THE SALE OF FLAVORED TOBACCO PRODUCTS**

17
18 **SEC. 19Q.1. FINDINGS.**

19 *(a) Tobacco use remains the leading cause of preventable death in the United States, killing*
20 *more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart*
21 *disease and respiratory diseases, among other health disorders. Tobacco use remains a public health*
22 *crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it*
23 *imposes on society, and the burdens it places on our health care system. The financial cost of tobacco*
24 *use in San Francisco alone amounts to \$380 million per year in direct health care expenses and lost*
25 *productivity.*

1 (b) Flavored tobacco products are commonly sold by California tobacco retailers. For
2 example: 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little
3 cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored
4 varieties; and 83.8% of stores that sell chew or snus sell flavored varieties. 70% of tobacco retailers
5 within 1,000 feet of San Francisco schools sell flavored tobacco products other than menthol
6 cigarettes, and nearly all sell menthol cigarettes.

7 (c) Each day, about 2,500 children in the United States try their first cigarette; and another
8 400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever
9 used a tobacco product report that the first tobacco product they used was flavored. Flavored tobacco
10 products promote youth initiation of tobacco use and help young occasional smokers to become daily
11 smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby
12 increasing the appeal of tobacco products. As tobacco companies well know, menthol, in particular,
13 cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making
14 menthol cigarettes an appealing option for youth who are initiating tobacco use. Tobacco companies
15 have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a
16 “graduation strategy” to encourage new users to start with tobacco products with lower levels of
17 nicotine and progress to products with higher levels of nicotine. It is therefore unsurprising that young
18 people are much more likely to use menthol-, candy- and fruit-flavored tobacco products, including not
19 just cigarettes but also cigars, cigarillos, and hookah tobacco, than adults. Data from the National
20 Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers
21 report using flavored little cigars or flavored cigarettes. Further, the Centers for Disease Control and
22 Prevention has reported a more than 800% increase in electronic cigarette use among middle school
23 and high school students between 2011 and 2015. Nicotine solutions, which are consumed via
24 electronic smoking devices such as electronic cigarettes, are sold in thousands of flavors that appeal to
25 youth, such as cotton candy and bubble gum.

1 (d) Much as young people disproportionately use flavored tobacco products including menthol
2 cigarettes, the same can be said of certain minority groups. In one survey, the percentage of people
3 who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most
4 dramatically, 82.6% of Blacks or African-Americans who smoke cigarettes. The statistics for other
5 groups were: 53.2% of Native Hawaiians or Other Pacific Islanders who smoke cigarettes; 36.9% of
6 individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who
7 smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives
8 who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes. People who identify
9 as LGBT and young adults with mental health conditions also struggle with disproportionately high
10 rates of menthol cigarette use. The disproportionate use of menthol cigarettes among targeted groups,
11 especially the extremely high use among African-Americans, is troubling because of the long-term
12 adverse health impacts on those groups.

13 (e) Between 2004 and 2014, overall smoking prevalence decreased, but use of menthol
14 cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These
15 statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of
16 successfully quitting smoking. Scientific modeling has projected that a national ban on menthol
17 cigarettes could save between 300,000 and 600,000 lives by 2050.

18
19 **SEC. 190.2. DEFINITIONS.**

20 For purposes of this Article 190, the following definitions shall apply:

21 “Characterizing Flavor” means a Distinguishable taste aroma or both, other than the taste or
22 aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product.
23 Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate,
24 vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A
25 Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of

1 additives or flavorings or the provision of ingredient information. Rather, it is the presence of a
2 Distinguishable taste or aroma or both, as described in the first sentence of this definition, that
3 constitutes a Characterizing Flavor.

4 “Cigarette” has the meaning set forth in 21 U.S.C. § 387(3), as may be amended from time to
5 time.

6 “Constituent” means any ingredient, substance, chemical, or compound, other than tobacco,
7 water, or reconstituted tobacco sheet that is added by the manufacturer to a Tobacco Product during
8 the processing, manufacture, or packing of the Tobacco Product.

9 “Director” has the meaning set forth in Health Code Section 19H.2.

10 “Distinguishable” means perceivable by either the sense of smell or taste.

11 “Establishment” has the meaning set forth in Health Code Section 19H.2.

12 “Flavored Cigarette” means a Cigarette that contains a Constituent that imparts a
13 Characterizing Flavor.

14 “Flavored Tobacco Product” means any Tobacco Product, other than a Cigarette, that
15 contains a Constituent that imparts a Characterizing Flavor.

16 “Labeling” means written, printed, pictorial, or graphic matter upon any Tobacco Product or
17 any of its Packaging.

18 “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any
19 wrapping (including cellophane) in which a Tobacco Product is sold or offered for sale to a consumer.

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

21
22 **SEC 190.3. SALE OR DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS**
23 **PROHIBITED.**

24 (a) The sale or distribution by an Establishment of any Flavored Tobacco Product is
25 prohibited.

1 **(b) A Tobacco Product, other than a Cigarette, is presumed to be a Flavored Tobacco**
2 **Product if a Manufacturer or any of the Manufacturer's agents or employees, in the course of their**
3 **agency or employment, has:**

4 **(1) made a statement or claim directed to consumers or to the public that the**
5 **Tobacco Product has or produces a Characterizing Flavor, including, but not limited to, text and/or**
6 **images on the product's Labeling or Packaging that are used to explicitly or implicitly communicate**
7 **that the Tobacco Product has a Characterizing Flavor; or**

8 **(2) taken actions directed to consumers that would be reasonably expected to result**
9 **in consumers receiving the message that the Tobacco Product imparts a Characterizing Flavor.**

10
11 **SEC 190.4. SALE OR DISTRIBUTION OF FLAVORED CIGARETTES PROHIBITED.**

12 **(a) The sale or distribution by an Establishment of any Flavored Cigarette is prohibited.**

13 **(b) A Cigarette is presumed to be a Flavored Cigarette if a Manufacturer or any of the**
14 **Manufacturer's agents or employees, in the course of their agency or employment, has:**

15 **(1) made a statement or claim directed to consumers or to the public that the**
16 **Cigarette has or produces a Characterizing Flavor, including, but not limited to, text and/or images on**
17 **the product's Labeling or Packaging that are used to explicitly or implicitly communicate that the**
18 **Cigarette has a Characterizing Flavor; or**

19 **(2) taken actions directed to consumers that would be reasonably expected to result**
20 **in consumers receiving the message that the Cigarette imparts a Characterizing Flavor.**

21
22 **SEC. 190.5. ADMINISTRATIVE REGULATIONS.**

23 **The Director may adopt rules, regulations, or guidelines for the implementation and**
24 **enforcement of this Article 190.**

1 **SEC. 190.6. ENFORCEMENT.**

2 The Director, or his or her designee, may enforce Sections 190.3 and 190.4 pursuant to
3 Articles 19 et seq. of the Health Code, including but not limited to Article 19H.

4
5 **SEC 190.7. NO CONFLICT WITH FEDERAL OR STATE LAW.**

6 Nothing in this Article 19.O 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 **SEC. 190.8. SEVERABILITY.**

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

17
18 Section 2. The Health Code is hereby amended by adding Section 19H.14-2, to read
19 as follows:

20
21 **SEC. 19H.14-2. CONDUCT VIOLATING HEALTH CODE ARTICLE 19O (PROHIBITING**
22 **THE SALE OF FLAVORED TOBACCO PRODUCTS).**

23 (a) Upon a decision by the Director that the Permittee or the Permittee's agent or employee
24 has engaged in any conduct that violates Health Code Section 190.3 (Sale or Distribution of Flavored
25

1 Tobacco Products Prohibited), the Director may suspend a Tobacco Sales permit as set forth in Section
2 19H.19.

3 (b) Upon a decision by the Director that the Permittee or the Permittee's agent or employee
4 has engaged in any conduct that violates Health Code Section 19O.4 (Sale or Distribution of Flavored
5 Cigarettes Prohibited), the Director may suspend a Tobacco Sales permit as set forth in Section
6 19H.19.

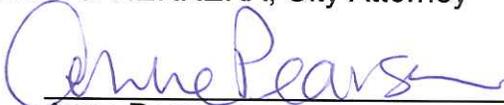
7 (c) The Director shall commence enforcement under this Section 19H.14-2 by serving either
8 a notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22
9 of this Article 19H.

10
11 Section 3. Effective and Operative Dates.

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

16 (b) This ordinance shall become operative on January 1, 2018.

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18
19 APPROVED AS TO FORM:
20 DENNIS J. HERRERA, City Attorney

21 By: 
22 Anne Pearson
23 Deputy City Attorney

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LEGISLATIVE DIGEST

[Health Code - Banning the Sale of Flavored Tobacco Products]

Ordinance amending the Health Code to prohibit tobacco retailers from selling flavored tobacco products, including menthol cigarettes

Existing Law

Federal law bans the manufacture of cigarettes with characterizing flavors, other than the flavor of menthol and tobacco. Federal law does not ban the manufacture of menthol cigarettes or flavored tobacco products other than cigarettes.

Amendments to Current Law

The proposed ordinance amends the Health Code to prohibit local tobacco retailers from selling flavored tobacco products. The tobacco products that would be subject to the prohibition on sale would include, but not be limited to, flavored cigarettes, including menthol cigarettes, flavored cigars, flavored smokeless tobacco, flavored shisha, and flavored nicotine solutions that are used in electronic cigarettes.

The ordinance defines a flavored tobacco product as a tobacco product that contains a constituent that imparts a characterizing flavor. The ordinance would create a presumption that a tobacco product is flavored if the tobacco manufacturer makes a statement or claim that the product has a characterizing flavor. For example, if the packaging in which a tobacco product is sold is printed with the word “grape” or with an image of grapes, the tobacco product would be presumed to be flavored, and subject to the restriction on sale.

Violation of the ordinance would be punishable by a suspension of the retailer’s tobacco license.

Background Information

Tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders. The financial cost of tobacco use in San Francisco alone amounts to \$380 million per year in direct health care expenses and lost productivity.

Although federal law prohibits the manufacture of flavored cigarettes, it does not ban menthol cigarettes or other types of flavored tobacco products, which are widely available in flavors like bubble gum, cotton candy, banana, cherry and vanilla. Each day, about 2,500 children in

the United States try their first cigarette, and another 400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored.

Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. Menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use. Young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products, including not just cigarettes but also cigars, cigarillos, and hookah tobacco, than adults.

Much as young people disproportionately use flavored tobacco products including menthol cigarettes, the same can be said of certain minority groups. In one survey, the percentage of people who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most dramatically, 82.6% of Blacks or African-Americans who smoke cigarettes. The statistics for other groups were: 53.2% of Native Hawaiians or Other Pacific Islanders who smoke cigarettes; 36.9% of individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes. People who identify as LGBT and young adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use. The disproportionate use of menthol cigarettes among targeted groups, especially the extremely high use among African-Americans, is troubling because of the long-term adverse health impacts on those groups.

Between 2004 and 2014, overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking. Scientific modeling has projected that a national ban on menthol cigarettes could save between 300,000 and 600,000 lives by 2050.