



## Legislation Text

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Report regarding a Study Session on the potential regulation of flavored tobacco, including e-cigarettes in South San Francisco. (*Christina Fernandez, City Manager's Office*)

### **RECOMMENDATION**

**Recommend City Council provide guidance and direction on the potential regulation of flavored tobacco, including e-cigarettes in South San Francisco.**

### **BACKGROUND/DISCUSSION**

According to the California Department of Public Health, 80% of young people who used tobacco started with a flavored tobacco product. A majority of youth report flavoring as a leading reason for using tobacco products. This includes 82% of e-cigarette users, 79% of hookah users, 74% of cigar users, and 69% of smokeless users. Flavors such as watermelon, cherry, chocolate, mint, and gummy bear appeal to kids and teens. Flavorings mask the taste of tobacco making it more palatable for youth to begin tobacco use. Flavored tobacco products also use the same flavoring chemicals as Jolly Rancher, Kool-Aid, and Life Savers. Certain minority groups also disproportionately use flavored tobacco products, including menthol cigarettes. In one survey, 82.6% of African American cigarette smokers reported smoking menthol cigarettes in the month prior.

### **Federal Guidance and Regulations**

The U.S. Surgeon General warns that flavored tobacco products help new users establish habits that lead to long-term addiction. Flavors like menthol in tobacco products make it more difficult for users to quit. All nicotine products are addictive and increase the risk of developing serious health problems including cancer, heart disease, and emphysema.

In 2009, the Federal Government passed the Family Smoking Prevention and Tobacco Control Act that banned the manufacture of flavored cigarettes. Menthol cigarettes were exempted from this ban. The ban also does not restrict non-cigarette tobacco products such as smokeless tobacco.

More recently, the Food and Drug Administration announced a new plan to protect youth by preventing access to flavored tobacco and banning menthol in cigarettes. The proposed plan would ban menthol cigarettes finding that menthol cigarettes are easier to smoke and harder to quit. It is also the choice combustible cigarette for youth and underserved communities.

### **Flavored E-Cigarettes**

Most commonly used among youth, e-cigarettes deliver flavorings, nicotine and other additives via an inhaled aerosol. E-cigarettes entered the marketplace in 2007, and since 2014 have been the most commonly used tobacco product among youth. E-cigarette use among U.S. middle and high school students have increased

900% between 2011-2015. During the past year, e-cigarette use has increased 78% among high school students. In 2018, more than 3.6 million U.S. youth, including 1 in 5 high school students and 1 in 20 middle school students currently use e-cigarettes. The chemical Diacetyl is found in 75% of flavored e-liquids and is linked to “popcorn lung” which causes irreversible lung damage.

### ***South San Francisco Tobacco-Related Ordinances***

In 2008, the City enacted South San Francisco Municipal Code (SSFMC) Section 6.46.010 “Authorization of enforcement by San Mateo County personnel” which adopts by reference San Mateo County Ordinance Code Chapter 4.98 “Tobacco Retailer Permit.”

San Mateo County Ordinance Chapter 4.98 requires all retailers to obtain and maintain a valid tobacco retailer’s permit from San Mateo County for each location where tobacco products are sold. Further, Chapter 4.98 authorizes the County’s Environmental Health Division to hold hearings, suspend permits, and issue administrative fines in enforcing the governing of tobacco retailer permits. The adoption of SSFMC Section 6.46.010 is significant as it serves as the mechanism for enforcement should the City Council decide to adopt a Flavored Tobacco Ban.

In 2012, the City enacted SSFMC Chapter 20.420 “Prohibition on new significant tobacco retailers,” which regulates a business whose principal or core is selling tobacco products and/or paraphernalia. Significant tobacco retailers are defined as any tobacco retailer with 20 percent or more of floor area and display area devoted to the sale or exchange of tobacco products, tobacco paraphernalia, or both; or 50 percent or more of completed sales transactions include tobacco products or paraphernalia.

### ***Locally Led Efforts***

#### **County of San Mateo**

In June 2018, the County prohibited the sale of any flavored tobacco product, including flavored e-cigarettes. (See San Mateo County Ordinance Code Chapter 4.99 “Sales of flavored tobacco products and pharmacy sales of tobacco products.”) In addition, the County prohibits the sale of any tobacco products by a pharmacy. The County prohibited menthol as a characterizing flavor and included electronic devices (i.e. e-cigarettes) in their definition of “tobacco,” but duty-free retail stores at the San Francisco International Airport (SFO) are exempt. The County authorizes its Health System Chief for enforcement pursuant to the administrative procedures set forth in the Chapter 4.98 of the County’s Code.

In the fall of 2018, the Town of Portola Valley and City of Half Moon Bay have adopted flavored tobacco ordinances, which also prohibit flavored e-cigarettes. Like tobacco retailers operating in unincorporated areas, tobacco retailers in Portola Valley and Half Moon Bay will be prohibited from selling any flavored tobacco products in their retail stores. On March 25, 2019, the City of San Carlos also introduced an ordinance to prohibit the sale of flavored tobacco products and sale of tobacco products in pharmacies.

#### **County of Santa Clara**

In 2015, Santa Clara County became the first municipality in the west to ban the sale of flavored tobacco

products. However, businesses that sell tobacco to adults only are exempted from the county's ban. Such adult-only tobacco businesses are defined as those generating more than 60% of their gross revenue from tobacco and tobacco paraphernalia and do not allow minors enter the premises without a parent. In 2010, the County of Santa Clara adopted its Tobacco Retailer Permit Ordinance that requires all retail outlets selling tobacco in unincorporated areas to obtain an annual county permit to sell tobacco. The 2010 law banned artificial or natural flavoring aside from menthol, but the county delayed its implementation until it could develop an enforcement plan with the U.S. Food and Drug Administration. The County of Santa Clara provided retailers with a 90-day implementation plan to sell their remaining flavored tobacco products. The county's Department of Environmental Health conducts annual inspections to ensure that flavored products are no longer being sold except in adult-only tobacco businesses.

### City and County of San Francisco

In June 2017, the City and County of San Francisco passed a citywide ban on the sale of flavored tobacco products such as menthol cigarettes, fruit flavored vape liquids, and any other tobacco products with flavoring. Local merchants gathered signatures for a referendum petition and launched a repeal campaign. The campaign was supported by \$700,000 from tobacco company R.J. Reynolds. The petition required the Board of Supervisors to reconsider the ordinance in September 2017. The Board of Supervisors unanimously supported upholding the ban. Per San Francisco law, the referendum was automatically placed on the June 2018 ballot as Proposition E. Proposition E prohibited local tobacco retailers from selling flavored tobacco products and was passed by San Francisco voters by 68.39%.

On March 19, 2019, the City and County of San Francisco in conjunction with the cities of Chicago and New York sent a joint letter demanding that the U.S. Food and Drug Administration (FDA) evaluate the effect of e-cigarettes on public health in a FDA review. Simultaneously, San Francisco County Supervisor Shamann Walton introduced legislation banning the sale of e-cigarettes in San Francisco unless the FDA provides San Francisco with an FDA review. Supervisor Walton also introduced legislation that prohibits making, selling, or distributing tobacco on city property, namely aimed at the e-cigarette company Juul Labs located at Pier 70.

## ***Challenges***

### Enforcement

Cities and counties nationwide are exploring legislation to curb youth access to e-cigarettes and flavored tobacco. However, challenges around enforcement remain. The County of San Mateo enforces its ordinance by relying on the Health System Chief to enforce Chapter 4.99 by suspending a tobacco retailer's permit and/or imposing administrative fines following enumerated procedures and amounts. Administrative fines range from \$100 for the first violation and range up to \$500 for a third and subsequent violations. Each day that tobacco products are offered for sale without a permit constitutes a separate violation.

Staff requests guidance on the appropriate penalties and whether enforcement should be complaint based.

## ***Policy Alternatives***

### **A. Maintain and Enforce Existing Municipal Code**

SSFMC Chapter 20.420 prohibits the establishment of new significant tobacco retailers in all zones throughout the City. No permit or any other license will be approved or issued for the establishment of new significant tobacco retailers.

Because the City adopted by reference the San Mateo County Ordinance prohibiting the sale of any tobacco products without obtaining a permit, the San Mateo County's Department of Environmental Health is authorized to enforce current regulations regarding tobacco sale in the county. (SSFMC § 6.46.010)

Of note, the use of e-cigarettes is generally prohibited in City buildings, City-owned parking structures, City vehicles, the City's parks and recreations areas, within twenty feet of City buildings, all City-owned parking lots, the City's downtown core, any open-air public places on City-owned property, multi-unit residences, and common areas of multi-unit residences. (SSFMC § 8.50.090). However, the sale of flavored and unflavored e-cigarettes is permitted within the City.

### **B. Ban Flavored Tobacco Products, Including Flavored E-Cigarettes but Not Unflavored E-Cigarettes**

Many cities have banned the sale of flavored tobacco products due to its prevalence among youth. The City may choose to ban all flavored tobacco products including flavored vape liquids and flavored e-cigarettes, but exempt unflavored e-cigarettes in order to make it available to adults who rely on unflavored e-cigarettes as an alternative to smoking traditional cigarettes.

The FDA has proposed the ban on the sale of all e-cigarettes (with an exception of mint and menthol flavors) in stores that do not have areas prohibiting kids under the age of 18. However, a 2018 Truth Initiative survey of more than 1,000 people between the ages of 12-17 years old and more than 500 people between the ages of 18-24 years old found that mint is a top three flavor among JUUL users only behind fruit and mango.

Similarly, on December 3, 2018, Senate Bill 38 (SB 38) was introduced in the California State Legislature to prohibit the sale of flavored tobacco products, which includes e-cigarettes. A hearing on SB 38 is set for March 27, 2019.

### **C. Ban Flavored Tobacco Products and All E-Cigarettes**

There has yet to be a city to ban the sale of all e-cigarettes. Recently, the County and City of San Francisco introduced legislation to ban both flavored tobacco and all e-cigarettes if the FDA fails to provide them with a review of its effects on public health. The City may choose to ban the use of flavored tobacco and all e-cigarettes as the two products are frequently used together.

#### **FISCAL IMPACT**

There is no known fiscal impact, as enforcement will remain with the County of San Mateo.

#### **RELATIONSHIP TO STRATEGIC PLAN**

Prohibiting the sale of e-cigarettes and flavored tobacco meet the City's strategic goals of providing a high

quality of life for its residents and employees by building and maintaining a sustainable city.

## CONCLUSION

There are opportunities to limit youth access to flavored tobacco and e-cigarettes by ordinance; however, questions regarding scope, enforcement, and timing must be addressed.

**Staff recommends City Council provide guidance and direction on the potential regulation of sale of e-cigarettes and flavored tobacco in South San Francisco.**

### Attachment:

- A. Matrix of Local Ordinances Restricting the Sale of Flavored Tobacco Products
- B. Flavored Tobacco PowerPoint Presentation