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REPORT RE:

**POLICY OPTIONS FOR BANNING OR RESTRICTING THE SALE OF
FLAVORED TOBACCO PRODUCTS TO YOUTH; SURVEY OF LEGISLATIVE
REGULATIONS IN OTHER JURISDICTIONS**

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012

Honorable Members:

This Office, in consultation with the Chief Legislative Analyst's Office, has prepared and now transmits for your review this report containing an overview of options and policy considerations relative to banning or restricting the sale of flavored tobacco products in the City of Los Angeles. This report responds to a Motion adopted by Council requesting that the City Attorney, with the assistance of the Chief Legislative Analyst, report on a proposed strategy to prohibit or restrict the sale of flavored tobacco to youth and to report on how other jurisdictions are addressing the issue. Due to the serious health crisis posed by flavored tobacco products for our City's youth, as detailed below, the City Attorney's Office recommends that the City Council enact a Citywide ban on the sale of all flavored tobacco products.

I. EXECUTIVE SUMMARY

E-cigarette usage, also known as "vaping," has created a public health crisis in Los Angeles and across the nation. Within the last week, the Centers for Disease Control and Prevention (CDC) warned Americans not to smoke e-cigarettes while the CDC is investigating why as many as 380 people in 33 states who used e-cigarettes

have reported possible pulmonary disease, seven of whom have died.¹ The CDC's advisory highlighted the CDC's inability to determine which of the many compounds or additives used in vaping devices are causing the injuries and deaths. The symptoms include shortness of breath, fatigue, fever and nausea or vomiting. The Los Angeles County Department of Public Health urged healthcare providers to be on the alert for pulmonary symptoms in e-cigarette users, after confirming that one of the vaping deaths was a Los Angeles County resident.²

The reports of serious symptoms and deaths related to the use of e-cigarettes is all the more alarming because youth tobacco product usage has increased exponentially in recent years, largely attributable to the popularity of e-cigarettes and flavored additives. According to the CDC, in 2018 more than one in four high school students had used a tobacco product in the past 30 days. This was a 77.8 percent increase in e-cigarette usage from 2017 and virtually erased any progress achieved in reducing youth tobacco product use that had occurred in prior years.³ The CDC opines that this sharp increase in youth use is attributable to the availability of e-cigarettes in kid-friendly flavors.⁴

The City has been an early leader in addressing the negative health consequences of tobacco products. Los Angeles was the first city in California to include e-cigarettes in the definition of tobacco products, bringing e-cigarettes within the ambit of City ordinances regulating use and sale. The Los Angeles City Attorney's Office also led in establishing the first tobacco retailer licensing unit -- regulating over 4,000 tobacco retailers -- focusing at the retailer level on the prohibition against sales to youth, through enforcement and education, as well as focusing at the youth level on outreach to discourage tobacco use. More must be done to protect against the negative health consequences of tobacco use, specifically by banning or regulating flavorings that appeal to youth and mask the natural harsh taste of tobacco.

At the federal level, the U.S. Food and Drug Administration (FDA) has been slow to regulate e-cigarettes by delaying efforts to bring flavored e-cigarette products under FDA review and approval requirements. Although the recent pulmonary disease outbreak prompted the FDA to announce an intent to issue a guidance banning flavored

¹ CDC, *Outbreak of Lung Illness Associated with Using E-cigarette Products*, (September 16, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html. The CDC revised downward the original estimate of pulmonary disease cases from more than 400 to 380, but the death toll has now risen from six to seven people, with the recent death of a Fresno, California patient.

² Los Angeles County Department of Public Health, *Press Release: Public Health Investigates First Death Associated with E-Cigarettes in LA County*, (September 6, 2019), <http://publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?prid=2137>.

³ Karen A. Cullen et al., *Notes From the Field*, *MMWR*, CDC (Nov. 16, 2018), <http://dx.doi.org/10.15585/mmwr.mm6745a5>.

⁴ Office of the Surgeon General, *Surgeon General's Advisory on E-Cigarette Use Among Youth* (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

e-cigarettes except those receiving FDA approval, the guidance is not expected to issue until at least May of 2020, during which time flavored e-cigarette products will not be subject to federal oversight. The State of California also has been slow to act. In response to tobacco industry concerns, two recent legislative efforts to regulate flavored tobacco products were watered down to such an extent that medical professionals and health organizations that once backed the bills, became opposed to their passage. The bills are currently stalled.

While efforts at the Federal and California State level have lagged, local jurisdictions have stepped to the forefront to protect public health. The County of Los Angeles Board of Supervisors is scheduled to vote at its September 24, 2019, meeting on an ordinance to ban the sale of flavored tobacco products, including menthol additives. The City and County of San Francisco unanimously passed an ordinance banning the sale of all flavored tobacco products, including menthol. A referendum sponsored by tobacco manufacturers to overturn the San Francisco ordinance lost in an electoral landslide. San Francisco thereafter went one step further by banning the sale of all e-cigarettes lacking Food and Drug Administration (FDA) approval; the ban is set to become operative at the end of 2019.

Other jurisdictions have enacted flavored tobacco bans or regulations. Beverly Hills banned the sale of all tobacco products, flavored and unflavored alike. Oakland, El Cerrito and Yolo County have enacted bans on the sale of flavored tobacco, including menthol flavoring.

According to a survey conducted by the Chief Legislative Analyst's Office, other jurisdictions in California have created a variety of regulatory schemes with carve-outs. Santa Clara County and the City of Palo Alto ban flavored tobacco but exempt adult-only retailers. Manhattan Beach bans the sale of flavored tobacco products but exempts menthol. Contra Costa County and the cities of Berkeley and Hayward create buffer zones around sensitive sites, in which the sale of flavored tobacco products, including menthol products, is prohibited.

A variety of options exist at the federal and state level for regulating the advertisement of flavored tobacco products. A chart of the potential federal and state statutes which could be amended to include e-cigarettes and/or flavored tobacco is attached to this report as Attachment Two for the City Council's information.

Prior to drafting this report, the City Attorney's Office and Chief Legislative Analyst's Office convened a meeting of stakeholders interested in providing input on the policy options for banning or regulating flavored tobacco products. The meeting included public health advocates and medical professionals such as the American Heart Association, the American Lung Association, the American Cancer Society and the Campaign for Tobacco Free Kids, as well as advocates representing the tobacco industry, including JUUL and the Hookah Chamber of Commerce. The policy options

advocated by the stakeholders ran the gamut from outright bans on flavored tobacco products to menthol or product-specific exemptions or to the maintaining of the status quo. The options are provided in this report.

City Council's concern about the role of flavored tobacco products in the tobacco use epidemic, which prompted the request for this report on flavored tobacco products, is both timely and urgent. Given the recent vaping-related deaths and injuries, combined with the prevalence of vaping among the City's youth, this report urges the City to heed the advice of medical experts and enact a Citywide ban on the sale of all flavored tobacco products.

II. CURRENT RESEARCH

A. "Vaping" and the Use of E-Cigarettes

The use of vaporizers (vapes) and e-cigarettes is still so new that there is not yet a comprehensive body of scientific research as with traditional cigarettes and other tobacco products. Particularly lacking are long-term longitudinal studies, which have only begun in the last few years. Yet, as the research is released, it continuously shows health issues associated with the use of vapes and e-cigarettes.

In one recent study, MRIs showed that even vaping a single time can temporarily affect cardiovascular functioning in healthy people.⁵ In another, exposure to various e-liquids caused inflammation and other negative consequences in cells, which in turn led to endothelial dysfunction, a risk factor for cardiovascular disease.⁶ Researchers have found that e-cigarettes sold in the United States have been contaminated with microbial toxins.⁷

The concentration of nicotine in e-cigarettes poses a number of health risks. Nicotine increases blood pressure and adrenaline, causing accelerated heart rate and increasing the likelihood of a cardiac event.⁸ Nicotine is highly addictive. A single e-cigarette cartridge contains approximately the same

⁵ Alessandra Caporale et al., *Acute Effects of Electronic Cigarette Aerosol Inhalation on Vascular Function Detected at Quantitative MRI*, Radiology (2019), <https://pubs.rsna.org/doi/pdf/10.1148/radiol.2019190562>.

⁶ Won Hee Lee et al., *Modeling Cardiovascular Risks of E-Cigarettes with Human-Induced Pluripotent Stem Cell-Derived Endothelial Cells*, 73 Journal of the American College of Cardiology Iss. 21, 2722 (2019), <https://www.sciencedirect.com/science/article/pii/S0735109719346960?via%3Dihub>.

⁷ Mi-Sun Lee, *Endotoxin and (1→3)-β-D-Glucan Contamination in Electronic Cigarette Products Sold in the United States*, 127(4) Environmental Health Perspectives 047008-1 (2019), <https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP3469>.

⁸ *Sympathomimetic Effects of Acute E-Cigarette Use: Role of Nicotine and Non-Nicotine Constituents*, Journal of the American Heart Association. <https://www.ahajournals.org>.

amount of nicotine as a pack of cigarettes and is more readily absorbed.⁹ Nicotine affects parts of the brain involved in learning, memory emotion and impulse control.¹⁰ E-cigarette usage in youth is particularly problematic from a developmental and academic standpoint.¹¹

Research on the component ingredients of e-liquid solutions has revealed more than concentrated nicotine. The solutions contain propylene glycol and vegetable glycerin, two of the primary ingredients in e-liquids found to be toxic to human cells. Research demonstrates that acetaldehyde and formaldehyde, two components of e-liquid vapor, increases the risk of lung and cardiovascular disease following repeated exposure.¹² Inhaling acrolein, an herbicide which is also present in e-liquid, has caused acute lung injury, including chronic obstructive pulmonary disease (COPD), asthma, and lung cancer.¹³

As previously discussed in this report, the CDC is conducting an investigation into the outbreak of serious and lethal pulmonary disease across the nation and has advised against vaping while the investigation is ongoing.¹⁴

B. The Use of Flavored Tobacco Products by Minors

According to the US Surgeon General, most tobacco use begins during youth and young adulthood.¹⁵ Scientific evidence also demonstrates that flavors play a major role in youth initiation and continued use of tobacco products.¹⁶ For example, in 2015, a study funded by the National Institute on Drug Abuse (NIDA), National Institutes of Health, the FDA, and the Department of Health and Human Services surveyed youth between the ages of 12 and 17 to determine the

⁹ *How Much Nicotine is in Juul?*, Truth Initiative. <https://truthinitiative.org/research-resources/emerging-tobacco-products/how-much-nicotine-juul>.

¹⁰ Nicotine and the Adolescent Brain; Journal of Physiology. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4560573/>.

¹¹ Ibid.

¹² Chronic E-Cigarette Exposure Alters the Human Bronchial Epithelial Proteome. American Journal of Respiratory and Critical Care Medicine. <https://www.atsjournals.org/doi/full/10.1164/rccm.201710-2033OC>.

¹³ Cf. footnote 4 and Toxic Substances Portal – Formaldehyde. Agency for Toxic Substances and Disease Registry. <https://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=39>.

¹⁴ https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#recommendations-public.

¹⁵ Office of the Surgeon General, *Preventing Tobacco Use Among Youths*, (June 6, 2017), <https://www.hhs.gov/surgeongeneral/reports-and-publications/tobacco/preventing-youth-tobacco-use-factsheet/index.html>.

¹⁶ American Academy of Pediatrics et al., *The Flavor Trap* (Mar. 15, 2017), https://www.tobaccofreekids.org/microsites/flavortrap/executive_summary.pdf.

prevalence of flavored tobacco use.¹⁷ This study found that the vast majority of youth who self-reported ever experimenting with a tobacco product reported that they started with a *flavored* tobacco product.¹⁸ Flavorings (other than menthol) are currently prohibited in traditional combustible cigarettes in the United States but widely available in other forms of tobacco products including e-cigarettes, cigars, hookah and smokeless tobacco.

C. Menthol and Minty Flavors

Menthol is a chemical compound with a minty flavor used as a cigarette additive by tobacco companies. By adding menthol to cigarettes, the natural harsh taste of tobacco is masked making the cigarette experience milder. Adding menthol to cigarettes also suppresses the user's instinctive coughing reflex thereby making inhalation of the smoke more tolerable.

Although statistically, traditional cigarette smoking rates have decreased, the prevalence of menthol cigarette use has *increased*. Menthol smokers of all ages show greater signs of nicotine dependence and are less likely to successfully quit smoking compared to other smokers.¹⁹ Studies have also shown that youth smokers remain the most likely group to use menthol cigarettes compared to all other age groups.²⁰

The City Attorney's Office was asked to address whether ethnic disparities relative to menthol tobacco exist. Our research has indeed revealed higher use rates of menthol cigarettes amongst African American smokers. This has been attributed to the tobacco industry's focus on African American consumers that dates back to the 1950s. For example, tobacco industry documents reveal a history of targeted marketing towards African American consumers and higher rates of discounts and promotions in African American neighborhoods.²¹ The consequences of these tobacco industry marketing practices are not only higher menthol use for this community but also higher rates of some tobacco-caused disease. Each year in the US more than 72,000 African Americans are diagnosed with a tobacco-related cancer and more than 39,000 die from a

¹⁷ Ambrose BK, Day HR, Rostron B, et al. *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years*, 2013-2014, JAMA (2015).

¹⁸ Bridget K. Ambrose et al., *Flavored Tobacco Product use Among US Youth*, JAMA (2015).

¹⁹ David T. Levy et al., *Quit Attempts and Quit Rates Among Menthol and Nonmenthol Smokers in the United States*, 101(7) Am. J. Pub. Health 1156, 1241 (2011).

²⁰ Andrea C. Villanti et al., *Changes in the Prevalence and Correlates of Menthol Cigarette use in the USA, 2004–2014*, 25 Tobacco Control 1, 14 (2016).

²¹ Tess Boley Cruz et al., *The Menthol Marketing Mix: Targeted Promotions for Focus Communities in the United States*, 12 Nicotine & Tobacco Res. 85, 147 (2010). See also Nina C. Schleider et al., *Tobacco Marketing in California's Retail Environment 2011-2014*, at 10, 12 (2015).

tobacco-related cancer.²² Researchers have estimated that, nationally, one-third of the number of lives that would be saved by a ban on menthol tobacco sales would be African American.²³

Many prominent African American organizations support a ban on the sale of mentholated tobacco products. In 2013, Delta Sigma Theta, the largest African American Sorority, approved a resolution to urge the FDA to prohibit menthol cigarettes.²⁴ The National Association for the Advancement of Colored People (NAACP) has stated that “the tobacco industry has perniciously targeted African Americans with mentholated products” and in 2016 issued a resolution to support efforts by state and local governments to restrict the sale of menthol tobacco products.²⁵ On September 9, 2019, consistent with the 2016 resolution, the NAACP issued a Statement commending the State of Michigan for recently banning the sale of all flavored tobacco products, including menthol.²⁶

In contrast, there are also community-based organizations that *oppose* a prohibition on the sale of menthol cigarettes. According to the California Department of Public Health, many of these organizations have received funding from the tobacco industry.²⁷ Despite the life-saving potential of a prohibition on the sale of menthol tobacco, these opposition groups have suggested that a prohibition on menthol unfairly targets the African American community, criminalizes the smoking of menthol cigarettes and makes menthol smokers susceptible to dangerous interactions between police and members of the African American community. These arguments cannot be substantiated. Any restriction on flavored tobacco only would restrict the *sale* of menthol tobacco products not their use. A menthol restriction only would be enforced at the retail sales level by prohibiting tobacco retailers from selling menthol flavored tobacco products. There would be no crime or violation applicable to the purchaser or user of the menthol tobacco product.

²² CDC, Vital Signs: Disparities in Tobacco-Related Cancer Incidence and Mortality—United States, 2004-2013, Morbidity & Mortality Weekly Report, (2016), <http://www.cdc.gov/mmwr/volumes/65/wr/mm6544a3.htm>.

²³ David T. Levy et al., Modeling the Future Effects of a Menthol Ban on Smoking Prevalence and Smoking-Attributable Deaths in the United States, 101(7) Am. J. Pub. Health 1156, 1236 (2011).

²⁴ Delta Sigma Theta, *Prohibiting the Use of Menthol as a Characterizing Flavor in Cigarettes*, 2013 National Convention Workbook, <http://www.tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/Attachment%205-Delta%20Resolution.pdf>.

²⁵ National Association for the Advancement of Colored People, Resolutions (2016), <http://www.naACP.org/wp-content/uploads/2016/03/Resolutions.2016.pdf>.

²⁶ National Association for the Advancement of Colored People, *NAACP Issues Statement on Michigan's Ban on Flavored Cigarettes*, September 9, 2019, <https://www.naACP.org/latest/naACP-issues-statement-michigans-ban-flavored-e-cigarettes/>.

²⁷ California Dep't of Pub. Health, *Menthol and Cigarettes* (May 2017), <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/FinalMentholFactSheecolo05022017.pdf>.

Certain opposition groups that have received tobacco industry funding have also suggested that menthol bans will lead to a dangerous illicit trade despite no definitive evidence to support this concern.²⁸ Other jurisdictions surveyed by the City Attorney's Office that enacted flavored tobacco restrictions did not report an increase in illicit trade. That said, should any illicit trade develop, the City Attorney's Office has decades of experience prosecuting illicit tobacco trafficking in the context of untaxed and counterfeit cigarettes. The City Attorney's Office, in conjunction with the Los Angeles Police Department (LAPD), is also the recent recipient of a State of California Department of Justice grant award that specifically funds tobacco enforcement efforts for the City. Should City Council enact any type of flavored tobacco prohibition, there are sufficient resources currently available to support and implement any new regulatory efforts.

D. Hookah

Hookah tobacco is a type of flavored tobacco usually mixed with molasses, honey and/or fruit. Hookah tobacco is smoked through a hookah pipe—a water pipe with a smoke chamber, bowl, pipe and hose. Hookah smoke contains high levels of toxic compounds including tar, carbon monoxide, heavy metals and cancer-causing carcinogens. As with cigarette smoking, hookah smoking is linked to lung and oral cancers, heart disease, and other serious illnesses. It is estimated that a 45-to-60 minute hookah smoking session is as harmful as smoking 100 or more cigarettes.²⁹

According to the 2018 National Youth Tobacco Survey (NYTS), 4.1 percent of high schoolers and 1.2 percent of middle schoolers, totaling over 700,000 youth, have used hookah in the past month.³⁰ Several studies have also found that although gains have been made in reducing cigarette use among college students, the prevalence of hookah use is increasing.³¹ In addition, the government-sponsored 2013-2014 Population Assessment on Tobacco and Health (PATH) survey revealed that more than three-quarters (78.9 percent) of youth hookah users reported that they use hookah because it comes in appealing flavors.³²

²⁸ The Truth Initiative. *Menthol: Facts, Stats and Regulations* (Aug. 31, 2018), <https://truthinitiative.org/research-resources/traditional-tobacco-products/menthol-facts-stats-and-regulations>.

²⁹ Akl, E.A., *The effects of waterpipe tobacco smoking on health outcomes: a systematic review*, International Journal of Epidemiology, (2010).

³⁰ CDC, *Tobacco Product Use Among Middle and High School Students—United States, 2011-2018*, MMWR, 68, (February 12, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6806e1-H.pdf>.

³¹ Creamer, MeLisa R et al. *College students' perceptions and knowledge of hookah use*. Drug and Alcohol Dependence Vol. 168 (2016).

³² Ambrose, BK, et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, Journal of the American Medical Association, (2015).

For over 20 years, state law has prohibited the smoking of tobacco (including hookah tobacco) in restaurants and bars. In the City of Los Angeles, despite extensive outreach and education efforts by the City Attorney's Office, many restaurants and bars unlawfully furnish hookah tobacco and allow their patrons to smoke in their businesses. Many of these businesses claim to be "hookah lounges;" however, state law does not recognize the term "hookah lounge" or afford such business any special privilege or exemption from the state's smoking prohibitions. Only smokers' lounges can lawfully allow indoor smoking, and any business that serves food or alcohol cannot, pursuant to state law, qualify as a smokers' lounge.

The Hookah Chamber of Commerce presented the City Attorney's Office with a letter on behalf of their membership requesting an exemption for hookah tobacco. The President of the Hookah Chamber of Commerce declined this Office's request for a membership list and indicated a list would not be provided because some of their members had been previously prosecuted by our Office. A review of our prior cases revealed that indeed over 60 bars and restaurants have been criminally prosecuted by the City Attorney's Office for unlawfully allowing hookah smoking in violation of state law. This Office estimates that there are still over 100 restaurants and bars that continue to unlawfully allow their patrons to smoke hookah in their business in violation of state law.

III. Existing Los Angeles City Initiatives

The City of Los Angeles has consistently been a statewide leader in tobacco control policy. Not only was the City the first jurisdiction in the State to establish a tobacco retailer licensing program (that has since been replicated in over 150 cities/counties in California), but the City of Los Angeles was also the first city in California to include e-cigarettes in the definition of tobacco products—two years before the State of California acted in 2016. Three current initiatives that demonstrate the City's commitment to protecting youth from the dangers of tobacco use and nicotine addiction are the Tobacco Enforcement Program (TEP), the Decreasing Adolescent Tobacco Access (DATA) Initiative and the TEP's ongoing collaborative efforts with the Los Angeles Unified School District (LAUSD).

A. The Tobacco Enforcement Program (TEP)

The Tobacco Retailer's Permit Ordinance established the TEP in May of 2000, with the goal of reducing youth access to tobacco products and decreasing youth smoking rates. Permit fee revenue collected by the City funds the TEP to ensure that the City's more than 4,000 tobacco retailers maintain a yearly tobacco permit and comply with local and state laws regulating tobacco sales—particularly the prohibition against sales to youth.

The TEP continuously engages in outreach aimed at the City's tobacco retailers that includes a wide array of services to support and encourage responsible retailing practices. These ongoing services include direct retailer training, site visits, targeted mailings, resource documents, and both phone and email support. This retailer outreach infrastructure has been utilized successfully to ensure that all City tobacco retailers are made aware of any new tobacco-related laws and regulations. Most recently, the TEP utilized this outreach infrastructure to successfully ensure that all City tobacco retailers were made aware of the expanded state law definition of tobacco products to include e-cigarettes and that the tobacco sales age had been raised from 18 to 21. Likewise, should City Council approve any new tobacco-related law, the TEP has the appropriate infrastructure in place to provide sufficient outreach and education to City tobacco retailers to support their compliance with the law.

B. The Decreasing Adolescent Tobacco Access (DATA) Initiative

In addition to the permit-fee funded TEP, the City Attorney is also the recent recipient of a grant awarded by the California Attorney General's Office. This grant has funded the City's Decreasing Adolescent Tobacco Access (DATA) Initiative which further supports the City's goal of keeping tobacco products away from youth. Through the DATA Initiative, the City has implemented several strategies to address the alarming increase in youth e-cigarette usage, including a comprehensive vaping awareness media campaign, an expanded youth outreach program, and an increase in undercover minor decoy compliance checks conducted by LAPD.

Through the DATA Initiative, traditional tobacco-related education modules have been modernized to stay up to date with current youth trends including the alarming popularity of flavored e-cigarettes. In addition, TEP's expanded youth outreach now regularly includes presentations at parent centers, school assemblies, after-school outreach events and the providing of resource tables at City schools. TEP's youth-focused outreach is also provided at health fairs, community events and includes collaboration with the City's Department of Recreation and Parks. An aggressive public education campaign to youth and their parents is also in development and expected to begin in earnest this Fall.

C. Los Angeles Unified School District (LAUSD)

Beginning in 2002, TEP was asked to be a participant agency in LAUSD's Public Health Advisory Board facilitated by the LAUSD Beyond the Bell Program and funded by the Tobacco Use Prevention and Education (TUPE) program. TEP has also been funded directly by the TUPE program to provide tobacco-use prevention and education at LAUSD schools and has participated in research on

youth tobacco access funded by the Tobacco Related Diseases Research Program (TRDRP).

LAUSD is in the process of revising its policy bulletin, BUL-3277.2, "Preventive Measures and Mandatory Procedures for Students Who Violate Laws Regarding Drugs, Alcohol, Tobacco, and Other Intoxicants." The Division of Instruction, Division of District Operations and the Beyond the Bell Branch have collaborated on the policy and plan to submit their final draft to the LAUSD Superintendent and Board of Education for input and approval. LAUSD expects the new policy to be finalized in the Fall of 2019.

IV. Overview of State and Local Legislation Efforts to Regulate Flavored Tobacco

A. Federal Efforts

i. Food and Drug Administration (FDA)

Although the Federal government has been slow to respond to the market explosion of flavored e-cigarette products, on September 11, 2019, the federal government took a first step when Alex Azar, Secretary of the United States Department of Health and Human Services as well as Ned Sharpless, the Acting Commissioner of the FDA announced that the FDA intends to issue enforcement guidance, requiring that any flavored e-cigarette product (including menthol but not including tobacco flavoring) be removed from the market until the product applies for and secures approval from the FDA under the Tobacco Control Act. The FDA allowed flavored e-cigarette products to remain on the market in the interim, at least through May of 2020.³³

Previous to the recent announcement, the FDA had delayed efforts to bring flavored e-cigarette products under FDA review and approval requirements. On May 10, 2016, the FDA issued a Final Rule deeming e-cigarette and other nicotine products that were not a part of the original 2009 Federal Tobacco Control Act, including e-cigarettes, to be "tobacco products."³⁴ The new Rule allowed the FDA to regulate e-cigarettes (including flavored products) and other covered tobacco products in the same way that it could regulate traditional tobacco products under the original 2009 Tobacco Control Act. A year later in May 2017, the FDA issued a Guidance related to the 2016 Deeming Rule, which extended the

³³ <https://www.cnbc.com/video/2019/09/11/hhs-secretary-alex-azar-fda-will-finalize-new-e-cigarette-rules.html>.

³⁴ Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, 21 CFR pt. 1100, 1140, and 1143 (2016).

compliance period for some tobacco product manufacturers, including flavored e-cigarette manufacturers.³⁵ This meant that flavored e-cigarette devices that were currently on the market could remain on the market (without any review by the FDA) until August 2022 (now accelerated to May of 2020).

In March of 2018, several health organizations including the American Academy of Pediatrics, the American Cancer Society Cancer Action Network, and the Campaign for Tobacco-Free Kids sued the FDA regarding its decision to grant deadline extensions to e-cigarette manufacturers under the May 2017 Guidance.³⁶ The court sided with the health organizations and vacated the Guidance for several reasons, including that its outcome (allowing e-cigarettes to be on the market without review by the FDA) cannot be reconciled with the 2009 Tobacco Control Act.³⁷

The immediate past Commissioner of the FDA, Scott Gottlieb,³⁸ issued the Guidance that extended the deadlines set in the Tobacco Control Act. Commissioner Gottlieb gradually revised his views about flavored e-cigarettes. After initially concluding that the FDA's tentative regulation of flavored e-cigarettes "struck the wrong balance,"³⁹ by April of 2018, Commissioner Gottlieb recognized "the troubling reality ... that electronic nicotine delivery systems (ENDS) such as e-cigarettes have become wildly popular with kids."⁴⁰ By March of 2019, Commissioner Gottlieb stated that "the number of children using e-cigarettes remains at epidemic levels" and announced new, more severe actions the FDA would take against e-cigarette retailers and manufacturers.⁴¹

³⁵ U.S. Dep't of Health and Hum. Serv., Extension of Certain Tobacco Product Compliance Deadlines Related to the Final Deeming Rule (Revised): Guidance for Industry (Mar. 8, 2019), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/extension-certain-tobacco-product-compliance-deadlines-related-final-deeming-rule>.

³⁶ American Academy of Pediatrics v. FDA, No. PWG-18-883, 2019 WL 2123397, F.Supp.3d (Dist. Ct. Md. 2019).

³⁷ *Id.*

³⁸ Scott Gottlieb served as the FDA Commissioner from May of 2017 to April of 2019.

³⁹ Angelica LaVito, *Former FDA Chief Gottlieb*, CNBC (May 21, 2019), <https://www.cnbc.com/2019/05/21/former-fda-chief-gottlieb-we-struck-the-wrong-balance-on-e-cigarettes.html>.

⁴⁰ FDA, Statement from FDA Commissioner Scott Gottlieb on New Enforcement Actions (Apr. 24, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-enforcement-actions-and-youth-tobacco-prevention>.

⁴¹ FDA, Statement from FDA Commissioner Scott Gottlieb on Forceful New Actions (Mar. 4, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-forceful-new-actions-focused-retailers-manufacturers>.

ii. House Subcommittee on Economic and Consumer Policy

On July 25, 2019, the House of Representatives' Subcommittee on Economic and Consumer Policy, which is a part of the House Committee on Oversight and Reform, held two days of hearings on the topic of youth vaping. The Subcommittee heard from parents, doctors, researchers, and representatives of JUUL. Notably, the Subcommittee questioned JUUL co-founder and current Chief Product Officer, James Monsees, on the second day of hearings.

At present, there are multiple bills to address youth vaping that have been introduced in the House of Representatives, and nearly all of these bills have an equivalent counterpart in the U.S. Senate. Some of these bills include: H.R. 293: Youth Vaping Prevention Act of 2019; H.R. 1498: SAFE Kids Act; H.R. 2111: PROTECT Act; H.R. 2339: Reversing the Youth Tobacco Epidemic Act of 2019; H.R. 2411: Tobacco to 21 Act; and H.R. 3942: Preventing Online Sales of E-Cigarettes to Children Act.

B. State Efforts

i. California State Senate Bill 38

On December 3, 2018, SB 38 was introduced in the California State Senate by Senators Jerry Hill, Mike McGuire, and Anthony Portantino. In its original form, SB 38 prohibited the sale of all flavored tobacco products and was sponsored by the American Lung Association (ALA), the American Cancer Society (ACS), and the American Heart Association (AHA).⁴²

On May 23, 2019, the bill was removed from consideration by Senator Hill because of amendments to the bill that carved out exemptions for tobacco products with patents issued prior to January 1, 2000, menthol products, and hookah.⁴³ According to Senator Hill, "the amendments imposed on the bill erode those protections [that keep flavored tobacco products from children] by creating unnecessary, harmful exemptions."⁴⁴ The sponsorship from the ALA, ACS, and AHA were also withdrawn and the previously supportive public health organizations then pivoted to oppose the bill.

⁴² Letter from Lindsey Freitas, Senior Director, Advoc., Am. Lung Ass'n Cal., to Sen. Jerry Hill, Cal. Sen. (May 21, 2019) (On file with Sen. Jerry Hill).
https://sd13.senate.ca.gov/sites/sd13.senate.ca.gov/files/aha_ala_acs_sb_38_opposition.pdf.

⁴³ SB 38 Amended May 17, 2019 (Cal. Sen.).

⁴⁴ Office of State Senator Jerry Hill, *Senator Jerry Hill Withdraws Bill to Ban Flavored Tobacco Products*, Senate District 13 (May 23, 2019), <https://sd13.senate.ca.gov/news/2019-05-23-senator-jerry-hill-withdraws-bill-ban-flavored-tobacco-products-rather-accept>.

At present, there are no California State Senate bills considering a flavor ban.

ii. California State Assembly Bill 1639

On February 22, 2019, AB 1639 was introduced in the California State Assembly by Assembly Members Gray, Cunningham, Robert Rivas, and Kamlager-Dove.⁴⁵ Originally, the bill would have banned flavored e-cigarettes, with broad exceptions. AB 1639 exempts “tobacco, mint, or menthol flavors;” retailers who sell tobacco in stores limited to customers aged 21 and older; and online retailers who verify that the purchaser is at least 21 years of age.⁴⁶ On August 20, 2019, the bill was amended to remove the flavor ban altogether. According to media reports, the removal of the flavor ban resulted from opposition groups that felt the originally included ban was too weak due to its exemption for menthol products.⁴⁷

The now stripped-down version of AB 1639 includes increased retailer compliance checks by the California Department of Public Health to reduce the availability of tobacco to persons under 21. The bill also imposes certain advertising restrictions. AB 1639 sets civil fines for noncompliance with various aspects of the bill, as well as escalating license suspension periods (and eventual revocations) for retailers that are found in violation of the law.

At present, AB 1639 is currently pending in the Senate. Two additional Assembly Bills would affect flavored tobacco products: AB 739 and AB 1625. The former would ban sales of flavored tobacco products, but it has been untouched in the Committees on Government Organization and Health since April 1, 2019. The latter would require manufacturers to submit a list of tobacco products sold that do not have a characterizing flavor. This bill has been untouched in the Committees on Government Organization and Judiciary since March 25, 2019.

iii. Executive Order Signed by Governor Newsom

On September 16, 2019, California Governor Gavin Newsom signed an executive order to confront the youth vaping epidemic. The order directs the California Department of Public Health to allocate \$20 million to a vaping awareness campaign and develop recommendations to

⁴⁵ AB 1639 was most recently amended on August 20, 2019.

⁴⁶ AB 1639 Amended August 13, 2019 (Cal. Assem.).

⁴⁷ Catherine Ho, *California Bill Cracking Down on Youth Vaping Moves Forward*, SF Chronicle (August 20, 2019), <https://www.sfchronicle.com/business/article/California-bill-cracking-down-on-youth-vaping-14364950.php>.

require warning signs about the health risks of vaping at vaping retailers and in vaping advertisements; increase enforcement regarding illegal sales; and to establish standards for nicotine content and uniform packaging for purposes of including nicotine content in the calculation of applicable taxes. The order also directs the California Tax and Fee Administration (CDTFA) to develop recommendations to remove illegal or counterfeit vaping products from stores and to review taxes on e-cigarettes to determine if taxes could be assessed according to nicotine content.

Governor Newsom's press release that announced the executive order also expressed the Governor's desire to work with the legislature and build on this executive action to "put together a strong tobacco reform package in 2020."

C. Local Efforts by Other Selected Jurisdictions in California

Cities and counties throughout California have been active in adopting prohibitions on the sale of flavored tobacco. The first local restriction on the sale of flavored tobacco was enacted by Santa Clara County in 2010.⁴⁸ Following Santa Clara, 34 cities in California passed some type of restriction on the sale of flavored tobacco. Four of these 34 cities are in Los Angeles County: Manhattan Beach in 2015, West Hollywood in 2016, Beverly Hills in 2018, and Hermosa Beach in 2019. A matrix of Local Ordinances Restricting the Sale of Flavored Tobacco Products compiled by The Center for Tobacco Policy and Organizing is attached to this report as Attachment One.⁴⁹

i. Los Angeles County (Draft Ordinance to Ban Sale of All Flavored Tobacco)

Pursuant to a Motion introduced by Supervisor Mark Ridley-Thomas and Supervisor Janice Hahn, the Board of Supervisors instructed County Counsel to prepare an ordinance to address nuisance tobacco shops and regulate flavored tobacco retailers.⁵⁰ At the August 14, 2019 Health and Operations Cluster Meeting, a proposed draft ordinance was

⁴⁸ *County of Santa Clara Raises Purchase Age for Tobacco and Electronic Smoking Products*, County of Santa Clara County News (June 9, 2015), <https://www.sccgov.org/sites/opa/nr/Pages/County-Raises-Purchase-Age-for-Tobacco-and-Electronic-Smoking-Products-from-18-to-21-in-Unincorporated-Santa-Clara-County.aspx>.

⁴⁹ The Center for Tobacco Policy and Organizing, *Matrix of Local Ordinances Restricting the Sale of Flavored Tobacco Products*, Am. Lung Assoc. (May 2019) <https://center4tobaccopolicy.org/wp-content/uploads/2019/05/Matrix-of-Local-Ordinances-Restricting-Flavored-Tobacco-2019-05-07.pdf>.

⁵⁰ County of Los Angeles, Motion by Supervisors Mark Ridley-Thomas and Janice Hahn (Sept. 25, 2018), <http://file.lacounty.gov/SDSInter/bos/supdocs/126756.pdf>.

jointly presented by County Counsel, the Department of Public Health and the Treasurer and Tax Collector. This draft Ordinance prohibits the retail sales of flavored tobacco products, including menthol. Additionally, the draft Ordinance requires “tobacco only” shops to obtain a separate business license, prohibit the entrance of customers under 21 years of age, and prohibit the consumption of food or alcoholic beverages on the premises. The proposed draft Ordinance is scheduled to be formally presented at the meeting of the Board of Supervisors on September 24, 2019.

ii. San Francisco and Other California Cities (Ban on Sale of All Flavored Tobacco, No Exemptions)

On June 20, 2017, the San Francisco County Board of Supervisors voted unanimously to pass an Ordinance amending the city’s Health Code by adding Article 19, to ban the sale of all flavored tobacco products, including menthol.⁵¹ Thereafter, opponents of the ban (funded in large part by tobacco manufacturers) gathered enough signatures to put a referendum on the June 2018 ballot to overturn the Ordinance.⁵² Although over \$10 million was spent to overturn the Ordinance, the referendum was not successful with 68 percent of San Francisco residents voting in favor of the flavored tobacco prohibition.⁵³ Despite overwhelming voter approval of the ban, the tobacco industry has initiated a second attempt to put a referendum on a future ballot to overturn the San Francisco law. In May 2019 JUUL introduced and funded a new ballot initiative (for the November 2019 election) to overturn the voter-approved flavored tobacco prohibition.

Notably, shortly after San Francisco enacted this flavored tobacco ban, the Board of Supervisors voted to prohibit the sale of e-cigarettes altogether. On June 28, 2019, San Francisco Mayor London Breed signed and approved the addition of Article 19R to the San Francisco County Health Code to prohibit the sale of all e-cigarettes that lack Food and Drug Administration premarket approval. This prohibition is set to take effect at the end of 2019. As with the flavored tobacco ban, JUUL has indicated its intent to seek to overturn this law by way of referendum.

⁵¹ San Francisco Health Code Ordinance No. 140-17 (2017). See also Lesley McClurg, *San Francisco Passes First-in-the-Nation Flavored Tobacco, Vaping Ban*, KQED (June 6, 2018), <https://www.kqed.org/futureofyou/441395/sf-voters-may-ban-vape-flavors-menthol-cigarettes>.

⁵² McClurg, *supra* note 13. See also Ballotpedia, *Proposition E, Ban on the Sale of Flavored Tobacco*, [https://ballotpedia.org/San_Francisco,_California,_Proposition_E,_Ban_on_the_Sale_of_Flavored_Tobacco_\(June_2018\)](https://ballotpedia.org/San_Francisco,_California,_Proposition_E,_Ban_on_the_Sale_of_Flavored_Tobacco_(June_2018)) (last visited July 1, 2019).

⁵³ Ballotpedia, *supra* note 10.

In addition to San Francisco, other California cities have enacted comprehensive flavored tobacco bans. The California cities with jurisdiction-wide flavored tobacco bans include Oakland, Palo Alto and El Cerrito. Some California jurisdictions have enacted flavor bans with exemptions. The County of Santa Clara exempts certain retailers and Manhattan Beach exempts menthol flavoring.

iii. Beverly Hills (Ban on sale of All Tobacco Products, Flavored and Unflavored)

One of the most expansive restrictions on tobacco sales in the State was enacted recently in the adjoining City of Beverly Hills. On June 4, 2019, the Beverly Hills City Council approved an Ordinance to prohibit the sale of all tobacco products (flavored and unflavored) in the city.⁵⁴

iv. Palo Alto (Ban on Sale of All Flavored Tobacco Products, 21 and Over Venues Exempted)

Palo Alto City Council passed an Ordinance in October of 2017 which restricts the sale of flavored tobacco products to retailers that generate more than 60 percent of their gross annual revenue from the sale of tobacco products, are adult-only, do not sell food or alcohol for consumption in the premises, and post signage outside the premises that clearly and conspicuously informs patrons that the premises is off-limits to persons who are under 21 years old.⁵⁵

v. Berkeley and Other California Cities (Ban on Sale of All Flavored Tobacco Products, 21 and Over Venues Exempted)

The City of Berkeley prohibits the sale of flavored tobacco products, including menthol flavored tobacco products, within a 600 foot buffer zone of a school, defined to include public and private Kindergarten through 12th grade with an enrollment of at least 25 students. The 600 foot buffer zone ordinance is applicable to all tobacco products, including mentholated products. The City of Manhattan Beach has a similar buffer zone ordinance.

⁵⁴ This Ordinance exempted three existing cigar lounges, hotels that sell tobacco products only to guests through concierge services, and those who can prove an exceptional hardship caused by the ban. City of Beverly Hills Municipal Code Ordinance No. 19-0-2783. See also City of Beverly Hills, *Information for Businesses*, <http://www.beverlyhills.org/citymanager/smokinginformation/informationforbusinesses/> (last visited July 2, 2019). See also Kim Baldonado, *Beverly Hills Moves Ahead with a Plan to Outlaw all Tobacco Sales*, NBC 4 (May 7, 2019), <https://www.nbclosangeles.com/news/local/Beverly-Hills-Considering-Ban-on-Tobacco-Sales-509613541.html>.

⁵⁵ City of Palo Alto Municipal Code Ordinance No. 5418.

V. Advertising Restrictions Pursuant to Settlement Agreements

The City Council requested that City Attorney's Office and Chief Legislative Analyst's Office report on the options, at the Federal and State levels, to regulate the advertising and marketing of e-cigarettes products. The majority of advertising restrictions currently applicable to tobacco products are a result of terms in the Master Settlement Agreement (MSA) and The Smokeless Master Settlement Agreement (SMSA).⁵⁶ Although e-cigarettes are a type of flavored tobacco product, they were not contemplated by the MSA or the SMSA and therefore not included in either settlement.

The MSA and SMSA provide the following restrictions on tobacco products (not including e-cigarettes):⁵⁷

- Prohibit direct or indirect targeting of youth in advertising, marketing and promotions.
- Prohibit brand name sponsorship of concerts, sports events, events with an intended audience having a significant percentage of youth and events with paid participants who are youth.
- Prohibit access by youth to free samples of tobacco products.
- Prohibit payments for placement of tobacco products in the media.
- Prohibit outdoor advertising of tobacco products.
- Prohibit transit ads, on or in public or private vehicles.
- Prohibit using cartoons to advertise tobacco products.
- Prohibit tobacco brand-name merchandise.

⁵⁶ The Master Settlement Agreement (MSA) is a settlement reached in November 1998 between the state Attorneys General of 46 states, five U.S. territories, the District of Columbia and the five largest cigarette manufacturers in the United States concerning the advertising, marketing and promotion of cigarettes. The Smokeless Master Settlement Agreement (SMSA) was executed at the same time as the MSA between the leading manufacturer of smokeless tobacco in the United States and the jurisdictions that signed the MSA, plus Minnesota and Mississippi. <https://oag.ca.gov/tobacco/msa>.

⁵⁷ For those tobacco products covered under the MSA and the SMSA, the following advertisements are exempted:

- Advertisements that are 14 square feet or smaller, and are either outside a tobacco retail store but on store property, or on the window of a tobacco retailer store facing outward;
- Advertisement inside a tobacco retail store that are not placed on a window facing outward;
- Advertisements located inside an adult-only facility (where operator ensure that no minors are present);
- Outside Advertisements at the site of the adult-only facility advertising the event with a brand name for the duration of the event and no more than 14 days before the event;
- Billboards advertising a tobacco brand sponsored event at the site of the event for 90 days before the initial sponsored event and 10 days after the last sponsored event; or
- Advertisements outside a tobacco manufacturing facility.

A matrix listing additional advertisement restrictions, at both the federal and state levels, unrelated to the MSA or SMSA that potentially could be applied to certain types of flavored tobacco products, including flavored e-cigarettes is attached to this report as Attachment Two.

VI. Stakeholder Engagement

On July 17, 2019, the City Attorney's Office and Chief Legislative Analyst's Office convened a stakeholder meeting, where it heard from a number of parties. Tobacco industry representatives, JUUL, the Hookah Chamber of Commerce and certain civil rights groups attended the meeting to oppose a citywide ban on the sale of flavors, including hookah and menthol. The American Heart Association, American Lung Association, American Cancer Society, The Campaign for Tobacco Free Kids, several medical doctors and other constituent groups attended the meeting to express their support for a citywide ban on the sale of flavors, including menthol.

After the July 17, 2019 stakeholder meeting, dozens of organizations, coalitions, advocates, and individuals provided the City with additional materials. These materials included formal letters of opposition or support, informational pieces, studies, charts, graphs, images, constituent letters and signatures, slides, and links to additional materials such as Congressional hearings.

VII. Legislative Options

Legislative options initiated by other jurisdictions at the state and local level are listed below by decreasing severity:

- Ban the retail sale of all tobacco products, including flavored tobacco products;
- Ban the retail sale of all flavored tobacco products without exemption;
- Ban the retail sale of all flavored tobacco products, exempting menthol cigarettes and/or hookah;
- Ban the retail sale of all flavored tobacco products except in 21-and-over specially licensed tobacco shops;
- Ban the retail sale of all or some flavored tobacco products near sensitive sites; or
- Reduce tobacco retail location concentration or by overall number.

VIII. City Attorney Recommendation

The health and well-being of an entire generation of our youth will be affected by the City's leadership during this current vaping crisis. We have been here before: The tobacco industry previously used the lure and masking qualities of kid-friendly flavors to

addict youth to combustible tobacco products, resulting in immense human suffering and billions of dollars in medical costs. The Master Settlement Agreement with tobacco manufacturers executed two decades ago eliminated flavored combustible cigarettes resulting in a steady and dramatic decline in smoking rates.

The tobacco manufacturers regrouped. With the introduction of e-cigarettes, which were not covered by the Master Settlement Agreement, flavored products were reintroduced to a new generation of our youth with resulting increase in youth tobacco usage. The current health crisis was a predictable result and so too should be the City's response. The City Attorney's Office recommends nothing short of a Citywide ban on the sale of all flavored tobacco products, without exception, as the best option to protect our current generation of youth and the generations to follow from the negative health consequences associated with use of tobacco products.

IX. Conclusion

This Office will be pleased to draft an ordinance to implement any of the legislative options discussed in this report and transmit that ordinance to the City Council for its consideration and adoption.

If you require any further information or have any questions, please contact the undersigned at (213) 202-5595. She or another member of this Office will be available when you consider this matter to answer any questions you may have.

Sincerely,

MICHAEL N. FEUER, City Attorney

By 

CELINA PORRAS
Deputy City Attorney

VF:CP:ac

ATTACHMENT ONE

Matrix of Local Ordinances Restricting the Sale of Flavored Tobacco Products



MAY 2019

The tobacco industry has a long history of using flavored tobacco to target youth and communities of color. The majority of youth who start experimenting with tobacco begin with flavored tobacco.¹ These products come in a variety of candy-like flavors including bubble gum, grape, menthol and cotton candy and include e-cigarettes, hookah tobacco, cigars, smokeless tobacco, and even flavored accessories such as blunt wraps.

Since 2009, the United States Food and Drug Administration (FDA) has banned flavored cigarettes nationwide. However, this ban included an exemption for menthol flavored cigarettes and doesn't extend to non-cigarette tobacco products. There are currently no state laws in California restricting the sale of flavored tobacco products. It is up to local communities to take action to protect their youth from the lure of enticing flavored tobacco.

The first community to restrict the sale of flavored tobacco in California was Santa Clara County in 2010. Since then, thirty-five communities have passed similar policies.

What products may be included?

1. **E-Cigarettes** – Restricts the sale of flavored electronic cigarettes.
2. **Menthol** – Restricts the sale of tobacco products labelled as menthol, including cigarettes, smokeless tobacco, little cigars, etc.
3. **Little Cigars** – Restricts the sale of flavored little cigars, which are small, usually filtered cigars wrapped in brown paper containing tobacco leaf. Little cigars became a popular alternative following the FDA's ban on flavored cigarettes.
4. **Smokeless Tobacco** – Restricts the sale of flavored smokeless tobacco such as chewing tobacco, dip, snus and snuff.

5. **Components & Accessories** – Restricts the sale of flavored accessory products such as blunt wraps and e-juice additives. These products cannot be smoked alone and serve as a delivery system for smoked products.

6. **Products Marketed as Flavored** – Tobacco companies sometimes try to circumvent flavor restrictions by marketing products as flavored without directly labelling them as such. This policy option allows communities to broaden the definition of flavored tobacco to include these products.

What exemptions are allowed?

1. **Adult-Only Stores Exempted** – Adult-only retailers are limited to customers who are 21 and over. This limits sales of flavored tobacco to stores that youth do not have access to.
2. **Grandfathered Retailers Exempted** – Allows retailers that were in operation prior to a specified date to continue selling flavored tobacco products.
3. **Limited to Youth-Populated Areas** – Retailers are required to be a certain distance away from schools, parks, or other youth-oriented locations. Since many flavored tobacco products target youth, including buffer zones is a way to limit their access to flavored products.

Resources

The Center has additional resources on tobacco retailer licensing ordinances, plug-in policies, and ordinances restricting menthol tobacco available at: <http://center4tobaccopolicy.org/tobacco-policy/tobacco-retail-environment/>. ChangeLab Solutions has model ordinance language available for ordinances restricting flavored tobacco at: <http://changelabsolutions.org>.

City/County Date Passed	Products Included						Exemptions		
	E-Cigs	Menthol	Little Cigars	Smokers	Components & Accessories	Products marketed as flavored	Adult-Only Stores Exempted	Grandfathered Retailers Exempted	Limited to Youth Populated Areas
San Carlos April 2019	X	X	X	X	X	X			
Larkspur April 2019	X	X	X	X	X	X			
Sacramento April 2019	X	X	X	X	X	X			
Albany April 2019	X	X	X	X	X	X			
Corte Madera March 2019	X	X	X	X	X	X			
Hermosa Beach Jan 2019	X	X	X	X	X	X	X		
San Pablo Dec 2018	X	X	X	X	X	X			
Alameda Nov 2018	X	X	X	X	X	X			
Santa Cruz Nov 2018	X	X	X	X	X	X			
Marin County Nov 2018	X	X	X	X	X	X			
Saratoga Oct 2018	X		X	X	X	X			
Half Moon Bay Oct 2018	X	X	X	X	X	X			
Portola Valley Sep 2018	X	X	X	X	X	X			
Beverly Hills August 2018	X	X	X	X	X	X			
Richmond July 2018	X	X	X	X	X	X			
Sausalito July 2018	X	X	X	X	X				
San Mateo County June 2018	X	X	X	X	X	X			
San Francisco June 2018	X	X	X	X	X	X			
Mono County July 2018	X								
Windsor March 2018	X		X**	X	X	X			

City/County Date Passed	Products Included						Exemptions		
	E-Cigs	Menthol	Little Cigars	Smoked	Components & Accessories	Products marketed as flavored	Adult-Only stores Exempted	Grandfathered Retailers Exempted	Limited to Youth Populated Areas ¹
Cloverdale Dec 2017	X		X	X		X			
Fairfax Dec 2017	X		X**	X	X	X			
San Leandro Oct 2017	X		X	X	X	X			
Palo Alto Oct 2017	X	X	X	X	X	X	X		
Oakland Sep 2017	X	X	X	X	X	X	X		
Contra Costa County July 2017	X	X	X	X	X	X			X 1000 ft
Los Gatos May 2017	X	X	X	X	X	X	X		
Novato Jan 2017	X		X**	X	X	X			
Santa Clara County Oct 2016	X	X	X	X	X	X	X		
Yolo County Oct 2016	X	X	X	X	X				
Manhattan Beach Dec 2015	X		X	X	X	X	X		
El Cerrito Oct 2015	X	X*	X	X	X	X			
Berkeley Sep 2015	X	X	X	X	X	X			X 600 ft
Sonoma June 2015	X		X**	X	X	X			
Hayward July 2014	X	X*	X	X	X	X		X	X 500 ft

¹ Ambrose, B.K., et al., Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014. JAMA, 2015; p.1-3.

*Does not include menthol cigarettes

**Exempts packages of at least 5 or more

***Doesn't apply to pipe tobacco

ATTACHMENT TWO

ATTACHMENT TWO

Federal and State Advertising Restrictions Respective to Tobacco Products

Topic	Law	Summary
Storefront Advertising	Cal. Business and Professions Code §§ 25612(c)(7), 25617, 25619 (Lee Law)	No more than 33 percent of the square footage of windows and clear (e.g. glass) doors of an alcohol retailer may have advertisement of any sort, including tobacco.
Blunt Wrap Advertising	Cal. Business and Professions Code §§ 22958(a), 22962 (STAKE Act) Cal. Penal Code 308	No person or business may place advertising for blunt wraps lower than four feet above the floor. No person or business offering blunt wrap for sale may place blunt wrap advertising within two feet of a candy, snack, or nonalcoholic beverage display.
State Building Advertising	Cal. Gov't Code § 19994.35	No advertising for any product containing tobacco shall be allowed in any building owned and occupied by the state.
Video Games	Cal. Penal Code § 308.5	The law prohibits paid commercial advertising for alcohol and tobacco products in video games intended for either private use or use in a public establishment, and intended primarily for use by any person under the age of 18 years. Paid commercial advertising includes, for example, containers or packaging, product brand names, trademarks, or copyrighted slogans.
Samples, Coupons, and Promotional Offers	Cal. Health and Safety Code §118950 Cal. Code of Regulations Title 18, § 4081 Cal. Business and Professions Code § 17534, 17535, 17537.3	Free or nominal cost cigarettes or smokeless tobacco products (or coupons, coupon offers, rebate offers, gift certificates, gift cards, or "other similar offers" for such products) may not be distributed on public grounds or private grounds that are open to the public. Free samples of smokeless tobacco products may not be distributed within a two-block radius of any premises or facility whose primary purpose is directed towards person under the age of 21, including schools, clubhouses, and youth centers, when those premises are being used for their primary purposes. Promotional offers, mail in and telephone

ATTACHMENT TWO

Federal and State Advertising Restrictions Respective to Tobacco Products

		<p>requests for promotional offers must state they are not available to individuals under 21 years of age and must include appropriate efforts to ensure person is at least 21 years of age (asking date of birth).</p> <p>Mailing unsolicited samples of smokeless tobacco as part of an advertising program is prohibited.</p>
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ATTACHMENT TWO

Federal and State Advertising Restrictions Respective to Tobacco Products

Television/Radio Cigarette Advertising	15 USC §§ 1335, 1338, 1339	The law prohibits advertising cigarettes or little cigars (defined by weight) on any medium of electronic communication subject to the jurisdiction of the U.S. Federal Communications Commission (FCC) (such as television and radio). - Law does not apply to regular size cigars.
Television/Radio Smokeless Tobacco Advertising	15 USC §§ 4402, 404, 4405	The law prohibits advertising smokeless tobacco on any medium of electronic communication subject to the jurisdiction of the FCC (such as television and radio).
Federal Laws on Misleading Consumers, Content Disclosures to Public and Permissible Forms of Advertisement		
Ban on Misleading Consumers about FDA endorsements	21 USC § 331(tt), 333, 372 (Tobacco Control Act)	Illegal to make any express or implied statement to consumers in tobacco product labeling or through the media that would mislead consumers to believing that a tobacco product is: 1) Approved by the FDA; 2) Endorsed by FDA; 3) Deemed safe by the FDA; or 4) Less harmful due to FDA regulation.
Content Disclosures to the Public	21 USC § 387d, 387n (Tobacco Control Act) 15 USC §§ 1333, 1336, 1338, 1339	U.S. Dept. of Health and Human Services (HHS) will determine whether tar or nicotine yields of cigarette and tobacco products must be disclosed on all product packages and advertisements.
Permissible Forms of Labeling and Advertising	21 USC § 333, 372, 387a-l, 387f(d) (Tobacco Control Act) 21 Code of Federal Regulation Section 1140.30(a)	Manufacturer, distributor or retailer must notify FDA 30 days prior to advertising cigarettes or smokeless tobacco in a medium other than the following: 1) Periodicals or other publications; 2) Billboards; 3) Posters and placards; or 4) Promotional Materials (direct mail, POS materials). Notice must disclose exposure to those under the age of 18.