

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

14 Section 1. The Health Code is hereby amended by adding Article 19Q, entitled  
15 “Prohibiting the Sale of Flavored Tobacco Products,” consisting of Sections 19Q.1 through  
16 19Q.8, to read as follows:

17

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

19

20 **SEC. 19Q.1. FINDINGS.**

21 *(a) Tobacco use remains the leading cause of preventable death in the United States, killing*  
22 *more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart*  
23 *disease and respiratory diseases, among other health disorders. Tobacco use remains a public health*  
24 *crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it*  
25 *imposes on society, and the burdens it places on our health care system. The financial cost of tobacco*  
*use in San Francisco alone amounts to \$380 million per year in direct health care expenses and lost*  
*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 or aroma or both, other than the taste  
22 or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco  
23 Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit,  
24 chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb,  
25 or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because

1 of the use of additives or flavorings or the provision of ingredient information. Rather, it is the  
2 presence of a Distinguishable taste or aroma or both, as described in the first sentence of this  
3 definition, that 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 19Q.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) There shall be a rebuttable presumption that a Tobacco Product, other than a**  
2 **Cigarette, is presumed to be a Flavored Tobacco Product if a Manufacturer or any of the**  
3 **Manufacturer's agents or employees, in the course of their 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, color,**  
6 **and/or images on the product's Labeling or Packaging that are used to explicitly or implicitly**  
7 **communicate that the Tobacco Product has a Characterizing Flavor;** ~~or~~

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

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

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

14           **(b) There shall be a rebuttable presumption that a Cigarette is presumed to be a**  
15 **Flavored Cigarette if a Manufacturer or any of the Manufacturer's agents or employees, in the course**  
16 **of their agency or employment, has:**

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

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

1                   **SEC. 19Q.5. ADMINISTRATIVE REGULATIONS.**

2                   The Director may adopt rules, regulations, or guidelines for the implementation and  
3 enforcement of this Article 19Q.

4  
5                   **SEC. 19Q.6. ENFORCEMENT.**

6                   The Director, or his or her designee, may enforce Sections 19Q.3 and 19Q.4 pursuant to  
7 Articles 19 et seq. of the Health Code, including but not limited to Article 19H.

8  
9                   **SEC 19Q.7. NO CONFLICT WITH FEDERAL OR STATE LAW.**

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

12  
13                  **SEC. 19Q.8. SEVERABILITY.**

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

21  
22                  Section 2. The Health Code is hereby amended by adding Section 19H.14-2, to read  
23 as follows:

1            **SEC. 19H.14-2. CONDUCT VIOLATING HEALTH CODE ARTICLE 19Q (PROHIBITING**  
2 **THE SALE OF FLAVORED TOBACCO PRODUCTS).**

3            (a) 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 19Q.3 (Sale or Distribution of Flavored  
5 Tobacco Products Prohibited), the Director may suspend a Tobacco Sales permit as set forth in Section  
6 19H.19.

7            (b) Upon a decision by the Director that the Permittee or the Permittee’s agent or employee  
8 has engaged in any conduct that violates Health Code Section 19Q.4 (Sale or Distribution of Flavored  
9 Cigarettes Prohibited), the Director may suspend a Tobacco Sales permit as set forth in Section  
10 19H.19.

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

14 //  
15 //  
16 //  
17 //  
18 //  
19 //  
20 //  
21 //  
22 //  
23 //  
24 //  
25 //

1 Section 3. Effective and Operative Dates.

2 (a) This ordinance shall become effective 30 days after enactment. Enactment  
3 occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or  
4 does not sign the ordinance within ten days of receiving it, or the Board of Supervisors  
5 overrides the Mayor’s veto of the ordinance.

6 (b) This ordinance shall become operative on ~~January~~April 1, 2018.

7  
8  
9 APPROVED AS TO FORM:  
10 DENNIS J. HERRERA, City Attorney

11 By: \_\_\_\_\_  
12 Anne Pearson  
Deputy City Attorney

13 n:\legana\as2017\1700412\01200817.docx