

ORDINANCE NO. .

BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA

* * * * *

AN ORDINANCE ADDING A NEW CHAPTER 4.95 TO TITLE 4 OF THE SAN MATEO COUNTY ORDINANCE CODE TO PROHIBIT THE SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES

The Board of Supervisors of the County of San Mateo, State of California, **ORDAINS** as follows:

SECTION 1. Findings.

The Board of Supervisors finds and determines that:

- (a) Electronic smoking device (or “e-cigarette, vape, vape pen, e-hookah, etc.”) usage by youth has been rising. Usage by high school students increased 78% between 2017-2018 with 1 in 5 high school students currently using and 1 in 20 middle school students currently using the products.¹ The devices were available in the U.S. marketplace in the mid-2000s² and, by 2014, the products were the most commonly used tobacco product among middle and high school students.³
- (b) According to the Centers for Disease Control and Prevention (“CDC”), the number of middle and high school students who reported being current users of tobacco products increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is directly attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28 percent in 2018 among current high school e-cigarette users.
- (c) In 2016, it was estimated that 20.5 million (4 in 5) middle and high school students in the U.S. were exposed to advertisements for e-cigarettes from

¹ Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018. MMWR Morb Mortal Wkly Rep 2018;67:1276-1277. DOI: <http://dx.doi.org/10.15585/mmwr.mm6745a5>

² US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016.

https://ecigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

³ Arrazola RA, Singh T, Corey CG, et al. Tobacco use among middle and high school students—United States, 2011–2014. MMWR Morb Mortal Wkly Rep 2015;64:381–5. PubMedexternal icon

at least one source. This was a significant increase compared to 2014 and 2015 data. Furthermore, almost 17.7 million (7 in 10) youths were exposed to advertisements for e-cigarettes in retail stores in 2016, while about 2 in 5 had exposure on the Internet or on television, and almost 1 in 4 had exposure through magazines and newspapers. E-cigarette advertising has an association with e-cigarette use among youths. The advertising themes and strategies used are similar to traditional cigarette advertising tactics that have been found to appeal to youths.⁴

- (d) The 2018 Monitoring the Future Survey found that over 60% of 10th grade students said it was easy to get vaping devices and e-liquids.⁵ The 2018 National Youth Tobacco Survey discovered that almost 15% of middle and high school e-cigarette users (younger than 18) reported that they got the devices from a vape shop in the past month, 8.4% from a gas station or convenience store, and 6.5% from the Internet.⁶
- (e) U.S. Surgeon General Vivek H. Murthy, M.D., M.B.A. stated that “Most e-cigarettes contain nicotine, which can cause addiction and can harm the developing adolescent brain. Compared with older adults, the brain of youth and young adults is more vulnerable to the negative consequences of nicotine exposure. The effects include addiction, priming for use of other addictive substances, reduced impulse control, deficits in attention and cognition, and mood disorders.”⁷
- (f) A 2018 National Academy of Sciences, Engineering, and Medicine report found moderate evidence that e-cigarette use increases the frequency and intensity of smoking cigarettes in the future.⁸ According to a report by the Surgeon General, any use of e-cigarettes among young people is not safe, even if the young people do not move on to future cigarette smoking.⁹
- (g) According to the American Heart Association, research has found health risks associated with using electronic smoking devices. One study found that both e-cigarettes and traditional cigarettes are independently

⁴ Marynak K, Gentzke A, Wang TW, Neff L, King BA. Exposure to Electronic Cigarette Advertising Among Middle and High School Students – United States, 2014–2016. *MMWR Morb Mortal Wkly Rep* 2018;67:294–299. DOI: <http://dx.doi.org/10.15585/mmwr.mm6710a3>

⁵ University of Michigan, 2018 Monitoring the Future Study, Trends in Availability – Tables 15–17. See <http://monitoringthefuture.org/data/18data/18drtb115.pdf> and <http://monitoringthefuture.org/data/18data/18drtb116.pdf>.

⁶ FDA, “Modifications to Compliance Policy for Certain Deemed Products: Guidance for Industry, Draft Guidance,” March 13, 2019, <https://www.fda.gov/media/121384/download>

⁷ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

⁸ Moritz, T. (2019, March 18). Vaping: It’s All Smoke and Mirrors. Retrieved from <https://www.lung.org/about-us/blog/2019/03/vaping-smoke-and-mirrors.html>

⁹ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

associated with increased risk of heart attack.¹⁰ The American Lung Association has reported that there is risk for irreversible lung damage and disease as a result of vaping.¹¹

- (h) The County of San Mateo (the “County”) issues permits to tobacco retailers. (Chapter 4.98). In 2018, in order to reduce flavored tobacco product availability, the County adopted Ordinance No. 04799, prohibiting the sale of flavored tobacco products and pharmacy sales of all tobacco products.
- (i) In spite of these efforts, San Mateo County youth still have access to tobacco products and are using the products. According to the 2018 California Student Tobacco Survey, for Region 20 (San Francisco, San Mateo counties), the current e-cigarette use prevalence among high school students in 2017-2018 was 20.8%. This prevalence is much higher than the state-wide prevalence of 10.9%.¹²
- (j) In June 2009, the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) was signed into law to give the U.S. Food & Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products. The Tobacco Control Act was enacted in order to protect the public and create a healthier future for all Americans.¹³
- (k) A central requirement of the Tobacco Control Act is premarket review of all new tobacco products. Specifically, every “new tobacco product”—defined to include any tobacco product not on the market in the United States as of February 15, 2007—must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket tobacco application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements.
- (l) In determining whether the marketing of a tobacco product is appropriate for the protection of the public health, the FDA must consider the risks and benefits of the product to the population as a whole, including users and nonusers of the product, and taking into account the increased or decreased likelihood that existing users of tobacco products will stop using tobacco products and the increased or decreased likelihood that those who do not use tobacco products will start using them. Where there is a lack of

¹⁰ 5 Jun 2019 <https://doi.org/10.1161/JAHA.119.012317> Journal of the American Heart Association. 2019;8:e012317

¹¹ Moritz, T. (2019, March 18). Vaping: It’s All Smoke and Mirrors. Retrieved from <https://www.lung.org/about-us/blog/2019/03/vaping-smoke-and-mirrors.html>

¹² Zhu S-H, Zhuang YL, Braden K, Cole A, Gamst A, Wolfson T, Lee J, Ruiz CG, Cummins SE (2019). Results of the Statewide 2017-18 California Student Tobacco Survey. San Diego, California: Center for Research and Intervention in Tobacco Control (CRITC), University of California, San Diego.

¹³ FDA. (2018, January 17). Family Smoking Prevention and Tobacco Control Act – An Overview. Retrieved from <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview>

showing that permitting the sale of a tobacco product would be appropriate for the protection of the public health, the Tobacco Control Act requires that the FDA deny an application for premarket review.

- (m) Virtually all electronic cigarettes that are sold today entered the market after 2007, but have not been reviewed by the FDA to determine if they are appropriate for the public health. In 2017, the FDA issued Guidance that purports to give electronic cigarette manufacturers until August 8, 2022 to submit their application for premarket review. The Guidance further purports to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health. In 2019, the FDA issued draft guidance in which it considered moving the premarket application deadline up by one year for certain flavored e-cigarette products.¹⁴ In July of 2019, a U.S. District Court issued an order requiring manufacturers to submit a premarket review application by May 12, 2020 for deemed tobacco products, which includes e-cigarettes, that were on the market as of August 8, 2016. However, that order has been appealed and a stay requested. Thus, the deadlines for applications for premarket review, and timelines for any premarket review orders, are in flux and uncertain.
- (n) By the time e-cigarette manufacturers will be required to submit their premarket review applications, e-cigarettes will have been on the market for approximately fifteen years without any FDA analysis of their safety and alleged benefit. If current trends continue, six million more youth in the United States will begin using e-cigarettes between now and then. Until such time as the FDA fulfills its statutory duty to conduct premarket reviews of new tobacco products, a generation of young people will become addicted to tobacco, resulting in an entirely preventable increase in the burdens and tragedies associated with tobacco use. The County of San Mateo is not content to continue to wait before addressing, for its residents, what appears from the evidence to be a major public health crisis that is going unattended by federal or state regulation.

SECTION 2. New Chapter 4.95 Added.

A new Chapter 4.95 is added to the San Mateo County Ordinance Code, to be numbered and entitled and to read as follows:

¹⁴ FDA. (2019, June). Premarket Tobacco Product Applications for Electronic Nicotine Delivery Systems – Guidance for Industry. Retrieved from <https://www.fda.gov/media/127853/download>

Chapter 4.95. Sale or Distribution of Electronic Cigarettes.

4.95.010. Application of Chapter.

The provisions of this Chapter shall apply within the unincorporated area of San Mateo County, except that this ordinance shall not apply to the duty –free retail stores at San Francisco International Airport.

4.95. 020. Definitions.

For the purposes of this Chapter, the following definitions shall govern unless the context clearly requires otherwise:

- (a) “Distribute” or “Distribution” means the transfer .by any Person other than a common carrier, at any point from the place of manufacture or thereafter to a Person who sells the electronic cigarette or other electronic smoking device.
- (b) “Electronic Cigarette” has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.
- (c) “New Tobacco Product” has the meaning set forth in 21 U.S.C. section 387j (a)(1), as may be amended from time to time.
- (d) “Person” means any individual, partnership, cooperative association, private corporation, or any other legal entity.
- (e) “Tobacco Retailer” means any store, stand, booth, concession or other enterprise that engages in the retail sale or exchange of tobacco products (as defined in subsection (h) of section 4.96.030 of this Code), electronic cigarettes, or electronic smoking devices.
- (f) “Sell”, “Sale” or “to Sell” mean any transaction where, for any consideration, ownership is transferred from one Person or entity to another including, but not limited to any transfer of title or possession for consideration, exchange or barter, in any manner or by any means.

4.95.030. Sale or Distribution of Electronic Cigarettes Prohibited.

No Person, Tobacco Retailer or other legal entity shall sell or distribute any Electronic Cigarette to a Person in unincorporated San Mateo County unless the Electronic Cigarette:

- (a) is a New Tobacco Product which requires premarket review under 21 U.S.C. section 387j, as may be amended from time to time;

(b) is covered by a premarket review and approval order under 21 U.S.C. section 387j (c)(1)(A)(i), as may be amended from time to time, and;

(c) is not a Flavored Tobacco Product prohibited by Chapter 4.99 of this Code.

4.95.040 Enforcement.

(a) The Health System Chief, or his or her designee, may enforce this Chapter by suspension of a tobacco retailer's permit and/or imposition of administrative fines following the procedures and amounts set forth in Sections 4.98.150 and 4.98.160 of Chapter 4.98 of this Ordinance Code.

(b) Violations of this Chapter may be criminally prosecuted as infraction(s) or misdemeanor(s) at the discretion of the prosecuting attorney as the interests of justice require.

(c) This section shall not be interpreted to limit the applicable civil or administrative remedies available under law.

(d) The Health System Chief may adopt administrative rules, regulations, or guidelines for the implementation and enforcement of this Chapter.

4.95.050 – Public Nuisance.

Any violation of this ordinance is hereby declared a public nuisance.

SECTION 3. No Conflict With State or Federal Law.

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

SECTION 4. Severability.

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

SECTION 5. Effective and Operative Dates.

This ordinance shall become effective 30 days after enactment, and shall become operative and enforceable six months after the effective date.

* * * * *