



City of Culver City

Staff Report

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Item #: A-1.

CC - (1) Discussion of the Regulation of Electronic Smoking Devices (E-Cigarettes) and Flavored/Menthol Tobacco Products; and (2) Direction to the City Manager as Deemed Appropriate.

Meeting Date: May 28, 2019

Contact Person/Dept: Heather Baker/Assistant City Attorney
Phone Number: (310) 253-5660

Fiscal Impact: Yes No

General Fund: Yes No

Public Hearing: **Action Item:** **Attachments:**

Commission Action Required: Yes No **Date:**

Public Notification: (E-Mail) Meetings and Agendas - City Council; Notify Me - Culver City News and Events; Stay Informed - Smoking (05/09/19, 05/20/19 and 05/22/19); (Mail) Culver City Tobacco Retailer Licensees (05/09/19); and (Publication) Culver City News (05/16/19)

Department Approval: Carol Schwab (05/22/19)

RECOMMENDATION

Staff recommends the City Council (1) discuss the regulation of electronic smoking devices (E-Cigarettes) and Flavored/Menthol Tobacco Products; and (2) provide direction to the City Manager as deemed appropriate.

BACKGROUND

The following is a chronology of the City Council's prior discussion of E-Cigarettes:

- **August 11, 2014:** City Council discussed the regulation of E-Cigarettes and specifically whether to (1) require tobacco retailers to obtain a tobacco retailer license for the sale of E-Cigarettes; and (2) prohibit the use of E-Cigarettes in all places (or certain places) where smoking is already prohibited. At that time, the City Council determined there was a need for additional information regarding the impacts of E-Cigarettes, encouraged advocates to continue to send material, and acknowledged that the issue could be revisited at a later date.

- **August 10, 2015:** City Council amended Chapter 11.15, Tobacco Retailer Licensing, of the Culver City Municipal Code (CCMC) to amend the definitions of “tobacco paraphernalia” and “tobacco product” to specifically include electronic smoking devices and electronic smoking device paraphernalia, as it was unclear from the previous definitions as to whether these were subject to a tobacco retailer license. This amendment to CCMC Chapter 11.15 also added new definitions for “electronic smoking device” and “electronic smoking device paraphernalia.” The purpose of the amendment was to make it clear that (1) a retailer engaged in the sale of E-Cigarettes must obtain a tobacco retailer license; and (2) the sale of E-Cigarettes to minors is unlawful.
- **January 14, 2019:** Vice Mayor (then Council Member) Eriksson requested support to agendaize a general discussion of E-Cigarettes. Mayor (then Vice Mayor) Sahli-Wells mentioned she had been in discussions with the Los Angeles County Department of Public Health (LADPH) and USC professors regarding a potential ban of flavored E-Cigarettes and requested that a discussion of such a ban be incorporated into the requested agenda item. The City Council supported this request and directed the City Manager to bring this item to a future City Council meeting for discussion.

The issues of (1) regulating the smoking of E-Cigarettes (usage) and (2) regulating tobacco flavored/menthol products (retail) are distinct issues, which require amendments to different Sections of the Culver City Municipal Code. As such, staff recommends the City Council discuss, and provide direction on, each of these issues separately.

DISCUSSION

E-CIGARETTE REGULATION

Health Impacts

At the time of the City Council’s discussion in 2014 staff was unable to provide the City Council with definitive answers relating to the health impacts of E-Cigarette usage, as the scientific information was limited. Since that time, a substantial amount of new information has been released from public agencies and the scientific community.

California Department of Public Health (CDPH)

In 2015, CDPH issued a Health Advisory, *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals* (Attachment 1), discussing health risks posed by the use of E-Cigarettes which include, but are not limited to (for more detailed information see Attachment 1):

- Heated e-liquid (used in E-Cigarettes) forms an aerosol, which is absorbed through the blood stream and delivered directly to the brain and all body organs.
- In addition to nicotine, e-liquids contain other toxic chemicals known to cause cancer, birth defects and other reproductive harm.
- E-Cigarette emissions are also a health concern for those exposed to secondhand aerosol

(exposure to secondhand aerosol results in nicotine absorption at levels comparable to secondhand smoke).

- Using a nicotine-containing E-Cigarette for five minutes causes similar lung irritation, inflammation and effect on blood vessels as smoking a traditional cigarette, which may increase the risk of a heart attack.
- Exposure to and use of nicotine products by adolescents is of particular concern because it is a critical period for brain growth and development.

CDPH's *State Health Officer's Report on E-Cigarettes: A Community Health Threat* (2015) also provides additional information regarding health risks (Attachment 2).

The National Academies of Sciences, Engineering, and Medicine (NASEM)

In 2018, NASEM issued a report *Public Health Consequences of E-Cigarettes* with the following findings¹:

- There is conclusive evidence that:
 - E-Cigarette use increases airborne concentrations of particulate matter and nicotine in indoor environments compared with background levels.
 - Except for nicotine, under typical conditions of use, exposure to potentially toxic substances from e-cigarettes is significantly lower compared with combustible tobacco cigarettes.
 - Exposure to nicotine from e-cigarettes is highly variable and depends on product characteristics (including device and e-liquid characteristics) and how the device is operated.
 - In addition to nicotine, most e-cigarette products contain and emit numerous potentially toxic substances.
 - Other than nicotine, the number, quantity, and characteristics of potentially toxic substances emitted from e-cigarettes are highly variable and depend on product characteristics (including device and e-liquid characteristics) and how the device is operated.
 - E-cigarette devices can explode and cause burns and projectile injuries. Such risk is significantly increased when batteries are of poor quality, stored improperly, or modified by users.
 - Intentional or accidental exposure to e-liquids (from drinking, eye contact, or dermal contact) can result in adverse health effects including but not limited to seizures, anoxic brain injury, vomiting, and lactic acidosis.
- There is substantial evidence that:
 - Nicotine intake from e-cigarette devices among experienced adult e-cigarette users can be comparable to that from combustible tobacco cigarettes.
 - E-Cigarette use increases risk of using combustible tobacco cigarettes among youth and young adults.
 - E-Cigarette aerosols can induce acute endothelial cell dysfunction, although the long-term consequences and outcomes with long-term exposure to e-cigarette aerosol are uncertain.

- E-Cigarette use results in symptoms of dependence on e-cigarettes.
- Some chemicals present in e-cigarette aerosols (e.g., formaldehyde, acrolein) are capable of causing DNA damage and mutagenesis.
- Heart rate increases shortly after nicotine intake from E-Cigarettes.

Notwithstanding the available information on the health risks of E-Cigarettes, there remains a claim they are an effective tool for smokers to quit smoking cigarettes (similar to the nicotine patch or gum). Some of the recent research has concluded E-Cigarettes are not effective smoking cessation devices, and has found that, among smokers, those using E-Cigarettes are less likely to quit smoking than persons who do not use E-Cigarettes.²

Current Law

City Regulations: Existing Culver City law does not regulate the use of E-Cigarettes; however, CCMC Chapter 11.15 requires a retailer selling E-Cigarettes to have a tobacco retailer license and prohibits the sale of E-Cigarettes to minors. The use of E-Cigarettes currently is not prohibited in areas where smoking is prohibited. Smoking is prohibited in the following areas within the City:

- City parks and recreational areas;
- Outdoor dining areas;
- Multi-unit housing; and
- Other areas where smoking is prohibited by state or federal law.

Federal and State Law: The following is an up-to-date summary of existing federal and state laws and policies that pertain to the regulation and use of E-Cigarettes:

- State law prohibits the sale (or otherwise furnishing of) E-Cigarettes to persons under 21 years of age.
- State law prohibits the use of E-Cigarettes in places where smoking is prohibited under state law (e.g. workplace).
- Federal law, which prohibits smoking on airplanes, has been interpreted to apply to E-Cigarettes.
- Certain branches of the military have policies that their existing regulations governing tobacco use apply to E-Cigarettes.
- The 2009 Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), which regulates the manufacturing and marketing of tobacco products, does not apply to E-Cigarettes.
- The U.S. Food and Drug Administration (FDA) has not approved E-Cigarettes for smoking cessation.

Cities within Los Angeles County

The following cities within Los Angeles County prohibit the use of E-Cigarettes in certain places:

1. Parks: A total of 42 Los Angeles County cities have adopted ordinances that prohibit E-Cigarettes in parks, including, but not limited to, the cities of:

- Beverly Hills
- Hermosa Beach
- Lawndale
- Long Beach
- Los Angeles
- Manhattan Beach
- Palos Verdes Estates
- Santa Monica
- Torrance

2. Outdoor Dining Areas: A total of 20 Los Angeles County cities have adopted ordinances that prohibit E-Cigarettes in outdoor dining areas, including, but not limited to, the cities of:

- Beverly Hills
- Hermosa Beach
- Long Beach
- Los Angeles
- Manhattan Beach
- Santa Monica

3. Multi-Unit Housing: A total of 12 Los Angeles County cities have adopted ordinances that prohibit E-Cigarettes in one or more areas of multi-unit housing, including, but not limited to, the cities of:

- Beverly Hills
- Manhattan Beach
- Santa Monica

For a complete list of cities see LADPH's matrix (Attachment 3).

Policy Options and Direction

If the City Council desires to prohibit the use of E-Cigarettes in places where smoking is prohibited, staff requests the City Council provide policy direction as to which of the following locations would be included:

1. All places where smoking is prohibited;
2. Parks and recreational areas;
3. Outdoor dining areas;
4. Multi-unit housing, and which areas (e.g. common areas, units, etc.); and
5. Other areas where smoking is prohibited by state and federal law.

Enforcement

Should the City Council wish to move forward with the consideration of an ordinance to prohibit the use of E-Cigarettes in certain areas, enforcement would be handled in the same manner as traditional smoking violations. Currently smoking violations are handled on a complaint basis and the Police Department incorporates educating the public on the law when responding. With regard to multi-unit housing, the City currently does not enforce smoking violations, but has provided residents

and others with a private right of action to enforce the City's regulations.

RESTRICTIONS ON FLAVORED/MENTHOL TOBACCO PRODUCTS

Health Impacts

For information regarding the health impacts of E-Cigarettes, please refer to (1) the discussion in the E-Cigarettes Section of this report above; (2) The December 2018 *Surgeon General's Advisory on E-Cigarette Use Among Youth* (Attachment 4); and the discussion regarding flavored and menthol tobacco products below.

Current Law

In 2009, the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") gave the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products. The legislation also prohibited cigarettes that contain artificial or natural flavors (except tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product ("characterizing flavor") to minimize the attractiveness of tobacco products to minors.

The Tobacco Control Act also established the Tobacco Products Scientific Advisory Committee (TPSAC), which was charged with developing a report assessing the impact of the use of menthol in cigarettes on public health and proposing recommendations to the FDA on whether menthol should be banned or not. The TPSAC report and recommendations were submitted to the FDA on March 18, 2011 and the report found that the availability of menthol cigarettes has an adverse impact on public health in the United States and recommended removal of menthol cigarettes from the marketplace.

Notwithstanding the TPSAC report, the FDA has not banned menthol products nor flavored *non-cigarette* tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco and electronic smoking devices and the nicotine solutions used in these devices. Currently California law also does not restrict the sales of these products; however, there is pending legislation in this regard, as discussed further below.

Pending Legislation

Senate Bill 38 (SB 38): This bill, which is currently pending in the California Senate Appropriations Committee, would, among other things:

- Prohibit a tobacco retailer, or any of the tobacco retailer's agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale a flavored tobacco product.
- Deem a tobacco product as a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of his or her agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a "characterizing flavor," as defined, including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

- Excludes tobacco products designed for non-electronic hookah from the meaning of flavored tobacco products.
- Defines “characterizing flavor” as any distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any by product produced by the tobacco product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. Prohibits a tobacco product from being determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.

FDA Actions:³ The FDA has issued several statements over the past couple of years focusing on youth access to tobacco products. Specifically, the FDA is concerned about youth access electronic smoking devices (ESDs), as the youth use rate has reached epidemic status. In various statements, the FDA commissioner signaled that most flavored tobacco products would be banned from retail locations. However, in March 2019, the FDA commissioner issued a statement announcing that manufacturers and retailers were being put on notice that they could be subject to FDA enforcement for selling certain flavored ESD products without authorization. The FDA announced it would prioritize enforcement to focus on protecting youth from becoming addicted to nicotine, which includes the retail sale of ESDs that are offered in ways that pose a greater risk for minors’ access to the products, such as retail and online sales without heightened age verification, and products that appeal to kids or that resemble non-ESD products like USB devices.

In September 2018, the FDA commissioner issued a statement stating that the FDA would not tolerate a whole generation of young people becoming addicted to nicotine as a tradeoff for enabling adults to have unfettered access to the same products. As a result, the FDA initiated a Youth Tobacco Prevention Plan that focuses on preventing youth access to tobacco products, curbing the marketing of tobacco products aimed at youth, and educating teens about the dangers of using any tobacco products. In the September 2018 statement, the FDA announced issuing 12 warning letters to companies that continued to advertise and sell products to youth. Earlier the same year the FDA had also issued 56 warning letters and six civil monetary penalties to retailers as part of its enforcement action to limit access of tobacco products to youth. The FDA also sent letters to five ESD manufacturers whose products were sold to kids during the FDA’s ramped up enforcement period. The five ESD manufacturers collectively represent more than 97% of the current market for ESDs. The FDA requested that these companies provide robust plans on how they will address the widespread use of their products by minors or face increased enforcement.

Flavored Tobacco Products

In addition to the FDA’s warnings about flavored tobacco products, the U.S. Surgeon General has also opined that flavored tobacco products are considered to be starter products that help establish smoking habits that can lead to long-term addiction; flavors, including menthol, make it harder for users to quit; and smokers starting at a young age are more likely to develop a severe nicotine addiction.

The CDPH has also published informational bulletins *The Truth About Flavored Tobacco* and *Flavored Tobacco Products Fact Sheet* (collectively, Attachment 5), which discuss many of the issues relating to the use of flavors in E-Cigarettes, including:

- Sweet flavors (e.g. watermelon, cherry, chocolate, mint and gummy bear) appeal to kids and teens.
- Flavorings mask the harsh taste of tobacco, making it easier for youth to initiate tobacco use.
- Current marketing of flavored tobacco products is targeted at youth:
 - Products similar to popular candy brands, such as Jolly Rancher, Kool-Aid and Life Savers; and
 - Colorful packaging and smaller, low costs packages available for purchase.
- Serious health risks from nicotine and flavored e-liquids.
- Flavoring chemicals E-Cigarettes have been linked to severe respiratory disease.

Menthol Tobacco Products

As discussed above, although the FDA banned flavors in cigarettes, it excluded menthol flavoring from such ban. As with other flavors, menthol appeals to young and beginning smokers and makes it harder to quit smoking, according to the CDPH's information bulletin *The Truth About Menthol Cigarettes* (Attachment 6). CDPH has also found menthol is easier to inhale and allows smokers to inhale more deeply, which causes harmful particles to settle deeper inside the lungs.

According to CDPH and the scientific community, in addition to the impacts of menthol products on the youth population, there appears to be a disproportionate marketing of menthol flavors to, and use by, minority groups, including African Americans and LGB communities:⁴

- Among adult smokers in California, 18% of white cigarette smokers smoke menthol cigarettes, whereas 70% of African American cigarette smokers use menthol. Additionally, almost 50% of LGB smokers use menthol cigarettes compared to 28% of straight smokers.
- Among Hispanic/Latino current adult smokers in the US, 46% smoke menthol cigarettes.
- Among Hispanic/Latino young adult current smokers (aged 18-25) in the US from 2008 to 2010, 47.3% smoked menthol cigarettes.
- Between 2008-2010 and 2012-2014, the largest increase in menthol cigarette use among race/ethnic groups was in found in Hispanic smokers (rising 9.8%).
- Studies have shown negative associations among menthol cigarette use and successful cessation in Hispanic communities.

Please also see Attachment 6 for further discussion of menthol products.

National and Local Data on E-Cigarette Use Among Youth

National Data:

- According to data from the Centers for Disease Control and Prevention (CDC), in 2011 less than 2% of high school students (220,000) reported using E-Cigarettes. In 2018, three million (3,000,000) high school students reported being current users, a rise of 78% from the previous year. Also in 2018, about 5% of middle school students (570,000) reported using E-Cigarettes, a rise of 48% from the prior year.⁵
- 80% of young people who have ever used tobacco started with a flavored product.⁶

Local Data:⁷

- Data from the California Healthy Kids survey found that 14% of 11th graders at Culver City High School reported current E-Cigarette use. Reports from teachers at the middle school cite a growing number of middle schoolers using E-Cigarettes.
- Data from the survey of Culver City students found that almost 70% of 9th and 11th graders thought that E-Cigarettes were easy to obtain, and approximately 1 out of 4 thought that E-Cigarettes posed little health risk.

Policy Options

In considering whether to restrict the sale of flavored and/or menthol tobacco products, the City Council has several options:

1. Complete Prohibition: This option would encompass a complete ban of all “characterizing flavors,” with no exemptions for menthol products, and is considered the “gold standard” by public health agencies (including CDPH, and LADPH). Approximately 23 cities and counties in California have opted to completely prohibit all flavored and menthol tobacco products including, but not limited to:

- Alameda
- Berkeley*
- Beverly Hills
- Contra Costa County
- Marin County
- San Francisco
- San Mateo County
- West Hollywood**
- Yolo County

* ban is not city-wide, but within 600 feet of a school (public and private K-12 with at least 25 students enrolled)

** ban is not city-wide, but within 600 feet of a youth-populated area (school, youth center, child-care facility, etc.)

2. Exemption for Menthol: This partial ban would prohibit the sale of all flavored tobacco products, with the exception of menthol. Public health agencies do not consider such an exemption to be a best practice. Approximately 10 cities and have opted for a menthol exception in their regulations including, the City of Manhattan Beach.
3. Permissible in Adults-Only Establishments: Another option is to prohibit the sale of all flavored and menthol tobacco products by tobacco retailers within the City, with the exception of adults-only establishments. This too is not considered to be a best practice by public health agencies. Some cities have paired this exemption with an exemption for menthol products. Cities and counties that have opted to allow adults-only establishments to continue to sell flavored/menthol tobacco products, while banning them elsewhere include:

- Hermosa Beach*
- Los Gatos
- Manhattan Beach**
- Oakland
- Palo Alto

* On May 14, 2019, Hermosa Beach City Council introduced an ordinance to delete the exemption for adults-only establishments.

** Manhattan Beach also has an exemption for menthol tobacco products.

For a complete list of cities, please see the American Lung Association matrix (Attachment 7).

Policy Direction

If the City Council desires to move forward with regulating flavored and/or menthol flavored tobacco products, staff requests the City Council provide direction on the following:

1. Should the regulations include a ban on flavored tobacco products?
 - A. Cigarettes only
 - B. Both cigarettes and non-cigarette products
2. Should the regulations include a ban on menthol tobacco products?
 - A. Cigarettes only
 - B. Both cigarettes and non-cigarette products
3. Should the ban be city-wide, or limited to certain areas? If limited, which areas should the ban cover?
 - A. City-wide, except adults-only establishments
 - B. Prohibited only within a certain distance of a school
 - C. Prohibited only within a certain distance of a youth populated area (this includes schools)
 - D. Other

Note: Prohibitions within limited areas may be difficult and time consuming to enforce.

Once policy direction is received, staff will return to a future City Council meeting with a proposed ordinance amending CCMC Chapter 11.15.

Enforcement

CCMC Section 11.15.040 (Compliance Monitoring and Enforcement), provides the following:

Compliance with the provisions of this Chapter shall be monitored by the Finance Department, Police Department and/or Enforcement Services Division, including any authorized designee of such departments and division, and/or by any other person or persons so designated by the City Manager.

Currently, due to limited resources, enforcement of the tobacco retailer licensees is handled on a complaint basis. If the City receives a complaint that tobacco products are being sold by a retailer that does not have a valid tobacco retailer license, the Finance Department will contact the retailer and require they apply for a Permit. Similarly, if the City receives a complaint that a tobacco retailer is selling to minors, the Police Department will get involved and issue a citation if warranted. As of this date, the City has not received any complaints of tobacco retailers operating in violation of the City's regulations.

Enforcement of restrictions on the sale of flavored and/or menthol tobacco products would be folded into enforcement of the current regulations pertaining to tobacco retailer licensees. If the City Council provides direction to return with an ordinance restricting the sale of flavored and/or menthol tobacco products, City staff would work with the Finance and Police Departments to re-evaluate the tobacco retailer license fee and request City Council consider a related fee increase, if warranted, to cover the cost of any additional enforcement required.

FISCAL ANALYSIS

There is no fiscal impact to the discussion of this item. Should the City Council provide policy direction as to potential regulations, the fiscal impact of such regulations will be included when the item returns to City Council for consideration.

ATTACHMENTS

1. 2015 CDPH Health Advisory, *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals*
2. 2015 State Health Officer's Report on *E-Cigarettes: A Community Health Threat*
3. Los Angeles cities matrix regarding E-Cigarettes usage regulations
4. 2018 Surgeon General's Advisory on *E-Cigarette Use Among Youth*
5. CDPH Bulletins, *The Truth About Flavored Tobacco and Flavored Tobacco Products Fact Sheet*
6. CDPH Bulletin, *The Truth About Menthol Cigarettes*
7. Cities/counties matrix regarding flavored/menthol tobacco product regulation

MOTION

That the City Council:

1. Discuss the regulation of E-Cigarettes;
2. Discuss restrictions on Flavored/Menthol Tobacco Products; and

3. Provide Direction to the City Manager on each of these issues as deemed appropriate.

NOTES

- ¹ National Academies of Sciences, Engineering, and Medicine. (2018). *Public health consequences of e-cigarettes*. National Academies Press.
<https://www.nap.edu/read/24952/chapter/2#6> <<https://www.nap.edu/read/24952/chapter/2>>
- ² Barrington-Trimis et al. *E-cigarette Use and Subsequent Smoking Frequency Among Adolescents*. Pediatrics. 2018;142; Kalkhoran S, Glantz SA. *E-cigarettes and smoking cessation in real-world and clinical settings: a systematic review and meta-analysis*. The Lancet Respiratory Medicine. 2016;4(2):116-28.
- ³ Senate Rules Committee, Office of Senate Floor Analysis, Third Reading, SB 38 Analysis, May 17, 2019
- ⁴ Keck School of Medicine of USC, *Flavor and Menthol Tobacco Products and E-cigarettes*, May 22, 2019.
- ⁵ Notes from the Field: *Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students - United States, 2011-2018* MMWR Weekly/November 16, 2018 / 67 (45);1276-1277
https://www.cdc.gov/mmwr/volumes/67/wr/mm6745a5.htm?s_cid=mm6745a5_e
- ⁶ Truth Initiative, 3/16/17. *Widespread use of flavored products in young tobacco users*. Available: <https://truthinitiative.org/research/widespread-use-flavored-products-young-tobacco-users>
- ⁷ Culver City Unified School District. *California Healthy Kids Survey, 2018-19: Main Report*. San Francisco: WestEd Health and Justice Program for the California Department of Education.