



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: "Butt Out of Our Bars" Tobacco
Product Sampling Regulation

DATE: April 2, 2015

RECOMMENDATION

As recommended by the Rules and Open Government Committee on March 11, 2015, accept the report and provide direction to staff.

BACKGROUND

The Rules and Open Government Committee on March 11, 2015, directed staff to bring this issue forward to the City Council for consideration and provide additional information and analysis of the proposed "Butt Out of Our Bars" Tobacco Product Sampling Regulation.

ANALYSIS

Tobacco product sampling, or nonsale distribution, is the promotional distribution of free or low cost tobacco products (or coupons, coupon offers, rebate offers, gift cards, or other similar offers).

Federal law currently prohibits manufacturers, distributors, and retailers from distributing free samples of cigarettes or smokeless tobacco (e.g. it does not apply to cigars or electronic cigarettes). However, the distribution of one free 15-gram package of smokeless tobacco per adult customer is exempt from this prohibition if it takes place in a qualified adult-only facility (QAF), as defined under federal law. Federal law does not currently prohibit the distribution of nominal price tobacco products or coupons. Federal law specifically allows state or local governments to prohibit or otherwise restrict the distribution of free samples of smokeless tobacco.

California state law currently prohibits tobacco product sampling on public grounds or on private grounds that are open to the public. However, this law does not apply to locations where minors are prohibited by law (e.g. bars) and this law applies only to cigarettes and smokeless tobacco products (e.g., it does not apply to cigars or electronic cigarettes). California state law specifically allows the adoption of a local tobacco product sampling ordinance that is more restrictive than the state law and it

also allows local agencies to pass and enforce laws regulating the distribution of electronic cigarettes that are stricter than state law.

At least 45 municipalities in California have adopted ordinances restricting sampling of tobacco products that extend beyond the provisions in California state law. For example, many of these ordinances cover a larger array of tobacco products, cover tobacco paraphernalia, and prohibit tobacco product sampling in QAF's on public property or prohibit tobacco product sampling throughout the entire municipality. The City Attorney's Office is not aware of any legal challenge brought against a California municipality's tobacco product sampling ordinance. Only a small handful of California municipalities have tobacco product sampling ordinances that prohibit the distribution of free and low cost electronic cigarettes ("e-cigarettes"). Two of these municipalities are the City of Richmond and the City of Union City, neither of which has been challenged legally on the prohibition of e-cigarette product sampling.

Tri-City Health Center has provided the City with a proposed draft ordinance to prohibit tobacco product sampling, which is attached hereto as Exhibit A. The proposed draft ordinance is a very broad prohibition of tobacco product sampling that covers any products made or derived from tobacco or nicotine that are intended for human consumption, as well as e-cigarettes and other electronic devices that deliver nicotine or other substances to a person inhaling from the device. Additionally, the proposed ordinance would extend the sampling prohibition to any place within the City, public or private, that is open to the general public regardless of any fee or age requirement, including for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

The City has broad police powers which it can use to further a reasonably related public purpose. Protection of the general safety and welfare of the public under its police powers is permissible and, generally, if something is injurious to the public welfare then the City can regulate it. It is well established that certain forms of local regulation of tobacco product distribution (e.g. tobacco retail licensing) as well as tobacco use (e.g. non-smoking ordinances) are within the City's police power. While many municipalities have adopted tobacco product sampling restrictions, it should be noted that the proposed draft ordinance contains broader prohibitions, both for where sampling would be prohibited within the City and which types of products would be prohibited from engaging in sampling, than those adopted by many other California municipalities. The regulation of e-cigarettes specifically is still an evolving area as the FDA's proposed rules for e-cigarettes have not been finalized and the State of California currently only prohibits the sale of e-cigarettes to minors. Therefore, any regulation adopted pertaining to e-cigarettes brings with it some amount of uncertainty.

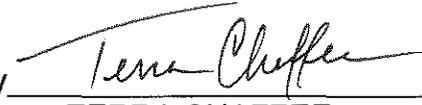
It also should be noted that before this proposed draft ordinance could be utilized by the City it would need to be revised to conform to the City's current Municipal Code in a

number of ways, including for example, modifications to or deletions from the enforcement provisions and appropriate chaptering in the Municipal Code.

COORDINATION

This memorandum has been coordinated with the Planning, Building, and Code Enforcement Department.

RICHARD DOYLE
City Attorney

By 
TERRA CHAFFEE
Deputy City Attorney

For questions please contact Terra Chaffee, Deputy City Attorney, at 408-535-1900.

AN ORDINANCE OF THE CITY OF SAN JOSE
AMENDING THE [____] MUNICIPAL CODE TO REGULATE
TOBACCO PRODUCT SAMPLING

The San Jose City Council ordains as follows:

SECTION I. FINDINGS. The City Council of San Jose hereby finds and declares as follows:

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, gift cards, gift certificates, rebate offers and other similar offers for such products) on public grounds and on private grounds that are open to the public;¹ and

WHEREAS, this state law does *not* apply to:

- locations where minors are prohibited by law (such as bars);
- public grounds leased for a private function where minors are denied access to the private function by a peace officer or licensed security guard;
- private property open to the general public where minors are denied access to a separate sampling area and the sampling area is enclosed so minors cannot see inside; and
- product samples, coupons, or rebate offers in connection with the sale of another item, including tobacco products, lighters, magazines, or newspapers; and

WHEREAS, this state law specifically allows adoption of a local ordinance that is “more restrictive” than the state law and provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law;² and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (the “FDA law”)³ prohibits the distribution of free cigarettes and other free tobacco products; and

WHEREAS, the FDA law contains an exception allowing the distribution of free samples of smokeless tobacco in defined “adult-only facilities,” which are temporary structures that can be located almost anywhere as long as they do not serve alcohol within the structure and a law enforcement officer or licensed security guard ensures that no minors gain access to the facility; and

¹ Cal. Health & Safety Code § 118950 (2008).

² *Id.*

³ Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.); 21 U.S.C.A. § 387a-1 (2009).

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WHEREAS, the FDA law does not prohibit the distribution of nominal- or low-cost cigarettes, smokeless tobacco, or other tobacco products, or the distribution of coupons for these products; and

WHEREAS, the FDA law specifically allows a state or local government to prohibit or otherwise restrict the distribution of free samples of smokeless tobacco;⁴ and

WHEREAS, state law also protects the public from the danger posed by alcohol sample distribution by prohibiting bars and retailers from furnishing or giving away free alcohol samples, premiums, gifts, or free goods (except in very particular, non-sale related circumstances);⁵ and

WHEREAS, tobacco use is an addictive, unhealthy, and harmful habit with significant social and economic costs, as evidenced by the following:

- the World Health Organization (WHO) estimates that by 2030, tobacco will account for 8.3 million deaths per year, killing 50% more people in 2015 than HIV/AIDS, and will be responsible for 10% of all deaths worldwide;⁶ and
- approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;⁷ and
- secondhand smoke is responsible for an estimated 41,300 deaths among non-smokers each year in the United States, which includes 7,300 lung cancer deaths and 34,000 deaths due to heart disease;⁸ and
- tobacco use costs at least \$133 billion per year in medical expenditures nationally, and more than \$156 billion per year resulting from lost productivity;⁹ and
- medical care costs in California just for nonsmokers suffering from diseases caused by secondhand smoke exposure in the home totaled \$241 million in 2009, with \$119 million in lost productivity;¹⁰ and

⁴ 21 U.S.C.A. §§ 387a-1(a)(2)(G), 387p(a)(1) (2009).

⁵ Cal. Bus. & Prof. Code §§ 23386, 25600 (2008); Cal. Code Regs. Tit. 4, §§ 52, 106 (2009).

⁶ World Health Organization, Statistical Information System. *World Health Statistics 2007, Part 1: Ten Statistical Highlights in Global Public Health*. 2007, p. 12. Available at: www.who.int/whosis/whostat2007_10highlights.pdf.

⁷ U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*. Available at: <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>

⁸ Id.

⁹ Id.

¹⁰ Max W, Sung H, Shi Y. "The Cost of Secondhand Smoke Exposure at Home in California." *Tobacco Control*, 2013. Available at: <http://tobaccocontrol.bmj.com/content/early/2014/02/05/tobaccocontrol-2013-051253.abstract>

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- scientific studies have concluded that cigarette smoking can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, mouth, cervix, colon, kidney, liver, pancreas, stomach, trachea and bladder;¹¹ and
- smoking a single cigarette makes nicotine addiction more likely to occur several years after the initial use;¹² and

WHEREAS, combining tobacco products with alcohol consumption increases the likelihood of developing oral cancer,¹³ and has been shown to dramatically increase the addictive power of nicotine among younger smokers;¹⁴ and

WHEREAS, tobacco use is particularly prevalent among young adults and young adulthood is a time when many people begin to smoke, as evidenced by the following:

- a California report identified young adults (aged 18-24 years) as having the highest smoking prevalence of any age group, at 14.6% in the year 2011;¹⁵ and
- a 2002 study reported that 70% of college students smoke socially, noting that it is possible that social smoking may transition into regular smoking behavior;¹⁶ and
- the college years (ages 18-24) are a time of transition in smoking behavior, during which many college students begin to experiment with a range of tobacco products¹⁷ and a significant portion of occasional smokers make the transition to habitual smoking;¹⁸ and

¹¹ U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*. Available at: <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>

¹² Fidler JA, Wardle J, Henning Broderson N, et al. "Vulnerability to Smoking After Trying a Single Cigarette Can Lie Dormant for Three Years or More." *Tobacco Control*, 15: 205-209, 2006.

¹³ Oral Cancer Foundation. *Tobacco*. Available at: <http://www.oralcancerfoundation.org/tobacco/>

¹⁴ Gilpin E, White V, Pierce J, et al. "How Effective are Tobacco Industry Bar and Club Marketing Efforts in Reaching Young Adults?" *Tobacco Control*, 14: 186-192, 2005. Available at: repositories.cdlib.org/cgi/viewcontent.cgi?article=3566&context=postprints.

¹⁵ California Department of Public Health. . *State Health Officer's Report on Tobacco Use and Promotion in California*. December 2012. Available at: <http://www.cdph.ca.gov/Documents/EMBARGOED%20State%20Health%20Officers%20Report%20on%20Tobacco.pdf>

¹⁶ Waters K, Harris K, Hall S, et al. "Characteristics of Social Smoking Among College Students." *Journal of American College Health*, 55(3): 133-139, 2006.

¹⁷ Rigotti N, Lee J and Wechsler H. "U.S. College Students Use of Tobacco Products - Results of a National Survey." *The Journal of the American Medical Association*, 284(6): 699-705, 2000.

¹⁸ Lantz P. "Smoking on The Rise Among Young Adults: Implications for Research and Policy." *Tobacco Control*, 12: i60-70, 2003.

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- college students are subject to unique stress levels due to a variety of factors, including peer pressure, close living quarters, and living away from home for the first time, making them likely to begin smoking at college in response to stress;¹⁹ and

WHEREAS, college students, especially light smokers, are more likely to smoke on weekends and while drinking, as evidenced by the following:

- a 2011 study demonstrated that college students smoke nearly twice as often on Fridays and Saturdays and that 33.2% of their overall smoking events were associated with drinking, parties or other social events;²⁰ and
- other studies have shown that college students who have smoked less than 100 cigarettes combine drinking and smoking 86% of the time;²¹ and that light smokers are more likely to smoke while drinking than heavier smokers and to smoke more cigarettes while drinking;²² and

WHEREAS, tobacco companies distribute free samples and coupons for minimal cost samples for the purpose of luring young adult tobacco users, as evidenced by the following:

- tobacco companies have developed marketing strategies that focus on key transition periods in young people's lives, such as entering college;²³ and
- after the 1998 Master Settlement Agreement (MSA) with the states, tobacco companies increased marketing aimed at college students by sponsoring events at college bars and providing free samples to college students;²⁴ and
- the distribution of free samples at promotional events in bars and fraternities has been an integral part of a marketing strategy designed to initiate young adult tobacco users;²⁵ and

¹⁹ Wechsler H, Kelley K, Seibring M, et al. "College Smoking Policies & Cessation Programs: Results of a Survey of College Health Center Directors." *Journal of American College Health*, 49(5): 205-12, 2001; Lantz P. "Smoking on The Rise Among Young Adults: Implications for Research and Policy." *Tobacco Control*, 12: i60-70, 2003.

²⁰ Cronk N, Harris K, Harrar S, et al. "Analysis of Smoking Patterns and Contexts Among College Student Smokers." *Substance Use and Misuse*, 46(8): 1015-22, 2011. Available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3144161/#R22>

²¹ McKee SA, Hinson R, Rounsaville D, Petrelli P. Survey of subjective effects of smoking while drinking among college students. *Nicotine and Tobacco Research*. 2004;6: 111-117.

²² Jackson K, Colby S, Sher K. *Daily Patterns of Conjoint Smoking and Drinking in College Student Smokers*. *Psychology of Addictive Behaviors*. Sep 2010;24(3): 424-435. Available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2946201/#R40>

²³ Ling P, Glantz S. "Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence From Industry Documents." *American Journal of Public Health*, 92(6): 908-916, 2002. Available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447481/>

²⁴ Sepe E, Ling P and Glantz S. "Smooth Moves: Bar and Nightclub Tobacco Promotions that Target Young Adults." *American Journal of Public Health*, 92(3): 414-419, 2002. Available at: www.ajph.org/cgi/reprint/92/3/414.pdf.

²⁵ Id.

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- a 2001 study showed that the tobacco industry sponsored social events at 99% of the college campuses surveyed;²⁶ and
- that same study showed that among students who were not smokers at age 19, those who had attended tobacco industry promotional events were twice as likely to become smokers;²⁷ and
- according to the 2002 California Tobacco Survey, 36.5% of adults age 18-29 reported seeing tobacco company logos on giveaway items at bars, while 15.4% reported seeing tobacco company representatives distributing free tobacco samples;²⁸ and
- tobacco promotional events encourage tobacco use among college students by linking the enjoyable aspects of a bar environment with a tobacco brand name;²⁹ and
- tobacco company documents demonstrate that bar promotions are highly effective at increasing sales due in part to resulting brand switching, smoking uptake, or relapse by former smokers;³⁰ and
- past research has shown that sampling in bar environments has the ability to significantly increase awareness, trial, and purchase of tobacco products by young adults;³¹ and
- Electronic cigarette manufacturers sponsored or provided free samples at 348 events nationwide in 2012 and 2013;³² and
- during 2013 and 2014, Phillip Morris USA scheduled 564 bar visits in the City of San Jose³³ where they have been observed distributing coupons for nominal cost items; and

²⁶ Rigotti N, Moran S and Wechsler H. "U.S. College Students Exposure to Tobacco Promotions: Prevalence and Association With Tobacco Use." *American Journal of Public Health*, 94(12): 1-7, 2004. Available at: www.hsph.harvard.edu/cas/Documents/tobacco/Rigotti.pdf.

²⁷ Id.

²⁸ Gilpin E, White V, Pierce J, et al. "How Effective are Tobacco Industry Bar and Club Marketing Efforts in Reaching Young Adults?" *Tobacco Control*, 14: 186-192, 2005. Available at: repositories.cdlib.org/cgi/viewcontent.cgi?article=3566&context=postprints.

²⁹ Katz S and Lavack A. "Tobacco Related Bar Promotions: Insights from Tobacco Industry Documents." *Tobacco Control*, 11: i92-i101, 2002. Available at: tobaccocontrol.bmj.com/cgi/reprint/11/suppl_1/i92?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&andorexactfulltext=and&searchid=1&FIRSTINDEX=0&sortspec=relevance&volume=11&firstpage=92&resourcetype=HWCIT

³⁰ Id.

³¹ Reynolds RJ. *RJR Document: Evaluation of RJR Sampling Experience*. May 3, 1979. Available at: legacy.library.ucsf.edu/cgi/getdoc?tid=nlz85d00&fmt=pdf&ref=results.

³² Report produced by staff of members of Congress. *Gateway to Addiction? A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth*. April 14, 2014. Available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Report-E-Cigarettes-Youth-Marketing-Gateway-To-Addiction-2014-4-14.pdf>

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- since September, 2014 Phillip Morris USA has been observed distributing free electronic cigarette products in bars in the City of San Jose; and

WHEREAS, the availability of less expensive tobacco products results in increased tobacco use³⁴, especially among adolescents and young adults, as evidenced by the following:

- over 100 academic studies conclusively demonstrate that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people stop using tobacco;³⁵ and
- a longitudinal Canadian study determined that smoking rates went up among 20-24 year olds when the taxes on tobacco were reduced;³⁶ and
- research shows that youth and young adults are two to three times more responsive to changes in tobacco prices than adults;³⁷

WHEREAS, the young adult population is especially vulnerable to tobacco sample distribution, as evidenced by the following:

- tobacco companies sponsored 2,802 bar based promotional events in California in 2008;³⁸ and
- despite the MSA's prohibition on marketing to underage youth, half of all age groups in a 2002 study reported seeing cigarette advertisements at special events, concerts, bars, or clubs;³⁹ and

³³ Compiled from weekly lists provided by Phillip Morris USA to the CA Attorney General's office.

³⁴ Institute of Medicine. 2007. *Ending the Tobacco Problem: A Blueprint for the Nation*. Washington, DC: The National Academies Press. www.nap.edu/openbook.php?record_id=11795

³⁵ Chaloupka, F., Yurekli, A., and Fong, G. 2012. "Tobacco Taxes as a Tobacco Control Strategy," *Tobacco Control*. 21: 172–180; Centers for Disease Control and Prevention. 2010. State Cigarette Minimum Price Laws—United States, 2009." *Morbidity and Mortality Weekly Report* 59: 389–392., www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm; Community Preventive Services. 2012. *Reducing Tobacco Use and Secondhand Smoke Exposure: Increasing the Unit Price of Tobacco Products..* www.thecommunityguide.org/tobacco/increasingunitprice.html; U.S. Department of Health and Human Services. 2000. *Reducing Tobacco Use: A Report of the Surgeon General*. www.cdc.gov/tobacco/data_statistics/sgf/2000/complete_report/index.htm; Institute of Medicine. 2007. *Ending the Tobacco Problem: A Blueprint for the Nation*. Washington, DC: The National Academies Press.

³⁶ Zhang B, Cohen J, et al. "The Impact of Tobacco Tax Cuts on Smoking Initiation Among Canadian Young Adults." *American Journal of Preventative Medicine*. 2006 Jun;30(6): 474-9.

³⁷ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Economic Facts About U.S. Tobacco Production and Use." Available at: http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm

³⁸ Dodge A, Zellers L, et al. "Tobacco Giveaways in California." Pg. 20. Available from the California Department of Public Health.

³⁹ Bogen K, Bierner L, and Nyman A. "Consequences of Marketing Exceptions in the Master Settlement Agreement: Exposure of Youth to Adult-Only Tobacco Promotions." *Nicotine and Tobacco Research*, 8(3): 467-471, 2006.

- five percent of the 12-17 year olds in the same 2002 study reported having been present at a bar, nightclub, or concert where free samples of cigarettes were available and one in five of the youth present at these events were actually offered free cigarettes;⁴⁰ and
- of the youth that were exposed to free tobacco samples in the same study, 45% were exposed at concerts for popular groups, which have no age restrictions;⁴¹ and
- The Lesbian, Gay, Bisexual, and Transgender (LGBT) Community in Santa Clara County smokes at a 23% rate⁴² compared to a 7.7% rate for the general population in the County⁴³, and approximately 25% of the scheduled tobacco industry bar visits to San Jose during 2013 were to a gay bar;⁴⁴ and

NOW THEREFORE, it is the intent of the City Council, in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of tobacco use, especially by children and current non-users; by prohibiting the distribution of free and low cost tobacco products in order to limit the ability of tobacco companies to make their addictive, unhealthy, and harmful products freely available to adults and particularly young adults; and by reducing the potential for children to wrongly associate smoking and tobacco with a healthy lifestyle.

SECTION II. [Article / Section] of the [____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Coupon” means anything that can be exchanged for or used to acquire a Tobacco Product for free or for Nominal Cost, such as a printed piece of paper, voucher, ticket, rebate,

⁴⁰ Bogen K, Bierner L, and Nyman A. “Consequences of Marketing Exceptions in the Master Settlement Agreement: Exposure of Youth to Adult-Only Tobacco Promotions.” *Nicotine and Tobacco Research*, 8(3): 467-471, 2006.

⁴¹ *Id.*

⁴² Santa Clara County Public Health Department. *Status of LGBTQ Health. Santa Clara County 2013*. P. 44. Available at http://www.sccgov.org/sites/sccphd/en-us/Partners/Data/Documents/LGBTQ%20Report%202012/LGBTQ_Report_WEB.pdf

⁴³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Communities Putting Prevention to Work. Community Profile: Santa Clara County, California, Obesity and Tobacco Prevention*. (2013) Available at http://www.cdc.gov/nccdphp/dch/programs/CommunitiesPuttingPreventiontoWork/communities/profiles/both-ca_santaclara-county.htm

⁴⁴ Compiled from weekly lists provided by Phillip Morris USA to the CA Attorney General’s office.

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rebate offer, check, credit, token, gift certificate, code, password, or anything labeled “coupon” or “coupon offer.”

(b) “Nominal Cost” means the cost of any item that is transferred from one person to another for less than the total of: (1) twenty-five percent (25%) of the full retail value of the item exclusive of taxes and fees; plus (2) all taxes and fees previously paid and all taxes and fees still due on the item at the time of transfer.

(c) “Nonsale Distribution” means to give, within the jurisdictional limits of the city a Tobacco Product or Coupon at no cost or at Nominal Cost to a Person who is not a Tobacco Seller.

(d) “Person” means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(e) “Public Place” means any place within the jurisdictional limits of the city, public or private, that is open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

(f) “Tobacco Paraphernalia” means any item designed for the consumption, use, or preparation of Tobacco Products.

(g) “Tobacco Product” means:

- (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and
- (2) Any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to an electronic cigarette, cigar, pipe, or hookah.
- (3) Notwithstanding any provision of subsections (a) and (b) to the contrary, “tobacco product” includes any component, part, or accessory of a tobacco product, whether or not sold separately. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

(g) “Tobacco Seller” means any Person who sells, distributes with an economic or a business purpose, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia. This definition is without regard to the quantity of

tobacco, Tobacco Products, or Tobacco Paraphernalia sold, distributed, offered for sale, exchanged, or offered for exchange.

Sec. [____ (*2)]. PROHIBITION OF NONSALE DISTRIBUTION OF TOBACCO PRODUCTS.

(a) No Tobacco Seller nor any agent or employee of a Tobacco Seller shall engage in the Nonsale Distribution of any Tobacco Product or Coupon in any Public Place.

(b) No Person shall knowingly permit the Nonsale Distribution of any Tobacco Product or Coupon by a Tobacco Seller or any agent or employee of a Tobacco Seller: (1) in any Public Place under the legal or de facto control of the Person; or (2) through any agent or employee of the Person. This provision shall not apply to Coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as that Person's distribution of a publication containing Coupons is not primarily motivated by an economic or a business purpose to distribute Coupons.

Sec. [____ (*3)]. ENFORCEMENT.

(a) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

(b) Each violation of this chapter constitutes a misdemeanor punishable as provided in section [____] of this Code or may, in the discretion of the City Attorney, be prosecuted as an infraction if the interests of justice so require.

(c) Enforcement of this chapter shall be the responsibility of the City Manager or his or her designee. In addition, any peace officer or code enforcement official also may enforce this chapter.

(d) Violations of this chapter are subject to a civil action brought by the City of San Jose, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

(e) Any violation of this chapter is hereby declared to be a nuisance.

(f) In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

SECTION III. STATUTORY CONSTRUCTION & SEVERABILITY. This chapter shall be construed so as not to conflict with applicable federal or state laws, rules, or regulations. Nothing in this chapter authorizes any City agency to impose any duties or obligations in conflict with limitations on municipal authority established by federal or state law at the time such agency action is taken.

In the event that a court or agency of competent jurisdiction holds that a federal or state law, rule, or regulation invalidates any clause, sentence, paragraph or section of this chapter or the application thereof to any person or circumstances, it is the intent of the City Council that the court or agency sever such clause, sentence, paragraph, or section so that the remainder of this chapter remains in effect.