

Fairhaven Board of Health Regulation Restricting the Sale of Tobacco Products

A. Statement of Purpose:

Whereas there exists conclusive evidence that tobacco smoking causes cancer, respiratory and cardiac diseases, negative birth outcomes, irritations to the eyes, nose and throat¹;

Whereas among the 15.7% of students nationwide who currently smoke cigarettes and were less than 18 years old, 14.1% usually obtained them by buying them in a store (i.e. convenience store, supermarket, or discount store) or gas station²;

Whereas nationally in 2009, 72% of high school smokers and 66% of middle school smokers were not asked to show proof of age when purchasing cigarettes³;

Whereas the U.S. Department of Health and Human Services has concluded that nicotine is as addictive as cocaine or heroin⁴ and the Surgeon General found that nicotine exposure during adolescence, a critical window for brain development, may have lasting adverse consequences for brain development⁵;

Whereas despite state laws prohibiting the sale of tobacco products to minors, access by minors to tobacco products is a major public health problem;

Whereas more than 80 percent of all adult smokers begin smoking before the age of 18, more than 90 percent do so before leaving their teens, and more than 3.5 million middle and high school students smoke⁶;

Whereas the Institute of Medicine (IOM) concludes that raising the minimum age of legal access to tobacco products to 21 will reduce tobacco initiation, particularly among adolescents 15-17, and will improve health across the lifespan and save lives⁷.

¹ Center for Disease Control and Prevention, (CDC) (2012), *Health Effects of Cigarette Smoking Fact Sheet*. Retrieved from:

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.

² CDC (2009), *Youth Risk Behavior, Surveillance Summaries* (Morbidity and Mortality Weekly Report (MMWR) 2010: 59, 11 (No. SS-55) Retrieved from: <http://www.cdc.gov/HealthyYouth/yrbs/index.htm>.

³ CDC Office of Smoking and Health, *National Youth Tobacco Survey, 2009*. Analysis by the American Lung Association (ALA), Research and Program Services Division using SPSS software, as reported in "Trends in Tobacco Use", ALA Research and Program Services, Epidemiology and Statistics Unit, July 2011. Retrieved from: www.lung.org/finding-cures/our-research/trend-reports/Tobacco-Trend-Report.pdf.

⁴ CDC (2010), *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease*. Retrieved from: http://www.cdc.gov/tobacco/data_statistics/sgr/2010/.

⁵ U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 122. Retrieved from: <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

⁶ SAMHSA, Calculated based on data in 2011 National Survey on Drug Use and Health and U.S. Department of Health and Human services (HHA). *The Health Consequences of Smoking-50 Years of Progress. A Report of the Surgeon General, 2014*.

⁷ IOM (Institute of Medicine) 2015. *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*. Washington DC: The National Academies Press, 2015.

Whereas sales of flavored little cigars increased by 23% between 2008 and 2010⁸; and the top three most popular cigar brands among African-American youth aged 12-17 are the flavored and low-cost Black & Mild, White Owl, and Swisher Sweets⁹;

Whereas the federal Family Smoking Prevention and Tobacco Control Act (FSPTCA), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,¹⁰ largely because these flavored products were marketed to youth and young adults,¹¹ and younger smokers were more likely to have tried these products than older smokers¹²;

Whereas although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law¹³, neither federal nor Massachusetts laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic devices and the nicotine solutions used in these devices;

Whereas the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction¹⁴;

⁸ Delnevo, C., Flavored Little Cigars memo, September 21, 2011, from Neilson market scanner data.

⁹ SAMSHA, Analysis of data from the 2011 *National Survey on Drug Use and Health*.

¹⁰ 21 U.S.C. §387g.

¹¹ Carpenter CM, Wayne GF, Pauly JL, et al. 2005. “New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies.” *Health Affairs*. 24(6): 1601-1610; Lewis M and Wackowski O. 2006. “Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands.” *American Journal of Public Health*. 96(2): 244-251; Connolly GN. 2004. “Sweet and Spicy Flavours: New Brands for Minorities and Youth.” *Tobacco Control*. 13(3): 211-212; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 537, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

¹² U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

¹³ 21 U.S.C. §387g

¹⁴ Food and Drug Administration. 2011. *Fact Sheet: Flavored Tobacco Products*, www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183214.pdf; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

Whereas data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes¹⁵;

Whereas the U.S. Centers for Disease Control and Prevention has reported that electronic cigarette use among middle and high school students doubled from 2011 to 2012¹⁶;

Whereas nicotine solutions, which are consumed via electronic or battery-operated delivery smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as cotton candy and bubble gum¹⁷;

Whereas in a lab analysis conducted by the FDA, electronic cigarette cartridges that were labeled as containing no nicotine actually had low levels of nicotine present in all cartridges tested, except for one¹⁸;

Whereas according to the CDC's youth risk behavior surveillance system, the percentage of high school students in Massachusetts who reported the use of cigars within the past 30 days went from 11.8% in 2003 to 14.3% in 2011¹⁹;

Whereas survey results show that more youth report that they have smoked a cigar product when it is mentioned by name, than report that they smoked a cigar in general, indicating that cigar use among youth is underreported²⁰;

Whereas in Massachusetts, youth use of all other tobacco products, including cigars, rose from 13.3% in 2003 to 17.6% in 2009, and was higher than the rate of current cigarette use (16%) for the first time in history²¹;

¹⁵ King BA, Tynan MA, Dube SR, et al. 2013. "Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students." *Journal of Adolescent Health*. [Article in press], www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract.

¹⁶ Centers for Disease Control & Prevention. 2013. "Electronic Cigarette Use Among Middle and High School Students – United States, 2011-2012," *Morbidity and Mortality Weekly Report (MMWR)* 62(35): 729-730.

¹⁷ Cameron JM, Howell DN, White JR, et al. 2013. "Variable and Potentially Fatal Amounts of Nicotine in E-cigarette Nicotine Solutions." *Tobacco Control*. [Electronic publication ahead of print], <http://tobaccocontrol.bmj.com/content/early/2013/02/12/tobaccocontrol-2012-050604.full>; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 549, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

¹⁸ Food and Drug Administration, *Summary of Results: Laboratory Analysis of Electronic Cigarettes Conducted by FDA*, available at: <http://www.fda.gov/newsevents/publichealthfocus/ucm173146.htm>.

¹⁹ CDC (2011) *Youth Risk Behavior, Surveillance Summaries* (MMWR 2012: 87 (No SS-61). Retrieved from: www.cdc.gov; and CDC (2003), *Youth Risk Behavior, Surveillance Summaries* (MMWR 2004: 53, 54 (No. SS-02).

²⁰ 2010 Boston Youth Risk Behavior Study. 16.5% of Boston youth responded that they had ever smoked a fruit or candy flavored cigar, cigarillo or little cigar, while 24.1% reported ever smoking a "Black and Mild" Cigar.

²¹ Commonwealth of Massachusetts, Data Brief, Trends in Youth Tobacco Use in Massachusetts, 1993-2009. Retrieved from: http://www.mass.gov/Eeohhs2/docs/dph/tobacco_control/adolescent_tobacco_use_youth_trends_1993_2009.pdf.

Whereas research shows that increased cigar prices significantly decreased the probability of male adolescent cigar use and a 10% increase in cigar prices would reduce by 3.4%²²;

Whereas nicotine levels in cigars are generally much higher than nicotine levels in cigarettes²³;

Whereas Non-Residential Roll-Your-Own (RYO) machines located in retail stores enable retailers to sell cigarettes without paying the excise taxes that are imposed on conventionally manufactured cigarettes. High excise taxes encourage adult smokers to quit²⁴ and high prices deter youth from starting.²⁵ Inexpensive cigarettes, like those produced from RYO machines, promote the use of tobacco, resulting in a negative impact on public health and increased health care costs, and severely undercut the evidence-based public health benefit of imposing high excise taxes on tobacco;

Whereas it is estimated that 90% of what is being sold as pipe tobacco is actually being used in Non-Residential RYO machines. Pipe tobacco shipments went from 11.5 million pounds in 2009 to 22.3 million pounds in 2010. Traditional RYO tobacco shipments dropped from 11.2 million pounds to 5.8 million pounds; and cigarette shipments dropped from 308.6 billion sticks to 292.7 billion sticks according to the December 2010 statistical report released by the U.S. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB)²⁶;

Whereas the sale of tobacco products is incompatible with the mission of health care institutions because these products are detrimental to the public health and their presence in health care institutions undermine efforts to educate patients on the safe and effective use of medication, including cessation medication;

Whereas educational institutions sell tobacco products to a younger population, who is particularly at risk for becoming smokers and such sale of tobacco products is incompatible with the mission of educational institutions that educate a younger population about social, environmental and health risks and harms;

²² Ringel, J., Wasserman, J., & Andreyeva, T. (2005) *Effects of Public Policy on Adolescents' Cigar Use: Evidence from the National Youth Tobacco Survey*. American Journal of Public Health, 95(6), 995-998, doi: 10.2105/AJPH.2003.030411 and cited in *Cigar, Cigarillo and Little Cigar Use among Canadian Youth: Are We Underestimating the Magnitude of this Problem?*, J. Prim. P. 2011, Aug: 32(3-4):161-70. Retrieved from: www.ncbi.nlm.nih.gov/pubmed/21809109.

²³ National Institute of Health (NIH), National Cancer Institute (NCI) (2010). *Cigar Smoking and Cancer*. Retrieved from: <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars>.

²⁴ Eriksen, M., Mackay, J., Ross, H. (2012). *The Tobacco Atlas*, Fourth Edition, American Cancer Society, Chapter 29, p. 80. Retrieved from: www.TobaccoAtlas.org.

²⁵ Chaloupka, F.J. & Lippman, R., NIH, NCI (2001). *The Impact of Price on Youth Tobacco Use, Smoking and Tobacco Control Monograph 14: Changing Adolescent Smoking Prevalence*. 193 – 200. Retrieved from: <http://dccps.nih.gov/TCRB/monographs/>.

²⁶ TTB (2011). *Statistical Report – Tobacco* (2011) (TTB S 5210-12-2010). Retrieved from: <http://www.ttb.gov/statistics/2010/201012tobacco.pdf>.

Whereas the Massachusetts Supreme Judicial Court has held that “ ... [t]he right to engage in business must yield to the paramount right of government to protect the public health by any rational means.”²⁷

Now, therefore it is the intention of the Fairhaven Board of Health to regulate the sale of tobacco products.

B. Authority:

This regulation is promulgated pursuant to the authority granted to the Fairhaven Board of Health by Massachusetts General Laws Chapter 111, Section 31 which states “Boards of Health may make reasonable health regulations”.

C. Definitions:

For the purpose of this regulation, the following words shall have the following meanings:

Blunt Wrap: Any tobacco product manufactured or packaged as a wrap or as a hollow tube made wholly or in part from tobacco that is designed or intended to be filled by the consumer with loose tobacco or other fillers.

Business Agent: An individual who has been designated by the owner or operator of any establishment to be the manager or otherwise in charge of said establishment.

Cigar: Any roll of tobacco that is wrapped in leaf tobacco or in any substance containing tobacco with or without a tip or mouthpiece not otherwise defined as a cigarette under Massachusetts General Law, Chapter 64C, Section 1, Paragraph 1.

Characterizing flavor: A distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted or detectable either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product.

Component part: Any element of a tobacco product, including, but not limited to, the tobacco, filter and paper, but not including any constituent.

Constituent: Any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacturing or packaging of the tobacco product. Such term shall include a smoke constituent.

Distinguishable: Perceivable by either the sense of smell or taste.

²⁷ Druzik et al v. Board of Health of Haverhill, 324 Mass.129 (1949).

Educational Institution: Any public or private college, school, professional school, scientific or technical institution, university or other institution furnishing a program of higher education.

Employee: Any individual who performs services for an employer.

Employer: Any individual, partnership, association, corporation, trust or other organized group of individuals that uses the services of one (1) or more employees.

Flavored tobacco product: Any tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

Health Care Institution: An individual, partnership, association, corporation or trust or any person or group of persons that provides health care services and employs health care providers licensed, or subject to licensing, by the Massachusetts Department of Public Health under M.G.L. c. 112 or a retail establishment that provides pharmaceutical goods and services and is the subject to the provisions of 247 CMR 6.00. Health care institutions include, but are not limited to, hospitals, clinics, health centers, pharmacies, drug stores, doctor offices, optician/optometrist offices and dentist offices.

Minimum Legal Sales Age (MLSA): The age an individual must be before that individual can be sold a tobacco product in the municipality.

Nicotine Delivery Product: Any manufactured article or product made wholly or in part of a tobacco substitute or containing nicotine that is expected or intended for human consumption, but not including a product approved by the United States Food and Drug Administration for sale as a tobacco use cessation or harm reduction product or for other medical purposes and which is being marketed and sold solely for that approved purpose. Nicotine delivery products include, but are not limited to, e-cigarettes.

Non-Residential Roll-Your-Own (RYO) Machine: A mechanical device made available for use (including to an individual who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the individual's own personal consumption or use) that is capable of making cigarettes, cigars or other tobacco products. RYO machines located in private homes used for solely personal consumption are not Non-Residential RYO machines.

Permit Holder: Any person engaged in the sale or distribution of tobacco products who applies for and receives a tobacco product sales permit or any person who is required to apply for a Tobacco Product Sales Permit pursuant to these regulations, or his or her business agent.

Person: Any individual, firm, partnership, association, corporation, company or organization of any kind, including but not limited to, an owner, operator, manager, proprietor or person in charge of any establishment, business or retail store.

Retail Tobacco Store: An establishment that is not required to possess a retail food permit whose primary purpose is to sell or offer for sale, but not for resale, tobacco products and tobacco paraphernalia, in which the sale of other products is merely incidental, and in which the entry of persons under the minimum legal sales age is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the Fairhaven Board of Health.

Self-Service Display: Any display from which customers may select a tobacco product, as defined herein,

without assistance from an employee or store personnel.

Schools: Public or private elementary or secondary schools.

Smoke Constituent: Any chemical or chemical compound in mainstream or sidestream tobacco smoke that either transfers from any component of the tobacco product to the smoke or that is formed by the combustion or heating of tobacco, additives or other component of the tobacco product.

Smoking Bar: An establishment that primarily is engaged in the retail sale of tobacco products for consumption by customers on the premises and is required by Mass. General Law Ch. 270, §22 to maintain a valid permit to operate a smoking bar issued by the Massachusetts Department of Revenue. “Smoking bar” shall include, but not limited to, those establishments that are commonly known as “cigar bars” and “hookah bars”.

Tobacco Product Flavor Enhancer: Any product designed, manufactured, produced, marketed or sold to produce a characterizing flavor when added to any tobacco product.

Tobacco Product: Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, 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, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization. “Tobacco product” includes any component or part of a tobacco product. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration either as a tobacco use cessation product or for other medical purposes and which is being marketed and sold or prescribed solely for the approved purpose.

Vending Machine: Any automated or mechanical self-service device, which upon insertion of money, tokens or any other form of payment, dispenses or makes cigarettes or any other tobacco products, as defined herein.

D. Tobacco and Nicotine Delivery Products to Persons Under the Minimum Legal Sales Age Prohibited:

1. No person shall sell tobacco or nicotine delivery products or permit tobacco products, as defined herein, to be sold to a person under the minimum legal sales age; or not being the individual's parent or legal guardian, give tobacco products, as defined herein, to a person under the minimum legal sales age. The minimum legal sales age in Fairhaven is 21.
2. Required Signage
 - a. In conformance with and in addition to Massachusetts General Law, Chapter 270, Section 7, a copy of Massachusetts General Laws, Chapter 270, Section 6, shall be posted conspicuously by the owner or other person in charge thereof in the shop or other place used to sell tobacco products at retail. The notice shall be provided by the Massachusetts Department of Public Health and made available from the Fairhaven Board of Health. The notice shall be at least 48 square inches and shall be posted conspicuously by the permit holder in the retail establishment or other place in such a manner so that it may be readily seen by a person standing at or approaching the cash register. The notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than 4 feet or greater than 9 feet from the floor. The owner or other person in charge of a shop or other place used to sell tobacco products at retail shall conspicuously post any additional signs required by the Massachusetts Department of Public Health.
 - b. The owner or other person in charge of a shop or other place used to sell tobacco products, as defined herein, at retail shall conspicuously post signage, if provided by the Department of Public Health that discloses current referral information about smoking cessation.
 - c. The owner or other person in charge of a shop or other place used to sell tobacco products, as defined herein, at retail shall conspicuously post a sign stating that "The sale of tobacco products, including e-cigarettes, to someone under the minimum legal sales age of 18 years is prohibited." The notice shall be no smaller than 8.5 inches by 11 inches and shall be posted conspicuously in the retail establishment or other place in such a manner so that they may be readily seen by a person standing at or approaching the cash register. The notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than four (4) feet or greater than nine (9) feet from the floor.
3. Identification: Each person selling or distributing tobacco products, as defined herein, shall verify the age of the purchaser by means of a valid government-issued photographic identification containing the bearer's date of birth that the purchaser is 21 years old or older. Verification is required for any person under the age of 27.
4. All retail sales of tobacco products, as defined herein, must be face-to-face between the seller and the buyer and occur at the permitted location.

E. Tobacco Product Sales Permit:

1. No person shall sell or otherwise distribute tobacco products, as defined herein, within the Town of Fairhaven without first obtaining a Tobacco Product Sales Permit issued annually by the Fairhaven Board of Health. Only owners of establishments with a permanent, non-mobile location in Fairhaven are eligible to apply for a permit and sell tobacco products at the specified location in Fairhaven.
2. As part of the Tobacco Product Sales Permit application process, the applicant will be provided with the Fairhaven regulation. Each applicant is required to sign a statement declaring that the applicant has read said regulation and that the applicant is responsible for instructing any and all employees who will be responsible for tobacco product sales regarding federal, state and local laws regarding the sale of tobacco and this regulation.
3. Each applicant who sells tobacco products is required to provide proof of a current Tobacco Retailer License issued by the Massachusetts Department of Revenue, as well as a Cigarette and Cigar/Loose Tobacco permit, when required by state law, before a Tobacco Product Sales Permit can be issued.
4. The fee for a Tobacco Product Sales Permit shall be determined by the Fairhaven Board of Health annually.
5. A separate permit is required for each retail establishment selling tobacco products, as defined herein.
6. Each Tobacco Product Sales Permit shall be displayed at the retail establishment in a conspicuous place.
7. No Tobacco Product Sales Permit holder shall allow any employee to sell tobacco products, as defined herein, until such employee reads this regulation and federal and state laws regarding the sale of tobacco products and signs a statement, a copy of which will be placed on file in the office of the employer, with the permit and license made available to the inspector during normal business hours, that he/she has read the regulation and applicable state and federal laws.
8. A Tobacco Product Sales Permit is non-transferable. A new owner of an establishment that sells tobacco products, as defined herein, must apply for a new permit. No new permit will be issued unless and until all outstanding penalties incurred by the previous permit holder are satisfied in full.
9. Issuance of a Tobacco Product Sales Permit shall be conditioned on an applicant's consent to unannounced, periodic inspections of his/her retail establishment to ensure compliance with this regulation.
10. A Tobacco Product Sales Permit will not be renewed if the permit holder has failed to pay all fines issued and the time period to appeal the fines has expired and/or has not satisfied any outstanding permit suspensions.

11. Maximum Number of Tobacco Product Sales Permits:

At any given time, there shall be no more than 20 Tobacco Product Sales Permits issued in Fairhaven. No permit renewal will be denied based on the requirements of this subsection except any permit holder who has failed to renew his or her permit within thirty (30) days of expiration will be treated as a first-time permit applicant. Applicants who purchase a business that holds a current Tobacco Product Sales Permit at the time of the sale of said business may apply, within sixty (60) days of such sale, for the permit held by the Seller if the Buyer intends to sell tobacco products, as defined herein. New applicants for permits who are applying at a time when the maximum number of permits have been issued will be placed on a waiting list and will be eligible to apply for a permit on a “first-come, first-served” basis as issued permits are either not renewed or are returned to the Board of Health.

12. A Tobacco Product Sales Permit shall not be issued to any new applicant for a retail location within 500 feet of a public or private elementary or secondary school as measured by a straight line from the nearest point of the property line of the school to the nearest point of the property line of the site of the applicant’s business premises. Applicants who purchase an existing business that holds a current Tobacco Product Sales Permit at the time of the sale of said business may apply, within sixty (60) days of such sale, for the permit held by the Seller if the Buyer intends to sell tobacco products, as defined herein.

F. Cigar Sales Regulated:

1. No person shall sell or distribute or cause to be sold or distributed a single cigar.
2. No person shall sell or distribute or cause to be sold or distributed any original package of two or more cigars, unless such package is priced for retail sale at \$5.00 or more.
3. This Section shall not apply to:
 - a. A person or entity engaged in the business of selling or distributing cigars for commercial purposes to another person or entity engaged in the business of selling or distributing cigars for commercial purposes with the intent to sell or distribute outside the boundaries of Fairhaven.
4. The Fairhaven Board of Health may adjust from time to time the amounts specified in this Section to reflect changes in the applicable Consumer Price Index by amendment of this regulation.

G. Sale of Flavored Tobacco Products Prohibited:

No person shall sell or distribute or cause to be sold or distributed any flavored tobacco product.

H. Prohibition of the Sale of Blunt Wraps:

No person or entity shall sell or distribute blunt wraps in Fairhaven.

I. Free Distribution and Coupon Redemption:

No person shall distribute, or cause to be distributed, any free samples of tobacco products, as defined herein. No means, instruments or devices that allow for the redemption of any tobacco products, as defined herein, for free or cigarettes at a price below the minimum retail price determined by the Massachusetts Department of Revenue shall be accepted by any permit holder.

J. Out-of-Package Sales:

1. The sale or distribution of tobacco products, as defined herein, in any form other than an original factory-wrapped package is prohibited, including the repackaging or dispensing of any tobacco product, as defined herein, for retail sale. No person may sell or cause to be sold or distribute or cause to be distributed any cigarette package that contains fewer than twenty (20) cigarettes, including single cigarettes.
2. A retailer of liquid nicotine, an “acutely hazardous waste” as identified in 310 CMR 30.136, must provide the Fairhaven Board of Health with a written plan for disposal of said product, including a disposal plan for any breakage or spillage of the product.

K. Self-Service Displays:

All self-service displays of tobacco products, as defined herein, are prohibited. All humidors including, but not limited to, walk-in humidors must be locked.

L. Vending Machines:

All vending machines containing tobacco products, as defined herein, are prohibited.

M. Non-Residential Roll-Your-Own Machines:

All Non-Residential Roll-Your-Own machines are prohibited.

N. Prohibition of the Sale of Tobacco Products by Health Care Institutions:

No health care institution located in Fairhaven shall sell or cause to be sold tobacco products, as defined herein. No retail establishment that operates or has a health care institution within it, such as pharmacy, optician/optometrist or drug store, shall sell or cause to be sold tobacco products, as defined herein.

O. Prohibition of the Sale of Tobacco Products by Educational Institutions:

No educational institution located in Fairhaven shall sell or cause to be sold tobacco products, as defined herein. This includes all educational institutions as well as any retail establishments that operate on the property of an educational institution.

P. Violations:

1. It shall be the responsibility of the establishment, permit holder and/or his or her business agent, and not their employees, to ensure compliance with all sections of this regulation. For violation of the sections of this regulation that incorporate MGL Ch. 270 Section 6 and 105 CMR 665, the following penalties apply:
 - a. In the case of a first violation, a fine of one thousand dollars (\$1000.00).
 - b. In the case of a second violation within 36 months of the date of the current violation, a fine of two thousand dollars (\$2,000.00) and the Tobacco Product Sales Permit shall be suspended for seven (7) consecutive business days.
 - c. In the case of three or more violations within a 36 month period, a fine of five thousand dollars (\$5,000.00) and the Tobacco Product Sales Permit shall be suspended for thirty (30) consecutive business days.
2. For violations of all other sections specific to the Town of Fairhaven, the violator shall receive:
 - a. In the case of a first violation, a fine of one hundred dollars (\$100.00).
 - b. In the case of a second violation within 36 months of the date of the current violation, a fine of two hundred dollars (\$200.00) and the Tobacco Product Sales Permit shall be suspended for seven (7) consecutive business days.
 - c. In the case of three or more violations within a 36 month period, a fine of three hundred dollars (\$300.00) and the Tobacco Product Sales Permit shall be suspended for thirty (30) consecutive business days.
 - d. In the case of further violations or repeated, egregious violations of this regulation within a 36 month period, the Board of Health may revoke a Tobacco Product Sales Permit.
2. Refusal to cooperate with inspections pursuant to this regulation shall result in the suspension of the Tobacco Product Sales Permit for thirty (30) consecutive business days.
3. In addition to the monetary fines set above, any permit holder who engages in the sale or distribution of tobacco products while his or her permit is suspended shall be subject to the suspension of all Board of Health issued permits for thirty (30) consecutive business days.
4. The Fairhaven Board of Health shall provide notice of the intent to suspend or revoke a Tobacco

Product Sales Permit, which notice shall contain the reasons therefore and establish a time and date for a hearing which date shall be no earlier than seven (7) days after the date of said notice. The permit holder or its business agent shall have an opportunity to be heard at such hearing and shall be notified of the Board of Health's decision and the reasons therefore in writing. After a hearing, the Fairhaven Board of Health shall suspend or revoke the Tobacco Product Sales Permit if the Board of Health finds that a violation of this regulation occurred. For purposes of such suspensions or revocations, the Board shall make the determination notwithstanding any separate criminal or non-criminal proceedings brought in court hereunder or under the Massachusetts General Laws for the same offense. All tobacco products, as defined herein, shall be removed from the retail establishment upon suspension or revocation of the Tobacco Product Sales Permit. Failure to remove all tobacco products, as defined herein, shall constitute a separate violation of this regulation.

Q. Non-Criminal Disposition:

Whoever violates any provision of this regulation may be penalized by the non-criminal method of disposition as provided in Massachusetts General Laws, Chapter 40, Section 21D or by filing a criminal complaint at the appropriate venue.

Each day any violation exists shall be deemed to be a separate offense.

R. Enforcement:

Enforcement of this regulation shall be by the Fairhaven Board of Health or its designated agent(s).

Any resident who desires to register a complaint pursuant to the regulation may do so by contacting the Fairhaven Board of Health or its designated agent(s) and the Board shall investigate.

S. Severability:

If any provision of this regulation is declared invalid or unenforceable, the other provisions shall not be affected thereby but shall continue in full force and effect.

T. Effective Date:

Adopted by unanimous vote of the Board of Health on November 10, 2014.

This regulation shall take effect on January 1, 2015.

Amended by unanimous vote of the Board of Health on February 28, 2018.

Amended by unanimous vote of the Board of Health on December 13, 2018

**AMENDMENTS TO STATE TOBACCO LAWS
AS A RESULT OF THE “OMNIBUS” LAW PASSED BY THE LEGISLATURE**

SUMMARY

The new law amends many sections of current laws relative to tobacco. This memorandum addresses these amendments as they affect the Statewide Smoke-free Workplace Law (Massachusetts General Law Chapter 270, Section 22) and laws relative to tobacco sales.

AMENDMENTS TO THE STATEWIDE SMOKEFREE WORKPLACE LAW

1. Inclusion of e-cigarettes/vaping products into the Smoke-Free Workplace Law

The new law changes the definition of “smoking” or “smoke” to include electronic cigarettes, other similar products and any products “that rely on vaporization or aerosolization.” This means that vaping is now banned in locations that have been smoke-free since the initial smoke-free workplace law went into effect in 2004. The new definition of smoking no longer has the phrase “or non-tobacco product designed to be combusted and inhaled.” This change excludes marijuana or any type of herbal cigarette that does not contain tobacco. The original definition of smoking included marijuana because it is a “non-tobacco product designed to be combusted or inhaled.”

Municipal Action

Because the state law is not preemptive, municipalities can continue to include “or non-tobacco product designed to be combusted or inhaled” in their local regulation. If they have not already done so, they may amend their definition to include “the use of electronic cigarettes, electronic cigars, electronic pipes or other small products that rely on vaporization or aerosolization is not permitted only where smoking is not permitted.”

2. Nursing Homes

The use of electronic/vaping products is now prohibited in nursing homes, with a limited exemption for certain residential areas upon application to the local Board of Health.

Municipal Action

Because the law is not preemptive, municipalities may prohibit smoking/vaping in nursing homes.

3. Schools and School Grounds

The new law amends the Education Reform Act to include prohibiting the use of e-cigarettes and other vaping products on private school and public and private vocational school grounds and facilities, as well as on buses of a public and private primary or secondary school and vocational school, and at all school-sponsored events. While the MA Smoke-Free Workplace Law now prohibits smoking and vaping in all enclosed workplaces, including public and private schools, the Education Reform Act also includes outdoor spaces such as school grounds.

Municipal Action

Each school committee is charged with establishing a policy regarding violations.

AMENDMENTS TO TOBACCO SALES

1. Definition of Tobacco Product

The “Tobacco Product” definition has been expanded to include a product made or derived from tobacco or nicotine, including:

- a. Conventional tobacco products;
- b. Electronic cigarettes, e-cigars, e-pipes, e-nicotine delivery systems or other similar products that rely on vaporization or aerosolization; and
- c. Components, parts, accessories of a tobacco product.

The definition exempts U.S. FDA-approved cessation products. However, it does not include “no-nicotine” products even though the Attorney General includes electronic products “regardless of nicotine content” in her regulations relative to electronic tobacco products.

Municipal Action

The expanded tobacco product definition in the new state law will subject vaping product vendors to the same conditions placed on traditional tobacco product vendors. 126 municipalities have incorporated the above-described AG regulation to include alleged no-nicotine products.

2. Increases Minimum Legal Sales Age to 21

The new sales law provides that no person shall sell or provide a tobacco product to a person who is under 21 years of age. However, it exempts anyone born before December 31, 2000. This means that anyone who turns eighteen (18) by or on December 30, 2018 is exempt from the law and may continue to be sold tobacco.

Municipal Action

If a city or town has enacted a local regulation that raises the minimum legal sales age to 21 and the local regulation is in effect on or before December 30, 2018, then the exemption for anyone born before December 31, 2000 does not apply. This means that 18, 19, and 20 year olds are subject to the local regulation. If a municipality does not have a local regulation in effect by December 30, 2018, then the municipality is preempted (prevented) from enacting such a regulation and must continue to permit the sale of tobacco to anyone born before December 31, 2000. (Keep in mind that at one point, everyone born before December 31, 2000 will be 21).

3. Fining Structure

- a. For violation of the sections of this regulation that incorporate MGL Ch. 270 Section 6 and 105 CMR 665, the following penalties apply: In the case of a first violation, a fine of one thousand dollars (\$1000.00).
- b. In the case of a second violation within 36 months of the date of the current violation,

a fine of two thousand dollars (\$2,000.00) and the Tobacco Product Sales Permit shall be suspended for seven (7) consecutive business days.

- c. In the case of three or more violations within a 36 month period, a fine of five thousand dollars (\$5,000.00) and the Tobacco Product Sales Permit shall be suspended for thirty (30) consecutive business days.

The fining scheme for Town of Fairhaven violations remains \$100 for a first violation, \$200 for a second and \$300 for third or subsequent violations.

Municipal Action

This three-tier fining scheme represents a “floor” for cities and towns. Municipal measures may have higher, but not lower, fine amounts. In addition, local regulations provide for permitting and suspensions and possible revocation of permits.

4. Age 21 Signage

Retailers must post a sign provided by the Department of Public Health indicating that the sale of tobacco product to anyone below the minimum legal sales age is prohibited. The sign will include the exemption for anyone born before December 31, 2000. There are already signs available for those municipalities that have or will increase their minimum sales age to 21 on or before December 30, 2018.

Municipal Action

New signage will be available for ordering from the state’s clearing house by December 2018 at: <http://massclearinghouse.ehs.state.ma.us/category/TOB.html>

5. No Exemption for Parents and Guardians

The new law removes the exemption that permitted parents and guardians buy or give tobacco products to their children.

Municipal Action

The exemption for parents and guardians in local regulations is no longer legal. It does not need to be removed, but it cannot be enforced. When a municipality is considering other regulatory policies, it can be removed at that time. It will be removed from the sample tobacco sales template.

6. No Sale of Tobacco in Health Care Institutions

This is a new section of state law. It prohibits the sale of tobacco product sales, including vaping products at Health Care Institutions. “Health Care Institutions” are those entities subject to state licensing under MGL Ch. 112, including but not limited to, hospitals, clinics and pharmacies. Supermarkets that have a pharmacy are included.

The law exempts locations that only sell optical, hearing aid and/or audiology products/services that are not subject to regulation by the state’s “board of registration in pharmacy.”

Municipal Action

Cities and towns may ban the sale of these products in health care institutions, including pharmacies. 171 cities and towns in Massachusetts have instituted this policy, barring over 800 pharmacies from selling tobacco products. Because the state law is not preemptive, municipalities can prohibit locations that sell optical, hearing aid and/or audiology products/services from selling tobacco products.

7. No Free Samples of Tobacco Products

No free samples of tobacco products may be distributed except by adult-only retail tobacco stores and smoking bars approved by the Department of Revenue.

Municipal Action

Most local regulations ban the distribution of free samples without exception. Since this law is not preemptive, a complete ban with no exemptions is permissible and no action is required.

8. Vending Machines

The “Minimum Legal Sales Age” (MLSA) to sell cigarettes from a vending machine is now 21.

Municipal Action

This law is not preemptive. Municipalities should continue to completely ban vending machines.

9. On-line Sales

On-line sales include vaping products. The Department of Public Health, in consultation with the Attorney General and the Department of Revenue may establish regulations for persons engaged in the sale or shipment of tobacco products to prevent the sale or delivery of tobacco products to persons under the age of 21.

Municipal Action

None required.

10. Incorporation of Attorney General Regulations

The new state law incorporates the Attorney General’s regulations on child-resistant packaging and liquid nicotine containers as found at 940 CMR 21.00 (M.G.L. Ch. 270 §27). The regulations authorize cities and towns to enforce it using the Non-Criminal Disposition (civil) form of ticketing without town meeting or city council approval. However, the allowable fining structure is \$200, \$500 and \$1,000. The two higher amounts exceed the maximum of \$300 permitted by the Non-Criminal Disposition state law. This discrepancy will need to be addressed.

Municipal Action

Many local regulations incorporate the entire Attorney General Regulations and enforce them like they enforce the rest of their tobacco sales regulation.

Effective Date of the New State Law: December 30, 2018 & September 30, 2020

DRAFT