INTRODUCTION
At the February 25 Commission Meeting, Staff introduced a framework for policy discussions on developing/exploring a policy to ban the sale of all tobacco products in Beverly Hills. This included a planned series of four Commission meetings ending on May 20 and a presentation of Commission recommendations to City Council at the first Study Session in June. Mayor Mirisch has requested the Staff present Commission recommendations to City Council at the first Study Session in May, anticipated to be May 7.

Staff has revised the timeframe and, after having polled Commissioners’ availability for other potential meeting dates, recommends the Commission discuss and vote on key policy points at this March 25 Commission meeting. Staff has provided notice to all appropriate stakeholders.

TOBACCO PRODUCT DEFINITION
The Beverly Hills Municipal Code (“BHMC”) defines a tobacco product as including:

a) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, and smokeless tobacco;

b) Any electronic cigarette; and

c) Any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately.

The Municipal Code definition of a tobacco product does not include a drug, device, or combination product authorized for sale by the U.S. Food & Drug Administration as a tobacco use cessation product such as nicotine patches, gum or lozenges.

If the City moves forward with a ban on the sale of tobacco products, the inclusion of Subsection C, above, may have some unintended consequences. For example, lighters, ashtrays and cigar papers are all is reasonably expected to be used with a tobacco product. However, because these products can come in many various forms (i.e. a cigarette lighter versus a generic lighter,
an ashtray versus a generic dish), this clause might present several unintended code enforcement complications where it is unclear whether an item being sold constitutes a tobacco product.

As such, Staff recommends removing Subsection C of the City’s definition of tobacco product. Doing so is consistent with other Municipal Code provisions as it relates to the sale of cannabis products, whereby products containing cannabis are prohibited to be sold, but cannabis accessories (i.e. pipes, water pipes, grinders, etc.) are not prohibited. This approach offers consistency among existing cannabis regulations and eliminates ambiguity.

**COMMISSION POLICY QUESTIONS**

After having heard City Council inquiries on February 5 and Commission inquiries and areas of interest on February 25, Staff has developed the following policy questions. Staff recommends the Commission evaluate the questions as posed in the table. Relevant details and background information is included in each subsection below.

<table>
<thead>
<tr>
<th>Short form</th>
<th>Policy Questions</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>1  Carve Out</td>
<td>Does the Commission support: a “carve out” for all, some or none of the categories of existing businesses?</td>
<td>ALL/SOME/NONE</td>
</tr>
<tr>
<td>2  Phase-in Period</td>
<td>What is the appropriate “phase-in period” for existing retailers?</td>
<td>___YEARS</td>
</tr>
<tr>
<td>3  Future/New Permits</td>
<td>Does the Commission support: immediately, upon the effective date of the ordinance, no longer accepting applications for new/future tobacco and electronic cigarette retailer permits?</td>
<td>YES/NO</td>
</tr>
</tbody>
</table>

1. **Does the Commission support a “carve out” for all, some or none of the categories of existing businesses?**

Staff recommends the Commission answer whether all, some or none of existing businesses should be exempted (“carved out”) from the ban. An existing business would be any retailer that applied for, and was subsequently issued, a tobacco retailer permit prior to the date when the City would no longer accept new permit applications (see Question 3). If the Commissions votes yes for a carve out for some existing businesses, Staff recommends the Commission refer to the business categories, shown below, and provide direction on which business types should be exempted from the ban.

There are currently 28 establishments with active City-issued tobacco and electronic cigarette retailer permits. Three retailers appear to be cigar lounges. Two are grocery stores, six are gas stations, eight are associated with hotels, and nine consist of convenience stores or pharmacies. The three cigar lounges that sell primarily tobacco products include the Buena Vista Cigar Club, the Grand Havana Room, and Nazareth’s Fine Cigars.
### Composition of Existing Retailers

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Retailers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cigar lounges</td>
<td>3</td>
</tr>
<tr>
<td>Grocery stores</td>
<td>2</td>
</tr>
<tr>
<td>Gas stations</td>
<td>6*</td>
</tr>
<tr>
<td>Associated with hotels</td>
<td>8</td>
</tr>
<tr>
<td>Convenience stores or pharmacies</td>
<td>9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>28</strong></td>
</tr>
</tbody>
</table>

*There appears to be two permits associated with one gas station.*

In 2012 there were approximately 45 retailers, but that number has steadily declined to approximately 28 current retailers. 19 of the City’s existing tobacco retailers have held permits since 2010, when the City adopted such requirements. One has held a permit since 2011, two since 2012, four since 2015, one since 2017, and one since 2018.

The Commission has previously requested information regarding the fiscal impact on individual businesses that currently sell tobacco products. The Chamber of Commerce and Staff have requested from permitted retailers supportable statistics regarding this question. Limited data exists to measure the sales volume of tobacco products in a manner that could help assess the fiscal impact to an individual business. As such, the City is reliant on self-reported data and other anecdotal evidence as provided by retailers.

Through both public meetings on the topic, business have stated that a ban on tobacco sales would have a negative impact on revenue and have provided various figures during the Public Comment section of the agendas.

Notably, the National Association of Tobacco Outlets (“NATO”) has stated that the business model for the average convenience store relies on gasoline sales at the pump and tobacco sales in the store. NATO has also written that tobacco sales account for approximately 36% of all in-store sales [at gas stations]. Further, NATO has written that customers who purchase tobacco products would patronize other stores in adjacent cities—in some cases across the street—resulting in a loss of not only tobacco sales revenue but also revenue from items these customers would have otherwise purchased as part of a larger transaction (gasoline, snacks, beverages, etc.).

Staff has additionally reached out to the American Petroleum and Convenience Store Association (“APCA”) to quantify generally tobacco sales at gas stations and convenience stores. APCA has written that local Beverly Hills retailers have already reported a significant drop in foot traffic and overall sales because of the City’s recent ordinance banning the sale of flavored tobacco products, which became effective in full on December 21, 2018—however local businesses, to date, have not provided data.

Data from pharmacy chain CVS does provide one indication of fiscal impact. In the fall of 2014, CVS stopped selling all tobacco products in an unprecedented move that gained national attention. According to a February 20, 2017 Forbes Magazine article, CVS said tobacco and related sales amounted to a loss of approximately $2 billion in annual sales that existed when the chain sold cigarettes. In 2014, the retailer reported $139.37 billion in sales, indicating that approximately 1.43% of all revenue was generated from tobacco products. This measure does
not prove sales trends of other retailers, or even other pharmacies, as there are several variables among different retailers that are unknown. Nonetheless, this statistic provides one point of reference for the Commission’s consideration.

As previously reported, the extent to which a business relies on revenue generated from tobacco sales will vary dependent upon its category and business model. For a large grocery store selling a high volume of varied products, tobacco products might represent a small or even insignificant portion of overall sales. For small businesses such as gift shops or newsstands, tobacco sales might represent a much larger portion of overall sales.

Finally, Staff estimates the availability of tobacco products for sale is fundamental to the business models of three existing businesses categorized as cigar lounges. Staff has received 87 letters (either explicitly referencing the Grand Havana Room or Buena Vista Cigar Club) from the public requesting exemptions for cigar lounges.

2. What is the appropriate “phase-in period” for existing retailers?

The City should allow for an appropriate amount of time before the ban takes effect for existing businesses. For clarity, any phase-in period would start upon the effective date of any ordinance adopted by City Council.

Ordinances typically require a first reading for introduction at a City Council meeting and second reading for adoption at the following City Council meeting. The ordinance then goes into effect 30 days after the second reading. For example purposes, unless otherwise clearly and unambiguously stated by the Commission, Staff will interpret a “#-year phase-in” as # years after the effective date of the adopted ordinance. In other policy discussions, the Commission has decided on a January 1 date for specific provisions in a new ordinance to become effective. This method simplifies the outreach processes and is generally easier to remember. For example, the Commission may wish a phase-in period to end January 1, 20yy.

Although the extent of the fiscal impact on an individual business is unknown, it is likely that existing permitted tobacco retailers would see some amount of reduced revenue. Furthermore, businesses will also likely have existing inventory. Whether tobacco constitutes 1.43% of all sales, 36% of all sales or any other percentage of sales, Staff recommends the Commission grant an appropriate amount of time before a ban would take effect with regard to existing retailers. An unanticipated and immediate decline in revenue might cause undue hardship on a business.

Representatives from the University of California, San Francisco School of Nursing and the organization Action on Smoking & Health have indicated that the City should take a phased approach in reducing tobacco sales and have suggested a three-to-five year phased strategy. During this time retailers could reformulate their business models, involve new product lines and/or develop new marketing strategies. Such measures would need to be developed, tested and implemented and might also require multiple iterations before each business identifies the best approach. Such changes might not be feasible in a one-or-two-year period, especially for smaller retailers.

Existing retailers would continue to renew permits annually until the end of the phase-in period. At the end of the phase-in period, a retailer would no longer be permitted to sell tobacco products (unless subject to a carve out discussed in Question 1). Any ordinance will include a
provision so that upon the end of the phase-in period, retailers may demonstrate that the loss of their permit would cause undue hardship, which is discussed later in this report.

3. **Does the Commission support immediately, upon the effective date of the ordinance, no longer accepting applications for new/future tobacco and electronic cigarette retailer permits?**

Public discussions thus far have focused on existing retailers. However, the Municipal Code still allows retailers to apply for and receive new permits. Staff recommends the Commission evaluate the appropriate date when the City will no longer accept new permits, essentially limiting tobacco permits to annual renewals for only existing retailers. An existing business would be any retailer that applied for, and was subsequently issued, a tobacco permit prior to the date when the City would no longer accept new permit applications.

Staff has posed the question in a “yes or no” format.

A “yes” vote would mean that upon the effective date of the ordinance (30 days after the second reading), the City would not accept new permit applications.

A “no” vote would require the Commission to pose an alternate date (i.e. six months, one year, January 1, 20yy, etc.). The City would accept and issue new permits to tobacco retailers through this date.

**HARDSHIP EXEMPTION**

Any ordinance should include a provision that allows for a “hardship exemption”. This provision is necessary to mitigate any challenges to a ban and offer businesses an opportunity to demonstrate the extent to which they are affected by an impending ban. At least six months prior to the end of the phase-in period, the permitted tobacco retailer/applicant would submit a completed application to the City requesting an extension of the permit. In determining whether to grant the hardship exemption, the hearing officer would consider, among other factors, the following information:

1. The term of the requested extension;
2. The percentage of the retail sales over the last three years that have been derived from tobacco products;
3. The amount of investment in the business;
4. The present actual and depreciated value of any business improvements dedicated to the retail sale of tobacco products;
5. The applicable Internal Revenue Service depreciation schedule or functional non-confidential equivalent;
6. The remaining useful life of the business improvements that are dedicated to the sale of tobacco products;
7. The remaining lease term, if any;
8. The ability of the tobacco and electronic cigarette retailer to sell other products; and
9. The opportunity for relocation of the business and the cost of relocation.

The hearing officer would determine whether to approve or deny the request. If granting the request, the hearing officer would also determine the length of time of the hardship exemption (i.e. how long the business would be permitted to continue selling tobacco products). The hearing officer’s decision could be appealed to City Council.
PERMITS NON-TRANSFERABLE

BHMC 4-2-2107 already provides: “a tobacco and electronic cigarette retailer permit is nontransferable and is valid only for the person(s) and location specified in the permit application. If a permittee changes business location, that permittee, prior to the permit expiration, must obtain a new permit prior to acting as a tobacco and electronic cigarette retailer at the new location. If a business permitted to conduct tobacco and electronic cigarette retailing is sold, the new owner must obtain a permit for that location before acting as a tobacco and electronic cigarette retailer.”

Because permits are non-transferable and the City would no longer accept new permit applications, staff is recommending that the ordinance also allow for a hardship exemption from this non-transfer provision. As such, the permitted tobacco retailer would be required to demonstrate that the imposition of the non-transferability clause, above, would constitute an undue hardship on their business. For example, the death of a family-member whose name was originally listed on the permit application might constitute an undue hardship. Or, a landlord with knowledge that a permitted tobacco retailer cannot transfer permits to new locations, might attempt to increase rent substantially at a permitted location above fair market value, recognizing that a permitted tobacco retailer would have no options to maintain a permit and seek alternate business locations. Staff is finalizing the details of this section.

ENFORCEMENT

For existing permitted retailers, BHMC 4-2-2115 already sets forth the enforcement provisions of the existing City’s tobacco and electronic cigarette retailer permitting regulations. The proposed ordinance would be subject to these same enforcement provisions. Additionally, the Municipal Code includes a provision for compliance monitoring that allows a “youth decoy” to participate in compliance checks supervised by a peace officer or code enforcement official of the City. On an annual basis, the Police Department conducts sting operations with a youth decoy to monitor compliance.

The City would continue enforcing existing permits in this manner with already established enforcement mechanisms. This includes escalating fines and civil penalties. A first violation is $250. A second violation within a five-year period is $750 and suspends the retailer permit for 90 days. A third violation within a five-year period is $1,000 and revokes the permit.

If a non-permitted retailer were to sell tobacco products, enforcement would default to the general provisions of the Municipal Code whereby at the discretion of the City Attorney or City Prosecutor, violations could be prosecuted as infractions or misdemeanors. In addition, the City could impose administrative penalties pursuant to BHMC 1-3-3. The City could also seek to declare the property a public nuisance or bring a civil action against the business.

OUTREACH

Due to the modifications to the timeline presented in the introduction section of this report, Staff has distributed a revised letter to existing retailers and other interested parties that have previously provided contact information, including the Chamber of Commerce and Conference and Visitors Bureau. Staff has notified the retailers by mail, email, and phone call on March 15, 2019. Staff has updated the website to reflect this new information. A copy of the letter has been included as Attachment 1. Staff has also attended a recent Chamber of Commerce Government Affairs Committee meeting on March 15, 2019 to discuss smoking regulation and signage. Previous outreach has included:
An email to the Health and Safety Commission on January 10, 2019;

A notification to the public at the January 28, 2019, Health and Safety Commission Regular Meeting;

A brief update at the Chamber’s Government Affairs Committee meeting on January 10, 2019—the Committee members provided preliminary input, but the Committee did not take any action;

Hardcopy letters and emails distributed to active holders of the City’s Tobacco and Electronic Cigarette Retailer Permit distributed on January 16, 2019;

Updates/discussions with the Board of Directors at the Chamber of Commerce and the Conference and Visitors Bureau;

Emails to the Beverly Hills Conference and Visitors Bureau, the Rodeo Drive Committee, and the Beverly Hills Chamber of Commerce on January 16, 2019;

Discussions regarding policy recommendations among individual Health and Safety Commissioners or Staff with organizations that support reducing exposure to smoke and tobacco; and

Emails to those who spoke on items related to flavored tobacco and smoking regulations at the August 7, 2018, City Council Study Session, the January 22, 2018, Health and Safety Commission meeting, and the February 26, 2018, Health and Safety Commission meeting, the February 5, 2019 City Council Study Session and the February 25, 2019 Health and Safety Commission meeting. This includes organizations such as Los Angeles County Department of Public Health, the American Lung Association and the National Association of Tobacco Outlets.

**RECOMMENDATION**

Due to timeline constraints, Staff recommends the Commission review the questions presented in the Commission policy questions section of this report vote on the specific policy options presented.

Staff additionally recommends (1) the modification to the definition of tobacco product as presented, (2) the inclusion of a hardship exemption, (3) the inclusion of a hardship exemption specifically as it relates to transferability of permits and (4) the inclusion of the enforcement provisions as presented.

Staff will include these key policy provisions in a draft ordinance that has been scheduled for the City Council Study Session May 7 and present the Commission’s recommendations to City Council.

At the April 22 Commission Meeting, Staff will present additional options for partnerships with other non-profit organizations and agencies.