Honorable President

and Members of the City Council,

Attached for your consideration is an Ordinance requested by Council President Chris Jerram. The Ordinance amends Omaha Municipal Code Chapter 12, Article VII, entitled "Retail Sales of Tobacco Products," by amending Section 12-146 to remove an exemption for nicotine delivery devices, such as vaping and e-cigarettes, from the occupation tax imposed pursuant to Chapter 12, Article VII.

Council President Jerram request your favorable consideration of this Ordinance.

Respectfully submitted,

Ryan J. Wiesen
Assistant City Attorney
AN ORDINANCE to amend Omaha Municipal Code Chapter 12, Article VII, entitled "Retail Sales of Tobacco Products," by amending Omaha Municipal Code Sections 12-136 and 12-146; to provide legislative findings and intent; to amend the definition of "tobacco products" to include electronic nicotine delivery systems (ENDSs) and ENDS components and parts, and to exclude FDA approved tobacco cessation products; to remove an exemption for nicotine delivery devices from the tax imposed by this article; and to provide an effective date hereof.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF OMAHA:

Section 1. Findings and Intent.

(a) This City Council hereby declares that it is the policy of the City to affirm the scientific evidence that the use of tobacco products is causally connected to many diseases and is dangerous to human health.

(b) This City Council further finds that the diseases and health hazards causally connected to the use of tobacco products adversely affect the economic vitality of the city, its citizens, and taxpayers in many ways, including lost employment opportunities, decreased productivity and compensation, and increased expenses for medical care that take away discretionary spending that generates tax revenue and enhances the quality of life in the city. Many of these costs are borne by employers and result in reducing the city's attractiveness to new businesses and new job opportunities for the citizens. These adverse economic effects are unfairly carried by persons who receive no benefit from the sale of tobacco products while persons engaged in the sale of tobacco products receive an economic benefit without contributing a fair share to the costs to the city and its citizens. It is preferable that persons who engage in the occupation that benefits from the sale and use of tobacco
products should bear a greater proportionate share of the adverse effects through an occupation tax that makes revenue available to the City for use in increasing economic and employment opportunities within the city. This determination is made with due recognition of the just, proper, and equitable distribution of tax burdens within the city.

(c) This City Council further finds that electronic nicotine delivery systems (ENDSs) and ENDS components and parts, including but not limited to e-cigarettes, vapes, vaping products, E-liquids, atomizers, cartomizers, clearomisers, flavors, flavor enhancers, water filtration base additives, flavored waterpipe tobacco charcoals, and other nicotine delivery devices that provide for the ingestion of nicotine into the human body that are regulated by the United States Food and Drug Administration (FDA) as tobacco products under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act, and authorized federal regulations, are causally connected to the diseases and health hazards set forth above that adversely affect the economic vitality of the city, its citizens, and taxpayers. Many of these costs are borne by employers and result in reducing the city’s attractiveness to new businesses and new job opportunities for the citizens. These adverse economic effects are unfairly carried by persons who receive no benefit from the sale of tobacco products while persons engaged in the sale of tobacco products receive an economic benefit without contributing a fair share to the costs to the city and its citizens. It is preferable that persons who engage in the occupation that benefits from the sale and use of tobacco products should bear a greater proportionate share of the adverse effects through an occupation tax that makes revenue available to the City for use in increasing economic and employment opportunities within the city. This determination is made
with due recognition of the just, proper, and equitable distribution of tax burdens within the city.

(d) This City Council further finds that there exists a separate classification of nicotine delivery devices that provide for the ingestion of nicotine into the human body but that are primarily intended, marketed, and used as tobacco cessation products. Such products are separately regulated by the FDA, are not considered tobacco products under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act, and do not adversely affect the economic vitality of the city, its citizens, and taxpayers in the manner set forth above. This City Council further finds that these tobacco cessation products do not contribute to the lost employment opportunities, decreased productivity and compensation, and increased expenses for medical care that take away discretionary spending that generates tax revenue and enhances the quality of life in the city like the tobacco products enumerated above.

(e) This City Council finds, therefore, that persons engaged in the activity of tobacco dealers comprise a different and distinct occupation than persons engaged in the activity of the sale of tobacco cessation products, and that these distinct occupations are recognized through local, state, and federal regulation and licensing. It is therefore appropriate that a tax be imposed on the occupation classification of tobacco dealers for the purpose of raising revenue to support and further city activities and services.

Section 2. Chapter 12, Article VII of the Omaha Municipal Code, entitled "Retail Sales of Tobacco Products," Section 12-136 – "Definitions," is amended as follows:

Sec. 12-136. – Definitions.

For the purpose of this article, the following terms, phrases, words and their derivations
shall have the meaning given:

(1) **Administrator** means the person who is authorized to perform the duties and responsibilities described herein, and that person shall be either the planning director or the director's designee, who shall be an employee of the planning department.

(2) **Place of business** means a place where tobacco products are sold at retail, including vending machines and any temporary sales location.

(3) **Responsible person** means any person, firm, association, company, partnership, or corporation or agent or employee of same who operates a store, stand, booth, concession, or other place at which tobacco sales are made to purchasers. A responsible person as defined and applied herein must be an individual 18 years or older.

(4) **Temporary sales location** shall mean a designated location where tobacco products are sold at retail for a period not to exceed six consecutive days. The term shall not include a vending machine.

(5) **Tobacco dealer** shall mean any person engaging in the retail sale of tobacco products or keeping of tobacco products for retail sale who is subject to the licensing requirement of this article and/or the requirements of Neb. Rev. Stat. § 28-1420 through 28-1424 (Reiss. 2008).

(6) **Tobacco products** shall mean (1) cigarettes, (2) cigars, (3) cheroots, (4) stogies, (5) periques, (6) granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, (7) snuff, (8) snuff flour, (9) cavendish, (10) plug and twist tobacco, (11) fine cut and other chewing tobacco, (12) shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco, (13) any nicotine delivery device providing for the ingestion of nicotine into the body, (14) any electronic nicotine delivery system (ENDS) and ENDS components and parts that are regulated by the FDA as tobacco products.
under 21 CFR Part 1100, 21 CFR Part 1140, or 21 CFR Part 1143, and (44)(15)
anything containing tobacco or any other kinds and forms of tobacco, prepared in
such a manner as to be suitable for either chewing, smoking in a pipe, chewing and
smoking, or inhaling and snorting through the nose. The term tobacco products shall
not mean any tobacco cessation device or tobacco cessation product whose
manufacturer has filed an application with the FDA's Center for Drug Evaluation and
Research and has been approved by the FDA as a tobacco cessation product.

(7) Vending machine means any device or machine requiring the deposit of money or
other things of value, including any such device or machine activated or operated by
the vendor or by an employee or agent of the vendor.

(8) Vendor-assisted access means access to tobacco, tobacco products, or other
nicotine delivery devices only with the direct assistance of the vendor or a vendor
employee or agent, so that customers do not have direct access to take possession
of tobacco, tobacco products, or other nicotine delivery devices without direct
assistance from the vendor or a vendor employee or agent.

Section 3. Chapter 12, Article VII of the Omaha Municipal Code, entitled "Retail Sales of
Tobacco Products," Section 12-146 – "Tax imposed," is amended as follows:

Sec. 12-146. – Tax imposed.

(a) The city council determines that persons engaged in activity as a tobacco dealer
comprise a distinct occupation which is recognized through city and state regulation
and licensing. It is appropriate that a tax be imposed on this occupation class for the
purpose of raising revenue to support and further city activities and services.

(b) On or after January 1, 2013, and in each calendar month thereafter, there is hereby
imposed an occupational privilege tax upon each and every person conducting
business as a tobacco dealer within the city for any period of time during a calendar
month. The amount of the tax shall be three percent of all gross receipts derived
from the sale of tobacco products and any pipe or other device intended for use in
consuming tobacco products. For purposes of calculating this tax, the term "tobacco
products" shall include any items within the definition provided by this article, except
nicotine delivery devices providing for the ingestion of nicotine into the body, and all
other cigarettes or tobacco products, if any, which are subject to the cigarette tax imposed by Neb. Rev. Stat. 77-2601 et seq. (Reiss. 2009), as amended, or the tax imposed by the Nebraska Tobacco Products Tax Act, Neb. Rev. Stat. 77-4001 et seq. (Reiss. 2009), as amended.

(c) A tobacco dealer may itemize the tax levied on a bill, receipt, or other invoice provided to the purchaser but each person engaged in the occupation shall remain liable for the tax imposed by this article.

(d) The tax imposed by this article is for revenue purposes to support the government of the city and its activities. The levy of the tax under this article is in addition to all other fees, taxes, excises, and licenses levied and imposed under any contract or any other provisions of this Code or ordinances of the city and in addition to any fee, tax, excise, or license imposed by the state. Payment of the tax shall not relieve the person paying it from paying any other tax now or hereafter imposed, including those imposed for any business or occupation carried on along with the sale of tobacco products, unless otherwise provided therein. The occupation tax imposed by this article shall be cumulative except where otherwise specifically provided.

(e) The occupation tax imposed by this section shall terminate on December 31, 2022.

Section 4. The sections, subsections, paragraphs, sentences, clauses, and phrases of this Ordinance are severable, and if any section, subsection, paragraph, sentence, clause, or phrase of this Ordinance shall be declared invalid, unenforceable, or unconstitutional by the valid judgment or decree of a court of competent jurisdiction, such invalidity, unenforceability, or unconstitutionality shall not affect any of the remaining sections, subsections, paragraphs, sentences, clauses, or phrases of this Ordinance.

Section 5. That this Ordinance shall be in full force and take effect 15 days from and after the date of its passage.
ORDINANCE NO. 48010

INTRODUCED BY COUNCILMEMBER
Christopher Jennew

APPROVED BY:
Jean Stothert 11-21-19
MAYOR OF THE CITY OF OMAHA DATE

PASSED NOV 19 2019 5-2

APPROVED AS TO FORM:

ATTEST:

CITY CLERK OF THE CITY OF OMAHA DATE

11-21-19