

THE SUTTON LAW FIRM

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August 7, 2019

VIA EMAIL ONLY

Members of the Ballot Simplification Commission
c/o Ms. Barbara Carr
Ballot Simplification Committee
1 Dr. Carlton B. Goodlett Place, Room 48
San Francisco, CA 94102

RE: Request for Reconsideration of "Vapor Products" Digest

Dear Committee Members:

On behalf of our client, the Coalition for Reasonable Vaping Regulation, the political committee formed to support the "Act to Prevent Youth Use of Vapor Products," also known as the "Vapor Products" initiative, we respectfully request reconsideration of 12 items in the "Vapor Products" Digest approved by the Ballot Simplification Committee ("BSC") on Tuesday, August 7, 2019. We appreciate the BSC's diligent efforts to create an accurate and understandable ballot digest for San Francisco voters, and hope that the following proposals help support the BSC's goals.

Request Item 1: The term "electronic cigarette" should be replaced with the term "vapor product" throughout the Digest.

Justification: The City Attorney's official initiative title is "Vapor Products," and that term is used throughout the law. Use of a different term may confuse voters because the Digest does not mention "vapor products" despite the fact that term appears in the title and legal language. (Please note that proposed language below includes this replacement based on the same justification.)

Request Item 2: Amend the following sentence.

Current language: "The U.S. Food and Drug Administration (FDA) regulates tobacco products. Beginning in late January 2020, the City will suspend the sale of electronic cigarettes that have not then gone through required pre-market review by the FDA."

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Proposed Language: "The U.S. Food and Drug Administration (FDA) regulates tobacco products. Beginning in late January 2020, the City will suspend the sale of vapor products that have not then gone through pre-market review by the FDA, making it illegal to sell such products in San Francisco."

Justification: FDA pre-market review is not required until May 2020, and the word "required" implies that such a requirement exists today. The current sentence is also legalistic, and the phrase "suspend the sale" may be confusing to voters. Highlighting that the sale of such products would be made illegal clarifies the practical application of the law to voters.

Request Item 3: Amend the following sentence,

Current language: "The City would regulate the sale of authorized electronic cigarettes as follows:"

Proposed language: "Today, the City regulates the sale of vapor products as follows:"

Justification: The phrase "would regulate" may confuse voters regarding the point at which the enumerated laws are effective. The laws listed are currently in effect, and different laws will be in effect in the future.

Request Item 4: The statement "The State regulates the sale of vapor products as follows:" should be included prior to the point beginning with "State law requires tobacco retailers."

Justification: The two points which would fall below this proposed insertion detail State regulations, and are currently below a statement regarding the City's regulatory provisions. This could confuse voters regarding current City law.

Request Item 5: Amend the following sentence,

Current Language: "Repeal the City law that suspends the sale of electronic cigarettes that lack required authorization by the FDA."

Proposed Language: "Repeal the City law that suspends the sale of vapor products that lack authorization by the FDA."

Justification: As noted above, FDA pre-market review is not required until May 2020, and the word "required" implies that such a requirement exists today.

Request Item 6: Amend the following sentence,

Current Language: "Partially repeal City law to allow the sale, manufacture and online retail sale of electronic cigarettes on City property."

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Proposed Language: "Allow the sale, manufacture and online retail sale of vapor products on City property."

Justification: The current preface regarding repeal is unnecessary.

Request Item 7: The sentence reading "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes" should be deleted.

Justification: The sentence is speculative and vague, and mentions no specific laws which will actually be repealed. A vague legalistic statement of this sort is likely to confuse voters and provides no concrete information upon which they may base their vote.

Alternative to Request Item 7: Amend the following sentence,

Current Language: "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes."

Proposed Language: "May repeal other City laws that apply to vapor products."

Justification: If the current speculative statement regarding the repeal of "some laws" must be included, then it is similarly important to avoid highlighting one particular law without legal justification while omitting others. Voters are likely to read this clause as a legal conclusion that the initiative actually repeals the flavor ban, or else a voter will be confused as to why only one law is highlighted and/or which other laws might be repealed. Given the comments during the BSC's August 6 meeting, it is clear that the repeal of particular laws will be included in ballot arguments on both sides of the issue, which will permit voters to receive sufficient information on the subject within the ballot materials.

Further Alternative to Request Item 7: Amend the following sentence,

Current Language: "May repeal other City laws that apply to electronic cigarettes, including the City law that prohibits the sale of flavored electronic cigarettes."

Proposed Language: "May repeal other City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products. The proponents and drafters of Proposition __ contend that it does not repeal the City law that prohibits the sale of flavored vapor products."

Justification: Including the position held by proponents regarding the flavor ban may help establish the clear intent of the initiative to maintain the flavor ban. Such clarification may assist a court in finding that the initiative does not actually repeal the flavor ban – a result which benefits both sides of this debate.

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Request Item 8: Amend the following sentence,

Current Language: "Proposition __ would repeal some City laws regarding electronic cigarettes and impose new regulations on the sale and distribution of vapor products in San Francisco as follows:"

Proposed Language: "Proposition __ would impose new regulations on the sale and distribution of vapor products in San Francisco as follows:"

Justification: Including the phrase "would repeal some City laws regarding electronic cigarettes" is duplicative of the previous section.

Request Item 9: Amend the following sentence,

Current Language: "Require retailers to scan photo identification to verify that customers are 21 years or older."

Proposed Language: "Require retailers to scan photo identification to verify that customers are 21 years or older, and that the identification has not expired."

Justification: The proposed clause tracks the legal language of the initiative, and is a new legal requirement imposed by the initiative.

Request Item 10: Amend the following sentence,

Current Language: "Require retailers to train their employees twice a year."

Proposed Language: "Require retailers to train their employees twice a year on the restrictions on the sale of vapor products, including these new regulations."

Justification: The proposed clause tracks the legal language of the initiative, and clarifies the type and scope of training required under the new legal requirements.

Request Item 11: Amend the following sentence,

Current Language: "Verify that customers are at least 21 years old"

Proposed Language: "Verify that customers are at least 21 years old using enhanced verification techniques."

Justification: The proposed clause specifies that the initiative institutes new third-party verification requirements to the current state verification requirements, and thereby constitutes a new legal requirement.

Request Item 12: Amend the following sentence,

Current Language: "A 'YES' Vote Means: If you vote 'yes,' you want to allow vapor products to be sold in the City regardless of FDA authorization and adopt new regulations on the sale, manufacturing, distribution and advertising of vapor products in San Francisco."

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Proposed Language: "A 'YES' Vote Means: If you vote 'yes,' you want to allow vapor products to be sold in the City, unless the FDA decides otherwise, and to adopt new regulations on the sale, manufacturing, distribution and advertising of vapor products in San Francisco."

Justification: The current statement inaccurately implies that products made illegal by the FDA could be sold in San Francisco. Instead, the sentence should indicate that the initiative would permit the continued availability of vapor products unless the FDA's review concluded that such a product should not be available to the public.

Thank you for your consideration of our proposed changes. We look forward to answering any questions you have during public meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "N. Sanders", with a stylized flourish at the end.

Nicholas L. Sanders