

Law Offices of

OLSON
HAGEL &
FISHBURN
LLP

Lance H. Olson
Richard R. Rios
Lacey E. Keys
Emily A. Andrews

Bruce J. Hagel
of counsel

Diane M. Fishburn (Ret.)

Deborah B. Caplan
of counsel

Christopher W. Waddell

Erika M. Boyd

Kelly Liang

Benjamin Gevercer

Megan W. Lasswell

Christine Dugger

Northern California

555 Capitol Mall
Suite 400
Sacramento, CA
95814-4602

Tel: (916) 442-2952
Fax: (916) 442-1280

Southern California

555 East Ocean Blvd.,
Suite 420
Long Beach, CA
90802-5003

Tel: (562) 427-2100
Fax: (562) 427-2237

August 5, 2019

VIA ELECTRONIC MAIL: PUBLICATIONS@SFGOV.ORG

Members of the Ballot Simplification Committee c/o Barbara Carr
Department of Elections
City and County of San Francisco
1 Dr. Carlton B. Goodlet Place, Room 48
San Francisco, CA 94102

RE: Comments Regarding Draft Ballot Digest for Vapor Products Initiative

Dear Committee Members:

We write on behalf of our client, the SF Kids vs. Big Tobacco Coalition, in response to the draft Ballot Digest released by the City Attorney on August 1, 2019. In advance of the Ballot Simplification Committee meeting scheduled for August 6, 2019, we are providing our written comments on the draft Digest. The SF Kids vs. Big Tobacco Coalition is a group of health and youth advocates who supported upholding the candy-flavored tobacco ordinance in San Francisco in 2018, and continue to advocate against the harmful impacts of tobacco and nicotine on youth.

As drafted, we agree with many of the provisions included in the Digest. We are proposing several changes to the draft that we believe will help provide greater transparency to voters regarding the impacts of the proposed measure, and which will help the Committee achieve its objective of providing voters a fair and impartial summary of the measure that is understandable at an eighth grade reading level. In addition to addressing our edits in this letter, we are attaching our proposed version of the Ballot Digest that tracks these changes.

As noted by the Department of Public Health, this “proposal does not serve the public health as it may remove local regulations aimed at protecting youth and reducing future nicotine addiction. Based on growing youth use rates and what the US Surgeon General calls ‘an epidemic of youth use’ this proposal would not protect public health but rather support the producers and sellers of e-cigarette products.” For this reason, we want to ensure that voters are provided with a full, accurate and understandable description of the effects of this Initiative.

Finally, while separate from the Ballot Digest, in preparing the summary regarding how this measure qualified for the ballot, we encourage you to make clear that Juul is the sole funder of the Initiative qualification effort. In analyzing this Initiative, voters have a right to understand that this measure was drafted and its qualification funded by the very industry the measure would regulate.

I. Recommended Changes to “The Proposal”: First Sentence

In the first sentence of The Proposal section, we recommend revising this sentence to include additional language clarifying that all future regulation of vapor tobacco and nicotine products will need to be imposed via voter initiative, rather than by the Board of Supervisors. The current draft provides that the proposal would “prevent the City from prohibiting the manufacture, wholesale, and online retail sale of vapor products in San Francisco.”

As explained in the letter we provided to the City Attorney in advance of the initial draft Digest, Section Article 19N.5-6 of the Initiative provides that the article is intended to comprehensively authorize and regulate the retail, sale availability and marketing of vapor products and e-cigarettes in the City and County of San Francisco. Further, the measure provides that pursuant to Municipal Elections Code §390 and California Elections Code §9217 the provisions of the Initiative may only be amended by a vote of the People. These two provisions, read together, restrict any future action by the Board of Supervisors regarding the retail, sale, availability and marketing of e-cigarettes and vapor products. We believe it is important that voters very clearly understand that they are restricting the Board of Supervisors from imposing future regulation on vapor tobacco and nicotine products in San Francisco.

In addition, we recommend revising the first sentence of The Proposal to inform voters regarding the impact that the Initiative will have on the existing City law that prohibits the sale of flavored tobacco products, including flavored electronic cigarettes. There are several provisions in the Initiative that make clear the Initiative intends to overturn the flavored tobacco prohibition as applied to vapor products.

As discussed above, Section 19M.5-6 of the Initiative provides that the Initiative is intended to comprehensively authorize and regulate the retail, sale, availability and marketing of vapor products in the City and County of San Francisco. The Findings and Conclusions section of the Initiative provides that the purpose of the Initiative is to preserve “access for adults [to vapor products] to enable them to transition from the use of combustible cigarettes.” To achieve this purpose, the Initiative defines “vapor products,” “electronic cigarettes,” and “e-cigarettes” broadly, and does not distinguish between flavored and non-flavored vapor products or electronic cigarettes. Further, the Interpretation section of the Initiative provides: “It is the intent of the voters that the provisions of this Act be interpreted or implemented in a manner that facilitates the purposes set forth in this Act.”

As further evidence that the Initiative intends to repeal existing law, Section 19N.2(c) of the Initiative provides: “Neither this section nor Article 19K nor any other provision of law apply to prohibit

the manufacture, wholesale, or online retail sale of vapor products.” (Emphasis added). This provision makes clear that the Initiative intends to allow for the online sale of vapor products, including flavored electronic cigarettes. According to this provision, no other provision of law, including Article 19Q of the Health Code, can prohibit the online sale of vapor products, including flavored vapor products.

To achieve its stated objective of preserving adult access to vapor products and electronic cigarettes, the Initiative repeals two existing laws and replaces those laws with a new regulatory scheme that permits the sale of electronic cigarettes, including flavored electronic cigarettes, in the City and County of San Francisco. The Initiative must be interpreted to repeal both the existing ban on electronic cigarettes which have not received FDA approval and the existing ban on flavored electronic cigarettes, in order to give full meaning to the Initiative’s stated purpose of preserving adult access to vapor products.

We recommend revising the first sentence to:

“Proposition ___ would prevent the City from prohibiting or regulating the manufacture, wholesale, and online retail sale of vapor products in San Francisco, and would prohibit the Board of Supervisors from imposing additional regulations on electronic cigarettes. This measure would also repeal certain existing City laws regarding vapor products, including repeal of the existing ban on flavored electronic cigarettes, and impose regulations on the sale and distribution of vapor products, otherwise known as electronic cigarettes, in San Francisco that would....”

II. Recommended Changes to “The Proposal”: First Two Bullet Points

As drafted, the first two bullet points of The Proposal section of the Digest highlight provisions of the Initiative that are currently part of existing law. Existing law prohibits the sale of tobacco products, including vapor products and electronic cigarettes, to persons under the age of 21, and also prohibits the sale of vapor products and electronic cigarettes everywhere that the sale of other tobacco products is prohibited.

While the Way It Is Now section of the Digest makes clear that these provisions are part of existing law, including bullet points highlighting these provisions as part of The Proposal section of the Digest confusingly gives the incorrect impression that these provisions are new protections added by the Initiative. They are not.

To make this clear to voters, we recommend completely striking the first two bullet points from The Proposal section.

Should the Committee elect to keep these bullet points, at a minimum, we recommend changing the first bullet point to include the word “knowingly” in front of “from selling or distributing vapor

products to people under age 21.” Current law in San Francisco provides: “The sale or distribution by an Establishment of any Tobacco Products to a person aged 18, 19, or 20, is prohibited.”¹ The Initiative changes this requirement specifically with respect to “vapor products,” and instead prohibits “knowingly” selling or distributing vapor products to persons under the age of 21. The addition of a legal standard requiring knowledge will make it extremely difficult for the City to hold retailers accountable for sales to underage buyers. We believe including the word “knowingly” in the first bullet point is important. This bullet point should read:

- Changes existing law Pprohibiting retailers and others from selling or distributing vapor products to people under age 21 to require actual knowledge by the seller or distributor that the purchaser was under age 21

To this point, in drafting the Words You Need to Know materials, we request that the Ballot Simplification Committee add an explanation of what it means to “knowingly” sell or distribute vapor products. While this distinction may seem like an obscure legal point, this change will have an impact on the liability of those who sell vapor products to persons under the age of 21 and voters have a right to understand this impact.

Black’s Law Dictionary provides the following definition of the word “knowingly: “With knowledge; consciously; intelligently. The use of this word in an indictment is equivalent to an averment that the defendant knew what he was about to do, and, with such knowledge, proceeded to the do the act charged.” We suggest using this language in the Words You Need to Know document.

III. Recommended Changes to “The Proposal”: Last Paragraph

While we generally agree with the language stated in the last paragraph of The Proposal, we request a change in formatting to make this information clearer to the voters. Currently, The Proposal section of the Digest lays out the regulatory provisions of the Initiative in clear bullet points. The last paragraph of The Proposal section contains several important points that we believe would be better understood by the voters if also formatted using bullet points. We believe that breaking out the information in the last paragraph of The Proposal into bullet points will help the Committee achieve its directive to make the Digest readable at an eighth grade reading level.

In addition, because the Initiative does in fact repeal other City laws that apply to vapor products, we recommend a change to the last sentence of the last paragraph of The Proposal to remove the word “may.” This wording is consistent with the wording provided in the the “A Yes Vote Means” section of the Digest, which provides that the measure would “repeal certain existing City laws...”

We propose revising the last paragraph to read as follows:

¹ San Francisco Health Code Article 19P.3

Proposition ___ states that it would comprehensively authorize and regulate the retail sale, availability and marketing of vapor products in San Francisco, with the following impacts:

- The measure would repeal the City law suspending the sale of electronic cigarettes that lack required approval by the FDA.
- The measure ~~It~~ would partially repeal the City law that prohibits the sale, manufacture, and distribution of tobacco products on City property by allowing the sale, manufacture, and online retail sale of vapor products on City property
- The measure ~~may~~ also repeals other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products ~~electronic cigarettes.~~

IV. Recommended Changes to “A Yes Vote Means”

In line with the reasons explained above, we are also requesting two changes to the “A Yes Vote Means” section of the Digest. These changes will also help to better inform voters regarding the impact of the measure on existing law, and the restrictions that the measure will place on the future ability of the Board of Supervisors to regulate vapor tobacco and nicotine products.

We recommend revising the first bullet point to read:

- Prevent the City from prohibiting the manufacture, wholesale, and online retail sale of ~~vapor products~~ electronic cigarettes, and prohibit the Board of Supervisors from imposing additional regulations on electronic cigarettes.

We recommend revising the second bullet point to read:

- Repeal certain existing City laws ~~relating to~~ prohibiting the sale of electronic cigarettes, including flavored electronic cigarettes ~~vapor products and impose laws permitting the sale of electronic cigarettes and other vapor products to people over age 21~~

We recommend adding an additional bullet point to read:

- Replace existing City bans on electronic cigarettes, including flavored electronic cigarettes, with a regulatory scheme that permits the sale of electronic cigarettes and other vapor products to people over age 21.

Members, Ballot Simplification Committee
August 5, 2019
Page 6

We appreciate your consideration of these changes, and look forward to discussing them in detail at the Ballot Simplification Committee meeting on Tuesday, August 6th.

Respectfully,

OLSON HAGEL & FISHBURN LLP

A handwritten signature in black ink, appearing to read "LH Olson", written on a light-colored rectangular background.

LANCE H. OLSON

A handwritten signature in blue ink, reading "Emily Andrews", written on a light-colored rectangular background.

EMILY A. ANDREWS

Vapor Products*

Digest by the Ballot Simplification Committee

Status: Draft for Consideration
On: Tuesday, August 6, 2019
Members: Packard, Anderson, Raveche

Deadline to Request Reconsideration: TBD

The Way It Is Now: The City and the State of California regulate the sale of tobacco products. The term “tobacco products” includes vapor products such as electronic cigarettes, their cartridges and other parts, and liquid nicotine. Electronic cigarettes are battery-operated devices that vaporize liquid nicotine and deliver it to the user.

City and State law prohibit the sale of vapor products in San Francisco in the following ways:

- The City and State prohibit the retail sale of tobacco products to people under age 21 and the State prohibits the sale of tobacco products on the internet to people under age 21.
- The City prohibits the sale of vapor products everywhere the sale of other tobacco products is prohibited.
- The City prohibits the sale of flavored tobacco products, including flavored vapor 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 U.S. Food and Drug Administration (“FDA”). As of July 2019, the FDA has not completed that review for any electronic cigarette product and the FDA probably will not have done so by late January 2020.

In situations where the sale of vapor products, like other tobacco products, is allowed in San Francisco, the City and State also regulate the sale of those products in the following ways:

- Tobacco retailers must obtain permits from the City and the State, and tobacco distributors must obtain a license from the State.
- State law requires tobacco retailers to check the identification of any customer who appears to be under age 21, and to store vapor products where customers cannot access them without assistance.
- State law requires sellers and distributors of vapor products on the internet to verify that customers are at least 21 years old.

City law prohibits the sale, manufacture, and distribution of vapor and other tobacco products on City property.

City law prohibits advertising of certain tobacco products on billboards or other publicly visible signs in San Francisco and on City property. Federal and State law impose additional advertising restrictions for tobacco products.

The Proposal: Proposition ___ would prevent the City from prohibiting or regulating the manufacture, wholesale, and online retail sale of vapor products in San Francisco, and would prohibit the Board of Supervisors from imposing additional regulations on electronic cigarettes. The measure would also repeal certain existing City laws regarding vapor products, including repeal of the existing ban on flavored electronic cigarettes, and impose regulations on the sale and distribution of vapor products, otherwise known as electronic cigarettes, in San Francisco that would:

- ~~• Prohibit retailers and others from selling or distributing vapor products to people under age 21;~~
- ~~• Prohibit retailers from selling vapor products everywhere the sale of other tobacco products is prohibited;~~
- Require retailers to place vapor products where customers cannot access them without assistance;

**Working title, for identification only. The Director of Elections determines the title of each local ballot measure; measure titles are not considered during Ballot Simplification Committee meetings*

- Require retailers to scan photo identification of customers to verify that they are 21 years or older;
- Prohibit retailers from selling more than two vapor product devices or five finished product packages of liquid nicotine, per transaction; and
- Require retailers to train their employees about these requirements twice a year.

Proposition ___ would also require individuals and entities that sell more than 100 vapor products per year on the internet to San Francisco customers to:

- Obtain a permit from the City;
- Verify that customers are at least 21 years old; and
- Sell no more than two vapor product devices or 60 milliliters of liquid nicotine, per month, to each customer.

Proposition ___ would prohibit knowingly advertising vapor products designed to appeal to minors or using an advertising medium known to be seen primarily by people under 21 years old.

Proposition ___ states that it would comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in San Francisco, **with the following impacts:**

- The measure would repeal the City law suspending the sale of electronic cigarettes that lack required approval by the FDA.
- **The measure** would partially repeal the City law that prohibits the sale, manufacture, and distribution of tobacco products on City property by allowing the sale, manufacture, and online retail sale of vapor products on City property.
- The measure **may** also **repeals** other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored **vapor products** **electronic cigarettes**

A "YES" Vote Means: If you vote "yes," you want to:

- Prevent the City from prohibiting the manufacture, wholesale, and online retail sale of **vapor products** **electronic cigarettes** in San Francisco, **and prohibit the Board of Supervisors from imposing additional regulations on electronic cigarettes.**
- Repeal certain existing City laws **relating to prohibiting the sale of electronic cigarettes, including flavored electronic cigarettes** **vapor products** and **impose laws permitting the sale of electronic cigarettes and other vapor products to people over age 21;**
- **Replace existing City bans on electronic cigarettes, including flavored electronic cigarettes, with a regulatory scheme that permits the sale of electronic cigarettes and other vapor products to people over age 21**
- Regulate these sales by imposing storage requirements on retailers, requiring retailers and internet sellers to obtain City permits and use age verification technology, and limiting the number of vapor products that retailers and internet sellers may sell per transaction; and
- Restrict the knowing advertising of vapor products to people under age 21.

A "NO" Vote Means: If you vote "no," you do not want to make these changes.