

# THE SUTTON LAW FIRM

August 5, 2019

VIA E-MAIL ONLY

Dennis Herrera, Esq.  
San Francisco City Attorney  
City Hall, Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4635

Dear Mr. Herrera:

This letter follows up on our letter to your office last week regarding the draft Ballot Simplification Committee digest for the “Act to Prevent Youth Use of Vapor Products” initiative (the “Initiative”).

In response to some politically motivated claims that the Initiative would repeal the City’s ban on flavored tobacco products, our letter made clear that the Initiative does not expressly or “impliedly” repeal either the ban on retail sales of flavored products adopted by voters last year or the extension of the flavor ban to online sales enacted by the Board of Supervisors earlier this year (collectively, the “flavor ban”). Despite our request that you not mention the flavor ban in the draft digest – just as your office had not mentioned it in the official Title & Summary – the draft digest (attached) incorrectly speculates that the Initiative “may” repeal the ban: “The measure may also repeal other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products.”<sup>1</sup> This sentence is false and misleading for a number of reasons.

First, including this sentence in the draft digest flies in the face of case law which, as you know, requires the digest and all other materials printed in the voter information pamphlet to be “true and impartial, and not argumentative,” and to not “create prejudice for or against the measure.” (See, e.g., Horneff v. City & County of San Francisco (2003) 110 Cal. App. 4th 814; McDonough v. Superior Court (2012) 204 Cal. App. 4th 1169.) Though we had hoped that our letter would avoid this prospect, the draft digest gives us serious concern – especially because you personally co-sponsored the complete ban on the sale of vaping products passed by the Board this June and because of your public statements to the press and on Twitter opposing the Initiative – that the City Attorney’s office has a conflict of interest in drafting the digest for the Ballot Simplification Committee as well as other official City actions relating to the Initiative. Given your personal and political opposition to the Initiative, we therefore call on you to rescind the draft digest, retain an outside law firm or other city attorney’s office to prepare a new one, and recuse yourself and your office from any and all official City actions relating to the Initiative.

Second, the Initiative will not repeal the flavor ban. Significantly, the City’s Office of Small Business submitted a letter to the Department of Elections (the day before we sent you our letter on this topic) which agrees unequivocally that the Initiative would not affect the flavor ban: “The measure does not reverse the ban on sales of flavored tobacco products.” (See attached 7/25/19

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<sup>1</sup>This sentence is found at the end of the last paragraph of “The Proposal” section.

Dennis Herrera, Esq.  
August 5, 2019  
Page 2

letter; emphasis added.) Moreover, the Initiative states repeatedly that it was intended to impose “additional” restrictions on vaping products; it also does not amend or otherwise alter the City laws which ban flavored tobacco products. (The flavor ban is found in sections 19Q and 19S of the City’s Health Code, while the Initiative only amends sections 19N and 19H.)

Third, and perhaps most notably, JUUL Labs, Inc. (“JLI”), the sponsor of the Initiative committee (the Coalition for Reasonable Vaping Regulation), has stated that it is not the intent of the Initiative to repeal the flavor ban. JLI’s Chief Administrative Officer, Ashley Gould, has submitted an affidavit to the Ballot Simplification Committee (attached) stating unequivocally:

“The Initiative was never intended to have the effect of . . . repeal[ing] the prohibition on the sale and distribution of flavored tobacco products. . . . It was always intended that the flavor ban, including its extension, would remain in effect. These flavor ban provisions are consistent with the Initiative, which was consciously designed to build on and incorporate existing regulation of vapor products and tobacco products more generally.”

In a full-page ad appearing in Sunday’s Chronicle (attached), the Coalition for Reasonable Vaping Regulation confirmed that the Initiative was never intended to repeal the flavor ban, stating: “Stopping youth vaping starts with keeping the City’s flavored e-cigarette ban” and “The Initiative to stop youth vaping will keep the City’s flavored e-cigarette ban.”

Finally, we ask the City Attorney’s office to recuse itself from all City matters relating to the Initiative. In sum, the draft digest is not impartial; is speculative and argumentative; and is deliberately misleading. Your office has an ethical and statutory obligation to the public and to the democratic process to provide true and impartial summaries of the Initiative, and to remain completely neutral in all advice given to the Department of Elections and City about the electoral process. We therefore repeat our request that you rescind the draft digest, retain an outside law firm or other city attorney’s office to prepare a new one, and hereinafter recuse your office from any and all official City actions relating to the Initiative.<sup>2</sup>

Sincerely,



James R. Sutton

cc: Barbara Carr, Ballot Simplification Committee

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<sup>2</sup>If you refuse to rescind the draft digest, by copy of this letter to the Ballot Simplification Committee, we respectfully request that the Committee completely remove the sentence regarding the flavor ban from the final version of the digest.

## **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

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**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 the manufacture, wholesale, and online retail sale of vapor products in San Francisco. The measure would also repeal certain existing City laws regarding vapor products and impose regulations on the sale and distribution of vapor products 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.

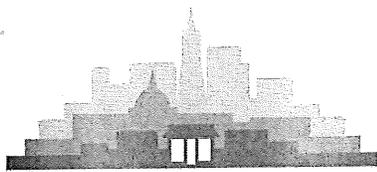
Proposition \_\_\_ would prohibit knowingly advertising vapor products designed to appeal to minors or using an advertising medium known to be seen primarily by people under 21 years old.

Proposition \_\_\_ states that it would comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in San Francisco. The measure would repeal the City law suspending the sale of electronic cigarettes that lack required approval by the FDA. 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 repeal other existing City laws that apply to vapor products, including the City law that prohibits the sale of flavored vapor products.

**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 in San Francisco;
- Repeal certain existing City laws relating to vapor products and impose laws permitting 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.



SAN FRANCISCO

**OFFICE OF SMALL BUSINESS**

CITY AND COUNTY OF SAN FRANCISCO  
LONDON N. BREED, MAYOR

OFFICE OF SMALL BUSINESS  
SMALL BUSINESS COMMISSION  
REGINA DICK-ENDRIZZI, DIRECTOR

July 25, 2019

John Arntz  
Director  
Department of Elections  
City Hall, Room 48  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94117

Dear Director Arntz,

This letter is the Office of Small Business (OSB) analysis of the “VAPOR PRODUCT” measure to the Ballot Simplification Committee.

Currently there is approximately 815 City and County of Department of Public Health tobacco sales permit holders and roughly 92% of these permit holders are small businesses. Currently tobacco sales permit holders currently are able to sell e-cigarettes or nicotine vapor products to individuals 21 or older. Beginning January 1, 2020, Ordinance No: 122-19 will prohibit current City and County of Department of Public Health tobacco sales permit holders from selling and distributing e-cigarettes products that do not have FDA premarket approval.

This ballot measure as drafted and passed by the voters will allow the continuation of City and County of Department of Public Health tobacco sales permit holders to sell e-cigarettes. The measure does not reverse the ban of sales flavored tobacco products. The ballot measure retains the requirement for the permit holder to sell only to individuals that are 21 and older. The requirement for the permit holder to purchase to a photo identification scanner will have a one-time expense that is approximately \$900.00.

The ballot measure does place a requirement of the number of products that the permit holder can sell at each transaction. This limitation in sales does will result in some reduction of revenue and sales for the permit holders, but it is a financial impact that is manageable for the small and all current tobacco permit holders.

The requirement to provide 1 hour of retail training twice a year to employees is manageable and a good procedure to ensure the retailer maintains the highest of standards necessary to ensure all sellable tobacco and vapor products are sold to individuals that are 21 and older.

This ballot measure is establishing new and first time regulations to online retailers, manufacturers and wholesalers. Very rarely does government attempt to apply the same regulatory requirements to online and app based businesses as is done to brick and mortar businesses. Not only is this very important to closing the loophole for easy access of e-cigarettes and vapor products for individuals under 21, it also levels the economic playing field for San Francisco's brick and mortar "establishments". One of the most critical components to this ballot measure is the creation of nearly similar regulatory requirements for online-retailers as there are for brick and mortar "establishment" retailers. This is done by:

- Requiring online retailers to obtain a tobacco sales permit from the Department of Public Health;
- Requirement so electronic age verification at the time of purchase;
- Requirement that limits the amount of e-cigarette or nicotine –containing liquids that can be sold at any one time;
- Placing advertising and marketing restrictions and a violation of this regulation that result in penalties and fines.

Where there are differences in brick and mortar "establishment" and online retailers is:

- A photo ID does not have to scanned at the time of the delivery of the purchase to insure the product is being delivered to the purchaser or an individual that is 21 or older;
- Employees of an online retailer are not required to do the twice a year 1 hour training.

The regulations applied to online retailers, manufacturers and wholesalers in this ballot measure are more stringent than current regulations and in Ordinance No: 122-19.

It is important for both San Francisco's small business and the City's youth to do the most we can to limit youth <21, in accessing tobacco. This ballot measure if passed takes good strong measures in doing so with minimal financial impact to San Francisco's tobacco sales permit holders while retaining adults in San Francisco the ability to continue to purchase these produces, and it strongly closes the online loopholes and ease of youth access through new online regulations.

Should the ballot measure not pass it will:

- Allow Ordinance No: 122-19 to go into effect January 1, 2020, which will prevent San Francisco brick and mortar businesses from selling e-cigarettes and nicotine containing liquids, which can significantly impact small tobacco sales permit holders;
- Prevent adults 21 and older from purchasing e-cigarettes;
- Will not require online retailers from obtaining a tobacco sales permit;
- Will not provide the Department of Public Health the tools it needs to regulation online sales to individuals <21;
- Will not provide the Department of Public Health the tools it needs to regulation advertising and marketing to youth.

CITY AND COUNTY OF SAN FRANCISCO  
OFFICE OF SMALL BUSINESS  
SMALL BUSINESS COMMISSION

Thank you to you, and the Ballot Simplification Committee for your consideration of the Office of Small Business analysis to the "Vapor Products" ballot measure. I will be happy to answer any questions you may have or attend any Committee meeting as requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Regina Dick-Endrizzi". The signature is written in a cursive, flowing style.

Regina Dick-Endrizzi  
Director, Office of Small Business

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IN THE BALLOT SIMPLIFICATION COMMITTEE  
FOR THE CITY & COUNTY OF SAN FRANCISCO

IN RE BALLOT DIGEST FOR  
INITIATIVE ENTITLED "VAPOR  
PRODUCTS" AT THE NOVEMBER 2019  
ELECTION

**DECLARATION OF ASHLEY  
GOULD, CHIEF  
ADMINISTRATIVE OFFICER OF  
JUUL LABS, INC., REGARDING  
THE "VAPOR PRODUCTS"  
INITIATIVE'S INTENDED LACK  
OF EFFECT ON THE "FLAVOR  
BAN"**

**DATE: August 6, 2019  
TIME: 9:00 a.m.**

I, ASHLEY GOULD, declare under penalty of perjury as follows:

1. I am over 18 years of age. I make this declaration of my personal knowledge. I am the Chief Administrative Officer of JUUL Labs, Inc., which is the sponsor of the Coalition for Reasonable Vaping Regulation, the committee primarily formed to support the "Act to Prevent Youth Use of Vapor Products" initiative, tentatively entitled the "Vapor Products" initiative in this proceeding (the "Initiative"). JUUL Labs was directly involved in the drafting of the Initiative.

2. There have been a number of public statements recently made by opponents of the Initiative to the effect that, if adopted, the measure would repeal the prohibition on the sale and distribution of flavored tobacco products, adopted by the voters as Proposition E in

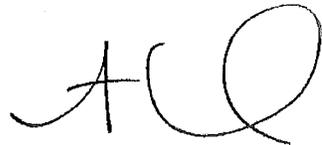
1 June 2018 and extended by the Board of Supervisors earlier this year (the “flavor ban”). The  
2 Initiative was never intended to have that effect, and it does not do so. It was always intended  
3 that the flavor ban, including its extension, would remain in effect. These flavor ban  
4 provisions are consistent with the Initiative, which was consciously designed to build on and  
5 incorporate existing regulation of vapor products and tobacco products more generally.

6 3. What the Initiative was meant to supersede—what is irreconcilable with the  
7 Initiative—was the complete prohibition on the sale of vapor products that was included in  
8 Sections 19R.2 and 19S.2, subdivision (b), of the Health Code, adopted by the Board of  
9 Supervisors in late June. Regulation cannot be reconciled with a categorical prohibition on  
10 the sale of all vapor products in the City.

11 4. If the Initiative passes, retailers will remain subject to the flavor ban—they will  
12 simply be required to also comply with the Initiative’s more stringent regulations on the sale  
13 of vapor products. In this context, the Initiative’s declaration of “comprehensive” regulation  
14 can only be understood as a clear alternative to the complete ban on the sale of vapor  
15 products, and does not repeal the flavor ban, implicitly or otherwise.

16 I declare under penalty of perjury under the laws of the State of California that the  
17 foregoing is true and correct of my personal knowledge, and, if called as a witness, I could  
18 testify competently thereto, except for those matters stated on information and belief and as  
19 to those matters, I believe them to be true.

20 Executed this 5th day of August, 2019, in San Francisco, California.

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24 Ashley Gould, Declarant  
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Paid Political Advertisement

# Stopping youth vaping starts with keeping the City's flavored e-cigarette ban.

San Franciscans agree: we all want to stop youth vaping. Our ballot initiative does that, while also saving adults' right to choose e-cigarettes as an alternative to smoking.

Cigarettes kill 8 million people a year. They shouldn't stay on the shelf while e-cigarettes are banned. It's just a gift to cigarette makers. Instead, let's further restrict e-cigarette sales and marketing to youth, and **keep the City's existing flavored e-cigarette ban.**

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## THE INITIATIVE TO STOP YOUTH VAPING WILL:

- **Keep the City's flavored e-cigarette ban**
  - **Require an ID age verification system for all retail and online sales**
  - **Ban e-cigarette marketing to youth under 21**
  - **Prohibit bulk sales to stop black market re-sellers**
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Read our letter to the City Attorney's Office and our plan to preserve the flavor ban at [RegulateNotBan.com](http://RegulateNotBan.com)

Ad paid for by Coalition for Reasonable Vaping Regulation, including neighborhood grocers and small businesses. Committee major funding from Juul Labs. Financial disclosures are available at [sfethics.org](http://sfethics.org).

**Stop Youth Vaping**

REGULATE DON'T BAN