THE SUTTON LAW FIRM

July 26, 2019

VIA E-MAIL

Andrew Shen, Esq.
Jenica Maldonado, Esq.
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102-4635

Dear Mr. Shen & Ms. Maldonado:

We write on behalf of Jennifer Hochstatter, the proponent of the "Act to Prevent Youth Use of Vapor Products" initiative which will appear on the November 2019 ballot (the "Initiative"), and the Coalition for Reasonable Vaping Regulation, the political committee supporting this measure.

Our purpose in writing is to address the initial draft "Digest" for this measure. We recognize that the content of the Digest is ultimately up to the Ballot Simplification Committee, but we also understand that the City Attorney's office often prepares an initial draft (and that you are the Deputy City Attorneys who will be working with the Committee this year).

Opponents of the Initiative have recently advanced a claim in the press that the Initiative would repeal the ban on flavored tobacco products which was adopted by the voters in 2018 and which was then extended by the Board of Supervisors earlier this year (collectively referred to herein as the "flavor ban"). That is false. The Initiative does not intend to repeal the flavor ban, and any legal analysis of the Initiative must conclude that it does not repeal the ban. Your office appropriately did not include any such claim about repealing the flavor ban in the title and summary it prepared for the Initiative, and we urge you to similarly refrain from including such a claim in any draft Ballot Simplification Committee Digest.

The flavor ban adopted in 2018 is contained in Article 19Q of the City's Health Code, and the extension of the flavor ban adopted in 2019 is contained in Section 19S.2(a). Except for adding certain enforcement provisions in Article 19H, the Initiative's provisions are limited to amending Article 19N – a wholly separate section of the Health Code – and do not expressly repeal or reference the flavor ban.

The opponents' argument, as we understand it, is that the statement in the Initiative that it is intended to "comprehensively authorize and regulate" the sale of vapor products amounts to an "implied repeal" of the flavor ban. That is not a supportable reading of the Initiative. As you know, the courts strongly disfavor repeals by implication: "Absent an express declaration of legislative intent, a court will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. Implied repeal

150 Post Street, Suite 405 ■ San Francisco, CA 94108
Tel: 415/732-7700 ■ Fax: 415/732-7701 ■ www.campaignlawyers.com

should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier." (Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1040; internal quotation marks and citations omitted.) This presumption against implied repeal is especially applicable here, where part of the law which would supposedly be repealed was the subject of a high-profile referendum campaign just last year. Courts will not presume that subsequently-enacted laws make major policy changes to prior laws in so obscure a manner – that they seek to "hide elephants in mouseholes." (Whitman v. Am. Trucking Ass'ns (2001) 531 U.S. 457, 468.)

Here, the prohibitions against the sale or distribution of any "Flavored Tobacco Product" contained in Sections 19.Q and 19S.2(a), which include combustible tobacco products and electronic cigarettes, are not irreconcilable with the Initiative's intent to comprehensively authorize and regulate the sale of vapor products. The entire text, structure and context of the Initiative makes clear that it was meant to build on and supplement, and not supersede, the regulations of vapor products which were already in place, and also to apply certain regulations applicable to tobacco products also to vapor products.

Indeed, throughout the Initiative and the supporting materials submitted to the Department of Elections, there are frequent references to the fact that the Initiative was meant to impose "additional" restrictions on the sale and access to vapor products (in "addition" to those that already existed), as well as to extend existing restrictions on traditional tobacco products to vapor products. Thus:

- The Notice of Intention states that the Initiative is being circulated "for the purpose of adopting additional restrictions and safeguards to prevent the sale of, and access to, vapor products (also referred to as "electronic cigarettes" or "e-cigarettes") to anyone under 21 years of age . . ." (Emphasis added.)

- The only statement of the Initiative's intent is in the section setting forth the "findings and purposes in enacting this initiative": "This article is intended to impose additional safeguards to prevent the access to and sale of vapor products by those under the age of 21 years and to restrict the marketing of vapor products to those underage, while preserving access for adults to enable them to transition from the use of combustible cigarettes." (Initiative Section 2(g); emphases added.)

- Section 7 of the Initiative adopts new age verification requirements and product quantity limits "in addition to the restrictions contained in Sections 19N.5 and 19P.3." (Emphasis added.)

- Section 9 of the Initiative bans advertising of vapor products in all places in which advertising of traditional tobacco products was already banned.

Moreover, the proposed title and summary submitted to your office would have titled the Initiative "Imposes Additional Regulations and Restrictions on the Access, Sale, and Marketing of Vapor Products in the City . . ." and would have further informed voters that "The sale and use

of vapor products in San Francisco are regulated and taxed by the State of California, including a prohibition against the sale of tobacco products, including vapor products, to persons under 21 years of age, with additional regulation by the City and County of San Francisco. This measure would impose additional safeguards, and enhanced restrictions, against the sale and marketing of vapor products to any person under the age of 21 years in San Francisco." (Emphases added.)

In addition, the Initiative imposes a number of new regulations that were not already applicable to traditional tobacco products, including online seller permits, additional advertising regulations, etc.

Again, the text and context of the Initiative make clear that it was intended to supplement, and not repeal, pre-existing regulations.

What the Initiative was meant to supersede – what is irreconcilable with the Initiative – is the complete prohibition on the sale of vapor products adopted by the Board of Supervisors in June, found in Health Code Sections 19R.2 and 19S.2(b). That prohibition on vapor products, which will prevent adults from using vapor products to transition away from the use of traditional combustible cigarettes, was pending in a Board committee before the Initiative was submitted. If the Initiative passes, retailers will still not be able to sell flavored tobacco in San Francisco – they will simply be required to also comply with the Initiative's more stringent regulations on the sale of vapor products. In this context, the Initiative's declaration of "comprehensive" regulation can only be understood as a clear alternative to the Board's complete ban on the sale of vapor products, and does not repeal the flavor ban, implicitly or otherwise.

It seems that opponents of the Initiative may shape their campaign around the claim that the flavor ban would be repealed, perhaps because the claim polls well. But such a claim is not consistent with the law, and, as this letter confirms, is not consistent with the proponent's intention. We therefore urge your office to reject any suggestion that this claim be included in the draft Digest.

Finally, we would appreciate this letter being included in the formal public file for of the upcoming Ballot Simplification Committee hearing with respect to the Initiative.

Sincerely,

James R. Sutton

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cc: Barbara Carr, Ballot Simplification Committee