

COUNCIL ACTION

EXECUTIVE SUMMARY SHEET

SUBJECT: Proposed ordinance repealing various tobacco advertising provisions, and amending other provisions to regulate the advertising and promotion of tobacco products and e-cigarettes.

REQUESTED ACTION:

Proposed Ordinance O-2015-96 repealing various existing tobacco advertising provisions, and amending other provisions to regulate tobacco and e-cigarette advertising and promotion.

STAFF RECOMMENDATION: Approve introduction of the ordinance as set forth in the Requested Action.

EXECUTIVE SUMMARY OF ITEM BACKGROUND:

On September 16, 2014, the City Council approved Ordinances O-20408 and O-20409 regulating the use and retailing of electronic cigarettes. When these two ordinances were being considered, the Council expressed its desire to regulate the advertising of electronic cigarettes in the same way that tobacco advertisements are regulated. Chapter 5, Article 8, Division 3 of the San Diego Municipal Code currently imposes restrictions and prohibitions on advertising and promotion of tobacco products. The intent with this ordinance is to amend existing provisions of the Municipal Code to impose the same restrictions and prohibitions on electronic cigarettes. To ensure that the City complies with Supreme Court decisions and federal law, the Office of the City Attorney requested time to review the ordinance and make appropriate revisions.

The ordinance repeals broad advertising restrictions in publicly visible locations and within previously established 1,000 foot buffer zones, and repeals restrictions on content-based advertisements. The ordinance restricts the advertisement and placement of products (tobacco products and electronic cigarettes) in certain locations, and prohibits self-service displays.

The City Attorney's office prepared a Memorandum of Law to the Mayor and City Council, dated April 10, 2015, with details of the ordinance. It is attached for reference.

Since approval of Ordinances O-20408 and O-20409 regulating the use and retailing of electronic cigarettes, the California Department of Public Health has issued a warning related to the hazards posed by electronic cigarettes, especially the dangers posed to youth.

Previous:

On September 16, 2014, the City Council approved the proposed Municipal Code revisions regulating the use and retailing of electronic cigarettes, Ordinances O-20408 and O-20409.

On June 18, 2014, the Public Safety and Livable Neighborhoods Committee unanimously approved the proposed municipal code revisions regulating the use and retailing of electronic cigarettes. VOTE: 4-0-0; Harris-yea, Cole-yea, Kersey-yea, Emerald-yea.

On February 26, 2014, the Public Safety and Livable Neighborhoods Committee ACTION: Motion by Councilmember Kersey, second by Councilmember Cole to approve drafting of an ordinance related to use and retailing of electronic cigarettes. VOTE: 3-0-1; Zapf-yea, Cole-yea, Kersey-yea; Emerald-absent.

FISCAL CONSIDERATIONS: N/A

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MEMORANDUM OF LAW

DATE: April 10, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Regulating Advertising of Tobacco Products and Electronic Cigarettes in the City of San Diego

INTRODUCTION

Last year, the San Diego City Council (Council) passed two ordinances relating to electronic cigarettes. San Diego Ordinance O-20408 (Oct. 2, 2014) prohibits the use of electronic cigarettes in the same locations where smoking of cigarettes and other tobacco products is prohibited. And San Diego Ordinance O-20409 (Oct. 2, 2014) regulates the sale of electronic cigarettes, electronic cigarette paraphernalia, and vaping juice in the same manner that sales of tobacco products are regulated. When these two ordinances were being considered, the Council expressed its desire to regulate the advertising of electronic cigarettes in the same way that tobacco advertisements are regulated.

The City's ordinances restricting the sale, advertising and promotion of tobacco products are codified in sections 58.0301 through 58.0312 of the San Diego Municipal Code (Municipal Code). This statutory scheme was adopted in 1998. Since then, a United States Supreme Court (Supreme Court) case was decided and federal regulations were enacted bringing into question the constitutionality of some of San Diego's advertising restrictions on tobacco products.

QUESTION PRESENTED

Are San Diego's advertising restrictions on tobacco products contained in Chapter 5, Article 8, Division 3 of the Municipal Code still valid such that they may be amended to apply to electronic cigarettes?

SHORT ANSWER

Probably not. In 2001, the Supreme Court invalidated portions of a Massachusetts law restricting the promotion and advertising of tobacco products finding that the state statutes were preempted by federal law and violated the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Massachusetts tobacco advertising restrictions that were struck down in *Lorillard* are very similar to San Diego's tobacco advertising regulations. Therefore, before the City's Municipal Code may be amended to regulate electronic cigarette advertising, some existing provisions for tobacco advertising must be repealed, and others must be amended to comply with federal regulations and constitutional requirements.

ANALYSIS

I. SAN DIEGO'S TOBACCO ADVERTISING REGULATIONS

In 1998, the City of San Diego adopted a statutory scheme to restrict the advertising and promotion of tobacco products to minors (Ordinance O-18597, adopted on October 20, 1998). Sections 58.0303 through 58.0306 of the Municipal Code regulate tobacco advertising displays. Section 58.0303, Advertising Restrictions, prohibits the advertising and promotion of tobacco products in publicly visible locations. Section 58.0304 contains exceptions to the advertising restrictions set forth in section 58.0303. Section 58.0305 restricts the placement of tobacco products and advertisements inside retail establishments. And section 58.0306 authorizes exceptions to the restrictions in section 58.0305.

Outdoor tobacco advertising displays are permitted if they "contain a generic description of tobacco products in black and white without logos or graphics." SDMC § 58.0304(d). Outdoor displays are also permitted on tobacco product delivery trucks. SDMC § 58.0304(b). Other outdoor tobacco advertising displays are prohibited unless they are (1) in certain industrial or commercial zones; and (2) "more than 1000 feet from the premises of any school, playground, recreation center or facility, child care center, arcade, or library;" and (3) "more than 1000 feet from the boundary of any zone that is not a designated commercial or industrial zone." SDMC § 58.0304(a)(1)-(a)(3). Additionally, tobacco advertising displays are prohibited when "[p]osted on the inside or outside of the windows or doors of the business such that the advertising or promotion is visible to the public from outside the establishment." SDMC § 58.0305(b)(3).

Indoor tobacco advertising displays are permitted without regulation for "commercial establishments where access to the premises by persons under eighteen years of age is prohibited by law." SDMC § 58.0306(a). Similarly, indoor tobacco advertising displays are permitted without regulation for establishments located more than "1000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library." SDMC § 58.0305. For all other establishments, indoor tobacco advertising displays are prohibited (1) below four feet from the floor; or (2) within two feet of candy, snack, or non-alcoholic beverage displays. SDMC § 58.0305.

II. FEDERAL PREEMPTION

When there is a conflict between federal law and state law, federal law prevails under the doctrine of federal preemption. The Supremacy Clause of the U.S. Constitution holds that some matters are of such a national concern, as opposed to a local concern, that a state may not pass a law inconsistent with the federal law.

In the Federal Cigarette Labeling and Advertising Act (FCLAA), Congress passed a comprehensive federal scheme governing the advertising and promotion of cigarettes. *Lorillard*, 533 U.S. at 541. The FCLAA preemption provision prohibited states or local jurisdictions from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. *Id.* at 542. In enacting the federal law, Congress was concerned with health warnings about the hazards of cigarette smoking. Congress also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising and, to this end, electronic media advertising of cigarettes was banned. *Id.* at 548.

In *Lorillard*, Massachusetts regulations on outdoor and point of sale cigarette advertising were deemed to be preempted by the FCLAA.

The Massachusetts regulations prohibited:

Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

The regulations also prohibited:

Point of sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

Lorillard, 533 U.S. at 534-35.

The stated purpose of Massachusetts' regulations was, in part, to address the incidence of tobacco use by minors and to prevent access to tobacco products by minors. The Court in *Lorillard* recognized the state's attempt to address underage cigarette smoking, but found the concern about youth exposure intertwined with concerns about cigarette smoking and health. *Id.* at 548.

In finding that the FCLAA preempted Massachusetts' regulations targeting cigarette advertising, the Court said that states remained free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales. *Id.* at 550. And the Court found that "[r]estrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision. Such restrictions are not 'based on smoking and health.'" *Id.* at 552.

Like Massachusetts, the City of San Diego also regulates outdoor and point of sale cigarette advertising. With few exceptions, Section 58.0303 of the Municipal Code prohibits advertising or promotion of tobacco products on any advertising display sign in a publicly visible location. Similarly, Municipal Code section 58.0305 prohibits tobacco products displays and advertising signs within two feet of candy, snack, or non-alcoholic beverage displays inside stores that are located within 1,000 feet of any school, playground, recreation center or facility, child care center, arcade, or library.

The stated purpose of San Diego's regulations is to discourage illegal sales and furnishing of tobacco products to minors by restricting advertising that encourages and induces minors to buy or steal and use cigarettes and other tobacco products. (Ordinance O-18597, adopted on October 20, 1998).

The preemption analysis under *Lorillard* involved the FCLAA which restricted advertising and promotion of cigarettes. The current federal standard is found in a more recent amendment, the Family Smoking Prevention and Tobacco Control Act, adopted in 2009. The Family Smoking Prevention and Tobacco Control Act requires a number of restrictions on cigarette and smokeless tobacco product advertising and other marketing, and authorizes the Federal Drug Administration (FDA) to impose additional restrictions on the advertising, promotion, and other marketing of tobacco products to promote public health.

Under the Family Smoking Prevention and Tobacco Control Act, states and local jurisdictions may restrict the time, place, and manner of tobacco advertising, but not the content. Thus, section 58.0304(d) of the Municipal Code, which is one of the few exceptions to San Diego's advertising restrictions and allows signs containing generic descriptions of tobacco products in black and white without logos or graphics, is preempted because it attempts to regulate the content of advertising.

Similar restrictions on logos or graphics in other jurisdictions have been found to be content-based and preempted. The Second Circuit held that New York City's "tombstone" provision was preempted content regulation. New York's ordinance prohibited outdoor tobacco advertising within 1,000 feet of certain areas frequented by children but permitted "a single, black-and-white, text-only 'tombstone' sign stating, 'Tobacco Products Sold Here,' within ten feet of an entrance to a retailer. *Greater New York Metro, Food Council, Inc. v. Giuliani*, 195 F.3d 100, 103 (2d Cir. 1999). The ordinance also prohibited colors, nontextual images, and non-conforming messages. *Id.* At 107. The Second Circuit concluded that "the tombstone provision thus creates obligations directly pertaining to the nature and content of advertising information. This risks the sort of 'diverse, nonuniform, and confusing' advertising standards

that Congress expressly sought to avoid. Congress could not have intended to let municipalities promulgate their own unique regulations governing the content and format of cigarette advertising information. See *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir.1997) (noting that ‘a quintessential state requirement ‘with respect to advertising and promotion’ would be a law mandating changes or additions to the content of cigarette advertisements’) (alteration omitted).” *Id.*

The Seventh Circuit reached a similar conclusion when it considered an ordinance that restricted tobacco advertisement to certain areas, but permitted “advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product.” *Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 640 (7th Cir. 1999) (abrogated on other grounds by *Lorillard*). That provision of the ordinance was preempted by the FCLAA because it “purports to regulate the content of some advertising without regard to any land-use consideration.” *Id.*

When the Ninth Circuit considered this preemption issue, it acknowledged the content versus location distinction made by the Second and Seventh Circuits but held that the FCLAA preempted both. At issue was an ordinance that generally banned advertisement but contained a tombstone exception permitting tobacco retailers to “post price and availability information outside their businesses so long as the advertisements are in plain black type on a white field without adornment, color, opinion, artwork, or logos.” *Lindsey v. Tacoma-Pierce Cnty. Health Dep’t*, 195 F.3d 1065, 1067 (9th Cir. 1999). Reaching the same conclusion that the U.S. Supreme Court later reached in *Lorillard*, the court held that “content regulations are indistinguishable from location regulations under the language and purpose of the FCLAA” and therefore they both were preempted. *Id.* at 1073.

While section 58.0304(d) is the only provision that is preempted by federal law, the balance of the San Diego’s advertising and promotion regulations are still subject to the constraints of the First Amendment, which protects certain commercial speech.

III. FIRST AMENDMENT – COMMERCIAL SPEECH

The Supreme Court defines commercial speech as speech that does “no more than propose a commercial transaction.” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973)). The Court has developed a framework for analyzing regulation of commercial speech that is “substantially similar” to the test for time, place, and manner restrictions. *Lorillard*, 533 U.S. at 554 (citing *Board of Trustees of State University of NY v. Fox*, 492 U.S. 469, 477 (1989)).

Commercial speech is analyzed under a four-part test to determine whether a regulation violates the First Amendment. *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980). The test, referred to as the *Central Hudson* test, asks whether (1) the proscribed expression is protected by the First Amendment, (2) the asserted governmental interest is substantial, (3) the regulation directly advances the governmental interest asserted, and

(4) the regulation is not more extensive than is necessary to serve that interest. *Lorillard*, 533 U.S. at 554 (citing *Central Hudson*, 447 U.S. at 566).

A. Is The Speech Protected By The First Amendment?

For commercial speech to receive constitutional protection, it must concern lawful activity and not be misleading. *Lorillard*, 533 U.S. at 554. The Supreme Court summarized the general principles underlying the protection of commercial speech thusly:

The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Edenfield v. Fane, 507 U.S. 761 (1993).

In *Lorillard*, the first prong was not at issue. The state assumed that the speech was entitled to First Amendment protection. *Id.* at 555. For purposes of analyzing San Diego's advertising restrictions, smoking cigarettes and using tobacco products are lawful, at least as to adults. Thus, a court would likely find that advertisements for tobacco products and cigarettes are protected speech, so long as the advertisements are truthful and non-deceptive.

B. Does The Government Have A Substantial Interest?

In *Lorillard*, the tobacco industry conceded that the state had an important interest in preventing tobacco use by minors. *Id.* And the Supreme Court even recognized that, "The State's interest in preventing underage tobacco use is substantial, and even compelling." *Id.* at 564. Here, it is likely that a court would find that the City has a substantial interest in preventing and discouraging tobacco use by minors based on the Supreme Court's observations in *Lorillard*.

C. Does The Regulation Directly Advance The Governmental Interest Asserted?

Under the *Central Hudson* test, this prong considers the relationship between the harm that underlies the state's interest and the means identified by the state to advance that interest. The speech restriction must directly and materially advance the asserted government interest. The burden is not satisfied by mere speculation or conjecture; rather the government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Id.* (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1993)).

The state is not required to provide empirical data supported by background information. *Lorillard*, 533 U.S. at 555. It is sufficient to cite studies and anecdotes pertaining to different locales altogether, or even to justify restrictions based upon history, consensus, and “simple common sense.” *Id.* at 555 (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

In *Lorillard*, the state cited numerous studies advancing the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. *Lorillard*, 533 U.S. at 557. The state provided evidence gathered by the FDA that the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a crucial role in that decision. *Id.* at 557-58. Other information relied upon by the state included FDA studies of tobacco advertising and trends in the use of various tobacco products. *Id.* at 558.

In evaluating this prong of the test, the Court was unable to conclude that the state’s decision to regulate advertising of tobacco products to combat the use of those products by minors was based on mere speculation and conjecture. *Id.* at 561. Therefore, the Court determined that the state justified its outdoor advertising regulations, satisfying the third prong of the *Hudson* test. *Id.*

The City of San Diego could similarly point to studies and statistics showing the link of advertising to tobacco use, and the trends of minors using tobacco products. For example, the Centers for Disease Control and Prevention (CDC) reports that tobacco use is the leading preventable cause of disease and death in the United States, and nearly all tobacco use begins during youth and young adulthood. Among U.S. youths, cigarette smoking has declined in recent years; however, the use of electronic cigarettes has increased, and nearly half of tobacco users use two or more tobacco products.¹ Likewise, the U.S. Surgeon General reports that sufficient evidence shows a causal relationship between advertising and promotion efforts of tobacco companies and the initiation and progression of tobacco use among young people.²

Thus, like Massachusetts, the City could probably satisfy the third prong of the *Central Hudson* test and show that tobacco advertising regulations directly advance the City’s substantial interest in preventing and discouraging tobacco use by minors.

D. Is There A Reasonable Fit Between The Means And Ends Of The Regulatory Scheme?

The final step of the *Central Hudson* analysis is whether the speech restriction is not more extensive than necessary to serve the interests that support it. *Id.* at 555 (quoting *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1993)). The standard is not the least restrictive means; rather case law requires a reasonable “fit between the

¹ Morbidity and Mortality Weekly Report of the Centers for Disease Control and Prevention (CDC), November 14, 2014.

² Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General, Executive Summary, 2012, U.S. Department of Health and Human Services.

legislature's ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective." *Lorillard*, 533 U.S. at 556 (citing *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Board of Trustees of State University of NY v. Fox*, 492 U.S. 469, 480 (1989))).

In this regard, the Court found that Massachusetts did not meet the standard and failed to "carefully calculate the costs and benefits associated with the burden on speech imposed" by the regulations. *Lorillard*, 533 U.S. at 561 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). The flaws in the restrictions are discussed more particularly below.

1. Advertising prohibited within 1,000 feet of schools or playgrounds

The Massachusetts outdoor advertising regulations prohibited advertising within a 1,000 foot radius of a school or playground. *Lorillard*, 533 U.S. at 556. The prohibition on outdoor advertising within 1,000 feet of schools or playgrounds resulted in prohibiting advertising in a substantial portion of the major metropolitan areas of Massachusetts.³ *Id.* at 562. The substantial geographic reach of the advertising prohibitions was compounded by the prohibition on advertising inside a store that is visible to the outside, and the restriction on advertisements of any size, from billboards to small signs. *Id.* at 562-63.

The state has an interest in preventing underage tobacco use. However, use of tobacco products by adults is legal, and tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have an interest in receiving truthful information about those products. *Id.* at 564. Thus, restrictions on speech must be narrowly tailored, and leave ample alternative channels for communication. *Id.* at 529.

The Massachusetts regulations failed to narrowly tailor the restrictions on speech, and the 1,000 foot radius restriction failed to account for different locales, and whether the area was rural, suburban or urban. *Id.* at 563. The uniformly broad sweep of the geographical limitation showed a lack of tailoring. *Id.* In addition, the ban on all signs of any size seemed ill suited to target advertising to youth; to the extent that studies have identified particular advertising and promotions that attract youth, tailoring would involve targeting those specific practices, while still allowing others. *Id.*

Like Massachusetts, San Diego's advertising restrictions apply to outside advertisements and advertisements posted on the inside or outside of windows or doors of businesses that are visible from the outside. Like Massachusetts, San Diego also prohibits advertising within 1,000 feet of schools or playgrounds; however, San Diego's regulations go even further. Municipal Code section 58.0304(a)(2) prohibits tobacco advertisements within 1,000 feet from any school, playground, recreation center or facility, child care center, arcade, or library. And San Diego's geographic reach is compounded in that the 1,000 foot restriction in Municipal Code

³ According to the petitioners, the advertising restrictions together with general zoning limitations prevented advertising in between 87 percent to 91 percent of some metropolitan areas. *Lorillard*, 533 U.S. at 562.

section 58.0304(a)(2) is on top of a restriction that limits advertisements to certain industrial or commercial zones which are also more than 1,000 feet from the boundary of any zone that is not a designated commercial or industrial zone.

Based on the Court's finding in *Lorillard*, a court would likely find that San Diego's advertising restrictions are similarly not sufficiently narrow. The backup materials in support of San Diego's ordinance did not contain any evidence of studies or data to justify the geographical restrictions. Even though schools and playgrounds are places where children congregate, the Court found that Massachusetts did not further analyze different locales (urban, rural, suburban). The City would likely have to provide that kind of analysis to defend a challenge to its geographical restrictions.

2. Advertising prohibited within five feet from the floor

Massachusetts regulations also restricted indoor point of sale advertisement, prohibiting them lower than five feet from the floor of any retail establishment within a 1,000 foot radius of any school or playground. *Lorillard*, 533 U.S. at 566. This regulation failed on the third and fourth prongs of the *Central Hudson* test. *Id.* at 567.

The blanket height restriction did not constitute a reasonable fit with the goal of preventing minors from using tobacco products or curbing demand. Not all children are less than five feet tall, and those who are may just look up and see the advertisements. *Id.* at 566. A regulation cannot be sustained if it "provides only ineffective or remote support for the government's purpose." *Id.* at 566 (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Central Hudson*, 447 U.S. at 564)). Likewise, a regulation cannot be sustained if there is "little chance" that the restriction will advance the state's goal. *Id.* at 576 (citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 193 (1993)).

Like Massachusetts, San Diego has a restriction limiting the height at which tobacco advertisements may be placed inside stores and businesses. Municipal Code section 58.0305(b)(1) prohibits advertisements from being placed below four feet from the floor, if the store or business is within 1,000 feet of a school, playground, recreation center or facility, child care center, arcade, or library.

While four feet is less restrictive than five feet, the same Constitutional principles apply. A court would likely find that San Diego's height limitation does not satisfy the third and fourth prongs of the *Central Hudson* test, in violation of the First Amendment. Again, the backup materials in support of San Diego's ordinance did not contain any evidence of studies or data to justify the height restriction to support the idea that the height restriction was effective in advancing the City's goals.

IV. SUMMARY OF PROPOSED AMENDMENTS TO THE SAN DIEGO MUNICIPAL CODE REGULATING ADVERTISING AND PROMOTION OF TOBACCO PRODUCTS AND ELECTRONIC CIGARETTES

Currently, there are no federal regulations governing the advertising or promotion of electronic cigarettes. However, to comply with First Amendment protections for commercial speech, any advertising restrictions on electronic cigarettes must still satisfy the four-prong *Central Hudson* test.

Thus, taking into account federal limitations on advertising of tobacco products and the Supreme Court's decision in *Lorillard*, the following amendments are proposed to the Municipal Code to regulate the sale, advertising, and promotion of tobacco products and electronic cigarettes.

Here is a summary of the proposed substantive changes:

Section 58.0301, Definitions: Some terms are stricken, as they are used in sections that should be repealed to comply with First Amendment principles. Some new terms relating to electronic cigarettes have been added.

Section 58.0302, Measure of Distance: This provision will be unnecessary and should be repealed since the 1,000 foot buffer zone is overly restrictive and should also be repealed.

Section 58.0303, Advertising Restrictions: Subdivision (a) prohibits tobacco advertising displays in publicly visible locations, except when expressly authorized by an exception in section 58.0304. Subdivision (b) authorizes advertising of tobacco products located inside commercial establishments, so long as there is compliance with the exceptions in section 58.0305. A court would likely find the exceptions contained in 58.0304 and 58.0305 to be overly restrictive and unable to satisfy the *Central Hudson* test. Without the exceptions, the restrictions in section 58.0303 have no application, and should be repealed.

Section 58.0304, Exceptions to Advertising Restrictions: The exception in subdivisions(a)(1) through (a)(3) allow advertising display signs located in certain industrial or commercial zones that are also more than 1,000 feet from any school, playground, recreation center or facility, child care center, arcade, or library, and more than 1,000 feet from the boundary of a zone that is not a designated commercial or industrial zone. This exception is overly restrictive so as to make it unconstitutional under the *Central Hudson* test, and should be repealed. The exceptions in sections 58.0304(b) and (c) relating to commercial vehicles used for transporting tobacco products and public service announcements, respectively, are no longer necessary if the advertising restrictions in section 58.0303 are repealed. And the exception in section 58.0304(d) which allows advertising signs containing a generic description of tobacco products in black and white without logos or graphics is preempted by federal law because it regulates the content of tobacco product signs, and should be repealed. Finally, section 58.0304(e) is not an exception, but rather applies the advertising restriction in section 58.0303(a) to public facilities within the City's jurisdiction, unless there's a contract with a private party giving the private party control

over advertising rights on the facility premises. This subdivision is unnecessary and should be repealed, if the advertising restrictions in section 58.0303 are repealed.

Section 58.0305, Location of Tobacco Products and Advertising Inside Retail Establishments: The proposed ordinance strikes the 1,000 foot restriction in subdivisions (a) and (b) because it fails to satisfy the *Central Hudson* test. Thus, as amended subdivision (a) makes it unlawful to place displays of tobacco products within two feet of candy, snacks or non-alcoholic beverage displays. And subdivision (b) makes it unlawful to place advertising signs for tobacco products within two feet of candy, snacks or non-alcoholic beverage displays. The additional restriction that prohibited advertising four feet from the floor has also been stricken from subdivision (b), as a similar restriction was found to be unconstitutional in *Lorillard*.

Section 58.0306, Exceptions to Location of Tobacco Products and Advertising Inside Retail Establishments: Subdivision (c) of section 58.0306 should be repealed. This provision is preempted by federal law because it regulates the content of public service announcements relating to tobacco products.

As amended, the balance of provisions in Chapter 5, Article 8, Division 3 of the Municipal Code regulate the sale, advertising, and promotion of tobacco products and electronic cigarettes, as they relate to minors, and comport with constitutional principles.

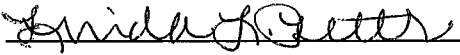
CONCLUSION

Much like the Massachusetts regulations found to be unconstitutional in *Lorillard*, it is likely a court would find San Diego's tobacco advertising restrictions overly burdensome on commercial speech. Therefore, the proposed ordinance amends the tobacco advertising restrictions contained in Chapter 5, Article 8, Division 3 of the Municipal Code to bring them into compliance with federal law and First Amendment commercial speech principles. As amended, the same advertising and promotion restrictions on tobacco products will now also apply to electronic cigarettes, electronic cigarette paraphernalia, and vaping juice.

The City is not left without options in preventing and discouraging use of tobacco products and electronic cigarettes by minors, however. First, the City may impose time, place and manner restrictions on advertising and promotion of tobacco products and electronic cigarettes, but may not restrict the content. Second, restrictions on the location and size of advertisements for tobacco products and electronic cigarettes must be treated the same as advertisements for other products. Finally, the City may regulate the use and sales of tobacco products and electronic cigarettes, and may employ zoning measures to do so.

If the City wishes to retain advertising-free buffer zones for tobacco products and electronic cigarettes, studies will have to be undertaken and information will have to be gathered to support the need for such restrictions.

JAN I. GOLDSMITH, CITY ATTORNEY

By  _____

Linda L. Peter
Deputy City Attorney

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Doc. No. 927355_10



June 28, 2014

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Council President Todd Gloria
Council President Pro Tem Sherri Lightner
Council Member Ed Harris
Council Member Myrtle Cole
Council Member Mark Kersey
Council Member Lori Zapf
Council Member Scott Sherman
Council Member David Alvarez
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202 C Street
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RE: Legal Comments on Retail Tobacco Ordinance

Dear Mayor Faulconer, Council President Gloria, Council Members, and City Attorney Goldsmith:

I am submitting this letter to the San Diego City Council on behalf of the National Association of Tobacco Outlets, Inc. (NATO), a national retail tobacco trade association, and association member stores located in San Diego. NATO requests that specific sections of the current San Diego Municipal Code and the proposed Ordinance O-2014-125 be repealed or not adopted, as the case may be, because certain sections violate the free speech protections under the First Amendment to the U.S. Constitution and the cigarette advertising restrictions are pre-empted by the Federal Cigarette Labeling and Advertising Act.

Background on Ordinance No. 18597

On October 29, 1998, the San Diego City Council adopted Ordinance 18597 amending Chapter 5, Article 8 of the San Diego Municipal Code, to add Sections 58.0301 through 58.0312. Specifically, Ordinance 18597 contains the following tobacco advertisement restrictions:

1. Section 58.0303 prohibits the placement of any advertising or promotion of tobacco products on an advertising sign in a publicly visible location.
2. Section 58.0305 prohibits the placement of advertising tobacco display signs in certain areas of retail stores that are located within 1,000 feet of a school, playground, recreation center, child care center, arcade or library, and the inside or outside of windows or doors of a business if the advertising is visible to the public from outside the establishment.

In addition, proposed Ordinance O-2014-125 would amend Sections 58.0303 and 58.0305 to apply the same current tobacco product advertising restrictions to electronic cigarettes, electronic cigarette paraphernalia, and vaping juice.

Tobacco Product and Electronic Cigarette Advertising Restrictions Violate Constitutional Protections and Conflict With U.S. Supreme Court and Other Federal Court Decisions

The current restrictions on tobacco product advertising in Ordinance 18597 and the proposed extension of these restrictions to electronic cigarettes, electronic cigarette paraphernalia, and vaping juice raise significant constitutional issues. The First Amendment of the U.S. Constitution protects the right of free speech. Advertising is how manufacturers and retailers “speak” to their customers about their products. It is important to understand that the U.S. Supreme Court has held that product advertising, including the advertising of tobacco products, constitutes “commercial speech” and is thus afforded First Amendment constitutional protections. Sections 58.0303 and 58.0305 as currently enacted under Ordinance 18597 and as proposed to be amended in Ordinance O-2014-125 violate this First Amendment protection afforded to tobacco products, electronic cigarettes, electronic cigarette paraphernalia, and vaping juice.

Specifically, these ordinance sections are in conflict with the 2001 U.S. Supreme Court decision in *Lorillard Tobacco Company v. Reilly*, which was decided after the San Diego City Council initially adopted Sections 58.0301 through 58.0312 in 1998. In *Lorillard v. Reilly*, the U.S. Supreme Court overturned regulations promulgated by the Massachusetts Attorney General banning outdoor tobacco advertising and tobacco advertising displayed in a retail store that is visible from outside the store, if the store was located within 1,000 feet of a school or playground. Moreover, the *Lorillard* decision also overturned a regulation prohibiting point-of-sale advertising for cigarettes, smokeless tobacco and cigars that is placed less than five feet from a store floor if the store was located within 1,000 feet of a school or playground.

More recently on March 31, 2012, a U.S. Federal District Court judge in Massachusetts cited the *Lorillard* decision in ruling that an outdoor and in-store tobacco advertising ban ordinance adopted by the City of Worcester, Massachusetts was unconstitutional on First Amendment free speech grounds (see *National Association of Tobacco Outlets, Inc., et. al, v. City of Worcester, Massachusetts, et. al.*, U.S. Federal District Court for the District of Massachusetts, Case No. 11-40110-DPW, March 31, 2012).

Accompanying this letter is a chart that shows the original San Diego tobacco advertising restrictions adopted in 1998 and the same or very similar Massachusetts tobacco advertising regulations and Worcester advertising restrictions that were found to be unconstitutional by the U.S. Supreme Court and the U.S. Federal District Court for the District of Massachusetts, respectively. In addition, a copy of both the *Lorillard* and *Worcester* court decisions accompany this letter and I would ask that City Attorney Goldsmith review the decisions.

Both of these specific court rulings, as well as other U.S. Supreme Court decisions establishing the commercial speech doctrine protecting product advertising under the First Amendment, including tobacco product advertising, would invalidate Sections 58.0303 and 58.0305 of Ordinance 18597 and the proposed amendments to these sections under Ordinance O-2014-125. Moreover, the *Lorillard* decision also found that the advertising restrictions on *cigarettes* under the Massachusetts regulations were pre-empted by the Federal Cigarette Labeling and Advertising Act.

Given the U.S. Supreme Court precedent as set down in the *Lorillard* case and the more recent federal court decision striking down the Worcester, Massachusetts tobacco advertising ban, the current tobacco advertising restrictions under Ordinance 18597 should be repealed on First Amendment constitutional grounds and due to the pre-emption of such state regulations by the Federal Cigarette Labeling and Advertising Act. Moreover, the San Diego City Council should not consider the proposed amendments to Ordinance 18597 that would extend the tobacco advertising restrictions to electronic cigarettes, electronic cigarette paraphernalia, and vaping juice.

I would appreciate a reply from the San Diego City Council and/or City Attorney Goldsmith regarding this matter. Thank you.

Sincerely,

Thomas A. Briant

Thomas A. Briant
Executive Director and Legal Counsel

San Diego Ordinance O-18597	Unconstitutional Advertising Regulations
<p data-bbox="186 239 714 268">Sec. 58.0303: Advertising Restrictions</p> <p data-bbox="186 310 803 562">(a) Except as expressly set forth in Section 58.0304, it is unlawful for any person, business, or tobacco retailer to place or maintain, or cause to be placed or maintained, any advertising or promotion of tobacco products on an advertising display sign in a publicly visible location.</p> <p data-bbox="186 604 803 709">Section 58.0305: Location of Tobacco Products and Advertising Inside Retail Establishments</p> <p data-bbox="186 751 803 1108">(a) It is unlawful for any person, business, or tobacco retailer to place or maintain, or cause to be placed or maintained, any displays containing tobacco products, within two feet of candy, snack, or non-alcoholic beverage displays inside stores or businesses that sell tobacco products and are located within 1,000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library.</p> <p data-bbox="186 1150 803 1507">(b) It is unlawful for any person, business, or tobacco retailer to place or maintain, or cause to be placed or maintained, any displays containing tobacco products in any of the locations listed in Section 58.0305(b)(1)-(3) inside stores or business that sell tobacco products and are located within 1000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library:</p> <ol data-bbox="186 1549 803 1801" style="list-style-type: none"> (1) Below four feet from the floor; or (2) Within two feet of any candy, snack, or non-alcoholic beverage displays; or (3) Posted on the inside or outside of the windows or doors of the business such that the advertising or promotion is visible to the public from outside the establishment. 	<p data-bbox="824 239 1356 268">940 Code of Mass. Regs. §21.01 (2000):</p> <p data-bbox="824 310 1430 489">(5) Advertising Restrictions. Except as provided in [§21.04(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:</p> <p data-bbox="824 531 1430 825">(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;</p> <p data-bbox="824 867 1430 1182">b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§21.04(5)(a)-(b).</p> <p data-bbox="824 1224 1430 1297">Worcester Massachusetts Revised Ordinances Chapter 8, § 3 (2008).</p> <p data-bbox="824 1339 1430 1654">No person shall display any advertising that promotes or encourages the sale or use of cigarettes, blunt wrap or other tobacco products in any location where any such advertising can be viewed from any street or park shown on the Official Map of the city or from any property containing a public or private school or property containing an educational institution.</p>

DRAFT 4/15/2015 (O-2015-96)

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~Struck Out~~
NEW LANGUAGE: Double Underline

ORDINANCE NUMBER O- _____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 5, ARTICLE 8, DIVISION 3 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 58.0301, REPEALING SECTION 58.0302 AND AMENDING AND RENUMBERING 58.0305 TO 58.0302, REPEALING SECTION 58.0303 AND ADDING A NEW SECTION 58.0303, REPEALING SECTION 58.0304, RENUMBERING SECTIONS 58.0306 TO 58.0304, 58.0307 TO 58.0305, 58.0308 TO 58.0306, 58.0309 TO 58.0307, 58.0310 TO 58.0308, 58.0311 TO 58.0309, AND 58.0312 TO 58.0310, ALL RELATING TO RESTRICTING THE SALE, ADVERTISING, AND PROMOTION OF TOBACCO PRODUCTS AND ELECTRONIC CIGARETTES TO MINORS.

§58.0301 Definitions

For purposes of this Division:

~~“Advertising”~~Advertising” [No change in text.]

~~“Advertising display sign”~~Advertising display sign” [No change in text.]

~~“Arcade” has the same meaning as in Municipal Code section 33.1635.~~

~~“Child care center” has the same meaning as in Municipal Code section 101.0101.0102 or its successor.~~

~~“City”~~City” [No change in text.]

~~“Director”~~Director” [No change in text.]

~~“Library” means any public library operated by the City of San Diego.~~

Electronic cigarette has the same meaning as in Municipal Code section 43.1001.

Electronic cigarette paraphernalia has the same meaning as in Municipal Code section 33.4502.

Electronic cigarette retailer has the same meaning as in Municipal Code section 33.4502.

~~“Person~~Person” [No change in text.]

~~“Playground” means any outdoor premises or grounds owned or operated by the City, a public or private school, child care center, youth or recreational center, that contains any play or athletic equipment used or intended to be used by minors.~~

~~“Promotion” includes a display of any logo, brand name, character, graphics, colors, scenes, or designs that are trademarks of a particular brand of tobacco product, on any door, sign, poster, banner, pamphlet or other paper, clock, display, display rack, ashtray, trash can, t-shirt or other clothing, lighter or other device.~~

~~“Publicly visible location” means any location that is open to or visible to the public from any street, sidewalk, or other public thoroughfare, and includes the placement of outdoor signs such as billboards, signs attached to poles, posts or other fixtures, signs attached to the outside of buildings, signs placed in the windows or doors of buildings that are visible to passers-by, and freestanding signs on the sidewalk.~~

~~“Recreation center or facility” means any recreation center or facility under the control, direction or management of the City.~~

~~“School” means any public or private elementary or secondary school, attendance at which satisfies the compulsory education laws of the State of California.~~

~~“Self-service display”~~Self-service display²² means an open display of tobacco products tobacco products or electronic cigarettes that the public has access to without the intervention of an employee.

~~“Tobacco product”~~Tobacco product²² [No change in text.]

Tobacco retailer has the same meaning as in Municipal Code section 33.4502.

~~“Vendor-assisted”~~Vendor-assisted²² means that only a store employee has access to the tobacco product tobacco product and assists a customer by supplying the product, and the customer does not take possession of the product until it is purchased.

Vaping juice has the same meaning as in Municipal Code section 33.4502.

§58.0302 Measure of Distance

~~The distance between any advertising display sign or any store or business that sells tobacco products and any school, playground, recreation center or facility, child care center, arcade, library, or non-commercial or non-industrial zone shall be measured in a straight line, without regard to intervening structures, from the advertising display sign or store or business to the closest property line of the school, playground, recreation center or facility, child care center, arcade, or library, or to the closest boundary of the zone.~~

§58.0303 Advertising Restrictions

- (a) — ~~Except as expressly set forth in Section 58.0304, it is unlawful for any person, business, or tobacco retailer to place or maintain, or cause to be placed or maintained, any advertising or promotion of tobacco products on an advertising display sign in a publicly visible location.~~
- (b) — ~~Except as provided in Section 58.0305, this section does not apply to advertising or promotions for tobacco products located inside commercial establishments.~~

§58.0304 Exceptions to Advertising Restrictions

- (a) — ~~Section 58.0303(a) does not apply to any advertising display sign located:~~
- (1) — ~~in an industrial zone (SR, M-IP, M-LI, M-SI, M-1, M-1A, M-1B, M-2, M-2A) or in a commercial zone designated CBD, CA-RR, C, C(PCOZ), C-1, or C-1(PCOZ); and~~
 - (2) — ~~more than 1000 feet from the premises of any school, playground, recreation center or facility, child care center, arcade, or library; and~~
 - (3) — ~~more than 1000 feet from the boundary of any zone that is not a designated commercial or industrial zone.~~
- (b) — ~~Section 58.0303(a) does not apply to commercial vehicles used for the primary purpose of transporting tobacco products.~~
- (c) — ~~Section 58.0303(a) does not apply to any public service message sponsored by a federal, state, or local government entity, or by a non-~~

~~profit entity, designed to communicate the hazards of smoking or to encourage minors to refrain from smoking or buying tobacco products.~~

~~(d) Section 58.0303(a) does not apply to signs that contain a generic description of tobacco products in black and white without logos or graphics.~~

~~(e) Section 58.0303(a) does apply to signs at public facilities within the City's jurisdiction unless an existing contract, entered into by the City for a private party's use and occupancy of the facility, gives the private party control over the advertising rights on the facility premises.~~

§58.0305~~2~~ Location of Tobacco Products and Advertising Inside Retail Establishments

(a) It is unlawful for any ~~person~~person, business, or ~~tobacco retailer~~tobacco retailer, or electronic cigarette retailer to place or maintain, or cause to be placed or maintained, any displays containing ~~tobacco products~~tobacco products, within two feet of candy, snack, or non-alcoholic beverage displays inside stores or businesses that sell ~~tobacco products~~tobacco products, electronic cigarettes, electronic cigarette paraphernalia, or vaping juice and are located within 1000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library.

(b) It is unlawful for any ~~person~~person, business, or ~~tobacco retailer~~tobacco retailer, or electronic cigarette retailer to place or maintain, or cause to be placed or maintained, any ~~advertising display sign~~advertising display sign for ~~tobacco products~~tobacco products in any of the locations listed in

~~Section 58.0305(b)(1)-(3) within two feet of candy, snack, or non-alcoholic beverage displays inside stores or businesses that sell tobacco products, tobacco products, electronic cigarettes, electronic cigarette paraphernalia, or vaping juice and are located within 1000 feet of the premises of any school, playground, recreation center or facility, child care center, arcade, or library:~~

- ~~(1) — Below four feet from the floor; or~~
- ~~(2) — Within two feet of candy, snack, or non-alcoholic beverage displays; or~~
- ~~(3) — Posted on the inside or outside of the windows or doors of the business such that the advertising or promotion is visible to the public from outside the establishment.~~

§58.0303

Location of Electronic Cigarettes and Advertising Inside Retail Establishments

- (a) It is unlawful for any person, business, tobacco retailer, or electronic cigarette retailer to place or maintain, or cause to be placed or maintained, any displays containing electronic cigarettes, electronic cigarette paraphernalia, or vaping juice within two feet of candy, snack, or non-alcoholic beverage displays inside stores or businesses that sell tobacco products, electronic cigarettes, electronic cigarette paraphernalia, or vaping juice.
- (b) It is unlawful for any person, business, tobacco retailer, or electronic cigarette retailer to place or maintain, or cause to be placed or maintained, any advertising display sign for electronic cigarettes, electronic cigarette

paraphernalia, or vaping juice within two feet of candy, snack, or non-alcoholic beverage displays inside stores or businesses that sell tobacco products, electronic cigarettes, electronic cigarette paraphernalia, or vaping juice.

§58.03064 **Exceptions to Location of Tobacco Products, Electronic Cigarettes, and Advertising Inside Retail Establishments**

- (a) Sections 58.0305(a)02 and ~~Section 58.0305(b)(1) and (2)03~~ do not apply to commercial establishments where access to the premises by ~~persons~~persons under ~~eighteen~~18 years of age is prohibited by law;
- (b) Sections 58.0305(a)02(a) and 58.0303(a) does not apply to displays in any establishment that are located behind a counter and not accessible to patrons.
- (c) ~~Section 58.0305(b) does not apply to any public service message sponsored by a federal, state, or local government entity, or by a non-profit entity, designed to communicate the hazards of smoking or to encourage minors to refrain from smoking or buying tobacco products.~~

§58.03075 **Identification Required for Purchase of Tobacco Products and Electronic Cigarettes**

It is unlawful for any ~~person~~person, business, or ~~tobacco retailer~~tobacco retailer, or electronic cigarette retailer to sell any ~~tobacco product~~tobacco product, electronic cigarette, electronic cigarette paraphernalia, or vaping juice to an individual who appears to be less than ~~twenty seven~~27 years of age, without first verifying by means of photographic identification containing the bearer's date of

birth, that the purchaser is not younger than ~~eighteen~~ 18 years of age, unless the seller has some other reliable basis for determining the purchaser's age.

§58.03086 Sale and Distribution of Tobacco Products and Electronic Cigarettes

- (a) It is unlawful for any ~~person~~ person, business, or ~~tobacco retailer~~ tobacco retailer, or electronic cigarette retailer to sell, permit to be sold, offer for sale, or display for purposes of sale, by means of ~~self-service displays~~ self-service displays or by any means other than ~~vendor-assisted~~ vendor-assisted sales, any ~~tobacco products~~ tobacco products.
- (b) It is unlawful for any person, business, tobacco retailer, or electronic cigarette retailer to sell, permit to be sold, offer for sale, or display for purposes of sale, by means of self-service displays or by any means other than vendor-assisted sales, any electronic cigarette, electronic cigarette paraphernalia, or vaping juice.

§58.03097 Distribution of Tobacco or Electronic Cigarette Samples or Promotional Items

- (a) It is unlawful for any ~~person~~ person, business, or ~~tobacco retailer~~ tobacco retailer, or electronic cigarette retailer to distribute free ~~tobacco products~~ tobacco products or promotional items, except in enclosed areas where minors are not permitted.
- (b) It is unlawful for any person, business, tobacco retailer, or electronic cigarette retailer to distribute free electronic cigarettes, electronic cigarette paraphernalia, vaping juice, or promotional items, except in enclosed areas where minors are not permitted.

§58.031008 Posting of Signs Regarding Sales to Minors

- (a) Every ~~person~~person who sells or deals in ~~tobacco products~~tobacco products shall post conspicuously in their place of business at each point of purchase a notice stating that the sale of ~~tobacco products~~tobacco products to ~~persons~~persons under ~~eighteen~~18 years of age is prohibited by law and subject to penalties. The notice shall also state that photo identification is required to purchase ~~tobacco products~~tobacco products. The letters of the sign shall be at least one-half inch in height.
- (b) Any sign meeting the content requirements of California Business and Professions Code section 22952(b) and regulations promulgated thereunder, and the posting requirements of California Penal Code section 308(c), satisfies ~~§~~§section 58.031008(a).
- (c) It is unlawful for any ~~person~~person who sells or deals in ~~tobacco products~~tobacco products to fail to post a sign in accordance with ~~§~~§section 58.031008(a) or (b).
- (d) Every person who sells or deals in electronic cigarettes, electronic cigarette paraphernalia, or vaping juice shall post conspicuously in their place of business at each point of purchase a notice stating that the sale of electronic cigarettes, electronic cigarette paraphernalia, and vaping juice to persons under 18 years of age is prohibited by law and subject to penalties. The notice shall also state that photo identification is required to purchase electronic cigarettes, electronic cigarette paraphernalia, and

vaping juice. The letters of the sign shall be at least one-half inch in height.

- (e) It is unlawful for any person who sells or deals in electronic cigarettes, electronic cigarette paraphernalia, or vaping juice to fail to post a sign in accordance with section 58.0308(d).

§58.031109 Extensions for Compliance

- (a) Any business that needs to make modifications to its business premises in order to comply with ~~Sections 58.0303, 58.030502 or 58.030806~~ of this Division, must comply within ~~sixty~~ 60 calendar days after ~~November 19, 1998~~.
- (b) Any business owner may apply to the City for an ~~reasonable~~ additional sixty-day extension of time within which to comply with ~~Sections 58.0303, 58.030502, or 58.030806~~ of this Division, provided that the application for extension is submitted on or before the last day of the ~~sixty~~ 60-day compliance period authorized by section 58.0309(a).
- (c) [No change in text.]

§58.031210 Enforcement

- (a) Violations of this Division shall be prosecuted as infractions for the first offense, and may be prosecuted as misdemeanors for subsequent offenses, subject to the fines and custody provided in Municipal Code ~~Section 12.0201~~. Any ~~Director~~ Director may also seek injunctive relief and civil penalties pursuant to Municipal Code ~~Section 12.0202~~ or pursue any administrative remedy as provided in Chapter 1 of this Code.

- (b) Any ~~person~~person who commits or proposes to commit an act in violation of this ~~d~~Division may be enjoined therefrom by is subject to the jurisdiction of a court of competent jurisdiction. An action for injunction may be brought by any aggrieved ~~person~~person, or any ~~person~~person or entity which will fairly and adequately represent the interests of the protected class.
- (c) [No change in text.]
- (d) The remedies provided by this section are in addition to any other legal or equitable remedies the aggrieved ~~person~~person may have and are not intended to be exclusive.

LLP:amt
April 10, 2015
Or.Dept:Council Dist.5
Doc. No.: 872162_5