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Vape and Mirrors: The Legal Issues Concerning e-Cigarettes for Municipalities

IMLA Webinar

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PRESENTED BY

Tamara Bogosian

Of Counsel

Andrew Maiorano

Associate

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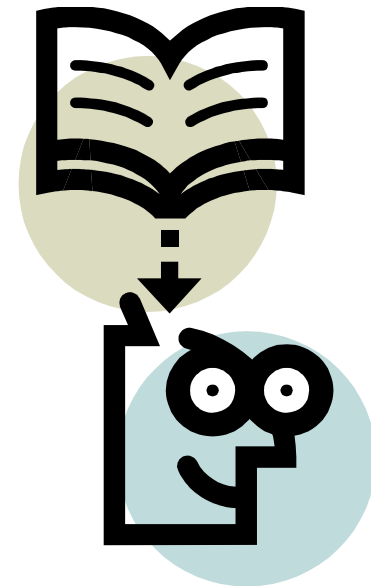
Introduction

- Attorneys with Best Best & Krieger LLP
- Experience in advising public agencies on the enactment and enforcement of several public safety measures, including the following illicit substances:
 - Medical Marijuana;
 - Synthetic Drugs (i.e. synthetic marijuana and bath salts);
 - Hookah Lounges; and
 - Cigar Shops.
- Both transactional and litigation experience



Overview

- What are e-cigarettes and why are they so popular?
- Emerging Market
- Federal Regulation. Yes, but when?
- Limited State Regulation/Preemption
- Options for Local Regulation
- Emerging Issues
- Questions?



What are e-cigarettes?

- Battery powered tube like device, often built to look like a traditional cigarette
- Release water vapor laced with "e-juice" from container
 - "e-juice" typically includes propylene glycol, vegetable glycerin, flavorings, and varying amounts of pure nicotine
- Originates from vaporizers used by marijuana smokers
 - An atomizer heats the e-juice into a vapor cloud that resembles traditional cigarette smoke
- Starter kits run between \$30-\$100, with replacement cartridges costing ~\$600 per year (as compared to ~\$1,000 per year for a pack-a-day cigarette habit)



Emerging Market

- Use increase among those smoking combustible cigarettes 2010-10%; 2011-21% (Center for Disease Control)
- Wells Fargo Sales Reports re Revenue: 2008-\$20M; 2012-\$500M; 2013-\$1B (projected)
 - Other current estimates say industry is approaching \$2B in 2014/2015
- Top three cigarette manufacturers have started marketing their own e-cigarettes
- Approximately 3,000 vaping stores nationwide



Food and Drug Administration

- Currently, the FDA's Center for Drug Evaluation and Research only regulates e-cigs that are marketed for therapeutic purposes.
- In 2009, FDA given the discretion to regulate the manufacture, distribution, and marketing of tobacco products to protect public health.
- FDA plans to regulate e-cigarettes:
 - “e-cigarettes have not been fully studied so consumers currently don't know the potential risks of e-cigarettes,” including how much nicotine or other chemicals are inhaled or if e-cigs “may lead young people to try ... conventional cigarettes.”



FDA (*cont.*)



- Possible proposed rules:
 - Banning sales to minors;
 - Prohibiting free samples;
 - Banning sales through vending machines, unless establishment does not allow minors;
 - Require warnings about nicotine and its addictive properties;
 - Require listing the ingredients of the e-juice on labels;
 - No health-related claims without evidence
- Proposed rules may also target cigars, hookah, and pipe tobacco



California Law

- SB 648 (Corbett): Attempt to ban sales of e-cigs from vending machines. (See Cal. Bus. & Prof. Code § 22960.) Passed by Senate but died in Assembly committee in 2014.
- SB 24 (Hill): Introduced on 12/1/2014 and referred to the Senate Health Committee on 1/15/14. If adopted, would be effective 7/1/2016.
 - Treats e-cig sales to minors the same way as cigarettes
 - Require retailer to post notice that sale to minors is illegal;
 - Allow for civil penalties in addition to criminal;
 - Expressly allows local governments to regulate the distribution or sale of e-cigs more restrictive than state law;
 - Create statewide licensing program for retailers through State Board of Equalization;
 - E-cig cartridges must be in child-proof packaging
- Health & Safety Code section 119405 (2010) bans sales of e-cigs to minors and states that California law is subject to federal government's regulation of the devices
- Currently no case law in CA



California Law (*cont.*)

- Several CA laws regulate smoking of tobacco products:
 - Labor Code § 6404.5 – no smoking of tobacco products in enclosed places of employment, with many exemptions
 - Civil Code § 1947.5 – residential landlord may prohibit smoking of tobacco products on the interior or exterior of their property
 - Gov. Code § 7597 – no smoking of tobacco products inside public buildings or within 20 feet of entrance/exit to a public building or in a State-owned vehicle
 - Health & Safety Code § 104495 – prohibits smoking of tobacco products within 25 feet of children’s playground or tot lot
 - Health & Safety Code § 1596.795 – prohibits smoking of tobacco product in private residences used as licensed day care centers or family day care homes when children are present
 - Health & Safety Code § 118925 *et seq.* – no smoking of tobacco product on a public transit system or vehicle of entities receiving State transit assistance



Other State Laws

- Most states (over 40) currently prohibit sales of e-cigs/vaping/alternative tobacco products to minors.
- For your state, see <http://www.ncsl.org/research/health/alternative-nicotine-products-e-cigarettes.aspx>



Potential Options for Local Legislation



- Ban - Include “vaping” and e-cig use within scope of definition of “smoking” which is prohibited in public buildings, schools, beaches, farmers market, sidewalks, trails, parks, etc.
 - Be careful of pre-emption/duplication of state law
 - Exceptions can be created for vapor lounges, e-cigarette stores, and/or filming/theatrical purposes
 - **Note:** legal nonconforming use issues for businesses/uses existing before local regulation
 - See City of LA’s ordinance - http://clkrep.lacity.org/onlinedocs/2013/13-1204-S1_RPT_ATT_Y_01-08-2014.pdf



Potential Options for Local Legislation (*cont.*)

- Zoning – only permit the manufacture or distribution of e-cigs in industrial zones (has the effect of limiting ability to sell e-cigs in commercial zones)
 - National Association of Convenience Stores (NACS) has encouraged its members to adopt a policy of treating e-cigs as age-restricted and follow the same applicable federal, state and local laws for verifying the age of the purchaser.
- Permitting System for Retail Sellers – include e-cigs in municipal code's definition of tobacco products, and require businesses to obtain a tobacco retailer's permit and ban use of tobacco products in designated areas.
- Moratorium - on new e-cig sales/distribution to study impact of devices and potential regulation of same
- Take no action and wait for federal regulations



Arguments Against E-Cig Use

- Societal Impact - Re-normalizes cigarette smoking
- Potentially Cancerous - Preliminary studies found many e-cigs contain carcinogens & toxic chemicals (including a chemical found in antifreeze)
 - Federal regulation is pending more conclusive medical testing, which may take years.
 - Result: the “Wild West Era” for e-cigs?



Arguments Against E-Cig Use (*cont.*)

- Increased popularity with minors - e-cigs marketed with fruit and candy flavors, which may be gateway to cigarette smoking and/or nicotine addiction
 - Use among middle and high schools users increasing exponentially (Centers for Disease Control)
- Increased Risk for Non-Smokers - Perceived non harmful effects encourage non-smokers to become addicted to nicotine
- Mask for Other Illicit Substances - Can be used to disguise smoking hash oil in public or odors of other drugs



Enforcement Issues

- Enforcement Issues

- Difficult to tell difference between outward appearance of traditional cigarettes and e-cigs (and even other illicit substances)
- Difficult to tell difference between cigarette smoke and e-cig e-juice vapor
- Flavored e-juice can mask the odor of devices being used for other illicit purposes
- Under many state laws, sales to minors is illegal, but law unclear on use by minors



E-Cig Advocate Arguments

- Cigarette Alternative – E-cig use helps wean people from use of combustible cigarettes
- Not/Less Harmful - Some research shows significantly lower harmful effects on smokers and no secondhand effects
- Lack of Medical Certainty - Long-term results of prolonged e-cigarette use are still a relative unknown



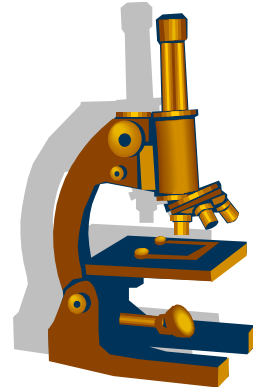
E-Cig Advocate Arguments (*cont.*)

- Comparable Benefit - Inhaling water vapors is much better than tobacco products
- Mitigation - evidence of increased use among youth is alarmist and these numbers can be kept down by outlawing sales to minors
- Not Multi-Purpose: Use of e-cigs for hash oil requires special equipment b/c gums up the e-cigs
- Monopoly - Federal regulation will only benefit a handful of large companies who have established distribution channels and the money and manpower to successfully obtain FDA approval



Emerging Issues

- “Sitting and Waiting” - Long-lead time for enactment of federal regulations
 - Currently performing more scientific studies into long-term impacts of e-cig use and ability of e-cigs to serve as tobacco cessation product
 - Result: state & local entities unprotected in interim
- Proactive Manufacturers - Manufacturers voluntarily including warning labels & ingredient lists
 - Warnings include that the products contain and have not been tested for being a smoking cessation product
 - Often more detailed than warnings for traditional cigs
 - Why?
 - Protection from lawsuits alleging misrepresentation of contents?
 - Currying favor with customers? With Regulatory agencies?
 - Public education/Altruism?



Emerging Issues (*cont.*)



- Limited scope of federal regulations - Distributors increasingly turning to internet as point of sale and to television for advertising as FDA has indicated these will not be included within regulations
- Taxation - States (MN, NC) are beginning to tax e-cigarettes in manner akin to traditional cigarettes



Questions?



Thank you for attending.

Tamara Bogosian

Best Best & Krieger LLP

Irvine, CA Office

Phone: (949) 263-2600

Email: tamara.bogosian@bbklaw.com

Andrew Maiorano

Best Best & Krieger LLP

Ontario, CA Office

Phone: (909) 989-8584

Email: andrew.maiorano@bbklaw.com

www.bbklaw.com



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