

PEMBROKE PINES
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INTER-OFFICE CORRESPONDENCE

MEMORANDUM NO. 2019-220

TO: Frank C. Ortis, Mayor
Thomas Good, Jr., Commissioner
Angelo Castillo, Commissioner
Jay D. Schwartz, Commissioner
Iris A. Siple, Commissioner

CC: Charles F. Dodge, City Manager
Aner Gonzalez, Assistant City Manager
Michael Stamm, Jr., Director Planning and Economic Development

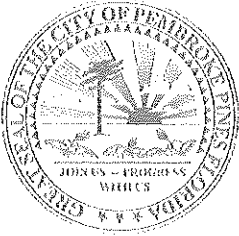
FROM: Samuel S. Goren, City Attorney
Ian P. Singer, Assistant City Attorney

DATE: October 21, 2019

RE: Proposed Federal Bill to Increase the Minimum Age to Purchase Electronic Nicotine Dispensing Systems ("ENDS") Products from 18 to 21

On September 25, 2019, the City Attorney's Office published our Inter-Office Memorandum No. 2019-193 (the "Memorandum"), relating to a possible increase in the age to purchase electronic nicotine dispensing devices and nicotine products. Another copy of the Memorandum is attached hereto for your convenience.

At the October 16, 2019 City Commission meeting several speakers commented upon the proposed ordinance to raise the minimum legal age to purchase electronic nicotine dispensing devices and nicotine products. Some of the speakers discussed the impact of the "adopted" federal law raising the legal minimum age to purchase ENDS products from eighteen (18) to twenty-one (21), nationally. We have reviewed the current and proposed federal laws regarding the sale and purchase of ENDS products. Federal law currently prohibits any individual under the age of eighteen (18) from purchasing a "tobacco product." 42 U.S.C. §300x-26. On May 20, 2019, Senator Mitch McConnell introduced a **proposed bill** (S. 1541) increasing the legal minimum age to purchase ENDS products to twenty-one (21). The proposed bill is pending before the legislature; however, no regulation has been adopted at the federal level to increase the age to twenty-one (21).



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AUTHORITY TO REGULATE "ENDS"

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 387a (the "Act"), as amended by the Family Smoking Prevention and Tobacco Control Act, grants the United States Food and Drug Administration (the "FDA") authority to regulate (including, without limitation the manufacturing, import, packaging, labeling, advertising, promotion, sale, and distribution) cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and other tobacco products that the FDA, by regulation deems to be subject to the law. The Act defines the term "tobacco products" as:

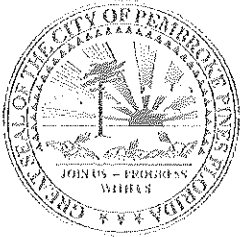
any product made or derived from tobacco that is intended for human consumption, including any component, part or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product).

In 2016, the FDA issued a final rule extending its authority to cover all other categories of products that meet the statutory definition of "tobacco product" in the Act, **except accessories** of such newly deemed tobacco products.

"Accessories" are defined by the Act as:

any product that is intended or reasonably expected to be used with or for the human consumption of a tobacco product; does not contain tobacco and is not made or derived from tobacco; and meets either of the following: (1) is not intended or reasonably expected to alter the performance, composition, constituents, or characteristics of a tobacco product; or (2) is intended or reasonably expected to affect or maintain the performance, composition, constituents, or characteristics of a tobacco product but (i) solely controls moisture and/or temperature of a stored product or (ii) solely provides an external heat source to initiate but not maintain combustion of a tobacco product.

By way of example, without limitation, accessories include items such as: ashtrays, spittoons, hookah tongs, cigar clips and stands, and pipe pouches, because these products do not contain tobacco, are not derived from tobacco, and do not affect or alter the performance, composition, constituents or characteristics of a tobacco product.



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The final rule also provides that the FDA may put in place restrictions on the sale and distribution of a tobacco product, including age-related access restrictions and advertising and promotions restrictions.

CURRENT FEDERAL REGULATION OF ENDS PRODUCTS

In conjunction with the foregoing authority, the FDA has deemed that ENDS products, including, without limitation, e-cigarettes, E-liquids, atomizers, batteries, cartomizers, clearomisers, tank systems, flavors, and vials that contain e-liquids, be classified as "tobacco products." As such, ENDS products are regulated by the FDA and federal law. Currently, federal law prohibits the sale of "covered tobacco products" (including ENDS products) to any individual under eighteen (18) years of age. 42 U.S.C. §300x-26. However, Senator McConnell's proposed bill, entitled the Tobacco-Free Youth Act, seeks to increase the federal minimum legal age to purchase tobacco products from eighteen (18) to twenty-one (21) years of age. The proposed bill is currently pending in the Senate and has yet to be voted upon.

CONCLUSION

Federal law currently prohibits individuals under the age of eighteen (18) from purchasing tobacco products, including ENDS products. There is proposed legislation, currently pending before the Senate, to increase the minimum legal age to purchase tobacco products, including ENDS products, at the federal level, from eighteen (18) to twenty-one (21) years of age. Further, the State of Florida currently prohibits any individual under the age of eighteen (18) from purchasing ENDS products. *See* §877.12, F.S.

The legislation proposed by Senator McConnell may take time to be debated before it is voted on at the federal level. Therefore, unless and until the proposed bill is passed at the federal level, individuals between eighteen (18) and twenty-one (21) years of age will be federally allowed to purchase ENDS products.

SSG:IPS/ab