

REPORT OF THE CHIEF LEGISLATIVE ANALYST

DATE: February 21, 2014

TO: Honorable Members of the Arts, Parks, Health, Aging and River Committee

FROM: Gerry F. Miller *KEV*
Chief Legislative Analyst

Council File No.: 13-1204-S2
Assignment No.: 14-02-0120

Los Angeles County Department of Public Health Policy Proposals Relative to E-Cigarettes

SUMMARY

On January 14, 2014, a Motion (O'Farrell – Koretz) was introduced to instruct the Chief Legislative Analyst to review the policy proposal from the Los Angeles County Department of Public Health (County) relative to e-cigarettes and report to Council with any actions the City can take to support the recommendations contained in the proposal (Attachment 1; C.F. 13-1204-S2). This Office has reviewed the County's report and identified three policy proposals that the County recommends that local governments enact. In addition, our Office will continue to monitor legislation related to e-cigarettes at the local, state, and federal levels.

On October 3, 2013, the County released a report relative to the rising prevalence of electronic cigarette use (Attachment 2). Electronic cigarettes (or e-cigarettes) are battery-operated products designed to convert liquid nicotine, flavors, and other chemicals into a vapor inhaled by the user. The County report notes that due to the absence of action by the Food and Drug Administration (FDA) to determine the health effects of ingredients in e-cigarettes, numerous state and local governments are enacting legislation to regulate the use and sale of these devices. The County report further discusses issues related to youth access to these devices and the health effects of passive inhalation of e-cigarette vapors. These issues are further discussed in the Background section of this report.

Policy Proposals Relative to E-Cigarettes

Below are the three policy actions that the County recommends be enacted at the local government level relative to e-cigarettes and any corresponding actions taken by the City to adopt these recommendations.

1. Amend local smoke-free policies to include "e-cigarette" use in the definition of "smoking."

According to the City Attorney, state and local law prohibits smoking in the following locations: outdoor dining areas; City-permitted farmer's markets; City parks and beaches; indoor workplaces; 20 feet from the entryway of a government building; and, vehicles when a minor is present. On January 8, 2014, the City Attorney transmitted a draft Ordinance to prohibit e-cigarette use in existing smoke free areas, such as restaurants and government buildings. The draft Ordinance is currently pending in the Arts, Parks, Health, Aging and River Committee for further consideration (C.F. 13-1204-S1). If Council adopts the Ordinance, the use of e-cigarette use would be prohibited in restaurants, government buildings, daycare centers, playgrounds, and beaches.

2. Amend existing tobacco retailer license Ordinances to include e-cigarettes in the definition of “tobacco product.”

On December 4, 2013 the City Council approved an Ordinance which requires retailers to obtain a Tobacco Retailer Permit for e-cigarettes and prohibits the self-service display of these devices. On January 22, 2014, the Ordinance went into effect. Under the terms of the Ordinance, the Office of Finance will administer and process permit applications. In addition, the City Attorney’s Office will enforce all provisions of the Ordinance, including investigating and prosecuting retailers who fail to obtain and/or maintain a permit (C.F. 13-1204).

3. Impose taxes on e-cigarettes to make retail prices more comparable to those of cigarettes.

The City has not yet taken any action relative to imposing taxes on e-cigarettes. Several states (e.g., Arkansas, Hawaii, Illinois, North Carolina, and South Carolina) have enacted bills to regulate e-cigarettes. In addition, Minnesota has imposed taxes on distributors, retailers, and consumers of these devices.

The City Attorney believes that the City does not have the authority to tax cigarettes or e-cigarettes as a tobacco product, inasmuch as the State of California currently levies and administers such a tax. We note, however, that the issue of categorizing and taxing e-cigarettes is still an open discussion at the federal, state, and local levels, and a definitive decision has not been made whether to categorize e-cigarettes as a tobacco product, a drug, or some other category. The California Board of Equalization advised that it is not currently aware of any legislative proposal to tax e-cigarettes differently than traditional tobacco cigarettes.

Conclusion

The City has adopted or is currently in the process of adopting two of the three policy recommendations contained in the County report, as stated above: (1) amend existing tobacco retailer license Ordinances to include e-cigarettes in the definition of “tobacco product” (Ordinance No. 182823) and, (2) a separate Ordinance is pending in the Arts, Parks, Health, Aging and River Committee which would amend local smoke-free policies to include e-cigarettes in the definition of smoking (C.F. 13-1204-S1). The City Council, with input from the City Attorney, may also wish to explore options for taxing or imposing fees on e-cigarettes, including adopting a Resolution to support legislation or a ballot initiative at the State level to allow local governments statewide to tax e-cigarettes and/or institute a statewide tax on e-cigarettes similar to tobacco taxes.

This Office will continue to monitor legislation related to e-cigarettes at the local, state, and federal level. The decision to support legislation at the State level, and any subsequent Ordinance to enact additional regulations and/or taxes on e-cigarettes within the City, is a policy decision of the City Council.

RECOMMENDATION

That the City Council instruct the Chief Legislative Analyst to continue to monitor legislation related to e-cigarettes at the local, state, and federal levels.

FISCAL IMPACT

There is no fiscal impact to the General Fund.

Brian Randol

Brian Randol

Analyst

- Attachments:
1. Motion (O'Farrell – Koretz) relative to e-cigarettes.
 2. Los Angeles County report, dated October 3, 2013, relative to rising prevalence of electronic cigarette use in Los Angeles County.

BACKGROUND

In its report dated October 3, 2013, the County states that e-cigarettes consist of one percent of the Nation's cigarette industry, yet retail sales are double the rate of 2012. The report further states that the popularity of e-cigarettes has increased since they were first introduced in the U.S. in 2007.

The County reports that studies from the FDA and others have detected the presence of carcinogens and toxins in e-cigarette cartridges. In addition, a 2010 U.S. Court of Appeals decision allowed the FDA to regulate e-cigarettes as a tobacco product under the Family Smoking Prevention and Tobacco Control Act. Such regulations could include ingredient listing, good manufacturing practices, and advertising restrictions.

In addition, the County states that current marketing tactics have increased the popularity of e-cigarettes and increased public perceptions that e-cigarettes can be safely utilized as a smoking cessation device. However, the FDA has not yet approved the use of these devices as a smoking cessation aid inasmuch as health effects are unknown. The report further notes that the absence of tobacco taxes on e-cigarettes has kept prices low in comparison to traditional tobacco cigarettes. We note that distributors are required to pay taxes on other tobacco products (e.g., cigars, chewing tobacco, and snuff).

Passive Inhalation of E-cigarette Vapors

The report states that second-hand inhalation of vapors among non-users poses a potential health concern. According to the report, the lack of conclusive evidence has provided e-cigarette manufacturers an opportunity to market e-cigarette emissions as harmless water vapor while the effects of long term exposure to these chemicals and toxins is unknown.

Youth Appeal and Access

The report indicates that the Centers for Disease Control and Prevention (CDC) has reported that the percentage of high school students who have used e-cigarettes more than doubled between 2011 and 2012, from 4.7 percent to 10 percent. According to the report, the accessibility and design of e-cigarettes have likely contributed to this increase in popularity.

E-Cigarette policies in Other Jurisdictions

The County reports that state and local governments will continue to make efforts to regulate e-cigarettes until the FDA determines how it will exert its authority over these devices and their ingredients.

In addition, the County report confirms that California does not have a state law that prohibits use of e-cigarettes where smoking is not allowed, such as: indoor workplaces, government buildings, and playgrounds. On February 22, 2013, Senate Bill 648 (Corbett) was introduced in the Legislature that would prohibit the use of e-cigarettes where smoking is currently prohibited. The Senate approved SB 648, however the bill is being held in the Assembly Committee on Local Government Organization. The County further reports that the bill does not include provisions which prohibit the smoking of e-cigarettes in all locations that are covered by local ordinances. In 2010, New Jersey became the first state to ban the use of e-cigarettes in public places and several counties (Contra Costa County in California; and Seattle-King County in Washington) prohibit use of e-cigarettes in workplaces.

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MOTION ARTS, PARKS, HEALTH, RECREATION & YOUTH
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Electronic smoking devices, also known as e-cigarettes, have recently been made available to consumers. These devices resemble traditional cigarettes, pipes, or cigars and mimic the act of smoking by having users inhale a vapor cloud which often contains nicotine; organic compounds such as benzene and toluene; and heavy metals such as nickel and arsenic.

The FDA indicated in an April 2011 letter to stakeholders that it intends to regulate e-cigarettes and related products in a manner consistent with its mission of protecting the public health. Potential regulatory activities could include registration, ingredient listing, and user fees. Potential FDA actions are currently being reviewed by the Office of Management and Budget. E-cigarette companies have yet to submit clinical trials to the federal government; however some private companies such as In-N-Out have taken steps to regulate use of e-cigarettes in their establishments. The World Health Organization, in a July 9, 2013 communication, notes that the safety of electronic smoking devices has not been scientifically demonstrated.

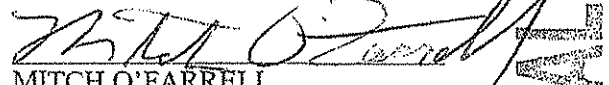
On October 3, 2013, the Los Angeles County Department of Public Health released a report relative to the rising prevalence of e-cigarette use in the County. The County supports the following three policy recommendations to address the prevalence of e-cigarettes in the County: (1) amend local smoke-free policies to include e-cigarettes use in the definition of smoking, (2) amend existing tobacco retailer licenses by including e-cigarettes in the definition of "tobacco product, and (3) impose higher taxes to discourage e-cigarette purchase among minors.

On December 4, 2013, the Council approved an Ordinance to regulate the sale of e-cigarettes. (C.F. 13-1204). On January 8, 2014, the City Attorney's Office released a draft Ordinance to revise the definition of smoking to include electronic smoking devices and to revise various provisions regarding the prohibition of smoking in certain places (C.F. 13-1204-S1). In its report, the City Attorney notes that a study published in the Journal of Environment and Public Health suggests that electronic smoking devices "may have the capacity to re-normalize tobacco use in a demographic that has had significant de-normalization of tobacco use previously." The City Attorney further notes a 2013 study in Nicotine and Tobacco confirmed that electronic smoking devices that contain nicotine also emit nicotine in the released vapor and involuntarily expose non-smokers to nicotine.

The City is taking various steps to protect the public health regarding regulation of e-cigarettes. In the interest of a thorough public discussion regarding this important public health issue, the Council should instruct the Chief Legislative Analyst to review the policy proposal from the Los Angeles County Department of Public Health and report to Council with any action the City can take to support these recommendations.

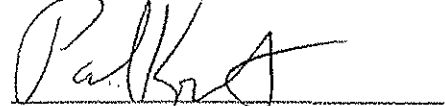
I THEREFORE MOVE that the City Council instruct the Chief Legislative Analyst (CLA) to review the policy proposal from the Los Angeles County Department of Public Health relative to e-cigarettes and report to Council with any actions the City can take to support these recommendations.

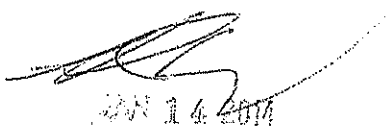
PRESENTED BY:



MITCH O'FARRELL
Councilmember, 13th District

SECONDED BY:




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Addressing the rising prevalence of electronic cigarette use in Los Angeles County
October 3, 2013

Executive Summary

Electronic cigarettes, or e-cigarettes, are battery-operated products designed to convert liquid nicotine, flavors, and other chemicals into a vapor inhaled by the user.¹ In 2010, the U.S. Court of Appeals allowed the United States Food and Drug Administration (FDA) to regulate e-cigarettes as a tobacco product under the Family Smoking Prevention and Tobacco Control Act.² To date, however, the FDA has yet to issue these regulations regarding the manufacture, sale, or usage of e-cigarettes.

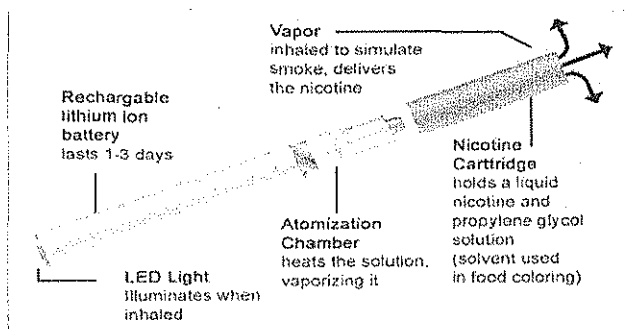
The popularity of e-cigarettes has increased since they were first introduced in the U.S. in 2007. While their effects remain largely unknown, early studies indicate that e-cigarettes pose potential dangers for users, as well as for non-users who passively inhale these chemical vapors. Given the unknown public health impacts and the current lack of regulation, the Los Angeles County Department of Public Health recommends a precautionary approach in regulating the sale and use of e-cigarettes, until their safety is conclusively established.

The Los Angeles County Public Health Department supports three policy recommendations to address the proliferation of electronic cigarettes:

- Amend local smoke-free policies by including “e-cigarette use” in the definition of “smoking”. This will prohibit e-cigarette use in existing smoke-free areas, thereby preventing inhalation of secondhand e-cigarette vapors or “passive vaping”.
- Amend existing tobacco retailer license (TRL) ordinances by including e-cigarettes in the definition of “tobacco product”. This will require e-cigarette retailers to obtain a TRL and become subject to enforcement measures that discourage sales to minors.
- Impose taxes on e-cigarettes to make retail prices more comparable to those of cigarettes. Higher prices will discourage e-cigarette purchases among price-sensitive minors.

Electronic nicotine delivery devices such as e-cigarettes are often promoted and used as a means to support smoking cessation. However, this use is not FDA approved and, therefore, e-cigarettes should not at this time be promoted as a tobacco cessation aid.

Background



Electronic nicotine delivery devices, most commonly produced as e-cigarettes, cigars, hookah and pipes, are battery-operated products designed to convert nicotine, flavor and other chemicals into vapor. While the e-cigarette market makes up just 1% of the U.S. cigarette industry, it has experienced a

surge in popularity since its introduction in 2007. Retail sales this year are expected to reach \$1.7 billion, or more than double the sales in 2012.³ In addition, many more Americans are reporting awareness and use of e-cigarettes. For example, 21 percent of U.S. adult smokers had used e-cigarettes in 2011, up from 10 percent in the previous year.⁴

E-cigarette use is growing among diverse groups. A 2011 U.S. survey reveals that the most likely users of e-cigarettes are smokers intending to quit cigarette use.⁵ The same survey also found that slightly more women than men tried e-cigarettes. Furthermore, a 2013 Florida Youth Tobacco Survey indicates that e-cigarette use among youth may be on the rise: since 2011, the rate of high school and middle school students who have tried an e-cigarette at least once increased by 102 percent and 43 percent, respectively.⁶

The popularity of e-cigarettes may stem from manufacturers' claims that they are a healthier alternative to cigarettes. Although that claim has yet to be substantiated, the e-cigarette differs from traditional cigarettes by utilizing water vapor, not tobacco smoke, to deliver nicotine. The user generates water vapor by inhaling through the mouthpiece and powering a battery-charged atomizer, which vaporizes a cartridge containing nicotine, flavors, and humectants. The user then inhales that vapor mixture, later exhaling it into the environment.

Electronic cigarettes can vary widely to fit a user's preferences or needs. The cartridges are replaceable and come in a variety of nicotine levels and flavors, such as cherry, tobacco, and coffee. In addition, e-cigarettes can be manufactured in disposable or reusable forms that mimic a cigarette, pipe, or more discreet items such as pens.

Issue Statement

Absence of Regulations and Growing E-cigarette Use

The U.S. Food and Drug Administration continues to warn the public about the potential harms of e-cigarettes. Studies led by the FDA and the German Cancer Research Center have detected the presence of carcinogens and toxins in e-cigarette cartridges and attributed them to quality control processes that are substandard or non-existent.^{7,8} In one study, for example, three separate but identical cartridges contained varying levels of nicotine; another cartridge delivered twice the level of nicotine as advertised; and several cartridges that were marketed as nicotine-free actually contained low-levels of nicotine. Further studies are required to fully understand the health and safety effects of these products.

In 2010, the U.S. Court of Appeals allowed the FDA to regulate e-cigarettes as a tobacco product under the Family Smoking Prevention and Tobacco Control Act. Doing so could require the e-cigarette industry to follow the same regulations that guide the tobacco manufacturing process, including: ingredient listing, good manufacturing practices, and advertising restrictions.⁹ The FDA has yet to issue these regulations. In the, the absence of government oversight, manufacturers and retailers have been able to advertise their products as a healthy, safe alternative to cigarettes. Furthermore, the e-cigarette industry advertises through multiple media platforms such as television, magazines, and social media sites – practices that the tobacco industry has not been allowed to engage in for many years. These marketing tactics have fueled the e-cigarette's popularity and also increased public misperceptions that e-cigarettes can be utilized as a smoking cessation device, though the government has not approved them for that use.

E-cigarettes are also not subject to tobacco taxes, which helps sustain their low prices. As a result, e-cigarette use has become more affordable and widespread among smokers and former smokers, and price-sensitive youth.

Passive Vaping

Due to carcinogens and toxins found in e-cigarette vapors, passive vaping among non-users poses a potential health concern. One study concluded that e-cigarettes are a new source of volatile organic compounds (VOC) in the indoor environment, and their effects should be examined.¹⁰ Long term exposure to these chemicals and toxins, for the user and passive user, has not been thoroughly explored; however, preliminary evidence suggests that vapors may pose some risk. As a result, manufacturers' claims that e-cigarettes can be used safely virtually anywhere are premature, considering that the health impact of passive vaping is not yet fully understood.

Again, the lack of conclusive evidence has given manufacturers the opportunity to market e-cigarette emissions as water vapors that are harmless or safer than secondhand smoke. As most smoke-free ordinances do not specifically define e-cigarettes as a tobacco product, many retailers encourage e-cigarette use in traditionally smoke-free areas such as indoor workplaces. This not only creates confusion about the permissibility of e-cigarette use in these spaces, but also the challenge of enforcing existing smoke-free laws, particularly because e-cigarettes are similar to regular cigarettes in their appearance and how they are used. The increasing prevalence of e-cigarette and allowing their use in places where smoking is prohibited threatens decades of public health efforts to denormalize smoking.

Despite the lack of health information on passive vaping, there is public support for regulations. According to a 2010 study by the University of Michigan, 69 percent of respondents supported a ban on e-cigarettes in the workplace.

Youth Appeal and Access

The Centers for Disease Control and Prevention (CDC) has reported that the percentage of high school students who have ever used e-cigarettes more than doubled, from 4.7% to 10.0%, between 2011 and 2012.¹¹ Current e-cigarette use in this group also increased from 1.5% to 2.8%, and the large majority (80.5%) of these users also smoked cigarettes.¹² The accessibility and design of e-cigarettes have likely contributed to this boom in popularity. Currently, most states do not prohibit the sale of e-cigarettes to minors, and e-cigarettes are liberally advertised on various social media platforms, websites, and TV commercials. Presented in enticing fruit and candy flavors, e-cigarettes successfully deliver the nicotine kick that cigarettes offer, without the harsh taste or secondhand smoke. E-cigarettes can also mimic commonplace items, such as pens, which are easier to conceal and use in smoke-free indoor and outdoor spaces. Manufacturers' advertising that their products can be used anywhere and without the strong odors or harshness of tobacco likely further fuels the appeal of e-cigarettes, while the lack of retail regulations and use bans have helped increase their visibility and accessibility among youth.

E-Cigarette Policies in Other Jurisdictions

The electronic cigarette's similarities to traditional cigarettes – in appearance and intent – combined with their potential to cause health harms have prompted various governments to adopt precautionary measures that regulate their sale and use. California and just 10 other states, for example, have passed laws prohibiting the sale of e-cigarettes to minors. Until the FDA determines how it will exert its authority over e-cigarettes, the regulation of these products will continue to fall mainly in the hands of state and local governments.

Vaping Restrictions

California does not have a state law that prohibits vaping in areas where smoking is not allowed. These areas include, but are not limited to, indoor workplaces, government buildings, and

playgrounds. The state legislature is considering a bill (SB 648, Corbett) that prohibits vaping where smoking is prohibited. However, it will not cover all areas that local laws currently protect. As a result, local policies must be modified separately to prohibit vaping in places where smoking is prohibited. In 2010, New Jersey became the first state to ban the use of e-cigarettes in public places and workplaces; Utah followed by banning vaping in indoor public places. In addition, several counties, including Contra Costa (CA), Seattle-King County (WA), Tacoma-Pierce County (WA), Suffolk County (NY), and Madison County (KY), prohibit vaping in workplaces. Individual organizations and agencies, such as Amtrak and the U.S. Department of Transportation, have taken precautionary stances by prohibiting vaping on their transportation vehicles.^{13,14}

Locally, some cities in Los Angeles County have revisited their smoke-free policies to address e-cigarette use in their communities. For example, both Huntington Park and Compton have included e-cigarette use in their definition of "smoking," prohibiting vaping in smoke-free areas such as public spaces, workplaces, and multi-unit housing complexes.

Licensing E-Cigarette Retailers

Unlike tobacco products, there is minimal or no regulation of the sale of e-cigarettes in most states, including California. However, 48 cities and counties in the state have independently passed or modified existing ordinances to require a license to sell e-cigarettes. In Los Angeles County alone, at least 18 cities, including Glendale, Burbank and Compton, require such a license.¹⁵

Recommended Local Policy Actions

- Amend local smoke-free policies by including "e-cigarette use" in the definition of "smoking". This will prohibit e-cigarette use in existing smoke-free areas, thereby preventing inhalation of secondhand e-cigarette vapors or "passive vaping".
- Amend existing tobacco retailer license (TRL) ordinances by including e-cigarettes in the definition of "tobacco product". This will require e-cigarette retailers to obtain a TRL and become subject to enforcement measures that discourage sales to minors.
- Impose taxes on e-cigarettes to make retail prices more comparable to those of cigarettes. Higher prices will discourage e-cigarette purchases among price-sensitive minors.

Tobacco Cessation

Electronic nicotine delivery devices such as e-cigarettes are often promoted and used as a means to support smoking cessation. However, this use is not FDA approved and, therefore, e-cigarettes should not at this time be promoted as a tobacco cessation aid.

¹ U.S. Food and Drug Administration. "Electronic Cigarettes (e-Cigarettes)." *FDA*. 25 April 2013. Available at: <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm172906.htm>

² U.S. Food and Drug Administration. "Regulation of E-Cigarettes and Other Tobacco Products." *FDA*. 25 April 2011. Available at: <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm252360.htm>

³ Mangan D. "E-cigarette sales are smoking hot, set to hit \$1.7 billion." *CNBC*. 28 August 2013. Available at: <http://www.cnn.com/id/100991511>

⁴ Centers for Disease Control and Prevention. "Press Release: About one in five U.S. adult cigarette smokers have tried an electronic cigarette." *CDC*. 28 February 2013. Available at: http://www.cdc.gov/media/releases/2013/p0228_electronic_cigarettes.html

⁵ Popova L & Ling PM. "Alternative tobacco product use and smoking cessation: a national study." *Am J Public Health* (2013) 103:923-930

⁶ Florida Department of Health . "2013 Florida Youth Tobacco Survey: Fact Sheet 12 – Youth Electronic Cigarette Use." Available at: http://www.doh.state.fl.us/disease_ctrl/epi/Chronic_Disease/FYTS/2013_FYTS_12_Ecigarette.pdf

⁷ U.S. Food and Drug Administration. "FDA and Public Health Experts Warn About Electronic Cigarettes." *FDA*. 22 July 2009. Available at: <http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm173222.htm>

⁸ German Cancer Research Center (Ed.) "Electronic Cigarettes – An Overview." *Red Series Tobacco Prevention and Tobacco Control*. (2013).

⁹ U.S. Food and Drug Administration. "Regulation of E-Cigarettes and Other Tobacco Products." *FDA*. 25 April 2011. Available at: <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm252360.htm>

¹⁰ Schripp T., Markewitz D., Uhde E., & Salthammer T. "Does e-cigarette consumption cause passive vaping?" *Indoor Air*. (2013). Vol. 23: 25-31.

¹¹ Centers for Disease Control and Prevention. "Morbidity and Mortality Weekly Report: Notes from the Field: Electronic Cigarette Use Among Middle and High School Students – United States, 2011-2012. *MMWR* 2013;62:p729.

¹² Centers for Disease Control and Prevention. "Morbidity and Mortality Weekly Report: Notes from the Field: Electronic Cigarette Use Among Middle and High School Students – United States, 2011-2012. *MMWR* 2013;62:p729.

¹³ U.S. Department of Transportation. "DOT Policy on E Cigarettes." *DOT*. 3 January 2013. Available at: <http://www.dot.gov/airconsumer/air-consumer/dot-policy-e-cigarettes>

¹⁴ AMTRAK. "Smoking Policy". *AMTRAK*. Available at: <http://www.amtrak.com/smoking-policy>

¹⁵ American Lung Association. "Tobacco Retailer Licensing and Electronic Cigarettes." *The Center for Tobacco Policy and Organizing*. June 2013. Available at: http://www.center4tobaccopolicy.org/CTPO/ files/ file/E-cigarettes%20in%20TRL%206_13_13.pdf