

CHAPTER 28
RESTRICTION ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS

§28-01 Definitions and Construction of Words and Terms.

- (a) **Act.** "Act" shall mean the Regulation of the Sale of Herbal Cigarettes and Flavored Tobacco Products, as provided in Chapter 7, Title 17 of the New York City Administrative Code ("the Administrative Code"), as amended by Local Law 69 of 2009.
- (b) **Aroma.** "Aroma" shall mean a quality that can be perceived by the sense of smell.
- (c) **ASTM.** "ASTM" shall mean the American Society for Testing and Materials:
www.astm.org
- (d) **Characterizing Flavor.** "Characterizing Flavor" shall have the meaning set forth in §17-713(b) of the Act.
- (e) **Commissioner.** "Commissioner" shall mean the Commissioner of the New York City Department of Health and Mental Hygiene.
- (f) **Department.** "Department" shall mean the New York City Department of Health and Mental Hygiene.
- (g) **Department of Consumer Affairs.** "Department of Consumer Affairs" shall mean the New York City Department of Consumer Affairs.
- (h) **Distinguishable.** "Distinguishable" shall mean clearly perceivable by either the sense of smell or taste.
- (i) **Flavored tobacco product.** "Flavored tobacco product" shall have the meaning set forth in §17-713(e) of the Act.
- (j) **Label.** "Label" shall mean a display of written, printed, or graphic matter upon the immediate container of any tobacco product.
- (k) **Labeling.** "Labeling" shall mean all labels and other written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.
- (l) **Manufacturer.** "Manufacturer" shall mean any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.
- (m) **Packaging.** "Packaging" shall mean a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a product is offered for sale, sold, or otherwise distributed to consumers.
- (n) **Rules.** "Rules" shall mean Chapter 28 of Title 24 of the Rules of the City of New York.
- (o) **Tobacco bar.** "Tobacco bar" shall have the meaning set forth in subdivision jj of §17-502 of the Administrative Code.
- (p) **Tobacco products.** "Tobacco product" shall have the meaning set forth in §17-713(j) of the Act. Tobacco products shall include, but not be limited to: cigars, pipe tobacco, smokeless tobacco, dissolvable tobacco, snuff, shisha, blunts, and blunt wraps. For purposes of this chapter, tobacco products shall not include cigarettes.

§28-02 Sale or Offer for Sale of Flavored Tobacco Products Restricted.

- (a) Only the following entities may sell or offer for sale flavored tobacco products:

- (1) Tobacco bars; and
 - (2) Tobacco wholesalers, but only where the sale or offer of sale is made to a tobacco bar or to an entity located outside the City of New York.
- (b) Tobacco products that impart a distinguishable taste or aroma of menthol, mint, wintergreen or tobacco, and do not also impart a characterizing flavor, are not subject to the restriction on sale set forth in §17-715 of the Administrative Code or these rules, and may lawfully be sold by any retail dealer or wholesale dealer licensed to sell tobacco products, regardless of whether such sale occurs to or in a tobacco bar.

§28-03 Presumptively Flavored Tobacco Products.

- (a) A tobacco product is presumed to be flavored if its manufacturer, or any person authorized or permitted by its manufacturer to make or disseminate public statements or claims concerning such tobacco product, has made a statement or claim on the tobacco product's label, labeling or packaging that such tobacco product has or produces a characterizing flavor.
- (b) As used in §17-713(e) of the Act and these rules, a "public statement or claim" includes text and/or images used to communicate information about the flavor, taste or aroma of a tobacco product.
- (c) Any tobacco product for which the label, labeling, or packaging of such product includes a public statement or claim that such product has or produces a taste or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice, or any other flavor other than menthol, mint, wintergreen or tobacco, shall be presumed to be a flavored tobacco product subject to the restrictions on sale set forth in §17-715 of the Act.

§28-04 Restricted Flavored Tobacco Product List.

- (a) A tobacco product that is not presumed to be flavored because of a statement or claim on its product label, labeling or packaging may nevertheless be a flavored tobacco product if it has or imparts a characterizing flavor. The Department shall establish a list of such tobacco products, entitled the "Restricted Flavored Tobacco Product List," set forth as Appendix A of these rules. The Restricted Flavored Tobacco Product List shall also be posted on the Department's website. Determinations about whether tobacco products are flavored within the meaning of the Act and subject to inclusion on the Restricted Flavored Tobacco List shall be made by the Department following the testing of such products by a panel of trained sensory testers consistent with ASTM standards. Products on the Restricted Flavored Tobacco Product List shall only be sold or offered for sale to a tobacco bar or in a tobacco bar, or by tobacco wholesalers to entities located outside the city of New York.
- (b) The Department shall develop the Restricted Flavored Tobacco Product List as follows:
 - (1) If the Department determines that a tobacco product has or imparts a characterizing flavor, it shall in writing notify the tobacco product's manufacturer of such determination and of its intent to include the product on the Restricted Flavored Tobacco Product List. The Department's notification shall include: (i) a description of the testing protocol used to determine whether the tobacco product has a characterizing flavor within the meaning of the Act; (ii) the identity of the entity that

- tested the product to determine if it has or produces a characterizing flavor; and (iii) any findings of fact developed by the testing entity.
- (2) A manufacturer may within sixty (60) days of service of the notification described in §28-04(b)(1) of these rules object to the inclusion of its product on the Restricted Flavored Tobacco Product List. An objection shall be in writing, and shall include all information and evidence a manufacturer deems relevant to a determination of whether the tobacco product has or imparts a characterizing flavor. Manufacturers that fail to submit an objection within sixty (60) days of service of the notification described in §28-04(b)(1) of these rules shall be deemed to have waived their right to do so and the Department may immediately commence rule making to add the tobacco product(s) to the Restricted Flavored Tobacco Product List.
 - (3) Upon notice by a manufacturer that the Department intends to include a tobacco product on the Restricted Flavored Tobacco Product List, any third party may submit to the Department information relevant to a determination of whether the tobacco product has or imparts a characterizing flavor. Such submissions shall be subject to the deadlines set forth in §28-04(a)(2) of these rules.
 - (4) Subject to the provisions of the Freedom of Information Law, N.Y. Pub. Off. Law § 87, a manufacturer or other party may request that any information it submits to the Department pursuant to §28-04(b)(2) or §28-04(b)(3) of these rules be designated as exempt from disclosure because it includes trade secrets, or for any other applicable reason set forth in the Freedom of Information Law. Any portion of a submission for which a privilege is asserted shall be treated as confidential until such times as a request is made for that information. If a request is made for information under the Freedom of Information Law and such information is designated as confidential pursuant to such law, the Department shall promptly notify the entity that submitted the information of the request.
 - (5) Within sixty (60) days of receipt of a manufacturer's submission pursuant to §28-04(b)(2) or 28-04(b)(3) of these rules, the Department shall either grant or deny the manufacturer's objection making findings of fact in support of its determination. If the Department denies the objection, it shall commence rule making to add the product(s) to the Restricted Flavored Tobacco Product List.

§28-05 Enforcement.

- (a) The Department and the Department of Consumer Affairs shall enforce the provisions of the Act and these rules.
- (b) Violations of this Act shall be punishable as provided by the Act. Violations of these rules which are not also violations of the Act shall be subject to a penalty not to exceed one thousand dollars (\$1,000), in accordance with §555(b)(2) of the New York City Charter.
- (c) Where a person is found to have violated the Act or these rules, the Department or the Department of Consumer Affairs shall commence a proceeding to recover any civil penalty authorized pursuant to §17-716 of the Act by the service of a notice of violation returnable to the Administrative Tribunal established by the Board of Health where the Department issues such a notice or to the adjudication division of the Department of Consumer Affairs where such department issues such notice.

- (d) In any administrative hearing conducted pursuant to §17-716 of the Act, a manufacturer shall be permitted to intervene in order to present evidence relevant to the adjudication of the notice of violation.

§28-06 Original Labels, Labeling and Packaging of Out-of-Package Sales Required.

Every owner, operator, manager or other person in control of an establishment that sells or offers for sale tobacco products, or non-tobacco products designed for consumption through the inhalation of smoke, shall maintain on site the original labels, labeling and packaging provided by the manufacturer for all such products that are sold or offered for sale by the establishment separately from its original packaging. The original labels, labeling and packaging from which the contents are sold separately shall be maintained during such time as the contents of the package are offered for sale, and may be disposed of upon the sale of the entire contents of such package.

§28-07 Construction.

If any provision of this Chapter is adjudged invalid by any court of competent jurisdiction, such judgment shall not affect or impair the validity of the remainder of this chapter.