

Cigar Association of America, Inc.

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May 4, 2010

Ms. Rena Bryant
Department of Health and Mental Hygiene
125 Water Street
New York, NY 10013

Re: Cigar Association of America Comments to
Proposed Rule Regarding Regulation of the
Sale of Certain Flavored Tobacco Products

Dear Ms. Bryant:

The Cigar Association of America, Inc. and its members (“the CAA”) submit these comments in response to the Notice of Intention to Amend Title 24 of the Rules of the City of New York to Add a New Chapter 28 (“the Proposed Rule”). The Proposed Rule was promulgated pursuant to Local Law 69 of 2009 (“the Ordinance”), which amended Title 17 of the New York City Administrative Code, adding §§ 17-713 to 17-718 to regulate the sale of certain tobacco products. The CAA is a national trade association comprised of cigar manufacturers, importers, distributors and major suppliers to the cigar industry. CAA’s members include companies that manufacture, distribute, import and sell the majority of cigars sold in the United States today.¹

¹ These comments are submitted pursuant to Chap. 45, § 1043(d) of the New York City Charter. While the CAA believes the Ordinance raises significant legal issues, they are not addressed here. The CAA reserves the right to challenge the Ordinance on any available grounds.



In summary, the CAA believes the Proposed Rule should be revised, and that the new Proposed Rule must:

- adhere to the definitions contained in the Ordinance;
- provide a clear and objective standard for determining whether a product is subject to the restrictions in the Ordinance;
- provide a basis and a mechanism to challenge the presumption contained in § 17-713(e) of the Ordinance;
- not go beyond the terms of the Ordinance by requiring retailers to maintain original labels and packaging for all tobacco products; and
- provide for a transition period so distributors and retailers may sell for a reasonable amount of time any tobacco product purchased before the product was deemed subject to the Ordinance.

I. Introduction

The Ordinance is aimed at “preventing youth initiation of smoking and tobacco use.”² New York City has been a leader in that effort and, indeed, the “smoking rate among New York City teens was lowest on record in 2007.”³ The CAA supports efforts -- at the federal, state and local levels -- to discourage and combat youth usage of tobacco, including cigars. A near prohibition, however, on an entire category of tobacco products is unnecessary, ill-advised and goes well beyond the Ordinance’s stated objective.

It is important to note that flavored cigars are not a recent phenomenon. Cigars have been flavored for centuries, and there is no evidence that flavored cigars are targeted at youth, or that youth use them in numbers that justify a ban on the entire category. Indeed, youth usage of cigars in New York City has been on a consistent downward trend. Cigars with flavorings are

² Report of the Human Services Division on Proposed Int. No. 433-A, dated October 13, 2009.

³ See Press Release PR- 001-08, dated January 2, 2008 from Mayor Michael Bloomberg, Commissioner of Health Dr. Thomas Frieden and Commissioner of Consumer Affairs Jonathan Mintz, attached as Exhibit 1.

developed and placed on the market to meet the demands of adult consumers, who increasingly seek flavored products of all kinds. A ban will deprive adult consumers of a legal product, one available outside of New York City, and deprive the City of much needed tax revenue.

II. Background

On October 28, 2009 Mayor Michael Bloomberg signed the Ordinance, regulating (in broad terms) the sale of certain tobacco products in New York City. The Ordinance also required “the Commissioner of the Department [of Health] and the Commissioner of the Department of Consumer Affairs” to promulgate rules to carry out the Ordinance. When it became clear that such rules would not be issued in advance of the February 25 effective date of the Ordinance, the CAA (on February 2) wrote to the agencies, requesting that the Ordinance not be enforced until rules were promulgated. On February 10, in connection with a lawsuit challenging certain aspects of the Ordinance, the New York City Law Department stated that it would not enforce the Ordinance until rules were enacted. The Proposed Rule was published on March 29, 2010.

III. The Ordinance

The Ordinance provides, at § 17-715, that “it shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.”⁴ “Flavored tobacco product” is defined, at § 17-713(d) as “any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor.” In other words, the product must be “flavored” as a result of a constituent. The Ordinance also defines “component part” as “any element of a tobacco product, including but not limited to, the tobacco, filter and paper, but not including any constituent.” It defines “constituent” as “any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted sheet tobacco, that is added by the manufacturer to a tobacco product. . . .” “Characterizing flavor,” in turn, is defined, at § 17-713(b), as:

⁴ The “tobacco bar” exemption applies to a very limited number of establishments, that are not located throughout New York City, and that do not typically carry the products subject to the Ordinance. More importantly, no new tobacco bars are permitted under New York City law. See New York City Administrative Code § 17-502(jj).

a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.

The critical phase, therefore, in determining which products are permitted and which are banned is “distinguishable taste or aroma.” This phrase, however, is undefined in the Ordinance. Moreover, the Ordinance is completely silent on how it will be determined that a product has a characterizing flavor, under what circumstances or by what criteria, or even who will make that determination. This failure is particularly egregious as the Ordinance states explicitly that a product may have “flavorings” but not be considered a “flavored product.”

The Ordinance also provides, at § 17-716, for civil penalties and possible suspension of a license to sell tobacco products for violations of the Ordinance. Enforcement is the responsibility of the Department of Health and the Department of Consumer Affairs (§ 17-717). Finally, the Ordinance provides that the Commissioner of the Health Department and the Commissioner of Consumer Affairs shall promulgate any necessary rules (§ 17-718).

IV. The Proposed Rule

As noted, the New York City Department of Health published the Proposed Rule, “Restriction on the Sale of Certain Flavored Tobacco Products,” on March 29, 2010.⁵ In the “Statement of Basis and Purpose,” the Proposed Rule states that it will “provide guidance for sellers of tobacco products about how to determine whether a tobacco product is flavored and therefore subject to restricted sale.” Unfortunately, it fails to do so.

The Proposed Rule, at § 28-01, sets forth various definitions, some of which are discussed below. For example, “distinguishable” means “detectable by either the sense of smell or taste.” “Flavored tobacco product” is given the meaning set forth in § 17-713(e) of the

⁵ As noted above, the Ordinance provides that rules are to be promulgated by the Commissioners of Health and Consumer Affairs. The Proposed Rule, however, comes only from the Health Department.

Ordinance “but also shall include dual or multiple flavored products where they impart only the taste or aroma of menthol, mint or wintergreen.”

Section 28-02(a) provides that “[f]lavored tobacco products shall only be sold or offered for sale to or in a tobacco bar,” while § 28-02(b) provides in part that “tobacco products that impart a distinguishable taste or aroma of menthol, mint or wintergreen, and do not impart a characterizing flavor are not subject to the restrictions on sale” in the Ordinance. This section, therefore, purports to describe products that are not subject to the Ordinance.

Sections 28-03 and 28-04 purport to create a two-pronged test for describing products that are subject to the Ordinance. Section 28-03, “presumptively flavored tobacco products,” provides that a “tobacco product is presumed to be flavored” if its manufacturer makes a statement or claim that the “product has or produces a characterizing flavor.” It goes on to state that any product with a flavor “other than menthol, mint or wintergreen” will be subject to the restrictions in the Ordinance.

The second prong, § 28-04, entitled “Restricted Flavored Tobacco Product List,” provides that a tobacco product not presumed flavored pursuant to § 28-03 may still be deemed flavored “if it has or imparts a characterizing flavor.” It establishes the Restricted Product List, but provides no guidance on how it will be determined that a product is placed on the list. Indeed, it says only that, if it is determined that a product has a characterizing flavor the manufacturer will be notified and the “Department’s notification shall state the basis for its determination. . . .”

Section 28-05 provides for enforcement of the Ordinance by the Department of Health and the Department of Consumer Affairs, and sets penalties for violations of the Ordinance.

Finally, § 28-06, “Original labels, labeling and packaging of out-of-package sales required,” places on retailers an obligation to “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.” This obligation, not contemplated by the Ordinance, requires retailer to maintain such materials until “the sale of the entire contents of such package.”

V. The Proposed Rule Violates the New York City Administrative Procedures Act

The New York City Administrative Procedure Act, (“the APA”) Chapter 45 of the New York City Charter, provides specific guidance for agency rulemaking. For example, § 1041(5) defines “Rule,” in part, as that which “implements or applies law or policy.” Moreover, § 1041(5)(a) provides, in part, that a rule “shall include. . .(i) standards which, if violated, may result in a sanction or penalty [and] (iv) standards for any product, material, or service which must be met before manufacture, distribution, sale or use. . . .” It is a fundamental principle of agency rulemaking that a rule may not be arbitrary and capricious, vague or ambiguous. A rule that violates these principles is unenforceable. See, Matter of Consolation Nursing Home v. Com. of NYS Dept. of Health, 85 N.Y.2d 326 (1995). The Proposed Rule violates these principles, and fails to comply with the APA in a number of important ways.

As an initial matter, the Proposed Rule makes a significant and impermissible change to the scope of the Ordinance, a change that by itself is fatal to the Proposed Rule. As set forth above, the Ordinance defines a “characterizing flavor” as “a distinguishable taste or aroma, *other than the taste or aroma of tobacco, menthol, mint or wintergreen. . . .*” (emphasis added) The Proposed Rule, however, at §§ 28-0(h), 28-02(b) and 28-03(c), omits “tobacco” from the list of distinguishable tastes or aromas exempt from the flavored product restrictions. The result is that a tobacco product with the taste or aroma of tobacco is apparently subject to the restrictions in the Ordinance, a result both contrary to the Ordinance and absurd.

In addition, the Proposed Rule compounds certain other deficiencies in the Ordinance rather than addressing them.

First, both §§ 28-03 and 28-04 restrict the sale of a tobacco product if it is found to have a “characterizing flavor.” The Proposed Rule, however, fails to establish and articulate for interested parties a standard by which the interested parties can determine --- before a product comes to market -- whether a product will be subject to the restrictions in the Ordinance. A proposed rule must provide this information, as an objective standard. This is particularly true here, when the Ordinance provides that “no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings.” While the Ordinance permits the use of flavorings, manufacturers are left to speculate, at their own risk, as to what

flavorings in what quantities will make a product “flavored” under the Ordinance. Neither the Ordinance nor the Proposed Rule, however, explain how that determination will be made. The lack of an objective standard clearly violates the express language of the APA.⁶

Second, as noted above, the Proposed Rule seeks to define “distinguishable taste or aroma” by defining “distinguishable” to mean “detectable.” §28-01(g). This definition of “distinguishable” changes the scope of “characterizing flavor” to make it broader than what was intended by the Act. Webster’s Online Dictionary defines “distinguishable” as “to perceive a difference in...to mark as separate or different.”⁷ “Detectable” is defined as “to discover or determine the existence, presence, or fact of.”⁸ Something that is “distinguishable” has a distinct property that will separate it from a generic group. To simply “detect” something covers a much broader category, and goes well beyond the scope of the Ordinance. The definition of “distinguishable” should be revised in a way that is consistent with the Ordinance.

Third, the Proposed Rule, at § 28-03, provides that a tobacco product is “presumed” to be flavored if the manufacturer makes a statement that it has a characterizing flavor. For the reasons stated above, there is, however, no way for a manufacturer to know in advance what statements, if made, will create a “presumption” that a product is flavored. In addition, under the Ordinance any statement made by an interested party is only to be “presumptive evidence” that a product is a flavored tobacco product. “Presumptive evidence” clearly requires that the interested party have an opportunity to rebut that presumption. As drafted, however, the Proposed Rule provides no basis or mechanism for such a challenge, and is therefore unreasonable, arbitrary and capricious.

Fourth, §28-06 requires that every “owner, operator, manager and other person in control of an establishment that sells or offers for sale tobacco products” must maintain on site all “original labels, labeling and packaging provided by the manufacturer...separately from its original packaging...and may be disposed of upon the sale of the entire contents of such

⁶ In addition, as noted above, under the definition of “flavored tobacco product” the City must demonstrate that it is “a constituent that imparts [any] characterizing flavor.” (emphasis added) A tobacco product flavored by some other means is not subject to the restrictions in the Ordinance.

⁷ <http://www.merriam-webster.com/dictionary/distinguishable> (last visited April 28, 2010).

⁸ <http://www.merriam-webster.com/dictionary/detectable> (last visited April 28, 2010).

package.” This is an onerous and completely unnecessary requirement, one not contemplated by the Ordinance. Most importantly, it applies to all tobacco products. As an example, if an owner of a retail establishment purchases a case of fifty cigars (flavored or unflavored), that owner will be required to keep the “original packaging” (which will at a minimum include the box and cellophane wrapper for that case) until all 50 boxes contained within the case are sold. This will require the owner to separately identify all 50 boxes as having come from that original case packaging and keep a record of each sale in relation to the original case packaging. For a retailer who may sell many different brands and types of tobacco products this is commercially unreasonable both for the onerous and unreasonable nature of the tracking and identification obligations, but also for the storage room for all of the original packaging. The Proposed Rule offers no justification for this requirement, and is plainly unreasonable, arbitrary and capricious.

Fifth, the Proposed Rule fails to provide for a transition period in order to allow products restricted under either § 28-03 or § 28-04 to be sold for a limited period of time. Distributors and retailers place orders for merchandise well before it reaches store shelves. These businesses should be able to sell inventory for a reasonable period of time after a product is restricted pursuant to the Ordinance. The CAA suggests that a six-month transition period is reasonable. A failure to provide for such a transition period is unreasonable.

VI. Conclusion

For the reasons set forth above, the CAA believes the Proposed Rule is arbitrary and capricious, vague and ambiguous, and violates the APA. A proposed rule must (i) adhere to the definitions contained in the Ordinance; (ii) provide a clear and objective standard for determining whether a product is subject to the restrictions in the Ordinance; (iii) provide a basis and a mechanism to challenge the presumption contained in § 17-713(e) of the Ordinance; (iv) not go beyond the Ordinance by requiring retailers to maintain original labels and packaging for all tobacco products; and (v) provide for a transition period so distributors and retailers may sell for a reasonable amount of time any tobacco product purchased before the product was deemed subject to the Ordinance.

Respectfully Submitted,



Norman F. Sharp
President
Cigar Association of America



FOR IMMEDIATE RELEASE

PR- 001-08

January 2, 2008

**MAYOR BLOOMBERG, HEALTH COMMISSIONER FRIEDEN AND
CONSUMER AFFAIRS COMMISSIONER MINTZ ANNOUNCE
THAT THE SMOKING RATE AMONG NEW YORK CITY TEENS
WAS LOWEST ON RECORD IN 2007**

*Sustained Anti-Tobacco Initiatives Cut Teen Smoking by More
Than Half Over Six Years*

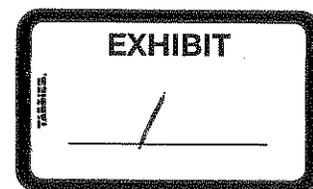
*Bronx Has Lowest Prevalence of Teen Smoking in the Five
Boroughs*

Mayor Michael R. Bloomberg, Health Commissioner Dr. Thomas R. Frieden and Consumer Affairs Commissioner Jonathan Mintz released new data today from the 2007 New York City Youth Risk Behavior Survey showing that cigarette smoking among New York City teens declined by 20% between 2005 and 2007. The City's teen smoking rate has dropped by more than half over the past six years from 17.6 percent in 2001 to 8.5 percent in 2007, the current rate that is about two-thirds lower than the latest available national teen smoking rate of 23 percent. The Mayor linked the continuing decline - which far exceeds the national decline - to the City's sustained efforts to reduce smoking among adults. Those efforts include a tax increase, the smoke-free workplace law, and TV and subway ads that graphically depict the realities of tobacco-related illnesses.

"In 2001, roughly one out of every six high school students smoked. Today, that has fallen to about one out of every 12 - or about 8.5% of students," said Mayor Bloomberg. "The reduction in teen smoking we've achieved in New York City will eventually prevent at least 8,000 premature deaths. These new numbers prove what we in New York have long believed: when you take bold public health measures, you get results."

"Smoking is the leading preventable cause of death in New York City and few people over the age of 18 start smoking for the first time," said Commissioner Frieden. "Preventing youth smoking will further reduce adult smoking and premature deaths in years to come. Parents should know that the strongest predictor of whether their children will smoke is if they themselves smoke."

In 2007, an estimated 20,000 students smoked cigarettes. Had smoking not declined since 2001, there would have been at least 24,000 additional teens smoking in New York City. This decrease will prevent an estimated 8,000 premature deaths. The largest recent declines in teen smoking were observed in Staten Island (down 36 percent between 2005 and 2007), and the Bronx (down 37 percent). Teen smoking remains highest in Staten Island at 14.7 percent.



In addition to efforts to reduce smoking, New York City has also gotten tougher at enforcing cigarette sales to minors. "With our Youth Tobacco Enforcement and Prevention Program, we are conducting more undercover inspections than ever, and under the Mayor's leadership, raising compliance to levels never before seen," said Commissioner Mintz. "While we're thrilled with the program's success and high compliance, our teams continue to go undercover every day to make sure businesses do the right thing and communities are protected. Parents and kids can be the most helpful by reporting stores that make illegal sales."

The New York City Youth Tobacco Enforcement and Prevention Program employs teens ages 15 to 17 to work undercover, accompanied by agency inspectors. The teens are paid \$7.25 per hour plus Metro Cards and are required to take a no-smoking pledge. The Department of Consumer Affairs (DCA) licenses approximately 11,000 tobacco retailers in New York City, and conducts daily inspections at stores year-round in all five boroughs. In fiscal year 2007, DCA conducted nearly 16,000 such inspections. In fiscal year 2007, 89 percent of businesses were in compliance for not selling cigarettes to teens, while in November alone, 93 percent of businesses -an all-time record high-stopped selling cigarettes to kids after being issued a violation. DCA's Youth Tobacco Enforcement and Prevention Program is made possible by a New York State grant.

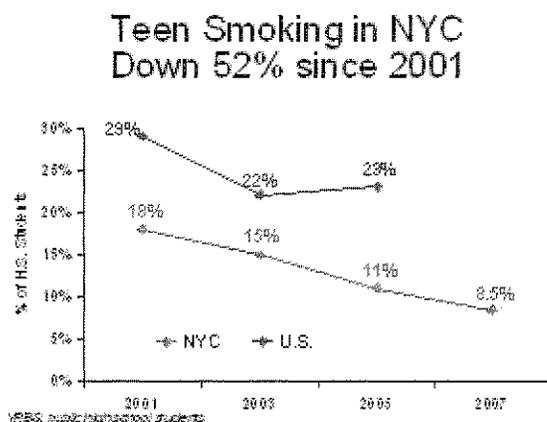
Bronx public high school students have the lowest prevalence of smoking in the city at 6.2 percent - a tremendous benchmark as historically, communities with socioeconomic challenges often have significant health disparities compared to other parts of the City. For example, compared with other boroughs, the Bronx has the highest HIV and diabetes death rates.

Smoking rates do not vary significantly by age or grade among New York City students, but girls previously reported a higher rate than boys. Between 2005 and 2007, however, the smoking rate for teenage boys fell from 10.5 percent to 8.3 percent, while the rate for teenage girls dropped from 12 percent to 8.6 percent, eliminating the differences in smoking by gender in 2007.

Youth Risk Behavior Survey

This information is based on results of the 2007 New York City Youth Risk Behavior Survey, a self-administered, anonymous questionnaire adapted for New York City from

protocols developed by the Centers for Disease Control and Prevention. Nationally, the survey is conducted in both public and private schools. In New York City, the survey has been conducted in public schools every two years since 1997. From 1997 to 2001 the



survey was conducted by the Department of Education (DOE); since 2003, it has been conducted jointly by DOE and the Health Department.

For smokers, quitting is the single most important thing they can do for their health and the health of their families. Smoking causes lung and mouth cancer, as well as stroke and heart disease. After just 24 hours of being tobacco free, a person's risk of heart attack drops. Within 30 days, lung function improves.

For more information about the dangers of smoking - and how to stop - call 311. New Yorkers looking to obtain free nicotine patches can visit the Staten Island Ferry Whitehall Terminal in Manhattan on January 3rd and 4th from 12:00 PM to 6:00 PM, or the Kings Plaza Mall in Brooklyn between January 7th and January 11th from 11:00 AM to 5:00 PM.

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