

May 4, 2010

VIA FACSIMILE AND ELECTRONIC MAIL

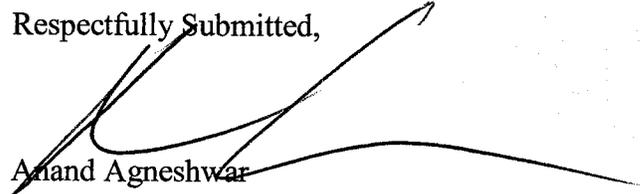
Ms. Rena Bryant
Secretary to the Board of Health
Board of Health
125 Worth Street CN-31
New York, New York 10013

Re: Written Comments on the Proposed Amendment to Title 24 of the Rules of the City of New York to Add a New Chapter 28

Dear Ms. Bryant:

On behalf of U.S. Smokeless Tobacco Manufacturing Company LLC and John Middleton Co., please find enclosed written comments regarding the Proposed Amendment to Title 24 of the Rules of the City of New York to Add a New Chapter 28 ("Restriction on the Sale of Certain Flavored Tobacco Products").

Respectfully Submitted,


Anand Agneshwar

WRITTEN COMMENTS OF U.S. SMOKELESS TOBACCO MANUFACTURING COMPANY LLC AND JOHN MIDDLETON CO. REGARDING THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE'S PROPOSED AMENDMENT TO TITLE 24 OF THE RULES OF THE CITY OF NEW YORK

U.S. Smokeless Tobacco Manufacturing Company LLC (“USSTMC”) and John Middleton Co. (“Middleton”) are submitting these comments on the New York City Department of Health and Mental Hygiene’s Proposed Amendment to Title 24 of the Rules of the City of New York (the “Proposed Rules”) implementing 17 N.Y.C. Admin. Code §§ 17-701 *et seq.* (the “Ordinance”).¹ USSTMC manufactures smokeless tobacco products. Middleton manufactures pipe tobacco and cigars.

USSTMC and Middleton believe that minors should not use any tobacco products and that all tobacco products should be marketed in a responsible manner. Accordingly, they support appropriate governmental regulation that helps prevent underage access to tobacco products. The legislative history of the Ordinance reflects the City Council’s concern with tobacco products that appeal to youth. The Ordinance itself bans certain tobacco products with “characterizing flavors” but does not ban tobacco products merely because they use additives and flavorings. The Ordinance lists some of the types of characterizing flavors that are banned but expressly excludes from the ban tobacco, menthol, mint and wintergreen.

Regulations promulgated by the Department must remain true to the City Council’s intent. The Proposed Rules should be revised as set forth below.²

I. The Rules Should Recognize That a Characterizing Flavor Is a Flavor That Is Identifiable and Predominates Over the Taste and Aroma of Tobacco.

The Proposed Rules acknowledge that the Ordinance bans only “characterizing flavors,” but they define aspects of that term in a manner that could expand the reach of the Ordinance beyond the City Council’s goal in enacting it.

The Ordinance defines “characterizing flavor” as “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....” 17 N.Y.C. Admin. Code § 17-713(b). The Proposed Rules define “distinguishable” to mean “detectable by either the sense of smell or taste.” Proposed Rule § 28-01(g). “Detectable” is not qualified in any way. Thus, the Proposed Rules appear to ban a tobacco product with even the slightest hint of a flavor or aroma other than tobacco, menthol, mint or wintergreen so long as it can be “detected,” even

¹ USSTMC and Middleton are wholly owned subsidiaries of Altria Group, Inc.

² USSTMC and Middleton believe that the Ordinance violates the protections afforded by the Due Process Clause of the United States and New York Constitutions because, among other reasons, it is unconstitutionally vague and constitutes an unconstitutional exercise of police power. In addition, USSTMC has challenged the Ordinance in federal court on the grounds that the Ordinance is preempted by federal law and violates the Commerce Clause of the United States Constitution. USSTMC and Middleton submit these comments without waiving any legal objections to the Ordinance, in accordance with the opportunity provided under § 1043(d) of the New York City Charter.

if it cannot be identified. In addition, because the Proposed Rules do not specify by whom a taste or aroma may be detected, a product might be banned simply because a highly trained and practiced tester, and not an ordinary consumer, could detect a taste or aroma other than tobacco, menthol, mint or wintergreen. Or, a product could be banned because an idiosyncratic untrained tester can detect a taste or aroma other than tobacco, menthol, mint or wintergreen.

The Proposed Rules therefore give no meaning to the concept of “*characterizing*.” The Department should interpret “characterizing” consistent with its ordinary meaning. To “characterize” means, in ordinary usage, “to describe the character or quality of.”³ A characterizing flavor, then, should be one that gives the product its character -- it must be identifiable (*i.e.*, distinguishable) and also must predominate. This interpretation comports with the Ordinance as a whole. The City Council recognized that flavorings are added during the manufacture of tobacco products yet stated in the Ordinance that the use of flavorings does not make a product *per se* unlawful. 17 N.Y.C. Admin. Code § 17-713(b) (“no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings”).

This means, of course, that, in order to be characterizing, the flavor must predominate *over the tobacco*, which otherwise would characterize the product. Without this requirement, the Ordinance’s express preservation of products with a tobacco flavor would have no meaning. 17 N.Y.C. Admin. Code § 17-713(b).

This plain interpretation of the term “characterizing” comports with the legislative purpose. The City Council sought to target tobacco products with strong and intense non-tobacco flavors other than menthol, mint or wintergreen because, in its view, such flavors would appeal to underage consumers. The Council therefore banned tobacco products with characterizing flavors such as chocolate and honey, but permitted products that have tobacco as their predominant flavor and did not restrict the use of flavorings.

The Proposed Rules also veer from the City Council’s intent by adding “dual or multiple flavored products” to the City Council’s definition of “flavored tobacco product.” Proposed Rule § 28-01(h). This expansion is vague and inconsistent with the meaning of “*characterizing* flavor.” Read broadly, it could sweep in products with predominant *tobacco* tastes and aromas simply because the products have subtle additional flavor notes. Such an interpretation contradicts the language and intent of the Ordinance, for the reasons explained above.

Pipe tobacco presents one illustration of the ambiguity created by the Department’s diversion from the ordinary meaning of the term “characterizing.” The tobacco in pipe tobacco is blended with a wide variety of flavorants and other ingredients designed to enhance and complement, not mask, the tobacco taste and aroma. Pipe tobacco thereby imparts complex and unique tastes and aromas.

³ See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/characterize>.

For hundreds of years, pipe tobacco manufacturers have sought to achieve a taste, smoothness and aroma profile distinct to pipe tobacco and unlike those of other tobacco products. For example, the *Tobacco Encyclopedia* describes pipe tobacco and flavors succinctly:

Flavors have played an important role in pipe smoking tobacco for many years. The packet aroma is even more important for pipe tobaccos than for cigarettes, and great care has to be taken to ensure that the flavour does not mask any of the natural tobacco flavour, yet at the same time adds a distinctive note to each particular brand on opening the packet or pouch, and to smoke taste.

Tobacco Encyclopedia 412 (Voges ed. 1984).

The Department, as the implementing agency, must give meaning to the provisions of the Ordinance as well as to its purpose. The Department can do so by providing, first, that a “characterizing flavor” is identifiable as a specific flavor or aroma of the type specified in the Ordinance. A vaguely detectable taste or flavor (such as spicy or sweet) that cannot be identified specifically should not be prohibited. Second, the Department should provide that the identifiable taste or aroma must predominate over the taste or aroma of tobacco.

II. The Rules Should Provide a Process for Rebutting the Presumption That a Product is a Flavored Tobacco Product Based Solely on the Product’s Label.

Section 28-03 of the Proposed Rules renders a product prohibited if its packaging or labeling references a flavor. The Rules provide no way for manufacturers to rebut this result. In this respect the Proposed Rules are contrary to the Ordinance. The Ordinance provides that a statement or claim regarding a tobacco product’s flavor constitutes “presumptive evidence” that the product is a flavored tobacco product as defined in the Ordinance. 17 N.Y.C. Admin. Code § 17-713(e). By using the term “presumptive evidence,” the Ordinance makes clear that manufacturers may rebut the presumption created by its product packaging or advertising. The Committee Report on the Ordinance even notes one category of evidence that manufacturers can present to rebut the presumption. *See Report of the Human Services Division, City Council Comm. on Health, at 10 (Oct. 13, 2009)* (indicating that evidence of another jurisdiction’s determination that a product does not have a characterizing flavor may be considered as evidence to rebut the presumption). To be consistent with the Ordinance and legislative intent, the Rules must provide a mechanism for manufacturers to do this. The Department should modify § 28-03 of the Proposed Rules to include at least the following examples of evidence that manufacturers may submit as part of the rebuttal process:

- Evidence of a determination from another jurisdiction that a product does not have a characterizing flavor.
- Evidence that a product has a name with more than one meaning -- *e.g.*, Middleton’s Walnut pipe tobacco was named after Walnut Street in Philadelphia, Pennsylvania, the former location of John Middleton’s retail

store, and the name of Middleton's Cherry Blend pipe tobacco and pipe tobacco cigars was derived from Cherry Street in Philadelphia.

- Evidence that the named flavor does not predominate over the natural tobacco aroma or taste of the product.

The Department should delineate procedures that it will use to evaluate evidence and make decisions with respect to the presumption.

III. The Rules Should Set Forth Clear Criteria and A Process by Which the Department Will Determine Whether To Include a Product on the Restricted Flavored Tobacco Product List.

Section 28-04 of the Proposed Rules contemplates that even a tobacco product that is not labeled or packaged as having a flavor name can be banned and placed on the Restricted Flavored Tobacco Product List (the "List") if the product has or imparts a characterizing flavor. Yet the Proposed Rules establish no substantive criteria or process that the Department will use to determine whether a product should be placed on the List. For example, the Proposed Rules do not identify who will judge whether a product has a "distinguishable taste or aroma," or whether that "taste or aroma" is one "other than tobacco, menthol, mint or wintergreen." They provide no criteria that an evaluator will use in deciding whether to ban a product. They give no insight on whether that determination will be based on a taster's subjective judgment, consumer surveys or some other means. The Proposed Rules' failure to answer these fundamental questions renders the regulatory process surrounding the Restricted Flavored Tobacco List impermissibly vague.

The Department should modify § 28-04 of the Proposed Rules to require an affirmative determination that a product has an identifiable flavor other than menthol, mint or wintergreen that predominates over the taste or aroma of tobacco before it can be placed on the List. The Department should delineate the procedures it will use to make these decisions. The procedures should require that any determination by the Department contain enough methodology and reasoning to explain the result and the evidence on which it was based.

IV. The Rules Should Specify an Effective Date that Is Feasible for Manufacturers, Distributors and Retailers.

Companies affected by the Ordinance will know the scope of its reach only when the Department issues Final Rules. After issuance of the Final Rules, unless the Department expressly specifies an alternative effective date, manufacturers will have only 30 days in which to communicate ordering and cut-off dates to customers, establish and communicate a returns process for products already in the distribution pipeline, and make other communications with distributors and retailers necessary for compliance by the effective date. *See* N.Y.C. Charter § 1043(e)(1)(c). Thirty days is insufficient time to accomplish these tasks. The Department therefore should provide sufficient time for manufacturers, distributors and retailers to comply. We request that the Department specify that the effective date for the Ordinance and regulations will be no sooner than 60 days after issuance of the Final Rules.

V. The Rules Should Clarify That the Ban Does Not Apply To Tobacco Product Sales to Wholesalers Located in New York City That Are Intended for Distribution Outside of New York City.

The New York City Ordinance cannot reach conduct outside the City, and should not be enforced in a manner that burdens the flow of interstate commerce. Many wholesalers located within the City sell and distribute flavored tobacco products to entities located outside the City and state of New York. The Department should modify the Proposed Rules to make clear that they permit the sale of flavored tobacco products to wholesalers located in New York City for distribution to entities located outside the City.

* * *

USSTMC and Middleton would welcome the opportunity to discuss these and related issues with the Department in the future.