

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
COMMISSIONER OF HEALTH AND MENTAL HYGIENE**

NOTICE OF PUBLIC HEARING

**NOTICE OF INTENTION TO AMEND 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”)**

IN COMPLIANCE WITH SECTION 1043(a) OF THE NEW YORK CITY CHARTER, NOTICE IS HEREBY GIVEN OF THE PROPOSED AMENDMENT OF CHAPTER 28 (RESTRICTIONS ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS) OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK.

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE WILL HOLD A PUBLIC HEARING ON THE PROPOSAL FROM 10:00 A.M. TO 12:00 P.M. ON TUESDAY, MAY 4, 2010, IN THE THIRD FLOOR BOARDROOM (ROOM 330) AT 125 WORTH STREET, NEW YORK, NEW YORK, 10013.

PERSONS INTERESTED IN PRE-REGISTERING TO SPEAK SHOULD NOTIFY, IN WRITING, RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK; (212) 788-5010 BY 5:00 P.M. MONDAY, MAY 3, 2010. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL BUSINESS HOURS. SPEAKERS WILL BE LIMITED TO FIVE (5) MINUTES.

PERSONS WHO REQUEST THAT A SIGN LANGUAGE INTERPRETER OR OTHER FORM OF REASONABLE ACCOMMODATION FOR A DISABILITY BE PROVIDED AT THE HEARING, ARE ASKED TO NOTIFY RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013; (212) 788-5010 BY TUESDAY, APRIL 20, 2010. REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 10:00 A.M. ON MAY 4, 2010. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL MUST BE SUBMITTED TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, BY MAIL TO 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013, BY FAX TO (212) 788-4315, BY E-MAIL TO RESOLUTIONCOMMENTS@HEALTH.NYC.GOV OR ONLINE (WITHOUT ATTACHMENTS) AT <http://www.nyc.gov/html/doh/html/notice/notice.shtml> ON OR BEFORE 5:00 P.M., MAY 4, 2010. ATTACHMENTS TO ONLINE COMMENTS MUST BE MAILED OR FAXED. COMMENTS RECEIVED AFTER MAY 4, 2010 WILL BE CONSIDERED TO THE EXTENT POSSIBLE.

WRITTEN COMMENTS RECEIVED BY THE SECRETARY TO THE BOARD OF HEALTH AND A TRANSCRIPT OF THE PUBLIC HEARING WILL BE AVAILABLE FOR PUBLIC INSPECTION WITHIN A REASONABLE TIME AFTER RECEIPT, BETWEEN THE HOURS OF 9:00 A.M. AND 5:00 P.M. AT THE OFFICE OF THE SECRETARY. THE DEPARTMENT’S GENERAL POLICY IS TO MAKE WRITTEN COMMENTS AVAILABLE FOR PUBLIC VIEWING ON THE INTERNET. ALL COMMENTS RECEIVED, INCLUDING ANY PERSONAL INFORMATION PROVIDED, WILL BE POSTED WITHOUT CHANGE TO <http://www.nyc.gov/html/doh/html/comment/comment.shtml>

Statutory Authority

This rule is promulgated pursuant to sections 389(b) and 1043(a) of the New York City Charter. Section 389(b) provides that “heads of mayoral agencies shall have the power to adopt rules to carry out the powers and duties delegated to the agency head or the agency by or pursuant to federal, state or local law.” Section 1043(a) similarly provides that each “agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.” Local Law 69 of 2009 (L.L. 69), which amended the New York City Administrative Code to restrict the sale of flavored tobacco products, delegates to the Department of Health and Mental Hygiene (“the department”) the authority to promulgate regulations necessary for the purposes of carrying out its provisions.

Statement of Basis and Purpose

L.L. 69 amended Title 17 of the Administrative Code, adding §§17-713 – 17-718 (regulating the sale of flavored tobacco products). Section 17-715 makes it illegal for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar. Section 17-713(e) defines flavored tobacco products to mean “any tobacco product or component part thereof that contains a constituent that imparts a characterizing flavor” and further provides that a “public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.” L.L. 69 provides that the department and the Department of Consumer Affairs shall enforce the provisions of §§17-713 – 17-718, and authorizes the agencies to promulgate regulations as may be necessary for purposes of carrying out the provisions of the law.

These rules define the scope and applicability of the law and provide guidance for sellers of tobacco products about how to determine whether a tobacco product is flavored and therefore subject to restricted sale. Section 28-03 of the rule provides that a tobacco product will be presumed to be flavored if its label, labeling, or packaging includes a 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. Section 28-04 sets forth the procedure by which the department will establish a Restricted Flavored Tobacco Product List comprised of flavored tobacco products that are subject to restricted sale, notwithstanding the fact that their label, labeling and/or packaging do not include statements that the products are flavored.

In order to facilitate enforcement of the law, section 28-06 requires the on-site maintenance of the original labels, labeling and packaging of all tobacco products, and non-tobacco products that are consumed through the inhalation of smoke, that are sold or offered for sale by the establishment outside of the original packaging provided by the manufacturer.

Statement Pursuant to Charter Section 1042 - Regulatory Agenda

This proposed rule was not included in the Department’s Regulatory Agenda because the law that necessitated this rule was enacted after the Regulatory Agenda was prepared and published.

THE PROPOSAL IS AS FOLLOWS:

Note - Matter to be deleted is in [brackets]

Matter underlined is new

Section 1. Title 24 of the Rules of the City of New York is hereby amended by adding a new chapter 28 (Restriction on the Sale of Certain Flavored Tobacco Products).

CHAPTER 28

RESTRICTION ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS

§28-01 Definitions and construction of words and terms.

§28-02 Sale or offer for sale of flavored tobacco products restricted.

§28-03 Presumptively flavored tobacco products.

§28-04 Restricted flavored tobacco product list.

§28-05 Enforcement.

§28-06 Original labels, labeling and packaging of out-of-package sales required.

§28-07 Construction.

§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) Characterizing Flavor. “Characterizing Flavor” shall have the meaning set forth in §17-713(b) of the Act.

(d) Commissioner. “Commissioner” shall mean the Commissioner of the New York City Department of Health and Mental Hygiene.

(e) Department. “Department” shall mean the New York City Department of Health and Mental Hygiene.

(f) Department of Consumer Affairs. “Department of Consumer Affairs” shall mean the New York City Department of Consumer Affairs.

- (g) Distinguishable. “Distinguishable” shall mean detectable by either the sense of smell or taste.
- (h) Flavored tobacco product. “Flavored tobacco product” shall have the meaning set forth in §17-713(e) of the Act and shall include dual or multiple flavored products unless they impart only the taste or aroma of menthol, mint or wintergreen.
- (i) Label. “Label” shall mean a display of written, printed, or graphic matter upon the immediate container of any tobacco product.
- (j) 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.
- (k) 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.
- (l) 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.
- (m) Rules. “Rules” shall mean Chapter 28 of Title 24 of the Rules of the City of New York.
- (n) Tobacco bar. “Tobacco bar” shall have the meaning set forth in subdivision jj of section 17-502 of the Administrative Code.
- (o) 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) Flavored tobacco products shall only be sold or offered for sale to or in a tobacco bar.
- (b) Tobacco products that impart a distinguishable taste or aroma of menthol, mint or wintergreen, and do not also impart a characterizing flavor, are not subject to the restriction on

sale set forth in section 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 or wintergreen, 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 in Appendix A to these rules. 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.

(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 state the basis for its determination that such tobacco product has or produces a characterizing flavor.

(2) A manufacturer may within thirty (30) 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 thirty (30) 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 shall add the tobacco product(s) named in the notice to the Restricted Flavored Tobacco Product List.

(3) Subject to the provisions of the Freedom of Information Law, N.Y. Pub. Off. Law § 87, a manufacturer may request that information it submits to the Department pursuant to §28-04(b)(2) of these rules be designated as confidential. Any portion of a manufacturer's submission for which such privilege is asserted shall be treated as confidential until such time as a Freedom of Information Law request is made for that information. If a request is made for confidential information submitted by a manufacturer, the Department shall promptly notify the manufacturer of the request.

(4) Within sixty (60) days of receipt of a manufacturer's submission pursuant to §28-04(b)(2) of these rules, the Department shall either grant or deny the manufacturer's request to exclude the tobacco product from the Restricted Flavored Tobacco Product List. The Department shall make findings of fact in support of its determination to grant or deny such request.

§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 section 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.

§28-06 Original labels, labeling and packaging of out-of-package sales required.

(a) 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.

(a) 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.

APPENDIX A

Restricted Flavored Tobacco Products List

Section 2. The list of Chapter headings in Title 24 of the Rules of the City of New York is hereby amended as follows:

TITLE 24

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

CHAPTER 1 POSTING REGULATIONS FOR VENDORS OF ALCOHOLIC BEVERAGES

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CHAPTER 27 FOOD ALLERGY INFORMATION

CHAPTER 28 RESTRICTION ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS