

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

**NOTICE OF ADOPTION OF A NEW CHAPTER 28  
("RESTRICTION ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS")  
IN TITLE 24 OF THE RULES OF THE CITY OF NEW YORK**

In compliance with §§1043(a) and 389(b) of the New York City Charter and pursuant to §17-718 of the Administrative Code of the City of New York, a notice of intention to amend Title 24 of the Rules of the City of New York by adding a new Chapter 28 (Restriction on the Sale of Certain Flavored Tobacco Products) and a notice of a public hearing was published in the City Record on March 29, 2010. At a public hearing on May 4, 2010, ten persons testified and four written comments were received. In response to the comments received, the changes indicated below were made to the proposed rule.

**Statutory Authority**

This rule is promulgated pursuant to §§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, §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.

Public comments received included the following:

1. Several members and representatives of the New York Tobacconists Association requested that the Department exempt professional tobacconists from application of Local Law 69. Local Law 69 generally prohibits the sale of flavored tobacco products except in a tobacco bar. It is beyond the scope of the Department's regulatory authority to create exemptions for other categories of retailers that are not exempted by the Local Law.
2. Two written comments argued that §28-01(g) of the proposed rule (defining "distinguishable" as "detectable by either the sense of smell or taste") would have the effect of banning tobacco products with "even the slightest hint" of a flavor or aroma other than tobacco, menthol, mint or wintergreen. In ordinary usage, "to distinguish" means "to perceive clearly."<sup>1</sup> The final rule has been revised to define "distinguishable" to mean "clearly perceivable by either the sense of smell or taste."
3. One written comment stated that the rule's addition of "dual or multiple flavored products" to the definition of "flavored tobacco products" was vague and inconsistent with the statute. The rule has been revised to eliminate the reference to "dual or multiple flavored products" because that language is unnecessary. The sale of tobacco products with flavors such as "chocolate mint" will be restricted, notwithstanding the additional presence of mint flavoring, if the chocolate flavor is clearly perceivable by either the sense of smell or taste.
4. Several comments requested that the proposed rule be amended to provide a mechanism for tobacco product manufacturers and/or other third parties to rebut a presumption that a tobacco product is flavored if its packaging or labeling contains a manufacturer's statement that it is flavored. A new §28-05(d) has been added to clarify that third parties are permitted to intervene in any administrative hearing held pursuant to §17-717 of the Act in order to present evidence relevant to the adjudication of the notice of violation.
5. Several written comments requested that the proposed rule be amended to clearly identify the methodology the Department will employ to determine whether a tobacco product is flavored and subject to inclusion on the Restricted Flavored Tobacco Product List. Section 28-04 has been revised to provide additional information about the testing procedure that will be used for purposes of determining whether tobacco products are flavored within the meaning of the Act and to specify the information that the Department will provide to manufacturers in the written notification of intent to include a product on the Restricted Flavored Tobacco Product List. Section 28-04(b)(2) has also been amended to increase from thirty to sixty days the time in which a manufacturer may object to the proposed inclusion of its product(s) on the Restricted Flavored Tobacco Product List.
6. Two comments requested that the proposed rule be amended to clarify that sales of flavored tobacco products to wholesalers located in New York City for distribution to entities located outside the City are permissible. The Department agrees that the Local Law was not intended to impact the availability of flavored tobacco products outside the city of New York and has amended §§28-02 and 28-04 to so clarify.

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<sup>1</sup> Webster's II New Riverside Dictionary (Revised Edition 1996)

7. The Cigar Association of America commented that §28-06 (requiring the maintenance of original labels and packaging) is onerous because it would require the maintenance of boxes in which tobacco products are delivered to retail establishments. This comment misunderstands the scope of the maintenance requirement. Section 28-01(l) defines packaging as “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*.” (Emphasis added.) This definition does not include packaging used solely for the purpose of mailing products to retailers. By way of example, §28-06 requires that a box containing ten cigars be maintained if the cigars are removed from the box and sold individually. It also requires that a box containing tobacco shisha be maintained if the shisha is removed from the box before it is served to customers. Section 28-06 does not apply to packaging used solely for the purposes of mailing or distribution to retailers, and therefore has not been amended.

8. The Cigar Association of America also asked that the rule be amended to clarify that the sale of tobacco products with the taste or flavor of tobacco is not restricted. Section 28-01(h), 28-02(b) and 28-03(c) have been amended to clarify that tobacco products that impart a distinguishable taste or aroma of tobacco, but do not also impart a characterizing flavor, are not subject to restricted sale.

9. Several comments asked that the Department delay enforcement of the Act for a period of time following the adoption of the final rule in order to permit wholesalers and retailers to “spend down” their existing stocks of flavored tobacco products. Although the Department voluntarily delayed enforcement of the Act until completion of the rulemaking process, the Act went into effect on or about February 25, 2010. Because the rulemaking process has not expanded the scope of products that are subject to restricted sale, no further delay of enforcement is warranted.

10. The Pipe Tobacco Council requested that the rule be amended to include a procedure for notifying retailers and distributors that a product has been added to the Restricted Flavored Tobacco Product List. Because the Restricted Flavored Tobacco Product List will be promulgated as an Appendix to these rules, it will be subject to the notice requirements of the City Administrative Procedure Act. In addition, §28-04(a) has been amended to provide that the List will also appear on the Department’s website.

11. In response to a request by the Pipe Tobacco Council, the rule has been amended to permit third parties to submit to the Department information relevant to the determination of whether a tobacco product has or imparts a characterizing flavor, and to clarify that any such submissions are subject to the provisions of the Freedom of Information Law, N.Y. Pub. Off. Law § 87.

#### **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) ASTM. “ASTM” shall mean the American Society for Testing and Materials: [www.astm.org](http://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.

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**