

CHAPTER 28

RESTRICTION ON THE SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS, FLAVORED ELECTRONIC CIGARETTES, AND FLAVORED E-LIQUID

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

- (a) **Act.** "Act" means the Regulation of the Sale of Flavored Tobacco Products, Flavored Electronic Cigarettes and Flavored E-Liquid, And Regulation of Age of Entry to Non-Tobacco Hookah Establishments, 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, Local Law 187 of 2017, and Local Law 228 of 2019, and Subchapter 35, Chapter 2, Title 20 of the Administrative Code.
- (b) **Characterizing Flavor.** "Characterizing Flavor" has the meaning set forth in §17-713 of the Act.
- (c) **Commissioner.** "Commissioner" means the Commissioner of the New York City Department of Health and Mental Hygiene.
- (d) **Department.** "Department" means the New York City Department of Health and Mental Hygiene.
- (e) **Department of Consumer Affairs.** "Department of Consumer Affairs" means the New York City Department of Consumer and Worker Protection.
- (f) **Distinguishable.** "Distinguishable" means clearly perceivable by either the sense of smell or taste.
- (g) **Flavored E-liquid.** "Flavored E-liquid" has the meaning set forth in § 17-713 of the Act.
- (h) **Flavored Electronic cigarette.** "Flavored Electronic cigarette" has the meaning set forth in § 17-713 of the Act.
- (i) **Flavored tobacco product.** "Flavored tobacco product" has the meaning set forth in §17-713 of the Act.
- (j) **Label.** "Label" means a display of written, printed, or graphic matter upon the immediate container of any tobacco product.
- (k) **Labeling.** "Labeling" means 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" means 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) **Marketing.** "Marketing" means the process or technique of promoting, selling, and distributing a product or service.
- (n) **Packaging.** "Packaging" means 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.
- (o) **Rules.** "Rules" means Chapter 28 of Title 24 of the Rules of the City of New York.
- (p) **Tobacco bar.** "Tobacco bar" has the meaning set forth in subdivision jj of §17-502 of the Administrative Code.
- (q) **Tobacco products.** "Tobacco product" has the meaning set forth in §17-713 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, electronic cigarettes, or e-liquids.
- (r) **Wholesale dealer or wholesaler.** "Wholesale dealer" and "wholesaler" mean any person who sells cigarettes, tobacco products, e-cigarettes or e-liquid to retail dealers or other persons for purposes of resale only, and any person who owns, operates or maintains one or more cigarette vending machines in, at or upon premises owned or occupied by any other person.

§28-02 Sale or Offer for Sale of Flavored Tobacco Products, Flavored Electronic Cigarettes, and Flavored E-Liquids 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.
- (b) The sale of flavored electronic cigarettes and flavored e-liquids is prohibited.
- (c) Tobacco products that do not impart a characterizing flavor other than menthol, mint, and wintergreen 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 Flavored Product List.

- (a) The Department will develop and maintain a non-exhaustive Flavored Products List, including Flavored Tobacco Products, Flavored Electronic Cigarettes and Flavored E-liquids, to facilitate compliance with and enforcement of § 17-715 of the Act. The Flavored Products List will be maintained on the Department's website.
- (b) The Flavored Products List will include:
 - (1) Products that the Department has determined to be Flavored Products based on their taste or aroma.

- (2) Products the Department presumes to be Flavored Products based on their Labeling, Packaging, or Marketing. The Department will presume that a Product is a Flavored Product if the Manufacturer or any of the Manufacturer's agents or employees has made a statement or claim directed to consumers or to the public that the Product has or produces a Characterizing Flavor, including, but not limited to, text, color, and/or images on the product's Labeling, Packaging, or Marketing that are used to explicitly or implicitly communicate that the Product has a Characterizing Flavor. The Department will presume that a Product is flavored if its Labeling, Packaging, or Marketing include descriptive terms such as "spicy" and "sweet" that imply or evoke Characterizing Flavors. The Department will not presume that a Product is a Flavored Product if the only descriptors that appear on its Labeling, Packaging, or Marketing are "strong," "mild," or "plain," where those descriptors appear to be referring to the taste of tobacco.
- (c) For products that have been found by an administrative law judge to be Flavored Products, following an administrative hearing, the Department will update the Flavored Products List to include such products.
- (d) A manufacturer may object to the inclusion of its product on the Flavored Product List. An objection must be submitted in writing, and must include all information and evidence a manufacturer deems relevant to a determination of whether the tobacco product has or imparts a characterizing flavor.
- (1) Such submission must 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) 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 this subdivision 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.
- (3) Within ninety (90) days of receipt of a manufacturer's complete submission pursuant to this subdivision, the Department shall either grant or deny the manufacturer's objection making findings of fact in support of its determination, or notify the manufacturer that additional time is needed to make such determination. If the Department denies the objection, the product(s) shall remain on the Flavored Product List.

§28-04 Licensee Inquiry about Flavored Tobacco Products, Flavored Electronic Cigarettes or Flavored E-Liquids.

A licensed retailer may inquire of the Department whether a product is a Flavored Tobacco Product for purposes of § 17-715 of the Act by sending an inquiry to NYCTobacco@health.nyc.gov. Such inquiry must include the brand, product name, product type, and either (1) an image of such product's packaging and labeling, or (2) a web link to digital images of such product's packing and labeling. Incomplete inquiries may not be reviewed. If the Department determines that such product is Flavored based on its aroma or taste, or that it is presumed to be flavored based on its Packaging, Labeling, or Marketing, the Department will update the Flavored Tobacco Products List within 90 days of the receipt of an inquiry with all necessary information, and will advise such licensed retailer of its conclusions within the same time frame.

§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.