CITY OF CHICAGO
RULES

Tobacco – Flavored Products

Last Updated: December 10, 2015

Mayor Rahm Emanuel - Commissioners Maria Guerra Lapacek and Julie Morita, M.D.

BY THE AUTHORITY VESTED IN THE COMMISSIONER OF BUSINESS AFFAIRS AND CONSUMER PROTECTION AND THE COMMISSIONER OF HEALTH PURSUANT TO SECTION 2-25-120 AND SUBSECTION 4-64-180(c) OF THE MUNICIPAL CODE OF CHICAGO, THE FOLLOWING RULES REGARDING FLAVORED TOBACCO SALES ARE ADOPTED HEREIN.

By Order of the Commissioners:

Signed: _____ Date: 12-10-15
MARIA GUERRA LAPACEK
Commissioner, BACP

Signed: _____ Date: 12/10/15
JULIE MORITA, M.D.
Commissioner, CDPH

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Effective: 12/14/2015

Section 1. Definitions.

Terms used in these rules that are defined in Chapter 64 of Title 4 of the Chicago Municipal Code shall bear those definitions. Particularly pertinent is the definition of "flavored tobacco product," which we include herein for ease of reference:

"Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor. As used in this definition, the term "characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, including, but not limited to, tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any 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. 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 such statements, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product.

Otherwise, for purposes of these rules:

"Aroma" means a quality that can be perceived by the sense of smell.

"BACP" means the Chicago department of business affairs and consumer protection.

"CDPH" means the Chicago department of public health.

"Label" means a display of written, printed, or graphic matter upon the immediately proximate container of any tobacco product.

"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.

"Liquid nicotine" means any liquid, gel, or other solution that contains nicotine.

"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.

"Ordinance" means subsection 4-64-180(b) of the Chicago Municipal Code

"Packaging" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a tobacco product is offered for sale, sold, or otherwise distributed to consumers.

"School" means any public, private, or parochial elementary, middle, or secondary school

located in the City of Chicago. The term "school" shall not include day care centers, or facilities solely providing nursery or kindergarten programs, day camps, tutoring, or after-school activities. The term "school" shall not include a school with no active enrollment.

Section 2. Methods Of Identifying Flavored Tobacco Products.

Because nicotine is ordinarily derived from tobacco, the City will presume that all e-cigarettes, e-hookah, vape pens, and other liquid nicotine products contain nicotine derived from tobacco.

In administering the Ordinance, the City will presume that a tobacco product is flavored if the product's manufacturer, or any person authorized or permitted by the product's manufacturer, makes or disseminates public statements or claims to the effect that the product imparts a characterizing flavor, or if the label, labeling, packaging, or marketing includes a statement or claim that the product imparts a characterizing flavor. Descriptive terms such as "sweet" and "spicy" that refer to or imply characterizing flavors will lead the City to presume that a tobacco product is flavored. However, terms such as "mild" and "strong" that could be referring solely to the taste or aroma of tobacco will not, by themselves, lead to a presumption of flavor; other flavor-related statements or claims from the label, labeling, packaging, or marketing would be needed to support such a presumption. The City will presume that a product containing liquid nicotine is flavored if the label, labeling, packaging, or marketing includes any statement or claim regarding its flavor, other than "plain," "tobacco," "regular," "no flavor," or "no flavor added." As used in these rules, a "statement or claim" includes text and/or images used to communicate information about the flavor of a tobacco product.

The City will make available on the CDPH website a non-exclusive list of terms which, if included in the name of a tobacco product, will support the presumption that the product qualifies as flavored for purposes of the Ordinance. A tobacco product that is not presumed to be flavored may nevertheless be deemed a flavored tobacco product if it imparts a characterizing flavor. The determination whether a tobacco product is flavored may involve reviewing retail or market research data from any widely recognized information and measurement company regarding a product's flavor or aroma, and reviewing any list of tobacco products maintained by a government entity that contains certified information from tobacco manufacturers related to a product's flavor (*e.g.*, a "Directory of Certified Tobacco Manufacturers and Brands," or a "Certification of Fire Safety/Ignition Propensity for Cigarettes" maintained by any Attorney General's Office).

Section 3. Restricted Flavored Tobacco Product List.

CDPH will establish a non-exclusive list of flavored tobacco products entitled the "Restricted Flavored Tobacco Product List." This list will be published on the City of Chicago's Open Data Portal and at http://www.flavoredtobaccosearchengine.org. The list will be updated with new products at the discretion of CDPH.

Section 4. 90-Day Opportunity To Deplete Prohibited Stock.

A retail tobacco dealer that: (a) is currently subject to the Ordinance; and (b) acquired its retail tobacco license on or before July 14, 2014, shall be given a grace period of 90 days to cease sale of flavored tobacco products. The 90-day grace period begins the day after such retail tobacco dealer is notified it is subject to the Ordinance. Proper notice may take the form of a warning through an enforcement action, a notification of determination sent via U.S. Mail, or a condition placed on the license at the time of renewal. In the notice, the City will provide the name and location of the school that renders the dealer subject to the Ordinance.

Section 5. Objecting To The Determination That A Retail Tobacco Dealer Is Subject To The Ordinance.

A retail tobacco dealer deemed subject to the Ordinance, or his agent, may object, in writing and within 30 days of receiving the notice described above in Section 4, on either or both of the following grounds: (a) that each school identified in the notice is more than 500 feet from the dealer's place of business; and (b) that no school identified in the notice meets the definition of "school" set out in Section 1 of these rules. A dealer may also object in writing, at any time, on the ground that a school has closed, permanently ceased to operate as a school, or moved to a location more than 500 feet away from the dealer's place of business. A written objection under this section based on the claim that there is no school within 500 feet of a particular retail tobacco dealer shall include a plat of survey and report documenting the distance measured between the nearest points between: (1) the property line of each school identified in the notice and (2) the property line of objector's place of business. The plat of survey must be prepared by a professional land surveyor, licensed by the State of Illinois.

Retail tobacco dealers or their agents shall submit written objections pursuant to this section via email to BACPtobaccodispute@cityofchicago.org. The commissioner of BACP shall, to the extent possible, respond within 60 days of receiving an objection. If the commissioner needs additional time in which to respond to the objection, the commissioner shall notify the retail tobacco detailer or their agent prior to the end of the 60-day period, and provide an estimate of when a response will issue.

In the event BACP denies an objection made pursuant to this section, the objector may, within 10 days of the denial, request, in writing, a hearing from the commissioner. The request shall be sent to Commissioner of BACP, Room 805, City Hall, 121 North LaSalle, Chicago, IL 60602. Upon receiving such request, the commissioner or her designee shall schedule and conduct a hearing expeditiously. At the hearing, the commissioner or her designee may receive written submissions, witness testimony, argument, and documents regarding the issues presented. The commissioner shall, to the extent possible, render a decision within 30 days of the conclusion of the hearing. That decision shall constitute a final determination for purposes of judicial review. If a retail tobacco dealer files a timely objection under this section, the 90-day period to exhaust any current inventory of flavored tobacco products described above in Section 4 shall not begin to run until the commissioner of BACP issues a final determination.

Section 6. Confirming Whether The Ordinance Applies To A Particular Product.

A retail tobacco dealer or product manufacturer, or a dealer or manufacturer's agent, is

entitled to inquire of the City whether a particular product contains nicotine derived from tobacco and/or constitutes a flavored tobacco product for purposes of the Ordinance. An inquiry based on either or both of these issues should be submitted, in writing, to CDPH, Attn: Director of Policy, 333 S. State Street, Suite 2119, Chicago, Illinois 60604 or via email to flavoredtobacco@cityofchicago.org. Such inquiry submitted may concern any particular product, regardless of whether it is on the Restricted Flavored Tobacco Product List.

Inquiries under this section shall include the brand (e.g., Marlboro), name (e.g., Menthol Lights), type (e.g., cigarette), and either (1) a photocopy, photograph, or digital image of each side of the product's package, label, or labeling, or (2) a web link to digital images of the product's package, label, or labeling, such as on a website where the product is sold. The images must clearly show the product name, description, and any images on the package, label, or labeling. Each inquiry must also include any and all additional information the dealer or manufacturer believes pertinent to assessing whether the product in question contains nicotine derived from tobacco and/or constitutes a flavored tobacco product for purposes of the Ordinance, as well as an explanation of the inquiring party's position on whether the Ordinance applies to the product. CDPH will, to the extent possible, respond within 30 days of receiving an inquiry under this section. CDPH's response may include, as pertinent: (1) a determination whether the product contains nicotine derived from tobacco and/or constitutes a flavored tobacco product for purposes of the Ordinance; (2) a brief description of how CDPH made its determinations; (3) the identity of any entity involved in collecting the data or conducting consumer research or product testing used by CDPH to help make its determinations; and/or (4) any other relevant findings of fact. If CDPH needs additional time to respond to the objection, the department shall notify the retail tobacco detailer or their agent prior to the end of the 30-day period, and provide an estimate of when a response will issue. The response shall constitute a final determination for purposes of judicial review.