

NEW YORK CITY

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The New York City Department of Health and Mental Hygiene (“Department” or “DOHMH”) is proposing to amend Chapter 28 of Title 24 of the Rules of the City of New York to clarify requirements related to Local Law 228 of 2019 (“LL228”), which prohibits the sale of flavored e-cigarettes and flavored e-liquids, while clarifying the definition of characterizing flavor.

The New York City Department of Health and Mental Hygiene will hold a public hearing on the proposed rule. The public hearing will take place at 10AM to 12PM on Thursday, July 8, 2021. The hearing will be conducted by video conference:

- **Internet Video and Audio.** To participate in the public hearing, register on the Webex URL: <https://nycdohmh.webex.com/nycdohmh/onstage/g.php?MTID=e23ddb0f45bfc36216acee7b7e3e54393>
If prompted to provide a password, please enter the following **password: Health**
- **Phone.** For access, dial: **(408) 418-9388**; **Access code: 719 757 328**; **Password: Health**

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department through the NYC Rules website at <http://rules.cityofnewyork.us>
- **Email.** You can email written comments to resolutioncomments@health.nyc.gov
- **Mail.** You can mail written comments to:
New York City Department of Health and Mental Hygiene
Gotham Center, 42-09 28th Street, 14th Floor, CN 30
Attn: Svetlana Burdeynik
Long Island City, NY 11101-4132
- **Fax.** You can fax written comments to the Department at 347-396-6087.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling Svetlana Burdeynik at 347-396-6078 or by emailing at resolutioncomments@health.nyc.gov by , July 8, 2021 at 5:00 P.M. While you will be given the opportunity during the hearing to indicate that you would like to provide comments, we prefer that you sign-up in advance. You can speak for up to three minutes.

Is there a deadline to submit written comments? Written comments must be received on or before 5:00 p.m. on July 8, 2021.

What if I need assistance to participate in the hearing? You must tell the Department’s Office of General Counsel if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by e-mail or by mail at the address given above. You may also tell us by telephone at 347-396-6078. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by June 24, 2021.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A

few days after the hearing, a transcript of the hearing and copies of the written comments will be available for review by the public at the Department's Office of the Secretary.

What authorizes the Department to make this amendment? Section 389(b) of the New York City Charter 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." Charter 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." Administrative Code section 17-709.1 authorizes the Department to promulgate rules as may be necessary to implement the Tobacco Product Regulation Act. Section 12 of LL228 authorizes the Department of Finance, the Department of Health and Mental Hygiene, and the Department of Consumer Affairs to "take such measures as are necessary for the implementation of this local law, including the promulgation of rules."

Where can I find the Department rules and the Health Code? The Department's rules and the Health Code are located in Title 24 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department must satisfy the requirements of Section 1043 of the Charter when adding or amending rules. This notice is made according to the requirements of Section 1043(b) of the Charter. These changes were not included in the Department's legislative agenda because they were not contemplated at that time.

Statement of Basis and Purpose of Proposed Rule

From 2001 to 2017, the cigarette smoking rate among New York City public high school students dropped by 72%, from 17.6% to 5.0%. Despite this progress, youth e-cigarette use is now at alarming levels: one in six public high school students (17.3%) and one in 15 public middle school students (6.7%) reported using e-cigarettes in the past month, according to surveys completed in 2017 and 2018, respectively. Among NYC adults, only 2.5% of adults reported using e-cigarettes in the past month. Especially for youth or young adults who have never smoked, flavors can make these products seem appealing and harmless. Manufacturers have been known to use the same flavors, such as pink lemonade, for example, and similar packaging used to market popular sweets and candy. Among U.S. youth aged 12-17, 81% of those who had ever used e-cigarettes reported their first product was flavored.

Although e-cigarettes do not contain tobacco, an estimated 99% of e-cigarettes contain nicotine. Nicotine is one of the most addictive substances available in a consumer product and can change the chemistry of the teen brain, and may decrease learning ability by worsening memory and concentration. The amount of nicotine in e-cigarettes varies greatly among products, but the current generation of products often contains in a single pod or device as much nicotine as a whole pack of cigarettes.

High nicotine concentration products now account for three-quarters of e-cigarette products sold nationally. E-cigarette aerosol can also contain toxic and cancer-causing chemicals, and the long-term health effects of using these products is unknown. A new generation is at risk of addiction and potential severe, long-term health risks because of these addictive products with variable and unregulated ingredients. In addition, youth who use e-cigarettes are more likely to later try

cigarettes, which are inherently dangerous. While there is insufficient evidence to back claims that e-cigarettes are an effective way to quit smoking, the evidence is clear that these products attract and can addict youth.

Local Law 69 of 2009 (“LL69”) addressed similar concerns about flavored Other Tobacco Products (OTP), by prohibiting the sale of tobacco products in any flavor other than menthol, mint, wintergreen or tobacco. Following the policy’s adoption, however, the tobacco industry started packaging flavored OTP with “concept flavor” names - names that do not explicitly indicate they are flavored, but implicitly convey this. Products with concept flavors like “Tropical” instead of pineapple and banana or “Purple,” instead of grape, made compliance with the law confusing for retailers, and kept flavored tobacco products on the market.

In 2019, LL228 was enacted to reduce the prevalence of tobacco and e-cigarette use, particularly among youth, by restricting flavored products in NYC. This includes any flavor of e-cigarette other than tobacco.

LL228 bans the sale of flavored e-cigarettes and flavored e-liquids in New York City, including mint, menthol and wintergreen electronic cigarettes and e-liquids. Further, to address the concept flavors that were introduced after the adoption of LL69, LL228 changes the definition of characterizing flavor to include “concept” flavors that impart a taste or aroma that is distinguishable from tobacco flavor but may not relate to any particular known flavor. This specifically limits those flavored tobacco products that are allowable for sale in NYC to tobacco, mint, wintergreen and menthol flavors.

To bring the Department’s rules into agreement with LL228, two sections of Chapter 28 of Title 24 of the Rules of the City of New York are being amended while two others are being repealed and readopted. Specifically, definitions are added to section 28-01 and flavored e-cigarettes and e-liquids are added to section 28-02. Section 28-03 and 28-04, defining flavored tobacco products and the establishment of the flavored product list are repealed and replaced by a simpler Section 28-03. The new section 28-04 establishes a process for licensed retailers to inquire about potentially flavored products.

The proposed rule also includes minor plain language revisions.

The amendment is as follows:

New material is underlined. [Deleted material is in brackets.]

Section 1. The heading of Chapter 28 of Title 24 of the Rules of the City of New York is amended to read as follows:

CHAPTER 28

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

Section 2. Section 28-01 of Chapter 28 of Title 24 of the Rules of the City of New York is amended to include updates to the definitions list to reflect the requirements of Local Law 228 of 2019.

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

(a) Act. "Act" [shall]means the Regulation of the Sale of [Herbal Cigarettes and] 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) 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

(d)](b) Characterizing Flavor. "Characterizing Flavor" [shall have] has the meaning set forth in [§ 17-713(b)] § 17-713 of the Act.

[(e)](c) Commissioner. "Commissioner" [shall mean] means the Commissioner of the New York City Department of Health and Mental Hygiene.

[(f)](d) Department. "Department" [shall mean] means the New York City Department of Health and Mental Hygiene.

[(g)](e) Department of Consumer Affairs. "Department of Consumer Affairs" [shall mean] means the New York City Department of Consumer [Affairs] and Worker Protection.

[(h)](f) Distinguishable. "Distinguishable" [shall mean] 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" [shall have] has the meaning set forth in [§ 17-713(e)] § 17-713 of the Act.

(j) Label. "Label" [shall mean] means a display of written, printed, or graphic matter upon the immediate container of any tobacco product.

(k) Labeling. "Labeling" [shall mean] 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" [shall mean] 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" [shall mean] 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.

[(n)](o) Rules. "Rules" [shall mean] means Chapter 28 of Title 24 of the Rules of the City of New York.

[(o)](p) Tobacco bar. "Tobacco bar" [shall have] has the meaning set forth in subdivision jj of § 17-502 of the Administrative Code.

[(p)](q) Tobacco products. "Tobacco product" [shall have] has the meaning set forth in [§ 17-713(j)] § 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.

Section 3. Section 28-02 of Chapter 28 of Title 24 of the Rules of the City of New York is amended to include flavored electronic cigarettes and flavored e-liquids as restricted.

§ 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 wholesale dealers, 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) Flavored electronic cigarettes and flavored e-liquids may only be sold or offered for sale by wholesalers where the sale or offer of sale is made to an entity located outside the City of New York.

(c) Tobacco products that do not impart a characterizing flavor other than menthol, mint, and 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.

Section 4. Section 28-03 of Chapter 28 of Title 24 of the Rules of the City of New York is proposed to be REPEALED, and a new section 28-03 is proposed to be added to read as follows:

§ 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.

(2) 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.

Section 5. Section 28-04 of Chapter 28 of Title 24 of the Rules of the City of New York is proposed to be REPEALED, and a new section 28-04 is proposed to be added to read as follows:

§ 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.

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Prohibition of Sale of Flavored Electronic Cigarettes

REFERENCE NUMBER: DOHMH-113

RULEMAKING AGENCY: Department of Health and Mental Hygiene

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because rule violations arise from completed events, the consequences of which are immediate, which makes a cure period impracticable under the circumstances.

/s/ Francisco Navarro
Mayor's Office of Operations

March 4, 2021
Date

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Prohibition of Sale of Flavored Electronic Cigarettes

REFERENCE NUMBER: 2020 RG 081

RULEMAKING AGENCY: Department of Health and Mental Hygiene

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: March 3, 2021