



**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 (the “Department”) is proposing to amend Chapter 28 of Title 24 of the Rules of the City of New York to prohibit the sale of flavored tobacco products, electronic cigarettes and flavored e-liquids to sales to entities located outside of the City of New York.

When and where is the hearing? The Department will hold a public hearing on the proposed rule. The public hearing will take place from 10a.m. until 12p.m. on May 6, 2024.

The hearing will be conducted by video conference accessible via internet or telephone:

- **Internet.** To participate in the public hearing, register at this Webex URL:
<https://nycdohmh.webex.com/nycdohmh/j.php?MTID=mc2e2f3c2437968b62eef64ffc6aa475f>
If prompted to provide an event number or password, please enter the following:
Event number: **2334 414 6571**, Password: **Health** (432584 from phones)
- **Phone:** For access, dial: (646) 992-2010 or (408) 418-9388; then please enter the following
Access Code: **233 441 46571**.

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

- **Website.** You can submit comments online to the Department through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You may email comments to resolutioncomments@health.nyc.gov
- **Mail.** You can mail comments to:

New York City Department of Health and Mental Hygiene
Gotham Center, 42-09 28th Street, CN 31
Long Island City, NY 11101-4132
- **Fax.** You may fax 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 email resolutioncomments@health.nyc.gov . You can also sign up when you join hearing before the hearing begins on May 6, 2024. You can speak for up to three minutes.

Is there a deadline to submit written comments? Written comments must be received by 5:00 pm (EST) on the date of the hearing, May 6, 2024.

What if I need assistance to participate in the hearing? You must tell the 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 mail at the address given above. You may also tell us by telephone at 347-396-6078 or email resolutioncomments@health.nyc.gov. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by two weeks before the hearing.

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 General Counsel.

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.” Section 556 Section 1043(a) of the Charter 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.”

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 regulatory agenda because they were not contemplated at that time.

Statement of Basis and Purpose of Proposed Rule

Section 17-715 of the Administrative Code of the City of New York (the “Code”) prohibits the sale of flavored tobacco products except in tobacco bars and altogether prohibits the sale of flavored electronic cigarettes and flavored e-liquids. Such section does not identify any exception to the prohibition of sales other than the sale of flavored tobacco products in tobacco bars. However, when the Department originally promulgated section 28-02 in Title 24 of the Rules of the City of New York, it adopted a narrow reading of section 17-715 that excepted sales of such products to entities located outside of the City of New York (the “City”), in addition to excepting sales of flavored tobacco products in tobacco bars, the latter of which is consistent with section 17-715.

The Department proposes to eliminate the exception that allows sales of flavored tobacco products, electronic cigarettes and e-liquids to entities located outside of the City. The Department’s proposal to prohibit such outside sales is motivated by several factors. First, the U.S. Food and Drug Administration (FDA) made it unlawful in 2016 to market tobacco products not authorized by the FDA, and, in 2022, made it unlawful to market non-tobacco nicotine products not authorized by the FDA. None of the flavored products covered by section 17-715 of the Code are authorized by the FDA, making the marketing of such products a violation of federal law. Second, the exception to the prohibition on sales to entities located outside of the City makes it easy for wholesalers located in the City to evade liability for illegal sales made to entities located in the City by wrongfully claiming that the sale of flavored tobacco products, electronic cigarettes and e-liquids is meant for out-of-City buyers. Finally, the proposed interpretation of section 17-715 better conforms to the letter and intent of such law, which makes no explicit exception for outside sales.

Statutory Authority

These rules are promulgated pursuant to the authority of DOHMH established in Charter sections 389, 556, and 1043.

The proposed rules are as follows.

New material is underlined.

[Deleted material is in brackets.]

RESOLVED, that section 28-02 of Title 28 of the Rules of the City of New York is amended to read as follows:

§ 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 [or to an entity located outside the City of New York].

(b) [Flavored] The sale of 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] 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.

**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: Amendment of Rules Relating to Sale of Flavored Tobacco Products, Electronic Cigarettes and Flavored E-liquids

REFERENCE NUMBER: 2024 RG 013

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
Senior Counsel

Date: March 18, 2024

**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: Amendment of Rules Relating to Sale of Flavored Tobacco Products,
Electronic Cigarettes and Flavored E-liquids**

REFERENCE NUMBER: DOHMH-141

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 a violation poses a risk to public health and safety.

/s/ Francisco X. Navarro
Mayor's Office of Operations

March 19, 2024
Date