



CITY OF PHILADELPHIA  
DEPARTMENT OF PUBLIC HEALTH

BOARD OF HEALTH: 4/21/2022  
LAW DEPARTMENT:  
RECORDS DEPARTMENT:

## **RECISSION OF REGULATION RELATING TO THE SALE OF FLAVORED TOBACCO PRODUCTS**

Pursuant to Court Order<sup>1</sup> by Judge Gene E.K. Pratter of the United States District Court for the Eastern District of Pennsylvania in the matter of *Cigar Association of America, et al. v. City of Philadelphia* requiring the City to “void and withdraw any and all regulations” regarding Bill No. 180457,<sup>2</sup> the Board of Health Regulation Relating to the Sale of Flavored Tobacco Products, which was filed with the Department of Records on August 13, 2020, is hereby rescinded.

The Members of the Philadelphia Board of Health further declare as follows:

1. The Board Members approving this rescission are doing so only because they are required to do so pursuant to the above court order.
2. The rescission of the regulation goes against the principles of public health and against the professional expertise and judgement of the Board Members.
3. The Board’s rescission is not intended to, and should not be interpreted to, reflect a view that the Regulation Relating to the Sale of Flavored Tobacco Products is not protective of public health.
4. The Board acknowledges that Bill No. 180457 and the Regulation Relating to the Sale of Flavored Tobacco Products have been declared unenforceable, but the Board Members declare their continued support for the public health goals that the Bill and the Regulation sought to achieve.
5. The Board further calls upon the Pennsylvania General Assembly to remove any legal obstacles preventing the City from enforcing Bill No. 180457 and the associated Board of Health Regulation Relating to the Sale of Flavored Tobacco Products that is rescinded by this vote.

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<sup>1</sup> Order of Judge Pratter is attached, as Attachment A.

<sup>2</sup> Bill No. 180457 is attached, as Attachment B.

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIGAR ASSOCIATION OF AMERICA <i>et al.</i> ,	:	
<i>Plaintiffs</i>	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA <i>et al.</i> ,	:	No. 20-3220
<i>Defendants</i>	:	

**ORDER**

AND NOW, this   3<sup>rd</sup>   day of March 2022, upon consideration of the June 18, 2020 Verified Complaint of Plaintiffs Cigar Association of America, Inc., ITG Cigars Inc., Swedish Match North America, LLC, and Swisher International, Inc. (collectively, “Plaintiffs”), this Court’s Memorandum Opinion and Order dated November 13, 2020 (ECF 26, 27), and the United States Court of Appeals for the Third Circuit’s decision dated November 24, 2021 (Appeal No. 20-3519);

IT APPEARING that on December 18, 2019, Defendant City of Philadelphia (“City”) enacted Bill No. 180457, *codified at* Phila. Code § 9-639,<sup>1</sup> titled “Sale of Flavored Tobacco Products” (“Bill No. 180457” or “the Ordinance”), which restricts the sale of Flavored Cigars and Flavored Roll-Your-Own Tobacco to licensed “Tobacco Products Distribution Businesses”;

IT FURTHER APPEARING that Plaintiffs challenged Bill No. 180457 as preempted by Section 301 of the General Local Government Code, 53 Pa. C.S. § 301 (“Section 301”), and Section 2 of Act 42 of 2018, Act of June 22, 2018, P.L. 281 (“Act 42”), 72 P.S. § 232-A(a);

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<sup>1</sup> The Philadelphia Code can be found at <https://codelibrary.amlegal.com/codes/philadelphia/latest/overview>. Note that Bill No. 180457 numbers this Section as 9-637, but the Code Editor renumbered it as 9-639 in the online publication of The Philadelphia Code.

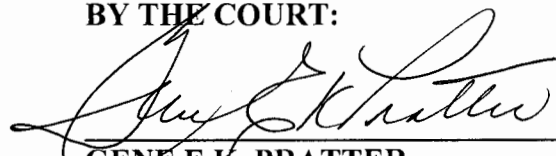
IT FURTHER APPEARING that by Order dated November 13, 2020, this Court entered a preliminary injunction which was affirmed by the Third Circuit Court of Appeals, wherein both Courts concluded, among other things, (a) Plaintiffs are likely to succeed on the merits of their claim that Bill No. 180457 is preempted by the current version of 53 Pa. C.S. § 301; (b) the Courts not need address Plaintiffs' alternative claim that the Ordinance is preempted by Act 42; and (c) Plaintiffs would be irreparably harmed if the requested injunction were not entered;

IT FURTHER APPEARING that all parties consent to the form and entry of the Stipulated Consent Order attached as Exhibit A to their Settlement Agreement and Mutual Release;

IT IS HEREBY **ORDERED** that:

1. Defendants and their departments, agencies, directors, officers, agents, affiliates, subsidiaries, servants, employees, predecessors, successors, and all other persons or entities in active concert or privity or participation with them are permanently enjoined and prohibited under current law from enforcing or seeking to enforce Bill No. 180457 against Plaintiffs and all other persons and entities; and
2. Defendants and their departments, agencies, directors, officers, agents, affiliates, subsidiaries, servants, employees, predecessors, successors, and all other persons or entities in active concert or privity or participation with them shall void and withdraw any and all regulations regarding the Ordinance.

**BY THE COURT:**

  
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**GENE E.K. PRATTER**  
**UNITED STATES DISTRICT JUDGE**

**ATTACHMENT B**

# City of Philadelphia



(Bill No. 180457)

## AN ORDINANCE

Amending Chapter 9-600 of The Philadelphia Code, entitled “Service and Other Businesses,” to add a new Section 9-637, entitled “Sale of Flavored Tobacco Products,” prohibiting offering for sale and selling certain tobacco products other than cigarettes with characterizing flavors and fixing penalties; all under certain terms and conditions.

WHEREAS, Tobacco use kills more than 3,500 Philadelphians each year and the average smoker loses 10 years of life as a result of tobacco use; and

WHEREAS, The health and economic burdens of tobacco use disproportionately fall on low-income Philadelphians, reflected in a 60% higher smoking prevalence for Philadelphians living in poverty compared to Philadelphians not living in poverty; and

WHEREAS, Characterizing flavors in tobacco products can increase the likelihood of tobacco use initiation and long-term addiction, are associated with fewer attempts to quit smoking as an adult, and can decrease the likelihood of successfully quitting; and

WHEREAS, 90% of current adult smokers started smoking by age 18 and 70% of teenagers who use tobacco in Philadelphia report using flavored tobacco; and

WHEREAS, Cigar use among black youth in Philadelphia doubled from 2011 to 2013 and has continued to rise since, driven by the wide availability of inexpensive, flavored cigars and the fact that stores in predominantly black neighborhoods are 74% more likely to display tobacco advertisements near children’s products; and

WHEREAS, National and local data show that, while federal, state, and local laws prohibit the sale of tobacco products to minors, many young people are able to access tobacco products without directly purchasing them, so that complementary efforts to reduce the overall availability of flavored tobacco products in Philadelphia are needed; now, therefore

*THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:*

SECTION 1. Chapter 9-600 of The Philadelphia Code is hereby amended to read as follows:

### CHAPTER 9-600. SERVICE AND OTHER BUSINESSES.

\* \* \*

§ 9-637. *Flavored Tobacco Products.*

# City of Philadelphia

BILL NO. 180457 continued

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(1) *Definitions.* For purposes of this Section, the following terms shall have the following meanings:

*“Characterizing Flavor.”* A taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, any taste or aroma relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.

*“Flavored Cigar.”* Any item rolled for smoking containing tobacco, including cigars and cigarillos, that imparts a Characterizing Flavor, except any cigarette subject to the tax authorized by Section 19-1807.

*“Flavored Roll-Your-Own Tobacco.”* Any Tobacco Product that imparts a Characterizing Flavor and that, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for rolling and smoking.

*“Tobacco Product.”* As defined in Section 9-631(1) of this Code.

*“Tobacco Products Distribution Business.”* An establishment that prohibits minors from entering; provides neither food nor beverage to customers; and derives ninety percent (90%) or more of gross sales on an annual basis from Tobacco Products and accessories used in the consumption of Tobacco Products, including from sales via the internet which are delivered only upon verification of identity and age.

(2) *Sale of Flavored Tobacco Products Prohibited.* It shall be a violation of this Section for any person to sell or offer for sale, or to possess with intent to sell or offer for sale, any Flavored Cigar or Flavored Roll-Your-Own Tobacco.

(3) *Exception.* Section 9-637(2) shall not apply to any Tobacco Products Distribution Business.

(4) *Enforcement.*

(.a) A violation of this Section shall be a Class III offense. Each day a violation continues shall constitute a separate offense. The amount required to be remitted in response to a notice of violation of this Section pursuant to § 1-112 shall be two hundred and fifty dollars (\$250).

# City of Philadelphia

BILL NO. 180457 *continued*

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*(.b) Any person applying for or renewing a Tobacco Retailer Permit pursuant to § 9-631 shall be denied such permit if the person has violated Section 9-637(2) two or more times within the preceding twenty-four (24) months.*

SECTION 2. This Ordinance shall take effect immediately.

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**Explanation:**

[Brackets] indicate matter deleted.  
*Italics* indicate new matter added.

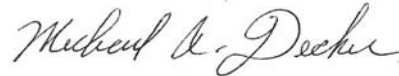


# City of Philadelphia

*BILL NO. 180457 continued*

Certified Copy

CERTIFICATION: This is a true and correct copy of the original Bill, Passed by the City Council on December 5, 2019. The Bill was Signed by the Mayor on December 18, 2019.



Michael A. Decker  
Chief Clerk of the City Council