

CITY OF PHILADELPHIA
DEPARTMENT OF PUBLIC HEALTH
BOARD OF HEALTH

Regulation Relating to the Sale of Flavored Tobacco Products

Approved August 13, 2020

WHEREAS, Section 9-639 of The Philadelphia Code (“Flavored Tobacco Products”) restricts the sale or offering for sale, or possession with intent to sell or offer for sale, of any cigar or roll-your-own tobacco that imparts a Characterizing Flavor, except in any establishment qualifying as a Tobacco Products Distribution Business pursuant to Section 9-639(1); and

WHEREAS, as flavored tobacco restrictions have proliferated in the United States, tobacco manufacturers have dramatically increased the use of “flavor non-descriptive” or “concept flavor” names, which often do not reliably reveal whether a product does or does not impart a Characterizing Flavor, even in conjunction with a visual inspection of the product’s packaging (e.g., a cigarillo named “Poco Loco,” which contains 17 flavor compounds and smells of raspberry, vanilla, and citrus); and

WHEREAS, Section 9-639 provides that the presence of any particular additive or flavoring, or the provision of ingredient information, is not independently sufficient for a determination that a product imparts a Characterizing Flavor—in some cases, tobacco manufacturers use flavoring or additives in a way that does not create the sensory experience of a Characterizing Flavor (e.g., to mask harshness or off-flavors, as noted in a 2016 study published in the BMJ journal *Tobacco Control*, in which case the manufacturer is engaged in a practice known as “flavor masking” in the flavoring industry); and

WHEREAS, evaluation by smell is a widely used practice in public health, provided for in numerous federal, state, and local regulations (e.g., restaurant inspectors must ensure that ventilation is sufficient to prevent “obnoxious odors” and that trash removal is sufficient to minimize “objectionable odors,” pursuant to FDA and Board of Health regulations); and

WHEREAS, given the high and ever-increasing volume of unique products potentially subject to the restrictions of Section 9-639, the Board of Health has determined that designating certain products as presumptively flavored based on certain criteria, while conducting sensory evaluation of “concept flavor” and other products as needed and upon request is appropriate; and

WHEREAS, City Council provided for limited retail availability of Restricted Products by exempting qualifying adults-only, single-purpose tobacconists, thereby limiting the normalization of and exposure to these products to people who affirmatively elect to visit such a tobacconist;

NOW, THEREFORE, the Board of Health hereby adopts this Regulation Relating to the Sale of Flavored Tobacco Products, as follows:

Section 1. Definitions. Capitalized terms not otherwise defined in this regulation shall have the meanings provided in Section 9-639 of The Philadelphia Code.

Characterizing Flavor. As defined in Section 9-639(1) of The Philadelphia Code: “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.”

With respect to the “taste or aroma of tobacco,” such taste or aroma shall encompass tobacco in any state (e.g., air-cured, fire-cured, uncured, etc.) available in the United States market. For example, a product that imparts a taste or aroma only of “flue-cured tobacco” does not impart a Characterizing Flavor.

The phrase “relating to” shall have its plain meaning, whereby a taste or aroma “relat[es] to,” for example, fruit or chocolate, if such taste or aroma is connected to fruit or chocolate—the product need not contain actual fruit or chocolate. Furthermore, the phrase “relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, herb, or spice” is illustrative and not exhaustive—any taste or aroma other than the taste or aroma of tobacco is sufficient.

The final clause, beginning with “provided, however,” clarifies that, consistent with the sensory nature of the definition, the presence of any particular additive or flavoring, or the provision of ingredient information, is not independently sufficient for a determination that a product imparts a Characterizing Flavor. For example, in some cases, tobacco manufacturers use flavoring or additives to mask harshness or off-flavors in a way that does not create the sensory experience of a Characterizing Flavor but rather simply modifies the tobacco flavor. Such modification does not alone constitute a Characterizing Flavor.

Department. The Philadelphia Department of Public Health.

Restricted Product. Any product subject to the restrictions of Section 9-639(2) of The Philadelphia Code.

Potentially Restricted Product. Any cigar or roll-your-own tobacco product.

Product Sample. A sample in original retail packaging of a Potentially Restricted Product, manufactured recently enough to impart the product’s typical taste and aromatic sensory experience.

Section 2. Identifying Restricted Products

(a) Rebuttable Presumption of Characterizing Flavor

(i) There shall be a rebuttable presumption that a Potentially Restricted Product is a Restricted Product under either of the following circumstances:

(A) if the Department determines that an individual product is a Restricted Product based on reasonable evidence other than sensory evidence procured from an evaluation pursuant to Section 2(b). Reasonable evidence upon which the Department will rely includes, but is not limited to:

(I) product packaging, labeling, public manufacturer's statements, advertisements, or user reviews; or

(II) a list of tobacco products maintained by a government entity that contains relevant certified information from tobacco manufacturers; or

(III) relevant retail or market research data from any widely recognized information or measurement company; or

(IV) information from other governmental agencies engaged in comparable regulatory activity consisting of or reflecting the foregoing forms of evidence; or

(B) if the Department makes publicly available a list of flavor terms (which shall include, at least, the flavor terms listed in the definition of Characterizing Flavor) that the Department has determined based on reasonable evidence typically indicate the presence of a Characterizing Flavor in the United States market, and the name of the Potentially Restricted Product contains a flavor term on such list. The plain meaning of a term may qualify as reasonable evidence that the product imparts a Characterizing Flavor (e.g., cherry, grape, or chocolate).

(ii) The sale of a product presumed to be a Restricted Product under Section 2(a)(i) by any person other than a Tobacco Products Distribution Business shall be a violation of Section 9-639(2) of The Philadelphia Code, provided such presumption may be rebutted by contradictory evidence from a sensory evaluation conducted pursuant to Section 2(b). The Department may issue a code violation notice in connection with the sale or offering for sale, or possession with intent to sell or offer for sale, of any product presumed to be a Restricted Product.

(b) Sensory Evaluation

(i) The Department shall, upon request pursuant to Section 4 or otherwise as it deems necessary, conduct a taste or aroma sensory evaluation of a Potentially Restricted Product, including a product for which it has already made a determination pursuant to Section 2(a). Either taste or aroma is sufficient; the sensory evaluation need not consist of both.

(ii) The Department shall establish a training and testing protocol for designees conducting sensory evaluations (e.g., requiring avoidance of interfering conditions like colognes or foods), and shall provide reference tobacco products (i.e., tobacco products previously determined not to impart a Characterizing Flavor) for use by such designee. A person requesting a sensory evaluation pursuant to Section 4 may elect to provide a reference Product Sample for a product already determined not to be a Restricted Product.

(iii) The Department shall for each sensory evaluation record the name or names of the designee or designees evaluating the product, the name of the product, the time, date, and location of product purchase and testing, and other information deemed necessary by the Department.

(iv) Any Department staff member or contractor without an impairment that would prevent that person from discerning non-tobacco tastes or aromas in tobacco products may be designated to participate in the sensory evaluations conducted pursuant to this Section 2(b).

Section 3. Product Guidance

(a) The Department may choose to maintain and make publicly available online a non-exclusive list of products it identifies pursuant to Section 2 as Restricted Products.

(b) The Department may choose to maintain and make publicly available online a non-exclusive list of products it identifies pursuant to Section 2 as not Restricted Products. The Department shall not issue code violation notices pursuant to Section 9-639 of The Philadelphia Code with respect to products on the then-current list maintained pursuant to this Section 3(b).

(c) The Department shall promptly update any publicly available list maintained pursuant to Section 3(a) and Section 3(b) to reflect any addition or removal.

(d) If the Department removes a product from the list maintained pursuant to Section 3(b), the Department shall notify each retailer permitted to sell tobacco products in Philadelphia pursuant to Section 9-631 of The Philadelphia Code via each such permit holder's e-mail on file of the removal, and shall delay issuance of code violation notices with respect to the removed product for thirty (30) days from the later of the date of such (i) e-mail notice or (ii) online posting.

Section 4. Requests for Determination

(a) A person may submit a request to the Department via e-mail at health.ptrd@phila.gov for a determination of whether a Potentially Restricted Product is or is not a Restricted Product. The following shall be submitted with the request: digital images of each side of the product's packaging and labeling, and a web link, if available, to a site at which the product is sold. Submitted images shall clearly show, as applicable, the product name, description, ingredients, and graphical content on the packaging and labeling. Each request

pursuant to this Section 4(a) shall also include any and all additional information the requesting person wishes to have considered in the Department's determination.

(b) The requesting person may, in connection with a request pursuant to Section 4(a), also request a sensory evaluation pursuant to Section 2(b). Upon such request, the Department shall provide an address to which the person requesting evaluation may send one (1) Product Sample in order to have the product evaluated; provided that, for the duration of the COVID-19 pandemic emergency, a person requesting sensory evaluation shall provide, as requested by the Department, up to four (4) Product Samples.

(c) If the Department is unable to make a determination pursuant to Section 2(a) in response to a request pursuant to Section 4(a) due to insufficiency of non-sensory evidence, the Department shall request a Product Sample and shall make a determination promptly after such Product Sample is received.

(d) The Department shall promptly reply to requests for determination submitted in accordance with this Section 4 and shall notify the person making the request of the Department's determination. The Department shall not stay enforcement with respect to a product merely because it is the subject of a request pursuant to this Section 4.

Section 5. Tobacco Products Distribution Business Application

The Department shall create and maintain a new application and annual renewal application process for designation of qualifying establishments as Tobacco Products Distribution Businesses in accordance with the requirements of Section 9-639(1).

Section 6. Administrative Review

Determinations made by the Department pursuant to Section 2(a) may be challenged by submitting a Product Sample in accordance with Section 2(b).