

A REGULATION LIMITING TOBACCO AND NICOTINE ACCESS BY YOUTH ("YOUTH ACCESS REGULATION")

(As Amended on December 1, 2011)

WHEREAS there exists conclusive evidence that tobacco smoke causes cancer, cardiovascular disease, respiratory disease, negative birth outcomes, allergies, and irritation to the eyes, nose, and throat; and whereas the majority of all smokers begin smoking as teenagers; an estimated three thousand (3,000) minors begin smoking every day in the United States; and the U.S. Department of Health and Human Services has concluded that nicotine is as addictive as cocaine or heroin; and despite state laws prohibiting the sale of tobacco products to minors, access by minors to tobacco products remains a major problem;

WHEREAS the U.S. Food and Drug Administration has conducted laboratory testing which found that e-cigarettes contain toxic chemicals and carcinogens; and has further determined that the use of certain unregulated nicotine delivery products, which contain addictive nicotine, present a strong potential for subsequent use and addiction to tobacco products, particularly among youth; and e-cigarettes and other unregulated nicotine delivery products are not approved for tobacco cessation; and the present regulatory gap in state and federal law allows for these products to be sold to minors;

WHEREAS nicotine has been found to increase blood pressure, respiration and heart rate and has been observed to contribute to cardiovascular disorders including cardiomyopathy, peripheral vascular disease, atherosclerosis, hypertension, direct coronary spasm and ischemia, potentially leading to coronary artery disease and myocardial infarction;

WHEREAS in a Massachusetts sample of 5,000 youth age twelve to eighteen years, 16.4% reported they had smoked a cigar; and whereas youth cigar use has grown in Boston, even as youth cigarette smoking decreased nearly 50% between 1995 and 2009; the price of a pack of cigarettes can be more than ten times the price of a single cigar since minimum packaging requirements, bans on flavoring, and certain taxes do not presently apply to cigars; and lower priced cigars are attractive to youth looking for a less expensive alternative to cigarettes; and nicotine levels in cigars are generally much higher than nicotine levels in cigarettes;

NOW THEREFORE, in furtherance of its mission to protect, promote, and preserve the health and wellbeing of Boston citizens and pursuant to the authority granted to it under M.G.L. c. 111 § 31, the Boston Public Health Commission enacts A Regulation Limiting Tobacco and Nicotine Access by Youth (hereinafter "Youth Access Regulation" or "Regulation") as follows:

SECTION I. GUIDELINES

The Boston Public Health Commission ("Commission") may issue guidelines for the implementation of these regulations, including but not limited to definitions of terms as

used in these regulations and in the guidelines. In the event of a conflict between these regulations and the guidelines, as either may be amended, the regulations shall control.

SECTION II. DEFINITIONS

1. *Bidi* (also spelled “beedie”) means a product containing tobacco that is wrapped in temburni leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*), or any product that is offered to, or purchased by, consumers as bidis.

2. *Business Agent* means an individual who has been designated by the owner or operator of a retail establishment to be the manager or otherwise in charge of said establishment.

3. *Cigar* means any roll of tobacco that is wrapped in leaf tobacco or in any substance containing tobacco with or without a tip or mouthpiece.

4. *Cigarette* shall be defined as that term is defined in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 et seq. (“FCLAA”).

5. *E-Cigarette* means any electronic device composed of a mouthpiece, heating element, battery and/or electronic circuits that provides a vapor of liquid nicotine to the user, or relies on vaporization of any liquid or solid. This term shall include such devices whether they are manufactured as e-cigarettes, e-cigars, e-pipes, or under any other product name.

6. *Employee* means any individual who performs services for an employer in return for wages or profit.

7. *Employer* means any individual, partnership, association, corporation, trust, or other organized group of individuals, including the City of Boston or any agency thereof, which regularly uses the services of one (1) or more employee.

8. *Nicotine Delivery Product* means any manufactured article or product made wholly or in part of a tobacco substitute or otherwise containing nicotine that is expected or intended for human consumption, but not including a tobacco substitute prescribed by a licensed medical provider or a product that has been approved by the U.S. Food and Drug Administration for sale as a tobacco use cessation or harm reduction product or for other medical purposes and which is being marketed and sold solely for that approved purpose. Nicotine delivery products include, but are not limited to, E-Cigarettes.

9. *Retailer* means any person or entity who sells tobacco or nicotine delivery products to individuals in the City of Boston, or who operates a facility located within the City of Boston where tobacco product vending machines are located.

10. *Retail Establishment* means any physical place of business or section of a physical place of business where tobacco or nicotine delivery products are offered to consumers. The term shall include those portions of any physical place of business where vending machines that dispense tobacco products are located.

11. *Retail Tobacco Store* means a retail establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, in which the sale of other products is merely incidental, and in which the entry of persons under the age of eighteen (18) is prohibited at all times.

12. *Smoking Bar* means an instrument whose business is primarily devoted to the serving of tobacco products for consumption by guests on the premises and in which the serving of food or alcohol is incidental to the consumption of such tobacco products and prohibits the entry of persons under the age of eighteen (18) at all times. Such establishment must demonstrate annually that revenue generated from the serving of tobacco products is equal to or greater than sixty percent (60%) of the total combined revenue generated by the serving of such tobacco products, beverages, and food.

13. *Tobacco Product* shall be defined as a cigarette, cigars, chewing tobacco, pipe tobacco, bidi, snuff, or other tobacco in any form.

SECTION III. SALE OF TOBACCO PRODUCTS

1. No retailer, retail establishment, or other individual or entity shall sale or distribute or cause to sell or distribute a tobacco product to a person under eighteen (18) years of age.

2. A retailer, retail establishment, or other individual or entity shall request and examine a government-issued photographic identification prior to the sale of a tobacco product to a person appearing under twenty-seven (27) years of age.

3. No retailer, retail establishment, or other individual or entity shall sell or distribute or cause to be sold or distributed an individual cigarette or bidi or any package that contains fewer than twenty (20) cigarettes or bidis.

4. No retailer, retail establishment, or other individual or entity shall sell or distribute or cause to be sold or distributed a cigar unless the cigar is contained in an original package of at least four (4) cigars.

5. No retailer, retail establishment, or other individual or entity shall sell or cause to be sold a tobacco product by means of a self-service or free-standing display unless such display is in strict compliance with the regulations promulgated by the Office of the Attorney General, specifically including, but not limited to 940 CMR 21.04.

6. No retailer, retail establishment, or other individual or entity shall sell or cause to be sold a tobacco product by means of a vending machine or any other device used in the sale of a tobacco product, unless such machine, in strict compliance with City of Boston Code, Ordinances, Chapter XVI, subsection 16-40.2(d):

- a. is located in a private club or bar licensed to sell or serve alcoholic beverages by the Licensing Board of the City of Boston; and
- b. is equipped with a lock-out device and posted with a sign not less than six inches by sixteen inches reading, "Attention! This machine is equipped with a lockout device. To purchase a tobacco product, you must first see the person in charge."

7. A retailer, retail establishment, or employer shall not allow an employee or other individual to sell a tobacco product in accordance with this regulation until such employee or individual has signed a statement acknowledging that he/she has read and understands the Youth Access Regulation. A copy of such statement of acknowledgment shall be placed on file with the retailer, retail establishment, or employer.

8. A retail establishment that sells tobacco products shall obtain a Permit for Location and Sale of Tobacco Products in the form and manner prescribed by the Tobacco Prevention & Control Program of the Boston Public Health Commission.

9. An annual permit fee as determined by the Boston Public Health Commission's Executive Director shall be assessed annually.

10. A retailer shall post the permit in a clear and conspicuous manner.

11. A Permit expires annually on December 31st and shall be valid for a maximum term of one year, renewable annually on January 1st.

12. A permit is non-transferable.

SECTION IV. SALE OF NICOTINE DELIVERY PRODUCTS

1. No retailer, retail establishment, or other individual or entity shall sell or distribute or cause to sell or distribute a nicotine delivery product to a person under eighteen (18) years of age.

2. In the event of a prospective purchase of a nicotine delivery product at retail by a person who appears to be under twenty-seven (27) years of age, the employee responsible for completion of the sale shall request and examine a government-issued photographic identification establishing the purchaser's age as eighteen (18) years or greater.

3. No retailer, retail establishment, or other individual or entity shall sell or cause to be sold a nicotine delivery product by means of a self-service or free-standing display unless such display is in strict compliance with the regulations promulgated by the Office of the Attorney General, specifically including, but not limited to 940 CMR 21.04.

4. No retailer, retail establishment, or other individual or entity shall sell or cause to be sold a nicotine delivery product by means of a vending machine or any other device used in the sale of a nicotine delivery product, unless such machine, in strict compliance with City of Boston Code, Ordinances, Chapter XVI, subsection 16-40.2(d):

- a. is located in a private club or bar licensed to sell or serve alcoholic beverages by the Licensing Board of the City of Boston; and
- b. is equipped with a lock-out device and posted with a sign not less than six inches by sixteen inches reading, "Attention! This machine is equipped with a lockout device. To purchase a tobacco product, you must first see the person in charge."

5. No retailer shall allow any employee to sell a nicotine delivery product in accordance with this regulation until such employee reads the Youth Access Regulation and signs a statement acknowledging that he/she understands the Regulation, a copy of which will be placed on file in the office of the employer or retailer.

6. A retailer who sells nicotine delivery products shall apply for a Permit for Location and Sale of Nicotine Delivery Products in the form and manner prescribed by Tobacco Control.

7. An annual fee for a Permit for Location and Sale of Nicotine Delivery Products as determined by the Commission's Executive Director shall be assessed annually.

8. A retailer shall post in a clear and conspicuous manner a valid Permit for Location and Sale of Nicotine Delivery Products.

9. A Permit for Location and Sale of Nicotine Delivery Products expires annually on December 31st and shall be valid for a maximum term of one year, renewable annually on January 1st.

10. A permit is non-transferable.

SECTION V. EXCEPTIONS

1. Sections III(4) and III(5) of this regulation shall not apply to retail tobacco stores.

2. Section III(4) shall not apply to:
 - a. the sale or distribution of any cigar having a wholesale price of more than two dollars (\$2.00) or a retail price of more than two dollars and fifty cents (\$2.50) as adjusted from time to time to reflect inflation in accordance with the Consumer Price Index; and
 - b. a person or entity engaged in the business of selling or distributing cigars for commercial purposes to another person or entity engaged in the business of selling or distributing cigars for commercial purposes with the intent to sell or distribute outside the boundaries of the City of Boston.

SECTION VI. SIGNAGE

A retailer shall post in a clear and conspicuous manner at all points of sale signage as provided in the guidelines issued pursuant to Section I.

SECTION VII. PENALTIES FOR VIOLATION

1. It shall be the responsibility of the retailer, retail establishment, permit holder and/or individual in charge of the area where tobacco products are being sold to ensure compliance with all applicable sections of this regulation.
2. Any fines collected under this regulation shall be used for the enforcement of this regulation and/or for educational programs on the harmful effects of tobacco and nicotine delivery products.
3. The permit holder and/or individual in charge of the area where tobacco and/or nicotine delivery products are being sold, or person involved in violating any of the provisions of these regulations may receive a fine or permit suspension, revocation or non-renewal as follows:
 - a. In the case of a first violation, the retail establishment shall be fined two hundred dollars (\$200.00).
 - b. In the case of a second violation within twenty-four (24) months, the retail establishment shall be fined four hundred dollars (\$400.00) and the Permit for Location and Sales of Tobacco and/or Nicotine Delivery Products shall be suspended for seven (7) consecutive business days.
 - c. In the case of a third violation within twenty-four (24) months, the retail establishment shall be fined six hundred dollars (\$600.00) and the Permit for Location and Sales of Tobacco and/or Nicotine

Delivery Products shall be suspended for thirty (30) consecutive business days.

- d. In the case of a fourth violation within twenty-four (24) months, the retail establishment shall be fined eight hundred dollars (\$800.00) and the Permit for Location and Sales of Tobacco and/or Nicotine Delivery Products shall be suspended for sixty (60) consecutive business days.

4. Tobacco Control may revoke a Permit upon the fifth and subsequent violation.

5. During the time that a Permit is suspended for a violation of the Regulation, all tobacco products and nicotine delivery products shall be removed from the retail establishment.

6. In the event that a retailer or retail establishment does not respond to a citation within twenty-one (21) days either by sending the appropriate payment or requesting a hearing, the permit shall be automatically suspended and Boston Tobacco Control Program may: file a complaint in any court of competent jurisdiction; and/or; pursue any other remedy as warranted by law.

7. No provision, clause or sentence of this section of this regulation shall be interpreted as prohibiting the Boston Public Health Commission or a City of Boston department or agency from suspending or revoking any license or permit issued by and within the jurisdiction of such department or agency for repeated violations of this regulation.

SECTION VIII. APPEALS

1. Any retailer, retail establishment, or other individual or entity charged with violation of any provision of this regulation shall receive a citation from a designated agent of the Commission. Such citation and any subsequent hearing notification shall be deemed a Notice of Action within the meaning of 801 CMR 1.02(6). Unless waived, the BPHC shall conduct an Administrative Hearing before a designated Hearing Officer and in accordance with procedures approved by the Commission's Executive Director, to determine the facts of the violation, the appropriate fine, if any, and/or the appropriate term of suspension, if any.

2. A retailer, retail establishment, or other individual or entity cited for violation of this regulation wishes to appeal the findings or rulings of the Hearing Officer he/she shall file a written appeal, and any supporting memoranda and documents, within twenty-one (21) days of the date the Hearing Officer's decision is issued. The Boston Tobacco Control Program shall file any response to the appeal within fifteen (15) days of the date of receipt of the appeal is filed.

3. The Commission's Executive Director or his/her designee shall review the appeal and may hear oral argument. The Executive Director or his/her designee shall make a written finding and recommendation. The Executive Director's decision shall be the final decision of the Commission.

4. Failure to pay the fine, if upheld, within twenty-one (21) days of the date of final decision of the Commission shall result in automatic suspension of the permit.

SECTION IX. ENFORCEMENT

1. Authority to enforce this regulation shall be held by the Boston Public Health Commission, its subsidiary programs or designees; the City of Boston Inspectional Services Department, and the Boston Police Department.

2. Any person may register a complaint under this Regulation to initiate an investigation and enforcement with the Boston Public Health Commission, its subsidiary programs or designees.

3. Any fines or fees collected under this regulation shall be used for the enforcement of these regulations and/or for educational programs on the harmful effects of tobacco and/or nicotine.

SECTION X. RETALIATION

No person, retailer, or employer shall discharge, refuse to hire, refuse to serve or in any manner retaliate or take any adverse action against any employee, applicant, customer or person because such employee, applicant, customer or person takes any action in furtherance of the enforcement of this regulation or exercises any right conferred by this regulation.

SECTION XI. PREEMPTION

Nothing in this Regulation shall be deemed to preempt the further limitation of the sale of tobacco products in the City of Boston by any local regulatory body within the limits of its authority and jurisdiction.

SECTION XII. SEVERABILITY

If any provision, clause, sentence, paragraph or word of this Regulation or the application thereof to any person, entity or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this article which can be given effect without the invalid provisions or application and to this end the provisions of this Regulation are declared severable.

Section XIII. EFFECTIVE DATE

This regulation shall take effect immediately upon passage by the Board of the Boston Public Health Commission, except that Section III(4) shall take effect sixty (60) days from the date of passage.

Authority: M.G.L. c. 111 § 5; M.G.L. c. 111 § 31; M.G.L. c. 111, App. §§ 2-6(b), 2-7(a)(1), and 2-7(a)(15).