

**Regulation of the Concord Board of Health
Sale of Tobacco Products and Nicotine Delivery Products**

A. Statement of Purpose:

WHEREAS, there exists conclusive evidence that tobacco use causes numerous cancers, respiratory and cardiac diseases, stroke, negative birth outcomes, irritations to the eyes, nose and throat;

WHEREAS, nearly nine out of 10 smokers started smoking by the age of eighteen years and ninety-nine percent started by age 26 (http://www.cdc.gov/tobacco/data_statistics/faact_sheets/youth_data/tobacco_use/ [accessed 5/11/2014]);

WHEREAS, tobacco products and nicotine delivery products contain nicotine which the U.S. Department of Health and Human Services has concluded is a highly addictive drug;

WHEREAS, despite state laws prohibiting the sale of tobacco products to persons under the age of eighteen, access by youth to tobacco products is a major problem;

WHEREAS, many non-cigarette tobacco products, such as cigars and cigarillos, can be sold in a single “dose;” enjoy a relatively low tax as compared to cigarettes, are available in fruit, candy and alcohol flavors, and are popular among youth;

WHEREAS, according to the CDC’s youth risk behavior surveillance system, the percentage of high school students in Massachusetts who reported the use of cigars within the past 30 days increased from 11.8% in 2003 to 14.9% in 2009;

WHEREAS, survey results show that more youth report that they have smoked a cigar product when it is mentioned by name, than report that they smoked a cigar in general, demonstrating that cigar use among youth is underreported;

WHEREAS, in Massachusetts, youth use of all other tobacco products, including cigars, increased from 13.3% in 2003 to 17.6% in 2009, and was higher than the rate of current cigarette use (16%) for the first time in history;

WHEREAS, research shows that increased cigar prices significantly decreased the probability of male adolescent cigar use;

WHEREAS, according to the CDC, the proportion of high school students who use e-cigarettes doubled in 2012 over 2011 rates, rising from 5% to 10%;

WHEREAS, according to CDC, in 2012 one in five middle school students and 7% of high school students who say they have tried e-cigarettes reported never having smoked conventional cigarettes;

WHEREAS, the list of ingredients in e-cigarettes is not generally known and, accordingly, the impact of those ingredients on the health of people who ‘smoke’ e-cigarettes or the people around them is not known and a December 2010 editorial in the American Journal of Public Health therefore called for removal of e- cigarettes from the market, pending rigorous safety testing;

WHEREAS, contrary to the claims of manufacturers and marketers of e-cigarettes being ‘safe,’ the quantity

and toxicity of the vapors generated by e-cigarettes and their exhaled vapors have not been studied, and more research on e-cigarettes is crucially needed to protect the health of e-cigarette users and the public exposed to vapors from e-cigarettes;

WHEREAS, the principal known liquid ingredient used in e-cigarettes is propylene glycol, which is widely used as a moistening food additive and an aid to vaporization, and research conducted on non-asthmatic people has shown that exposure to propylene glycol mist from artificial smoke generators may cause acute ocular and upper airway irritation, and in some cases cough and slight airway obstruction;

WHEREAS, the use of e-cigarettes which release vapor that may contain harmful substances or respiratory irritants constitutes a potentially dangerous exposure to members of the public when used in a confined space;

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (FSPTCA) enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely to have tried these products than older smokers (Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office of Smoking and Health, p. 537);

WHEREAS although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor Massachusetts laws restrict sales of flavored non-cigarette products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices;

WHEREAS data from the National Youth Tobacco Survey indicate that more than two fifth of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;

WHEREAS, coupons or other means, instruments or devices that allow for the procurement of tobacco products or nicotine delivery products for free or at a reduced or discounted price or the procurement of cigarettes at a price below the minimum retail price counteract the effects of increased prices in deterring or discouraging smoking;

WHEREAS, nicotine levels in cigars are generally much higher than nicotine levels in cigarettes;

WHEREAS, Health Care Institutions are subject to state and local regulation by virtue of their role in the health care delivery system;

WHEREAS, medically vulnerable individuals are significantly affected by smoking and use of other tobacco products and these individuals are more likely to visit Health Care institutions, including pharmacies;

WHEREAS, the sale of tobacco and nicotine delivery products is incompatible with the mission of health care institutions because it is detrimental to the public health and undermines efforts to educate patients on the safe and effective use of medication;

WHEREAS, non-residential Roll-Your-Own (RYO) machines located in retail stores enable retailers to sell cigarettes without paying the excise taxes that are imposed on conventionally manufactured cigarettes;

WHEREAS, inexpensive cigarettes, like those produced from RYO machines, promote the use of tobacco, resulting in a negative impact on public health and increased health care costs, and severely undercut the

evidence-based public health benefit of imposing high excise taxes on tobacco;

WHEREAS, high excise taxes have been demonstrated to encourage adult smokers to quit and deter youth from starting smoking;

WHEREAS the Massachusetts Supreme Judicial Court has held that “. . . [t]he right to engage in business must yield to the paramount right of government to protect the public health by any rational means.” *Druzik et al v. Board of Health of Haverhill*, 324 Mass. 129 (1949); and

NOW, THEREFORE it is the intention of the Concord Board of Health to regulate the sale of tobacco products and nicotine delivery products in health care institutions and to regulate the sale of tobacco products nicotine delivery products to persons under the age of 21.

B. Authority:

This regulation is promulgated pursuant to the authority granted to the Concord Board of Health by Massachusetts General Laws Chapter 111, Section 31 that "Boards of Health may make reasonable health regulations".

C. Definitions:

For the purpose of this regulation, the following words shall have the following meanings:

Bidi: Any tobacco product consisting of small thin cigarettes hand-rolled in leaf wrapping.

Blunt Wrap: Any tobacco product manufactured or packaged as a wrap or as a hollow tube made wholly or in part from tobacco that is designed or intended to be filled by the consumer with loose tobacco or other fillers.

Business Agent: An individual who has been designated by the owner or operator of any establishment to be the manager or otherwise in charge of said establishment.

Cigar: Any roll of tobacco that is wrapped in leaf tobacco or in any substance containing tobacco with or without a tip or mouthpiece and not otherwise defined as a cigarette under Massachusetts General Law, Chapter 64C, Section 1, Paragraph 1.

Characterizing flavor: A distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted or detectable either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided however, that no tobacco product shall be determined to have a characterizing flavor solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product

Component part: Any element of a tobacco product or nicotine delivery product, including, but not limited to, the tobacco, filter, paper, liquid or other part, but not including any constituent.

Constituent: Any ingredient, substance, chemical or compound, other than tobacco, water or constituted tobacco sheet, that is added by the manufacturer to a tobacco product or nicotine delivery product during the processing, manufacturing or packaging of the tobacco product or nicotine delivery product.

Distinguishable: Perceivable by either the sense of smell or taste.

E-Cigarette: Any electronic nicotine delivery product 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 solid nicotine or any liquid. This term shall include such devices whether they are manufactured as e-cigarettes, e-cigars, e-pipes, e-hookahs, or under any other product name.

Employee: Any individual who performs services for an employer.

Employer: Any individual, partnership, association, corporation, trust or other organized group of individuals that uses the services of one (1) or more employees.

Flavored tobacco product: Any tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

Flavored Nicotine Delivery Product: Any nicotine delivery product, as defined herein, including e-cigarettes, as defined herein or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of a nicotine delivery product, including e-cigarettes as defined herein, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such product, that the product has or produces a characterizing flavor shall constitute presumptive evidence that the product is a flavored nicotine delivery product, including e-cigarettes, as defined herein.

Health Care Institution: An individual, partnership, association, corporation or trust or any person or group of persons that provides health care services and employs health care providers licensed, or subject to licensing, by the Massachusetts Department of Public Health under M.G.L. Ch. 112 or a retail establishment that provides pharmaceutical goods and services and subject to the provisions of 247 CMR 6.00. Health care institution includes, but is not limited to, hospitals, clinics, health centers, pharmacies, drug stores, doctor offices and dentist offices.

Minimum Legal Sales Age: The age an individual must be before that individual can be sold nicotine delivery and tobacco products. The Minimum Legal Sales Age in the Town of Concord is twenty-one (21).

Nicotine Delivery Product: Any manufactured article or product made wholly or in part of a tobacco substitute or containing nicotine that is expected or intended for human consumption, but not including a tobacco substitute prescribed by a licensed physician or a product that has been approved by the United States 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, mints, lozenges or other candy, drinks, and inhalers.

Non-Residential Roll-Your-Own (RYO) Machine: A mechanical device made available to use (including to an individual who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the individual's own personal consumption or use) that is capable of making cigarettes, cigars or other

tobacco products. RYO machines located in private homes used for solely personal consumption are not Non-Residential RYO machines.

Permit Holder: Any person engaged in the sale or distribution of tobacco or nicotine delivery products directly to consumers who applies for and receives a Tobacco and/or Nicotine Delivery Product Sales Permit or any person who is required to apply for a Tobacco and/or Nicotine Delivery Product Sales Permit pursuant to these regulations, or his or her business agent.

Person: An individual, employer, employee, retail store, or establishment manager, owner or operator, in each case engaged in the sale or distribution of tobacco products and/or nicotine delivery products directly to consumers.

Retail Tobacco Store: An 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 tobacco paraphernalia, in which the sale of other products is merely incidental, in which the entry of persons under the age of twenty-one (21) is prohibited at all times, and which maintains a valid permit for the retail sale of tobacco products as required to be issued by the Concord Board of Health.

Self-Service Display: Any display from which customers may select a tobacco product or nicotine delivery product without assistance from an employee or store personnel, excluding vending machines

Snus: Any moist powder tobacco product.

Tobacco Product: Blunt wraps, cigarettes, cigars, chewing tobacco, pipe tobacco, bidis, snuff, snus, or tobacco in any of its forms.

Vending Machine: Any automated or mechanical self-service device, which upon insertion of money, tokens or any other form or payment, dispenses or makes cigarettes, any other tobacco product, or nicotine delivery product.

D. Prohibition of the Sale of Tobacco Products and Nicotine Delivery Products by Health Care Institutions:

No health care institution located in the Town of Concord shall sell or cause to be sold tobacco products or nicotine delivery products. No retail establishment that operates or has a health care institution within it, including, without limitation a pharmacy or drug store, shall sell or cause to be sold tobacco products or nicotine delivery products.

E. Prohibition of the Sale of Tobacco and Nicotine Delivery Products to Persons Under the Minimum Legal Sales Age:

No person shall sell a tobacco product or nicotine delivery product or permit a tobacco or nicotine delivery product to be sold to a person under the minimum legal sales age; or not being that person's parent or legal guardian, give a tobacco or nicotine delivery product to a person under the minimum legal sales age.

All retail sales of tobacco and nicotine delivery products must take place directly, in a face-to-face exchange between the seller and the buyer and may not be made through a self-service display or other automated device and must occur at the permitted location. Each person selling or distributing a tobacco or nicotine delivery

product shall verify the age of the purchaser by means of a government-issued photographic identification containing the bearer's date of birth to verify that the purchaser is of the minimum legal sales age or older. Verification is required for any person under the age of twenty-seven (27).

The owner or other person in charge of a permitted shop or other place used to sell tobacco or nicotine delivery products at retail shall conspicuously post a sign stating "The sale of tobacco products or nicotine delivery products to persons under 21 years of age is prohibited." The notice shall be no smaller than 8.5" by 11" and shall be posted conspicuously in the retail establishment or other place in such a manner so that it may be readily seen by a person standing at, or approaching the cash register. Such notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than 4 or greater than 9 feet from the floor.

The owner or other person in charge of a permitted shop or other place used to sell e-cigarettes at retail shall conspicuously post a sign stating, "The use of e-cigarettes at indoor establishments is prohibited by Board of Health regulation." The notice shall be no smaller than 8.5 by 11 inches and shall be posted conspicuously in the retail establishment or other place in such a manner so that it may be readily seen by a person standing at, or approaching the cash register. Such notice shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than 4 or greater than 9 feet from the floor.

The notices required by this section may be placed on the same sign.

F. Tobacco and Nicotine Delivery Product Sales Permits:

1. No person shall sell or otherwise distribute tobacco or nicotine delivery products at retail establishments within Concord without first obtaining a Tobacco and/or Nicotine Delivery Product Sales Permit issued annually by the Concord Board of Health. Only owners of establishments with a permanent, non-mobile location in Concord are eligible to apply for a permit and sell nicotine delivery products at the specified location in Concord.
2. As part of the Tobacco and/or Nicotine Delivery Product Sales Permit application process, the applicant will be provided with the Concord Board of Health's regulations. Each applicant is required to sign a statement declaring that the applicant has read said regulations and that the applicant is responsible for instructing any and all employees who will be responsible for tobacco or nicotine delivery product sales regarding federal, state and local laws or regulations, including this regulation, regarding the sale of tobacco products or nicotine delivery products.
4. Each applicant for a Tobacco and/or Nicotine Delivery Product Sales Permit who wishes to sell tobacco shall be required to provide proof of a current tobacco sales license issued by the Massachusetts Department of Revenue before a Tobacco and/or Nicotine Delivery Product Sales Permit can be issued.
5. The fee for a Tobacco and/or Nicotine Delivery Product Sales Permit shall be determined and published on the Town's website by the Concord Board of Health annually.
6. A separate permit is required for each retail establishment selling tobacco and/or nicotine delivery products.
7. Each Tobacco and/or Nicotine Delivery Product Sales Permit shall be displayed at the retail establishment in a conspicuous place.

8. No Tobacco or Nicotine Delivery Product Sales Permit holder shall allow any employee to sell tobacco or nicotine delivery products until such employee reads this regulation and federal and state laws regarding the sale of tobacco and signs a statement, a copy of which will be placed on file in the office of the employer, that he/she has read the regulation and applicable state and federal laws.

9. Tobacco and Nicotine Delivery Product Sales Permits are non-transferable. A new owner of an establishment that sells tobacco or nicotine delivery products must apply for a new permit. No new permit will be issued unless and until all outstanding penalties incurred by the previous permit holder are satisfied in full.

10. Issuance of a Tobacco and Nicotine Delivery Product Sales Permit shall be conditioned on an applicant's consent to unannounced, periodic inspections of his/her retail establishment to ensure compliance with this regulation.

11. Issuance and holding of a Tobacco and/or Nicotine Delivery Product Sales Permit shall be conditioned on a permit holder's or applicant's on-going compliance with current Massachusetts Department of Revenue requirements and policies including, but not limited to, applicable minimum retail prices of tobacco products and nicotine delivery products.

12. A Tobacco and/or Nicotine Delivery Product Sales Permit will not be renewed if the permit holder has failed to pay all fines issued and the time period to appeal the fines has expired.

G. Prohibition of E-Cigarette Use in Public Places:

The use of e-cigarettes is prohibited wherever smoking is prohibited in any location in Concord per M.G.L. Ch. 270 Section 22 or the Concord Smokefree Workplace Bylaw.

H. Prohibition of the Sale of Tobacco Products and Nicotine Delivery Products at Self-Service Displays:

All self-service displays of tobacco products or nicotine delivery products are prohibited.

I. Prohibition of the Sale of Tobacco Products and Nicotine Delivery Products in Vending Machines:

All tobacco or nicotine delivery product vending machines are prohibited.

J. Cigar Sales Regulated:

1. No person 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 five (5) cigars. No package of five (5) or more cigars shall be sold unless it has a retail price of at least \$10.00.

2. This Section shall not apply to:

a. The sale or distribution of any cigar having a retail price of three (3) dollars (\$3.00) or more.

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.

c. Retail Tobacco Stores.

K. Prohibition of the Sale of Blunt Wraps:

No person shall sell or distribute blunt wraps.

L. Sale of Flavored Tobacco Products and Flavored Nicotine Delivery Products Prohibited:

No person shall sell or distribute or cause to be sold or distributed any flavored tobacco product or flavored nicotine product except in retail tobacco stores as defined herein.

M. Free Distribution and Coupon Redemption:

No person shall distribute, or cause to be distributed, any free samples of tobacco products or nicotine delivery products. No coupons or other means, instruments or devices that allow for the procurement of any tobacco product or nicotine delivery product for free or at a reduced or discounted price or the procurement of cigarettes at a price below the minimum retail price determined by the Massachusetts Department of Revenue shall be accepted by any permit holder.

N. Non-Residential Roll-Your-Own Machines:

All Non-residential Roll-Your-Own machines are prohibited.

O. Out-of Package Sales:

The sale of distribution of tobacco products or nicotine delivery products in any form other than an original factory-wrapped packaging is prohibited. No person shall sell or cause to be sold or distribute or cause to be distributed any cigarette package, whether or not in original factory-wrapped packaging, that contains fewer than twenty (20) cigarettes, including single cigarettes.

P. Violations:

1. It shall be the responsibility of an establishment or its business agent to ensure compliance with all sections of this regulation pertaining to the distribution of tobacco products and nicotine delivery products. Persons who violate this regulation shall be subject to the following penalties:
 - A. In the case of a first violation, a fine of one hundred dollars (\$100).
 - B. In the case of a second violation within 24 months of the date of a first violation of this regulation, a fine of two hundred dollars (\$200) shall be assessed. If the person is a permit holder, that person shall also be required to appear at a Board of Health hearing at which the Board will consider a suspension of that person's Tobacco and/or Nicotine Delivery Product Sales Permit for up to seven (7) consecutive business days in accordance with the provisions of Section P(2) below.

C. In the case of three or more violations of this regulation within a 24 month period, a fine of three hundred (\$300) shall be assessed. If the person is a permit holder, that person shall also be required to appear at a Board of Health hearing at which the Board will consider a suspension of that person's Tobacco and/or Nicotine Delivery Product Sales Permit for up to thirty (30) consecutive business days in accordance with the provisions of Section P(2) below.

D. Each day any violation exists shall be deemed to be a separate offense.

E. In addition to the above, refusal to cooperate with inspections pursuant to this regulation shall result in the suspension of the tobacco sales permit for thirty (30) consecutive business days in accordance with the provisions of Section P(2) below.

2. The Concord Board of Health shall provide notice of the intent to suspend a Tobacco or Nicotine delivery product sales permit, which notice shall contain the reasons therefore and establish a time and date for a hearing which date shall be no earlier than seven (7) days after the date of said notice. The permit holder or its business agent shall have an opportunity to be heard at such hearing and shall be notified of the Board of Health's decision and the reasons therefore in writing. After the hearing, the Concord Board of Health will suspend the Tobacco or Nicotine Delivery Product Sales Permit if the Board finds that a sale or activity prohibited by this regulation has occurred. For purposes of such suspensions, the Board shall make the determination notwithstanding any separate criminal or non-criminal proceedings brought in court hereunder or under the Massachusetts General Laws for the same offense. All tobacco and/or nicotine delivery products shall be removed from the retail establishment upon suspension of the tobacco and/or nicotine delivery sales permit. Failure to remove all tobacco or nicotine delivery products shall constitute a separate violation of this bylaw.

Q. Non-Criminal Disposition:

Whoever violates any provision of this regulation may be penalized by the non-criminal method of disposition as provided in General Laws, Chapter 40, Section 21D and the Town of Concord, Massachusetts Bylaw Providing for Non-criminal Disposition of Violations of Town Bylaws. Nothing herein shall prohibit or prevent enforcement by the filing of a criminal complaint.

Each day any violation exists shall be deemed to be a separate offense.

R. Enforcement:

Enforcement of this regulation shall be by the Concord Board of Health of or its designated agent(s). Any citizen who desires to register a complaint pursuant to the regulation may do so by contacting the Concord Board of Health of or its designated agent(s) and the Board shall investigate said complaint.

S. Other Applicable Laws:

These regulations shall not be interpreted or construed to permit smoking, the use of e-cigarettes or the sale of tobacco products or nicotine delivery products where such sale, use of e-cigarettes or smoking is otherwise restricted by other applicable health, safety or fire codes, laws, Bylaws or regulations, including, without limitation, any Town of Concord Bylaw.

T. Severability:

If any provision of these regulations is declared invalid or unenforceable, the other provisions shall not be affected thereby but shall continue in full force and effect.

U. Effective Date:

This regulation shall take effect on November 1, 2014.