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Baltimore City Health Department
Attention: Rianna Brown
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Comment On Baltimore City Health Department Proposed Cigarette Fire Standard Regulation

On behalf of R.J. Reynolds Tobacco Company and Lorillard Tobacco Company, we submit the following comments on the proposed Baltimore City Health Department fire standards for cigarettes as released for public comment on October 10, 2007. The proposed Health Department regulation should not be promulgated because it is prohibited by the law enacted on the same subject by the General Assembly, could not be complied with by law-abiding Baltimore City businesses in the time frame currently proposed, and would create severe economic disruption in violation of the express determination by the General Assembly that fire standards for cigarettes are to be implemented on a uniform statewide basis beginning on July 1, 2008, only nine months from now.

On May 17, 2007, Sections 16-601 through 16-610, Title 16 - Business Regulation, of the Annotated Code of Maryland as enacted by the General Assembly was approved by the Governor. A comprehensive and statewide cigarette fire standard law with strong enforcement mechanisms and penalties became Maryland law. As an integral part of the new law, the General Assembly provided in Article 8-102 of the Public Safety Code of Maryland

that the new law expressly “preempts any local law, ordinance or regulation that conflicts with any provision of this Act or any policy of the State implemented in accordance with this Act. . .” The General Assembly further decreed that “a governmental unit of this State may not enact or enforce an ordinance, local law or regulation conflicting with or preempted by this Act.”

In the 2007 law, the General Assembly established as a matter of express statutory law and legislative policy a statewide effective date of July 1, 2008. Pursuant to that policy, the General Assembly enacted a specific and carefully considered procedure which prohibits the sale throughout Maryland of cigarettes tax-stamped after that date unless they comply with the new law. (Section 8-102, Public Safety, Annotated Code of Maryland).

The proposed Health Department regulation would clearly conflict with the policy adopted by the General Assembly and specific provisions of the law it enacted to carry out that policy. The October 10, 2007 announcement of the proposed regulation states that one of the proposed purposes is to establish a regulation that would take effect in “advance” of the effective date established by the General Assembly. The conflict is clear and far-reaching in its effect: under the proposed regulation, Baltimore City cigarette wholesalers and retailers would be prohibited from selling their inventories of cigarettes tax-stamped before July 1, 2008, when the General Assembly has expressly determined that these cigarettes are not to be prohibited from sale. As provided in Section 8-102 of the 2007 Act, the General Assembly decided “That the requirement that cigarettes sold in this State must be in compliance [with the standard provided by the General Assembly and proposed in the Health Department regulation] does not prohibit retailers, sub wholesalers, vending machine operators or wholesalers from selling cigarette inventories on or after July 1, 2008”, if the

inventory has been tax-stamped before July 1, 2008 and was purchased in “a quantity comparable to the inventories purchased between July 1, 2006 and July 1, 2007.”

The burden and disruption the regulation would impose on Baltimore City businesses is obvious and severe. The regulation as proposed would take effect 30 days after approval. This is not a sufficient amount of time for law-abiding businesses to sell their inventory and replace it with new, compliant inventory. Cigarette wholesalers and retailers, and small businesses in particular, need 6 months or more to sell their existing inventory and switch over to 100% new stocks. The need for a realistic transition period has been confirmed by manufacturers’ experience in working with tens of thousands of cigarette businesses in New York, California and other states on the implementation of parallel laws. In considering and enacting the May 2007 law, the General Assembly took the experience of other states into account on the time needed for legitimate businesses to transition their inventories and expressly determined that an effective date beginning on July 1, 2008, 14 months from enactment, was necessary as a matter of controlling and uniform state law to permit an orderly transition for businesses throughout the State. The same need has been recognized in Pennsylvania, New Jersey and numerous other states that have recognized that at least a one year period is essential to allow for an effective and orderly compliance period and avoid crippling losses to local businesses. The General Assembly’s recognition of the need for a similar and uniform statewide transition period is clearly reflected in the General Assembly’s express prohibition of local measures that conflict in any way with the Maryland law and the compliance policy it adopts.

The Charter of Baltimore City provides that the power and authority of the City is “subject to the provisions of [the Maryland] Constitution and Public General Laws [of the

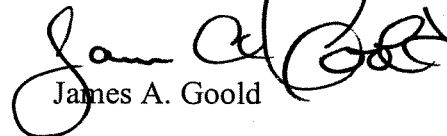
General Assembly]”. (Article II). The Court of Appeals has long held that “[a] local government ordinance which conflicts with a public general law enacted by the General Assembly is preempted and thus is invalid.” Coalition for Open Doors v. Annapolis Lodge No. 622 Benevolent and Protective Order of Elks; 333 Md. 359, 379-380, 635 A.2d 412, 422 (1994). See also City of Baltimore v. Sitnick & Firey, 254 Md. 303, 317, 255 A.2d 376, 380-382 (1969): (“... a political subdivision may not prohibit what the State by general public law has permitted...”)

Applying this basic constitutional and statutory principle, the Court of Appeals has declared that “[a] local ordinance is preempted by conflict when it prohibits an activity which is intended to be permitted by state law...” Allied Vending v. Bowie, 332 Md. 279, 297 n.12, 631 A.2d 77, 86 n.12 (1993). The preemptive effect of an enactment by the General Assembly is beyond dispute when, as is the case with the May 2007 law, the General Assembly expressly prohibits local regulations that conflict with a law enacted by the General Assembly on the same subject. Worton Creek Marina, LLC v. Claggett, 381 Md. 499, 502 (2004); Montgomery County v. Atlantic Guns, Inc., 302 Md. 540, 489 A.2d 1114 (1985).

In the May 2007 law, the General Assembly specifically decided that any local ordinance or regulation that “conflicts with any provision of this Act or any policy of the State” adopted in the Act is pre-empted and may not be “enact[ed] or enforce[ed]”. The General Assembly’s statement of its purposes in enacting the 2007 law affirmed that the General Assembly’s purposes included “pre-empting local laws, ordinances or regulations” that conflict with the law, “prohibiting local governmental units from enacting and enforcing” conflicting “ordinances, local laws or regulations” and “providing for a delayed

effective date” so as to allow sufficient time for affected businesses to transition to compliance. The General Assembly determined that a July 1, 2008 effective date was the appropriate date to achieve these purposes and expressly provided that compliance is to begin with cigarettes tax-stamped beginning on July 1, 2008. Accordingly, any local regulation that would prohibit the sale of cigarettes deemed lawful in the 2007 Act, or conflict in any other respect with the 2007 Act, would be barred from enactment and/or enforcement. It is therefore respectfully urged that the hard-pressed resources of the City and the Health Department should not be diverted to promulgating and defending a regulation prohibited by controlling state law. Health Department resources available for fire safety would be more usefully be devoted to the far more productive and achievable goal of promoting compliance in Baltimore City with the new state law, rather than taking on the burden of enforcing a law for which the State has taken responsibility.

Respectfully submitted,


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