August 26, 2015

Ministry of Health and Long-Term Care
Attention: Martha Greenberg, Assistant Deputy Minister
777 Bay Street
Suite 1903, 19th floor
Toronto, ON
M7A 1S5

Re: Proposed Amendments to Ontario Regulation 48/06 (Smoke-Free Ontario Act)

I am writing to you on behalf of National Smokeless Tobacco Company (NSTC) regarding the government’s proposed amendments to Ontario Regulation 48/06 (O. Reg 48/06) under the Smoke-Free Ontario Act (SFOA) and specifically as they relate to Schedule 2 of Bill 45, the Making Healthier Choices Act, 2014.

NSTC is concerned that the proposed regulatory regime under O. Reg 48/06 restricting the sale of flavoured tobacco products in Ontario is not a reasonable tobacco regulation and does not recognize individual adult consumer preferences. Given the extremely high price point of NSTC’s smokeless tobacco products, a provincial prohibition on retail visibility of tobacco products, low reported youth usage numbers, and the relatively small sales compared to all other tobacco products in Ontario, NSTC requests that smokeless tobacco products as a category be exempt from the proposed restrictions on the sale of flavoured tobacco products in Ontario.

Below we provide background information about NSTC, explain why smokeless tobacco products should be exempt from the proposed restrictions, and provide specific comments on the proposed regulations.

About NSTC

NSTC is the Canadian distributor of smokeless tobacco products sold in Canada under the brand names of Copenhagen® and Skoal®. At NSTC we pride ourselves on being a leader in responsibly providing smokeless tobacco products to adult tobacco consumers. One of our mission goals is to help reasonable tobacco regulation succeed by supporting the development and implementation of regulations that improve public health and recognize individual adult consumer preferences.

Our products are for adults only. Children should not use any tobacco product and NSTC actively supports and participates in programs to reduce the underage use of tobacco products. We support initiatives and actions by the Ontario government to help prevent underage access to tobacco products.

Smokeless tobacco is used orally and is not smoked, and has been available in Canada since at least 1913. As of August 2015, NSTC distributes 20 individual smokeless tobacco products across different sizes (14, 23, and 34 gram cans), forms (long cut, fine cut, and pouches), and varieties. Our smokeless tobacco products are available at approximately 3,700 retail locations in Ontario.

It is important to understand the actual sales of smokeless tobacco products in the province of Ontario when making legislative and regulatory decisions affecting these products. NSTC’s products represent a small component of total tobacco sales in Ontario. For the year ended December 31, 2013, smokeless tobacco sales
accounted for less than one-third of one percent of all tobacco sold in the province. This represents approximately 1.7 million cans of smokeless tobacco across all of our product offerings. For the same year ended December 31, 2013, more than 450 million 25 count-equivalent packages of cigarettes were sold in the province. NSTC’s products retail in Ontario for approximately $19.00 (plus HST) or almost double the price of a package of premium cigarettes.

Flavoured Smokeless Tobacco Products Should be Exempt from the Proposed Ban

There is a long history of adult consumer interest in flavoured cigars and flavoured smokeless tobacco. Tobacco products come in a wide range of flavour varieties, some of which have a distinguishable dominant flavour or aroma other than tobacco. Such flavour varieties are not new; some flavour varieties of smokeless tobacco products – including peach and apple-flavoured snuff – have patents that date back to the 1800s.

Smokeless tobacco products in flavour varieties other than tobacco comprise an important percentage of the total smokeless tobacco category. In Ontario, for example, more than 45% of NSTC’s products are “mint” and “wintergreen” flavour varieties which have been on the market since at least 1950.

Recently, some in the public health community have expressed concern that tobacco products with characterizing flavours other than tobacco may appeal to youth. NSTC believes that the prohibition of all smokeless tobacco products with characterizing flavours other than tobacco is not an effective way to address the issue of underage tobacco use and is unfair to adult tobacco consumers who prefer such flavour varieties. Instead of a ban depriving adult tobacco consumers of products they prefer, the focus should remain on responsible marketing, responsible sale at retail, and reducing underage access to tobacco products. Any regulation of flavoured tobacco products should take into account the history of flavour varieties within each tobacco category.

In 2009, the federal government introduced Bill C-32, the Cracking Down on Tobacco Marketing Aimed at Youth Act. This federal legislation banned the sale of flavoured cigarettes, cigarillos, and blunt wraps and established a common standard across all provinces for regulating flavoured tobacco products. This standard is enforced by Health Canada as Health Canada is in the best position to analyze tobacco product ingredients, sales, and youth usage data and to make determinations on the variety of tobacco products available for sale in Canada.

 Appropriately, the federal legislation does not ban the sale of flavoured smokeless tobacco products, a tobacco segment that has not been shown to be of significant youth appeal. The Canadian Tobacco, Alcohol and Drugs Survey (CTADS, formerly known as the Canadian Tobacco Use Monitoring Survey – CTUMS) suggests a low prevalence of smokeless tobacco use among youth and young adults. Specifically, CTADS reports that in 2013, 1% of Canadian youth (15-19) reported past 30-day use of smokeless tobacco. These rates remain unchanged from 1999 (the first year CTADS/CTUMS addressed the topic).

Additional data on youth usage of tobacco products is available in the Youth Smoking Survey (YSS), administered every two years by the University of Waterloo’s Propel Centre for Population Health Impact on behalf of Health Canada. The survey is representative of over 2.5 million Canadian youth in grades 6-12 and collects information on a variety of youth behaviours, including tobacco use. Flavoured smokeless tobacco product use was not assessed in the 2012-2013 YSS. Health Canada states “[B]ecause of low prevalence of use recorded in the previous cycle [1.5%], information on past 30-day flavoured smokeless tobacco use was not collected in the 2012-2013 cycle.”

Given the history of the regulation of flavoured smokeless tobacco products in Canada, as well as the fact that they have not been shown to have significant youth appeal, such products should be exempt from the proposed prohibition on the sale of flavoured tobacco products in Ontario.

Specific Comments on Proposed Amendments to O. Reg 48/06

2 Source: Health Canada Wholesale Sales Data, 2013, (2013 is the last full-year data currently available)
3 Source: Based on NSTC SRP of $19.39; average reported price of premium cigarettes $10.52; NSTC Sales Data, 2015
4 Source: NSTC Sales Data, August 2015
NSTC has the following specific comments regarding Ontario’s proposed flavour ban, as outlined in O. Reg 48/06 and related regulatory powers under the SFOA:

1. **Exception for prescribed flavoured tobacco products, SFOA s. 6.1 (3)**
   At present, the Ministry only proposes to exempt “cigarettes that contain only a flavouring agent that imparts a flavour or aroma of clove” and “all flavoured pipe tobacco” from the prohibition on the sale of flavoured tobacco products. In considering exemptions for the ban on the sale of flavoured tobacco products (s. 3 of schedule 2, amending s. 6.1 (3) of the SFOA), the government should review and analyze data contained in the Canadian Tobacco, Alcohol and Drugs Survey (CTADS) and related tobacco use surveys. The CTADS annual survey data has consistently demonstrated a low prevalence of past 30-day smokeless tobacco use among all Canadians age 15 and up. In addition, as referenced above, the youth usage data in the 15-19 cohort has remained stable at 1% since 1999 and the YSS did not assess flavoured smokeless tobacco use in the 2012-13 survey.

   It should also be noted that the broader flavour restrictions in the federal *Tobacco Act* and in the Manitoba *Non-Smokers Health Protection Act* provide an exemption for smokeless tobacco products.

   NSTC recommends that smokeless tobacco products be provided with a categorical exemption to the prohibitions proposed in O.Reg 48/06.

2. **Defining “Flavouring agents”**
   Under section 9 of Schedule 2 of Bill 45, s. 19 (1) (a.2.1) of the SFOA is amended to include the regulatory authority to define a “flavouring agent.” Any regulations developed by the government require a thorough understanding of the manufacture of smokeless tobacco products.

   Smokeless tobacco is a complex product with a long history of adult usage in the Canadian marketplace. The manufacture of smokeless tobacco is unique and distinct from that of many other tobacco products, involving fermentation or heat treatment processing of tobacco coupled with ingredients that provide the desired adult tobacco consumer product attributes. Specifically, it must be recognized that the use of flavour additives in a smokeless tobacco product does not necessarily mean that the product is flavoured or has a characterizing flavour.

   The government should not take an oversimplified approach to defining “flavouring agents” under the regulatory powers of the SFOA. Failing to recognize the unique attributes of individual tobacco products with respect to “flavouring agents” could have the unintended consequence of prohibiting tobacco products that have the dominant flavour of tobacco, but which contain ingredients that individually might be defined as a “flavouring agent” (though those ingredients do not result in a characterizing flavour).

   The Ministry proposes to define a flavouring agent as:
   
   “an artificial or natural flavour contained in any of the component parts of a tobacco product, as a constituent or an additive that imparts a distinguishing taste or aroma other than tobacco either before or during the consumption of the tobacco product. By defining ‘flavouring agent’ in this way, the proposed ban on the sale of flavoured tobacco products would not include a tobacco product that contains additives intended to reduce the harsh taste of tobacco, but that still leave the tobacco product with a distinguishing and predominant tobacco flavour, and no other flavour.”

   NSTC proposes that the Ministry’s definition be clarified by adding language explicitly stating that a product should not be considered a flavoured product simply because of the use of additives. Alberta regulation 201/2014 amending Alberta regulation 240/2007 (November 2014) specifically states that:
   
   “No tobacco product shall be determined to have a characterizing flavour solely because of the use of additives or flavourings.”

   NSTC recommends that the following language be included in O.Reg 48/06:
   
   “No tobacco product shall be determined to have a distinguishing taste or aroma solely because of the use of additives or flavourings.”

3. **Exempt tobacco products that contain only a flavouring agent that imparts a flavour or aroma of menthol (i.e. menthol flavoured tobacco products)**
   As written, the government is proposing an exemption for menthol cigarettes but not for tobacco products in other segments with comparable flavours. Menthol is a flavour used in smoked tobacco products. If the
government is considering any exemption for “menthol” then NSTC requests that this exemption is clarified to extend to other related characterizing flavours including mint, wintergreen, and spearmint flavours of smokeless tobacco products, varieties which have been on the market in Canada since at least 1950. “Mint” and “wintergreen” flavoured smokeless tobacco products are comparable to “menthol” flavoured products that exist in the smoked tobacco products segment; “menthol” is not a term used to describe smokeless tobacco products. New York City has implemented a ban on the sale of tobacco products with “chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice flavours,” but exempts “tobacco, menthol, mint, or wintergreen flavours.”

The Ministry’s proposed exemption should read:

“Exempt tobacco products that impart a distinguishing flavour or aroma of menthol, mint, wintergreen, or spearmint.”

4. Proposed effective date: January 1, 2016

The proposed effective date does not provide an adequate “sell-through” period for wholesalers and retailers of smokeless tobacco products.

Smokeless tobacco is a moist, freshness-dated product with a shelf life of between four and six months, depending on the variety. Wholesalers may maintain an inventory of several weeks and the retailers they ship to may maintain an inventory of between four and six months, depending on the product.

Without an adequate implementation timeframe and clarity on exceptions for any specific flavoured tobacco products, tens of millions of dollars of inventory could end up being unsaleable at wholesale and retail resulting in significant business loss. When the federal government passed Bill C-32, the sell-through period for retailers was 270 days following Royal Assent. With passage of the bill occurring some four months before Royal Assent, the time provided for industry to effectively plan was considerable. O.Reg 48/06 has not yet been made final or been approved by Cabinet, and as of the date of this submission there are only four months remaining until the proposed January 1 implementation date.

NSTC recommends that the proposed implementation date be six months following promulgation of the regulation.

Conclusion

Tobacco products come in a wide range of flavour varieties, some of which have a distinguishable dominant flavour or aroma other than tobacco. Such flavour varieties are not new; some flavour varieties of smokeless tobacco products have patents that date back to the 1800s. The CTADS demonstrates extremely low reported youth usage of smokeless tobacco products in Canada.

NSTC believes that Ontario’s proposed flavoured tobacco product restrictions are unfair to adult tobacco consumers and are unfair to the retailers who sell flavoured tobacco products. Smokeless tobacco products should be considered for exemption.

Thank you for the opportunity to contribute to this important policy review.

Sincerely,

J.F. Turcotte
President
National Smokeless Tobacco Company, Limited