



Legislation Details (With Text)

File #: Int 1547-2017 **Version:** * **Name:** Expanding the retail dealer license to include retailers of tobacco products and setting caps on retail dealer licenses.

Type: Introduction **Status:** Laid Over in Committee
In control: Committee on Health

On agenda: 4/5/2017

Enactment date: **Enactment #:**

Title: A Local Law to amend the administrative code of the city of New York, in relation to expanding the retail dealer license to include retailers of tobacco products and setting caps on retail dealer licenses

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Attachments: 1. Summary of Int. No. 1547, 2. April 5, 2017 - Stated Meeting Agenda with Links to Files, 3. Int. No. 1547, 4. Committee Report 4/27/17, 5. Hearing Testimony 4/27/17, 6. Hearing Transcript 4/27/17

Date	Ver.	Action By	Action	Result
4/5/2017	*	City Council	Introduced by Council	
4/5/2017	*	City Council	Referred to Comm by Council	
4/27/2017	*	Committee on Health	Hearing Held by Committee	
4/27/2017	*	Committee on Health	Laid Over by Committee	

Int. No. 1547

By Council Members Lander, Johnson, Levine, Richards, Rosenthal and Cohen

A Local Law to amend the administrative code of the city of New York, in relation to expanding the retail dealer license to include retailers of tobacco products and setting caps on retail dealer licenses

Be it enacted by the Council as follows:

Section 1. Declaration of legislative findings and intent. The Council finds that tobacco use is a leading risk factor for preventable premature death in the United States and the City of New York, having killed an estimated 12,000 people in the city in 2014. Smoking-related illnesses cause a significant burden in health care costs and lost productivity. Every year, tobacco-related health care costs New York State \$10.4 billion, of which Medicaid covers only \$3.3 billion, and an additional \$6 billion in lost productivity. The accumulated savings for the State resulting from the decline in smoking prevalence between 2001 and 2010 was \$32.5 billion.

Given the substantial human and economic costs associated with tobacco use, the City has a compelling interest in continuing with its efforts to reduce tobacco use among adults and to prevent youth from starting to use tobacco products. Since 2002, New York City has employed a comprehensive, multifaceted tobacco control program incorporating high cigarette excise taxes, educational media campaigns, a cessation program that helps people to quit, and regulations on the sale and use of tobacco products. The City has succeeded in reducing the prevalence of adult smoking from 21.5% in 2002 to 14.3% in 2015. While this demonstrates the impact of the City's interventions on adults, an estimated 934,000 adults in the City still smoke cigarettes.

Smoking prevalence among NYC public high students also declined substantially from 17.6% in 2001 to 5.8% in 2015. However, 15,000 youth still smoke cigarettes. Youth increasingly consume tobacco through various forms, including cigars, smokeless tobacco, and hookah pipes. Youth cigar use, at 5.7%, is comparable to cigarette smoking. Youth smokeless tobacco use increased from 2.2% in 2007 to 3.1% in 2015, and 16.1% of high school students had smoked a hookah pipe in 2014. Although City law regulates the sale of other tobacco products, the City's cigarette retail dealer license is a prerequisite solely for selling cigarettes; it is not required to sell other tobacco products.

There are more than 2,700 pharmacies in New York City, and approximately 600 of them have a retail dealer license to sell cigarettes. Pharmacies provide a critical service of dispensing medications, and pharmacists are dedicated to optimizing medication use and improving health. The co-location of the sale of deadly and addictive products runs counter to the services provided by pharmacists to improve health. In addition, studies show that when pharmacies have stopped selling tobacco products, tobacco sales in the affected area have declined significantly.

Overall, the City has a high level of tobacco retail density with approximately 9,000 licensed cigarette retailers within approximately 300 square miles. The Council further finds, based on a number of studies, that easy access to tobacco retailers makes it harder for smokers to quit, particularly in low-income areas. In addition, weekly youth exposure to tobacco retail settings doubles the odds of youth smoking. Therefore,

reducing the number of tobacco retailers over time is likely to reduce tobacco use and, in turn, morbidity.

The Council hereby declares that the enactment of this law is necessary to reduce the number of retailers selling tobacco products in New York City. This law will expand the scope of the existing retail dealer license for cigarettes to cover all tobacco products and restrict the availability of new retail dealer licenses, decreasing their numbers over time through attrition.

§ 2. Paragraph 4 of subdivision a of section 17-177 of the administrative code of the city of New York, as added by local law number 67 for the year 1990, is amended to read as follows:

(4) “Retail dealer” means “retail dealer” as defined in section [11-1301 of the administrative code] 20-201.

§ 3. Subdivision d of section 17-177 of the administrative code, as added by local law number 67 for the year 1990, is amended to read as follows:

d. Identification of vending machines. A wholesale dealer or retail dealer shall post a durable sign on any vending machine which such dealer is licensed to own, operate or maintain. Such sign shall be visible to the general public and provide the applicable [cigarette] license number and expiration date and the license holder's name, place of business and phone number.

§ 4. Paragraph 1 of subdivision f of section 17-177 of the administrative code, as added by local law number 67 for the year 1990, is amended to read as follows:

f. Violations and penalties. (1) Any person found to be in violation of this section shall be liable for a civil penalty of not more than three hundred dollars for the first violation; not more than five hundred dollars for the second violation; and not more than one thousand dollars for the third and all subsequent violations. In addition, for a third and subsequent violations, any person who engages in business as a wholesale dealer or retail dealer shall be subject to the suspension of his or her [cigarette] license, for a period not to exceed one year, after notice and the opportunity for a hearing before the commissioner of finance or his or her designee. A wholesale dealer who owns, operates or maintains a vending machine placed in violation of subdivision b or

paragraph (1) of subdivision c of this section shall be liable only if he or she has knowledge of the violation. The department shall promptly give written notice to the wholesale dealer identified on the sign required by subdivision d of this section of any such violation by an owner of the premises, or his or her employee or agent. For purposes of this section, such notice shall be prima facie evidence that the wholesale dealer has knowledge of future violations of subdivision b or paragraph (1) of subdivision c of this section.

§ 5. Subdivision c of section 17-702 of the administrative code of the city of New York is REPEALED.

§ 6. Subdivision k of section 17-702 of the administrative code of the city of New York, as added by local law number 83 for the year 1992 and renumbered by local law number 69 for the year 2009, is amended to read as follows:

k. "Retail dealer" means "retail dealer" as defined in section [11-1301 of the code, and any employee or other agent of such retail dealer]20-201.

§ 7. Paragraph 5 of subdivision a of section 17-710 of the administrative code of the city of New York, as amended by local law number 97 for the year 2013, is amended to read as follows:

(5) In addition, for a second violation of any of sections 17-703, 17-703.2, 17-704, 17-705 or subdivision a or b of section 17-706 occurring on a different day and any subsequent violations occurring on different days at the same place of business within a three-year period, any person who engages in business as a retail dealer shall be subject to the mandatory revocation of his or her [cigarette] license for such place of business. Any violation of section 17-703, 17-703.2, 17-704, 17-705 or subdivision a or b of section 17-706 by any license holder at a place of business shall be included in determining the number of violations by such license holder and by any subsequent license holder at the same place of business unless the subsequent license holder provides the commissioner of the department that has commenced the proceeding to recover a civil penalty pursuant to subdivision b of this section with adequate documentation demonstrating that the subsequent license holder acquired the premises or business through an arm's length transaction as defined in subdivision e of this section and that the sale or lease was not conducted, in whole or in part, for the purpose of

permitting the original licensee to avoid the effect of violations on the premises. A [cigarette] license shall be revoked at the same hearing at which a retail dealer is found liable for a second violation or subsequent violations at the same place of business within a three-year period.

§ 8. Subdivision b of section 17-710 of the administrative code of the city of New York, as amended by local law number 97 for the year 2013, is amended to read as follows:

b. A proceeding to recover any civil penalty authorized pursuant to the provisions of subdivision a of this section for a violation of section 17-703, 17-703.1, 17-703.2, 17-704, 17-705 or 17-706 of this subchapter shall be commenced by the service of a notice of violation which shall be returnable to the health tribunal at the office of administrative trials and hearings where the department of health and mental hygiene issues such notice, the adjudication division of the department of consumer affairs where that department or a designated employee of any authorizing agency issues such notice, or an adjudication division of the department of finance or the administrative tribunal selected by the commissioner of finance where the department of finance issues such notice. Such notice shall contain a statement that any hearing for a second violation or subsequent violation of any of such sections at the same place of business within a three-year period shall also constitute a hearing for the revocation of a retail dealer's [cigarette] license where the retail dealer is found to be in violation of any such sections. The department of health and mental hygiene, the department of consumer affairs and the department of finance shall notify each other within thirty days of a final determination that a retail dealer has been found to be in violation of section 17-703, 17-703.1, 17-703.2, 17-704, 17-705 or 17-706 of this subchapter. A proceeding to recover any civil penalty authorized pursuant to the provisions of subdivision a of this section for a violation of section 17-708 shall be returnable to the health tribunal at the office of administrative trials and hearings. Such tribunal shall have the power to impose the civil penalties prescribed by subdivision a of this section. The adjudication division of the department of consumer affairs, the health tribunal at the office of administrative trials and hearings and an adjudication division of the department of finance or the administrative tribunal selected by the commissioner of finance shall have the power to impose

the civil penalties prescribed by subdivision a of this section for a violation of section 17-703, 17-703.1, 17-703.2, 17-704, 17-705 or 17-706 of this subchapter.

§ 9. Subdivision b of section 17-716 of the administrative code of the city of New York, as amended by local law number 97 for the year 2013, is amended to read as follows:

b. Any person who violates section 17-715 of this subchapter shall be liable for a civil penalty of not more than one thousand dollars for the first violation, and not more than one thousand dollars for each additional violation found on that day; and not more than two thousand dollars for the second violation at the same place of business within a three-year period, and not more than two thousand dollars for each additional violation found on that day; and not more than five thousand dollars for the third and all subsequent violations at the same place of business within a three-year period. In addition, for a third violation occurring on a different day and all subsequent violations occurring on different days at the same place of business within a three-year period, any person who engages in business as a retail dealer, as such term is defined in section 20-201 of the code, shall be subject to the mandatory suspension of his or her [cigarette] license, issued pursuant to section 20-202 of the code, for such place of business, for a period not to exceed one year. [A cigarette]Such license shall be suspended at the same hearing at which a retail dealer is found liable for a third violation or subsequent violations at the same place of business within a three-year period.

§ 10. Section 17-717 of the administrative code of the city of New York, as amended by local law number 97 for the year 2013, is amended to read as follows:

§ 17-717 Enforcement. The department, the department of consumer affairs and the department of finance shall enforce the provisions of this subchapter. A proceeding to recover any civil penalty authorized pursuant to section 17-716 of this subchapter shall be commenced by the service of a notice of violation returnable to the health tribunal at the office of administrative trials and hearings where the department issues such a notice or to the adjudication division of the department of consumer affairs where such department issues such a notice or to an adjudication division of the department of finance or the administrative tribunal

selected by the commissioner of finance where the department of finance issues such notice. The notice of violation or copy thereof when filled in and served shall constitute notice of the violation charged. Such notice shall contain a statement that any hearing for a third violation or subsequent violation of section 17-715 of this subchapter at the same place of business within a three-year period shall also constitute a hearing for the suspension of a retail dealer's [cigarette] license where the retail dealer is found to be in violation of such section. The health tribunal at the office of administrative trials and hearings, the adjudication division of the department of consumer affairs and an adjudication division of the department of finance or the administrative tribunal selected by the commissioner of finance shall have the power to render decisions and to impose the remedies and penalties provided for in section 17-716 of this subchapter, in addition to any other remedies or penalties provided for the enforcement of such provisions under any other law including, but not limited to, civil or criminal actions or proceedings. The department, the department of consumer affairs and the department of finance shall notify each other within thirty days of finding that a retail dealer has been found liable for any section of this subchapter.

§ 11. The heading of subchapter 1 of chapter 2 of title 20 of the administrative code of the city of New York, as added by local law number 2 for the year 2000, is amended to read as follows:

[RETAIL CIGARETTE]TOBACCO RETAIL DEALERS

§ 12. Section 20-201 of the administrative code of the city of New York, as added by local law number 2 for the year 2000, is amended to read as follows:

§ 20-201 Definitions. Whenever used in this subchapter:

[a.]"Agent" means any person authorized to purchase and affix adhesive or meter stamps under chapter thirteen of title eleven of this code who is designated as an agent by the commissioner of finance.

[b.]"Cigarette" shall mean any roll for smoking made wholly or in part of tobacco or any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or

material but is not made in whole or in part of tobacco.

[c.]"Commissioner of finance" means the commissioner of finance of the [City of New York]city.

"Community district" means each of the community districts established pursuant to chapter 69 of the charter.

"Community district retail dealer cap" means the maximum number of retail dealers permitted to obtain a license to sell cigarettes or tobacco products within a community district.

[d.]"Dealer" shall mean any wholesale dealer or retail dealer as hereinafter defined.

"Good standing" means any retail dealer that has not been found to have violated subdivision a of section 20-202, subdivision a or b of section 11-1303, section 17-703, section 17-703.2, section 17-704, section 17-705, subdivision a or b of section 17-706 or section 17-715 on more than one day during the previous three consecutive years.

[e.]"Person" shall mean any individual, partnership, society, association, joint-stock company, corporation, limited liability company, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals.

[f.]"Retail dealer" shall mean any person other than a wholesale dealer engaged in selling cigarettes or tobacco products, and includes any employee or other agent of such retail dealer. For the purposes of this chapter, the possession or transportation at any one time of more than four hundred cigarettes or little cigars, or more than one hundred tobacco products, which shall include individual tobacco products, packages of tobacco products, or any combination thereof, by any person other than a manufacturer, an agent, a licensed wholesale dealer or a person delivering cigarettes or tobacco products in the regular course of business for a manufacturer, an agent or a licensed wholesale or retail dealer, shall be presumptive evidence that such person is a retail dealer.

[g.]"Sale or purchase" shall mean any transfer of title or possession or both, exchange or barter,

conditional or otherwise, in any manner or by any means whatsoever or any agreement therefor.

“Tobacco product” means “tobacco product” as defined in section 17-702.

[h.]"Wholesale dealer" shall mean any person who sells cigarettes to retail dealers or other persons for purposes of resale only, and any person who owns, operates or maintains one or more cigarette vending machines in, at or upon premises owned or occupied by any other person.

§ 13. Section 20-202 of the administrative code of the city of New York, as added by local law number 2 for the year 2000 and subdivision d as amended by local law number 97 for the year 2013, is amended to read as follows:

§ 20-202 License. a. License required of retail dealers.

1. It shall be unlawful for any person to engage in business as a retail dealer without first having obtained a license as hereinafter prescribed for each place of business wherein such person sells cigarettes or tobacco products in the city.

2. It shall be unlawful for a person to permit any premises under such person's control to be used by any other person in violation of paragraph one of subdivision a of this section.

b. License application. In order to obtain a license to engage in business as a retail dealer, a person shall file an application with the commissioner for a license for each place of business that he or she desires to have for the retail sale of cigarettes or tobacco products in the city. The application for each license or renewal thereof shall be made upon such form as prescribed by the commissioner and shall contain such information as the commissioner shall require.

c. Fee and license term. 1. There shall be a biennial fee of one hundred ten dollars for a license to engage in the business of a retail dealer at each place of business where cigarettes or tobacco products are sold in the city.

2. All even-numbered licenses shall expire on December 31 of the even-numbered year, and all odd-numbered licenses shall expire on December 31 of the odd-numbered year, next succeeding the year in which

the license is issued.

d. Issuance of license.

1. A license shall be issued to a person to conduct the business of a retail dealer for each place of business where such person engages in selling cigarettes or tobacco products in the city only where:

(A) an applicant for a license or renewal thereof meets all the requirements prescribed herein and any criteria in addition thereto established by the commissioner by rule as he or she deems necessary to effectuate the purposes of this subchapter;

(B) an applicant satisfies the commissioner that such person is fit and able to conduct the business of a retail dealer; [and]

(C) the commissioner has not received notification from the commissioner of finance or the commissioner of the department of health and mental hygiene that such applicant is not in full compliance with any provisions of chapter thirteen of title eleven of this code[,] or chapter forty of title eleven of this code relating to the sale of cigarettes or tobacco products, section 17-176 or section 17-176.1 of this code or chapter seven of title seventeen of this code, or any rules promulgated by the commissioner of finance or the commissioner of the department of health and mental hygiene to effectuate the purposes of such chapters; and

(D) the number of licenses in the community district in which the place of business of such applicant is located is lower than the community district retail dealer cap.

2. A retail dealer license shall not be assignable and shall be valid only for the persons in whose names it is issued and for the transaction of business in the place designated therein and shall at all times be conspicuously displayed at the place for which it is issued.

3. Where a license for any place of business licensed pursuant to this subchapter has been revoked, the commissioner shall refuse to issue a license required under this subchapter[, for a period of two years after such revocation,] for such place of business [or for any part of the building that had contained such place of business and was connected therewith], unless the applicant for such license demonstrates with documentary proof, to

the satisfaction of the commissioner, that the applicant acquired the premises or business through an arm's length transaction.

4. For purposes of revocation of retail dealer licenses pursuant to section 17-710 of the code, any violation of section 17-703, 17-703.2, subdivision a of 17-704, 17-705 or subdivision a or b of section 17-706, or for purposes of suspension of retail dealer licenses pursuant to section 17-716 of the code, any violation of section 17-715, by any license holder at a place of business shall be included in determining the number of violations by any subsequent license holder at the same place of business unless the subsequent license holder provides the commissioner with adequate documentation demonstrating that the subsequent license holder acquired the premises or business through an arm's length transaction and that the sale or lease was not conducted, in whole or in part, for the purpose of permitting the original licensee to avoid the effect of violations on the premises.

5. For purposes of paragraphs 3 and 4 of subdivision d of this section [20-202], "arm's length transaction" means a sale of a fee or all undivided interests in real property, or lease of any part thereof, or a sale of a business, in good faith and for valuable consideration, that reflects the fair market value of such real property or lease, or business, in the open market, between two informed and willing parties, where neither is under any compulsion to participate in the transaction, unaffected by any unusual conditions indicating a reasonable possibility that the sale or lease was made for the purpose of permitting the original licensee to avoid the effect of violations on the premises. The following sales or leases shall be presumed not to be arm's length transactions unless adequate documentation is provided demonstrating that the sale or lease was not conducted, in whole or in part, for the purpose of permitting the original licensee to avoid the effect of violations on the premises:

- (1) a sale between relatives; or
- (2) a sale between related companies or partners in a business; or
- (3) a sale or lease affected by other facts or circumstances that would indicate that the sale or lease is

entered into for the primary purpose of permitting the original licensee to avoid the effect of violations on the premises, or revocation of a license, such as a sale or lease entered into while there are violations pending against the original licensee that could result in revocation or suspension of the license.

e. Community district retail dealer cap.

1. The commissioner shall establish a community district retail dealer cap for each community district in the city. The initial community district retail dealer cap shall be fifty percent of the total number of licenses issued to retail dealers in the community district on the effective date of the local law that added this subdivision, as determined by the department.

2. The department, in conjunction with the department of health and mental hygiene, shall evaluate community district retail dealer caps every two years and any time community district boundaries change. The factors to be considered in this evaluation include the number of retail dealers and the prevalence of cigarette smoking and use of other tobacco products. If, based on the evaluation, the department of health and mental hygiene recommends further reductions to the community district retail dealer cap, the department of health and mental hygiene shall advise the city council of such recommendations.

3. The commissioner may promulgate rules governing the application process related to the issuance of new licenses after the establishment of a community district retail dealer cap.

4. Exceptions for certain new licenses. Notwithstanding subdivision e of this section, if a retail dealer license becomes void pursuant to section 20-110 or 20-111, the person or organization who became the beneficial owner of ten percent or more of the stock of the organization to which a license had been granted, or the succeeding partnership, as applicable, may apply for a license, provided that the previous licensee had operated for five consecutive years immediately preceding submission of the application under the same retail dealer license, and the place of business is in good standing. Such application must be received within three months of the change of ownership.

§ 14. Subdivision c of section 20-207 of the administrative code of the city of New York, as added by

local law number 97 for the year 2013, is amended to read as follows:

c. The commissioner, after providing notice and [hearing] an opportunity to be heard, shall be authorized to order the sealing of any premises where any person has been found:

1. to have engaged in unlicensed activities in violation of this subchapter on at least two occasions within a three-year period; or

2. to have violated any of [sections] subdivision a of section 17-704, section 17-705, subdivision a or b of section 17-706 or 17-715 on at least three occasions within a three-year period.

§ 15. This local law takes effect 180 days after it becomes law.

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LS 5246/6209/10137
3/31/17