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**Title:** A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the regulation of tobacco products.

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**Attachments:** 1. Int. No. 433 - 9/13/06, 2. Proposed Int. No. 433-A - 5/21/09, 3. Committee Report 10/19/06, 4. Hearing Transcript 10/19/06, 5. Committee Report 5/21/09, 6. Hearing Transcript 5/21/09, 7. Hearing Testimony 5/21/09, 8. Committee Report 10/13/09, 9. Hearing Transcript 10/13/09, 10. Hearing Transcript - Stated Meeting 10/14/09, 11. Hearing Testimony 10/13/09, 12. Fiscal Impact Statement, 13. Mayor's Letter, 14. Local Law

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9/13/2006	*	City Council	Referred to Comm by Council	
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10/19/2006	*	Committee on Health	Laid Over by Committee	
5/21/2009	*	Committee on Health	Hearing Held by Committee	
5/21/2009	*	Committee on Health	Amendment Proposed by Comm	
5/21/2009	*	Committee on Health	Laid Over by Committee	
10/13/2009	*	Committee on Health	Hearing Held by Committee	
10/13/2009	*	Committee on Health	Amendment Proposed by Comm	
10/13/2009	*	Committee on Health	Amended by Committee	
10/13/2009	A	Committee on Health	Approved by Committee	Pass
10/14/2009	A	City Council	Approved by Council	Pass
10/14/2009	A	City Council	Sent to Mayor by Council	
10/28/2009	A	Mayor	Hearing Held by Mayor	
10/28/2009	A	Mayor	Signed Into Law by Mayor	
10/28/2009	A	City Council	Recved from Mayor by Council	

Int. No. 433-A

By Council Members Rivera, Arroyo, Avella, Brewer, Dickens, Felder, James, Liu, Mealy, Mendez, Palma,

Recchia Jr., Sanders Jr., Seabrook, Sears, Weprin, Mark-Viverito, Gentile, Foster, Gennaro, Vacca, Gioia, Lappin, Gerson, Nelson, Koppell, Jackson, Yassky, White Jr., Mitchell, Vallone Jr., Eugene, Ulrich and Vann

A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the regulation of tobacco products.

Be it enacted by the Council as follows:

Section 1. Subdivision b of section 365 of chapter 14 of the charter of the city of New York, as added by local law number 83 for the year 1992, is amended to read as follows:

b. Every agreement memorializing the terms and conditions of a franchise, revocable consent or concession shall contain an agreement by the grantee that it will (1) permit the placement or display of the public health messages required by section [17-621]17-707 of the code, on any property subject to such franchise, revocable consent or concession, or any facility, plant, equipment or other property used in connection with such franchise, revocable consent or concession; and (2) bear any costs associated with the posting of such public health messages and any costs in terms of foregone advertising revenues associated with the placement or display of such public health messages.

§2. The heading of chapter 7 of title 17 of the administrative code of the city of New York, as added by local law number 83 for the year 1992, is amended to read as follows:

CHAPTER 7

REGULATION OF TOBACCO PRODUCTS

SUBCHAPTER 1

TOBACCO PRODUCT REGULATION ACT

§3. Sections 17-616, 17-617, 17-617.1, 17-618, 17-619, 17-620, 17-621, 17-622, 17-623, 17-624, 17-625, 17-626 of chapter 7 of title 17 of the administrative code of the city of New York are renumbered as sections 17-701, 17-702, 17-703, 17-704, 17-705, 17-706, 17-707, 17-708, 17-709, 17-710, 17-711, and 17-712, respectively.

§4. Section 17-701 and the opening paragraph and subdivision a of section 17-702, as added by local

law number 83 for the year 1992 and renumbered by section 3 of this local law, are amended to read as follows:

§17-701 Short title. This [chapter]subchapter shall be known and may be cited as the “Tobacco Product Regulation Act.”

§17-702 Definitions. For purposes of this [chapter]subchapter, the following terms shall be defined as follows:

a. "Affiliated company" means any business entity which is the holder of a right to place or display advertisements in or on a unit of advertising space and which has a relationship with a holder of a right to place or display advertisements in or on another unit of advertising space; such relationship shall be an identity of all principal owners or all directors; provided, however, that only entities which are holders of a right to place or display advertisements on the same type of units of advertising space shall be considered affiliated companies for purposes of this [chapter]subchapter.

§5. Section 17-706 of chapter 7 of title 17 of the administrative code of the city of New York, as amended by local law number 2 for the year 2000 and renumbered by section 3 of this local law, is amended to read as follows:

§17-706 Sale of tobacco products to minors prohibited. Any person operating a place of business wherein tobacco products are sold or offered for sale must be licensed as required by section [17-617.1]17-703 of this code and is prohibited from selling such products to individuals under eighteen years of age, and shall post in a conspicuous place a sign upon which there shall be imprinted the following statement, "SALE OF CIGARETTES, CIGARS, CHEWING TOBACCO, POWDERED TOBACCO, OR OTHER TOBACCO PRODUCTS, ROLLING PAPER OR PIPES, TO PERSONS UNDER EIGHTEEN YEARS OF AGE IS PROHIBITED BY LAW." Such sign shall be printed on a white card in red letters at least one-half inch in height. Sale of tobacco products in such places, other than by a vending machine, shall be made only to an individual who demonstrates, through a driver's license or other photographic identification card issued by a government entity or educational institution, that the individual is at least eighteen years of age. Such

identification need not be required of any individual who reasonably appears to be at least twenty-five years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of a tobacco product to an individual under eighteen years of age.

§6. Paragraph 1 of subdivision h of section 17-707 of chapter 7 of title 17 of the administrative code of the city of New York, as added by local law 83 for the year 1992 and renumbered by section 3 of this local law, is amended to read as follows:

1. shall promptly comply with subdivisions a through g of this section upon the expiration of such contract term, excluding any periods of time subject to an option to renew such contract, or upon the removal of any legal barrier to compliance prior to the expiration of the original contract term, whichever is earlier. Any person who claims to be covered by this paragraph and who fails to comply with subdivisions a through g of this section within the time limits set forth herein shall be liable for a civil penalty of not more than five hundred dollars for each day of non-compliance following the expiration of the original contract term or upon the removal of any legal barrier to compliance, whichever is earlier. Such civil penalty shall be recovered in accordance with the provisions of subdivision b of section [17-624]17-710; and

§7. Subdivision i of section 17-707 of chapter 7 of title 17 of the administrative code of the city of New York, as amended by local law 3 for the year 1998 and renumbered by section 3 of this local law, is amended to read as follows:

i. Nothing in this [chapter]subchapter shall be construed to permit the placement of a tobacco product advertisement as defined in subdivision m of section 27-508.2 of this code where such advertisement is prohibited by section 27-508.3 of this code or by any other law or rule.

§8. Section 17-709 of chapter 7 of title 17 of the administrative code of the city of New York, as amended by local law 22 for the year 2002 and renumbered by section 3 of this local law, is amended to read as follows:

§17-709 Enforcement. The department of health and mental hygiene and the department of consumer

affairs shall enforce the provisions of this [chapter]subchapter. In addition, designated enforcement employees of any authorizing agency and the department of finance shall have the power to enforce the provisions of this [chapter]subchapter.

§9. Section 17-710 of chapter 7 of title 17 of the administrative code of the city of New York, subdivisions a, e and f as amended by local law 2 for the year 2000, subdivision b as amended by local law number 22 for the year 2002, and subdivisions c and d as amended by local law 83 for the year 1992 and renumbered by section 3 of this local law, is amended to read as follows:

§17-710 Violations and penalties. a. Any person found to be in violation of section [17-618]17-704, [17-619]17-705 or [17-620]17-706 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 and each subsequent violation at the same place of business within a two-year period. In addition, for a second violation occurring on a different day and all subsequent violations occurring on different days at the same place of business within a two-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. For purposes of this section, any violation of section [17-618] 17-704, [17-619]17-705 or [17-620]17-706 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 of consumer affairs 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 two-year period. Any person who shall knowingly make a false statement or who shall falsify or allow to be falsified any record or report required by

section [17-621]17-707, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than five hundred dollars nor more than one thousand five hundred dollars, or by imprisonment not to exceed six months, or both. Any person who shall make a false statement or who shall falsify or allow to be falsified any record or report required by section [17-621]17-707, or who shall fail to maintain any record or submit any report required by section [17-621]17-707, shall be liable for a civil penalty of not less than three hundred dollars nor more than one thousand five hundred dollars. Any person who violates section [17-622] 17-708 shall be liable for a civil penalty of not more than fifty dollars for each violation.

b. A proceeding to recover any civil penalty authorized pursuant to the provisions of subdivision a of this section for a violation of section [17-618]17-704, [17-619]17-705 or [17-620]17-706 of this [chapter] subchapter shall be commenced by the service of a notice of violation which shall be returnable to the administrative tribunal established by the board of health where the department of health and mental hygiene issues such notice or the adjudication division of the department of consumer affairs where that department or a designated employee of any authorizing agency or the department of finance issues such notice. Such notice shall contain a statement that any hearing for a second violation or subsequent violations of section [17-618] 17-704, [17-619]17-705 or [17-620]17-706 at the same place of business within a two-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. Where the department of health and mental hygiene finds a retail dealer to be liable for a violation of section [17-618]17-704, [17-619]17-705 or [17-620]17-706 that department shall notify the department of consumer affairs within thirty days of such finding. Where the department of consumer affairs finds a retail dealer to be liable for a violation of section [17-618]17-704, [17-619]17-705 or [17-620] 17-706, that department shall notify the department of health within thirty days of such finding. A proceeding to recover any civil penalty authorized pursuant to the provisions of subdivision a of this section for a violation of section [17-621]17-707 or authorized pursuant to subdivision h of section [17-621]17-707 shall be returnable to the administrative tribunal established by the board of health. A proceeding to recover any civil penalty

authorized pursuant to the provisions of subdivision a of this section for a violation of section [17-622]17-708 shall be returnable to the administrative tribunal established by the board of health. Such tribunal shall have the power to impose the civil penalties prescribed by subdivision a of this section or subdivision h of section [17-621]17-707 of this [chapter]subchapter. The adjudication division of the department of consumer affairs shall have the power to impose the civil penalties prescribed by subdivision a of this section for a violation of section [17-618]17-704, [17-619]17-705 or [17-620]17-706 of this [chapter]subchapter.

c. The penalties provided by subdivision a of this section and subdivision h of section [17-621]17-707 of this [chapter]subchapter shall be in addition to any other penalty imposed by any other provision of law or rule promulgated thereunder.

d. Whenever any person has engaged in any acts or practices which constitute a violation of any provision of this [chapter]subchapter or of any rule promulgated thereunder, the city may make application to a court of competent jurisdiction for an order enjoining such acts or practices and for an order granting a temporary or permanent injunction, restraining order or other order enjoining such acts or practices.

e. For purposes of this section, "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.

f. Notwithstanding the provisions of subdivision a of this section, the mandatory revocation of a license for a second offense shall be waived if, upon the submission of satisfactory proof, the commissioner determines that the person or persons who committed the violations which are the basis for the mandatory revocation acted against the licensee's will in committing such violations, the licensee utilized extensive precautionary measures to prevent violations of the provisions of sections [17-618]17-704, [17-619]17-705 and [17-620]17-706 of this code, and the licensee has terminated any financial or employment relationship with each person who committed the violations which are the basis of the mandatory revocation of its license or has taken other significant disciplinary action against such persons. The commissioner shall not determine that a licensee utilized extensive precautionary measures to prevent violations of the provisions of sections [17-618]17-704, [17-619]17-705 and [17-620]17-706 of this code unless the licensee submits satisfactory proof demonstrating that the licensee had, prior to the second violation which is the basis for the mandatory revocation of its license, done the following:

(1) implemented a clear policy requiring all persons working in the place of business to strictly comply with the provisions of sections [17-618]17-704, [17-619]17-705 and [17-620]17-706 of this code and permitting persons working in the place of business to complete a tobacco product sales transaction only after establishing the age of a prospective purchaser of tobacco products through identification that has been verified for authenticity or through photographic identification as required by section [17-620]17-706 of this code; and

(2) trained all persons working in the place of business to comply with any such policy before they are allowed to sell tobacco products to the public; and

(3) monitored the performance of persons working in the place of business to ensure that they adhere to such policy, or, in accordance with rules promulgated by the commissioner, conducted periodic retraining of



persons working in the place of business.

§10. Section 17-711 of chapter 7 of title 17 of the administrative code of the city of New York, as added by local law number 83 for the year 1992 and renumbered by section 3 of this local law, is amended to read as follows:

§17-711 Report. Not later than twelve months after the effective date of the local law that added this section and each year thereafter, the department shall submit a report to the mayor and the city council concerning the administration and enforcement of this [chapter]subchapter.

§11. Section 17-712 of chapter 7 of title 17 of the administrative code of the city of New York, as added by local law number 83 for the year 1992 and renumbered by section 3 of this local law, is amended to read as follows:

§17-712 Construction. Nothing contained in this [chapter]subchapter shall be construed to preclude the city of New York from prohibiting the placement or display of tobacco advertisements in or on units of advertising space.

§12. Chapter 8 of title 17 of the administrative code of the city of New York, as added by local law number 30 for the year 2000, is amended to become subchapter 2 of chapter 7 and amended to read as follows:

[CHAPTER 8] SUBCHAPTER 2

REGULATION OF THE SALE OF HERBAL CIGARETTES AND FLAVORED TOBACCO

PRODUCTS

§[17-701]17-713 Definitions.

§[17-702]17-714 Sale of herbal cigarettes to minors prohibited.

§[17-703]17-715 Sale of flavored tobacco products prohibited.

§17-716 Violations and penalties.

§17-717 Enforcement.

§17-718 Rules.

§[17-701]17-713 Definitions. Whenever used in this [chapter]subchapter, the following terms shall be defined as follows:

a. [“Person” means any natural person, partnership, firm, joint stock company, corporation, or employee thereof, or other legal entity]”Cigarette” means (1) any roll made or used for smoking made wholly or in part of tobacco or any other substance wrapped in paper or in any other substance not containing tobacco, and (2) any roll made or used for smoking made wholly or in part of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1) of this subdivision; provided, however, that no roll shall be considered to be a cigarette for purposes of paragraph (2) of this subdivision if it is not treated as a cigarette for federal excise tax purposes under the applicable federal statute in effect on August first, two thousand nine.

b. [“Herbal cigarette” means a cigarette that is composed of one or more herbs and is not a tobacco product as defined in subdivision r of section 17-617 of this code.] “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted 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 use of additives or flavorings or the provision of ingredient information.

c. “Component part” means any element of a tobacco product, including, but not limited to, the tobacco, filter and paper, but not including any constituent.

d. “Constituent” means any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacture or packing of the tobacco product. Such term shall include a smoke constituent.

e. “Flavored tobacco product” means any tobacco product or any component part thereof that contains a

constituent that imparts a characterizing flavor. A public statement or claim 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.

f. “Herbal cigarette” means a product that is meant to be smoked like a cigarette but is composed of one or more herbs and does not contain tobacco.

g. “Person” means any natural person, partnership, firm, joint stock company, corporation, or employee thereof, or other legal entity.

h. “Smoke constituent” means any chemical or chemical compound in mainstream or sidestream tobacco smoke that either transfers from any component of the tobacco product to the smoke or that is formed by the combustion or heating of tobacco, additives or other component of the tobacco product.

i. “Tobacco bar” has the meaning as such term is defined in subdivision jj of section 17-502 of this code.

j. “Tobacco product” means any substance which contains tobacco, including, but not limited to, cigars and chewing tobacco; provided, however, that such term shall not include cigarettes.

§[17-702]17-714 Sale of herbal cigarettes to minors prohibited. It shall be unlawful for any person to sell or offer for sale herbal cigarettes to an individual under eighteen years of age.

§[17-703]17-715 Sale of flavored tobacco products prohibited. It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.

§17-716 Violations and penalties. a. Any person who violates [any provision]section 17-714 of this [chapter]subchapter or any rules promulgated hereunder shall be liable for a civil penalty of not less than two hundred and fifty dollars, nor more than two thousand dollars for each violation.

b. [A proceeding to recover any civil penalty authorized pursuant to the provisions of paragraph a of this

section shall be commenced by the service of a notice of violation which shall be returnable to the administrative tribunal established by the board of health, where the department of health issues such notice, or the adjudication division of the department of consumer affairs where that department issues such notice.]Any person who violates section 17-715 of this subchapter shall be liable for a civil penalty of not more than five hundred dollars for the first violation, and not more than five hundred dollars for each additional violation found on that day; and not more than one thousand dollars for the second violation at the same place of business within a two-year period, and not more than one thousand dollars for each additional violation found on that day; and not more than two thousand dollars for the third and all subsequent violations at the same place of business within a two-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 two-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 20-202 of the code, for such place of business, for a period not to exceed one year. A cigarette 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 two-year period.

§17-717 Enforcement. The department and the department of consumer affairs 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 administrative tribunal established by the board of health 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. 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 two-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 administrative tribunal of the board of health and the adjudication division of the department of consumer affairs 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 and the department of consumer affairs shall notify each other within thirty days of finding that a retail dealer has been found liable for any section of this subchapter.

§17-718 Rules. The commissioner of the department and the commissioner of the department of consumer affairs shall promulgate any rules as may be necessary for the purposes of carrying out the provisions of this section.

§13. Paragraph 4 of subdivision d of section 20-202 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:

4. For purposes of revocation of retail dealer licenses pursuant to section [17-624]17-710 of the code, any violation of section [17-618]17-704, [17-619]17-705 or [17-620]17-706, or for purposes of revocation 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.

§14. Paragraph 3 of subdivision a of section 20-206 of title 20 of the administrative code of the city of New York, as added by local law number 30 for the year 2000, is amended to read as follows:

3. violated the provisions of section [17-702]17-714 of this code or any rules promulgated thereunder.

§15. Effect of invalidity; severability. If any section, subsection, sentence, clause, phrase or other portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court

of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this local law, which remaining portions shall continue in full force and effect.

§16. This local law shall take effect one hundred twenty days after its enactment; provided that actions necessary to prepare for the timely implementation of this local law may be taken prior to its effective date.

AMS  
LS # 973  
8/26/09