

NOTICE OF RULEMAKING

Pursuant to the power vested in me as Commissioner of Finance by New York City Administrative Code Sections 11-709.1 and 11-718, Section 3 of Local Law 97 of 2015 and Sections 1043 and 1504 of the New York City Charter, I hereby issue these rules on the adjudication of tobacco violations issued pursuant to Local Law 97 of 2013 and of synthetic marijuana violations issued pursuant to Local Laws 95 and 97 of 2015. These rules were published in the proposed form on April 28, 2017. A hearing for public comment was held on May 31, 2017.

S/S

Jacques Jiha, Commissioner of Finance

STATEMENT OF BASIS AND PURPOSE

The Department of Finance is proposing rules related to Local Law 97 of 2013, Local Law 95 of 2015 and Local Law 97 of 2015.

The Sensible Tobacco Enforcement Law (“STE Law”) (Local Law 97 of 2013) amended Titles 11 and 17 of the New York City Administrative Code (“Code”). The law added new tobacco violations to Title 17 of the Code and authorized the Department of Finance (“Department”) to enforce these new and other existing tobacco violations, including the issuance of Summonses (also known as Notices of Violation). The STE Law also authorized the Commissioner of Finance (“Commissioner”) to establish an adjudicative body or select an administrative tribunal to adjudicate these violations and to promulgate rules relating to such violations under Title 17 of the Code. Additionally, the STE Law amended Titles 11 and 20 of the Code to authorize the Commissioner and the Commissioner of Consumer Affairs to order the sealing of premises when multiple violations within a prescribed period occur on the premises.

Thereafter, Local Law 97 of 2015 amended Title 10 of the Code by adding a new § 10-203, which prohibits the manufacture, distribution or sale, and the possession with intent to sell, of any synthetic cannabinoid or synthetic phenethylamine (known as “synthetic marijuana” or “K2”). Among other things, Local Law 97 of 2015 imposed civil penalties for the violation of these prohibitions. Local Law 95 of 2015 amended this new § 10-203 by authorizing the suspension or revocation a cigarette dealer’s license for violating § 10-203. The civil penalties set forth in the law may be adjudicated in a proceeding before a tribunal established within the Office of Administrative Trials and Hearings (“OATH”) or within an agency designated to conduct such proceedings. The Department is authorized by this local law to establish rules to carry out its provisions.

The Department has adopted the following rules that detail how the penalties will be adjudicated as authorized by the previously mentioned local laws. These rules will:

- Designate the OATH Hearings Division to adjudicate Summonses for tobacco violations
- Designate the OATH Hearings Division to adjudicate Summonses for synthetic marijuana (K2) violations
- Establish procedures for admitting to violations and for settling the alleged violations
- Provide fixed penalties for people who admit or are found in violation- by OATH, and
- Establish procedures for the sealing of premises for a violation of the laws where sealing is authorized for such violation.

Matter underlined is new. Matter in brackets [] is to be deleted.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Title 19 of the Rules of the City of New York is amended by adding a new chapter 55, to read as follows:

Chapter 55

ADJUDICATION OF CERTAIN NOTICES OF VIOLATION AND SEALING OF PREMISES

SUBCHAPTER A: SCOPE AND APPLICATION

§55-01 Scope and Construction.

This chapter applies to the enforcement by the Department of Finance of matters involving tobacco and synthetic marijuana (also known as “K2”) pursuant to various provisions of the New York City Administrative Code. The Commissioner of the Department of Finance (the “Commissioner”) hereby designates the Hearings Division of the Office of Administrative Trials and Hearings (“OATH”) to adjudicate Summonses issued by the Department alleging tobacco and synthetic marijuana violations. These rules supplement the rules of the Hearings Division of OATH found in Chapter 6 of Title 48 of the Rules of the City of New York. The term “Summons” as used in these rules is defined by the rules of the OATH Hearings Division (section 6-01 of Title 48 of the Rules of the City of New York) and is the equivalent of a “Notice of Violation” as that term is defined in Titles 10 and 17 of the Administrative Code.

SUBCHAPTER B: SUPPLEMENTAL PROCEDURES

§ 55-11 Admission of Violations Without a Hearing.

A respondent who receives a Summons for a tobacco or synthetic marijuana violation may be given an opportunity to admit to the alleged violation(s). Respondents who admit to the violation in advance of their hearing date will not be required to attend their hearing. In order to make such an admission, a respondent must admit to the violation, pay the indicated penalty amount, and accept any other penalty stated in the Summons (such as license revocation or suspension) prior to the date set forth therein. Such payment may be made by mail, in person or by such

other means, including electronic means, as may be authorized by the Commissioner, in the manner prescribed in the Summons. The respondent's admission of the alleged violation(s) will constitute a determination that respondent committed the alleged violation(s).

§55-12 Settlement Agreements.

(a) The Department and a respondent may enter into a written settlement agreement before the hearing date. Any respondent who enters into a settlement agreement with the Department must comply with the terms of such settlement agreement.

(b) Unless the settlement agreement provides otherwise, a settlement agreement will constitute a determination that the respondent committed the alleged violation(s) set forth in the Summons. A settlement agreement has the force and effect of a final decision. Failure of a respondent to comply with the terms of a settlement agreement, in whole or in part, may subject the respondent to additional penalties and/or sanctions, including, where appropriate, a monetary penalty and suspension or revocation of a cigarette or tobacco license.

SUBCHAPTER C: PENALTIES

§ 55-31 Remedies and Penalties.

Respondents who admit to the offenses or are found in violation by OATH may be subject to penalties. The remedies and penalties provided for in this subchapter shall be 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. Pursuant to New York City Charter § 2203(h)(1), except to the extent that dollar limits are otherwise specifically provided, civil penalties cannot exceed five hundred dollars for each violation.

§ 55-32. Retail Cigarette Dealer Penalty Schedule.

(a) The citations in the schedule of penalties set forth in Schedule A of this Chapter are to Title 17 of the Administrative Code of the City of New York.

(b) The penalties set forth for each section of law or rule also apply to all subdivisions, paragraphs, subparagraphs, clauses, items, or any other provision contained therein. Each such provision charged in the Summons will constitute a separate violation of the law or rule.

(c) First and Subsequent Violations.

(1) For violations of Chapter 7 of Title 17 of the Administrative Code, a first violation means the first time a person has violated such Chapter, whether by admitting to the violation; being found in violation by an OATH hearing officer; or entering into a settlement agreement for any such violation and includes any other violation of such chapter committed on the same day, provided there has been no previous violation on a different day.

(2) For purposes of section 17-710(a) of the Administrative Code, a second or subsequent violation of the provisions of such Code subjecting the respondent to mandatory license revocation under such subdivision (a) means a violation has occurred

that has been resolved through any of the dispositions set forth in paragraph (1) of this subdivision, when there has been a previous violation that occurred on a different day within a three-year period at the same place of business. Pursuant to section 17-710(a)(5) of such Code, violation of any of the provisions of the Code stated in such section 17-710(a)(5) shall constitute a basis for determining there has been a previous violation under any of those stated provisions.

(3) For purposes of section 17-716(b) of the Administrative Code:

(i) A second violation of section 17-715 of the Code means a violation that has occurred and has been resolved through any of dispositions set forth in paragraph (1) of this subdivision when there has been a previous violation of such section on a different day within a three-year period at the same place of business;

(ii) A third or subsequent violation of section 17-715 of the Code subjecting the respondent to mandatory license suspension means a violation of such section that has occurred and has been resolved through any of dispositions set forth in paragraph (1) of this subdivision when there has been have been two previous violations on different days within a three-year period at the same place of business.

(d) In certain cases, the Department may seek license suspension, revocation, or sealing as permitted by statute. If a respondent is found in violation of multiple provisions that require a suspension period, the suspension periods will run concurrently.

(e) The parties are authorized to present evidence offered to mitigate the license suspension period within the date range marked by two asterisks (**) in Schedule A of this Chapter.

§ 55-33 Synthetic Marijuana (“K2”) Penalty Schedule.

(a) The citations in the schedule of penalties set forth in Schedule B of this Chapter are to Title 10 of the Administrative Code of the City of New York.

(b) The penalties set forth for each section of law or rule also apply to all subdivisions, paragraphs, subparagraphs, clauses, items, or any other provision contained therein. Each such provision charged in the Summons will constitute a separate violation of the law or rule.

(c) For violations of section 10-203 of the Administrative Code, a first violation subjecting the respondent to a mandatory license suspension means the first time a person has violated that section of the Code whether by admitting to the violation, being found in violation by an OATH hearing officer, or entering into a settlement agreement for any such violation(s) committed on the same day. A second or subsequent violation of such section subjecting the respondent to mandatory license revocation means any violation that has occurred within a three-year period and has been resolved through any such dispositions, and is not a first violation.

(d) In certain cases, the Department may seek license suspension, revocation, or sealing as permitted by statute.

(e) The manufacture, sale, offering for sale, display for sale, distribution for sale or possession with intent to sell of each packet of the substance described in section 10-203(a) of the Administrative Code shall constitute a separate violation. The maximum penalty for all violations in any one day is \$50,000 for a single person or entity.

SUBCHAPTER D: SEALING

§ 55-41 Orders for Sealing.

(a) Issuance of Order for Sealing. If a basis for sealing exists under Administrative Code section 11-4023, the Commissioner may, pursuant to that section, issue an order for sealing, directing the Sheriff, another peace officer of the Department, or any police officer to seal the premises as described in subdivision (c) of this section. Such order for sealing shall be enforced in accordance with the procedures set forth in Administrative Code section 11-4023 and shall constitute the written directive of the Commissioner required under subdivision (c)(2) of such section.

(b) Posting, Delivery and Mailing of Order for Sealing.

(1) The order for sealing shall be posted as provided in section 11-4023 of the Administrative Code in a conspicuous place at the premises. A warning notice stating that any perishable property that may spoil or pose a public health hazard may be disposed of by the Sheriff or other officer without further process at the time of the sealing shall also be posted in a conspicuous place in the vicinity of the order for sealing.

(2) At the time of the posting, copies of the order for sealing and the warning notice shall also be delivered at the premises to the respondent or any employee or agent of the respondent. If neither the respondent nor any employee or agent is at the premises at the time of posting, copies of the order for sealing and the warning notice must be delivered to any natural person at the premises in control or apparent control of such premises. If delivery is to be made to a natural person, and no such natural person is at the premises, no delivery will be required under this paragraph.

(3) Mailing of Order for Sealing. Within two days of the posting required by paragraph (2), a copy of the order for sealing, together with a copy of the warning notice, must be mailed to the respondent and to the record owner of the premises, if the record owner is different from the respondent, both by registered or certified mail and by regular first class mail.

(i) If the respondent or record owner is a natural person, the mailing of the documents must be sent to the premises, unless the premises is not the residence of such person. If the premises is not the residence of such person, the mailing must be sent as follows: as follows: (A) If the Department of Consumer Affairs ("DCA") or other licensing authority can provide information about the residential address of such person, to the last such address; (B) If DCA or other licensing authority has no information about the residential address of such person, but has business or employment address information, to the last business or employment address known to DCA or other licensing authority; (C)

If DCA or other licensing authority has no other address information, to the premises.

(ii) If the respondent or record owner is a corporation, joint-stock or other unincorporated association or a limited liability company, the mailing must be sent to the premises unless the principal place of business is not located at the premises. If the corporation, joint-stock or other unincorporated association or limited liability company is not located at the premises, the mailing must be sent as follows: (A) if DCA or other licensing authority has information about the address of the principal place of business within the State, to such address; (B) if DCA or other licensing authority has no such information but has information about any place of business within the State, to any such address; (C) if DCA or other licensing authority has no other address information, to the premises.

Allegations about such information that affect the mailing address must be set forth in an affidavit and maintained along with the proof of mailing. The order for sealing will be considered served upon the later of the date of posting or the date of the proof of mailing.

(4) For purposes of this section:

(i) The term “other licensing authority” means any agency or authority, other than the petitioner or DCA, which has issued a New York City retail cigarette license to the petitioner;

(ii) The term “record owner of the premises” or “record owner” means the owner of the premises identified in the records of the Office of the City Register of the City of New York (for Manhattan, Brooklyn, Queens, and the Bronx) or the Office of the County Clerk of the County of Richmond (for Staten Island) as of the date of posting;

(iii) Any person in possession or occupation of the premises must also be treated as a respondent if the transfer of the premises was not an arm’s length transaction as defined in section 17-710(e) of the Administrative Code.

(c) Sealing of Premises Pursuant to Order for Sealing. Ten days after the posting of the order for sealing, and after the mailing of such order for sealing as provided in paragraph three of subdivision (b) of this section, the Sheriff or other officer executing an order for sealing must, upon delivery of the order for sealing to any person present in the premises, command all persons present in the premises to vacate such premises forthwith. Upon sealing, the premises must be securely locked and all keys delivered to the Sheriff or other officer serving the order, who thereafter shall deliver the keys to the respondent or any employee or agent of the respondent, or any other appropriate person in control or apparent control of the premises. If neither the respondent nor any employee or agent of the respondent, nor any other appropriate person in control or apparent control of the premises, is present at such premises when the order for sealing is being executed, the Sheriff or other officer must securely padlock the premises and retain the keys until the respondent, record owner or other appropriate person presents identification and/or documentation entitling such person to the possession of the premises, in which event the Sheriff or other officer must deliver the keys to such person.

(d) Inventory Upon Execution of Order for Sealing. The Sheriff or other officer executing an order for sealing must forthwith make an inventory of personal property situated on the premises subject to the order for sealing. Such inventory must be taken in any manner which is deemed likely to evidence a true and accurate representation of the personal property subject to such inventory including, but not limited, to the photographing or videotaping of such personal property. Any perishable property that could spoil or pose a public health hazard may be disposed of by the Sheriff or other officer without further process at the time of the sealing. An inventory of the personal property disposed must be taken in any manner which is deemed likely to evidence a true and accurate representation of the personal property subject to such inventory including, but not limited to the photographing or videotaping of such personal property. Perishable property must be disposed of in accordance with applicable City policies or rules.

(e) Re-posting of Order for Sealing. Upon execution of the order for sealing, the Sheriff or other officer must re-post a copy thereof in a conspicuous place or upon one or more of the principal doors at entrances of such premises where the sealing is being ordered. In addition, the Sheriff or other officer must affix, in a conspicuous place or upon one or more of the principal doors at entrances of such premises, a printed notice that the premises have been sealed by virtue of an order, which notice shall contain the legend printed on a white card in bold red letters that are at least one-half inch in height stating "Sealed by Order of the Commissioner of Finance", the date of the order, and the name of the Sheriff or other officer or agency posting the notice. The notice shall also state any person who removes the seal on any premises or removes the seal on or makes operable any devices, items or goods sealed or otherwise made inoperable in accordance with an order of the Commissioner shall be guilty of a misdemeanor.

(f) Enforcement of Orders for Sealing Issued by Other City Agencies. Pursuant to a memorandum of understanding or similar written agreement between a City agency and the Department, or upon other written consent of the Commissioner, the Sheriff of the City of New York or any other peace officer of the Department may also enforce an order for sealing authorized under a law other than section 11-4023 of the Administrative Code, by any agency or official pursuant to applicable law. Under such circumstances, the Sheriff or other peace officer of the Department shall be authorized to enforce such order for sealing. Except as otherwise provided by law, the procedures set forth under this section and under section 11-4023 of the Administrative Code shall apply to the enforcement of such order for sealing.

(g) No Possession, Ownership or Control of Premises. A sealing by the Sheriff or other officer pursuant to the provisions of this section shall not constitute an act of possession, ownership or control by the Sheriff or other officer of the sealed premises.

SCHEDULE A

<u>Citation</u>	<u>Violation Description</u>	<u>First Violation</u>	<u>First Default</u>	<u>Second Violation</u>	<u>Second Default</u>	<u>Third and Subsequent Violation</u>	<u>Third and Subsequent Default</u>
<u>Admin Code § 17-703</u>	<u>Unlicensed retail cigarette dealer activity (i.e., engaging in any act as retail cigarette dealer without the required license)</u>	<u>\$2,100</u>	<u>\$2,100</u>	<u>\$2,100</u>	<u>\$2,100</u>	<u>\$2,100</u>	<u>\$2,100</u>
<u>Admin Code § 17-703</u>	<u>Operating as a wholesale dealer without a license</u>	<u>\$5,000</u>	<u>\$5,000</u>	<u>\$10,000</u>	<u>\$10,000</u>	<u>\$10,000</u>	<u>\$10,000</u>
<u>Admin Code § 17-703.1</u>	<u>Failure to conspicuously post tax stamp sign</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>
<u>Admin Code § 17-703.2(a)</u>	<u>Selling, offering for sale, possessing or transporting untaxed cigarettes by retail dealer (i.e., cigarettes not in a package bearing a valid tax stamp)</u>	<u>\$1,500</u>	<u>\$2,000</u>	<u>\$4,500 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>
<u>Admin Code § 17-703.2(b)</u>	<u>Prohibited sale or purchase of cigarettes by retail dealer (i.e., Sale to an unlicensed cigarette dealer or Purchase from any person other than a licensed wholesale cigarette dealer or a cigarette manufacturer)</u>	<u>\$1,500</u>	<u>\$2,000</u>	<u>\$4,500 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>
<u>Admin Code § 17-703.2(c)</u>	<u>Selling, offering for sale, possessing or transporting counterfeit tax stamps by retail dealer</u>	<u>\$1,500</u>	<u>\$2,000</u>	<u>\$4,500 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>
<u>Admin Code § 17-703.2(d)</u>	<u>Hiding or concealing untaxed cigarettes or counterfeit tax stamps by retail dealer</u>	<u>\$1,500</u>	<u>\$2,000</u>	<u>\$4,500 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>	<u>\$5,000 (plus revocation)</u>

<u>Admin Code § 17-704</u>	<u>Improper out-of-package sales</u>	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>
<u>Admin Code § 17-705</u>	<u>Failure to comply with age restrictions on handling (i.e., 18 or over)</u>	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>
<u>Admin Code § 17-706(a)</u>	<u>Unlawful sale of cigarettes, tobacco products, or electronic cigarettes to an individual under 21</u>	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>
<u>Admin Code § 17-706(b)</u>	<u>Unlawful sale of non-tobacco shisha, pipes, or rolling papers to an individual under 18</u>	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>	<u>\$2,000 (plus revocation)</u>
<u>Admin Code § 17-706(c)</u>	<u>No minimum age sign violation/missing information on sign</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>	<u>\$500</u>
<u>Admin Code § 17-708</u>	<u>Unlawful use of tobacco products on school premises</u>	<u>\$50</u>	<u>\$50</u>	<u>\$50</u>	<u>\$50</u>	<u>\$50</u>	<u>\$50</u>
<u>Admin Code § 17-714</u>	<u>Unlawful sale of herbal cigarettes to persons under 18</u>	<u>\$2,000</u>	<u>\$2,000</u>	<u>\$2,000</u>	<u>\$2,000</u>	<u>\$2,000</u>	<u>\$2,000</u>
<u>Admin Code § 17-715</u>	<u>Unlawful sale of flavored tobacco</u>	<u>\$1,000</u>	<u>\$1,000</u>	<u>\$2,000</u>	<u>\$2,000</u>	<u>\$5,000 (plus 1 to 90 day suspension)**</u>	<u>\$5,000 (plus one year suspension)</u>

SCHEDULE B

<u>Citation</u>	<u>Violation Description</u>	<u>First Violation</u>	<u>First Default</u>	<u>Second and Subsequent Violation</u>	<u>Second Default</u>	<u>Maximum Penalty for Violations in Any One Day</u>
<u>Admin Code §10-203 (a)</u>	<u>Manufacture, sale, offer for sale, display for sale, distribute for sale or possess with intent to sell synthetic marijuana ("K2") in violation of §10-203(a) with commission of no other crime</u>	<u>\$5,000 (plus 30-day suspension)</u>	<u>\$5,000 (plus 30-day suspension)</u>	<u>\$10,000 (plus revocation)</u>	<u>\$10,000 (plus revocation)</u>	<u>\$50,000</u>
<u>Admin Code §10-203(a)</u>	<u>Manufacture, sale, offer for sale, display for sale, distribute for sale or possess with intent to sell synthetic marijuana ("K2") in violation of §10-203(a)</u>	<u>\$10,000 (plus 30-day suspension)</u>	<u>\$10,000 (plus 30-day suspension)</u>	<u>\$10,000 (plus revocation)</u>	<u>\$10,000 (plus revocation)</u>	<u>\$50,000</u>