

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF INTENTION  
TO REPEAL ARTICLES 111 AND 117 OF THE NEW YORK CITY HEALTH CODE

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**NOTICE OF PUBLIC HEARING**  
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In compliance with §1043(b) of the New York City Charter (the “Charter”) and pursuant to the authority granted to the Board of Health by §558 of said Charter, notice is hereby given of the proposed repeal of Article 111 (“Milk and Milk Products”) and Article 117 (“Dairy Food Products”) of the New York City Health Code (the “Health Code”).

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE WILL HOLD A PUBLIC HEARING ON THE PROPOSAL FROM 10 A.M. to 12 P.M. ON THURSDAY, JULY 22, 2010 IN THE THIRD FLOOR BOARD ROOM (ROOM 330) AT 125 WORTH STREET, NEW YORK, NEW YORK 10013.

PERSONS INTERESTED IN PRE-REGISTERING TO SPEAK SHOULD NOTIFY, IN WRITING, RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK; (212) 788-5010 BY 5:00 P.M. WEDNESDAY, JULY 21, 2010. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL BUSINESS HOURS. SPEAKERS WILL BE LIMITED TO FIVE (5) MINUTES.

PERSONS WHO REQUEST THAT A SIGN LANGUAGE INTERPRETER OR OTHER FORM OF REASONABLE ACCOMMODATION FOR A DISABILITY BE PROVIDED AT THE HEARING ARE ASKED TO NOTIFY RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013; (212) 788-5010 BY JULY 12, 2010.

REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 12:00 P.M. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL ADDRESSED TO THE ATTENTION OF THE BOARD OF HEALTH MUST BE SUBMITTED TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, BY MAIL TO 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013, BY FAX TO (212) 788-4315, BY E-MAIL (WITHOUT ATTACHMENTS) TO [RESOLUTIONCOMMENTS@HEALTH.NYC.GOV](mailto:RESOLUTIONCOMMENTS@HEALTH.NYC.GOV) OR ELECTRONICALLY THROUGH [nyc.gov/nycrules](http://nyc.gov/nycrules) OR [nyc.gov/html/doh/html/notice/notice.shtml](http://nyc.gov/html/doh/html/notice/notice.shtml) ON OR BEFORE 5:00 P.M., THURSDAY, JULY 22, 2010. ATTACHMENTS TO ONLINE COMMENTS MUST BE DELIVERED, MAILED OR FAXED. COMMENTS RECEIVED AFTER JULY 22, 2010 WILL BE CONSIDERED TO THE EXTENT POSSIBLE.

WRITTEN COMMENTS RECEIVED BY THE SECRETARY TO THE BOARD OF HEALTH AND A TRANSCRIPT OF THE PUBLIC HEARING WILL BE AVAILABLE FOR PUBLIC INSPECTION WITHIN A REASONABLE TIME AFTER RECEIPT, BETWEEN THE HOURS OF 9:00 A.M. AND 5:00 P.M. AT THE OFFICE OF THE SECRETARY. THE DEPARTMENT’S GENERAL POLICY IS TO MAKE WRITTEN COMMENTS AVAILABLE FOR PUBLIC VIEWING ON THE INTERNET. ALL COMMENTS RECEIVED, INCLUDING ANY PERSONAL INFORMATION PROVIDED, WILL BE POSTED WITHOUT CHANGE TO [nyc.gov/html/doh/html/comment/comment.shtml](http://nyc.gov/html/doh/html/comment/comment.shtml)

## STATUTORY AUTHORITY

These amendments to the New York City Health Code (the “Health Code”) are promulgated pursuant to Sections 556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with jurisdiction to regulate all matters affecting the health in the city of New York. Section 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters to which the Department’s authority extends. Section 1043 of the Charter grants the Department rulemaking powers.

## STATEMENT OF BASIS AND PURPOSE

As part of a comprehensive review of the Health Code to assess its efficacy in protecting the public health, the Department of Health and Mental Hygiene (the Department or DOHMH) is requesting that the Board of Health repeal Article 111 (Milk and Milk Products) and Article 117 (Dairy Food Products). Both of these articles include provisions dating from the earliest versions of the City’s Sanitary Code, and have historic importance because they predate State and federal laws regulating production, distribution and sales of milk, milk products and dairy products, and establishing standards for identity, purity and wholesomeness. However, currently all activities associated with the manufacture and distribution of the milk and dairy products regulated by these two Health Code articles are licensed and comprehensively regulated in the State of New York by the State Department of Agriculture and Markets (NYSDAM) pursuant to the State Agriculture and Markets (A&M) Law and NYSDAM regulations. Standards of identity for most milk and dairy products in State law currently incorporate by reference identical standards in federal law, regulation and guidance. The Department’s historic concern about milk sanitation is based its widespread use and importance as a source of dietary elements needed for the maintenance of proper health and its potential as a source of disease that has been associated with major disease outbreaks. In recognition of this importance, New York City’s first milk inspector was appointed in 1873, and milk samples began to be subject to analysis at the Department’s laboratory, established in the 1860’s. Early City Sanitary Code provisions and Board of Health regulations covered all aspects of milk production and distribution, and were incorporated in various Health Code articles starting in 1959 when the Sanitary Code was renamed.

Pasteurization, required by New York City since 1911, and now required throughout the United States by federal law, and ultra-pasteurization (prolonged heat treatment) have largely eliminated contamination in milk and milk products by pathogens such as *E. coli*, *Salmonella* spp., and *L. monocytogenes*. The incidence of illness associated with milk in the United States has been sharply reduced in recent years. In 1938, milk associated outbreaks constituted 25 percent of all food and water borne illness outbreaks. This proportion has dramatically decreased over time as a result of technological improvements in equipment, refrigeration and more effective control over the pasteurization and ultra-pasteurization of milk and milk products. Outbreaks caused by milk and dairy products are now largely associated with ingestion of raw milk and other unpasteurized dairy products.

Although Health Code Article 111 provides for issuance of Department permits for every process associated with milk production and distribution, in 1992 the Department formally transferred issuance of permits and responsibility for inspections of the few remaining dairies in New York City to NYSDAM. At the time, NYSDAM was regulating all other dairies and producers outside the City, including those supplying the City with dairy products. As a result, all permits and licenses related to milk production and distribution in New York State, including for such products sold in New York City, are currently issued by the NYSDAM.

The dairy industry is very important to New York State, which is among the top six states in dairy production, and NYSDAM comprehensively regulates all aspects of the industry's activities, and conducts thorough periodic inspections of all milk processing plants in the state, covering general maintenance, structure of the facilities, and all equipment used in processing, homogenization, pasteurization, ultra-pasteurization and fortification of milk products. NYSDAM conducts periodic testing of samples taken at all milk processing plants of all raw, pasteurized and ultra-pasteurized milk products for microbiological acceptability.

NYSDAM inspects milk transport vehicles which deliver milk primarily to small stores and "bodegas" and evaluates temperatures of milk products upon arrival at various retail outlets, issuing violations for storage of milk products at temperatures greater than 45°F.

NYSDAM investigates complaints involving milk products sold in retail stores throughout New York State. Complaints allege products adulterated with flies, insects or, dirt, and milk spoilage at or after purchase. NYSDAM has advised the Department that, in 2007, it received six inquiries about date coding; in 2008, one inquiry about expired milk; in 2009, two complaints of spoiled milk and three inquiries about date coding, but no complaints or inquiries to date for 2010.

Currently, the only provision of Article 111 that the Department enforces is §111.33 (Standards generally; time of delivery) requiring that liquid milk products ("milk, low sodium milk, low fat milk, skimmed milk, modified skimmed milk, cream or half and half") not be sold beyond the "expiration date" on product labels. Expiration date requirements in New York City predate the current Health Code, going back to a time when farm sanitation and pasteurization processes were not as effective as they are now. The expiration date required to be stamped on these labels was established in 1959 at 54 hours after the date of pasteurization for milk, and 72 hours for cream and "half and half." On May 20, 1960, the Board of Health repealed this provision after the State legislature amended §1400 of the New York Public Health Law, prohibiting local boards of health in the State from adopting and enforcing milk dating regulations. In March 1962, the right of local boards of health to enact milk dating regulations was restored by the legislature in State NYSDAM Law §71-l and §111.33 of the Health Code was readopted. The expiration date has been changed over time, as the Board and Department acknowledged improvements in sanitation and processing standards, and the current requirement is that products may be sold in New York City up to nine days after pasteurization. Ultra pasteurized products may have an expiration date that is 45 calendar days after ultra pasteurization. The Department enforces this provision at food service establishments and issues violations if milk is held past its "expiration date" and when it receives complaints of retail sales of milk without expiration dates. The number of complaints for expired milk has decreased in the past three calendar years, in 2008; the Department received forty-one complaints about expired milk, in 2009; seventeen complaints, and in 2010; nine complaints.

In 1934, milk dating was eliminated from the United States Public Health Service Ordinance and Code. In 1940, New York State abolished milk dating as a state requirement. New York City is one of only a few jurisdictions in the United States that requires an "expiration" date to be stamped on milk labels in addition to the manufacturer's "sell-by" date. Other jurisdictions, such as New Jersey require "Open Dating". "Open Dating" is a date stamped on a product's package to help the retailer determine how long to display the milk product. It can also help the consumer know the time limit to purchase or use the product at its best quality. It is not a food safety date. After the date passes, while not of best quality, the product should still be safe to consume, if it was handled properly and kept at or below required temperature for the recommended manufactured storage times. Additionally, except for infant formula and some baby food, product dating is not generally required by Federal regulations. However, the labeling of the date is regulated by Federal regulations; if a calendar date is used, it must express both the month and day of the month (and the year, in the case of shelf-stable and frozen products). If a calendar date is shown, immediately adjacent to the date must be a phrase explaining the meaning of that date such as "sell-by" or

"use before." There is no uniform or universally accepted system used for food dating in the United States. Although dating of some foods is required by more than 20 states, there are areas of the country where much of the food supply has some type of open date and other areas where almost no food is dated.

There is no evidence that substituting the producers' "sell by" dates for "expiration" date of milk would put the public's health at risk. As noted, the rest of New York State has imposed no milk "sell by" date requirements on milk processors, and reports no adverse public health effects, poor milk quality or a decrease in milk demand.

The Department does not establish or enforce "sell-by" dates for any food products. Except for infant formula and baby food, the federal government does not establish any sell-by dates, and "sell-by" dates establishing shelf life for packaged foods are not considered matters of public health concern. The "sell by" dates on most products are provided by manufacturers so that products are aesthetically attractive in at the time of purchase with respect to taste, smell and appearance. Sell-by dates do not mean products are safely prepared, processed, transported, or stored. It is these critical processes which, when performed properly, render a safe product. For fluid milk products, a potentially hazardous food, maintaining optimal product temperature is the major concern in maintaining product quality and achieving stated shelf-life. The milk processor has a strong business interest in establishing a "sell by" date that will result in the consumer receiving milk of acceptable quality.

Recently, the Board of Health was petitioned pursuant to Article 9 of the Health Code to commence rulemaking by four members of the New York City Council. The council members have requested the Board to re-examine Health Code milk dating regulations, arguing that such dating is no longer necessary because of technological advances in sanitation, processing standards and refrigeration. For the reasons set forth above, the Department agrees that public health interests would be more than adequately served by the common manufacturers practice of labeling milk, as other products are labeled, with a "best if used by" or "sell by" date.

Because milk quality, production and distribution is extensively currently regulated by the State, the Department requests that the Board repeal Article 111.

## 2. Repeal Article 117.

Both Article 111 and Article 117 (Dairy Food Products) established minimum milk fat requirements for butter, and identity standards for malted milk and cheddar, processed and soft cheese, at a time when there were no national standards. The Department does not regulate the manufacture or distribution of these products and has not enforced these provisions for many years. Accordingly, the Department requests the Board to repeal Article 117.

The resolution is as follows.

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

**RESOLVED**, that Article 111 (Milk and Milk Products) and the list of section headings in Article 111 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby are, REPEALED.

**RESOLVED**, that Article 117 (Dairy Food Products) and the list of section headings in Article 117 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby are, REPEALED.