

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF INTENTION
TO AMEND ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE

NOTICE OF PUBLIC HEARING

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 amendment of Article 81 (Food Preparation and Food Establishments) 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 10:00 A.M. TO 12:00 NOON ON FRIDAY, FEBRUARY 5, 2010, IN THE THIRD FLOOR BOARDROOM (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. THURSDAY, FEBRUARY 4, 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 JANUARY 22, 2010. REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 12:00 P.M. FEBRUARY 5, 2010. 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 TO RESOLUTIONCOMMENTS@HEALTH.NYC.GOV OR ONLINE (WITHOUT ATTACHMENTS) AT <http://www.nyc.gov/html/doh/html/notice/notice.shtml> ON OR BEFORE 5:00 P.M., FRIDAY, FEBRUARY 5, 2010. ATTACHMENTS TO ONLINE COMMENTS MUST BE MAILED OR FAXED. COMMENTS RECEIVED AFTER FEBRUARY 5, 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 <http://www.nyc.gov/html/doh/html/comment/comment.shtml>.

STATUTORY AUTHORITY

These amendments to the Health Code are promulgated pursuant to §§558 and 1043 of the Charter. Sections 558(b) and (c) of the Charter empower the Board of Health to amend the Health Code and to include in the Health Code all matters to which the authority of the Commissioner and the Department of Health and Mental Hygiene (the Department) extends. Section 1043 grants the Department rule-making authority.

STATEMENT OF BASIS AND PURPOSE

Background

The Department is charged with preventing and controlling disease, including food-borne illness. Food service establishments, including restaurants, are an important source of food for New York City residents. An estimated one third of daily caloric intake comes from foods purchased and prepared outside the home, and this proportion is increasing.¹ Maintaining safe food service establishments is therefore a core public health function.

The Department enforces provisions of the Health Code, the State Sanitary Code, Public Health Law and other applicable laws relating to food served directly to consumers throughout the City. This includes regulation of food that is commercially prepared and sold by food service establishments (establishments or FSEs), a broad category that includes restaurants. The Department issues permits to and inspects all New York City food service establishments, as defined in §81.03(j) and (p) of the Health Code.

Sanitary inspections cover a range of specific practices, including the manner in which food is received and stored, processed, and the temperatures at which food is cooked, held, and reheated. These inspections are unannounced, and are conducted by Public Health Sanitarians who are trained public health professionals with college degrees and backgrounds in the sciences. Additionally, the Health Code requires that a food service establishment have a supervisor with a Food Protection Course certificate present during all hours of operation.

More than a quarter of restaurants in New York City have sufficiently serious or numerous violations of the Health Code on initial inspections to require a reinspection. These rates have fluctuated between about 20 and 30% over the past five years. Food service establishment inspections are scored in accordance with Chapter 23 of Title 24 of the Rules of the City of New York (RCNY). In the past fiscal year (FY09), nearly 11,000 inspections, about 27% of all inspections, resulted in scores exceeding 27 points, requiring reinspection. In the same year, there were more than 1,500 restaurants closed by the Department as a result of serious, repeated violations or imminent health hazards found on sanitary inspections. Department analysis of New York State Department of Health hospital discharge data indicates that hospitalization rates for food-borne illness in New York City rose over the past ten years. Informing consumers at point-of-entry about food sanitation inspection results by means of a grading system would provide an additional incentive beyond fines to FSEs to improve their food handling practices. Over time this should lead to improved compliance with Health Code and State Sanitary Code food safety requirements.

The goals of a sanitary inspection grading system are to:

1. communicate risks to the public to enable informed public choice about where to dine;
2. improve compliance by food service establishments; and

3. reduce, over time, restaurant-attributable food-borne illness.

Information helps consumers compare options and make informed decisions

Food establishment grading information provided at the time of restaurant selection would enable New Yorkers concerned with food hygiene and sanitary practices to consider the practices of the establishments where they may choose to eat. Currently, a summary of inspection findings are available on the Department's website and copies of complete inspection reports are available on request from the Department. The Department's website lists point totals from inspection findings, with greater numbers of points indicative of more violations. As an educational tool, the current system is limited in important ways. First, though New Yorkers across full educational and economic spectra dine out, websites are disproportionately used by more educated and affluent residents. Second, the ability of consumers to use inspection scores in decision-making depends on checking scores on-line in advance for many. Third, the presentation of inspection scores, the higher the score, the worse the performance, is for many counter-intuitive.

This proposal to introduce point-of-entry posted letter grading addresses each of these fundamental limitations. It will enable point-of-entry viewing of scores; it equalizes access to inspection results; it normalizes scoring into a categorical letter grade that comports with a far more common approach to communicating performance; and it categorizes scores into grades that are easily understood but remain tied to historical distinctions in scoring.

Sanitary inspection grades that are conspicuously posted at FSEs enable consumers to make choices about where to eat based on their degree of confidence in the restaurants' food safety inspection results. A 2001 survey of 2,000 Los Angeles County residents found that 84% of respondents had heard of the grading system and 77% of respondents noticed posted grades always or most of the time. The survey also found that 65% of respondents were influenced in their selection of food facilities by letter grades always or most of the time. Of respondents who dined out, only 3% responded that they would eat at "C" restaurants, and 25% would eat at a "B" restaurant, whereas 88% would eat at an "A" restaurant always or most of the time. Three-quarters of respondents identified the Los Angeles County Department of Public Health as being the sponsor of the grading system, making it the most widely recognized program within the Department of Public Health and confirming people's association of the grades with health and hygiene.

Posting of sanitary grades at restaurants is associated with improvements, over time, in restaurants' compliance with sanitary codes.

Many restaurants recognize their duty to operate their establishments in a safe and sanitary manner. Currently, external incentives for restaurants' compliance with the Health Code consist principally of the avoidance of fines and the threat of closure. While appropriate, these incentives are insufficient to compel routine compliance for a substantial number of restaurants. Evidence from other jurisdictions that have implemented restaurant grading suggests that the adoption of mandatory grade posting leads to significant improvements in food safety and sanitary practices in restaurants. Though Tennessee, Georgia, South Carolina and North Carolina have adopted letter grading, Los Angeles County's grading system was first adopted in 1998 and is the most formally evaluated program in the United States. In 1998, when grading was first adopted in Los Angeles, just 40% of restaurants scored an "A." By 2002, 82% received "A" grades and that percentage has held steady.

Restaurants contribute to food-borne illnesses and restaurant grading has been associated with a decline in food-borne illness.

Today more people eat out and they eat out more often, elevating the importance of food hygiene in restaurants. In 1970, Americans spent 26% of their food dollars on foods prepared outside their homes; by 2006 they spent almost half (48%).² Nationally, it is estimated that about half of all food-borne illness outbreaks are associated with dining in restaurants. By applying national estimates of food-borne illness and the percentage of those cases that are attributable to dining out, the Department estimates that each year more than 5,000 people are hospitalized and about 10,000 visit hospital emergency departments for food-borne illnesses that are likely attributable to restaurant dining in New York City. Thousands of cases of diarrhea each day are attributable to restaurant dining.³

In other jurisdictions, adoption of restaurant grading has been associated with declines in food-borne illnesses. Although the association is not proven, one study compared trends in food-borne illness hospitalizations in Los Angeles compared to California jurisdictions that had not adopted grading. That study found a 20% decline in hospitalizations for food-borne illnesses associated with the adoption of the posting of sanitary grades in food service establishments.⁴

The Department proposes that the Board repeal current §81.51 (Examination of most recent inspection report by patron or customer; posting sign) and adopt a new §81.51 to authorize the Department to develop a system for grading inspection results and to require posting of grades by certain food service establishments. Food establishments that would not be covered by the new provision would include primary and secondary school and hospital-operated cafeterias, correctional facilities, charitable organizational feeding programs, membership organization food service establishments, temporary food service establishments, mobile vendors and mobile vending commissaries. The proposed provision will require posting of “A” (the highest) grades immediately by FSEs that receive fewer than 14 points on an initial sanitary inspection. Immediate posting would not be required for FSEs receiving scores of 14 or more points. These FSEs would be reinspected, receiving an opportunity to decrease their scores on a compliance inspection, and would then be required to post grade placards reflecting compliance inspection scores, after the notices of violation issued on the compliance inspection were adjudicated at the Administrative Tribunal.

Mandating restaurant grading information for restaurants is feasible, informs consumer choice and is likely to improve restaurants’ compliance with Health Code requirements and reduce the burden of food-borne illness in New York City.

The resolution is as follows:

Matter that is deleted is in brackets []; matter that is underlined is new.

Resolved, that §81.51 of Article 81 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 is, repealed and recodified, to be printed together with explanatory notes, to read as follows:

§ 81.51 Grading of inspection results and posting of grades by certain food service establishments.

(a) Grading. The Department shall establish and implement a system for grading and classifying inspection results for food service establishments using letters to identify and represent an establishment's degree of compliance with the provisions of this Code, the State Sanitary Code and other applicable laws that require such establishments to operate in a sanitary manner so as to protect public health. The letter "A" shall be the grade representing the highest degree of compliance with such laws. Subject to the provisions of this section, the Department shall provide each operating establishment that it inspects with a letter grade card indicating the establishment's inspection grade, except that no letter grade card shall be provided when the Department orders an establishment closed after an inspection.

(b) Posting. Upon receipt, and except as provided in subdivisions (c) and (e), an establishment shall conspicuously post a letter grade card so that it is visible to the general public and to patrons prior to entering the establishment. The letter grade card shall not be defaced, marred, camouflaged or hidden from public view.

(c) Issuance of grade card.

(1) "A" grades. For any establishment receiving an "A" grade, the Department shall provide the establishment with a letter grade card at the conclusion of the inspection where such grade is determined. The grade card shall be posted immediately.

(2) Other grades. For any food service establishment receiving a grade lower than an "A," the Department shall advise the establishment of its inspection grade and the findings upon which it was based. The Department shall conduct a subsequent inspection of the establishment no sooner than seven (7) days after the first inspection. At the conclusion of the second inspection, the Department shall provide the establishment with a letter grade card indicating the inspection grade that the establishment received on that inspection.

(d) Adjudications. After any notice of violation ("NOV") issued at an inspection at which a letter grade card was provided to a food service establishment is heard and determined by the Administrative Tribunal established by Article 7 of this Code, the Department shall re-grade the inspection results taking into account only the violations alleged in the NOV that were either admitted by the establishment or sustained by a hearing examiner. If re-grading changes the inspection grade, the Department shall issue the food service establishment a new letter grade card that the establishment shall immediately post instead of or in place of the letter grade card provided by the Department at the conclusion of the inspection resulting in the issuance of the NOV.

(e) When posting may be deferred.

(1) Any food service establishment receiving a grade lower than an “A” at a second inspection conducted pursuant to subdivision (c) of this section may defer posting the letter grade card provided by the Department at the conclusion of that inspection until the hearing date scheduled by the Department pursuant to subdivision (c). If an establishment chooses to defer posting this letter grade card, the establishment shall remove any letter grade card that is currently posted, and instead post a sign provided by the Department advising the public that the establishment’s most recent inspection results are under review and that the results of the inspection can be obtained from the Department.

(2) If an establishment does not appear at the Administrative Tribunal on the date scheduled for hearing the NOV referred to in subdivision (d), the establishment shall immediately post the letter grade card issued by the Department at the second inspection conducted pursuant to subdivision (c). If the establishment appears at the Administrative Tribunal on the scheduled date, but the hearing is unable to proceed for any reason, or if the establishment makes a timely request for an adjournment and such adjournment is granted, the establishment may continue to defer posting the letter grade card until the adjourned hearing date. In no event shall an establishment defer posting its letter grade card after the adjourned hearing date if the establishment is not able to proceed on such date.

(f) Scope and applicability. This section shall not apply to mobile food vending units, mobile food vending commissaries, temporary food service establishments, food service establishments operated in or by primary and secondary schools, hospital-operated cafeterias, correctional facilities, or charitable organizations, including soup kitchens or other prepared food distribution programs, nor to food service establishments operated by not for profit membership organizations.

(g) No effect on other enforcement. Nothing in this section shall affect the Department’s authority to take any other action necessary to protect the public health or to enforce the provisions of this Code or any other law or rule applicable to operation of a food service establishment.

Notes: Section 81.51 was repealed and recodified by resolution adopted on XXX, requiring the Department to institute a letter grading system for certain food service establishments. Former §81.51 required posting a sign indicating where inspection reports may be obtained. Since inspection results are now posted on the Department’s website, and may be obtained from the Department on request under the Freedom of Information Law, this signage is no longer necessary.

Resolved, that the Table of Section Headings in Article 81 (Food Preparation and Food Establishments) 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 is, amended, to be printed together with explanatory notes to read as follows:

ARTICLE 81

FOOD PREPARATION AND FOOD ESTABLISHMENTS

§81.01 **Scope.**

* * *

§81.50 **Calorie labeling.**

§81.51 **[Examination of most recent inspection report by patron or customer; posting sign.] Grading of inspection results and posting of grades by certain food service establishments.**

Notes: The Table of Section Headings was amended by resolution on XXX when §81.51 (Examination of most recent inspection report by patron or customer; posting sign) was repealed and a new §81.51 authorizing the Department to develop a letter grading system for food service establishments was added.

¹ Guthrie JF, Lin BH, Frazao E. Role of food prepared away from home in the American diet, 1977-78 versus 1994- 96: changes and consequences. *Society for Nutrition Education* 2002; 34:140-150.

² National Restaurant Association (NRA). *Industry at a Glance*. 2005.

³ Mead, PS, Slutsker, L, Dietz, V, McCaig, LF, Bresee, JS, Shapiro, C, Griffin, PM, Tauxe, RV. Food-related Illness and Death in the United States. *Emerging Infectious Diseases*: 5(5)

⁴ Ten Year Anniversary of Restaurant Grading Program. *County of Los Angeles Public Health*. January 28, 2008.