

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
COMMISSIONER OF HEALTH AND MENTAL HYGIENE**

NOTICE OF ADOPTION OF A NEW CHAPTER 26 OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK PROVIDING FOR THE ESTABLISHMENT AND MAINTENANCE OF SEPARATE BOROUGH SPECIFIC WAITING LISTS FOR THOSE SEEKING FRESH FRUITS AND VEGETABLES PERMITS AUTHORIZED TO BE ISSUED BY LOCAL LAW NO. 9 OF 2008

In compliance with Sections 1043 and 389(b) of the New York City Charter (the “Charter”) and pursuant to Title 17, Chapter 3, Subchapter 2, Sections 17-307(4)(b) and 17-324 of the New York City Administrative Code, a notice of intention to adopt a new Chapter 26 of Title 24 of the Rules of the City of New York was published in the City Record of April 10, 2008 and a public hearing was held on May 13, 2008. No written comments or testimony was received by the close of the initial comment period ending May 13, 2008 nor during an extended public comment period ending May 29, 2008, notice of which was published in the City Record of May 20, 2008. The final resolution has been modified slightly, however, to take into consideration borough rankings assigned by waiting list applicants, in addition to any preference categories and any additional preferences within a category, in the randomization process resulting in the creation of the borough specific waiting lists. Section 26-03, as modified, now provides that waiting list applicants with the same weighted value, as determined by any preference category and additional preferences within a category, shall be placed on borough specific waiting lists in order “pursuant to the borough rankings indicated by such persons in their applications.” Section 26-07 was changed to specify that those waiting list applicants within each preference category, including any additional preferences within each preference category, specifying a borough as a preferred choice in which to operate will be given preference on that borough’s waiting list over those identifying that borough as a lesser choice.

Statutory Authority

This rule is promulgated pursuant to §§389(b) and 1043(a) of the New York City Charter (the “Charter”). Charter §389(b) provides that “heads of mayoral agencies shall have the power to adopt rules to carry out the powers and duties delegated to the agency head or the agency by or pursuant to federal, state or local law.” Charter §1043(a) similarly provides that each “agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.” §17-324 of the Administrative Code of the City of New York (the “Administrative Code”) authorizes the Commissioner of Health to make “make such rules as deemed necessary for the proper implementation and enforcement of this subchapter.” §17-307(b)(4)(d) of the Administrative Code more specifically provides in connection with the issuance of fresh fruits and vegetables permits that “the commissioner shall establish a separate waiting list for each borough to be administered in accordance with procedures to be established by rules of the commissioner”. The provision also authorizes the Commissioner to by “rule limit the number of places on each such waiting list.”

Statement of Basis and Purpose

Local Law No. 9 of 2008 amends Subchapter 2 of Chapter 3 of Title 17 of the Administrative Code of the City of New York by authorizing the Commissioner of Health and Mental Hygiene to issue up to one thousand (1000) newly created “fresh fruits and vegetables permits”, as defined in Section 17-306(r) of the Administrative Code. Unlike other full term permits issued pursuant to Subchapter 2, these permits authorize the holders thereof to vend only “fresh fruits and vegetables”. “Fresh fruits and

vegetables” is defined, in part, in Section 17-306 (q) as the “unprocessed unfrozen raw fruits and vegetables that have not been combined with other ingredients.”

Local Law 9 also establishes a new type of pushcart called a “green cart”, which must comply with standards established by the Commissioner, and which is to be used exclusively by those issued fresh fruits and vegetables permits. No food vendor issued a fresh fruits and vegetables permit shall be authorized to vend from other than a “green cart” or vehicle or to vend any food other than fresh fruits and vegetables from the vehicle or green cart for which the fresh fruits and vegetables permit was issued. The initial issuance of these 1000 fresh fruits and vegetables permits shall be phased in over a two year period. No more than five hundred (500) permits shall be issued during the first year of permit availability, with no more than one-half designated for use in each borough to be issued during the first year. During the second year of permit availability, the Commissioner may issue the remaining 500 permits along with any permits not issued during the first year of permit availability. Each of the 1000 fresh fruits and vegetables permits issued pursuant to Local Law 9 shall be designated for use exclusively in the designated areas of boroughs in the numbers authorized by that law. Local Law 9 further requires that preferences shall be given in the issuance of fresh fruits and vegetables permits and in the placement on any borough specific waiting lists for such permits to persons on any existing mobile food unit permit waiting list on the effective date of this local law, with additional preference given to those on these lists who are also disabled veterans, disabled persons and veterans, in that order of priority. Disabled veterans, disabled persons and veterans who are not on any existing mobile food unit permit waiting lists shall also be given preferences, as specified in §17-307(b)(4)(e).

It is the Department’s experience that the demand for mobile food unit permits generally exceeds their availability as fixed by statutory maximums. Accordingly, it is anticipated that the demand for fresh fruits and vegetables permits will also exceed their limited availability. Accordingly, a fair, orderly and efficient procedure is needed for persons to communicate to the Department their interest in applying for fresh fruits and vegetables permits and for the Department to issue these permits. A new Chapter 26 is adopted. §26-02 of the rule directs the Department to establish five separate waiting lists, one for each borough of the City. §26-03 establishes preferences to be given on these borough specific waiting lists to certain categories of persons, specifically to those persons on any existing mobile food unit waiting list on the effective date of Local Law No. 9 of 2008, with additional preference to be given to those on existing waiting lists who are also disabled veterans, disabled persons and veterans, in that order of priority or preference. §26-03 further provides that preferences on these borough specific fresh fruits and vegetables permit waiting lists shall also be given, as specified in §17-307(b)(4)(e), to those not on any existing mobile food unit permit waiting lists on the effective date of Local Law 9 of 2008 but who are disabled veterans, disabled persons and veterans, in that same order of priority. §26-04 provides that only those persons holding valid mobile food vendor licenses at least ten (10) days prior to the Department’s establishment of the borough specific waiting lists for fresh fruits and vegetables shall be eligible for placement on any of the lists established pursuant to this Chapter. §26-05 describes the notice to be provided to prospective applicants for newly issued fresh fruits and vegetables permits and for those seeking position(s) on any of the waiting lists. §26-06 describes the procedures to be followed for requesting position(s) on these lists. The remaining provisions of new Chapter 26 specify how the waiting lists are to be established and administered for those seeking fresh fruits and vegetables permits.

The original proposal published for public comment was slightly modified to take into consideration borough choice rankings assigned by waiting list applicants, in addition to any preference category or additional preference within a preference category, prior to the randomization and establishment of a borough specific waiting list. §26-03 was changed to provide that, among those applicants having the same weighted value based on any preference category and additional preferences within that category, borough rankings identified by persons on their waiting list applications would be a factor in their placement on borough specific waiting lists. §26-07, as modified, goes further in specifying that “those applicants specifying a borough as a preferred choice in which to operate shall be

given preference on that borough's waiting list over those identifying that borough as a lesser choice." These changes were made to the original proposal because it will lead to a more orderly result after randomization and list establishment. The names of persons within the highest preference group and selecting a particular borough would be randomized followed by randomization of those persons in the highest group who ranked that same borough as their second choice, followed by those in the highest preference category selecting that borough as their third choice etc. More importantly, taking borough choice rankings into consideration before randomization and list establishment should result in giving potential vendors, within the limitations of their preference group, their first borough of choice and thereby maximizing the likelihood that they will apply for a permit and commence vending fresh fruits and vegetables.

Statement Pursuant to Charter Section 1042 - Regulatory Agenda

This rule was not included in the Department's Regulatory Agenda because the law which necessitated this rule was enacted after the Regulatory Agenda was prepared and published.

The adopted rule is as follows:

Note- Matter underlined is new

CHAPTER 26

ESTABLISHMENT AND MAINTENANCE OF SEPARATE BOROUGH SPECIFIC WAITING LISTS FOR THOSE SEEKING FRESH FRUITS AND VEGETABLES PERMITS

§26-01 Definitions.

(a) Words and terms used in this Chapter shall have the meanings specified in §17-306 of the Administrative Code.

(b) "Establishment", "establish", "establishing" or "established" shall refer to the initial creation of the five separate borough specific waiting lists for fresh fruits and vegetables mobile food unit permits as well as all subsequent supplementations and re-establishments of any of these lists as necessary for filling both permit vacancies and waiting list positions for these permits.

§26-02 Direction to Establish Waiting Lists

The Department shall establish five separate waiting lists for fresh fruits and vegetables permits that are designated for use exclusively in the boroughs of Brooklyn, Bronx, Queens, Manhattan and Staten Island. The waiting lists shall take into account the four preference categories listed in §17-307(b)(4)(e) of the Administrative Code, including the additional preferences described in §17-307(b)(4)(e)(i) of such Code.

§26-03 Preferences on Waiting Lists

Establishment of the five borough specific waiting lists in accordance with this Chapter shall be in accordance with the preference categories and any additional preferences within a preference category as listed in §17-307(b)(4)(e) of the Administrative Code. No person shall be placed on a borough specific fruits and vegetables waiting list pursuant to this Chapter in a higher position than any person who is given a greater preference pursuant to §17-307(b)(4)(e). Persons with a higher preference shall be given a higher weighted value in the selection process used to establish the borough specific fruits and vegetables waiting lists created pursuant to this Chapter. Persons who appear on any existing mobile food unit permit waiting list on the effective date of Local Law No. 9 of 2008 and who also classify themselves as disabled veterans shall receive a weighted value of 8. Persons who appear on any existing mobile food unit permit waiting list on the effective date of Local Law No. 9 of 2008 and who also classify themselves as disabled persons shall receive a weighted value of 7. Persons who appear on any existing mobile food unit permit waiting list on the effective date of Local Law No. 9 of 2008 and who also classify themselves as non-disabled veterans shall receive a weighted value of 6. Any other persons who appear on any existing mobile food unit permit waiting lists on the effective date of Local Law No. 9 of 2008 shall receive a weighted value of 5. Persons not appearing on any existing mobile food unit permit waiting lists on the effective date of Local Law No. 9 of 2008 but who classify themselves as disabled veterans shall receive a weighted value of 4. Persons not appearing on any existing mobile food unit permit waiting lists on the effective date of Local Law No. 9 of 2008 but who classify themselves as disabled persons shall receive a weighted value of 3. Persons not appearing on any existing mobile food unit permit waiting list on the effective date of Local Law No. 9 of 2008 but who classify themselves as non-disabled veterans shall receive a weighted value 2. All other persons shall receive a weighted value of 1. Persons of the same weighted value shall be placed on borough specific fruits and vegetables waiting lists in order pursuant to the borough rankings indicated by such persons in their applications.

§26-04 Eligibility for Placement on Borough Specific Waiting Lists for Fresh Fruits and Vegetables Permits

To be eligible for inclusion on any of the waiting lists established pursuant to this Chapter, applicants shall be natural persons holding a valid mobile food vendor license at least ten (10) days prior to the Department's establishment of the borough specific fresh fruits and vegetables permit waiting lists created pursuant to this Chapter.

§26-05 Notice of the Establishment of Borough Specific Waiting Lists for Fresh Fruits and Vegetables Permits

Notice of the Department's intention to establish fresh fruits and vegetables borough specific waiting lists shall be made by publication in the City Record at least fourteen days prior to the establishment of such lists.

§26-06 Procedure for Requesting a Place on Waiting Lists.

(a) The Division of Permits shall use a mail-in procedure for establishing all waiting lists. Such procedure shall allow persons requesting placement on one or more of the five waiting lists established pursuant to this Chapter to submit a Department-issued waiting list application form, which shall contain their license number, their preference category, if applicable, and their choice(s) of borough specific fresh fruits and vegetables permit(s) they seek, by mail postmarked during a period of time to be determined by the Department, as specified in the Notice published pursuant to §26-05 of this Chapter.

(b) The Notice shall advise those persons requesting placement on one or more of these five borough specific waiting list(s) to rank the waiting list(s) they select by order of borough choice. Applicants shall be directed to apply only for waiting list(s) for boroughs in which they would be willing to vend should they obtain such borough specific permit.

(c) Persons in the first preference category, as provided in §17-307(b)(4)(e), shall not lose their position on any pre-existing waiting list as a result of their submission of an application for a fresh fruits and vegetables permit waiting list position or any resulting placement on any such list. A person on any existing waiting list who is issued a fresh fruits and vegetables permit also need not relinquish his or her place on any previously existing waiting list. Pursuant to §17-307(b)(4)(b), however, a person shall be issued no more than one permit, whether full-term citywide, borough-specific full-term, temporary citywide or exclusively fresh fruits and vegetables.

§26-07 Procedure for Establishment of Borough Specific Fresh Fruits and Vegetables Waiting Lists

Not less than fourteen days after the Notice required by §26-05 is published in the City Record, the Department shall create five separate borough specific full-term fresh fruits and vegetables waiting lists. Applicants holding valid mobile food vendor licenses at least ten (10) days prior to the Department's establishment of the fresh fruits and vegetables borough specific waiting lists created pursuant to this Chapter shall be included in the selection process, subject to the preferences and weighted values described in §26-03 of this Chapter. Each applicant eligible for a position on any of these borough specific fresh fruits and vegetables waiting lists shall be able to obtain only one waiting list position per list. An applicant's position on a fresh fruits and vegetables borough specific waiting list shall be determined by his or her preference category, including the additional preferences within the category specified in §17-307(b)(4)(e)(i) of the Administrative Code. Within each preference category, including the additional preferences within the category specified in §17-307(b)(4)(e)(i) of the Administrative Code, those applicants specifying a borough as a preferred choice in which to operate shall be given preference on that borough's waiting list over those identifying that borough as a lesser choice. For each borough specific waiting list, applicants in identical preference categories, including the additional preferences within the category specified in §17-307(b)(4)(e)(i) of the Administrative Code, who rank the applicable borough equally shall be placed on such borough specific waiting list in random order. The Department shall notify persons assigned a position on any of these waiting lists by mailing a notice to the address provided by the applicant on the applicant's waiting list application form.

§26-08 Number of Positions on the Waiting Lists

The Department shall not impose a pre-set limit or maximum on the number of waiting list positions on each of the five borough specific fresh fruits and vegetables waiting lists. Those applicants eligible for a waiting list position on any of the five borough specific waiting lists during the permit waiting list application period set by the Department shall be included on the waiting lists for which they applied. When it deems it necessary, the Department in its discretion may seek to supplement any specific borough waiting list or all waiting lists with additional names, pursuant to the procedure specified in §§26-03 through 26-07 of this Chapter, except that §26-06(b) shall not apply.

§26-09 Responsibility of Those on Waiting Lists to Notify the Department of Change of Address

(a) The names of persons selected for a waiting list created pursuant to this rule shall be entered on each list for which they apply with their address of record as known to the Department through mobile food vendor license records, or with any updated address provided to the Department on the waiting list application form. Thereafter, it shall be the responsibility of each person placed on a waiting list to provide written notification to the Department of any change of address. The Department shall provide written confirmation of its receipt of such address change notification. The Department's written confirmation of its receipt of a change of address notification shall constitute proof that such notification was provided to the Department.

(b) Failure to provide change of address information or, when requested, proof of the Department's confirmation of receipt of such written notification, may result in the loss of a person's waiting list position(s) and such person's eligibility to apply for a fresh fruits and vegetables permit pursuant to §17-307(b)(4) of the Administrative Code. Such person shall be deemed to have abandoned his or her place(s) on any of these borough specific fresh fruits and vegetables waiting list(s) and shall not be eligible for a fresh fruits and vegetables permit unless such person participates in the process of list establishment pursuant to §§26-03 through 26-07 of this Chapter, except that §26-06(b) shall not apply.

§26-10 Multiple Requests for Waiting List Position on any One Borough Specific Fruits and Vegetables Waiting List Prohibited

An applicant may apply for and obtain no more than one waiting list position on each of the borough specific waiting lists established pursuant to this Chapter and shall be eligible to obtain and possess only one permit. Before the creation of the borough specific fresh fruits and vegetables waiting lists, the Department shall attempt to ascertain that a mobile food vendor licensee is represented only once in the pool of licensees from which the selection is to be made in producing each of the five borough specific fresh fruits and vegetables lists pursuant to §26-07. Should the Department receive more than one request for a waiting list position on any one borough list from any person, requests subsequent to the first shall be deemed invalid. A person who submits more than one request for a position on any one borough specific fresh fruits and vegetables waiting list created pursuant to these rules may be disqualified and denied a position on that borough specific fresh fruits and vegetables waiting list if such multiple requests are deemed, in the sole discretion of the Department, to adversely affect the fairness or orderly establishment of that specific borough list.

§26-11 Selection of Applicants From a Waiting List

When the number of fresh fruits and vegetables permits outstanding for a particular borough falls below the statutory maximum for that borough and at such time as the Department in its discretion may determine based upon a consideration of the number of permit vacancies, a number of persons on such waiting list sufficient to fill the number of permit vacancies shall be notified by the Department, by waiting list order, of their eligibility to apply for a fresh fruits and vegetables permit to be used exclusively in a specific borough and shall form a pool of prospective applicants. Only one permit shall be issued for each eligible waiting list position or applicant.

§26-12 Eligibility to Apply for a Fresh Fruits and Vegetables Permit

Only those persons who have been notified that their waiting list number has been reached shall be eligible to submit an application for a fresh fruits and vegetables borough specific permit. A person whose waiting list number is reached and who holds another mobile food unit permit issued by the Department to vend on public space, shall not be eligible for a fresh fruits and vegetables permit pursuant to this rule unless such previously held permit is surrendered or expires before a permit with respect to such fresh fruits and vegetables waiting list is issued. Positions on a waiting list shall not be transferable.

§26-13 Notification of Eligibility to Apply For Permit

Within thirty (30) days of mailing notification of eligibility to apply for a fresh fruits and vegetables permit issued pursuant to §17-307(b)(4) of the Administrative Code, a person desiring to obtain such permit shall submit an application, completed in accordance with Section 5.05 of the New York City Health Code, together with the requisite fees and requested supporting documentation therefore. The permit application shall be submitted on or before the thirtieth day.

§26-14 Failure to Make Application for Permit or Complete Inspection Process, Declination of Permit

(a) A person on a borough specific fresh fruits and vegetables waiting list who is notified of his or her eligibility to apply for a permit and who fails to submit a completed permit application to the Department within thirty (30) days of being notified by the Department, or who otherwise communicates to the Department his or her lack of interest in the permit offered, shall result in the forfeiture of such person's waiting list position and the permit shall be offered to the next person on that borough specific fresh fruits and vegetables waiting list.

(b) A person notified of his or her eligibility to apply for a fresh fruits and vegetables permit to vend in a borough not his or her first choice, as that choice was specified on that person's waiting list application, who applies for a permit for such borough and who presents documentation supporting his or her claim of eligibility in one of the preference categories listed in §17-307(b)(4)(e) of the Administrative Code, if applicable, and whose mobile food unit passes the Department's required inspection pursuant to §17-307(b)(2)(d) of the Administrative Code, shall not lose his or her waiting list position(s) on any other borough specific fresh fruits and vegetables waiting lists of higher choice, as stated on the same waiting list application form. Such fresh fruits and vegetables permittee, however, shall forfeit his or her

position(s) on existing borough specific fresh fruits and vegetables waiting lists of lesser choice as stated on his or her waiting list application form.

(c) Any person notified that their waiting list number on a selected borough specific fresh fruits and vegetables waiting list has been reached and who is eligible to apply for this permit but who declines such borough specific permit offer shall be required to forfeit all waiting list positions on any other existing fresh fruits and vegetables waiting lists.

(d) Any person who fails to submit documentation satisfactory to the Department demonstrating that such person belongs to a preference category listed in §17-307(b)(4)(e) or whose mobile food unit does not pass the Department's required inspection, in accordance with §17-307(b)(2)(d) of the Administrative Code, shall be required to forfeit all such person's waiting list positions on all existing borough specific fresh fruits and vegetables waiting lists.

(e) The failure of any person to timely apply for a permit offered as specified in this section, complete the Department's inspection process or a person's declination of a specific borough permit offered pursuant to this Chapter, shall not affect that person's standing on any non-fresh fruits and vegetables mobile food unit permit waiting list.

§26-15 Abandonment of Waiting List Position

(a) A person who does not respond within thirty (30) days to a Departmental inquiry concerning a waiting list position held by such person, mailed by ordinary mail to the address provided by such person, shall be deemed to have abandoned such waiting list position. That person shall also be deemed to have abandoned or forfeited his or her standing on any other existing fresh fruits and vegetables waiting list on which he or she may appear.

(b) A person who holds a waiting list position may withdraw his or her name at any time by providing written notice to the Department with verifying documentation satisfactory to the Department.