

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

**NOTICE OF ADOPTION OF AN AMENDMENT TO
CHAPTER 10 (SMOKING UNDER THE NEW YORK CITY SMOKE-FREE AIR ACT)
OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK**

IN COMPLIANCE WITH SECTION 1043(a) OF THE NEW YORK CITY CHARTER, THE NOTICE OF INTENTION TO AMEND THIS RULE AND THE NOTICE OF PUBLIC HEARING WAS PUBLISHED IN THE CITY RECORD ON NOVEMBER 12, 2003. A PUBLIC HEARING WAS HELD ON DECEMBER 17, 2003. ONE WRITTEN COMMENT WAS RECEIVED AND SEVENTEEN PERSONS TESTIFIED AT THE PUBLIC HEARING. MOST OF THE COMMENTS REQUESTED CHANGES IN CITY AND STATE SMOKING LAWS OVERWHICH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE HAS NO JURISDICTION, AND THERE HAVE BEEN NO CHANGES MADE IN FINAL RULE.

Statutory Authority

Amendment of Chapter 10 of Title 24 of the Rules of the City of New York is authorized by §§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) authorizes each agency to "adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law." These rules are further authorized pursuant to Local Law 47 of 2002 which amends various provisions of Chapter 5 of Title 17 of the New York City Administrative Code (the "Administrative Code") (the "Smoke-Free Air Act") and which provides that "the department of health and mental hygiene may promulgate rules ... necessary to carry out the provisions of this local law; ..."

Statement of Basis and Purpose

Local Law 47 of 2002, most of which became effective on March 30, 2003, substantially amended the New York City Smoke-Free Air Act (Chapter 5 of Title 17 of the New York City Administrative Code) (hereinafter, the "SFAA" or the "Act"). These extensive changes required repeal and re-enactment of the applicable rules of the Department of Health and Mental Hygiene (the "Department") to enable the Department to implement and enforce the amended SFAA. On March 26, 2003, the Governor signed into law a bill substantially amending Article 13-E of the Public Health Law (hereinafter the "State law" or "PHL") pertaining to "Regulation of Smoking in Certain Public Places." The State law provisions on smoking became effective on July 24, 2003 statewide and apply to all jurisdictions within New York State. Remaining intact is §1399-r of the State law which states, in pertinent part, that

Nothing herein shall be construed to restrict the power of any ... city ... to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.

Section §17-513.2 (“Construction”) of the SFAA provides that

The provisions of this chapter shall not be interpreted or construed to permit smoking where it is prohibited or otherwise restricted by other applicable laws, rules or regulations.

Under the amended SFAA, smoking has been prohibited since March 30, 2003 in nearly every indoor area in the City where people work or congregate. However, the Department (as the enforcement officer of the State law) finds that it is necessary to harmonize certain provisions of the rules implementing the SFAA with the amended State law to minimize confusion or uncertainty about how the Department will enforce these laws. The provisions of the rules to be addressed include:

I. Amendments related to the effective date of the State law. The SFAA permits smoking on the premises of certain entities, e.g., tobacco bars [“cigar” bars in the State law, essentially the same as the SFAA tobacco bars; under the SFAA such bars had to be in operation as of December 31, 2001, under the State law only since December 31, 2002; see, PHL §1399-q(5)], owner operated bars and not for profit membership associations, until September 26, 2003, if these entities held a good faith belief that they would qualify to register with the Department after September 26, 2003. The State law was effective July 24, 2003, and provides no grace periods for cigar bars and membership associations wishing to allow smoking on their premises. Since the operation of the State law makes grace periods moot after July 24, 2003, and the City SFAA provides that the grace periods expire on September 26, 2003, the rules postponing enforcement of these smoking prohibitions until September 26, 2003 have been repealed.

II. Waiver of the State law. The City’s SFAA, as amended, repealed provisions authorizing the Commissioner to issue waivers. The State law, however, retains such a provision. Section 1399-u of the State law provides that the Department (as the enforcement officer of the State law) may grant a waiver from the application of a specific provision of the State law where the applicant for the waiver establishes that compliance would cause “undue financial hardship” or that “other factors ... render compliance unreasonable.” While the Department is not authorized to grant waivers of any provisions of the City SFAA, it will evaluate an application for a waiver of the State law prohibitions only if the granting of the waiver would not otherwise violate the City’s SFAA. The Department is therefore amending Chapter 10 by adding a new §10-15, setting forth the Department’s policy for granting such waivers. Incorporated in this new section is a provision that waivers would be automatically invalidated by changes in ownership, size or location of the entity, since waivers would only be granted to a specific entity which has demonstrated individual circumstances justifying a waiver.

The State law prohibits smoking in all bars but those it calls “cigar bars” (the equivalent of the SFAA’s “tobacco bars”), with no exceptions for smoking in “owner operated” bars and/or in separate smoking rooms in any bars. Other exceptions in the City SFAA allowing smoking in enclosed rooms for patients of certain residential health care facilities and in buildings housing tobacco businesses were also not included in the stricter State law. But see, PHL §1399-o (14) allowing smoking by patients in enclosed rooms in certain nursing homes and day treatment programs. The Department’s rules implementing the City SFAA allowed smoking in such entities.

§10-05 (enclosed rooms for patients of residential health care and day treatment facilities and programs), §10-06 (owner operated bars), and §10-09 (separate smoking rooms in bars) to provide that *smoking may only be allowed in such entities if they have been granted a waiver of the State law*. After obtaining a waiver, such entities may apply for registration or other approval for smoking under the SFAA. For example, a bar seeking either to register as an owner operated bar or approval for a separate smoking room would first need to submit evidence satisfactory to the Department to establish that undue financial hardship or other factors render compliance with the State law unreasonable, and request and receive a waiver of the State law, before any application for registration or approval to allow smoking will be considered.

III. Tobacco promotion public events. The State law allows such events to be held in any premises on two (2) days per calendar year, compared with the five (5) days in the City SFAA, and §10-04 (d) of the rules has been amended accordingly. *See* PHL 1399-q (7). The rules have been further amended to allow persons in control of premises where such events are held to request a waiver to allow up to five (5) events to be held annually.

IV. Membership associations. Both the SFAA and the State law allow smoking in membership associations which have no employees. The Department has amended §10-08 of the rules applicable to membership associations to clarify that smoking may be allowed in premises owned or operated by membership associations when members and their guests are present, but that smoking may not be allowed when the public is invited to attend events, including, but not limited to, bingo games. While the City SFAA requires registration of these associations, the State law does not. Because the City law is more restrictive in this respect, the registration requirement is being retained. To enhance the Department's ability to enforce the limitations on smoking in such places, this section is being further amended to provide that where a membership association is found in violation of these rules three or more times within any two-year period, the association's registration may be subject to rescission.

V. Definitions. The State law includes outdoor seating areas in its definition of "bars" and the definition of "bars" in §10-01 (b) has been amended accordingly. *See*, PHL 1399-n (1). A new definition has also been added for "State law" and the following subdivision re-lettered as well.

VI. Smoking Prohibited in Enclosed Areas. With some specific exceptions, the intent of the amended SFAA has been to prohibit smoking in "enclosed" areas where the public and/or employees may be exposed to second-hand smoke. In the amended SFAA, many exceptions allowing smoking under the earlier law were deleted, including, for example, those in sports arenas and stadiums. *See*, Administrative Code §17-503 (a)(II). The amended SFAA, however, is silent as to the plain meaning of the word "enclosed" and since the law went into effect, the Department has received complaints of smoking in some partially enclosed areas where there would be a substantial likelihood of exposure of non-smokers to second-hand smoke if smoking were allowed. For clarification, therefore, and to provide notice as to how the Department will enforce the SFAA, the Department is amending subdivision (a) of §10-02 of these rules to provide that prohibitions on smoking shall be enforced in all regulated "enclosed" areas, including those which have a partial overhead covering, roofing or ceiling.

VII. Section headings. A listing of section headings, which was inadvertently omitted from earlier amendments, is included as section 1 of this proposal.

Note - Matter to be deleted is in [brackets]
Matter underlined is new

Section 1. Chapter 10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended by adding a listing of section headings, to read as follows:

Chapter 10

Smoking Under the New York City Smoke-Free Air Act

<u>§10-01</u>	<u>Definitions and Construction of Words and Terms</u>
<u>§10-02</u>	<u>Smoking Prohibited</u>
<u>§10-03</u>	<u>Smoking Not Regulated</u>
<u>§10-04</u>	<u>Tobacco Promotion Public Events</u>
<u>§10-05</u>	<u>Enclosed rooms for patients of certain residential health care facilities and day treatment programs</u>
<u>§10-06</u>	<u>Owner operated bars</u>
<u>§10-07</u>	<u>Tobacco bars</u>
<u>§10-08</u>	<u>Membership associations</u>
<u>§10-09</u>	<u>Separate Smoking Rooms in Bars</u>
<u>§10-10</u>	<u>Outdoor Dining Areas</u>
<u>§10-11</u>	<u>Ashtrays</u>
<u>§10-12</u>	<u>Signs</u>
<u>§10-13</u>	<u>Enforcement</u>
<u>§10-14</u>	<u>Construction</u>
<u>§10-15</u>	<u>Waiver of State law</u>
<u>Appendix A</u>	<u>Specifications for Separate Smoking Rooms</u>

of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended, a new subsection (u) is added, and former subsection (u) is re-lettered as subsection (v), to read as follows:

§10-01 Definitions and Construction of Words and Terms.

(b) **Bar.** “Bar” shall have the meaning set forth in § 17-502(b) of the Act[.] or subdivision (1) of §1399-n of the New York State Public Health Law, whichever is more inclusive.

* * *

(u) State law. “State law” shall mean Article 13-E of the Public Health Law of the State of New York (“Regulation of Smoking in Certain Public Areas”), as amended.

[(u)] (v) Tobacco bar. “Tobacco bar” shall have the meaning set forth in §17-502 (jj) of the Act.

§3. Subsections (a) and (b) of section 10-02 of Chapter 10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” are amended, to read as follows:

§10-02 Smoking Prohibited.

(a) Except as otherwise specifically provided in the Act, [or] in these rules, or in other applicable law, smoking shall be prohibited in all indoor areas of all public places and places of employment, and certain outdoor areas in accordance with §§17-503 (a) and 17-504 of the Act, and other applicable law, and all enclosed areas regulated by the State law, the Act and these rules, including areas which have any full or partial overhead ceiling, roof or other covering.

(b) Smoking shall be prohibited in a tobacco business, as defined by §17-502 (aa) of the Act; except that smoking shall be permitted on no more than two floors of a building occupied by such tobacco business, and only within areas of such floors which are designated by such business for the purpose of testing or development of tobacco or tobacco products[.] and only if such tobacco business has applied for and has been issued a waiver of the State law prohibition on smoking in such premises, in accordance with §1399-u of the State law and §10-15 of these rules.

§4. Subsection (d) of section 10-04 (“Tobacco Promotion Public Events”) of Chapter

10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended, to read as follows:

(d) No such facility shall be authorized to permit smoking pursuant to this section on more than [five (5)] two (2) days in any calendar year[.] unless such facility has applied for and has been issued a waiver of the State law, in accordance with §1399-u of the State law and §10-15 of these rules, allowing such events to be held in any facility on no more than five (5) days in any calendar year.

§5. Section 10-05 (“Enclosed rooms for patients of certain residential health care facilities and day treatment programs.”) of Chapter 10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended, to read as follows:

§10-05. Enclosed rooms for patients of certain residential health care facilities and day treatment programs. Smoking may be permitted in an enclosed room, as defined in §10-01(g) of these rules, in certain residential health care facilities, as defined in §17-502(q) and (dd) of the Act, and facilities providing day treatment programs, as defined in §17-502 (cc) of the Act, which rooms have been designated for smoking by patients, [provided that:] in accordance with the following terms and conditions:

(a) Such rooms shall comply with all applicable Building Code and Fire Code requirements and shall have the prior approval of the New York City Fire Department and, on request of any person authorized to enforce the Act, the operator or person in charge of the facility shall make available for inspection the most recent inspection report from the Fire Department showing such approval.[:]

(b) No persons other than patients of such facilities shall be allowed to smoke in such rooms.[: and]

(c) Signs shall be posted in accordance with §10-12 of these rules and shall state: “SMOKING PERMITTED. IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT, ONLY PATIENTS OF THIS FACILITY MAY SMOKE IN THIS ROOM.”

(d) In addition, operators of residential health care facilities defined in §17-502(q) of the Act,

which are prohibited by the State law from allowing smoking on premises under their management or control, may apply to the Department for a waiver of the State law pursuant to §10-15 of these rules. If a waiver of the State law is granted, such rooms shall be constructed and operated in accordance with subsections (a), (b) and (c) of this section.

§6. Section 10-06 (“Owner operated bars”) of Chapter 10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended to read as follows:

§10-06. Owner operated bars. Smoking [may be permitted] shall be prohibited in owner operated bars, as defined in §17-502 (gg) of the Act and §10-01 of these rules [provided that:], except in accordance with the following terms and conditions:

[(a) Any entity which, in good faith, believes itself to be an owner operated bar shall have until September 26, 2003 to apply to the Department to register as an owner operated bar. Submission of a complete application on or prior to June 30, 2003 shall be deemed to have provided the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether an entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003, until such time as its application has been approved by the Department. There shall be a rebuttable presumption that if more than three (3) persons perform any work or render any services identified in §17-502 (gg) of the Act, an entity does not have a good faith belief that it is eligible to qualify as an owner operated bar.

(b)When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon request the Department may allow the applicant more time to complete its application.

(c) After September 26, 2003,] (a) There shall be no smoking [shall be prohibited] in the premises

of any entity alleging eligibility to register as an owner operated bar until an application for a waiver of the State law and an application for registration [has] have been submitted and the Department has notified the applicant that the Department has granted a waiver of the State law prohibition against smoking in such premises and approved [such] the application for registration. The Department shall review all applications submitted and shall notify each applicant within [forty-five (45) days of] a reasonable time after receipt of the applications as to whether a waiver is being granted and if such application for registration has been approved or denied, provided all information requested has been submitted. [If the Department determines, upon review of the documents submitted, and/or upon investigation, that such bar is not an owner operated bar within the definitions of the Act and these rules, it shall notify the applicant of this determination.]

[(d)] (b) Registrations and waivers shall not be transferrable. Any change in [a principal owner] ownership of an owner operated bar shall automatically void such registration and waiver. [require submission of a new application for registration, which shall be received by the Department no later than ten (10) business days after the change in a principal owner of the bar.]

[(e)] (c) Applications for waivers shall be submitted in accordance with §10-15 of these rules. Applications for registration shall be submitted on forms provided by the Department, and shall be supported by such documentation as the Department may require, to demonstrate the eligibility of the bar for registration as an owner operated bar [where smoking is permitted]. Such submissions shall include, but not be limited to, copies of the original and current applications for a license submitted to the State Liquor Authority, copies of tax returns filed with the state and federal governments, including W-2's and 1099 forms issued to persons working in or who render services to the bar, for such periods of time as the Department may require, and copies of insurance policies in force at the time of application. The owner operator shall be a permittee who holds a currently valid permit issued by the Commissioner pursuant to Articles 5 and 81 of the New York City Health

Code. The Department shall afford all documents submitted such confidentiality as may be provided

by applicable law, [and shall, within a reasonable time after receiving such application, notify the permittee if such registration has been approved or denied.]

[(f)] (d) Registrations shall expire one (1) year from the date the Department issues its approval of such registration. Applications for annual re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application for registration.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: "SMOKING PERMITTED. THIS IS AN OWNER OPERATED BAR WHICH IS REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT."

[(g)] Except as otherwise provided in §17-513.1 of the Act, smoking shall not be permitted in an owner operated bar unless and until the Department approves an application for registration pursuant to this section.

[(h)] (e) Copies of the current registration and the waiver of the State law shall, on request, be made available to any person authorized to enforce the Act.

[(i)] (f) The Department's determinations about any applications for registration as an owner operated bar shall be "final agency determinations."

§7. Section 10-07 ("Tobacco bars") of Chapter 10 of Title 24 of the Rules of the City of New York, entitled "Smoking Under the New York City Smoke-Free Air Act," is amended, to read as follows:

§10-07. Tobacco bars. Smoking shall be permitted in tobacco bars, as defined in §17-502 (jj) of the Act and §10-01 of these rules, which were in existence in the calendar year ending December 31, 2001, and in which ten (10) or more percent of the bar's total gross annual income was derived from

the on-site sale of tobacco products and rental of humidors, [provided that:] in accordance with the

following terms and conditions:

(a) The applicant for registration shall show that the tobacco bar has been operated pursuant to a permit issued by the Commissioner in accordance with Articles 5 and 81 of the New York City Health Code by the current and any prior owner since the calendar year ending December 31, 2001.

[(b)When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon request the Department may allow the applicant more time to complete its application.

(c) Any entity which, in good faith, believes itself to be a tobacco bar shall have until September 26, 2003 to apply to the Department to register as a tobacco bar. Submission of a complete application on or prior to June 30, 2003 shall provide the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether an entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003.]

(d)] (b) Applications to register shall be submitted on forms provided by the Department with such supporting documentation as the Department may require, including but not limited to, copies of tax returns filed with the state and federal governments for such periods of time as the Department may require; copies of tax returns, reports, or other proof submitted to demonstrate compliance with all applicable federal, State and local laws governing the taxation, sale and distribution of tobacco products; and a current retail license to sell tobacco products issued pursuant to §20-202 of the Administrative Code by the Department of Consumer Affairs; other documentation demonstrating that ten (10) or more percent of the bar's total gross annual income was derived from the on-site sale

of tobacco products and rental of humidors; architectural or engineering plans showing the size of

the premises occupied by the bar on the date of application for registration; and copies of leases in effect at the time of the initial and annual registration. The Department shall afford such documents such confidentiality as may be provided by applicable law.

[(e)] (c) Any change in permittee shall require notice to the Department, in writing, no later than ten (10) business days prior to any change in permittee.

[(f)] (d) Any change in location or increase in the size of an existing tobacco bar shall be a violation of these rules and grounds for revocation of the registration of the bar. The permittee shall notify the Department, in writing, no later than ten (10) business days prior to any change in location or increase in the size of an existing tobacco bar.

[(g)] (e) Registrations shall not be transferrable.

[(h)] (f) Registrations shall expire one (1) year from the date the Department issues its approval of such registration. Applications for annual re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: "SMOKING PERMITTED. THIS IS A TOBACCO BAR REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT."

[(i) After September 26, 2003, s] (g) Smoking shall be prohibited in any entity alleging eligibility to register as a tobacco bar until an application for registration has been submitted and the Department has notified the applicant that the Department has approved such application. The Department shall review the application submitted and shall notify the applicant within forty-five (45) days as to whether such application has been approved or has been denied, provided all information requested has been submitted. If the Department determines, upon review of the

documents submitted, and/or upon investigation, that such applicant does not qualify for registration

in accordance with the definitions of the Act and these rules, it shall notify the applicant of this determination.

[(j)] (h) A copy of the current registration shall, on request, be made available to any person authorized to enforce the Act.

[(k)] (i) The Department's determination about the application for registration of any tobacco bar shall be a "final agency determination."

§8. Section 10-08 ("Membership associations") of Chapter 10 of Title 24 of the Rules of the City of New York, entitled "Smoking Under the New York City Smoke-Free Air Act," is amended, to read as follows:

§10-08. Membership associations. Smoking may be permitted in not-for-profit membership associations, as defined in §17-502 (ff) of the Act and §10-01 of these rules, [provided that:] in accordance with the following terms and conditions:

(a) An entity which[, in good faith,] believes itself to be a not-for-profit membership association shall [have until September 26, 2003 to] apply to the Department to register to allow smoking on its premises by its members and their guests. [Submission of a complete application on or prior to June 30, 2003 shall be deemed to have provided the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether the entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003.

(b) When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon

[(c)] (b) The application to register shall be submitted to the Department on such forms as the Department provides, and shall include such documentation as the Department may require to demonstrate the eligibility of the entity for such registration. Such submissions shall include, but not be limited to, copies of the entity's by-laws, copies of tax returns filed with the state and federal governments for such periods of time as the Department may require; copies of all insurance policies covering the premises occupied by the entity; copies of documents filed with the Secretary of State and the Attorney General, if applicable, to demonstrate its status as a not-for-profit entity and purpose. The Department shall afford such documents such confidentiality as may be provided by applicable law.

[(d)] (c) Registrations shall expire two (2) years from the date the Department issues its approval of such registration. Applications for re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: "SMOKING PERMITTED. THIS IS A MEMBERSHIP ASSOCIATION WHICH IS REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT."

[(e)] (d) The entity shall notify the Department, in writing, no later than ten (10) business days after any change in the employee information entered on the application for registration, or if any persons are engaged as "employees" to perform work or render any services on any premises controlled by the entity. It is a violation of these rules and grounds for revocation of the registration if the entity engages any employees to perform work or render any services on such premises.

[(f) After September 26, 2003, s] (e) Smoking shall be prohibited in any entity alleging eligibility to register as a not-for-profit membership association until an application for registration has been

submitted and the Department has notified the entity that the Department has approved such

application. The Department shall review the application submitted and shall notify the entity within forty-five (45) days as to whether such application has been approved or has been denied, provided all information requested has been submitted. If the Department determines, upon review of the documents submitted, and/or upon investigation, that such entity does not qualify for registration in accordance with the definitions of the Act and these rules, it shall notify the entity of this determination.

[(g)] (f) A copy of the current registration shall, on request, be made available to any person authorized to enforce the Act.

[(h)] (g) The Department's decision about whether an entity qualifies for registration shall be a "final agency determination."

(h) Smoking in any indoor premises owned or operated by a membership association shall be limited to times when the association's premises are being used only by its members and guests. "Members' guests" shall not include members of the public invited to attend events open to the public, including, but not limited to, bingo games, theatrical productions, carnivals, rummage sales, or similar events.

(i) The Commissioner may rescind the registration of a membership association which has been found in violation of subdivision (h) of this section more than three (3) times in any two-year period.

§9. Section 10-09 ("Separate Smoking Rooms in Bars") of Chapter 10 of Title 24 of the Rules of the City of New York, entitled "Smoking Under the New York City Smoke-Free Air Act," is amended, to read as follows:

§ 10-09. Separate Smoking Rooms in Bars. Smoking [may be permitted] shall be prohibited in separate smoking rooms, as defined in §17-502 (w) of the Act and §10-01 (u) of these rules, in bars, as defined in §17-502(b) of the Act and §10-01 (b) of these rules, [until January 2, 2006, provided that:] except in accordance with the following terms and conditions:

(a) A permittee operating a bar who wishes to construct a separate smoking room shall apply to the

Department for a waiver of the State law prohibition on smoking in such premises, in accordance with §1399-u of the State law and §10-15 of these rules. There shall be no separate smoking room in any bar unless the permittee operating the bar has been granted a waiver in response to an application filed with the Department.

[a] (b) A permittee who has been granted a waiver pursuant to the State law shall construct a [Such] separate smoking room[s] which shall conform to the specifications of §17-502 (w) of the Act and the standards found in Appendix A of these rules.

[(b)] (c) The permittee shall obtain documentation demonstrating that the plans for construction and use of such a room comply with all applicable Building Code requirements, and shall, on request, submit such documentation to any person authorized to enforce the Act. The permittee shall notify the Department when the Department of Buildings commences any action to revoke the permit issued for construction of such room.

[(c)] (d) Smoking shall be prohibited in such separate smoking room until the permittee has submitted documentation satisfactory to the Department demonstrating compliance with applicable provisions of the Building Code and these rules, and proof that such room is to be constructed within a bar as defined in §17-502(b) of the Act. The Department may charge a fee not to exceed \$100.00 per plan filed.

[(d)] (e) With respect to a restaurant bar, as defined in §17-502(s) of the Act, a separate smoking room shall be contiguous to the restaurant bar area and the entrance to such room shall not open into the restaurant area.

[(e)] (f) The permittee shall not allow any employee of a bar with a separate smoking room to enter such room until at least fifteen (15) minutes after all persons who are smoking have left the room and the room is no longer being used for smoking.

[(f)] (g) Upon receipt of notification from the Department's Administrative Tribunal that a permittee

with an approved separate smoking room has been found in violation of §10-09 [(e)] (f) of these

rules on two (2) or more occasions, the Commissioner shall revoke the right of such permittee to maintain a separate smoking room in such bar. The decision of the Commissioner as to whether to revoke such right shall be a “final agency determination.”

(h) Use of a separate smoking room in any bar shall be prohibited after January 2, 2006.

§10. Chapter 10 of Title 24 of the Rules of the City of New York, entitled “Smoking Under the New York City Smoke-Free Air Act,” is amended by adding a new §10-15 (“Waiver of State law”), to read as follows:

§10-15 Waiver of State law.

(a) **Eligibility for a waiver.** Any entity in whose premises smoking is prohibited by Article 13-E of the State Public Health Law (the “State law”), but where smoking may be allowed under the City Smoke-Free Air Act (the “City law”), subject to conditions in such law, may apply for a waiver of the State law prohibition. Applications for waivers shall be evaluated on an individual basis based on individual circumstances. In granting a waiver, the Department may impose such terms and conditions as it deems necessary, including conditions intended to prevent the exposure of non-smokers to second-hand smoke.

(b) **Smoking not allowed unless waiver granted.** No person who owns, operates, manages or is otherwise in control of any premises where smoking is prohibited under the State law, but could have been allowed by the City law, subject to conditions in such law, shall allow smoking in such premises unless a waiver has been granted by the Commissioner or designee in accordance with these rules.

(c) **Waiver application requirements.** An application for a waiver of a specific provision of the State law shall:

(i) be made in a form supplied by or acceptable to the Department;

(ii) be completed by an owner, operator, corporate officer, partner or authorized representative

of such owner or operator, or of another person in control of a premises;

(iii) identify the specific section(s) of the State law for which the waiver is requested;

(iv) indicate whether the applicant is claiming undue financial hardship and/or that there are other factors which render compliance with the State law unreasonable; and

(v) specify in detail proposed conditions and restrictions which the applicant believes will avoid or minimize the involuntary exposure of employees and the public in the premises to second-hand smoke.

(d) Evidence to be submitted in support of waiver application. An applicant for a waiver shall support a claim of undue financial hardship or other factors which render compliance unreasonable by submission of evidence satisfactory to the Department and shall provide any additional information required by the Department to evaluate the application.

(i) Evidence submitted to support a claim of undue financial hardship may include business and financial records clearly demonstrating an actual loss of income directly attributable to the effect of the State law prohibition on smoking.

(ii) An applicant claiming undue financial hardship shall clearly identify and distinguish actual losses attributable to the effect of the State law, if any, from losses associated with seasonal variations, ordinary business cycles, or other circumstances affecting similarly situated entities or businesses.

(iii) An applicant claiming that there are factors other than undue financial hardship which render compliance unreasonable shall submit evidence clearly demonstrating the existence of such factors, and describe how these factors render compliance unreasonable.

(e) Waiver application fee. The Department may impose a fee, not to exceed \$100.00, for its costs in reviewing each application for a waiver.

(f) Violations of waiver conditions. It shall be a violation of these rules for any entity granted a waiver which includes conditions or restrictions necessary either to minimize the effects of smoking

on persons involuntarily exposed to second-hand smoke, or to otherwise ensure that the waiver is

consistent with the general purpose of the State law, to fail to comply with such conditions, and such waiver may be rescinded, after an opportunity to be heard, if the Department finds that there has been repeated failure to adhere to or comply with such conditions.

(g) **Waivers not transferrable.** Waivers shall not be transferrable. Any change in ownership, size or location of a business entity granted a waiver of any provision of the State law shall invalidate such waiver on the effective date of such change. Any entity granted a waiver shall notify the Department at least ten (10) days in advance of any possible change in ownership, size or location.

(h) **Term and renewal of waivers.** A waiver may be granted for a term not to exceed 24 months. An applicant shall apply for renewal no later than four weeks prior to the expiration date. With each application for renewal, the applicant shall have the burden of demonstrating by submitting evidence satisfactory to the Department that there is continuing undue financial hardship or other factors exist which make compliance with the State law unreasonable.

(i) **Waiver to be available for inspection.** A copy of the waiver shall be kept on file at the premises and shall be made available upon request to Department or other enforcement agents.