

DEPARTMENT OF HEALTH AND MENTAL HYGIENE  
BOARD OF HEALTH

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NOTICE OF ADOPTION OF AMENDMENTS TO ARTICLE 81 AND §§47.37(d), 88.09(a),  
115.17(d) AND 115.27(a) OF THE NEW YORK CITY HEALTH CODE  
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In compliance with Section 1043(b) of the New York City Charter (the “Charter”), a Notice of Intention to Amend Article 81 and §§47.37(d), 88.09(a), 115.17(d) and 115.27(a) of the New York City Health Code and Notice of Public Hearing was published in the City Record on Wednesday, March 16, 2006. A public hearing was held on Thursday, April 21, 2005. Four persons testified at the hearing. In response to the comments received from food service industry representatives the proposal to add a new §81.10 was withdrawn. At a meeting on July 7, 2005 the Board of Health adopted the following resolution.

**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 Department’s authority extends. Section 1043 grants the Department rule-making authority.

**STATEMENT OF BASIS AND PURPOSE**

The Department of Health and Mental Hygiene (the “Department”) enforces provisions of the New York City Health Code (“Health Code”) and other applicable law intended to protect the wholesomeness of food served directly to the consumer throughout the City, including food that is commercially prepared, and sold or distributed for free, by food service establishments, a broad category which includes restaurants, caterers (non-retail food processing establishments), mobile food vending units, and mechanical food dispensing devices. This resolution amends various Health Code provisions regarding the storage temperature of potentially hazardous cold foods, and re-numbers a provision authorizing the Commissioner to impose more stringent requirements on a food service establishment to prevent the recurrence of imminent health hazards.

**Holding potentially hazardous cold foods**

On June 15, 1998, the Board of Health amended various provisions of Article 81 (“Food Preparation and Food Establishments”) of the Health Code, adopting new, more stringent, temperature requirements for maintenance of potentially hazardous foods consistent with standards of the 1997 US FDA *Food Code*. For cold foods, the FDA-recommended maintenance standard of 41 degrees Fahrenheit (5 degrees Celsius) or lower was adopted in amendments to §§81.03 (b) and 81.09 (a), (c), (e), (f), (g), (h) and (k) of the Health Code, replacing 45 degrees Fahrenheit (7.2 degrees Celsius). This standard is intended to further retard the growth of some bacteria that are known to grow at 45 degrees Fahrenheit in ready-to-eat potentially hazardous foods. Through an oversight at the time, however, required maintenance temperatures for potentially hazardous cold foods in several other provisions of the Health Code were not amended. The amendments in this proposal substitute the more protective 41 degree Fahrenheit temperature requirement for refrigeration of potentially hazardous cold foods as follows: Health Code §47.37(d) (storage of milk for children in day care services); §81.09(b) (storage of intact shell eggs); §81.41(a)(3) (maintenance of potentially hazardous cold foods in dispensing devices); §88.09(a) (maintenance of potentially hazardous or perishable cold foods by temporary food

service establishments, e.g., booths at street fairs); §115.17(d) (labeling of formula milk); and §115.27(a) (post-sterilization formula milk cooling and keeping). The temperature requirements in §111.23 (post-pasteurization milk cooling and keeping temperatures) are not being amended, since the Department will, in the near future, request that the Board repeal nearly all of Article 111 (“Milk and Milk Products”), with the possible exception of its dating provisions, since the Department no longer regulates dairy product processing.

### **Refrigerated holding equipment**

In the resolution adopting the above-referenced refrigeration temperature requirements in 1998, the Board added a new subdivision (k) to §81.09 allowing food service establishment operators to continue to use existing refrigerated holding equipment, regardless of whether such equipment was able to maintain the more stringent cold holding temperature. This provision also states, however, that within five years, or by July 1, 2003, all refrigeration equipment in food service establishments must be able to maintain cold foods at the lower temperature. Since §81.09(k) has expired, and is no longer applicable, it is being repealed.

### **Renumber §81.09 (j)**

Subdivision (j) of §81.09, which was included in the repeal and re-enactment of Article 81, effective September 1, 1996, is being deleted from §81.09 and renumbered as a separate section of Article 81 of the Health Code. This subdivision authorizes the Department to impose additional requirements on a food establishment whenever necessary to prevent the occurrence of “public health hazards.” This clarifies the Department’s interpretation that notwithstanding the original placement of this provision in §81.09, “public health hazards” include not only conditions related to handling of specific potentially hazardous foods, but hazards resulting from such other insanitary conditions as repeated and uncorrected infestations of pests, improper use of toxic chemicals (cleaning supplies and pesticides), poorly maintained, dirty or inoperative equipment, facilities and plumbing, which threaten the health or safety of the establishment’s patrons. In addition, since the term “public health hazards” is not defined in either the Health Code or in Part 14 of the State Sanitary Code, the provision refers to prevention of recurrent “imminent health hazards,” a term which is defined in both Article 81 and the Sanitary Code.

### **Changes made in response to public comments**

The Department’s original proposal to amend the Health Code included a new §81.10 allowing food service establishments to use time as the public health control for holding potentially hazardous ready-to-serve foods. At the public hearing, comments were received from food service establishment industry representatives raising questions concerning handling of ready-to-eat comminuted meat products, procedures in pizzerias, take out food items, and hanging poultry. The Department is currently reconsidering the appropriate approach to these issues. Therefore, the Department has asked the Board to withdraw consideration of the proposed addition of this new section until these issues can be resolved.

### **STATEMENT PURSUANT TO SECTION 1042 – REGULATORY AGENDA**

These proposed amendments were not included in the Department’s Regulatory Agenda because they were the result of a recent analysis by the Department.

The proposal is as follows:

Note-matter in brackets [ ] to be deleted

Matter underlined is new

RESOLVED, that subdivision (d) of §47.37 of the New York City Health Code, as added by resolution adopted on the seventeenth of October, nineteen hundred eighty-eight, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

(d) Milk shall be stored at a temperature below [45] 41 degrees Fahrenheit, may not be kept beyond its expiration date, and may not be dispensed or served [by] to children except under adequate supervision.

Notes: Subdivision (d) of §47.37 was amended on July 7, 2005 to reflect the appropriate temperature for refrigeration of milk, a potentially hazardous cold food, in accordance with the 2001 US FDA *Food Code*.

RESOLVED, that subdivision (b) of §81.09 of the New York City Health Code, as added by resolution adopted on the tenth of June, nineteen hundred ninety-six, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

(b) Intact shell eggs shall be stored at an ambient temperature of [45] 41 degrees Fahrenheit ([7.2] 5 degrees Celsius) or below.

Notes: Subdivision (b) of §81.09 was amended on July 7, 2005 to reflect the appropriate temperature for refrigeration of potentially hazardous cold foods.

RESOLVED, that subdivision (j) of §81.09 of the New York City Health Code, as amended by resolution adopted on the sixteenth of June, nineteen hundred ninety-eight, be, and the same hereby is, repealed.

Notes: Subdivision (j) of §81.09 was repealed by resolution adopted on July 7, 2005, renumbered as §81.06, and amended to clarify that such provision is applicable to prevention of imminent health hazards with respect to all food service establishment operations, not only to handling potentially hazardous foods.

RESOLVED, that Article 81 of the New York City Health Code, as last amended by resolution adopted on the fourteenth of December, nineteen hundred ninety-eight, be,

and the same hereby is, further amended by adding a new §81.06, to be printed together with explanatory notes, as follows:

**§81.06 Prevention of imminent health hazards.** Whenever necessary to prevent the occurrence or recurrence of imminent health hazards the Department may, in specific instances, impose additional requirements on an establishment. The Department shall describe in writing the terms and conditions of operation that have been imposed, the reasons therefor, shall provide such document to the permit holder, and shall maintain such document with the records of the Department.

Notes: Section 81.06 was added to Article 81 by resolution adopted on July 7, 2005. The new section amends former subdivision (j) of §81.09, which has been repealed, and is applicable to all food service establishment operations, not only to handling potentially hazardous foods.

RESOLVED, that subdivision (k) of §81.09 of the New York City Health Code, as added by resolution adopted on the sixteenth of June, nineteen hundred ninety-eight, be, and the same hereby is, repealed.

Notes: Subdivision (k) of §81.09 was repealed on July 7, 2005 since its provisions, allowing refrigeration equipment incapable of maintaining required cold temperatures until July 1, 2003, are no longer applicable.

RESOLVED, that paragraph (3) of subdivision (a) of §81.41 of the New York City Health Code, as added by resolution adopted on the tenth of June, nineteen hundred ninety-six, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

**§81.41 Dispensing devices used to dispense food; construction, cleanliness, refrigeration, safety.** (a) No person shall employ a food vending machine for the sale of packaged food or beverages in closed bottles or containers unless:

\* \* \*

(3) potentially hazardous foods shall be kept at or below [45] 41 degrees Fahrenheit ([7.2] 5 degrees Celsius) or at or above 140 degrees Fahrenheit (60 degrees Celsius);

\* \* \*

Notes: Paragraph (3) of subdivision (a) of §81.41 was amended on July 7, 2005 to reflect the appropriate temperature for refrigeration of potentially hazardous cold foods, in accordance with the 2001 US FDA *Food Code*.

RESOLVED, that the list of Section Headings in Article 81 of the New York City Health Code, as amended by resolution adopted on the thirteenth of March, two thousand, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

**ARTICLE 81**

**FOOD PREPARATION AND FOOD ESTABLISHMENTS**

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**§81.05 Technical review and pre-permitting inspections for food service establishments and non-retail food processing establishments.**

**§81.06 Prevention of imminent health hazards**

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Notes: Section 81.06 was added by resolution adopted on July 7, 2005, when subdivision (j) of §81.09 was deleted from this section, amended, and renumbered, to clarify that such a provision applied to prevention of the occurrence or recurrence of all kinds of imminent health hazards, not just those resulting from out-of-temperature potentially hazardous foods.

RESOLVED, that subdivision (a) of §88.09 of the New York City Health Code, as added by resolution adopted on the twenty-ninth of May, nineteen hundred eighty-five, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

**§88.09 Food; refrigeration or heat treatment required if perishable or potentially hazardous.** (a) Temporary food service establishments may only serve food which requires limited preparation such as hamburgers and frankfurters. The preparation or service of other potentially hazardous foods, including pastries filled with cream or synthetic cream, custards and similar products, and salads or sandwiches containing meat, poultry, eggs, shellfish or fish, is prohibited unless approved by the commissioner. Perishable or potentially hazardous foods capable of supporting rapid and progressive growth of pathogenic microorganisms shall be kept at all times under appropriate refrigeration at a temperature no higher than [45] 41 degrees

Fahrenheit or under appropriate heat treatment at a temperature no lower than 140 degrees Fahrenheit.

Notes: Subdivision (a) of §88.09 was amended on July 7, 2005 to reflect the appropriate temperature for refrigeration of potentially hazardous cold foods, in accordance with the 2001 US FDA *Food Code*.

RESOLVED, that subdivision (d) of §115.17 of the New York City Health Code, as last amended by resolution adopted on the thirteenth of April, nineteen hundred seventy-one, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

§115.17 **Standards; labeling of containers.** Each container of formula milk or the box holding one or more containers of formula milk for an individual infant or institution shall bear a label with the following information:

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(d) The date of preparation and a statement that the formula milk must be kept under refrigeration at a temperature no higher than [45] 41 degrees Fahrenheit.

Notes: Subdivision (d) of §115.17 was amended on July 7, 2005 to require labeling to reflect the appropriate temperature for refrigeration of milk, a potentially hazardous cold food, in accordance with the 2001 US FDA *Food Code*.

RESOLVED, that subdivision (a) of §115.27 of the New York City Health Code, as amended by resolution adopted on the thirteenth of April, nineteen hundred seventy-one, be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

§115.27 **Operations; sterilization of formula milk.** (a) No formula milk permittee shall offer for sale, sell, give away or distribute formula milk otherwise than in individual containers for a single feeding. Immediately after filling of a container of formula milk, it shall be closed with a cover or cap which effectively seals and protects the mouth of the container. Container may be closed with suitable, incised nipples which shall be protected with suitable outside fitted caps. When [dosed] closed the container shall be heated in an autoclave for at least ten minutes at 230 degrees Fahrenheit so as to render the formula milk and its container sterile. After

sterilization, containers of formula milk shall be immediately cooled to and kept at a temperature no higher than [45] 41 degrees Fahrenheit until delivery to the consumer.

Notes: Subdivision (a) of §115.27 was amended on July 7, 2005 to reflect the appropriate temperature for refrigeration of milk, a potentially hazardous cold food, in accordance with the 2001 US FDA *Food Code*. The subdivision was also amended to substitute “closed” for “dosed” to correct a typographical error in the original version.