

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 of the New York City Health Code (the “Health Code”).

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE (THE “DEPARTMENT”) WILL HOLD A PUBLIC HEARING ON THE PROPOSAL ON MONDAY, APRIL 26, 2010 FROM 2:00 P.M. TO 4:00 P.M. 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. FRIDAY, APRIL 23, 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 APRIL 12, 2010. REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 2:00 P.M. APRIL 26, 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., MONDAY, APRIL 26, 2010. ATTACHMENTS TO ONLINE COMMENTS MUST BE MAILED OR FAXED. COMMENTS RECEIVED AFTER APRIL 26, 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 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, served or distributed by food service establishments ("FSEs"), a broad category that includes restaurants, caterers (non-retail food processing establishments), mobile food vending units, and mechanical food dispensing devices. This proposal would add a new §81.10 to Article 81 of the Health Code allowing use of time as a public health control for maintaining the wholesomeness of ready-to-eat potentially hazardous foods.

Currently, Health Code §81.09 generally requires that all potentially hazardous foods be kept at temperatures below 41 degrees Fahrenheit, or above 140 degrees Fahrenheit, to retard the growth of pathogens, except during time needed for preparation. However, there are several prepared foods, including, most commonly, sushi rice, for which food service establishments most frequently request that the Department modify applicable Health Code temperature holding requirements, since such temperature requirements apparently adversely affect the palatability of such foods.

The Department proposes that the Board of Health amend Article 81 to establish a procedure for allowing certain potentially hazardous foods to be held at room temperature, by using time alone as public health control. The proposal also includes amending the definition of potentially hazardous food to include a reference to temperature control for safety (TCS), adds new potentially hazardous foods to the existing list, and defines a violation of the new use of time as a public health procedure as a violation of §81.09. The amended definition of potentially hazardous/temperature control for safety foods (PHF/TCS) considers whether or not time and temperature control is to be maintained to ensure the safety of the food product. This new definition takes into account pH, high water activity (A_w) and pH interaction, in determining whether or not a food will require temperature control to limit pathogen growth or toxin formation.

Recently, local and state regulatory authorities and the Centers for Disease Control and Prevention have identified an increase in the number of food borne outbreaks associated with foods that were typically considered not to be potentially hazardous¹. These foods include cooked vegetables, tomatoes, lettuce and spinach. Some melons and vegetables that have moderate pH and high A_w may be considered hazardous because of environmental conditions at

¹<http://www.fda.gov/Food/ScienceResearch/ResearchAreas/SafePracticesforFoodProcesses/ucm090977.h> Analysis and Evaluation of Preventive Control Measures for the Control and Reduction/Elimination of Microbial Hazards on Fresh and Fresh-Cut Produce, Chapter IV. Outbreaks Associated with Fresh and Fresh-Cut Produce. Incidence, Growth, and Survival of Pathogens in Fresh and Fresh-Cut Produce, September 30, 2001.

the places where they are grown or they may be rendered hazardous by how they are processed. The amended definition of “potentially hazardous foods” would include foods of plant origin that have been cooked, cut melons, sliced raw tomatoes, and raw bean or seed sprouts. *Salmonella* can enter fruits and vegetables through roots, flowers, small cracks in the skin, the stem scar, or the plant itself.² The new Health Code definition is consistent with §1-202.10 of the USFDA 2009 *Model Food Code* (“*Food Code*”), and is consistent with current provisions of Subpart 14 of the Sanitary Code. The definition includes a provision that a food does not need temperature control when a food service establishment operator can demonstrate that the combined effect of Aw and pH is such as to render the food non potentially hazardous. In such cases, the Department will be guided by evidence from either a certified laboratory test or published scientific research.

Food Code §3-501.19 provides that ready to eat potentially hazardous food (“RTE PHF”) may be held without temperature control for up to four hours, at which time it must be consumed, or after which it must be discarded. The *Food Code* also contains guidelines enabling establishments to hold foods taken from required cold holding temperatures for up to six hours, providing that the temperature of the individual food items do not exceed 70 degrees Fahrenheit (21 degrees Celsius). The New York State Department of Health has also published guidelines enabling use of time as a sole public health control.

If an establishment wishes to hold food following removal from temperature control for up to four hours, the food will have to be labeled with the initial temperature, the time it was removed from temperature control, and a time four hours following that, which will be the time at which food may last be consumed, and after which must be discarded. If an establishment wishes to hold food following removal from cold temperature control for up to six hours, an additional requirement will be imposed that the food’s temperature be monitored every two hours, and be recorded on the food’s label. In such cases, the label will also note the time at which it was removed from cold control, and a time six hours following that, which will be the time at which food may last be consumed, and after which must be discarded. The labels would provide documentation that temperatures of cold RTE PHF have not been allowed to exceed 70 degrees Fahrenheit (21 degrees Celsius). This additional public health control is documentation that the holding time and temperature of such food does not exceed the growth periods for *L. monocytogenes* and *C. perfringens*. All FSEs found out of compliance with these provisions will be cited for violation of Health Code §81.09, which defines hot and cold holding requirements for PHF at required temperatures.

The provision would also prohibit use of time as a sole public health control for certain foods, and certain places of sale and distribution. Time and temperature controls (§81.09) will continue to be required for sales of hot and cold foods at self-service salad bars or buffets; RTE PHF intended for takeout or delivery; mobile food vending; and street fairs. And because of their potential for rapid *Salmonella* growth, eggs cannot be held for extended periods at room temperature before service to certain highly susceptible, i.e., immunocompromised, persons, consistent with the FDA *Food Code*, and State guidance.

The Department is also requesting that the Board amend the definition of temporary food service establishment in §81.03 (ff) to conform to the new definition applicable to such establishments in the recently recodified Article 88 of the Code.

²<http://www.fda.gov/Food/ScienceResearch/ResearchAreas/SafePracticesforFoodProcesses/ucm094141.htm> . Evaluation and Definition of Potentially Hazardous Foods, Chapter 3. Factors that Influence Microbial Growth, September 30, 2001.

STATEMENT PURSUANT TO SECTION 1042 – REGULATORY AGENDA

The proposed amendment was not included in the Department’s Regulatory Agenda because it resulted from a recent analysis by the Department.

The proposal is as follows:

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

RESOLVED, that subdivisions (y) and (ff) of §81.03 of Article 81 of the New York City Health Code be, and the same hereby are, amended, to be printed together with explanatory notes, as follows:

§81.03 Definitions.

* * *

(y) Potentially hazardous food (PHF) or temperature controlled for safety (TCS) food means any food that consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, crustacea and other aquatic animals, [cooked potato, cooked rice,] foods of plant origin that have been heat treated; garlic in oil mixtures that support the growth of Clostridium botulinum; leafy greens, cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxins formation; raw bean or seed sprouts; or other [ingredients] foods in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms, or growth of C. botulinum. The term does not include food with a water activity (a_w) value of 0.85 or less, or a hydrogen ion concentration (pH) level of 4.6 or below. A food may be deemed not potentially hazardous because of the combined effect of a_w and pH other than as specified above if supported by a food product assessment acceptable to the Department.

* * *

(ff) Temporary food service establishment means [any] a food service establishment as defined in Article 88 of this Code. [that operates at a fixed location for a temporary period of time, not to exceed 14 consecutive days, in connection with a single event or celebration such as a fair, carnival, circus, public exhibition, advertising campaign or business promotion, religious or

fraternal organization function or transitory gathering.] Additional to the provisions of this Article, a temporary food service establishment shall be operated at all times in compliance with the provisions of Article 88 and all applicable provisions of this Code.

* * *

Notes: Subdivision (t) was amended by resolution adopted on XXX to incorporate the term “temperature controlled for safety” foods consistent with the 2009 FDA *Model Food Code*, and subdivision (ff) was amended to reflect the definition of a temporary food service establishment in Article 88 of the Code.

RESOLVED, that Article 81 of the New York City Health Code be, and the same hereby is, amended by adding a new §81.10, to be printed together with explanatory notes, as follows:

§81.10. Time as a Public Health Control.

(a) Use of time controls. Food service establishments may use time as the sole public health control, rather than using time in conjunction with temperature, for holding potentially hazardous ready-to-eat foods to be consumed on site, only in accordance with the provisions of this section. Such foods shall not be returned to temperature control at any time with the intent to extend their use.

(1) Food shall have an initial temperature of 41 degrees Fahrenheit (5 degrees Celsius) or less when removed from cold holding temperature control, or 140 degrees Fahrenheit (60 degrees Celsius) when removed from hot holding temperature control.

(2) After cold holding. Foods taken from cold holding temperatures at or below 41 degrees Fahrenheit (5 degrees Celsius) may be kept for no more than four hours without any other controls. Foods taken from cold holding temperatures at or below 41 degrees Fahrenheit (5 degrees Celsius) may be kept for no more than six hours provided that the temperature of the food is recorded every two hours on the food’s label and the food temperature does not reach 70 degrees Fahrenheit (21 degrees Celsius) within such time period.

(3) After hot holding. Foods taken out of hot holding temperatures at or above 140 degrees Fahrenheit (60 degrees Celsius) may be held at ambient temperatures for no more than four hours after removal from temperature control.

(4) Labeling. All foods removed from temperature control in accordance with this section shall be labeled as follows.

(A) Four hour holding. Food to be held following removal from hot or cold temperature control for up to four hours requires a label that lists the initial temperature, the time it was removed from temperature control, and a time, four hours thereafter, which will be the time when food may last be consumed, after which it shall be discarded.

(B) Six hour holding. Food to be held following removal from cold temperature control for up to six hours requires a label that shall lists the initial temperature, the time it was removed from cold temperature control, and a time, six hours thereafter, which will be the time at which food may last be consumed, after which it shall be discarded. The label shall further record the time and temperature taken at a minimum of two hour intervals.

(C) Labels shall be kept until foods have been served or discarded.

(b) Limits on use of time as a public health control. Time shall not be used as the sole means of public health control, and §81.09 shall remain applicable to:

(1) Holding raw eggs prior to using such eggs in food prepared for (i) persons who may be at higher risk for food-borne illnesses, such as immunocompromised persons including residents or clients of senior centers, charitable feeding programs, adult day care programs, custodial care and health care facilities, and assisted living programs; (ii) infants and children in day care and pre-school programs; and (iii) pupils in primary and secondary schools.

(2) Preparation and holding of ready-to-eat potentially hazardous foods sold by or in (i) mobile food vending units; (ii) food vending machines; (iii) temporary food service establishments operating in accordance with Article 88 of this Code; (iv) self-service salad bars or buffets; or when intended for takeout or delivery.

(3) Preparation and holding of potentially hazardous foods consisting of: (i) aquatic animals, fish or molluscan shellfish and (ii) opened or packaged smoked or vacuum-packed food products.

Notes: Section 81.10 was added by resolution adopted on xxxx to authorize the use of time alone as a public health control instead of both time and temperature controls in holding certain potentially hazardous ready to eat foods.

RESOLVED, that the list of Section Headings in Article 81 of the New York City Health Code be, and the same hereby is, amended, to be printed together with explanatory notes, as follows:

ARTICLE 81

FOOD PREPARATION AND FOOD ESTABLISHMENTS

* * *

§81.10 Time as a public health control

* * *

Notes: Section 81.10 was added by resolution adopted on XXXX to authorize the Department to approve use of time alone as a public health control instead of using both time and temperature controls in handling certain potentially hazardous ready-to-eat foods.

S:\Gcounsel\Article 81 81.10 intention3.doc

3/4/10