

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF ADOPTION OF AMENDMENTS
TO ARTICLE 89 OF THE NEW YORK CITY HEALTH CODE

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 of intention to amend Article 89 (Mobile Food Vending) of the New York City Health Code (the “Health Code”) was published in the City Record on March 23, 2011 and a public hearing was held on the proposal on April 29, 2011. Two written comments were received and one of the commenters testified at the public hearing. In response to comments, the proposal was further amended. At its meeting on June 14, 2011, the Board of Health adopted the following resolution.

Statement of Basis and Purpose

Statutory Authority

These amendments to the New York City Health Code (the “Health Code”) are issued according to §§556, 558 and 1043 of the New York City Charter (the “Charter”).

- Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with authority to regulate all matters affecting health in the city of New York.
- Section 558(b) and (c) of the Charter empowers the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters over which the Department has authority.
- Section 1043 of the Charter gives the Department rulemaking powers.

Basis and purpose of the rule change

As part of a comprehensive review of the Health Code, the Board of Health repealed and recodified Article 89 by resolution adopted December 16, 2008. The recodified Article went into effect January 1, 2010. The Department is requesting that the Board further amend this Article to address three issues that arose after the recodified Article went into effect:

1. The preparation, holding and service of raw and cooked fish and shellfish on mobile food vending units, currently prohibited by subdivision (f) of §89.19 (“Food protection and safety”);
2. Prohibiting sales of raw meat from mobile food vending units; and
3. Clarifying Department enforcement procedures after a mobile food vendor has been issued an order to cease operating a vending unit in the street, pursuant to §89.29.

Amend §89.19 (f)

Article 89 (Mobile Food Vending) was repealed and recodified by resolution of the Board adopted at its December 16, 2008 meeting. Article 88 (Temporary Food Service Establishments) was also repealed and recodified by resolution adopted on December 17, 2009.

Both Article 88 and Article 89 regulate the sale and distribution of foods directly to consumers at places and events that usually occur on City streets.

Article 88 regulates such sales by temporary food service establishments at events of relatively limited duration such as flea markets or street fairs, whereas Article 89 regulates the year round or seasonal sale of food from mobile food vending units. Since it was amended in 2009, Article 88 restricts the sale of raw fish or shellfish at street fairs, flea markets and other events, but allows properly cooked fish or shellfish to be sold at such events. Article 89, however, prohibits the sale of all fish and other aquatic animal food products, whether raw or not, from mobile food vending units.

The Department believes that, when properly stored and prepared, most cooked fish and other aquatic animal food products may be safely sold from either a temporary or a mobile vending establishment. Because there is therefore no basis for prohibiting the sale of properly cooked fish and other aquatic animal food products from mobile food vending units while allowing it for other street vendors, the Department is requesting that the Board amend paragraph (2) of subdivision (f) to permit the sale of properly cooked fish and other aquatic animal food products and to prohibit only the sale of raw fish and other raw aquatic animal food products from mobile vending units.

In addition, the Board is amending paragraph (1) (“Meat”) of subdivision (f) of §89.19 to prohibit the sale of raw meat in or from a mobile food vending unit. Currently, the Code prohibits butchering and dressing of raw meat on a mobile food vending unit, since such processing should only be done at a properly equipped Code-compliant commissary facility. Since mobile food vending units generally cannot be equipped with adequate storage and cleaning facilities, as are retail outlets that are inspected and licensed by the State Department of Agriculture and Markets, the sale of raw meat from such units is also being prohibited.

Amend §89.29

The Administrative Code of the City of New York (the “Administrative Code”) §17-317 (c) authorizes the pre-hearing suspension “for good cause” of a license or permit for up to ten days. If the Department determines before the ten days have elapsed that the permittee or operator of the suspended unit has corrected the infractions and that the infractions resulting in the suspension will not be repeated, the Department may allow the unit to resume operating. In such cases, the Department will meet with the vendor and offer to restore the permit and/or license seized before ten business days have elapsed provided that the vendor agrees to conditions intended to avoid recurrence of imminent or public health hazards. This is consistent with Department practice in dealing with similar conditions at food service establishments, and the original proposal sought to clarify §89.29 accordingly. The Department received a comment asking that the days for providing notice and a hearing be measured as calendar days, not business days, so that closures of units not be prolonged, and has amended the proposal accordingly. The commenter also requested guidance as to conditions constituting imminent health hazards warranting the removal of a decal. Since imminent health hazards are defined in Article 81 of the Health Code and Part 14 of the State Sanitary Code, they are not further defined in this section. However, a reference to these provisions has been added to subdivision (a) of this section.

STATEMENT PURSUANT TO CHARTER §1043.

This resolution was not included in the Department’s Regulatory Agenda for 2010-2011 because the need for the amendment was not known until after the Regulatory Agenda was promulgated.

The resolution is as follows:

Matter deleted is in brackets [].

New matter is underlined.

RESOLVED, that subdivision (f) of §89.19 of Article 89 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§89.19 Food protection and safety.

* * *

(f) *Prohibitions on sale or service of specific foods.* The Commissioner may by rule prohibit the sale or service of specific potentially hazardous foods or types of foods by mobile food vending units.

(1) *Meat.* All meat shall be processed and prepared for cooking at a mobile food commissary. No raw meat shall be sold, butchered, de-boned, dressed, or cut into portion size in or on a mobile food vending unit.

(2) *Fish and other aquatic animals.* No raw fish, raw shellfish, or any other raw food products consisting of or made with an aquatic animal, as defined in Article 81, shall be [prepared, stored,] held for service or sold from a mobile food vending unit. No raw fish, raw shellfish, or any other raw food products consisting of or made with an aquatic animal shall be cleaned, de-boned, dressed, scaled, eviscerated, or cut into portion sizes in or on a mobile food vending unit. Such food products may be cooked or reheated on a mobile food vending unit, provided that the food products have been commercially manufactured, or processed and prepared for cooking at a mobile food commissary or at another duly licensed and approved facility.

Notes: Paragraphs (1) and (2) of subdivision (f) of §89.19 were amended by resolution adopted on June 14, 2011 to clarify restrictions on preparation, service and sale of raw meat and raw fish, shellfish and other aquatic animal food products by mobile food unit vendors.

RESOLVED, that §89.29 of Article 89 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§89.29 Imminent health hazards.

(a) *Cessation of operations of a mobile food vending unit for imminent health hazards.* The Department may order any person operating a mobile food vending unit to immediately cease operations and serving food if the continued operation of the unit presents an imminent hazard to public health, as defined in Article 81 of this Code and Part 14 of the State Sanitary Code. Any person ordered to cease operations and service of food pursuant to this section shall comply with such order immediately[, and].

(b) Seizure of permit and license(s) authorized. When the Department determines that a vending unit is operating with imminent health hazards and has ordered the vendor to cease operation, the Department may seize the permit document, and the operator's license document and badge, and may apply a seal or sign to cover the mobile food vending unit's decal, or remove the decal, thereby suspending the license and/or permit.

(c) Suspension of the vendor's license and permit. In the event a license or permit has been seized, the licensee or permittee shall, within 10 [business] calendar days thereafter, be provided with a hearing as to why the cessation order should be rescinded and as to why the mobile food vendor's license and the permit for the unit should not be further suspended or revoked.

[(b) Seizure of permit and license(s) authorized. In such cases, the Department shall seize the permit document, and the operator's license document and badge, and may apply a seal or sign to cover the mobile food vending unit's decal, or remove the decal.

(c)](d) Restoration of the vendor's license or permit. If the Department determines within 10 [business] calendar days after issuing the cessation order that the imminent hazard resulting in the order has been corrected, and that public health will not be adversely affected by the resumed operation of the vending unit, the Department may return or reissue any license and/or permit that it has seized pursuant to this section. The Department may condition such return on the licensee and/or permittee agreeing to take any steps necessary so that the hazard does not recur.

(e) Operation prohibited until after hearing. [No] Unless otherwise provided in this section, no person shall operate the unit until there has been a hearing at OATH followed by expeditious adoption by the Commissioner of the report and recommendation of an OATH administrative law judge, setting forth a finding that continued operation of the unit by or on behalf of the permittee does not present a continuing hazard to the public health. If the administrative law judge finds

that continued operation of the mobile food vending unit by the permittee and the licensee presents a continuing hazard to the public health, the permittee and licensee may request that the Commissioner provide them with an opportunity to correct the violations and to demonstrate that they are willing and able to operate the mobile food vending unit in compliance with all applicable law. If such request is not received the Commissioner shall issue an order suspending or revoking the permittee's mobile food vending unit permit and license and the operator's mobile food vending license.

[(d)] (f) *Service of cessation order.* If the operator of the mobile food vending unit is not the permit holder, the order issued pursuant to this section shall be served upon the permittee by delivery to the person operating the mobile food vending unit, and by mailing the order to the permittee's address, as maintained in Department records, pursuant to §3.05 (b) of this Code.

[(e)] (g) *Cessation signs not to be removed.* Cessation signs or seals affixed by the Department shall not be removed except by order of the Commissioner or designee.

Notes: Section 89.29 was amended by resolution adopted on June 14, 2011, to provide for return of a vending license and permit to the operator of a mobile food vending unit within 10 calendar days, without scheduling a hearing, where the Department determines that although a vendor's conduct may be considered an "imminent health hazard," justifying the seizure of permit documents, the continuing operation of a mobile food vending unit will not endanger public health.