

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH

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

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 and §§47.37(d), 88.09(a), 115.17(d) and 115.27(a) 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 THURSDAY, APRIL 21, 2005 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 or (212) 442-8965 BY 5:00 P.M., WEDNESDAY, APRIL 20, 2005. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL WORKING 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 or (212) 442-8965 BY APRIL 7, 2005.

REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 4:00 P.M. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL MUST BE SUBMITTED TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, BY MAILING TO 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013, BY FAX TO (212) 788-4315, OR BY E-MAIL TO PUBLICCOMMENTS@HEALTH.NYC.GOV ON OR BEFORE 5:00 P.M. THURSDAY, APRIL 21, 2005.

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.

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 proposal would amend various Health Code provisions regarding the storage temperature of potentially hazardous cold foods, re-number a provision authorizing the Commissioner to impose more stringent requirements on a food service establishment to prevent the recurrence of imminent health hazards, and allow use of time as a public health control for ready-to-eat potentially hazardous foods.

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 proposed that it be repealed.

Time as a public health control

The Department is requesting the Board to amend the Health Code to add a new provision governing use of time as the public health control for holding potentially hazardous foods for which Health Code §81.09 currently prescribes both time and temperature controls. Health Code §81.09 currently specifies a range of required holding temperatures for all potentially hazardous foods. However, there are several processed foods, including, most commonly, sushi rice, homemade (i.e., not commercially manufactured) yogurt and garlic-infused oil, hanging poultry in Asian establishments, cooked pizza and related baked products (calzones), for which food service establishments have requested that the Department modify applicable Health Code temperature holding requirements, since such temperature requirements apparently adversely affect the palatability of such foods.

The USFDA 2001 *Model Food Code* includes standards and justification for “Time as a Public Health Control.” The FDA concludes that four hours holding of some ready-to-eat (“RTE”) potentially hazardous foods (“PHF”) within a specific range of ambient temperatures is sufficient in specific circumstances to prevent toxin formation and does not contribute to unacceptable bacterial growth. See, *Model Food Code*, 2001, Annex 3, §3-501.19.

With the advice of a subcommittee of its Food Safety Technical Advisory Committee, which consists of the representatives from the food service industry, FDA and NYSDOH, the Department has attempted to resolve food safety issues related to garlic-in-oil, hanging poultry and similar processes by adapting the FDA standard for using time as a sole public health control in a new provision in Article 81. This provision would be relatively simple to implement, although it would require the approval of the Department, and would be monitored by DOHMH field staff who conduct inspections. Other jurisdictions have adopted similar requirements, and California, Wisconsin, Massachusetts and Portland, Oregon have adopted the FDA recommended standards without modification.

Using time alone as a public health control means that when properly documented and implemented, RTE PHF may be offered for sale after being held at room temperature for up to four hours. All such foods must be properly cooked or cooled before they are held for such a four-hour period. Certain foods, however, such as hamburgers, or hot and cold foods sold at self-service salad bars, will continue to require both time and temperature treatment. The Department also will approve use of time only controls in commercial FSE’s that do not serve targeted populations at high risk for food borne illness.

Each RTE PHF item must be clearly labeled with the date and time that identify when the food is removed from safe temperatures. RTE PHF that is maintained by using time, as a public health control must be served or discarded within four hours of removal from safe temperatures. No RTE PHF that is held using time as a public health control is to be reused. All FSE’s improperly following DOHMH-approved written procedures will risk citation for violation of applicable Health Code provisions, and rescission of DOHMH approval.

Renumber §81.09 (j)

Finally, it is proposed that subdivision (j) of §81.09, which was included in the repeal and re-enactment of Article 81, effective September 1, 1996, be deleted from §81.09 and renumbered as a separate section of Article 81. This subdivision authorizes the Department to impose additional requirements on a food establishment whenever necessary to prevent the occurrence of “public health hazards.” To clarify the Department’s interpretation that notwithstanding the 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 Department proposes that the provision refer to prevention of recurrent “imminent health hazards,” a term which is defined in Article 81 and the Sanitary Code.

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 xxxx 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 xxxx 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 xxxx, 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 xxxx. 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 xxxx since its provisions, allowing refrigeration equipment incapable of maintaining required cold temperatures until July 1, 2003, are no longer applicable.

RESOLVED, that Article 81 of the New York City Health Code, as 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 §81.10, to be printed together with explanatory notes, as follows:

§81.10. Time as a Public Health Control

a. Food service establishments may use time as the sole public health control, rather than time in conjunction with temperature, for holding potentially hazardous ready-to-eat foods only in accordance with the provisions of this section.

b. Limits on use of time as a public health control.

(1) Time shall not be used as a means of public health control in preparation and holding of ready-to-eat potentially hazardous foods sold or distributed to (i) persons who may be at higher risk for food-borne illnesses, including but not limited to, food service establishments serving immunocompromised persons such as infants, residents or clients of senior centers, charitable feeding programs, adult day care programs, custodial care and health care facilities, and assisted living programs; (ii) children in day care and pre-school programs; and (iii) pupils in elementary and high schools.

(2) Time shall not be used as a means of public health control in preparation and holding of ready-to-eat potentially hazardous foods (i) sold by mobile food vendors; (ii) in food vending machines; (iii) at temporary street fairs operating in accordance with a permit issued pursuant to Article 88 of this Code; and (iv) in salad bars.

(3) Time shall not be used as a means of public health control in preparation and holding of the following potentially hazardous foods: (i) any foods containing ground or chopped (comminuted) meats; (ii) raw foods such as meats, fish or molluscan shellfish; and (iii) opened or packaged smoked or vacuum-packed food products.

c. Use of time alone as a public health control.

(1) Food shall be consumed within four (4) hours of removal from hot or cold temperature control or discarded.

(2) Food shall be clearly labeled with the date and time it is first removed from hot or cold temperature control and the time it is to be discarded.

(3) Food in unlabeled containers or packages, or where the time marked on the label indicates that food has been removed from hot or cold holding temperatures for more than four (4) hours, shall be discarded.

d. Written procedures and Department approval.

(1) No food service establishment shall use time as a public health control pursuant to this section unless it has received the approval of the Department for specific potentially hazardous ready-to-eat foods, and is operating in accordance with its written procedures and this section.

(2) Applications for approval shall include written procedures specifying how time controls will be implemented, and such applications and procedures shall be submitted to the Department and approval of the Department received before time controls may be implemented. Written procedures shall specify: (i) how foods will be labeled and (ii) the names and functional title of person(s) responsible for labeling foods and for discarding foods held in excess of four (4) hours. Approved written procedures shall be maintained in the establishment and updated as necessary to reflect personnel changes.

(3) Approval by the Department is discretionary. If the Department does not approve the procedures, or determines that an establishment is not in compliance with this section, or is not following its written procedures, such establishment shall be deemed in violation of applicable provisions of this Code.

Notes: Section 81.10 was added by resolution adopted on xxxx to authorize the Department to approve use by certain establishments of time alone as an alternative public health control to time and temperature controls in holding certain potentially hazardous ready to eat foods, such as rice for making sushi, hanging poultry, pizza and calzones. While these provisions are adapted from the 2001 US FDA *Food Code* analysis of potential bacterial contamination of foods within specified time periods, the Code contains additional protections prohibiting use of time controls alone when feeding immune compromised populations known to be at higher risk of contracting food borne illness.

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 xxxx 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, further amended, to be printed together with explanatory notes, as follows:

ARTICLE 81

FOOD PREPARATION AND FOOD ESTABLISHMENTS

* * *

§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

* * *

§81.09 Food; temperature requirements

§81.10 Time as a public health control

* * *

Notes: Section 81.06 was added by resolution adopted on XXXX, 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.

Section 81.10 was added by resolution adopted on XXXX to authorize the Department to approve use by certain establishments of time only as an alternative public health control to both time and temperature controls in handling certain potentially hazardous ready-to-eat 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 xxxx 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:

* * *

(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 xxxx 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 xxxx 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.

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