

## NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to Comment on the Proposed Amendment of Article 81 (Food Preparation and Food Establishments) of the New York City Health Code, found in Title 24 of the Rules of the City of New York.
- Date/Time:** July 24, 2012 / 1 P.M. to 3 P.M.
- Location:** New York City Department of Health and Mental Hygiene  
2 Gotham Center, Third Floor, Room 3-32  
42-09 28<sup>th</sup> Street  
Long Island City, NY 11101-4132
- Contact:** Rena Bryant  
(347) 396-6071

### Proposed Rule

The Department of Health and Mental Hygiene is proposing that the Board of Health amend Article 81 of the Health Code, related to the maximum size of sugary drinks and self-service beverage cups sold and offered in food service establishments. This proposal was not included in the Department's Regulatory Agenda for 2011-2012 because the Department did not anticipate this amendment at the time.

### Instructions

- Prior to the hearing, you may submit written comments about the proposed amendment by mail to

New York City Department of Health and Mental Hygiene  
Board of Health  
Office of the Secretary to the Board  
Attention: Rena Bryant  
2 Gotham Center, 14<sup>th</sup> Floor, Room 14-15, Box 31  
Long Island City, NY 11101-4132

or electronically through NYC RULES at <http://www.nyc.gov/html/nycrules> or by email to [RESOLUTIONCOMMENTS@HEALTH.NYC.GOV](mailto: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., on July 24, 2012.

- To request a sign language interpreter or other form of reasonable accommodation for a disability at the hearing, please contact Rena Bryant at the phone number shown above by July 10, 2012.
- Copies of written comments and a summary of oral comments received at the hearing will be available within a reasonable time after receipt between the hours of 9:00 A.M. and 5:00 P.M. at the

New York City Department of Health and Mental Hygiene  
Board of Health  
Office of the Secretary to the Board  
Attention: Rena Bryant  
2 Gotham Center, 14<sup>th</sup> Floor, Room 14-15, CN 31  
Long Island City, NY 11101-4132

## **Statement of Basis and Purpose**

### *Statutory Authority*

These proposed 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 authority of the Department of Health and Mental Hygiene (the “Department” or “DOHMH”) extends. Section 1043 grants the Department rule-making authority. The amendment is also proposed pursuant to the Department’s historic power to regulate restaurants and food safety in New York City.

### *Background*

The Charter provides the Department with broad jurisdiction to protect and promote the health of all New Yorkers. Regulation of food service establishments (“FSEs”), a category that includes restaurants, is a core public health function. The Department enforces provisions of the Health Code, the State Sanitary Code, Public Health Law and other applicable laws relating to food served directly to consumers throughout New York City. This includes regulation of food that is commercially prepared and sold by FSEs. The Department issues permits to and inspects all New York City FSEs, as defined in §81.03(s) and (aa) of the Health Code in an attempt to ensure safe and healthy dining options.

FSEs are an important source of food and beverages for New York City residents. An estimated one third of daily caloric intake comes from foods purchased and prepared outside of the home, and this proportion is increasing.<sup>1</sup> By eating out more, people are more likely to be exposed to oversized beverages sold at restaurants.<sup>2,3</sup>

### ***Obesity is epidemic among New Yorkers and the consequences are devastating***

More than half of New York City adults (58%) are now overweight or obese<sup>4</sup> and more than 20% of the City’s public school children (K-8) are obese.<sup>5</sup> Obesity is a risk factor for heart disease, cancer and diabetes.<sup>6</sup> Adults who are obese are almost twice as likely to develop diabetes as those who are overweight and almost three times as likely as those who are at a healthy weight.<sup>7</sup> Childhood obesity leads to serious health consequences, including cardiovascular disease and increased mortality.<sup>8</sup> As a result of obesity, today’s children may have a shorter life expectancy than their parents.<sup>9</sup>

### ***Sugary drinks are a leading driver of the obesity epidemic and are associated with dangerous chronic diseases***

Americans consume 200-300 more calories daily than 30 years ago, with the largest single increase due to sugary drinks.<sup>10</sup> Sugary drinks are also the largest source of added sugar in the average American’s diet, comprising nearly 43% of added sugar intake.<sup>11</sup> A 20 ounce sugary drink can contain the equivalent of 16 packets of sugar. These drinks are associated with long-term weight gain among both adults and youth.<sup>12,13,14,15</sup> With every additional sugary beverage a child drinks daily, his/her odds of becoming obese increase by 60%.<sup>16</sup> In addition, high consumption of sugary drinks is linked to an increased risk of heart disease and diabetes.<sup>17,18,19</sup> These drinks are now the primary source of added sugars (sugars and syrups that are added to foods or beverages when they are processed or prepared) in children’s diets.<sup>20</sup> Sugar intake has also been linked to heart disease risk factors in adolescents.<sup>21</sup>

### ***New Yorkers are consuming excessive quantities of sugary drinks***

Sugary drink consumption among New York City residents is alarming. More than 30% of adult New Yorkers report drinking one or more sugary drink per day.<sup>22</sup> These rates are much higher in minority and low-income communities. Many residents in low-income neighborhoods report drinking 4 or more sugary drinks daily.<sup>23</sup> New York City youth are also consuming these drinks in excessive quantities: in 2009,

44% of NYC children aged 6 to 12 years consumed more than 1 sugary drink per day,<sup>24</sup> and 26% of public high school students consumed 2 or more sugary drinks per day in the last week.<sup>25</sup>

***Portion sizes are increasing – and bigger portions lead to greater consumption of sugary drinks***

The trend toward larger portion sizes has occurred in parallel with increases in the prevalence of obesity and people being overweight.<sup>26</sup> Serving sizes of manufacturer-packaged carbonated soft drinks have exploded – the original Coca-Cola bottle size was 6.5 fluid ounces, which is significantly smaller than the vast majority of sizes for sale today.<sup>27</sup> Fountain drink portions at restaurants are also growing - beverage portion sizes at McDonald’s have increased 457% since 1955, from 7 fluid ounces to 32 fluid ounces.<sup>28,29</sup> Some quick-service chain restaurants in New York City offer individual drink sizes up to 64 fluid ounces. A sugary drink of this size contains 780 calories and 54 teaspoons of sugar, and no nutrients.

Larger portions lead to increased consumption and calorie intake.<sup>30,31,32</sup> When people are given larger portions they unknowingly consume more and do not experience an increased sense of satiety. In one study, people eating soup from self-refilling bowls ate 73% more, without perceiving that they had eaten more or feeling more full.<sup>33</sup> The same holds true with beverages. When served more fluid ounces of a beverage, people drink more without decreasing the amount of food they eat or experiencing a difference in “fullness” or thirst.<sup>34</sup>

***Proposed Rule***

To address the obesity epidemic among the City’s residents, the Department proposes that the Board of Health amend Article 81. The proposed changes would establish maximum sizes for beverages offered and sold in FSEs. The limits would apply to cups and containers used for sugary drinks. The limits would also apply to all self-service cups and containers, regardless of intended contents. Without such limitation, a self-service cup exceeding the maximum size could be used for either non-sugary or sugary drinks. This rule will not limit the amount of sweetener a customer may add to his or her own drink.

The rule will not take effect until 6 months after adoption by the Board of Health. It establishes a fine of \$200 for each occasion that it is violated. By addressing the increasing size of sugary drinks and reacquainting New Yorkers with more appropriate portion sizes, the City is taking an important step in reducing sugary drink consumption and combating obesity and its resulting morbidity and mortality.

The following specific amendments are proposed:

- *Set a maximum size for sugary drinks:* Non-alcoholic sugary drinks may not be offered or sold in cups or containers that can contain more than 16 fluid ounces.
- *Set a maximum size for self-service cups:* Food service establishments may not offer or sell self-service cups that can contain more than 16 fluid ounces.
- *Set a fine for violations:* No more than two hundred dollars for each violation as described in the proposed rule.

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<sup>1</sup> Guthrie JF, Lin BH, Frazao E. Role of food prepared away from home in the American diet, 1977-78 versus 1994-96: Changes and consequences. *Society for Nutrition Education* 2002; 34:140-50.

<sup>2</sup> Guthrie JF et al. (2002)

<sup>3</sup> National Restaurant Association (NRA). *Industry at a Glance*. 2005.

<sup>4</sup> New York City Department of Health and Mental Hygiene. *Community Health Survey* 2010.

<sup>5</sup> Centers for Disease Control and Prevention. Obesity in K-8 students – New York City, 2006-07 to 2010-11 school years. *Morbidity and Mortality Weekly Report* 2011; 60(49): 1673-78.

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- <sup>6</sup> National Institutes of Health. Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: the Evidence Report. Bethesda, MD: National Institutes of Health, U.S. Department of Health and Human Services; 1998.
- <sup>7</sup> Narayan KMV, Boyle JP, Thompson TJ, Gregg EW, Williamson DF. Effect of BMI on lifetime risk for diabetes in the U.S. *Diabetes Care* 2007; 30(6):1562-66.
- <sup>8</sup> Han JC, Lawlor DA, Kimm SYS. Childhood obesity. *Lancet* 2010; 375:1737-48.
- <sup>9</sup> Olshansky SJ, Passaro DJ, Hershow RC, Layden J, Carnes BA, Brody J, Hayflick L, Butler RN, Allison DB, Ludwig DS. A potential decline in life expectancy in the United States in the 21<sup>st</sup> century. *New England Journal of Medicine* 2005; 352(11): 1138-45.
- <sup>10</sup> Finkelstein EA, Ruhm CJ, Kosa KM. Economic causes and consequences of obesity. *Annual Review of Public Health* 2005; 26:239-57.
- <sup>11</sup> Guthrie JF, Morton JF. Food sources of added sweeteners in the diets of Americans. *Journal of the American Dietetic Association* 2000; 100:43-51.
- <sup>12</sup> Malik VS, Schulze MB, Hu FB. Intake of sugar-sweetened beverages and weight gain: A systematic review. *American Journal of Clinical Nutrition* 2006; 84:274-88.
- <sup>13</sup> Mozaffarian D, Hao T, Rimm EB, Willett WC, Hu FB. Changes in diet and lifestyle and long-term weight gain in women and men. *New England Journal of Medicine* 2011; 364(25): 2392-404.
- <sup>14</sup> Malik VS, Popkin BM, Bray GA, Despres J-P, Hu FB. Sugar-sweetened beverages, obesity, type 2 diabetes mellitus, and cardiovascular disease risk. *Circulation* 2010; 121(11):1356-64.
- <sup>15</sup> Schulze MB, Manson JE, Ludwig DS, Colditz GA, Stampfer MJ, Willett WC, Hu FB. Sugar-sweetened beverages, weight gain, and incidence of type 2 diabetes in young and middle-aged women. *Journal of the American Medical Association* 2004; 292(8):927-34.
- <sup>16</sup> Ludwig DS, Peterson KE, Gortmaker SL. Relation between consumption of sugar-sweetened drinks and childhood obesity: A prospective, observational analysis. *Lancet* 2001; 357:505-8.
- <sup>17</sup> Fung TT, Malik V, Rexrode KM, Manson JE, Willett WC, Hu FB. Sweetened beverage consumption and risk of coronary heart disease in woman. *American Journal of Clinical Nutrition*. 2009; 89:1037-42.
- <sup>18</sup> Malik VS et al. (2010)
- <sup>19</sup> Schulze MB et al. (2004)
- <sup>20</sup> Reedy J, Krebs-Smith SM. Dietary sources of energy, solid fats, and added sugars among children and adolescents in the United States. *Journal of the American Dietetic Association* 2010; 110:1477-84.
- <sup>21</sup> Welsh JA, Sharma A, Cunningham SA, Vos MB. Consumption of added sugars and indicators of cardiovascular disease risk among US adolescents. *Circulation* 2011; 123:249-57.
- <sup>22</sup> New York City Department of Health and Mental Hygiene. Community Health Survey 2010.
- <sup>23</sup> Alberti P, Noyes P. Sugary drinks: How much do we consume? New York, NY. New York City Department of Health and Mental Hygiene, 2011.
- <sup>24</sup> New York City Department of Health and Mental Hygiene. Child Health Survey 2009.
- <sup>25</sup> New York City Department of Health and Mental Hygiene. Youth Risk Behavior Survey 2009.
- <sup>26</sup> Young LR, Nestle M. The contribution of expanding portion sizes to the US obesity epidemic. *American Journal of Public Health* 2002; 92(2):246-49.
- <sup>27</sup> Retrieved on 5/7/2012 from: <http://www.thecoca-colacompany.com/ourcompany/historybottling.html>.
- <sup>28</sup> Young LR, Nestle M. Portion sizes and obesity: Responses of fast-food companies. *Journal of Public Health Policy* 2007; 28:238-48.
- <sup>29</sup> Retrieved on January 6, 2012 from: <http://nutrition.mcdonalds.com/getnutrition/nutritionfacts.pdf>.
- <sup>30</sup> Wansink B, Painter JE, North J. Bottomless bowls: Why visual cues of portion size may influence intake. *Obesity Research* 2005; 13(1): 93-100.
- <sup>31</sup> Flood JE, Roe LS, Rolls BJ. The effect of increased beverage portion size on energy intake at a meal. *Journal of the American Dietetic Association* 2006; 106:1984-90.
- <sup>32</sup> Nielsen SJ, Popkin BM. Patterns and trends in food portion sizes, 1977-1998. *Journal of the American Medical Association* 2003; 289(4): 450-53.
- <sup>33</sup> Wansink B et al. (2005)
- <sup>34</sup> Flood JE et al. (2006)

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the text below, unless otherwise specified or unless the context clearly indicates otherwise.

New text is underlined; deleted text is in [ ] brackets.

**RESOLVED, that Article 81 of the New York City Health Code, found in Title 24 of the Rules of the City of New York is being amended by adding a new §81.53 and will be printed together with explanatory notes, to read as follows:**

**§ 81.53 Maximum Beverage Size**

*(a) Definition of terms used in this section.*

*(1) Sugary drink means a carbonated or non-carbonated beverage that:*

*(A) is non-alcoholic;*

*(B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener;*

*(C) has greater than 25 calories per 8 fluid ounces of beverage; and*

*(D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.*

*The volume of milk or milk substitute in a beverage will be presumed to be less than or equal to 50 percent unless proven otherwise by the food service establishment serving it.*

*(2) Milk substitute means any liquid that is soy-based and is intended by its manufacturer to be a substitute for milk.*

*(3) Self-service cup means a cup or container provided by a food service establishment that is filled with a beverage by the customer.*

*(b) Sugary drinks. A food service establishment may not sell or offer to sell a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.*

*(c) Self-service cups. A food service establishment may not sell or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces.*

*(d) Violations of this section. Notwithstanding the fines, penalties, and forfeitures outlined in Article 3 of this Code, a food service establishment determined to have violated this section will be subject to a fine of*

no more than two hundred dollars for each violation and no more than one violation of this section may be cited at each inspection of a food service establishment.

*Notes: §81.53 was added to Article 81 by resolution adopted XXX to establish maximum sizes for sugary drinks and self-service beverage cups sold and offered in FSEs. People tend to consume more calories at meals that include large beverage sizes. Its intent is to address the supersize trend and reacquaint New Yorkers with smaller portion sizes, leading to a reduction in consumption of sugary drinks among New York City residents.*

**RESOLVED, that the Table of Section Headings of Article 81 of the New York City Health Code, found in Title 24 of the Rules of the City of New York is being amended, to read as follows:**

ARTICLE 81

FOOD PREPARATION AND FOOD ESTABLISHMENTS

§81.01 **Scope.**

\* \* \*

§81.53 **Maximum Beverage Size.**

§81.55 **Modification by Commissioner.**

**NEW YORK CITY LAW DEPARTMENT  
DIVISION OF LEGAL COUNSEL  
100 CHURCH STREET  
NEW YORK, NY 10007  
212-788-1087**

**CERTIFICATION PURSUANT TO  
CHARTER §1043(d)**

**RULE TITLE: Serving Sizes in Food Service Establishments (Health Code Article 81)**

**REFERENCE NUMBER: 2012 RG 047**

**RULEMAKING AGENCY: Department of Health and Mental Hygiene**

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN  
Acting Corporation Counsel

Date: June 5, 2012

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS  
253 BROADWAY, 10<sup>th</sup> FLOOR  
NEW YORK, NY 10007  
212-788-1400**

**CERTIFICATION / ANALYSIS  
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE:** Serving Sizes in Food Service Establishments (Health Code Article 81)

**REFERENCE NUMBER:** DOHMH-18

**RULEMAKING AGENCY:** Department of Health and Mental Hygiene

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because a cure period would pose a risk to public health.

/s/ Ruby B. Choi  
Mayor's Office of Operations

6/5/2012  
Date