

DEPARTMENT OF HEALTH AND MENTAL HYGIENE  
COMMISSIONER OF HEALTH AND MENTAL HYGIENE

**Rules of the City of New York, Title 24, Chapter 10: Smoking Under the New York City Smoke-Free Air Act (*Unofficial Version*)\***

**§10-01 Definitions and Construction of Words and Terms.**

(a) **Act.** “Act” shall mean the Smoke-Free Air Act, as provided in Chapter 5, Title 17 of the New York City Administrative Code (the “Administrative Code”), as amended by Local Law No. 47 of 2002 or subdivision (1) of §1399-n of the New York State Public Health Law, whichever is more inclusive.

(b) **Bar.** “Bar” shall have the meaning set forth in § 17-502(b) of the Act or subdivision (1) of §1399-n of the New York State Public Health Law, whichever is more inclusive.

(c) **Commissioner.** “Commissioner” shall mean the Commissioner of the New York City Department of Health and Mental Hygiene.

(d) **Compensation.** “Compensation” shall mean any money, gratuities, privileges or benefits received in return for work performed or services rendered.

(e) **Department.** “Department” shall mean the New York City Department of Health and Mental Hygiene.

(f) **Employee.** “Employee” shall mean an employee as defined in §17-502 (h) of the Act. There shall be a rebuttable presumption that any person who performs work or renders services for compensation, for any period(s) of time, at the direction of an operator of an entity or facility which is subject to the provisions of the Act, is an employee of such entity.

(g) **Enclosed room.** “Enclosed room” shall mean a room which is completely enclosed on all sides by solid floor-to-ceiling walls, windows, or solid floor-to-ceiling partitions, and which complies with all applicable Building Code and Fire Code requirements. Any such windows in such room shall remain closed while people are smoking in the room unless the windows open to

*\* Note: This version of Chapter 10 combines the originally adopted rules and the amendments thereto.*

the exterior. Any doors shall remain closed while people are smoking in the room except to the extent necessary to permit ingress and egress to and from such room. Such room shall be ventilated in a manner that shall prevent emission of smoke to any other interior part of the facility.

(h) **Entrance.** “Entrance” shall mean every means of entering or exiting a room, facility, or premises ordinarily used by the public and/or employees.

(i) **Incidental service and/or sales of food and/or drink.** For the purpose of §10-04 of these rules, service of food and/or drink shall be deemed “incidental” to the purpose of promoting and sampling tobacco products, where such food and/or drink is pre-packaged or requires no on-site preparation or monitoring, and there is no service or self-service of potentially hazardous foods, as defined in §81.09 of the New York City Health Code, within the enclosed room in which the event is held.

(j) **Membership association.** “Membership association” shall have the meaning set forth in §17-502 (ff) of the Act.

(k) **On-site agent.** “On-site agent” shall mean an employee designated by a building operator, owner or manager to inform persons that smoking is prohibited on the building premises.

(l) **Open for business.** For the purpose of §23 of Local Law 47 of 2002 and §10-02(c) of these rules, the term “open for business” shall include any time that employees are present in such establishment or any time the establishment is open to the public.

(m) **Overhang.** “Overhang” shall mean any roof, ceiling or other complete or partial covering of, or over, an outdoor dining area of a restaurant.

(n) **Outdoor dining area.** “Outdoor dining area” shall mean any patio, courtyard, sidewalk café, backyard or other outdoor area of a restaurant where food or drink is served.

(o) **Owner operated bar.** “Owner operated bar” shall have the meaning set forth in §17-502 (gg) of the Act.

(p) **Permittee.** “Permittee” shall mean a person who holds a valid permit issued pursuant to Articles 5 and 81 of the New York City Health Code to operate a bar, restaurant or other food service establishment.

(q) **Place of employment.** “Place of employment” shall have the meaning set forth in §17-502(m) of the Act.

(r) **Principal owner.** “Principal owner” shall have the meaning set forth in §17-502(hh) of the Act.

(s) **Rules.** “Rules” shall mean Chapter 10 of Title 24 of the Rules of the City of New York.

(t) **Separate smoking room.** “Separate smoking room,” as defined in §17-502 (w) of the Act, shall mean a room constructed in accordance with the Act and Appendix A of these rules.

(u) **State law.** “State law” shall mean Article 13-E of the Public Health Law of the State of New York (“Regulation of Smoking in Certain Public Areas”), as amended.

(v) **Tobacco bar.** “Tobacco bar” shall have the meaning set forth in §17-502 (jj) of the Act.

#### **§10-02 Smoking Prohibited.**

(a) Except as otherwise specifically provided in the Act or in these rules, or in other applicable law, smoking shall be prohibited in all indoor areas of all public places and places of employment, and certain outdoor areas in accordance with §§17-503 (a) and 17-504 of the Act, and other applicable law, and all enclosed areas regulated by the State law, the Act and these rules, including areas which have any full or partial overhead ceiling, roof or other covering.

(b) Smoking shall be prohibited in a tobacco business, as defined by §17-502 (aa) of the Act; except that smoking shall be permitted on no more than two floors of a building occupied by such tobacco business, and only within areas of such floors which are designated by such business for the purpose of testing or development of tobacco or tobacco products and only if such tobacco business has applied for and has been issued a waiver of the State law prohibition

on smoking in such premises, in accordance with §1399-u of the State law and §10-15 of these rules.

(c) In accordance with §23 of Local Law 47 of 2002, smoking by the owner or his or her family members is permitted in an establishment regulated by the Act when such establishment is not open for business.

**§10-03 Smoking Not Regulated.** Smoking is not regulated in:

(a) Private residences, provided, however, that smoking is prohibited in private residences housing child day care centers, as defined in §17-502 (d) of the Act, or health care facilities, in accordance with §17-505 of the Act;

(b) Hotel and motel guest rooms;

(c) Private automobiles; and

(d) Retail tobacco stores, as defined in §17-502 (u) of the Act.

**§10-04. Tobacco Promotion Public Events.** Smoking may be permitted in an enclosed room, as defined in §10-01(g) of these rules, in a restaurant, bar, cabaret, catering hall, convention hall, hotel or motel conference room, or other such similar facility, where smoking is otherwise prohibited, when the public is invited to attend a specific event held for the primary purpose of promoting and sampling tobacco products, provided that:

(a) Notice of the public event shall be provided to the Department on forms furnished by the Department. Completed forms shall be received by the Department no later than two weeks prior to the event.

(i) The Department may charge a fee not to exceed \$100.00 per notice.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: “SMOKING PERMITTED AT THIS EVENT. NOTICE OF THIS EVENT HAS BEEN FILED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT.

(b) Service of food and drink shall be incidental to the promotion and sampling of tobacco products.

(c) If tobacco products are to be distributed at the event for sampling, such distribution shall be in compliance with all laws and rules relating to the distribution of tobacco products, including but not limited to §§17-176, 17-618 and 20-202 of the Administrative Code and §1399-bb of the Public Health Law.

(d) No such facility shall be authorized to permit smoking pursuant to this section on more than two (2) days in any calendar year unless such facility has applied for and has been issued a waiver of the State law, in accordance with §1399-u of the State law and §10-15 of these rules, allowing such events to be held in any facility on no more than five (5) days in any calendar year.

**§10-05. Enclosed rooms for patients of certain residential health care facilities and day treatment programs.** Smoking may be permitted in an enclosed room, as defined in §10-01(g) of these rules, in certain residential health care facilities offering health related services, as defined in §17-502 (q) and (dd) of the Act, and facilities providing day treatment programs, as defined in §17-502 (cc) of the Act, which rooms have been designated for smoking by patients, in accordance with the following terms and conditions:

(a) Such rooms shall comply with all applicable Building Code and Fire Code requirements and shall have the prior approval of the New York City Fire Department and, on request of any person authorized to enforce the Act, the operator or person in charge of the facility shall make available for inspection the most recent inspection report from the Fire Department showing such approval.

(b) No persons other than patients of such facilities shall be allowed to smoke in such rooms. (c) signs shall be posted in accordance with §10-12 of these rules and shall state: “SMOKING PERMITTED. IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT, ONLY PATIENTS OF THIS FACILITY MAY SMOKE IN THIS ROOM.”

(d) In addition, operators of residential health care facilities defined in §17-502(q) of the Act, which are prohibited by the State law from allowing smoking on premises under their management or control, may apply to the Department for a waiver of the State law pursuant to §10-15 of these rules. If a waiver of the State law is granted, such rooms shall be constructed and operated in accordance with subsections (a), (b) and (c) of this section.

**§10-06. Owner operated bars.** Smoking shall be prohibited in owner operated bars, as defined in §17-502 (gg) of the Act and §10-01 of these rules, except in accordance with the following terms and conditions:

(a) There shall be no smoking in the premises of any entity alleging eligibility to register as an owner operated bar until application for a waiver of the State law and for registration have been submitted and the Department has granted a waiver of the State law prohibition against smoking in such premises and notified the applicant that the Department has approved the application for registration. The Department shall review all applications submitted and shall notify each applicant within a reasonable time after receipt of the applications as to whether a waiver is being granted and if such application for registration has been approved or denied, provided all information requested has been submitted.

(b) Registrations and waivers shall not be transferable. Any change in ownership of an owner operated bar shall automatically void such registration and waiver.

(c) Applications for waivers shall be submitted in accordance with §10-15 of these rules. Applications for registration shall be submitted on forms provided by the Department, and shall be supported by such documentation as the Department may require, to demonstrate the eligibility of the bar for registration as an owner operated bar. Such submissions shall include, but not be limited to, copies of the original and current applications for a license submitted to the State Liquor Authority, copies of tax returns filed with the state and federal governments, including W-2's and 1099 forms issued to persons working in or who render services to the bar, for such periods of time as the Department may require, and copies of insurance policies in force at the time of

application. The owner operator shall be a permittee who holds a currently valid permit issued by the Commissioner pursuant to Articles 5 and 81 of the New York City Health Code. The Department shall afford all documents submitted such confidentiality as may be provided by applicable law.

(d) Registrations shall expire one (1) year from the date the Department issues its approval of such registration. Applications for annual re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application for registration.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: "SMOKING PERMITTED. THIS IS AN OWNER OPERATED BAR WHICH IS REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT."

(e) Copies of the current registration and the waiver of the State law shall, on request, be made available to any person authorized to enforce the Act.

(f) The Department's determinations about any applications for registration as an owner operated bar shall be "final agency determinations."

**§10-07. Tobacco bars.** Smoking shall be permitted in tobacco bars, as defined in §17-502 (jj) of the Act and §10-01 of these rules, which were in existence in the calendar year ending December 31, 2001, and in which ten (10) or more percent of the bar's total gross annual income was derived from the on-site sale of tobacco products and rental of humidors, in accordance with the following terms and conditions:

(a) The applicant for registration shall show that the tobacco bar has been operated pursuant to a permit issued by the Commissioner in accordance with Articles 5 and 81 of the New York City Health Code by the current and any prior owner since the calendar year ending December 31, 2001.

(b) Applications to register shall be submitted on forms provided by the Department with such supporting documentation as the Department may require, including but not limited to, copies of tax returns filed with the state and federal governments for such periods of time as the Department may require; copies of tax returns, reports, or other proof submitted to demonstrate compliance with all applicable federal, State and local laws governing the taxation, sale and distribution of tobacco products; and a current retail license to sell tobacco products issued pursuant to §20-202 of the Administrative Code by the Department of Consumer Affairs; other documentation demonstrating that ten (10) or more percent of the bar's total gross annual income was derived from the on-site sale of tobacco products and rental of humidors; architectural or engineering plans showing the size of the premises occupied by the bar on the date of application for registration; and copies of leases in effect at the time of the initial and annual registration. The Department shall afford such documents such confidentiality as may be provided by applicable law.

(c) Any change in permittee shall require notice to the Department, in writing, no later than ten (10) business days prior to any change in permittee.

(d) Any change in location or increase in the size of an existing tobacco bar shall be a violation of these rules and grounds for revocation of the registration of the bar. The

permittee shall notify the Department, in writing, no later than ten (10) business days prior to any change in location or increase in the size of an existing tobacco bar.

(e) Registrations shall not be transferable.

(f) Registrations shall expire one (1) year from the date the Department issues its approval of such registration. Applications for annual re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state: “SMOKING PERMITTED. THIS IS A TOBACCO BAR REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT.”

(g) Smoking shall be prohibited in any entity alleging eligibility to register as a tobacco bar until an application for registration has been submitted and the Department has notified the applicant that the Department has approved such application. The Department shall review the application submitted and shall notify the applicant within forty-five (45) days as to whether such application has been approved or has been denied, provided all information requested has been submitted. If the Department determines, upon review of the documents submitted, and/or upon investigation, that such applicant does not qualify for registration in accordance with the definitions of the Act and these rules, it shall notify the applicant of this determination.

(h) A copy of the current registration shall, on request, be made available to any person authorized to enforce the Act.

(i) The Department’s determination about the application for registration of any tobacco bar shall be a “final agency determination.”

**§10-08. Membership associations.** Smoking may be permitted in not-for-profit membership associations, as defined in §17-502 (ff) of the Act and §10-01 of these rules, in accordance with the following terms and conditions:

(a) An entity which believes itself to be a not-for-profit membership association shall apply to the Department to register to allow smoking on its premises by its members and their guests.

(b) The application to register shall be submitted to the Department on such forms as the Department provides, and shall include such documentation as the Department may require to demonstrate the eligibility of the entity for such registration. Such submissions shall include, but not be limited to, copies of the entity's by-laws, copies of tax returns filed with the state and federal governments for such periods of time as the Department may require; copies of all insurance policies covering the premises occupied by the entity; copies of documents filed with the Secretary of State and the Attorney General, if applicable, to demonstrate its status as a not-for-profit entity and purpose. The Department shall afford such documents such confidentiality as may be provided by applicable law.

(c) Registrations shall expire two (2) years from the date the Department issues its approval of such registration. Applications for re-registration shall be received by the Department no later than forty-five (45) days prior to their expiration date.

(i) The Department may charge a fee not to exceed \$100.00 for each application.

(ii) Signs shall be posted in accordance with §10-12 of these rules and shall state:  
“SMOKING PERMITTED. THIS IS A MEMBERSHIP ASSOCIATION WHICH IS REGISTERED WITH THE NEW YORK CITY DEPARTMENT OF HEALTH AND

MENTAL HYGIENE IN ACCORDANCE WITH THE NEW YORK CITY SMOKE-FREE AIR ACT.”

(d) The entity shall notify the Department, in writing, no later than ten (10) business days after any change in the employee information entered on the application for registration, or if any persons are engaged as “employees” to perform work or render any services on any premises controlled by the entity. It is a violation of these rules and grounds for revocation of the registration if the entity engages any employees to perform work or render any services on such premises.

(e) After September 26, 2003, smoking shall be prohibited in any entity alleging eligibility to register as a not-for-profit association until an application for registration has been submitted and the Department has notified the entity that the Department has approved such application. The Department shall review the application submitted and shall notify the entity within forty-five (45) days as to whether such application has been approved or has been denied, provided all information requested has been submitted. If the Department determines, upon review of the documents submitted, and/or upon investigation, that such entity does not qualify for registration in accordance with the definitions of the Act and these rules, it shall notify the entity of this determination.

(f) A copy of the current registration shall, on request, be made available to any person authorized to enforce the Act.

(g) The Department’s decision about whether an entity qualifies for registration shall be a “final agency determination.”

(h) Smoking in any indoor premises owned or operated by a membership association shall be limited to times when the association’s premises are being used only by its members and guests. “Members’ guests” shall not include members of the public invited

to attend events open to the public, including, but not limited to, bingo games, theatrical productions, carnivals, rummage sales, or similar events.

(i) The Commissioner may rescind the registration of a membership association which has been found in violation of subdivision (h) of this section more than three (3) times in any two-year period.

**§ 10-09. Separate Smoking Rooms in Bars.** Smoking shall be prohibited in separate smoking rooms, as defined in §17-502 (w) of the Act and §10-01 (u) of these rules, in bars, as defined in §17-502(b) of the Act and §10-01 (b) of these rules, except in accordance with the following terms and conditions:

(a) A permittee operating a bar who wishes to construct a separate smoking room shall apply to the Department for a waiver of the State law prohibition on smoking in such premises, in accordance with §1399-u of the State law and §10-15 of these rules. There shall be no separate smoking room in any bar unless the permittee operating the bar has been granted a waiver in response to an application filed with the Department.

(b) A permittee who has been granted a waiver pursuant to the State law shall construct a separate smoking rooms which shall conform to the specifications of §17-502 (w) of the Act and the standards found in Appendix A of these rules.

(c) The permittee shall obtain documentation demonstrating that the plans for construction and use of such a room comply with all applicable Building Code requirements, and shall, on request, submit such documentation to any person authorized to enforce the Act. The permittee shall notify the Department when the Department of Buildings commences any action to revoke the permit issued for construction of such room.

(d) Smoking shall be prohibited in such separate smoking room until the permittee has submitted documentation satisfactory to the Department demonstrating compliance with

applicable provisions of the Building Code and these rules, and proof that such room is to be constructed within a bar as defined in §17-502(b) of the Act. The Department may charge a fee not to exceed \$100.00 per plan filed.

(e) With respect to a restaurant bar, as defined in §17-502(s) of the Act, a separate smoking room shall be contiguous to the restaurant bar area and the entrance to such room shall not open into the restaurant area.

(f) The permittee shall not allow any employee of a bar with a separate smoking room to enter such room until at least fifteen (15) minutes after all persons who are smoking have left the room and the room is no longer being used for smoking.

(g) Upon receipt of notification from the Department's Administrative Tribunal that a permittee with an approved separate smoking room has been found in violation of §10-09 (e) of these rules on two (2) or more occasions, the Commissioner shall revoke the right of such permittee to maintain a separate smoking room in such bar. The decision of the Commissioner shall be a "final agency determination."

(h) Use of a separate smoking room in any bar shall be prohibited after January 2, 2006.

**§10-10 Outdoor Dining Areas.** Smoking may be allowed in a contiguous "outdoor dining area," as defined in §17-503(c) of the Act and §10-01 of these rules provided that such area:

(a) Represents a separate and discrete area of a restaurant, as defined in §17-502(r) of the Act, in which all tables and chairs in the smoking area are located three (3) or more feet apart from all tables and chairs in the indoor and outdoor non-smoking areas, measured from the closest leading edges of all tables in the non-smoking area(s) to the closest leading edges of all tables in the area where smoking is permitted and seating is arranged so that no chairs in the smoking area may be deliberately or inadvertently placed within the three (3) foot separation area;

(b) Constitutes no more than twenty-five (25) percent of the total outdoor seating capacity of the establishment;

(c) Has no roof, ceiling, overhead structure, or other overhang as defined in §10-01 of these rules which either fully or partially covers any part of the outdoor dining area where smoking is permitted; and

(d) Is clearly designated by signage as an area where smoking is permitted.

(e) Staff of the establishment shall ask patrons and prospective patrons, prior to seating, whether they prefer seating in a smoking or no-smoking part of the outdoor dining area.

**§10-11 Ashtrays.**

(a) Ashtrays shall not be used or provided for use in any smoke-free area. Ashtrays which are offered for sale in a smoke-free area other than a retail store shall be kept within a display case or in an area visible but not otherwise accessible to a customer (such as a shelf behind a cash register).

(b) Ashtrays are prohibited in all smoke-free areas of hotels and motels, except that ashtrays may be placed immediately adjacent to hotel and motel public entrances and elevators. The following signs shall be posted at every location in a hotel or motel where ashtrays are permitted:

NO SMOKING

SMOKING IS PROHIBITED IN ALL AREAS OF THIS HOTEL [MOTEL]

EXCEPT IN GUEST ROOMS DESIGNATED AS SMOKING ROOMS

PLEASE EXTINGUISH YOUR CIGARETTE, CIGAR OR PIPE

**§10-12 Signs.**

(a) “NO SMOKING” signs indicating that smoking is prohibited shall be conspicuously posted so that they are clearly visible in lobbies and other appropriate locations of buildings and structures where smoking is prohibited by the Act and these rules.

(b) “SMOKING PERMITTED” signs shall be posted outside the entrances to and within separate smoking rooms and enclosed rooms. Such signs shall also be posted within

registered tobacco bars, registered owner operated bars, registered membership associations and tobacco promotion public events, as defined in the Act and these rules.

(c) All signs required to be posted pursuant to the Act shall conform to the following specifications:

(i) Lettering and symbols shall be at least one-half inch in height and shall be color contrasted so that all information is clear, conspicuous, and easily readable.

(ii) The size of lettering or symbols on “SMOKING PERMITTED” signs shall not exceed the size of lettering or symbols on “NO SMOKING” signs in the same establishment.

(iii) Signs shall be printed on durable material.

(iv) Wording and symbols listed below are Department-approved. However, except for the Warning set forth in (c)(iv)D of this section, other similar wording may be used.

(A) No smoking signs:

- (1) International symbol or
- (2) “NO SMOKING”

(B) Smoking permitted sign, including the warning in (D) below:

- (1) “SMOKING PERMITTED IN THIS ROOM” or
- (2) “SMOKING PERMITTED”

(C) No smoking except in enclosed or separate smoking room sign, to be posted within establishments where smoking is permitted by the Act and these rules:

“NO SMOKING EXCEPT IN ENCLOSED ROOM” or

“NO SMOKING EXCEPT IN SEPARATE SMOKING ROOM”

(D) All “SMOKING PERMITTED” signs shall include the following warning:

**\_\_\_\_\_ WARNING: TOBACCO SMOKE CAUSES CANCER,  
HEART DISEASE,  
LUNG DISEASE AND**

**CAN HARM YOUR  
BABY.**

(d) Signs shall not be required to be posted in areas not regulated by the Act or these rules.

**§10-13 Enforcement.**

(a) Every owner, operator, employer, manager, or other person in control of a building, public place, or place of employment shall inform, or designate an on-site agent to inform, persons who are smoking in violation of the Act and these rules that smoking is prohibited.

(b) On or before June 30, 2003, every employer shall establish and/or update a written smoking policy that conforms with the Act and these rules.

(c) Any certification of correction required pursuant to §17-508(g) of the Act shall be filed with the Department within twenty (20) days of the date the order to correct was issued.

(i) The certification shall include the name and address of the premises and the docket number of the notice of violation and attach a copy of the order to correct and the Department's inspection report; shall be typed or clearly printed in ink; shall list and state for each violation that such violation has been corrected and briefly describe how the correction was accomplished, and shall indicate how respondent plans to prevent such violation(s) from recurring.

(ii) Such supporting documentation as the Department may require shall be submitted with the certification.

(iii) The certification shall be signed and dated by the permittee, owner, director, officer, partner, manager, operator or other person having control, and shall be sworn to before a notary public.

(iv) The certification shall be mailed or delivered to the Department at the address specified on the order to correct.

(d) Violations of the Act shall be punishable as provided in the Act. Violations of these rules which are not also violations of the Act shall be subject to a penalty not to exceed one thousand dollars (\$1,000), in accordance with §555 (b)(2) of the New York City Charter.

(e) Where the Commissioner has issued a license or permit pursuant to Articles 5 and 81 of the Health Code, he or she may suspend or revoke such permit for such reasons as she or he determines is sufficient grounds for suspension or revocation, in accordance with §5.17(b) of the Health Code. Such reasons may include, but not be limited to, wilful and continuous violations of the Smoke-Free Air Act and these rules.

**§10-14. Construction.**

(a) The provisions of these rules shall not be interpreted or construed to permit smoking where it is prohibited or otherwise restricted by other applicable laws, rules or regulations.

(b) If any provision of this Chapter is adjudged invalid by any court of competent jurisdiction, such judgment shall not affect or impair the validity of the remainder of this Chapter.

**§10-15 Waiver of State law.**

(a) **Eligibility for a waiver.** Any entity in whose premises smoking is prohibited by Article 13-E of the State Public Health Law (the “State law”), but where smoking may be allowed under the City Smoke-Free Air Act (the “City law”), subject to conditions in such law, may apply for a waiver of the State law prohibition. Applications for waivers shall be evaluated on an individual basis based on individual circumstances. In granting a waiver, the Department may impose such terms and conditions as it deems necessary, including conditions intended to prevent the exposure of non-smokers to second-hand smoke.

(b) **Smoking not allowed unless waiver granted.** No person who owns, operates, manages or is otherwise in control of any premises where smoking is prohibited under the State law, but could have been allowed by the City law, subject to conditions in such law, shall allow smoking in such premises unless a waiver has been granted by the Commissioner or designee in accordance with these rules.

(c) **Waiver application requirements.** An application for a waiver of a specific provision of the State law shall:

- (i) be made in a form supplied by or acceptable to the Department;
- (ii) be completed by an owner, operator, corporate officer, partner or authorized representative of such owner or operator, or of another person in control of a premises;
- (iii) identify the specific section(s) of the State law for which the waiver is requested;
- (iv) indicate whether the applicant is claiming undue financial hardship and/or that there are other factors which render compliance with the State law unreasonable; and
- (v) specify in detail proposed conditions and restrictions which the applicant believes will avoid or minimize the involuntary exposure of employees and the public in the premises to second-hand smoke.

(d) **Evidence to be submitted in support of waiver application.** An applicant for a waiver shall support a claim of undue financial hardship or other factors which render compliance unreasonable by submission of evidence satisfactory to the Department and shall provide any additional information required by the Department to evaluate the application.

(i) Evidence submitted to support a claim of undue financial hardship may include business and financial records clearly demonstrating an actual loss of income directly attributable to the effect of the State law prohibition on smoking.

(ii) An applicant claiming undue financial hardship shall clearly identify and distinguish actual losses attributable to the effect of the State law, if any, from losses associated with seasonal variations, ordinary business cycles, or other circumstances affecting similarly situated entities or businesses.

(iii) An applicant claiming that there are factors other than undue financial hardship which render compliance unreasonable shall submit evidence clearly demonstrating the existence of such factors, and describe how these factors render compliance unreasonable.

(e) **Waiver application fee.** The Department may impose a fee, not to exceed \$100.00, for its costs in reviewing each application for a waiver.

(f) **Violations of waiver conditions.** It shall be a violation of these rules for any entity granted a waiver which includes conditions or restrictions necessary either to minimize the effects of smoking on persons involuntarily exposed to second-hand smoke, or to otherwise ensure that the waiver is consistent with the general purpose of the State law, to fail to comply with such conditions, and such waiver may be rescinded, after an opportunity to be heard, if the Department finds that there has been repeated failure to adhere to or comply with such conditions.

(g) **Waivers not transferable.** Waivers shall not be transferrable. Any change in ownership, size or location of a business entity granted a waiver of any provision of the State law shall invalidate such waiver on the effective date of such change. Any entity

granted a waiver shall notify the Department at least ten (10) days in advance of any possible change in ownership, size or location.

(h) **Term and renewal of waivers.** A waiver may be granted for a term not to exceed 24 months. An applicant shall apply for renewal no later than four weeks prior to the expiration date. With each application for renewal, the applicant shall have the burden of demonstrating by submitting evidence satisfactory to the Department that there is continuing undue financial hardship or other factors exist which make compliance with the State law unreasonable.

(i) **Waiver to be available for inspection.** A copy of the waiver shall be kept on file at the premises and shall be made available upon request to Department or other enforcement agents.