

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

NOTICE OF ADOPTION OF A RULE TO REPEAL AND REENACT
CHAPTER 10 (SMOKING UNDER THE NEW YORK CITY SMOKE-FREE AIR ACT)
OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK

IN COMPLIANCE WITH SECTION 1043(a) OF THE NEW YORK CITY CHARTER, NOTICE OF INTENTION TO REPEAL THESE RULES AND NOTICE OF PUBLIC HEARING WAS PUBLISHED IN THE CITY RECORD ON FEBRUARY 3, 2003.

A public hearing was held on March 7, 2003. Testimony and written comments were received. After a review of the testimony and comments submitted the proposed rules were adopted on March 20, 2003.

Statutory Authority

The repeal and reenactment of Chapter 10 of Title 24 of the Rules of the City of New York is authorized by §§389(b) and 1043 (a) of the New York City Charter (the “Charter”). Charter §389(b) provides that “heads of mayoral agencies shall have the power to adopt rules to carry out the powers and duties delegated to the agency head or the agency by or pursuant to federal, state or local law.” Charter §1043(a) authorizes each agency to “adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.” These rules are further authorized pursuant to Local Law 47 of 2002 which amends various provisions of Chapter 5 of Title 17 of the New York City Administrative Code (the “Administrative Code”) (the “Smoke-Free Air Act”) and which provides that “the department of health and mental hygiene may promulgate rules ... necessary to carry out the provisions of this local law; ...”

Statement of Basis and Purpose

On December 30, 2002, the Mayor signed Local Law 47 of 2002 which substantially amended the New York City Smoke-Free Air Act (Chapter 5 of Title 17 of the New York City Administrative Code) (hereinafter, the “Act”). The extensive changes require repeal and reenactment, rather than amendment, of the applicable rules of the Department of Health and Mental Hygiene (the “Department”) to enable the Department to implement and enforce the Act.

Under the Act, as amended, smoking is prohibited as of March 30, 2003 in nearly every indoor area in the City where people work. Smoking is now prohibited in all indoor areas of all restaurants, regardless of patron capacity, and in all bars, except for certain existing tobacco bars, owner operated bars and bars whose owners elect to construct separate smoking rooms with strict environmental controls to prevent indoor emission of smoke. The amended Act permits smoking in an enclosed room at tobacco promotion public events whose primary purpose is promoting use of tobacco products. Smoking is prohibited in membership associations; however, not-for-profit membership associations which have no employees may register with the Department if they wish to allow smoking on premises they control. Smoking is prohibited in all but a small portion of outdoor dining areas of restaurants. The Act requires registration of tobacco bars, the above-referenced membership associations, and owner operated bars which wish to allow smoking; requires notice to be filed with the Department of tobacco promotion public events and for owners to file architectural or engineering plans for construction of separate smoking rooms in bars; and for the Department to promulgate rules related to enforcement of provisions applicable to such entities and events.

Accordingly, as repealed and reenacted, Chapter 10 of Title 24 of the Rules of the City of New York (R.C.N.Y.) defines and indicates the construction of words and terms used in the rules; establishes rules applicable to eligible owners or operators of entities who apply for the referenced registrations to allow smoking, and rules applicable to entities required to provide notice to the Department of tobacco promotion public events where smoking will be allowed. The rules specify requirements for separate smoking rooms in bars and the enclosed room in other facilities where smoking may be permitted pursuant to the Act.

Response to Public Comments

Written comments and oral testimony were received at the hearing from 17 individuals and organizations. Additional written comments were received from five organizations and from government agencies affected by the rules. Several comments objected to various provisions in the amended Act, without suggesting any changes in the proposed rules. Many comments expressed approval of the rules, without reservation, and others expressed either approval or disapproval and requested further changes or clarification in the rules as they apply to various entities. For the reasons stated, the following changes have been made in the rules:

Signs. Signs shall be posted indicating that smoking is permitted in any entity which has registered with the Department, or filed required notices. Such signage requirements now appear in §§10-04(a); 10-05(c); 10-06(f); 10-07(h); and 10-08(d). Because smoking will now be prohibited in every part of commercial buildings, there is no need for multiple “no-smoking” signs. Section 10-12 (a) has been amended to require such postings only in the lobby and at other such other locations deemed necessary by building owners.

Ashtrays. The Act allows ashtrays to be present in smoke-free areas only if ashtrays are offered for sale or, at elevators and entrances to hotels or motels, to provide a receptacle for extinguishing cigars and cigarettes. Several comments expressed concern that ashtrays may be “offered for sale” and then used impermissibly in places where smoking is prohibited. The current Act makes it a violation to have ashtrays in any area where smoking is prohibited except

if they are being offered for sale. In view of the extensive applicability of the Act to premises previously permitting smoking, the Department believes it is appropriate to specify the conditions under which such ashtrays may be offered for sale. Accordingly, §10-11(a) has been amended to specify that ashtrays offered for sale in smoke-free areas, except in retail stores, shall be kept within a display case or another area visible to, but not accessible to patrons, and shall not be present or used in any smoke-free area. Section 10-11(b) has been further amended to specify that this subsection applies exclusively to ashtrays and signs posted in hotel and motel locations where ashtrays are permitted so that patrons may extinguish cigars, cigarettes and pipes prior to entry into the hotel or motel, or into elevators in hotels and motels.

Separate smoking rooms in bars. The Act allows only bars to have these rooms, which must be constructed in compliance with requirements of the City's Building Code. An entity which is not a bar within the definition in the Act at §17-502(b) may not have or use such a room. To deal with this threshold question, the Department has added to §10-09(c) a requirement that the operator provide proof that the location in which such room shall be provided is a bar.

Restaurant bars. The amended Act retains the definition of a "restaurant bar." Accordingly, §10-09 has been amended to include explicit requirements for adding a separate smoking room to a restaurant with a restaurant bar.

Fees for processing applications for registrations of owner operated and tobacco bars and membership associations, and reviewing notices of tobacco promotion public events and plans for separate smoking rooms in bars. Although the number of such applications and filings is presently unknown, the Department anticipates expenditure of considerable staff and other scarce non-personnel resources in reviewing applications, notices and plans; maintaining correspondence and meeting with applicants whose filings are incomplete; and maintaining records and creating a public information data base to notify the public about which entities have complied with provisions of applicable law, and may allow smoking on their premises and at specified events. Accordingly, the rules applicable to each entity or event contain a provision for a maximum fee of \$100.00 to be paid by any entity submitting an application for an initial or renewal registration as a tobacco bar or owner operated bar or a membership association or by any entity filing plans for a separate smoking room in a bar or by any person filing a notice of a tobacco promotion public event.

The Department received several comments and suggestions whose implementation it believes would not serve to further the intent of the Act, or which would excessively limit the Department's power to enforce the Act, or which would require the Department to exceed its enforcement powers. Such comments stated, e.g., that the Department should apply smoking prohibitions applicable to indoor areas of bars to any outdoor areas used by the bars (not authorized in the Act); revise the definition of "incidental" as it applies to the tobacco product public events and specify permissible foods and beverages; and make the effective date of the amended Act as applied to separate smoking rooms in bars September 26, 2003 (not authorized in the Act). Two comments were received stating the writers' opinion that the Commissioner lacks authority to revoke or suspend permits issued by the Commissioner when there has been wilful or continuous violation of the Act and the rules. The Department does not agree with these comments. Although the Act states that the Department "shall seek to obtain voluntary

compliance with this chapter by means of publicity and education programs, and the issuance of warnings where appropriate” [Act, §17-507 (f)], the Act also provides that the monetary penalties for violations of the Act “shall be in addition to any other penalty imposed by any other provision of law or regulation thereunder.” [Act, §17-508 (k), as amended.] New York City Health Code §5.17(b) provides that “when ... a permit is issued by the Commissioner, he may suspend or revoke such permit for willful or continued violation of this Code or for such other reason as he determines is sufficient grounds for suspension or revocation.” In view of the intent of the Act, i.e., to dissipate, if not eliminate the deadly effects of second-hand smoke, the Department believes it is appropriate and necessary to utilize the full range of the Department and Commissioner’s regulatory and enforcement powers to further such intent. This provision serves to notify persons holding Department permits that these powers will be utilized to protect the non-smoking public from such effects in whatever manner may be authorized by applicable law.

Statement Pursuant to Charter Section 1042 - Regulatory Agenda

The proposed rule change was not included in the Department’s FY 2003 Regulatory Agenda because the Local Law requiring the rule change was enacted after the Regulatory Agenda was promulgated.

THE PROPOSAL IS AS FOLLOWS:

Note - All Matter is new

Chapter 10 Smoking Under the New York City Smoke-Free Air Act is repealed and reenacted to be printed to read as follows:

Chapter 10 Smoking Under the New York City Smoke-Free Air Act

§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.

(b) Bar. “Bar” shall have the meaning set forth in § 17-502(b) of the Act.

(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 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) **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, 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 all enclosed areas regulated by the Act and these rules.

(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.

(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 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 (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, provided that:

(a) Such rooms shall comply with all applicable Building Code and Fire Code requirements and shall have the prior approval of the 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; and

(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.”

§10-06. Owner operated bars. Smoking may be permitted in owner operated bars, as defined in §17-502 (gg) of the Act and §10-01 of these rules, provided that:

(a) Any entity which, in good faith, believes itself to be an owner operated bar shall have until September 26, 2003 to apply to the Department to register as an owner operated bar. Submission of a complete application on or prior to June 30, 2003 shall be deemed to have provided the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether an entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003, until such time as its application has been approved by the Department. There shall be a rebuttable presumption that if more than three (3) persons perform any work or render any services identified in §17-502 (gg) of the Act, an entity does not have a good faith belief that it is eligible to qualify as an owner operated bar.

(b)When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon request the Department may allow the applicant more time to complete its application.

(c) After September 26, 2003, smoking shall be prohibited in any entity alleging eligibility to register as an owner operated 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 all applications submitted and shall notify each applicant within forty-

five (45) days of receipt of the application 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 bar is not an owner operated bar within the definitions of the Act and these rules, it shall notify the applicant of this determination.

(d) Registrations shall not be transferrable. Any change in a principal owner of an owner operated bar shall require submission of a new application for registration, which shall be received by the Department no later than ten (10) business days after the change in a principal owner of the bar.

(e) Applications 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 where smoking is permitted. 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 and shall, within a reasonable time after receiving such application, notify the permittee if such registration has been approved or denied.

(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 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.”

(g) Except as otherwise provided in §17-513.1 of the Act, smoking shall not be permitted in an owner operated bar unless and until the Department approves an application for registration pursuant to this section.

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

(i) 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, provided that:

(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)When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon request the Department may allow the applicant more time to complete its application.

(c) Any entity which, in good faith, believes itself to be a tobacco bar shall have until September 26, 2003 to apply to the Department to register as a tobacco bar. Submission of a complete application on or prior to June 30, 2003 shall provide the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether an entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department

with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003.

(d) 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 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; 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.

(e) 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.

(f) 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.

(g) Registrations shall not be transferrable.

(h) 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."

(i) After September 26, 2003, 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.

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

(k) 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, provided that:

(a) An entity which, in good faith, believes itself to be a not-for-profit membership association shall have until September 26, 2003 to apply to the Department to register. Submission of a complete application on or prior to June 30, 2003 shall be deemed to have provided the Department with sufficient time to review such application and render a decision prior to September 26, 2003 as to whether the entity qualifies for registration. An entity which submits an application for registration after June 30, 2003, or submits an incomplete application, or which does not provide the Department with sufficient time to review its application, assumes the risk that smoking will be prohibited in such entity after September 26, 2003.

(b) When the Department determines that a submission lacks sufficient information or documentation and is incomplete, it shall notify the applicant, and the applicant shall provide the Department with the information or documents required within two weeks of notification. Upon request the Department may allow the applicant more time to complete the application.

(c) 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.

(d) 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."

(e) 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.

(f) 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.

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

(h) The Department's decision about whether an entity qualifies for registration shall be a "final agency determination."

§ 10-09. Separate Smoking Rooms in Bars. Smoking may be permitted 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, until January 2, 2006, provided that:

(a) Such separate smoking rooms shall conform to the specifications of §17-502 (w) of the Act and the standards found in Appendix A of these rules.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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."

§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.

APPENDIX A

Specifications for Separate Smoking Rooms

§10A-01. Definitions

1.1 “ASHRAE Standard 62-2001” means the document entitled “Ventilation for Acceptable Indoor Air Quality” published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., or equivalent published standard acceptable to the Department.

1.2 “Qualified individual” means a Professional Engineer or Certified Industrial Hygienist where:

- a. “Professional Engineer” means a licensed professional engineer registered pursuant to Section 7211 of the New York State Education Law, or successor law; and
- b. “Certified Industrial Hygienist” means an individual licensed pursuant to the acceptance and certification requirements of the American Board of Industrial Hygiene, or other certifying organization acceptable to the Department.

1.3 “Make-up air” means air that originates from outside (e.g., adjacent rooms where smoking is not permitted or the outdoors) of a separate smoking room.

1.4 “Structurally separate” means having contiguous walls and an adjoining ceiling;

1.5 “Ventilation system” means a mechanical ventilation system, independent of that system used for the remainder of the building, used to provide separate supply and exhaust ventilation in a separate smoking room as required by §10A-02.

§10A-02. Ventilation design for a separate smoking room

2.1 The ventilation system shall be designed, constructed and verified to:

a. Provide sufficient capacity for the maximum occupancy of the separate smoking room;

b. Establish a minimum ventilation rate of sixty (60) cubic feet per minute per occupant, based on a maximum occupancy ratio of seven (7) individuals per one hundred (100) feet of floor space;

c. Maintain a continuous flow of make-up air into the separate smoking room at all times when occupied;

d. Exhaust to the outdoors a greater volume of air than is supplied, creating a continuous negative pressure differential (i.e., the air pressure within the separate smoking room, as measured pursuant to §10A-02(e), is less than the pressure in adjacent rooms where smoking is not allowed) within the separate smoking room of three hundredths (0.03) of an inch of water column;

e. A manometer with measurement sensitivity of 0.001” of water column (or 0.1 Pascal) at a minimum shall be used to measure and verify differential pressure.

f. Exhaust all separate smoking room air directly to the outdoors so that no air is recirculated from a separate smoking room to areas where smoking is not allowed; and

g. Discharge air from the separate smoking room to the outside and at least twenty-five feet away from operable windows, doors, and any other heating, ventilation or air conditioning intake vents, or outdoor dining areas.

§10A-03. Structural requirements for a separate smoking room

3.1 The separate smoking room shall be constructed with:

- a. Walls extending to full height (from floor to ceiling slab) on four sides; and
- b. Self-closing door or doors that shall remain closed except to the extent necessary to permit ingress and egress.

3.2 The separate smoking room shall:

- a. Comply with all applicable fire and building code requirements, and have a sprinkler system for fire safety (which may be part of a sprinkler system of the premises in which the room is located);
- b. Be clearly designated by signage as a separate smoking room, in accordance with §10A-05 of this Appendix, wherein no services are offered;
- c. Not contain the sole means of ingress and egress to restrooms or any other smoke-free area;
- d. Not constitute the sole indoor waiting area of the premises; and
- e. Not exceed twenty-five (25) percent of the aggregate square footage of the premises, including non-smoking lounges, and shall not in any event exceed three hundred fifty (350) square feet, in accordance with §17-502 (w) of the Act.

§10A-04. Ventilation system testing, operation and maintenance documentation

4.1 Prior to first use of the separate smoking room, the owner shall ensure that a qualified person:

- a. Prepares an operation and maintenance plan for the ventilation system, in accordance with the physical and mechanical design specifications for the ventilation system, which shall include written procedures for the

operation, inspection, testing, cleaning, calibration, and maintenance of the ventilation system;

b. Conducts a functional performance test of the ventilation system and records the testing results; and

c. Prepares a ventilation report containing the results of the functional performance test and stating that the ventilation system:

i. Is designed and installed in conformance with all requirements of §10A-02;

ii. Was operating in conformance with all requirements of §10A-02 at the time of the functional performance test conducted pursuant to §10A-04.1(b); and

iii. Is capable of providing continuous supply and exhaust ventilation rates as specified for the maximum occupancy of the separate smoking room.

4.2 The written procedures required by §10A-04.1(a) shall:

a. Ensure that the ventilation system is monitored and maintained in conformance with its physical and mechanical design specifications;

b. Specify the manner of operation of the ventilation system, including the hours of operation; and

c. Specify the nature and frequency of inspections, testing, cleaning, calibration, and maintenance of the ventilation system.

4.3 The ventilation report required by §10A-04.1(c) shall:

a. Contain documentation of the results of each inspection, testing, cleaning, calibration, and maintenance activity including:

i. The date and type of the activity performed;

ii. The name of the person who performed the activity and his/her employer;

- iii. The components of the ventilation system involved; and
- iv. The test results, observed deficiencies, and any remedial action taken.
- b. Be reviewed by a qualified individual and amended:
 - i. If the ventilated system is modified so as to materially affect its ability to ventilate the separate smoking room in conformance with its mechanical and design specifications;
 - ii. If an inspection of the ventilation system identifies non-conformance with its physical and mechanical design specifications so as to require changes to its operation and maintenance; or
 - iii. At least annually.
- c. Be available for inspection by the Department at all times.
- d. Be kept for at least 2 years.

4.4 If the documentation referred to in §10A-04 is amended in accordance with §10A-04.3(b) the owner is required to keep only the most current version of the document for the purposes of §10A-04.3(c).

§10A-05. Signage for Separate Smoking Room

- 5.1 An owner shall display a “Separate Smoking Room” sign in the form set forth below measuring at least eight and one-half (8 ½) inches in width and at least eleven (11) inches in height.
- 5.2 “Separate Smoking Room” sign shall be
 - a. Placed immediately above or on each entrance doorway to a separate smoking room; and
 - b. Unobstructed by other signs, advertisements or promotions.
- 5.3 An owner shall assume any costs associated with the signage required by this section.

5.4 A Department inspector may order the removal of a sign that the inspector finds to be in violation of these regulations.

5.5 “Separate Smoking Room” sign shall include the following text only:

“SEPARATE SMOKING ROOM

WARNING: TOBACCO SMOKE CAUSES CANCER, HEART DISEASE, LUNG DISEASE

AND CAN HARM YOUR BABY

NO PERSONS UNDER 18 PERMITTED

NO BEVERAGES OR FOOD SERVED

MAXIMUM OCCUPANCY = ”

NOTE: These rules were adopted on March 20, 2003.

These rules shall take effect on March 30, 2003, in accordance with Section 1043 (e)(1)(c) of the New York City Charter.

S:\Ch10 Adopt.wpd