

City of New York  
Environmental Control Board

Notice of Public Hearing and Opportunity to Comment on Proposed Rule

**What are we proposing?** The Environmental Control Board (ECB) is proposing to amend 48 RCNY 3-31(c) of its rules of procedure. The proposed rule clarifies that a single attempt at service of a notice of violation (NOV) may be sufficient to constitute “a reasonable attempt” under New York City Charter Section 1049-a, which provides requirements that agencies must fulfill prior to the delivery or posting of certain NOV’s.

**When and where is the Hearing?** ECB will hold a public hearing on the proposed rule. The public hearing will take place at 3:30 pm on January 8, 2014. The hearing will be in the ECB Conference Room located at 66 John Street, 10<sup>th</sup> Floor, New York, NY 10038.

**How do I comment on the proposed rules?** Anyone can comment on the proposed rule by:

- **Website.** You can submit comments to the ECB through the NYC rules website at <http://rules.cityofnewyork.us/>.
- **Email.** You can email written comments to Rules\_Oath@oath.nyc.gov.
- **Mail.** You can mail written comments to ECB, Attention: James Macron, Counsel to the Board, ECB, 66 John Street, 10<sup>th</sup> Floor, New York, NY 10038.
- **Fax.** You can fax written comments to ECB at 212-361-1900.
- **Hearing.** You can speak at the hearing. Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling Elizabeth Nolan at 212-436-0592, or you can also sign up in the hearing room before the hearing begins on January 8, 2014. You can speak for up to three minutes.

**Is there a deadline to submit written comments?** You may submit written comments up to January 8, 2014.

**What if I need assistance to participate in the Hearing?** You must tell us if you need a reasonable accommodation of a disability at the Hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at 212-436-0592. You must tell us by January 2, 2014.

**Can I review the comments made on the proposed rule?** You can review the comments that have been submitted online by visiting the NYC rules website at <http://rules.cityofnewyork.us/>. A few days after the hearing, a transcript of the hearing and copies of the written comments will be available to the public at ECB, 66 John Street, New York, NY 10038.

**What authorizes ECB to make this rule?** Sections 1049-a of the City Charter authorizes ECB to make this proposed rule. This proposed rule was not included in ECB's regulatory agenda for this Fiscal Year because it was not contemplated when ECB published the agenda.

**Where can I find the ECB's rules?** The ECB's rules are in title 48 of the Rules of the City of New York.

**What rules govern the rulemaking process?** ECB must meet the requirements of Section 1043(b) of the City Charter when creating or changing rules. This notice is made according to the requirements of Sections 1043(b) and section 1049-a of the City Charter.

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### Statement of Basis and Purpose of Proposed Rule

The Environmental Control Board (ECB) is proposing to amend section 48 RCNY 3-31(c) of its rules of procedure. The proposed rule clarifies that a single attempt at service of a notice of violation may be sufficient to constitute "a reasonable attempt" under Section 1049-a(d)(2)(b) of the New York City Charter ("Charter"). Section 1049-a does not contain a definition of "reasonable attempt," but ECB decisions have long held that a single attempt is sufficient. However, recent court decisions have created some confusion as to the correct standard. Therefore, ECB is seeking to codify its decisions via rulemaking.

### **The Current Rule**

ECB's rules of procedure, as found in 48 RCNY 3-31(c), regulate the service of certain notices of violation (NOV). A person accused of violating a provision of the Charter or the City's Administrative Code under ECB's jurisdiction is known as a respondent.

Under Charter section 1049-a(d)(2)(a), an agency typically must serve a NOV to a respondent in the same manner as is prescribed by article three of the Civil Practice Law and Rules or article three of the Business Corporation Law. However, the Charter also includes a number of exceptions to this rule. Section 1049-a(d)(2)(a)(i) allows for service of a NOV by delivering the notice to a person employed by the respondent on or in connection with the premises where the violation occurred. Section 1049-a(d)(2)(a)(ii) allows for service of a NOV issued by the Department of Sanitation, the Department of Buildings, or the Fire Department by affixing such notice in a conspicuous place to the premises where the violation occurred.

Charter section 1049-a(d)(2)(b) provides that sections 1049-a(d)(2)(a)(i)-(ii) only apply after "a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law." The Charter does not contain a definition of "reasonable attempt," but ECB has long interpreted the language so that a single attempt could satisfy the requirement. ECB's interpretation is

based on the plain language of section 1049-a(d)(2)(b), which requires “a reasonable attempt” (emphasis added), and also the section’s legislative history. The State Legislature added section 1049-a(d)(2)(b) to the Charter with the intent that the new language would “eliminate the time-consuming, costly and often unrewarding process now entailed in identifying and locating the person responsible for the violation.” Governor’s Memorandum on Approval, Bill Jacket, L. 1979, ch. 623. The proposed rule ensures that the legislative intent behind the creation of section 1049-a(d)(2)(b) is codified in ECB’s rules of procedure.

ECB’s authority to implement this rule is found in section 1049-a of the New York City Charter.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

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Section 1. Section 3-31 (c) of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

(c) Service: A notice of violation issued by a petitioner may be served on a respondent in accordance with the methods set out in §1049-a(d)(2) of the New York City Charter which render the tribunal's decision and order automatically docketable in Civil Court, or alternatively as provided by the statute, rule or other provision of law governing the violation alleged. Lawful service in a manner other than that provided for in §1049-a(d)(2) shall give the tribunal jurisdiction to hold a hearing or render a decision and order whether after hearing or in default thereof, but such decision and order shall not be entered in Civil Court or any other place provided for entry of civil judgments without court proceedings.

For the purpose of service of notices of violation pursuant to New York City Charter 1049-a(d)(2)(a)(i) and (ii), the term “reasonable attempt” as used in New York City Charter 1049-a(d)(2)(b) may be satisfied by a single attempt to effectuate service upon the respondent or another person upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law.

**NEW YORK CITY LAW DEPARTMENT  
DIVISION OF LEGAL COUNSEL  
100 CHURCH STREET  
NEW YORK, NY 10007  
212-356-4028**

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

**RULE TITLE:** Rule Defining Reasonable Attempt at Service

**REFERENCE NUMBER:** 2013 RG 094

**RULEMAKING AGENCY:** Environment Control Board

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: November 7, 2013

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** Rule Defining Reasonable Attempt at Service

**REFERENCE NUMBER:** OATH/ECB-40

**RULEMAKING AGENCY:** OATH/ECB

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 it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Hunter Gradie  
Mayor's Office of Operations

November 12, 2013  
Date