

Waiver of Polystyrene Prohibition
Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing?

Pursuant to Local Law 142 of 2013, the New York City Department of Small Business Services (“DSBS”) is proposing a rule that sets forth the procedure by which New York City businesses may apply for financial hardship waivers from the City’s prohibition on using certain polystyrene items.

When and where is the hearing? DSBS will hold a public hearing on the proposed rule. The public hearing will take place 10:00 A.M. – 12:00 P.M. on May 29, 2015. The hearing will be in the 4th Floor hearing room at 110 William Street, New York, New York.

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

- **Website.** You can submit comments to the DSBS through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to nycrules@sbs.nyc.gov.
- **Mail.** You can mail written comments to Zen Baraki, Department of Small Business Services, 110 William Street, 7th Floor, New York, NY 10038.
- **Fax.** You can fax written comments to DSBS at 212-618-8865.
- **By speaking 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 212-513-6428. You can also sign up in the hearing room before the hearing begins on May 29, 2015. You can speak for up to three minutes.

Is there a deadline to submit written comments? Yes. You must submit any written comments on or before May 29, 2015.

Do you need assistance to participate in the hearing? You must contact DSBS’s Office of Legal Affairs if you need a reasonable accommodation because 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 212-513-6428. You must tell us by May 22, 2015.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public at 110 William Street, 7th floor, New York, NY 10038.

What authorizes DSBS to make this rule? Sections 1301 and 1043(a) of the New York City Charter and Section 16-329 of the New York City Administrative Code, as added by Local Law 142

of 2013, authorize DSBS to make this proposed rule. This proposed rule was not included in DSBS's regulatory agenda for this Fiscal Year because the determination of the Commissioner of the New York City Department of Sanitation pursuant to the local law that authorizes this rule had not been made when DSBS published the agenda.

Where can I find DSBS's rules? DSBS's rules are in Title 66 of the Rules of the City of New York.

What rules govern the rulemaking process? DSBS must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose

The Commissioner of the New York City Department of Small Business Services (“DSBS”) intends to promulgate rules within Title 66 of the Rules of the City of New York implementing § 16-329 of the New York City Administrative Code.

Local Law 142 (2013), which amended section 16-324 and added section 16-329 of the New York City Administrative Code (Ad. Code), establishes a prohibition on the use of polystyrene single service articles and polystyrene loose fill packaging in New York City and establishes violations and penalties for businesses that continue to use these items in contravention of the law. Local Law 142 also provides that any not-for-profit corporation, regardless of its income, and any food service establishment, mobile food commissary, or store that had a gross income under five hundred thousand dollars per location on their annual income tax filing for the most recent tax year and is not part of a chain food service establishment or a chain store may request from the Commissioner of DSBS, in a manner and form established by the DSBS Commissioner, a financial hardship waiver of the requirements of this section. Such waiver request may apply to one or more single service articles possessed, sold, or offered for use by any such not-for-profit corporation, food service establishment, mobile food commissary, or store. The DSBS Commissioner shall, after consultation with the New York City Department of Sanitation (DSNY) Commissioner, grant such waiver if such not-for-profit corporation, food service establishment, mobile food commissary, or store proves: (1) that there is no comparable alternative product not composed of expanded polystyrene that would cost the same as or less than the single service article composed of expanded polystyrene, and (2) that the purchase or use of an alternative product not composed of expanded polystyrene would create an undue financial hardship. Such financial hardship waiver shall be valid for twelve months and shall be renewable upon application to the DSBS Commissioner. A pending application for such financial hardship waiver shall be a defense to any notice of violation issued

pursuant to Section 16-329 of the Ad. Code to which such pending application relates and such notice of violation shall be dismissed.

The proposed rules seek to establish the manner and form for the submission of waiver applications.

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.

Section 1. Title 66 of the Rules of the City of New York is amended by adding a new Chapter 13 to read as follows:

§ 13-01 Definitions.

As used in these rules, the following terms shall have the following meanings:

Applicant means a business or not-for-profit corporation which has applied for a financial hardship waiver.

Business means any food service establishment, mobile food commissary, or store that is not a not-for-profit corporation.

Acknowledgement Letter means the letter sent by DSBS to an applicant notifying the applicant of its pending application for a financial hardship waiver.

City means the City of New York.

Commissioner means the Commissioner of the New York City Department of Small Business Services or his or her designee or his or her successor in function.

Comparable alternative product means a product to be used by the business or not-for-profit corporation in place of an expanded polystyrene single service item prohibited by section 16-329 of the Administrative Code or any successor provision.

Day means a calendar day unless otherwise specified.

Denial or Denied means a determination by DSBS that an applicant is not eligible for a financial hardship waiver.

DSBS means the New York City Department of Small Business Services or its successor in function.

DSNY means the New York City Department of Sanitation or its successor in function.

DSNY Commissioner means the commissioner of the New York City Department of Sanitation or his/her designee or his/her successor in function.

Expanded polystyrene means blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene). Such term shall not include rigid polystyrene.

Food service establishment means a premises or part of a premises where food is provided directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle. Food service establishment shall include, but not be limited to, full-service restaurants, fast food restaurants, cafes, delicatessens, coffee shops, grocery stores, vending trucks or carts and cafeterias.

Mobile food commissary means any facility that:

1. disposes of solid waste generated by the operation of a food service establishment that is located in or is a pushcart, stand or vehicle; or

2. supplies potable water and food, whether pre-packaged or prepared at the mobile food commissary, and supplies non-food items.

Store means a retail or wholesale establishment other than a food service establishment.

Undue financial hardship means that an applicant has demonstrated any of the following, based on submitted financial projections:

1. The cost of using a comparable alternative product will result in an increase of more than 5% of the business's annual cost of operations;
2. The increased costs will result in the elimination of at least one employee; or
3. The increased cost will result in a reduction in annual net profit of more than 5%.

§ 13-02 Application for a Waiver

(a) To be eligible for consideration of a financial hardship waiver, a business must:

(1) Submit its tax returns for the most recent tax year, which must demonstrate that the business had an annual gross income of less than five hundred thousand dollars per location for such year;

(2) Provide a list of expanded polystyrene single service items used by the business for which a waiver is sought;

(3) Provide a list of comparable alternative products that cost more than the expanded polystyrene single service items the business currently uses;

(4) Provide a detailed explanation of why the use of comparable alternative products creates an undue financial hardship for the business; and,

(5) Provide any additional information related to the waiver request as requested by DSBS or DSNY.

(b) Applicants that are not-for-profit corporations must:

(1) Submit a certificate of incorporation demonstrating that the applicant is a not-for-profit corporation;

- (2) Submit a current Form 990 filed with the Internal Revenue Service;
- (3) Provide a list of expanded polystyrene single service items used by the not-for-profit corporation for which a waiver is sought;
- (4) Provide a list of comparable alternative products that cost more than the expanded polystyrene single service items the not-for-profit corporation currently uses;
- (5) Provide a detailed explanation of why the use of comparable alternative products creates an undue financial hardship for the not-for-profit corporation; and
- (6) Provide any additional information related to the waiver request as requested by DSBS or DSNY.

§ 13-03. Waiver Determinations

- (a) Determinations by the DSBS Commissioner approving or denying an applicant's waiver request, made in consultation with the DSNY Commissioner, shall be made in writing on the basis of all the circumstances presented by the applicant.
- (b) A copy of the waiver determination shall be sent to the applicant and filed with DSBS and DSNY. Such determinations shall be made available for public inspection upon request.
- (c) Waivers shall be valid for twelve months from the date of determination and shall be renewable upon written application to DSBS. All determinations shall be final.
- (d) Applicants receiving a denial of a waiver request may re-apply after twelve months from the date of the denial of the initial application. Applicants receiving a denial of a waiver request or a renewal request shall have two months from the date of the denial to come into compliance with section 16-329 of the Administrative Code.
- (e) DSBS will send applicants an acknowledgment letter notifying the applicant of receipt of its pending application for a financial hardship waiver within twenty calendar days from the date of receipt of a waiver request application. A pending application for a financial hardship waiver or application for renewal of a waiver shall be a defense to any notice of violation issued pursuant to section 16-329 Administrative Code to which such pending application relates and such notice of violation shall be dismissed.

§ 13-04. Renewals

A business may request renewal of a waiver no later than 30 days before the termination date of the waiver. A request for renewal shall certify that there has been no material change with respect to the relevant facts or circumstances that existed at the time the initial waiver was granted. Any application submitted after the termination date or less than 30 days before the termination date of the waiver shall be treated as a new application.

**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: Waiver of Polystyrene Prohibition

REFERENCE NUMBER: 2015 RG 029

RULEMAKING AGENCY: Department of Small Business Services

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: April 17, 2015

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

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

RULE TITLE: **Waiver of Polystyrene Prohibition**
REFERENCE NUMBER: **SBS-4**
RULEMAKING AGENCY: **Department of Small Business Services**

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/ Norma Ponce
Mayor's Office of Operations

April 20, 2015
Date