

## NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to comment on proposed amendment of §3.12 (Administrative Tribunal and Environmental Control Board proceedings) and §151.05 of the New York City Health Code, relating to service of notices of violation returnable to the Environmental Control Board.
- Date / Time:** May 23, 2013/ 10 a.m. to 12:00 p.m.
- Location:** New York City Department of Health and Mental Hygiene  
2 Gotham Center, 14<sup>th</sup> Floor, Room 14-34  
42-09 28<sup>th</sup> Street  
Long Island City, NY 11101-4132
- Contact:** Rena Bryant  
(347) 396-6071

### Proposed Amendment

Pursuant to the authority vested in the Board of Health (“Board”) by §558(b) and (c) of the New York City Charter (“Charter”), and in accordance with §§556, 558, 1043 and 1046 of the Charter, the Department of Health and Mental Hygiene (“Department”) is proposing that the Board of Health amend §3.12 (c) and §151.05 (b) of the Health Code relating to service of notices of violation returnable to the Environmental Control Board. This proposal was not included in the Department’s regulatory agenda because the need for the amendment became known after publication of the regulatory agenda.

### Instructions

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

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

or electronically through NYC RULES at [www.nyc.gov/nycrules](http://www.nyc.gov/nycrules) or by email to [RESOLUTIONCOMMENTS@HEALTH.NYC.GOV](mailto:RESOLUTIONCOMMENTS@HEALTH.NYC.GOV) or online (without attachments) at <http://www.nyc.gov/html/doh/html/about/notice.shtml> on or before 5:00 P.M., on May 23, 2013.

- To request a sign language interpreter or other form of reasonable accommodation for a disability at the hearing, please contact Rena Bryant at (347) 396-6071 by May 9, 2013.
- Copies of written comments and a transcript of oral comments received at the hearing will be available within a reasonable time after receipt between the hours of 9:00 A.M. and 5:00 P.M. at:

New York City Department of Health and Mental Hygiene  
Board of Health

Attention: Rena Bryant, Secretary to the Board  
2 Gotham Center, 14<sup>th</sup> Floor, Room 14-15, CN 31  
Long Island City, NY 11101-4132

- The Department’s general policy is to make written comments available for public viewing on the internet. The comments it receives, including any personal information provided with the comment, will be posted without change to <http://www.nyc.gov/html/doh/html/about/comment.shtml>.

### **Statement of Basis and Purpose**

#### *Statutory Authority*

These amendments to the New York City Health Code (the “Health Code”) are issued in accordance with §§556, 558, 1043 and 1046 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with authority to regulate all matters affecting health in the city of New York. Paragraphs (b) and (c) of §558 of the Charter empower the Board of Health (the “Board”) to amend the Health Code and provide how the Health Code will be enforced. Section 1043 of the Charter gives the Department rulemaking powers and §1046 authorizes City agencies to adopt rules governing adjudications.

#### *Background of Amendments*

On November 2, 2010, New York City voters approved Charter revisions including an amendment authorizing the Mayor, by Executive Order, to consolidate certain administrative tribunals into OATH. In addition, the Charter amendment required the establishment of a committee whose mandate was to recommend which tribunals or types of cases should be transferred to OATH. The Mayor's Committee on Consolidation of Administrative Tribunals (“Mayor’s Committee”) issued its "Report and Recommendations," dated June 7, 2011, containing an Appendix with recommended modifications to rules of the various tribunals ("Report" and "Appendix").

By Executive Order No. 148 (June 8, 2011) (the “Executive Order”), the Mayor ordered the “transfer of the administrative tribunals established by the Board of Health pursuant to Section 558 of the Charter” to OATH, effective July 3, 2011. According to the Executive Order, certain provisions of the Health Code and other Rules of the City of New York pertaining to the Department’s Administrative Tribunal, as well as some additional interim procedures, would be deemed interim rules of OATH in accordance with the Mayor’s Committee’s Report and Appendix. These provisions, rules, and procedures, were designated interim rules until OATH itself completed official rulemaking in accordance with the Charter.

At its meeting on December 13, 2011, the Board adopted a Resolution repealing Article 7 (“Administrative Tribunal”) of the Health Code, and amending other provisions of the Health Code that refer to Article 7 and/or the Administrative Tribunal. Certain provisions of Article 7 survived the transfer to OATH and were added to Article 3 (“General Provisions”) of the Health

Code. These provisions, incorporated in a new §3.12 (“Administrative Tribunal”) became effective July 20, 2012 when the OATH rules for the OATH Health Tribunal became effective.

Section 3.12 of the Health Code was further amended by the Board at its June 12, 2012 meeting (also made effective July 20, 2012) to provide for service of notices of violations (NOVs) returnable to the Environmental Control Board (ECB) (“Administrative Tribunal and Environmental Control Board proceedings”), which under the Charter has concurrent jurisdiction with the former Administrative Tribunal to adjudicate NOVs issued for violations of the Health Code. ECB’s rules provide that NOVs returnable to ECB that are not served personally pursuant to Charter §1049-a(d)(2) may be served “alternatively as provided by the statute, rule or other provision of law governing the violation alleged.” 48 RCNY §3-31 (c).

As amended, Health Code §3.12 (c) currently provides that NOVs returnable to ECB may be served personally, or by any form of mail delivery “that provides proof of mailing and receipt.” Health Code §151.05, which was adopted by the Board on March 15, 2011 and provides for hearing of NOVs returnable to ECB, similarly requires proof of mailing and receipt. The Department has been serving NOVs returnable to ECB by US Postal Service (USPS) first class mail. Although no return receipt is provided with this method of mailing, a uniquely numbered certificate of mailing provided by the USPS was used to track delivery. Until recently, the USPS website reported the actual address where the NOV was delivered and the date and time of its delivery when the number of the certificate of mailing was entered online. The USPS website, however, no longer provides address-specific information, but only the zip code where the mail was delivered. Because Health Code §3.12 (c) currently requires proof of receipt of the NOV, ECB has advised the Department that NOVs mailed this way will be dismissed if service of the NOV is challenged by the respondent. The dismissals will be automatic and occur even though respondents receive their NOVs and appear at their hearings. The Department is proposing that the Board further amend §3.12 (c) and §151.05 (b) to delete the requirement that it prove receipt of an NOV as an essential element of service to avoid these dismissals.

City agencies are authorized by §1046(b) of the Charter to make rules governing service of notices of adjudicatory hearings, as well as other elements of such proceedings; how notice is to be proved is not specified.

“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.

The resolution is as follows:

Deleted material is in [brackets]; new text is underlined.

RESOLVED, that paragraph (2) of subdivision (c) of §3.12 of Article 3 (General Provisions) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes as follows:

**§3.12 Administrative Tribunal and Environmental Control Board proceedings.**

\* \* \*

(c) *Service of notices of violations returnable to the Environmental Control Board.*

(1) *Personal service.* Notices of violation returnable to the Environmental Control Board may be served in person upon (i) the person alleged to have committed the violation, (ii) the permittee or registrant, (iii) the person who was required to hold the permit or to register, (iv) a member of the partnership or other group concerned, (v) an officer of the corporation, (vi) a member of a limited liability company, (vii) a management or general agent, or (viii) any other person of suitable age and discretion as may be appropriate, depending on the organization or character of the person, business, or institution charged.

(2) *Service by mail.* Notices of violation returnable to the Environmental Control Board may be served by [certified or registered] mail [through] deposited with the U.S. Postal Service, or [by any type of mail utilizing] any other mailing service [that provides proof of mailing and receipt,] to any such person at the address of the premises that is the subject of the NOV or, as may be appropriate, at the residence or business address of (i) the alleged violator, (ii) the individual who is listed as the permittee or applicant in the permit issued by the Board or the Commissioner or in the application for a permit, or (iii) the registrant listed in the registration form. In the case of service by mail, documentation of [delivery or receipt provided by the delivery or] mailing [service is] is sufficient proof of service of the notice of violation.

\* \* \*

Notes: Paragraph (2) of subdivision (c) of §3.12 was amended by resolution adopted XX, to clarify that mail service of notices of violation returnable to the Environmental Control Board is sufficient if proof of mailing alone is shown.

RESOLVED, that subdivision (b) of §151.05 of Article 151 (Rodents, Insects and Other Pests) of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes as follows:

**§151.05 Notices of violation.**

\* \* \*

(b) *Service of a notice of violation.* A notice of violation shall be served by delivery to an owner or other person in control of property or premises, upon a member of the partnership, limited liability company or other group, upon an officer, director or managing agent of a corporation, or upon any other person of suitable age and discretion owning or in control of such property. Service may be made to such person(s) at the address of the premises that is the subject of the NOV or at such person's last known residence or business address,

(1) By personal delivery in accordance with Article 3 of the New York Civil Practice Law and Rules or Article 3 of the Business Corporations Law; or

(2) By [certified or registered] mail delivered by the U.S. Postal Service or by any other type of mailing [or delivery] service, [that provides proof of mailing or receipt by the respondent.] Documentation of [delivery or receipt provided by the delivery or] mailing [service] shall be sufficient proof of service of the notice of violation.

Notes: Paragraph 2 of subdivision (b) of §151.05 was amended by resolution adopted XXX to clarify that mail service of notices of violation returnable to the Environmental Control Board is sufficient if proof of mailing alone is shown.

Article 3 151 NOI service

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

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

**RULE TITLE: Amendment of Rules Governing Service of Notices of Violation  
(Health Code Article 3)**

**REFERENCE NUMBER: 2012 RG 086**

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

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

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

/s/ STEVEN GOULDEN  
Acting Corporation Counsel

Date: December 3, 2012

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

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

**RULE TITLE: Amendment of Rules Governing Service of Notices of Violation  
(Health Code Article 3)**

**REFERENCE NUMBER: 2012 RG 086**

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

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

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

December 4, 2012  
Date