

DEPARTMENT OF CONSUMER AFFAIRS

Notice of Proposed Hearing and Opportunity to Comment

What are we proposing?

The Department of Consumer Affairs is proposing rules to clarify Chapter 9 of Title 20 of the Administrative Code of the City of New York (as added by the Mass Transit Benefits Law, Local Law 53 of 2014), which requires certain employers to offer the opportunity to purchase pre-tax transportation benefits to their employees, and to provide guidance to employers about how penalties for violations of the law are assessed.

When and where is the Hearing? The Department of Consumer Affairs will hold a public hearing on the proposed rule. The public hearing will take place at 10:00 AM on July 7, 2016. The hearing will be in Department of Consumer Affairs hearing room at 42 Broadway 5th Floor, 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 Department of Consumer Affairs through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to Rulecomments@dca.nyc.gov.
- **Mail.** You can mail written comments to Casey Adams, Deputy Director of City Legislative Affairs, Department of Consumer Affairs, 42 Broadway, 8th Floor, New York, NY 10004.
- **Fax.** You can fax written comments to the Department of Consumer Affairs, (646) 500- 5962.
- **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 212-436-0392. You can also sign up in the hearing room before the hearing begins on July 7, 2016. You can speak for up to three minutes.

Is there a deadline to submit written comments? Written comments may be submitted on or before 5 PM on July 7, 2016.

Do you need assistance to participate in the Hearing? You must tell the Office of Legal Affairs 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 212-436-0155. You must tell us by July 5, 2016.

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 between the hours of 9 a.m. and 5 p.m. to the public at the office of Casey Adams, Deputy Director of City Legislative Affairs, Department of Consumer Affairs, 42 Broadway, 8th Floor, New York, NY 10004.

What authorizes the Department of Consumer Affairs to make this rule? Section 1043 of the New York City Charter and Section 20-926(d) of the Administrative Code of the City of New York authorize the Department of Consumer Affairs to make these proposed rules. These proposed rules were not included in the Department’s regulatory agenda for this Fiscal Year because it was not contemplated when the Department of Consumer Affairs published the agenda.

Where can I find the Department of Consumer Affairs’ rules? The Department of Consumer Affairs’ rules are in title 6 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department of Consumer Affairs must meet the requirements of Section 1043 of the New York 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 of Proposed Rule

In October 2014, the City Council passed the Mass Transit Benefits Law (Local Law 53 of 2014), which requires employers with 20 or more full time employees to offer the opportunity to purchase certain pre-tax transportation benefits to their employees. The law is expected to reduce transportation costs to employees, promote a cleaner environment by increasing the use of mass transit and lower payroll taxes for employers.

These proposed rules define the penalties to be imposed when the department finds a violation of the Mass Transit Benefits Law and provide guidance to employers about recordkeeping requirements and the right to cure violations.

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.

Proposed Rule

Section 1. Chapter 8 of Title 6 of the Rules of the City of New York is amended to read as follows:

CHAPTER 8 TRANSPORTATION BENEFITS

§8-01 Definitions.

As used in this chapter and, where applicable, in the Transportation Benefits Law, the following terms have the following meanings:

“Chain business” means a group of establishments that share a common owner or principal who owns a majority of each establishment where such establishments (i) engage in the same business or (ii) operate pursuant to franchise agreements with the same franchisor as defined in general business law section 681.

“Commuter highway vehicle” means a “commuter highway vehicle” as such term is defined in Section 132(f)(5)(B) of the Internal Revenue Code.

“Cure period” means the ninety-day period immediately following a finding of a first violation.

“Department” means the Department of Consumer Affairs of the City of New York.

“Employee” means an “employee,” “manual worker,” “railroad worker,” “commission salesman,” or “clerical or other worker” as such terms are defined in § 190 of the New York State Labor Law. [For the purposes of this chapter,] “[employee] Employee” does not include partners, sole proprietors, independent contractors, or two-percent shareholders of S-corporations.

“Employer” means an “employer” as such term is defined in § 190 of the New York State Labor Law and that employs twenty or more full-time employees in New York City. [For the purposes of this chapter, the] The common owner or principal of a chain business shall be considered the employer of the full-time employees of such chain business.

“First violation” means the first finding by the administrative tribunal that a particular employer has violated the Transportation Benefits Law since July 1, 2016.

“Full-time employee” means an employee who has worked an average of 30 hours or more per week in the most recent four weeks as of any date of counting, any portion of which was in New York City, for a single employer.

“Earnings” shall have the same meaning as the term “gross income” as used in § 132 of the Internal Revenue Code.

“Month” means an employer’s regularly established fiscal month.

“Recidivist violation” means any new finding by the administrative tribunal that a particular employer has violated the Transportation Benefits Law, after the first finding by the administrative tribunal that the employer had violated the Transportation Benefits Law since July 1, 2016.

“Subsequent violation” means each continuous thirty-day period after the expiration of the

cure period, or after the finding of a recidivist violation by the administrative tribunal, in which the employer has not demonstrated to the department's satisfaction that it is complying with the Transportation Benefits Law.

“Temporary help firm” means an employer that recruits, hires and supplies employees to perform work or services for another organization to: (i) support or supplement the other organization’s workforce; (ii) provide assistance in special work situations including, but not limited to, employee absences, skill shortages or seasonal workloads; or (iii) perform special assignments or projects.

“Transportation Benefits Law” means Chapter 9 of Title 20 of the Administrative Code of the City of New York.

“Transportation fringe benefits” means qualified transportation fringe benefits, other than qualified parking, that may be purchased using pre-tax earnings in accordance with § 132 of the Internal Revenue Code.

“Week” means an employer’s regularly established payroll week.

§8-02 Determination of Size of Employer.

- (a) An employer’s number of full-time employees is determined by calculating the average number of full-time employees for the most recent consecutive three-month period, provided that for an employer that has operated for less than three months, the number of full-time employees is determined by calculating the average number of full-time employees per week for the period of time in which the employer has been in operation.
- (b) Full-time employees at all of an employer’s or a chain business’s locations in New York City shall be counted in determining the number of full-time employees of the employer.

§8-03 Temporary Help Firms.

- (a) Where a temporary help firm supplies a full-time employee to another organization, the temporary help firm shall be the employer of the full-time employee for purposes of the Transportation Benefits Law and must comply with its provisions, regardless of the size of the other organization.
- (b) To determine the number of hours worked each week by an employee working for a temporary help firm, the employer must aggregate the number of hours worked by the employee in the most recent four weeks at all placements.

§8-04 Employee Eligibility.

- (a) An employer must offer its full-time employees the opportunity to use pre-tax earnings to purchase transportation fringe benefits by January 1, 2016, or four

weeks after such employee's commencement of employment as a full-time employee of the employer, whichever is later.

- (b) If an employer's work force is reduced to fewer than 20 full-time employees, the employer must continue to offer the opportunity to use pre-tax earnings to purchase transportation fringe benefits to full-time employees who were employer's full-time employees before the work force was reduced.

§8-05 Maximum Deductions.

Employers must offer full-time employees the opportunity to use the maximum amount of pre-tax earnings permitted under federal law for the purchase of transportation fringe benefits.

§8-06 Recordkeeping Requirements.

Employers must retain records for two years sufficient to demonstrate (i) that each full-time employee eligible for transportation fringe benefits pursuant to the Transportation Benefits Law and this chapter was offered the opportunity to use pre-tax earnings to purchase transportation fringe benefits in accordance with this chapter [and (ii) whether the employee accepted or declined the offer]; or (ii) records sufficient to demonstrate that the employer provides, at the employer's expense, a transit pass or similar form of payment for transportation on public or privately-owned mass transit or in a commuter highway vehicle at the maximum federal transportation fringe benefit amount that may be excluded from pre-tax earnings. Employers may use the form provided by the department and available on the department's website to document compliance.

§8-07 Employer-Funded Transportation Benefits.

- (a) As an alternative to offering the opportunity to use pre-tax earnings to purchase transportation fringe benefits, an employer may provide at the employer's expense a transit pass or similar form of payment for transportation on public or privately-owned mass transit or in a commuter highway vehicle.
- (b) If the employer-provided transit pass or similar form of payment is less than the maximum transportation fringe benefit that may be excluded from pre-tax earnings under federal law, then the employer must offer employees the opportunity to use pre-tax earnings to purchase transportation fringe benefits for an amount equal to the difference between the value of the employer-provided transit pass or similar form of payment and the maximum amount that may be excluded from gross earnings under federal law.

§8-08 Financial Hardship Exemption

- (a) The department may waive the requirements of the Transportation Benefits Law for an employer if such employer demonstrates to the department's satisfaction that offering the opportunity to use pre-tax earnings to purchase transportation fringe benefits would be a financial hardship for such employer.

- (b) To qualify for a waiver, an employer must present compelling evidence that complying with the Transportation Benefits Law would be impracticable and create a severe financial hardship.

§8-09 Enforcement and Penalties

- (a) The department may issue a notice of violation pursuant to section 20-926(b) of the Administrative Code.
- (b) Any employer found to be in violation of the Transportation Benefits Law will be liable for a civil penalty of two-hundred fifty dollars payable to the city of New York for the first violation, for any and each subsequent violation, and for any and each recidivist violation.
- (c) A civil penalty will not be imposed on an employer for the first violation if the employer demonstrates to the satisfaction of the department within the cure period that it is complying with the Transportation Benefits Law.
- (d) For the purposes of this section, “satisfaction of the department” with reference to an employer’s compliance with the Transportation Benefits Law means proof that the employer has offered its full time employees the opportunity to use pre-tax earnings to purchase transportation fringe benefits or that the employer provides, at the employer’s expense, a transit pass, or similar form of payment, for transportation on public or privately-owned mass transit or in a commuter highway vehicle at the maximum federal transportation benefit amount that may be excluded from pre-tax earnings.
- (e) An employer seeking to demonstrate that it is complying with the Transportation Benefits Law may do so by submitting the compliance form provided by the department and available on the department’s website. The department may require submission of additional information, including documentary evidence, reasonably necessary to prove that a first violation was cured within the cure period.

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: Amendment of Mass Transit Benefit Rules

REFERENCE NUMBER: DCA-51

RULEMAKING AGENCY: Department of Consumer Affairs

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) Provides a cure period.

/s/Guenevere Knowles
Mayor's Office of Operations

May 31, 2016
Date

**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: Amendment of Mass Transit Benefit Rules

REFERENCE NUMBER: 2016 RG 035

RULEMAKING AGENCY: Department of Consumer Affairs

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: May 31, 2016