

**NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**Notice of Public Hearing and Opportunity to Comment on
Proposed Amendment to Article 203 of the New York City Health Code**

What are we proposing? The New York City Department of Health and Mental Hygiene (“Department” or “DOHMH”) is proposing that the Board of Health (“Board”) amend Article 203 of the New York City Health Code (“Health Code”) to align it with recently adopted New York State and New York City legislation to provide the same strong level of protection for confidential medical information about spontaneous terminations of pregnancy reported to the Department as that provided to induced terminations of pregnancy.

When and where is the hearing? The New York City Department of Health and Mental Hygiene will hold a public hearing on the proposed rule. The public hearing will take place at 10:00AM to 12:00PM on Tuesday, March 21, 2023. The hearing will be conducted by video conference accessible via internet or telephone:

- **Internet.** To participate in the public hearing, enter to register at this Webex URL: <https://nycdohmh.webex.com/nycdohmh/j.php?MTID=m95f93b7cbd1b2eeabef6166dcc4a7c8c>
If prompted to provide an event number or password, please enter the following:
Webinar number: **2343 042 9173**, Password: **Health** (432584 from phones)
- **Phone:** For access, dial: **(646) 992-2010** or **(408) 418-9388**; then please enter the following access code: **234 304 29173**.

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

- **Website.** You may submit comments to the Department through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You may email comments to resolutioncomments@health.nyc.gov.
- **Mail.** You may mail comments to:
New York City Department of Health and Mental Hygiene
Gotham Center, 42-09 28th Street, CN 30
Long Island City, NY 11101-4132
- **Fax.** You may fax comments to Department at 347-396-6087.
- **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 Svetlana Burdeynik at 347-396-6078 /6116. You can also sign up in the hearing before the hearing begins on March 21, 2023. You can speak for up to three minutes.

Is there a deadline to submit comments? Written comments must be received on or before March 21, 2023, at 5:00 pm.

What if I 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 347-396-6078. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by March 7, 2023.

Can I review the comments made on the proposed amendment? You may review the comments made online at <http://rules.cityofnewyork.us/> on the proposed amendments by going to the website at <http://rules.cityofnewyork.us/>. All written comments and a summary of the oral comments received by the Department will be made available to the public within a reasonable period of time by the Department's Office of the General Counsel.

What authorizes the Department to make this amendment? Section 558(b) and (c) of the Charter empower the Board to amend the Health Code and to include in the Health Code all matters to which the Department's authority extends. Section 558(c) of the Charter authorizes the Board to include in the Health Code provisions related to maintaining a registry of births and deaths. Section 556(c)(1) of the Charter authorizes the Department to supervise and control the registration of births and deaths. Section 1043(a) of the Charter grants rulemaking powers to the Department. The Department did not include the proposed amendment in its regulatory agenda for this fiscal year because it did not contemplate this amendment at the time.

Where can I find the Department's rules? The Department's rules and the Health Code are located in Title 24 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department must satisfy the requirements of Section 1043 of the Charter when adding or amending rules. This notice is made according to the requirements of Section 1043(b) of the Charter.

Statement of Basis and Purpose of Proposed Rule

Since 2019, the New York State ("NYS") Reproductive Health Act (NYS Public Health Law Article 25-a) has protected the right to an abortion throughout the State. The Act permits abortions when the patient is within twenty-four weeks from the commencement of pregnancy, there is an absence of fetal viability, or the abortion is necessary to protect the patient's life or health. NYS Public Health Law § 2599-bb(1).

In contrast and as a result of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022), abortions are mostly banned in 12 states and have been severely restricted in many other states.¹ Some of these anti-abortion laws make it more difficult to receive standard surgical procedures or medication for the loss of desired pregnancies. There are reports of providers in the affected states refusing to perform procedures needed to fully evacuate the uterus after a spontaneous termination of pregnancy, e.g., a dilation and curettage ("D&C"), lest they be accused of performing an abortion. Women have faced life-threatening

¹ For an analysis of each state's policies, see Guttmacher Institute, "Interactive Map: US Abortion Policies and Access After Roe," <https://states.guttmacher.org/policies/> (last accessed on November 10, 2022).

infections and other complications as a result.² In addition, some lawmakers in states that have mostly banned abortions have considered targeting people traveling to other states to seek abortion care.³ Whether state abortion-restricting laws can apply extraterritorially is an open constitutional question.⁴

In anticipation of the *Dobbs* decision, New York State and New York City took legislative action in 2022 to protect abortion patients and those helping patients access abortions. The State adopted laws generally prohibiting (1) courts and county clerks from issuing subpoenas in connection with out-of-state proceedings related to abortions lawfully performed in New York;⁵ and (2) State and local law enforcement agencies from cooperating with, or providing information to, any individual or out-of-state agency or department regarding abortions lawfully performed in New York.⁶ The City separately adopted a law prohibiting the use of City resources to cooperate with, or provide information to, any individual or out-of-state agency or department that would confirm, deny, or identify any person associated with an abortion that has been lawfully performed.⁷ This local law defines “abortion” as “the procedure to terminate a pregnancy for purposes other than producing a live birth, including a termination using pharmacological agents, and any services related to such procedure, including pre-procedure and post-procedure counseling.”

In New York City, fetal deaths must be reported to the Department as part of its vital records-keeping function.⁸ The Department is not permitted to include the name or any identifying information about an individual whose termination of pregnancy was induced unless the individual requests it to be collected.⁹ Rather, the Department uses unique, confidential identifiers to “monitor the quality of care provided by any individual or entity licensed to perform an abortion in this state and to permit coordination of data concerning the medical history of the woman for purposes of conducting surveillance scientific studies and research.”¹⁰ In addition, the City’s Administrative Code provides

² See, Mendez, M., “Texas laws say treatments for miscarriages, ectopic pregnancies remain legal but leave lots of space for confusion,” *The Texas Tribune* (July 20, 2022), accessible online at <https://www.texastribune.org/2022/07/20/texas-abortion-law-miscarriages-ectopic-pregnancies/>; Belluck, P., “They Had Miscarriages, and New Abortion Laws Obstructed Treatment,” *New York Times* (July 17, 2022), accessible online at <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>; Rubin, R., “How Abortion Bans Could Affect Care for Miscarriage and Infertility,” *JAMA*. 2022;328(4):318-320. doi:10.1001/jama.2022.11488, accessible online at <https://jamanetwork.com/journals/jama/fullarticle/2793921>.

³ See, generally, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 Columbia L. Rev. 1, (2022) (Draft), 17-23, available online at https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1515&context=fac_articles.

⁴ See *id.*

⁵ NYS Civil Practice Law and Rules §§ 3102(e), 3119(g).

⁶ NYS Executive Law § 837-w.

⁷ NYC Administrative Code § 10-184(b)(2).

⁸ *Id.* § 17-166(a).

⁹ *Id.* § 17-166(e).

¹⁰ *Id.*

that records of fetal death “shall be issued upon request unless it does not appear to be necessary or required for a proper purpose.”¹¹

In New York City, Health Code Section 203.03(a) requires that all terminations of pregnancy be reported to the Department. “Termination of pregnancy” (“TOP”) is defined in Health Code § 203.01(a) as “the expulsion or extraction of a conceptus, regardless of the duration of pregnancy, other than a live birth . . . , and includes fetal death.” Section 203.01(b) defines “spontaneous termination of pregnancy,” commonly referred to as a miscarriage, as the “unplanned termination of a pregnancy,” while section 203.01(c) defines “induced termination of pregnancy,” commonly referred to as an abortion, as “the purposeful interruption of an intrauterine pregnancy with the intention other than to produce a live-born infant and which does not result in a live birth.” Health Code § 203.07(c) requires that the certificate of induced TOP “be confidential and not subject to compelled disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department.” In contrast, Health Code § 203.07(a) offers *less protection* to confidential medical reports of spontaneous TOPs by allowing disclosure of the records “in a criminal action or criminal proceeding, or for official purposes by a federal, State, county or municipal agency charged by law with the duty of detecting or prosecuting crime. The Commissioner may, however, approve the inspection of such medical reports for scientific purposes.”

The lesser protections afforded spontaneous TOPs by Health Code § 203.07(a) are no longer be in sync with the State and City laws enacted in 2022 and described above: under the current Code provisions, it is possible that an out-of-state law enforcement agency could try to access spontaneous TOP records of an out-of-state resident in order to commence an action against an alleged “illegal abortion” under that state’s laws. The Department therefore proposes amending Health Code § 203.07 to afford both induced and spontaneous TOPs the same level of protection and to allow the Department to assess any subpoenas or other requests for spontaneous TOP records to determine whether the underlying use is permitted by State and City law.

The proposed amendment is as follows:

New material is underlined.

[Deleted material is in brackets.]

Asterisks (***) indicate unamended text.

“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.

RESOLVED, that section 203.07 of Article 203 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, be amended to read as follows:

§ 203.07 Confidential medical report of spontaneous termination of pregnancy and certificate of induced termination of pregnancy; not subject to [compelled disclosure or] inspection.

¹¹ *Id.* § 17-169(b).

- (a) The confidential medical report of a spontaneous termination of pregnancy and the certificate of induced termination of pregnancy shall be confidential and not subject to [compelled] disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department[, except in a criminal action or criminal proceeding, or for official purposes by a federal, State, county or municipal agency charged by law with the duty of detecting or prosecuting crime]. The Commissioner or the Commissioner's designee may, however, approve the inspection by others of such medical reports and certificates for scientific or lawful purposes.
- (b) Within the context of this section, scientific purposes shall mean epidemiologic surveillance and investigation by a governmental public health agency, research, or the compilation of statistics relating factors bearing on disease incidence, prevalence, mortality or treatment.
- [(c) The certificate of induced termination of pregnancy shall be confidential and not subject to compelled disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department.]

**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: Confidentiality of Information Regarding Spontaneous Termination of Pregnancy

REFERENCE NUMBER: DOHMH-129

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/ Fiona Peach
Mayor's Office of Operations

January 6, 2023
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: Confidentiality of Information Regarding Spontaneous Termination of Pregnancy

REFERENCE NUMBER: 2022 RG 101

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
Senior Counsel

Date: January 6, 2023