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March 23, 1988

Ms. Patricia Caruso
Secretary, New York City
Department of Health
125 Worth Street
New York, New York 10013 - Box 31

Dear Ms. Caruso:

These comments address the regulations that were issued in proposed form on March 2, 1988, to implement the New York City Clean Indoor Air Act (the "Act"). While the proposed regulations are faithful to the Act in many respects, certain provisions conflict with both the letter and spirit of the Act and should be amended or deleted entirely before the regulations are issued in final form.

Section 17-513 of the Act provides that the Commissioner of Health "shall promulgate rules and regulations in accordance with the provisions *** [of the Act], and such other rules and regulations as may be necessary for the purpose of implementing and carrying out the [Act's] provisions***." As the language just quoted makes abundantly clear, the Commissioner's authority under the Act to issue regulations has been carefully circumscribed. Rather than being given an administrative carte blanche, the regulations issued by the Commissioner must be consistent with the Act and may not go beyond what is "necessary implementing the Act's provisions.

The limits imposed by the Act itself on the Commissioner's authority to issue implementing regulations reflect and are required by established principles of administrative law.

Administrative agencies in New York do not possess legislative powers. E.g., Boreali v. Axelrod, 71 N.Y.2d 1, 523 N.Y.S.2d 464 (1987). Rather, their authority is entirely derivative. Of particular pertinence here, any regulations that are issued must be consistent with the underlying statute and must not impose requirements that exceed what the legislative body has required. See Nicholas v. Kahn, 47 N.Y.2d 24, 31, 389 N.E.2d 1086, 416 N.Y.S.2d 565, 569 (1979); Jones v. Berman, 37 N.Y.2d 42, 53, 332 N.E.2d 303, 371 N.Y.S.2d 422, 429 (1975); Humphrey v. State Ins. Fund, 298 N.Y. 327, 83 N.E.2d 539, 541 (1949); Levine v. N.Y. State Dep't of Social Services, 106 Misc.2d 496, 434 N.Y.S.2d 572, 574 (Sup. Ct. Kings Co. 1980).

In the respects noted below, the regulations proposed by the Commissioner directly contravene or go beyond the Act. We urge that the regulations be changed in such respects before they are issued in final form.

1. Warning Statement

The proposed regulations require that signs specifying where smoking is permitted include a statement that "Smoking and Breathing Second-Hand Smoke is Dangerous to Health" (Reg. Sections 1(h), 10(b) and (d)). Nothing in the Act authorizes the Commissioner to impose such a warning requirement. Rather, the Act requires that signs be posted indicating by words or symbols whether smoking is permitted in a particular area (Act Section 17-506(a)). The Commissioner's authority to implement that provision is limited, by the Act's express terms, to regulating the "size, style and location" of the signs. Nothing in the Act permits the Commissioner also to require that certain of the signs bear a warning notice of the Commissioner's choosing.

Although the Act's preamble makes clear that the City Council's approval of the Act was motivated, in part, by health concerns, the Council stopped short of requiring private establishments to post government-approved or government-endorsed statements concerning the possible relationship between environmental tobacco smoke and health. The Council could easily have imposed

such a requirement had it desired to do so. It decided instead, of course, simply to prohibit smoking in certain placed except in designated areas and to regulate smoking in the workplace. Under settled principles of administrative law, the Commissioner cannot "add [ ] a new requirement" to the Act. Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E.2d 581, 582 (1950). Since the warning notice provisions of the proposed regulations go beyond the Commissioner's delegated powers, and are inconsistent with the Act's specific provisions, the warning notice provisions should be deleted.

2. Special Facilities

(a) The proposed regulations deem "cabarets, jazz clubs, comedy clubs and other entertainment clubs that sell and serve refreshments, including alcoholic beverages," to be restaurants for purposes of the Act (Reg. Section 5(c) (emphasis added)). As the reference to alcoholic beverages recognizes, many of these facilities are far more analogous to bars than to restaurants. This is significant, of course, because bars are not subject to the Act's smoking restrictions (Act Section 17-505(a)).

The scope of the exemption for bars in the Act is intended to be broad. The exemption encompasses not only establishments exclusively serving alcoholic beverages but also those serving food, where the activity is "incidental to the consumption of alcoholic beverages" (Act Sections 17-502(b), 17-505(a)). The Act also exempts from regulation the bar areas of restaurants (ibid.), which confirms the City Council's intent to permit smoking in those establishments and areas of establishments in which the serving of alcoholic beverages is the predominant activity.

It is inconsistent with the language and intent of the Act to presume, as the proposed regulations do, that all cabarets and other clubs are restaurants regardless of whether any food is served or whether it is served only as an incident to the service of alcoholic beverages. The Act contains a lengthy list of establishments included within the definition of "restaurant"

(Act Section 17-502(p)). That definition does not refer to cabarets or other clubs, which are not commonly thought of as "commercial eating establishments(s)" (ibid.).

The City Council could have written the Act in a way that bars would have lost their exemption if they permitted singers, dancers or others to provide entertainment to bar customers during all or a portion of the bar's opening hours. It did not do so. Instead, it imposed a definitional test that depends upon the extent to which the establishment serves alcoholic beverages for consumption on the premises. Nothing in the Act permits the Commissioner to add a further test -- one focusing on whether entertainment is provided -- before an establishment may take advantage of the exemption for "bars." Thus, the proposed regulations should be amended to provide that any establishment, or area of an establishment, that is devoted exclusively or primarily to the serving of alcoholic beverages for on-premises consumption qualifies as a "bar."

(b) Section 5(d) of the proposed regulations provides that certain multiple dwellings are public places "to which the public is deemed to be permitted at all times." This is significant because the Act prohibits smoking in public places only "during the times in which the public is invited or permitted" (Act Section 17-503(a)). There is no basis in fact or in the Act for assuming that the public is permitted at all times to enter buildings containing ten or more dwelling units. This issue should be decided on a case-by-case basis, as the Act clearly intends by its reference to "the times" during which the public is permitted. If, as is often the case, the public is not permitted in a building at certain times, then the Act's prohibition does not apply. The proposed regulations should be amended accordingly.

3. Calculation of Number of Employees

Section 4 of the proposed regulations provides that "all employees on the payroll, whether full or part-time," must be included in calculating the number of employees of an individual

employer and that, where the number of employees varies over the course of the year, the largest number shall be used. This calculation is significant because the Act does not significantly affect businesses and most retail stores employing fewer than 15 persons (Act Sections 17-503(a)(4) and (6), 17-504(a), 17-505(d)). The obvious intent of the Act is to exclude small businesses.

Section 4 of the proposed regulations would severely limit this small business exemption. For example, if a small retail store used two shifts of five full-time employees each and the owner hired an additional six part-time workers solely during the period form Thanksgiving to Christmas, the exemption would be lost for the entire year. Such an unreasonable result is not consistent with the Act's intent.

Section 4 of the proposed regulations also is inconsistent with the language of the Act, which speaks of persons employed "at the same location" (Act Section 17-503(a)(4); see, also id. Section 17-503(a)(6)). Employees who are on different shifts or who work during only part of the year cannot be considered "at the same location" as other workers when they are not on the premises at the same time. For this reason as well, the proposed regulation is invalid.

4. Definition of Floor Space

Section 2(b) - (f) of the proposed regulations defines the method of calculating floor space for convention halls, health care facilities, waiting areas of public transit depots, lobbies and other structures. These calculations are important in determining the limits of areas in which smoking is permitted (Act Section 17-503(a)(1), (6), (8), (9), (10), (12), (14)). The Act refers generally to the "area" or "floor space" of the structure. The proposed regulations, by contrast, reduce the area or floor space by the "space occupied by structures and other nonmovable objects not used for seating."

This reduction is not authorized by the Act. Neither does it

comport with the generally understood meaning of "area" or "floor space." Indeed, we believe that the members of the City Council would be more than mildly surprised to learn that the restrictions they devised would require the owners and managers of affected facilities to measure each and every piece of furniture and all other objects resting on the floor in order to calculate area or floor space for purposes of the Act. Any such requirement would involve, of course, an administrative nightmare -- something that the City Council attempted to avoid by stating that the intent of the Act was to strike a "reasonable" balance. Accordingly, the final regulations should permit floor space and other pertinent areas to be measured without regard to any objects that may be present. In the usual case, that calculation should involve no more than multiplying the width of the room or area by its length.

5. Waiver

Section 8(b) of the proposed regulations would require that an application for a waiver include "adequate business records clearly demonstrating changes of income and/or expenses which are directly attributable to implementation of the Act." This requirement may effectively prevent persons from applying for a waiver before the Act has been in effect for some period, so that they may accumulate proof of loss under the Act. The Act, however, contemplates that waivers may be obtained on proof that application of the Act "would cause the applicant undue financial hardship" (Act Section 17-509(a) (emphasis added)). Thus, the Act permits waivers on the basis of expected financial harm without requiring proof of past harm. We thus urge that the regulations be changed to provide that evidence of financial harm "shall, if available, include adequate business records ***," and that other evidence of expected financial injury also is acceptable.

6. Size of Lettering

Section 12 of the proposed regulations focus, in part, on the size of the letters that are to be used on signs that are posted

pursuant to the Act, creating a sliding scale depending upon the "furthest distance form which [the] sign is to be read." Section 12 of the proposed regulations purports to implement Section 17-506(a) of the Act, which requires signs to be "prominent" and "conspicuous" but also instructs the Commissioner to "take into consideration the concerns of the various types of establishments regulated therein with respect to the style and design of such signs."

The latter requirement was included in the Act to avoid administrative regulations requiring signs to be posted that, by any reasonable measure, would constitute an eyesore or be unnecessarily disfiguring. Lettering of the sizes contemplated by the proposed regulations would, we submit, fail that elementary test. To the extent that letters, rather than graphics, are used on any sign posted pursuant to the Act, we urge that no sign be required to be larger than thirty-six (36) square inches. The proposed requirement of much larger signs in certain circumstances is both unreasonable and unnecessary, creating a form of visual blight that was never considered -- and would be unlikely to be approved -- by the City Council.

Respectfully submitted,

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for The Tobacco Institute

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