

**STATE OF NEW YORK —DEPARTMENT OF HEALTH
INTEROFFICE MEMORANDUM**

TO: City and County Commissioners of Health and Public Health Directors
District Directors

FROM: Richard W. Svenson, P.E., Director
Division of Environmental Health Protection

DATE: December 12, 2003

SUBJECT: Clean Indoor Air Act (CIAA) – Implementation Guidance

The attached documents have been prepared to assist enforcement officials in the implementation of the Clean Indoor Air Act (CIAA). This guidance includes a review of the law's applicability to membership associations, a cigar bar definition, and criteria for use in reviewing waiver applications and issuing waivers. The waiver criteria are to be followed by New York State Department of Health ("Department") enforcement officials. City and county officials may, in their discretion, choose to follow some or all of the waiver guidance.

The documents, which have been prepared and reviewed in conjunction with staff of the Department's Division of Legal Affairs, can be used as separate attachments for use/transmittal as necessary. The following is a brief description of the three documents.

1. A membership association, as defined in the Section 1399-n(4) of the Public Health Law, does not need to comply with any of the provisions of the CIAA when all association duties are performed by members that do not receive compensation of any kind from the membership association or any other entity for the performance of such duties. These organizations have a choice regarding allowing smoking on their premises for any and all activities, including service of food, service of beverages and fundraising activities such as bingo games and other events.
2. The definition of a cigar bar simply reflects the definition of a "bar" in the CIAA, that is primarily engaged in the business of selling cigars and that obtained at least 10% of its annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines for the calendar year ending December 31, 2002. Based upon brief review of cigar bars that exist in New York City, we anticipate the number of exempt facilities will be small.
3. The largest and most detailed of the attachments addresses the criteria for consideration of waiver applications and issuance of waivers based on undue financial hardship or other factors. Each application should be carefully reviewed on its own individual merits. Those applicants that are eligible for a waiver should be made

aware of any restrictions/conditions that will need to be implemented to minimize the impact of the waiver on persons subject to an involuntary exposure to secondhand smoke.

If you have questions, please contact Eileen Franko or Brian Miner at (518) 402-7600.

Attachments

12/12/03
New York State Department of Health
Clean Indoor Air Act (CIAA) Guidance – Cigar Bar Definition

1. A “Cigar bar” is an establishment that
 - (A) is a bar, as defined in Section 1399-n (1) of the Public Health Law (“any area, including outdoor seating areas, devoted to the sale and service of alcoholic beverages for on-premises consumption and where the service of food is only incidental to the consumption of such beverages”), and
 - (B) is primarily engaged in the business of selling cigars and generated ten percent (10%) or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, in the calendar year ending December 31, 2002.

12/12/03

**New York State Department of Health
Clean Indoor Air Act (CIAA) Guidance – Applicability of Membership
Associations as defined in Section 1399-n(4) and described in Section
1399-q(4) of the Public Health Law**

A “membership association” in which all the duties are performed by members who do not receive compensation of any kind from the membership association or any other entity for the performance of their membership association duties, is exempt from all smoking restrictions contained within the CIAA. Compensation includes pay, tips, free membership, life insurance, drinks, meals, lodging, or any other items that would be considered compensation for performance of their duties. Any membership association that meets the criteria described in Section 1399-q(4) for “membership associations” is not subject to any of the provisions in the CIAA. Such organization could allow smoking in facilities that serve food and alcoholic beverages, operate bingo games or operate other fund raising activities. These activities could be attended by members, member guests and the general public.

Any organization seeking exemption from the applicability of the CIAA as a membership association must show that:

1. It is a membership association, which is defined in Section 1399-n(4) as a not-for-profit entity which has been created or organized for a charitable , philanthropic, educational, political, social or other similar purpose; and
2. All of the duties with respect to the operation of such association, including, but not limited to
 - the preparation of food and beverages,
 - the service of food and beverages,
 - reception and secretarial work, and
 - the security of the membership association

are performed by members of such membership association who do not receive compensation of any kind from the membership association or any other entity for the performance of such duties.

12/12/03

**New York State Department of Health
Clean Indoor Air Act (CIAA) Guidance - Criteria for the Issuance of a
Waiver (Section 1399-u of the Public Health Law)**

A waiver applicant may be granted a waiver if the applicant demonstrates that compliance with a specific provision of the CIAA created an “undue financial hardship” or other factors exist that make compliance unreasonable. The merits of each waiver application should be assessed individually, taking into account the particular circumstances of each facility for which a waiver is sought.

- I. An “undue financial hardship” may be found to exist based on (A) a facility’s loss of revenue due to compliance with the law; (B) a facility’s capital expenditures prior to the law; or (C) other exceptional circumstances resulting in adverse economic impact(s) on the facility.**
 - A. Undue financial hardship due to loss of revenue:** An undue financial hardship due to loss of revenue may be found to exist if documentation provided pursuant to Paragraph I (A)(1) below demonstrates that the facility has experienced at least a fifteen percent (15%) reduction in state sales tax receipts from the sale of food and beverages for a period of three (3) consecutive months during which the facility has operated smoke-free as compared to the combined average of such receipts during the same three (3) consecutive month period in the two (2) years immediately prior to smoke-free operation. The operator of a facility that was in operation prior to July 24, 2003 may apply for a waiver pursuant to Section I(A). The operator is the legal entity of record for the facility on July 23, 2003. If the facility has not been in operation for an entire two (2) years prior to the date of its application for a waiver, an “undue financial hardship” may be found to exist if documentation provided pursuant to Paragraph I (A)(1) below demonstrates that the facility has experienced at least a 15% reduction in state sales tax receipts from the sale of food and beverages for a period of three (3) consecutive months during which the facility has operated smoke-free as compared to the three (3) consecutive month period immediately prior to the three (3) month period of smoke-free operation. A waiver applicant whose facility has not experienced at least a 15% reduction in state sales tax receipts as set forth in Section I (A) may seek a waiver based on undue financial hardship pursuant to Sections I (B) or I (C) below.
 1. A waiver application based on loss of revenue should contain the following:
 - a. The specific provision from which the applicant seeks a waiver;
 - b. A description of all efforts made to operate the facility profitably as a smoke-free environment; and
 - c. Exact copies of State sales tax statements that were submitted by the operator to the State of New York to support the operator’s contention that the facility has experienced at least a 15% reduction in state sales tax receipts from the sale of food and beverages for a three (3) consecutive month period of smoke-

- free operation immediately prior to filing as compared to the combined average of such receipts during the same three (3) consecutive month period in the two (2) years immediately prior to smoke-free operation; and
- d. Evidence which demonstrates that the facility's purported reduction in State sales tax receipts from the sale of food and beverages has occurred under similar operational conditions, other than the presence of a smoke-free environment, and is not due to other factors. Such evidence should include, but need not be limited to: evidence that the facility operated during the same number of hours, was open the same number of days, was open on the same high business days, such as holidays, and sold food and beverages from a menu similar in selection and cost; and
 - e. A description of conditions or restrictions that may be necessary for the facility to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure the waiver is consistent with the general purpose of Public Health Law Article 13-E.
 - f. When assessing whether a facility will minimize the effects of a waiver, the following actions by the facility should be sought; and the extent to which such actions will be undertaken by the facility should be determined:
 - i. Smoking areas located away from the general traffic patterns of travel to enter the establishment and visit the restrooms.
 - ii. Separate smoking/non-smoking areas, possibly physically separated or utilizing special mechanical ventilation systems, located in such a manner to control second hand smoke exposure to non-smokers.
 - iii. Maintenance of smoking/non-smoking area signs.
 - iv. Efforts to limit employee exposure to second hand smoke.

- 2. All materials submitted by the waiver applicant should be considered in deciding whether or not to grant the waiver sought by the applicant.

B. Undue financial hardship due to capital expenditures prior to the law: An undue financial hardship due to capital expenditures prior to the law may be found to exist if documentation provided pursuant to Paragraph I (B)(2) below demonstrates that the operator is unable to recover the costs associated with a capital improvement project that was initiated prior to July 24, 2003 (the effective date of the 2003 amendments to the CIAA) and was designed to provide a smoke-free environment at the facility. The operator of a facility that was in operation prior to July 24, 2003 may apply for a waiver pursuant to Section I(B). The operator is the legal entity of record for the facility on July 23, 2003.

- 1. The operator of the facility should demonstrate that structural/equipment improvements of the facility were made before the law was amended and that these modifications controlled secondhand smoke exposure to nonsmokers.
- 2. A waiver application based on capital expenditures prior to the law should contain the following:
 - a. The specific provision from which the applicant seeks a waiver;

- b. A description of all efforts made to operate the facility profitably as a smoke-free environment;
- c. Cost receipts for, and a description of, the capital project improvements, including documentation as to the effectiveness of these improvements;
- d. A description of conditions or restrictions that may be necessary for the facility to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure the waiver is consistent with the general purpose of Public Health Law Article 13-E.
- e. When assessing whether a facility will minimize the effects of a waiver, the following actions by the facility should be sought; and the extent to which such actions will be undertaken by the facility should be determined:
 - i. Smoking areas located away from the general traffic patterns of travel to enter the establishment and visit the restrooms.
 - ii. Separate smoking/non-smoking areas, possibly physically separated or utilizing special mechanical ventilation systems, located in such a manner to control second hand smoke exposure to non-smokers.
 - iii. Maintenance of smoking/non-smoking area signs.
 - iv. Efforts to limit employee exposure to second hand smoke.

3. All materials submitted by the waiver applicant should be considered in deciding whether or not to grant the waiver sought by the applicant.

C. Undue financial hardship due to other exceptional circumstances resulting in adverse economic impact(s) on the facility: An undue financial hardship due to other exceptional circumstances resulting in adverse economic impact(s) on the facility may be found to exist if documentation provided pursuant to Paragraph I (C)(2) below demonstrates that the facility has experienced, or will experience, due to exceptional circumstances other than those described in Sections I (A) and I (B), adverse economic impact(s) from the implementation of the CIAA.

- 1. The operator of the facility should demonstrate that, due to exceptional circumstances other than those described in Sections I (A) and I (B), the facility has experienced or will experience adverse economic impacts that result from the implementation of the CIAA.
- 2. A waiver application based on other exceptional circumstances resulting in adverse economic impact(s) on the facility should contain the following:
 - a. The specific provision from which the applicant seeks a waiver;
 - b. A description of all efforts made to operate the facility profitably as a smoke-free environment;
 - c. Cost receipts associated with, and a complete description of, the exceptional circumstances purported to result in adverse economic impact(s) on the facility.
 - d. A description of conditions or restrictions that may be necessary for the facility to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure the waiver is consistent with the general purpose of Public Health Law Article 13-E.

- e. When assessing whether a facility will minimize the effects of a waiver, the following actions by the facility should be sought; and the extent to which such actions will be undertaken by the facility should be determined:
 - i. Smoking areas located away from the general traffic patterns of travel to enter the establishment and visit the restrooms.
 - ii. Separate smoking/non-smoking areas, possibly physically separated or utilizing special mechanical ventilation systems, located in such a manner to control second hand smoke exposure to non-smokers.
 - iii. Maintenance of smoking/non-smoking area signs.
 - iv. Efforts to limit employee exposure to second hand smoke.

3. All materials submitted by the waiver applicant should be considered in deciding whether or not to grant the waiver sought by the applicant.

II. Demonstration that (A) safety or security factors or (B) other factors exist that would make compliance unreasonable.

(A) Safety or Security Factors Exist That Would Make Compliance Unreasonable:

1. The operator of the facility should demonstrate, through documentation provided pursuant to Paragraph II (A) (2) below, that compliance with the law will jeopardize the safety and/or security of facility staff, patrons or others.
2. A waiver application based on safety or security factors should contain the following:
 - a. The specific provision from which the applicant seeks a waiver;
 - b. A description of all efforts made to operate the facility safely or securely as a smoke-free environment;
 - c. A complete description of how the specific provision from which the applicant seeks a waiver caused or contributed to, or will cause or contribute to, safety or security concerns.
 - d. A description of conditions or restrictions that may be necessary for the facility to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure the waiver is consistent with the general purpose of Public Health Law Article 13-E.
 - e. When assessing whether a facility will minimize the effects of a waiver, the following actions by the facility should be sought; and the extent to which such actions will be undertaken by the facility should be determined:
 - i. Smoking areas located away from the general traffic patterns of travel to enter the establishment and visit the restrooms.
 - ii. Separate smoking/non-smoking areas, possibly physically separated or utilizing special mechanical ventilation systems, located in such a manner to control second hand smoke exposure to non-smokers.

- iii. Maintenance of smoking/non-smoking area signs.
 - iv. Efforts to limit employee exposure to second hand smoke.
3. All materials submitted by a waiver applicant should be considered in deciding whether or not to grant the waiver sought by the applicant.

B. Other Factors Would Make Compliance Unreasonable:

1. The operator of the facility should demonstrate, through documentation provided pursuant to Paragraph II (B)(2) below, that factors other than safety, security or financial hardship would make compliance with a specific provision of the CIAA unreasonable.
2. A waiver application based on factors other than safety, security or financial hardship that would make compliance with a specific provision of the CIAA unreasonable should contain the following:
 - a. The specific provision from which the applicant seeks a waiver;
 - b. A description of all efforts made to operate the facility as a smoke-free environment;
 - c. A complete description of those factors that are believed to make compliance unreasonable.
 - d. A description of conditions or restrictions that may be necessary for the facility to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure the waiver is consistent with the general purpose of Public Health Law Article 13-E.
 - e. When assessing whether a facility will minimize the effects of a waiver, the following actions by the facility should be sought; and the extent to which such actions will be undertaken by the facility should be determined:
 - i. Smoking areas located away from the general traffic patterns of travel to enter the establishment and visit the restrooms.
 - ii. Separate smoking/non-smoking areas, possibly physically separated or utilizing special mechanical ventilation systems, located in such a manner to control second hand smoke exposure to non-smokers.
 - iii. Maintenance of smoking/non-smoking area signs.
 - iv. Efforts to limit employee exposure to second hand smoke.
3. All materials submitted by the waiver applicant should be considered in deciding whether or not to grant the waiver sought by the applicant.

If a waiver is granted, one of its written conditions should state that “if the actions to be taken by the facility to meet the conditions and restrictions for the following item listed above that is applicable to the facility: IA(1)(f), IB(2)(e), IC (2)(e), IIA(2)(e),

IIB(2)(e) are determined by the enforcement officer to not be effective in minimizing the adverse effects of the waiver, the enforcement officer reserves the right to require other actions and/or if necessary rescind the waiver.” All waivers should be issued for a two-year time period. Periodically, and in response to any complaints received, there should be a re-evaluation of the establishment to assure that the waiver’s conditions to minimize the adverse effects of the waiver have been, and continue to be, implemented. The history of the facility should also be reviewed to determine if there have been any complaints filed against the facility regarding the implementation of the waiver. Issued waivers should not be transferable upon change of ownership.