



## December 2014 Micro Market Update

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### Federal

#### **Food and Drug Administration and the Conference for Food Protection:**

NAMA has been in dialogue with the U.S. Food and Drug Administration (FDA) to discuss micro markets and the Food Code's application to the industry. In addition to meetings with the FDA's Office of Food Safety, a meeting was held with the Deputy Commissioner for Food, Mike Taylor during the 2014 Public Policy Conference. The FDA is determining how to address a micro market in the Food Code. This process will most likely take a few years; however NAMA is at the forefront of these discussions.

In early 2014, NAMA attended the Conference for Food Protection (CFP) meeting where a committee was formed to develop recommendations on whether and how the Food Code should be modified to address unattended food merchandising operations, consider any existing guidance from FDA and others and develop a CFP document that could assist States when addressing the need to have alternative protective provisions in place when approving a waiver or variance for entities that do not meet section 2-101.11 and 2-103.11 of the 2013 Food Code, and report back at the next conference with a recommendation. Since that time, NAMA has been actively involved in the committee and will continue to advocate on behalf of the industry and its customers

### State

#### **California:**

California's industry leaders have met with several counties across the state. Discussions with Los Angeles County began in 2013 and discussions are in the final states of approval of the counties micro market regulatory proposal. The pending proposal, setting forth the rules and procedures, has been completed by the County and is ready for implementation with the fee schedule still pending. Successful meetings have also been held with Orange and San Diego Counties and plans are pending for meetings with Riverside and San Bernardino. Several of these counties are following the Los Angeles County model although negotiations continue on plan check and annual fees.

#### **Arizona:**

Members have worked in a collaborative way with the Maricopa County Environmental Health Services Department on regulations that were recently approved by the County Board of Supervisors. Industry will continue to work with the county on a reasonable fee structure.

### **Indiana:**

Industry leaders have worked successfully with state regulators in Indiana to produce state guidance for local health departments and other regulatory agencies on how to address micro market operations on routine inspections. Indiana's guidance on micro markets has served as a model for industry to present to other government entities interested in regulating micro markets.

### **Iowa:**

State council and industry leaders pro-actively began discussions with the State Health Department on issues related to a variance for micro markets and have invited the Director of Inspection and Appeals to their Annual Meeting in 2014.

### **Ohio:**

In December 2013, the Ohio Department of Health held a hearing on changes to the Ohio Administrative Code (O.A.C.) rules Section 3717-1- 01. The proposed amendment changed the definition of "micro markets" to allow this type of operation to offer additional food items. The adopted language became effective in early 2014.

### **Washington:**

Members have been working with King County on regulations for micro market operations and expect a final determination in the near future. Once King County has established rules and a fee structure, it is expected that other Washington state counties will likely follow these guidelines.

### **Texas:**

NAMA worked with the Texas Department of State Health Services to incorporate a change in the Texas Food Code that defines micro markets and sets forth standards for them. Several Texas operators attended a recent hearing at the State Health Department where the changes to the code were approved. The change was part of an overall revision of the Texas Food Code. The revisions will be posted for public comment before being published in the state rules register.

## **Appendices**

Appendix 1: Los Angeles County Proposed Regulations

Appendix 2: Maricopa County Environmental Health Services Department Proposed Regulations

Appendix 3: Indiana Micro Market Guidance

Appendix 4: Ohio Micro Market Regulations

Appendix 5: Texas Micro Market Regulations

## Los Angeles County Proposed Regulations

### Procedures for Approving and Inspecting Micro-Markets Adopted January 1, 2015

#### **APPLICATION: Specialized Food Services**

#### **DEFINITIONS:**

Micro-market – an unattended, self-checkout food facility in an enclosed building available to employees at a work location.

Standard plan – a plan submitted and approved for all future businesses of a similar nature. A standard plan for a micro-market must include equipment specifications such as type and number of refrigeration units used for Potentially Hazardous Food (PHF) and beverages, as well as the number of racks used for food in the facility.

#### **PROCEDURE:**

##### **Permit Guidelines**

- I. If an approved standard plan is not on file, the owner of a proposed micro-market is required to submit a standard plan to the Plan Check Program for review and approval.
  
- II. If an applicant is proposing to install a micro-market using an approved standard plan, the applicant is required to submit an application for a Public Health Permit (PHP) to the Specialized Food Services (SFS) Program. Upon receipt of the application, the Environmental Health Specialist (EHS) shall:
  - A. Generate a Service Request (SR) in EnvisionConnect (EC) to create a Program Record (PR). The SR # issued by Plan Check shall be used to locate the approved standard plan in EC.
  - B. Conduct a site evaluation/routine inspection to verify the facility meets the standard plan and all requirements.
  - C. If all requirements are met, the EHS shall issue an invoice and Official Inspection Report (OIR) directing the owner to pay the PHP fee within 7 days.
  - D. If the requirements are not met, the EHS shall issue an OIR instructing the owner to discontinue operation until the facility meets the standard plan. Upon verification of the corrections, the EHS shall issue a PHP.

##### **Inspection Process**

Micro-markets shall receive one unannounced routine inspection for each fiscal year.

##### **Operational Requirements**

As part of the inspection process, the EHS shall verify that the facility complies with the following requirements:

- The refrigeration unit used in the facility for PHF is NSF approved for prepackaged PHF, is capable of self-monitoring temperature, and self-locks if the temperature is not in the required range.
- The facility is unmanned and sales are conducted through self-checkout.
- The food is stocked by a route employee.

During the inspection, EH staff shall:

1. Verify the current PHP with the correct ownership.
2. Confirm the following:
  - The facility is clean and free of vermin.
  - PHF are maintained at the required temperature.
  - The operation has not expanded beyond the scope of the micro-market permit.

- All refrigeration units are maintained clean and in good repair.
  - All shelves/racks are maintained cleaned and in good repair.
  - Sign containing the owner's name, address and telephone number is visibly posted.
  - Video surveillance is provided.
3. Document any violations on the OIR and provide a copy of the OIR to the operator either onsite, email or via U. S. Mail. .
  4. Schedule a re-inspection if the micro-market has major violations.
  5. If there are major violations of significant public health concern that cannot be mitigated (e.g. vermin infestation, inoperable refrigeration unit), EH staff shall:
    - a. Contact the owner via phone call and inform him/her of the violation,
    - b. Red tag food displays and refrigeration units,
    - c. Suspend the PHP and direct the owner/operator to discontinue operation of the facility.
    - d. Issue a hearing notice to the owner.
    - e. Post a Notice of Closure sign.
  6. Conduct the re-inspection. If additional re-inspections are required to gain compliance, a re-inspection fee will be issued for every visit after the first non-compliance inspection until compliance is met. The EHS shall note the status of each violation and issue an OIR to the operator until compliance is obtained.

### **Complaints Procedures**

EH staff shall respond to all complaints regarding micro-markets within three (3) working days of receiving the complaint.

## **Maricopa County Environmental Health Services Department Proposed Regulations**

Maricopa County, Arizona

### Regulation 6. Micro markets

- (A) A micro market shall be located where access can be limited to employees and customers of the business.
- (B) The area of a micro market in which food is displayed shall be limited to a space of three hundred (300) square feet or less.
- (C) All micro market display units offering time/temperature controlled for safety food shall have an automatic control that prevents the equipment from opening:
  - 1) If there is a power failure, mechanical failure, or other condition that results in an internal equipment temperature that cannot maintain food temperatures as specified under chapter 3 of the U.S. food and drug administration 2013 code; and
  - 2) If a condition specified under subparagraph (c)(1) of this regulation occurs, until the equipment is serviced and restocked with food that has

been maintained at temperatures specified under chapter 3 of the U.S. food and drug administration 2013 food code.

- (D) When the automatic shutoff within a display described under paragraph (c) of this regulation is activated, the ambient temperature may not exceed 41 degrees Fahrenheit for more than thirty minutes immediately after the display is filled, serviced, or restocked.
- (E) Labeling requirements for prepackaged food items shall be met as required by the U.S. food and drug administration 2013 food code.
- (F) Refrigerated, ready-to-eat, time/temperature controlled for safety food, displayed at a micro market, shall be discarded if the automatic shutoff control is activated as specified in (c)(1) of this regulation.
- (G) All micro market display units offering time/temperature controlled for safety food shall be equipped with a self-closing door, an automatic shut-off device, and shall comply with all applicable regulations of this code as determined by the department.

The permit applicant shall submit for review and approval a complete set of plans and specifications documenting the equipment is certified or classified for sanitation by an American national standards institute (ansi)-accredited certification program.

## **Indiana State Department of Health Guidance for regulation of "Micro Markets"**

### **Purpose:**

This document is to provide guidance to local health departments, other regulatory agencies, and interested individuals regarding retail food establishments called "micro markets."

### **Background:**

Micro Markets are an emerging market concept being advanced by the automated food vending industry where consumers can open coolers and select from a variety of products without actuating a traditional vending mechanism. Customers take selected products to an automatic pay kiosk and then leave or consume the product on site. Common vending machines may or may not be present in addition to items which are freely accessed by customers. There are no company staff onsite to accept payment or monitor the operation. There is no "person-in-charge" as required in 410 IAC 7-24-117. Products are stocked, maintenance & cleaning occurs routinely, but not necessarily every day. Companies operating these facilities expect them to function on an honor system, assuming consumers will voluntarily pay for the goods they've selected.

### **Definitions:**

"Micro markets" means an unstaffed, self-checkout retail food establishment:

1. with displays that do not exceed 75 linear feet in total length across the front of all displays;
2. which contains an automated payment kiosk;
3. which is located within a business and can be accessed only by customers who are known by the business, such as escorted guests and employees of the business; and

4. which is not accessible to the general public.

"Micro Market Display" means any of the following in which food is displayed such as:

1. an open rack;
2. a refrigerator;
3. a freezer;
4. vending machines; or
5. beverage dispensers

"Vending Machine" means:

1. means the same as the same term defined in 410 IAC 7-24-102; and
2. means a self-service device that, upon activation, such as through the insertion of a coin, paper currency, token, card, key, or by manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

"Person-in-charge" means, as defined in 410 IAC 7-24-60, the individual present at a retail food establishment who is responsible for the operation at the time of inspection.

**Discussion:**

The regulation of vending operations is included in Indiana State Department of Health (ISDH) Rule 410 IAC 7-24, "Retail Food Establishment Sanitation Requirements"; however, micro market operations may not be recognized by all regulatory agencies if they do not routinely regulate vending operations.

A micro market does not meet the definition of a vending machine, so unless individual vending machines are present in the micro market, the vending requirements would not apply to these operations. The operations typically have been located in a factory setting or in other closed environments where the general public does not have access. While micro markets are considered "retail food establishments" under the retail food rule, by design, they do not comply with Section 11 7 as stated below:

410 IAC 7-24-117 Assignment of supervision responsibility

Sec. 117. (a) The owner or operator of a retail food establishment shall have a person-in-charge present at the retail food establishment during all hours of operation.

(b) For purposes of this section, a violation of subsection (a) is a critical item.

These operations are routinely maintained by service individuals who restock and clean/maintain the facilities, but who are not there at all times as is required. The ISDH Food Program is aware of no complaints of illness or injury from the operation of these units, but recently, they began operating in new venues that are more accessible to the general public. When inspected, these facilities had been correctly cited as not being compliance with section 117. Several vending companies then reached out to the ISDH voicing their concerns that the current food code restricts their ability to effectively operate this new concept. They were encouraged to follow the variance process provided in law to seek a change to the code with which they could not comply. As an alternative, they sought a solution to address their concerns from the Indiana State Legislature.

A Senate bill was drafted; however, the sponsoring Legislator called for a meeting between ISDH and the Indiana Vending Council to address issues between the affected parties and ISDH. It was decided that the best course of action would be to work with ISDH on upcoming food code revisions to find middle ground to address both sides of the issue. Meanwhile, ISDH has agreed to provide interim guidance to local health departments and other regulatory agencies on how to address micro market operations on routine inspections.

It has been agreed that, for the immediate future, micro markets shall provide the following measures:

- Each facility shall be indoors and shall not have more than 75 linear feet of sales space in any one location.
- These units will not be placed in facilities that are generally open to the public and must remain in limited access facilities, such as in a factory, restricted access business office or warehouse.
- Operators shall provide 24/7 video surveillance records consumers viewing, selecting, handling and purchasing products from the micro market; and provides sufficient resolution to identify these consumers. The video surveillance recordings are maintained and available for inspection upon request by the state department or other regulatory agency within 24 hours of a request.
- The video surveillance recordings are maintained and available for inspection upon request by the state department for fourteen (14) days after the date of the surveillance.
- The automated self-checkout equipment used in the micro market has the capability to match a purchase with the consumer who made the purchase.
- The only food sold at the micro market is commercially prepackaged food or ready-to-eat fruit.
- Packaging shall be tamper evident.

Prepackaged food sold at the micro market contains the following information on its packaging:

- (A) Except as exempted in the Federal Food, Drug, and Cosmetic Act sections 403(Q)(3)-(5), nutrition labeling for the food as specified in 21 CFR 101 -Food Labeling and 9 CFR 317 Part B Nutrition Labeling.
  - (B) A freshness or expiration date.
  - (C) The standard mandatory labeling requirements for packaged food products as stated in 410 IAC 7-24-146.
- The refrigerated/frozen food sold in a micro market is stored in a refrigerated cooler or freezer that:
    - (A) maintains an internal product temperature of 41°F or less necessary for food safety, as established by the state department;
    - (B) has self-closing doors;
    - (C) allows the food to be viewed without opening the door to the refrigerated cooler or freezer; and
    - (D) has an automatic self-locking feature that prevents a consumer from accessing the food upon the occurrence of any condition (including a power failure or mechanical failure) that results in the failure of the refrigerated cooler or freezer to maintain the internal product temperature of 41°F necessary for food safety, as established by the state department.
    - (E) Each micro market shall have a sign readily visible from the automated payment kiosk stating:
      - (1.) the name of the business responsible for the micro market to whom complaints/comments shall be addressed;



- (2.) the address of the business responsible for the micro market;
- (3.) the responsible business' telephone number and email or web information, when applicable.

The entire contents of the sign shall be in English and may additionally be in any other prevalent language of customers.

When a retail food establishment operating as a micro market incorporates these items, the units will not be required to maintain a "person-in-charge" onsite at all times as specified under Section 117 of ISDH Rule, 410 IAC 7-24, Retail Food Establishment Sanitation Requirements. It is recommended as a routine part of their inspection of these facilities, regulatory agencies should regularly request and review available video surveillance records.

#### **Conclusion:**

It is anticipated that the "micro market" concept will be addressed in future versions of the FDA Model Food Code and some states, such as Ohio, have already adopted rules to legalize and regulate these entities. It is anticipated that the Indiana Vending Council will participate in upcoming revisions of the food code. Please use this guidance to regulate these entities until further notice.

### **Ohio State Regulation**

“(70) "Micro market" means a retail food establishment that offers for sale food items that are allowable in a risk level one operation in displays not more than two hundred and fifty linear feet: Air commercially prepackaged refrigerated or frozen time/temperature controlled for safety food shall be stored in equipment that complies with paragraph (H) of rule 3717-1-03.4, paragraphs (LL) and (MM) or rule 3717-1-04.1 of the Administrative Code.”

### **Texas Micro Market Regulations**

#### **§228.225 Self-Service Food Market**

- (a) Self-Service Food Markets shall comply with the minimum standards of this section.
- (b) Self-Service Food Markets shall:
  - (1) be equipped with 24/7 video surveillance records of consumers viewing, selecting, handling, and purchasing products that identify these customers. Video surveillance records must be maintained and available for the regulatory authority.
  - (2) provide information to the regulatory authority as to the responsible party that will be available for routine inspections.
- (c) Pre-packaged food sold at a Self-Service Food Market shall:
  - (1) meet the labeling requirements as specified in §228.62(a)(3) of this title; and
  - (2) be tamper evident.



- (d) A food specified under §228.75(g)(1) or (2) or (h) of this title shall be discarded if it:
  - (1) exceeds the temperature or time specified in §228.75(g)(1) and (2) of this title, except time that the product is frozen,
  - (2) is in a container or package that does not bear an expiration date or day, or
  - (3) is not appropriately marked with a date or day that exceeds the temperature and time combination as specified in §228.75(g)(1) and (2) of this title.
- (e) All self-service food market display units offering refrigerated, time/temperature controlled for safety (TCS) food shall have an automatic shut-off control or a plan approved by the regulatory authority that prevents the market or market equipment from dispensing food if:
  - (1) There is a power failure, mechanical failure, or other condition that results in failure of the equipment to maintain food temperatures as specified under Subchapter D of these rules, and
  - (2) Where a condition specified under paragraph (1) of this subsection occurs, until the equipment is serviced and restocked with food that has been maintained at temperatures specified under Subchapter C (Pertaining to Food) of these rules.
- (f) When a condition specified under subsection (e)(1) of this section occurs, the ambient temperature may not exceed forty-one degrees Fahrenheit (five degrees Celsius) for more than thirty minutes immediately after the display is filled, serviced, or restocked.
- (g) All self-service food market display units offering time/temperature controlled for safety (TCS) food, shall be:
  - (1) Equipped with a self-closing door; or
  - (2) Maintained a forty-one degrees Fahrenheit (five degrees Celsius) if it is an open display unit.
- (h) Self-Service Food Markets shall have a sign readily visible from the automated payment kiosk stating:
  - (1) the name of the business to whom complaints/comments shall be addressed,
  - (2) the address of the business responsible for the market, and
  - (3) the responsible business' telephone number and email or web information, when applicable.
- (i) When a retail food establishment operating a Self-Service Food Market incorporates the provision in this section, they will not be required to maintain a person in charge onsite as specified under §228.34 of this title.