

# RULE MAKING ACTIVITIES

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Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM        -the abbreviation to identify the adopting agency  
01        -the *State Register* issue number  
96        -the year  
00001     -the Department of State number, assigned upon receipt of notice.
- E        -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

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## Office of Alcoholism and Substance Abuse Services

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### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Problem Gambling Treatment and Recovery Services

**I.D. No.** ASA-49-08-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Addition of Part 857 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07, 32.01, 32.02 and 32.07(a)

**Subject:** Problem gambling treatment and recovery services.

**Purpose:** Part 857 establishes criteria for problem gambling services.

**Substance of proposed rule (Full text is posted at the following State website: [www.oasas.state.ny.us](http://www.oasas.state.ny.us)):** Problem Gambling Services, Part 857 creates a standardized set of requirements within the field of problem gambling addiction recovery services, so that each of the service providers is delivering the same or similar services to persons suffering from problem gambling throughout the State.

The regulation defines the admission procedure, recordkeeping, quality improvement and utilization review procedure, staff patterns and qualifications, as well as treatment planning and program requirements.

The delivery of problem gambling services and its treatment modality is different from the delivery of chemical dependency services, therefore this regulation establishes the first protocol for gambling services through OASAS which will enable providers to give the best

possible care to those suffering from problem gambling and their families.

**Text of proposed rule and any required statements and analyses may be obtained from:** Patricia Flaherty, Associate Counsel, OASAS, 1450 Western Avenue, Albany New York 12203, (518) 485-2317, email: [patriciaflaherty@oasas.state.ny.us](mailto:patriciaflaherty@oasas.state.ny.us)

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

1. Statutory Authority: Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction. In addition, the regulations were sent to the existing members of the Advisory Council on Alcoholism and Substance Abuse Services who were given an opportunity to comment.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.02 of the Mental Hygiene Law states the Commissioner of the Office of Alcoholism and Substance Abuse Services may adopt regulations necessary to ensure quality services to those suffering from problem gambling.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

The relevant sections of the Mental Hygiene Law cited above, allow the Commissioner to regulate the administration of problem gambling services. Problem gambling will be treated and persons seeking treatment for their addictions will be provided the opportunity to also deal with their gambling problem. Additionally, those persons suffering with a diagnosis of problem gambling without a chemical dependency can also get treatment. This objective is in line with the legislative intent of Sections 19 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat gambling and chemical dependency. This Part establishes a treatment standard for all service providers that is in the best interest of the client by providing better health care and a stronger basis of recovery from problem gambling.

2. Legislative Objectives: Section 32.02 of the Mental Health Law allows the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from compulsive gambling. The proposed Part 857 will assure that patients, and their families receive the best care and treatment. Treating problem gambling along with chemical dependency is within the Commissioner's jurisdiction and responsibilities under 32.02 and 19.07(e) of the Mental Hygiene Law.

3. Needs and Benefits: This rule is necessary to fulfill the purpose of section 32.02, and Article 32 in its entirety which provisions are applicable to gambling services as stated in 32.02 (b). There are currently no regulations for problem gambling services, therefore a regulation which sets out the objectives, standards, policy and expectations of gambling services providers is necessary to comply with the above referenced statute. This regulation will aid providers in understanding the requirements of the statute, and provides guidelines for the effective treatment of problem gambling. Persons suffering

from problem gambling will benefit greatly from having providers adhere to a common set of expectations.

4. Costs: There will be no additional cost to the State or existing operating entities to implement this new regulation as programs are currently operating under the standards included in this regulation.

5. Local Government Mandates: There are no new mandates or administrative requirements placed on local governments.

6. Paperwork: Part 857 will require some paperwork for certified and or funded providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control record keeping, it is not expected that new record keeping requirements will be excessive. In addition some providers who are approaching the excessive services threshold will have to justify, based upon good clinical practice and specific patient needs, that the amount of services they are providing to patients is appropriate.

7. Duplication: There is no duplication of other state or federal requirements.

8. Alternatives: The alternative is to allow this area of treatment to be unregulated or to continue to provide these services through contracts. This vehicle for ensuring compliance with consistent standards of care is less viable than a regulation. The provider community commented positively in that this regulation will assist in moving forward with the viability of treatment services including possible Medicaid reimbursement.

9. Federal Standards: There are no minimum federal standards.

10. Compliance Schedule: Upon adoption.

#### **Regulatory Flexibility Analysis**

Effect of the Rule: The proposed Part 857 will impact problem gambling service providers that are currently being funded by OASAS and have contracts with the agency to provide this service. There are approximately seventeen providers currently operating in the State. It is expected that the development of the Problem Gambling Services regulation may require providers to incorporate additional standards into their current practice. However, all of the existing programs have been regulated by OASAS through contracts that specify these same standards. Therefore, the existing funded programs operations will not change significantly. These standards will not only result in better patient treatment, but more efficient and effective programs.

Local governments and districts will not be affected by this regulation.

Compliance Requirements: It is not expected that there will be significant changes in compliance requirements. Since providers are already required to adhere to many of the standards proposed in this regulation by way of their contracts with OASAS it is not expected that this regulation, which provides additional guidance on good utilization review practices, will have additional costs.

Professional Services: It is not expected that programs will need to utilize additional professional services.

Compliance Costs: Some programs may need additional staff to meet the proposed requirements; however, existing fees reimburse a sufficient staffing ratio to meet these requirements. Current problem gambling programs are bound by contract with OASAS now, and the conditions of the contract are substantially the same as the proposed regulation.

Economic and Technological Feasibility: Compliance with the recordkeeping and reporting requirements of the proposed Part 857 is not expected to have an economic impact or require any changes to technology for small businesses and government.

Minimizing Adverse Impact: Part 857 has been carefully reviewed to ensure minimum adverse impact to providers. Alcoholism and Substance Abuse Providers of NYS, Inc., the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services, OASAS funded Problem Gambling Prevention and Treatment Providers and the OASAS Problem Gambling Policy Committee were briefed on this proposal.

Small Business and Local Government Participation: These amendments were shared with New York's treatment provider and the Advi-

sory Council on Alcoholism and Substance Abuse Services were briefed on this proposal.

#### **Rural Area Flexibility Analysis**

A rural flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The regulation makes the provision of problem gambling services voluntary, and therefore does not mandate the service in any area. The compliance, recordkeeping and paperwork requirements are the minimum needed to insure compliance with state and federal requirements and quality patient care.

#### **Job Impact Statement**

The implementation of Part 857 will potentially create new jobs in that it creates a new service that can be performed either in a stand alone clinic or within a chemical dependency service. This regulation will not adversely impact jobs outside of the agency. Part 857 will not result in the loss of any jobs within New York State.

## **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

### **Individual Counseling, Physical Examination, Medical History, Quality Improvement and Utilization Review**

**I.D. No.** ASA-49-08-00005-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 817.4(b)(1), (2), 818.4(b)(1), (2), 819.4(b)(1), (2), 822.2(c)(1), 822.4(b)(1), (2) and 822.6(c) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

**Subject:** Individual counseling, physical examination, medical history, quality improvement and utilization review.

**Purpose:** Deliver cost effective and accountable patient care; conform regulatory language to medical and insurance practice.

#### **Text of proposed rule:**

Section 1. Paragraph 1 of subdivision (c) of section 822.2 is amended to read as follows:

(c) Each outpatient service must directly provide the following:

(1) individual counseling [(for each individual patient, at least one out of every ten counseling sessions must be an individual counseling session of at least one half hour in duration with the individual patient's primary counselor, unless a different frequency or intensity is otherwise determined, with supporting documentation, by the multidisciplinary team)];. *OASAS recognizes that individual counseling is a critical element of chemical dependence treatment and patient-centered care. Individual counseling is a requirement that must be provided with a frequency and intensity consistent with the individual needs of each unique patient, as prescribed by the primary counselor and the multi-disciplinary team in the treatment plan. Individual counseling sessions must be of at least 30 minutes in duration and be with the individual patient's primary counselor or another appropriate member of the treatment staff, depending on the individual needs of the patient and as identified in the individual treatment plan.*

§ 2. Paragraphs 1 and 2 of subdivision (b) of section 822.4 is amended to read as follows:

(b) Physical examination. (1) For those patients who do not have an available medical history and no physical examination has been performed within [six] 12 months, each such patient shall be assessed face-to-face by a member of the medical staff within [three weeks] 45 days of admission to ascertain the need for a physical examination. If a physical examination is determined to be indicated, a referral shall be made for a physical examination to be conducted by a physician, physician's assistant, or a nurse practitioner. The physical examination [shall] may include but shall not be limited to the investigation of, and if appropriate, screenings for: infectious diseases, including, but not limited to, an intradermal PPD; pulmonary, cardiac or liver abnormalities; and physical and/or mental limitations or disabilities which may require special services or attention during treatment.

(2) If the patient has a medical history available and has had a physical examination performed within [six] 12 months prior to admission, or if the patient is being admitted directly to the outpatient service from another chemical dependence service authorized by the Office, the existing medical history and physical examination documentation may be used to comply with the requirements of this Part, provided within 45 days after

admission that such documentation has been reviewed by a medical staff member and determined to be current and accurate.

§ 3. Subdivision (c) of section 822.6 is amended to read as follows:

(c) The utilization review plan shall include procedures for ensuring that [admissions are appropriate,] retention [and discharge] criteria are met[,] and services are appropriate. The utilization review plan shall consider the needs of a representative sample of patients for continued treatment, the extent of the chemical dependence problem, and the continued effectiveness of, and progress in, treatment. At a minimum, utilization review shall include separate random samples based upon a patient's length of stay, with larger samples for patients with longer lengths of stay. Utilization review shall also be conducted for all active cases on the 365th day after admission and every 90 days thereafter.

§ 4. Paragraphs 1 and 2 of subdivision (b) of section 817.4 are amended to read as follows:

(b) Medical history. (1) For those patients who do not have available a medical history and no physical examination has been performed within [six] 12 months, within seven days after admission the patient's medical history shall be recorded and placed in the patient's record and the patient shall receive a physical examination by a physician, physician's assistant, or a nurse practitioner. The physical examination [shall] *may* include but *shall* not be limited to the investigation of, and if appropriate, screenings for infectious diseases; pulmonary, cardiac or liver abnormalities; and physical and/or mental limitations or disabilities which may require special services or attention during treatment. The physical examination shall also include the following laboratory tests which must be ordered within seven days of admission:

- (a) complete blood count and differential;
- (b) routine and microscopic urinalysis;
- (c) if medically or clinically indicated, urine screening for drugs;
- (d) intradermal PPD, given and interpreted by the medical staff unless the patient is known to be PPD positive; and
- (e) any other tests the examining physician or other medical staff member deems to be necessary, including, but not limited to, an EKG, a chest X-ray, or a pregnancy test.

(2) If the patient has a medical history available and has had a physical examination performed within [six] 12 months prior to admission, or if the patient is being admitted directly to the service provider from another chemical dependence service provider authorized by the Office, the existing medical history and physical examination documentation may be used to comply with the requirements of this Part, provided that such documentation has been reviewed and determined to be current and accurate.

§ 5. Paragraphs 1 and 2 of subdivision (b) of section 818.4 are amended to read as follows:

(b) Medical history. (1) For those patients who do not have available a medical history and no physical examination has been performed within [six] 12 months, within three days after admission the patient's medical history shall be recorded and placed in the patient's case record and the patient shall receive a physical examination by a physician, physician's assistant, or a nurse practitioner. The physical examination [shall] *may* include but *shall* not be limited to the investigation of, and if appropriate, screenings for infectious diseases; pulmonary, cardiac or liver abnormalities; and physical and/or mental limitations or disabilities which may require special services or attention during treatment. The physical examination shall also include the following laboratory tests:

- (a) complete blood count and differential;
- (b) routine and microscopic urinalysis;
- (c) if medically or clinically indicated, urine screening for drugs;
- (d) intradermal PPD, given and interpreted by the medical staff unless the patient is known to be PPD positive;
- (e) or any other tests the examining physician or other medical staff member deems to be necessary, including, but not limited to, an EKG, a chest X ray, or a pregnancy test.

(2) If the patient has a medical history available and has had a physical examination performed within [six] 12 months prior to admission, or if the patient is being admitted directly to the inpatient service from another chemical dependence service authorized by the Office, the existing medical history and physical examination documentation may be used to comply with the requirements of this Part, provided that such documentation has been reviewed and determined to be current and accurate.

§ 6. Paragraphs 1 and 2 of subdivision (b) of section 819.4 are amended to read as follows:

(b) Medical history. (1) For those residents who do not have available a medical history and no physical examination has been performed within [six] 12 months, within forty five days after admission the resident's medical history shall be recorded and placed in the resident's case record and the resident shall receive a physical examination by a physician, physician's assistant, or a nurse practitioner. The physical examination [shall] *may* include but *shall* not be limited to the investigation of, and if appropriate, screenings for infectious diseases; pulmonary, cardiac or liver

abnormalities; and physical and/or mental limitations or disabilities which may require special services or attention during treatment. The physical examination shall also include the following laboratory tests:

- (a) complete blood count and differential;
- (b) routine and microscopic urinalysis;
- (c) if medically or clinically indicated, urine screening for drugs;
- (d) intradermal PPD, given and interpreted by the medical staff unless the resident is known to be PPD positive;
- (e) or any other tests the examining physician or other medical staff member deems to be necessary, including, but not limited to, an EKG, a chest X ray, or a pregnancy test.

(2) If the patient has a medical history available and has had a physical examination performed within [six] 12 months prior to admission, or if the resident is being admitted directly to the residential service from another chemical dependence service authorized by the Office, the existing medical history and physical examination documentation may be used to comply with the requirements of this Part, provided that such documentation has been reviewed and determined to be current and accurate.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara E. Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Avenue, Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### **Consolidated Regulatory Impact Statement**

The proposed amendments to the above named regulations are being submitted for public review and comment. The proposed amendments to certain Part 822, 819, 818 and 817 requirements will improve quality of service and afford treatment professionals more time with clients by eliminating redundancy and excess paperwork currently required for admission, assessment and discharge, aligning more closely with mainstream medical practice and insurance rules related to required physical exams, and reducing occasions for "no shows" or premature discharge.

##### 1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

Section 19.15(a) of the Mental Hygiene Law bestows upon the Commissioner the responsibility of promoting, establishing, coordinating, and conducting programs for the prevention, diagnosis, treatment, aftercare, rehabilitation, and control in the field of chemical abuse or dependence.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by article 32 of the Mental Hygiene Law.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of article 32 of the Mental Hygiene Law.

The relevant sections of the Mental Hygiene Law cited above authorize the Commissioner to regulate the provision of services to patients and how such chemical dependency services are delivered and to establish standards for the provision of such services and qualifications of staff.

##### 2. Legislative Objectives:

Article 32 of the Mental Hygiene Law (§ 32.01) sets forth provisions enabling the Commissioner to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. Parts 822, 819, 818 and 817 establish the requirements for outpatient services, residential and inpatient services. These requirements ensure that patients are properly assessed to receive care from qualified counselors in appropriate settings, receive services which comport with federal and state confidentiality and Medicaid requirements and are consistently evaluated for progress and appropriate changes in treatment when necessary. The proposed amendments to Part 822, Chemical Dependence Outpatient Services, sections 822.2(c)(1) regarding frequency of individual counseling, 822.6(c) regarding utilization review for admissions and discharge, and 822.4(b) regarding physical examinations for medical assessment will guarantee patients the best care and treatment delivered in a manner that is also cost effective and accountable. The proposed amendments to Parts 819, 818 and 817, re-

lated to physical exams for medical history, will deliver treatment in a manner that is more cost effective by aligning more closely with mainstream medical practice and insurance rules, reduce occasions for "no shows" or premature discharge, and afford treatment professionals more time with clients.

### 3. Needs and Benefits:

The proposed amendments are necessary to enable clinical staff and qualified health professionals to better focus their skills and attention on clients through the reduction of paperwork and/or administrative redundancy where such requirements may inhibit cost-effective operations and patient-centered care. The need for these changes was identified through a process of on-going broad-based dialogue between OASAS, OASAS certified providers, and affiliated stakeholders to define of a "gold standard" for treatment and/or identify "best practices" for quality patient-centered care. The main OASAS-provider workgroup identified five areas for subcommittee focus: patient-centered care and documentation; patient-centered regulatory reform; unified reporting; electronic records; and OASAS reporting requirements. Subcommittees identified and prioritized specific actions which could be readily implemented to advance the dual goals of quality patient-centered care and administrative relief. The proposed amendments represent the consensus of the OASAS-provider workgroup that these changes would advance those goals as follows:

A. 822.2(c)(1): Removing the specific frequency for required individual counseling sessions. Each outpatient service must directly provide individual counseling of at least 30 minutes in duration. In 2007 regulations were promulgated to require one individual session for every ten group sessions. The ratio was established for enforcement purposes to ensure providers were not offering only group counseling because a "best practice" of comprehensive patient-centered care must also include confidential one-to-one counseling. Evidence from providers, confirmed by data collected prior to and after the enactment of the frequency regulation from OASAS's client data system and Office of Mental Health records of Medicaid reimbursements, shows that more than 90% of providers offer individual counseling sessions at a frequency that exceeds the regulatory minimum.<sup>1</sup> Therefore, regardless of the regulatory requirement, clients receive individual counseling at a greater frequency because it is sound clinical practice. However, to comply with the current regulation providers must maintain tracking systems for all patients in order to adhere to an arbitrary frequency schedule. Eliminating the frequency requirement would reduce staff time devoted to tracking for compliance with an arbitrary standard and allow more time for direct care. As a result quality care would be improved by shifting the focus to individual needs and appropriately placing the responsibility with the primary counselor and multidisciplinary team to address client needs on a more individualized basis. This is a more clinically flexible and patient-centered approach rather than an arbitrary frequency that is not based on individual needs or necessary to enforce the requirement of individual counseling.

B. 822.4(b)(1) and (2): Changes the timeframe for previously conducted physical exams from 6 months to 12 months prior to admission and for a face-to-face medical assessment from 3 weeks to 45 days from admission; changes due date for review of patient medical history by a physician; leaves decisions regarding the extent of the required physical exam to the discretion of the doctor conducting the examination. Providers report that at admission clients are bombarded with forms, paperwork, level of care determinations, medical assessments, information on confidentiality and other medical appointments. This barrage of paperwork and data collection hinders the immediate establishment of a therapeutic alliance essential for commitment to treatment. Providers report occasional discharge of clients who cannot provide a current medical history or document a recent physical exam and fail to timely appear for the required face-to-face medical assessment. In addition, the length of stay for an average of 20 percent of persons in outpatient treatment is less than 30 days so identifying and eliminating reasons for early drop out is important.<sup>2</sup> This proposed change would permit clinical staff to more readily establish a therapeutic relationship with the client by removing two regulatory deadlines which affect premature discharge or early drop out.

Insurance carriers do not reimburse for more than one physical exam per year (12 months), so it is rare that clients have had a physical exam within 6 months prior to admission; if they have not, within 3 weeks of admission a face-to-face medical assessment is required (the current regulatory standard). The proposed change would permit acceptance of a physical exam conducted within 12 months prior to admission, conforming to a mainstream medical practice as well as insurance rules; it also extends the due date for a face-to-face medical assessment from 3 weeks to 45 days from admission. These changes could reduce premature discharge of persons who may be reluctant to meet a physician in the early days of treatment and thereby fail to show up for scheduled medical assessments. The change in required physical exam frequency could also reduce associated paperwork for individuals readmitted within the same 12 month period.

The proposed change also conforms the due dates for medical assessment of persons without a recent physical exam and medical review of the history and examination of those who have had a recent physical examination. This allows for more efficient use of limited physician schedules and concurrent completion of two related medical assessments.

The proposed change preserves the physician's ability to exercise clinical judgment regarding the extent of the required physical exam by changing the word "shall" to "may." This conforms regulatory language to medically sound practice.

C. 822.6: Repeal admission and discharge utilization review. Review and evaluation for appropriateness of admission and discharge are accomplished by means of several regulatory requirements throughout a client's treatment. Eliminating oversight redundancy, duplication of staff effort, and creation of parallel tracking systems to compile identical information into a utilization review would allow more time for patient-centered care and result in greater efficiency of necessary tracking.

D. 819.4(b)(1) and (2); 818.4(b)(1) and (2); 817.4(b)(1) and (2): Changes the timeframe for previously conducted physical exams from 6 months to 12 months prior to admission; leave decisions regarding the extent of the required physical exam to the discretion of the doctor conducting the examination. Insurance carriers do not reimburse for more than one physical exam per year (12 months), so it is rare that clients have had a physical exam within 6 months prior to admission; if they have not, within 3 weeks of admission a face-to-face medical assessment is required (the current regulatory standard). The proposed change would permit acceptance of a physical exam conducted within 12 months prior to admission, conforming to a mainstream medical practice as well as insurance rules; it also extends the due date for a face-to-face medical assessment from 3 weeks to 45 days from admission. These changes could reduce premature discharge of persons who may be reluctant to meet a physician in the early days of treatment and thereby fail to show up for scheduled medical assessments. The change in required physical exam frequency could also reduce associated paperwork for individuals readmitted within the same 12 month period.

### 4. Costs:

There are no increased costs anticipated from these proposed amendments.

a. Costs to the agency, state and local governments: There will be no additional costs to the agency, counties, cities, towns or local districts.

b. Providers will realize cost savings from more efficient delivery of services and increased productivity of a treatment staff focused more on the individual patient than on the paper-trail.

### 5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

### 6. Paperwork/Reporting:

The proposed amendments will result in a reduction in paperwork for both the OASAS and its certified providers.

### 7. Duplications:

There is no duplication of other state or federal requirements.

### 8. Alternatives:

a. Removing the specific frequency of individual counseling sessions. The proposed amendments do not challenge the purpose of the regulation, but seek to advance quality patient-centered treatment as a result of improved administrative efficiency. As an alternative to the "no specific frequency" requirement, the OASAS-provider workgroup considered retaining the frequency requirement but changing it from one individual session for every 10 groups to one individual session every 30 days because providers were reporting that the tracking required of the 1-in-10 ratio was onerous and too easily complicated by staff changes or patient no-shows. Although 1-in-30 provides an expanded window to accommodate certain variables, it is still an arbitrary frequency ratio that would require the same rigid tracking.

Concerns were raised about the effect on enforcement of eliminating the frequency requirement altogether, since the reason for including it in the first place was to correct the behavior of fewer than 10 percent of certified providers (30 out of 485 providers) who fail to provide individual counseling at a frequency that is considered a "best practice" for quality patient-centered care. However, since the statistical data from Department of Health Medicaid records and OASAS client data systems collected before and after the promulgation of the 1-in-10 frequency requirement verified that the majority of providers were and are exceeding the minimum as a matter of course, concerns were raised that a specified frequency might in fact tempt providers to reduce frequency because of administrative burden, fluctuations in staff availability, and/or other non-clinical factors.

Considering alternatives to enforcement led to the proposed amendments removing the frequency requirement altogether because regulations which prohibit excessive services (14 NYCRR section 822.11) and are more closely aligned to individual patient treatment plans provide a

stronger enforcement tool than an arbitrary frequency ratio. Providers can be cited in certification reviews for excessive group sessions, or failing to follow treatment plans which specify individual counseling at a specific frequency. Violators risk revocation, suspension or limitation of their operating certificate.

b. Leaves decisions regarding the extent of the required physical exam to the discretion of the doctor conducting the examination. The alternative -- retaining the language which leaves providers and physicians in positions that are neither authorized nor professionally responsible -- is unacceptable.

c. Changing timing for face-to-face medical assessment; accepting physical examinations conducted within 12 months prior to admission. As an alternative to the face-to-face medical assessment and a solution to no-shows, lack of recent physical exams and difficulties scheduling medical staff, the OASAS-provider workgroup briefly considered developing a self-administered patient history/assessment, but concluded that this would not be good medical practice and that individuals in early recovery are not reliably objective reporters of their own condition. Because of insurance reimbursement policies, there is no reasonable alternative to accepting physical exams conducted within 12 months prior to admission. The only other alternatives to extending the due date for medical assessments from 30 days after admission to 45 days after admission is another arbitrary number. The OASAS-provider workgroup concluded that 30 days is too short a window but 45 is enough time to establish a therapeutic relationship, overcome reluctance about medical assessment, afford more flexibility in physician scheduling, and spread out the submission of reports and documentation required in the early weeks of treatment.

d. Repeat admission and discharge utilization review. No alternatives were considered because the current requirement is replicated by other regulatory requirements and therefore the proposed repeal is correcting oversight redundancy.

9. Federal Standards:

There are no specific federal standards or regulations that apply to these amendments.

10. Compliance Schedule:

Providers can comply with the proposed changes as soon as new regulations are promulgated.

<sup>1</sup> OASAS client data systems: 2005-2006: 125,527 discharges from 822 programs (clinic and OP rehab); averaged 30 groups from primary counselor and 9 individual sessions from primary counselor, i.e., ratio of 3.33 to 1. 2006-2007: 129,197 discharges from 822 programs; averaged 31 group sessions and 9 individual sessions, ie, ratio of 3.44 to 1. Medicaid: 2006, 4 to 1; 2007, 4 to 1.

<sup>2</sup> OASAS client data system and OMH Medicaid reimbursement reporting: 2005(20.49%), 2006 (20.69%), 2007 (20.08%).

**Consolidated Regulatory Flexibility Analysis**

Types/Numbers:

The proposed amendments to Part 822 will impact all approximately 481 certified providers of outpatient services; proposed amendments to Part 819 will impact all 88 certified providers of Intensive Chemical Dependency Residential Services; proposed amendments to Part 818 will impact all 65 certified providers of Inpatient Rehabilitation Services; proposed amendments to Part 817 will impact all 10 certified providers of Residential Rehabilitation Services for Youth. All programs may interact with local governments; some of these providers are also small businesses.

Reporting/Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban) it is anticipated that there will be no impact on reporting, recordkeeping or engagement of professional services by local governments or small businesses.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban) providers will realize cost savings from more efficient delivery of services and increased productivity of treatment staff because of reduction or elimination of unnecessary or excessive administrative paperwork. There will be no impact on costs of local governments.

Economic/Technological Feasibility:

Regardless of type, size and location of business or local government, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The need for these changes was identified through a process of ongoing statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders begun in the summer of 2007. The goals of the main workgroup include: defining a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; and reducing the administrative burden on clinical staff while improving efficiency and productivity. Subcommittees identified and prioritized specific ac-

tions which could be readily implemented to advance quality patient-centered care and administrative relief. Potential adverse economic impact was a primary concern because the goal of the workgroup is to improve cost effectiveness and efficiency. The proposed amendments represent the consensus of the OASAS-provider workgroup that these changes would advance those goals.

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community not already participating in the initial workgroup. Providers are supportive of these proposed changes and eager to implement them.

Participation of Affected Parties:

The need for these changes was identified through a process of ongoing statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders begun in the summer of 2007. The goals of the main workgroup include: defining a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; and reducing the administrative burden on clinical staff while improving efficiency and productivity. Subcommittees identified and prioritized specific actions which could be readily implemented to advance quality patient-centered care and administrative relief. The proposed amendments represent the consensus of the OASAS-provider workgroup that these changes would advance those goals. They received additional input from the OASAS Executive Team and Advisory Council and were also distributed for comment to members of the provider/stakeholder community not already participating in the initial workgroup. Providers, stakeholders and the agency are supportive of these proposed changes and eager to implement them.

**Consolidated Rural Area Flexibility Analysis**

Types/Numbers:

The proposed amendments to Part 822 will impact all approximately 481 certified providers of outpatient services; proposed amendments to Part 819 will impact all 88 certified providers of Intensive Chemical Dependency Residential Services; proposed amendments to Part 818 will impact all 65 certified providers of Inpatient Rehabilitation Services; proposed amendments to Part 817 will impact all 10 certified providers of Residential Rehabilitation Services for Youth. Some of these providers may be located in rural areas.

Reporting/Recordkeeping, Professional Services:

Regardless of program location (rural, urban or suburban) it is anticipated that there will be no impact on reporting or recordkeeping or engagement of professional services by local governments or small businesses. There are no new mandates or administrative requirements placed on local governments.

Costs:

Regardless of program location (rural, urban or suburban) providers will realize cost savings from more efficient delivery of services and increased productivity of treatment staff because of reduction or elimination of unnecessary or excessive administrative paperwork. There will be no impact on costs of local governments.

Economic/Technological Feasibility:

Regardless of location (rural, urban or suburban) the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The need for these changes was identified through a process of ongoing statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders begun in the summer of 2007. The goals of the main workgroup include: defining a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; and reducing the administrative burden on clinical staff while improving efficiency and productivity. Subcommittees identified and prioritized specific actions which could be readily implemented to advance quality patient-centered care and administrative relief. Potential adverse economic impact was a primary concern because the goal of the workgroup is to improve cost effectiveness and efficiency. The proposed amendments represent the consensus of the OASAS-provider workgroup that these changes would advance those goals.

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community not already participating in the initial workgroup. Providers are supportive of these proposed changes and eager to implement them.

Participation of Affected Parties:

The need for these changes was identified through a process of ongoing statewide dialogue between OASAS, OASAS certified providers, and affiliated stakeholders begun in the summer of 2007. The goals of the main workgroup include: defining a "gold standard" for treatment; identifying "best practices" for quality patient-centered care; and reducing the administrative burden on clinical staff while improving efficiency and productivity. Subcommittees identified and prioritized specific ac-

tions which could be readily implemented to advance quality patient-centered care and administrative relief. The proposed amendments represent the consensus of the OASAS-provider workgroup that these changes would advance those goals. They received additional input from the OASAS Executive Team and Advisory Council and were also distributed for comment to members of the provider/stakeholder community not already participating in the initial workgroup. Providers, stakeholders and the agency are supportive of these proposed changes and eager to implement them.

#### **Consolidated Job Impact Statement**

No change in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the amendments either clarify or streamline provider actions which will not be eliminated or supplemented. Treatment providers will not need to hire additional staff or reduce staff size; the proposed changes will not adversely impact jobs outside of the agency; the proposed changes will not result in the loss of any jobs within New York State.

### **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Opioid Treatment for Addiction**

**I.D. No.** ASA-49-08-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of Part 828 of Title 14 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-year Review of Existing Rules.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), (e), 19.09, 19.21, 19.40, 32.01, 32.05, 32.07 and 32.09

**Subject:** Opioid Treatment for Addiction.

**Purpose:** To update and provide regulatory reform in the area of Opioid addiction services.

**Substance of proposed rule (Full text is not posted on a State website):** The proposed regulations would revise current Part 828 requirements for the operation of chemotherapy substance abuse programs to allow for changes in addiction treatment services as the last changes to the regulation occurred under Division of Substance Abuse Services (DSAS) as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The current methadone regulations have existed for 24 years without change even though the federal rules of opioid treatment have changed due to advancements and evidence based practice.

The proposed regulation would update the following definitions in Part 828.5: medical director, medical staff and multi-disciplinary team to reflect other current regulations. The proposed regulations would also add the following definitions: accrediting body, key extended entry program (KEEP), program sponsor, opioid medical maintenance, prescribing professional and specialized opioid service.

The proposed regulations would add a new section to describe additional locations in Part 828.6 for an OTP.

The proposed regulation would establish priorities for screening for admission in Part 828.8 and allows only patients with a primary diagnosis of opioid addiction to be admitted by an OTP.

The proposed regulation would revise the admission criteria in Part 828.9. OTP clinics would now be required to admit patients within 24 hours of determining eligibility. This reduces the criteria which were originally within 72 hours, although the current draft does permit flexibility up to 72 hours if needed. OASAS level of care criteria must be used and documented. Patients who are temporarily not available to the OTP due to hospitalization, incarceration may be excluded from the certified capacity. The admission criteria also indicates that when an OTP is at certified capacity it must maintain a waiting list and make one good faith attempt to contact the next person on the list when an opening becomes available. The proposed regulation requires testing for Hepatitis A, B, and C but permits flexibility by now allowing the clinic discretion when determining the need for an EKG (electrocardiogram) or STD testing (medical testing for sexually transmitted infections). There is also language to address the temporary transfer of patients from one OTP to another in the draft Part 828 regulations.

The proposed regulation expands clinical flexibility in the areas of individualized treatment (Part 828.10), comprehensive treatment review (Part 828.11), medication administration (Part 828.13), take-home medication (Part 828.14) and staffing patterns (Part 828.16).

The proposed regulation strengthens the toxicology testing in Part 828.15 through changing mandatory testing to current drugs of abuse and

two positive toxicology test results now require counseling and a treatment plan that is documented in the patient chart. Unsupervised urines are no longer permitted and oral testing is encouraged.

The new sections, Sections 828.19 and 828.20, establish current practice for an opioid taper and opioid medical maintenance.

The new section "Specialized opioid services" (Section 828.22), requires that specialized services that are not defined by the regulation must be approved by OASAS prior to implementation.

The new section "Quality improvement" (Section 828.24), requires that each OTP must have a defined quality assurance policy, defined diversion policy and a client advisory committee.

The new section on buprenorphine (section 828.25) is consistent with the current emergency buprenorphine regulations which permits the provision of buprenorphine medication within an OTP setting.

**Text of proposed rule and any required statements and analyses may be obtained from:** Deborah Egel, Esq., NYS OASAS, 1450 Western Avenue, Albany, New York 12303, (518) 485-2317, email: DeborahEgel@oasas.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 60 days after publication of this notice.

**Additional matter required by statute:** Provisions of the Code of Federal Regulations contained in the booklet entitled Code Of Federal Regulations, title 42, Part 8, and Title 21 CFR, Part 1300-1399, published by the Office of the Federal Register, have been incorporated by reference.

#### **Reasoned Justification for Modification of the Rule**

The proposed regulations would revise current Part 828 requirements for the operation of chemotherapy substance abuse programs to allow for changes in addiction treatment services as the last changes to the regulation occurred under Division of Substance Abuse Services (DSAS) as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The current methadone regulations have existed for 24 years without change even though the federal rules of opioid treatment have changed due to advancements and evidence based practice.

The proposed regulation would update the following definitions in Part 828.5: medical director, medical staff and multi-disciplinary team to reflect other current regulations. The proposed regulations would also add the following definitions: accrediting body, key extended entry program (KEEP), program sponsor, opioid medical maintenance, prescribing professional and specialized opioid service.

The proposed regulations would add a new section to describe additional locations in Part 828.6 for an OTP.

The proposed regulation would establish priorities for screening for admission in Part 828.8 and allows only patients with a primary diagnosis of opioid addiction to be admitted by an OTP.

The proposed regulation would revise the admission criteria in Part 828.9. OTP clinics would now be required to admit patients within 24 hours of determining eligibility. This reduces the criteria which were originally within 72 hours, although the current draft does permit flexibility up to 72 hours if needed. OASAS level of care criteria must be used and documented. Patients who are temporarily not available to the OTP due to hospitalization, incarceration may be excluded from the certified capacity. The admission criteria also indicates that when an OTP is at certified capacity it must maintain a waiting list and make one good faith attempt to contact the next person on the list when an opening becomes available. The proposed regulation requires testing for Hepatitis A, B, and C but permits flexibility by now allowing the clinic discretion when determining the need for an EKG (electrocardiogram) or STD testing (medical testing for sexually transmitted infections). There is also language to address the temporary transfer of patients from one OTP to another in the draft Part 828 regulations.

The proposed regulation expands clinical flexibility in the areas of individualized treatment (Part 828.10), comprehensive treatment review (Part 828.11), medication administration (Part 828.13), take-home medication (Part 828.14) and staffing patterns (Part 828.16).

The proposed regulation strengthens the toxicology testing in Part 828.15 through changing mandatory testing to current drugs of abuse and two positive toxicology test results now require counseling and a treatment plan that is documented in the patient chart. Unsupervised urines are no longer permitted and oral testing is encouraged.

The new sections, Sections 828.19 and 828.20, establish current practice for an opioid taper and opioid medical maintenance.

The new section "Specialized opioid services" (Section 828.22), requires that specialized services that are not defined by the regulation must be approved by OASAS prior to implementation.

The new section "Quality improvement" (Section 828.24), requires that each OTP must have a defined quality assurance policy, defined diversion policy and a client advisory committee.

The new section on buprenorphine (section 828.25) is consistent with the current emergency buprenorphine regulations which permits the provision of buprenorphine medication within an OTP setting.

#### **Regulatory Impact Statement**

The proposed regulation is being submitted for public review and comment. The proposed Part 828 - Opioid Treatment for Addiction - will revise methadone regulations that have existed for 24 years without change. The impact of the proposal will bring state regulations more into alignment with the federal rules that were promulgated in 2001.

Opioid addiction is a chronic illness which can be treated effectively with medications that are administered under conditions consistent with their pharmacological efficacy, and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, when appropriate, vocational rehabilitation. Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients. The proposed regulation sets forth standards to guide opioid addiction treatment.

##### **1. Statutory Authority:**

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21 (b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services including but not limited to methadone.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09(b) of the Mental Hygiene Law gives the Commissioner the power to withhold an operating certificate for a opioid treatment provider until statutory requirements are satisfied.

The relevant sections of the Mental Hygiene Law cited above allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within the state regulations in alignment with federal CSAT regulations (CSAT, 2001). The objective is in line with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising policy and procedures with regard to opioid treatment will establish a standard for all facilities, which is in the best interest of the patient, and will assist opioid treatment programs to provide better health care services and recovery from opioid addiction.

##### **2. Legislative Objectives:**

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The legislature enacted Section 19 of the Mental Hygiene Law, enabling the Commissioner to establish best practices for treating chemical dependency.

##### **3. Needs and Benefits:**

Research supports that opioid addiction is a chronic illness that can be treated effectively with medications when administered under conditions consistent with their pharmacological efficacy and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and when appropriate vocational rehabilitation (CSAT, 2001). Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients.

Approximately 40,000 patients, who represent 36 percent of patients currently being served in addiction treatment, are in opioid treatment programs in New York State. The Part 828 regulations were written more than 24 years ago and have not been revised despite federal regulations, 42 CFR Part 8, having been revised in January 2001. The proposed regula-

tion would place OASAS in better alignment with CSAT federal regulations and federal guidelines. Furthermore, recent research supports individual methadone dosing without artificial dose limits, toxicology testing and other clinical practices that have been incorporated into the proposed regulation (Leavitt, 2003). Consistency between federal and state regulations is a benefit to providers.

Also, a new section on buprenorphine is included in the proposed regulations. Currently New York State allows buprenorphine to be administered by physicians in their private practices in addition to OTP clinics. However, the current Part 828 does not permit buprenorphine administration. Buprenorphine treatment for opioid dependence is appropriate in the OTP setting, since clients will receive additional services such as counseling, toxicology and medical support. The proposed regulation will address this problem and patients will benefit from this added service.

A new section will be added for Opioid Medical Maintenance (OMM). New York State is able to offer OMM through a federal waiver, permitting select providers who submitted applications to OASAS to offer patients who have demonstrated successful treatment outcomes (e.g., stabilization on methadone, cessation of all illicit substances and alcohol use, and employment) to obtain their medication with minimal counseling services in a physician's office. This service recognizes certain patients do not need long-term counseling services but must be maintained on methadone in order to remain treatment compliant and self-sufficient. This treatment does not interfere with employment and is the least intrusive to the higher functioning patient (Marion, 2005).

Furthermore, information disseminated in the process of rewriting, reorganizing, and promulgating Part 828 regulation will provide both patients and OTP clinics better understanding of the intent of the regulation. This will result in better implementation and homogeneous services, improving patient care and more efficient use of staff resources.

##### **4. Costs:**

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

##### **a. Costs to regulated parties:**

Regulated parties include patients and providers of substance abuse services. Patients should not incur additional costs. Providers may incur additional costs associated with toxicology and/or laboratory testing. Additionally, providers may see costs associated with training and or hiring qualified health professionals for staff. These costs will be offset as follows:

First, the proposed regulation recommends that the fifth drug on a toxicology panel be rotated. Different toxicology test charges are associated with different substances. Second, the proposed regulation states providers may use oral fluid testing, or CSAT approved alternatives, or develop policy and procedures for supervised urine collection in certain instances. Supervised urine toxicology may have a small increased cost because both male and female staff would need to be available to perform testing that is currently done unsupervised. In addition, there may be a nominal increase in cost associated with the use of oral fluid testing. However, the benefits are many. Oral testing is not onerous to staff and several patients can be tested simultaneously. Oral testing also provides a more dignified method of providing toxicology samples. It is the intent of the regulation to treat addiction and improve overall functionality of our patients. In order to deliver appropriate services, providers need know if patients relapse. To this end, OASAS is recommending that providers use improved toxicology testing practices and technology as a tool to aid in improved patient outcomes through identification and counseling.

Opioid treatment providers currently receive \$6.02 for toxicology testing as part of the weekly Medicaid reimbursement rate. While there are overhead costs associated with all services provided at OTPs, not all patients enrolled in the OTPs are tested weekly and this may help to defray any additional cost incurred.

Third, the proposed regulation no longer requires testing for sexually transmitted diseases (STD) and leaves this as optional. However, the proposed regulation does require mandatory testing of Hepatitis. The rationale for requiring testing for Hepatitis is to help protect the public. When the regulations were developed 34 years ago, Hepatitis was not an epidemic. Today, intravenous drug users are commonly affected by Hepatitis and need to be screened while patients presenting with a STD is far fewer in number. In addition, there is currently federal funding available to OTPs for Hepatitis testing and vaccines.

Fourth, the proposed regulation requires all new medical directors, whether full or part time, to obtain either a subspecialty board certification. This is not onerous because the regulation states physicians may be hired as probationary medical directors if not certified, and then allows the physicians 4 years to obtain the certification. In addition, the physician must become buprenorphine certified within 4 months of employment

which is only an 8 hour course. The proposed regulation also accepts three types of medical specialty certification in order to be totally inclusive. The benefit of this requirement is that addiction is its own subspecialty and if New York State intends to improve both treatment services and outcomes, this requires trained medical staff.

Finally, the proposed regulation changes the staffing pattern. The regulation requires fifty percent of the staff should be Qualified Health Professionals (QHPs), which is in alignment with other New York State treatment regulations (e.g., Part 822). Patients in OTP sites have numerous medical, psychiatric and psychosocial barriers, which require the hiring of qualified staff to address these issues and make the necessary improvements in patient care. The current regulation has few requirements for formally trained staff. In order to help improve patient outcomes, OTPs need trained staff. According to OASAS, most programs already meet or exceed this requirement. Due to concerns by OASAS about staff retention and recruitment, OASAS has allowed for Credentialed Alcohol and Substance Abuse Counselors (CASAC) trainees to be counted towards the 50 percent of QHP staff requirement. OASAS, in recognizing the need for additional CASACs, has recently changed the CASAC testing requirements to increase the number of CASACs and currently leading an aggressive recruitment drive and the proposed regulation allows for a four year phased implementation.

In addition, OASAS reviewed a representative cross-section of opioid treatment providers and believe that most providers currently exceed the 50 percent QHP requirement. Therefore this will not be a significant fiscal issue for providers. Finally, the proposed regulation allows for more flexibility in the areas of medication administration, toxicology and staffing configuration. The cost of hiring more QHPs may be offset by deploying staffing in new and innovative ways.

There should be no additional costs for materials. Any additional requirement by the proposed regulation for quality assurance is already mandated under Federal standards and the OTPs are already performing this task to meet the Federal standards.

b. Costs to the agency, state and local governments:

OASAS is not expected to see increased costs related to administering the rule. While OASAS will need to modify the program review instrument currently used to certify OTPs, which will also require provision of additional technical assistance to OTPs, this is not expected to result in any undue hardship for OASAS. Staff time can be devoted to other areas of need due to a decreased volume for individual and general waivers that must currently be provided under the current regulation.

Additionally, there is an anticipated cost saving with the regulation being less restrictive for patients receiving reduced medication pick-up schedule for take home medications. The proposed regulation changes the number of years it may take a client to achieve a monthly pick up schedule from four years to three years. Medicaid costs will be reduced because the patient crosses the threshold only once per month thereby reducing the number of visits and weekly billing.

There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

6. Paperwork:

Updated Part 828 regulations decrease the amount of individual patient exemptions and general waivers from current regulation, saving providers considerable time and effort. On average, 60 waiver requests are submitted per month to OASAS and would be eliminated. The proposed regulation includes changes to allow more flexibility in take home medication and clinic schedule changes. The highest number of individual patient exemptions falls within these two areas.

As compared to the current regulations, the proposed regulations are silent on requiring OASAS approval for methadone dosage increases above 200 milligrams. Recent literature recognizes that adequate dosage varies greatly amongst patients, although inadequate methadone dosing remains common in the United States (NIH, 1998). Differences in patient metabolism and in the effects of methadone's interaction with other concurrent medications can require higher dosing (Marion, 2005) and dosing flexibility has been associated with improved treatment retention and is demonstrated as safe (Tenore, 2004; Maddux, et al, 1997). In January 2007, three waivers specific to methadone were sent to the entire field. One allowed for a waiver for prior OASAS approval for methadone dosage increases. After this waiver was presented to the field, 103 of the 117 clinics submitted this waiver to OASAS resulting in 114 less individual patient exemptions regarding dosage increases during 2007. The proposed draft regulations would eliminate the need for providers to submit this waiver renewal upon recertification.

7. Duplication:

There is no duplication of other state or federal requirements.

8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. OASAS used a statewide coalition group, the Committee of Methadone Program Administrators (COMPA), to facilitate distribution of this proposed regulation to all of its members and have collected comments. All comments received were reviewed and numerous changes were made. Additionally, these regulations were also shared with the National Alliance of Methadone Advocates (NAMA), the New York State Council of Local Mental Hygiene Directors, the New York State Advisory Council on Alcoholism and Substance Abuse Services, and the Alcoholism and Substance Abuse Providers of New York State (ASAP).

9. Federal Standards:

The CSAT federal regulations preserve states' authority to regulate OTPs. The federal regulations are considered minimal and the States are authorized to determine appropriate additional regulations. New York has regulations that are stricter than the minimal federal regulations. New York State has many unique concerns that are addressed in the proposed draft Part 828 regulations. New York has the largest number of OTP clinics and patients (115 and 39,314 respectively) of all 44 states and United States territories with opioid treatment programs. In New York City there are areas in which multiple clinics exist within blocks of each other and can draw thousands of patients into these communities. This can lead to community resistance in the affected neighborhood, and public opposition to community based treatment programs.

The issue of methadone diversion is a major concern for all OTPs, as there is a substantial black market for such prescription drugs (Bell & Zador, 2000, Breslin & Malone, 2006, & Lewis, 1997). With the large number of OTP clinics and patients served, New York State is at a greater risk for potential diversion and misuse of a controlled substance. Many states permit greater flexibility in take home schedules, having adopted the federal standard which permits an OTP to provide a patient who has been in treatment a minimum of 2 years and who meets the 8-point criteria to receive up to a 30-day supply of take home medication. The draft Part 828 regulations moves from requiring a minimum of four years in treatment to three years in treatment before becoming eligible for a 30-day take home supply of medication. While OASAS has relaxed the take home schedule in the proposed draft Part 828 regulations, OASAS has not acceded to the federal take home schedule standards. OASAS recognizes that it is imperative New York State maintain a balance between implementing stricter control measures to minimize methadone diversion as well as provide opiate dependent patients ease of access to opioid treatment. The opioid treatment literature recommends control measures in the form of increased toxicology testing and establishing routine "call backs" for those with large numbers of take home medications be implemented (Varenbut et al., 2007). OASAS has added these two safeguards to the proposed draft regulation in order to monitor and control for methadone diversion.

While methadone mortality concerns have recently received media attention, it is recognized that the majority of methadone-related deaths have been directly related to illicit methadone diversion, with a large percentage of these patients who were not enrolled in an OTP but in pain management centers (Center for Substance Abuse Treatment, 2004; Cicero, 2005).

In support of relaxing take home schedule requirements, it is demonstrated that there are numerous benefits of take home doses which include improved retention in treatment for existing patients, making OTPs more attractive to new patients, rewarding patients for abstinence or compliance with treatment, and giving patients more control over their treatment experience. In addition, patient quality of life may be improved through the reduction in daily attendance at an OTP clinic. It has been recognized that provision of a variety of flexible take-home options may provide an evidence-based platform for take-away policy development (Ritter, et al. 2005).

10. Compliance Schedule:

It is expected that full implementation of Part 828 will be completed within one year of the adoption of the regulation.

**Regulatory Flexibility Analysis**

Effect of the Rule: The proposed Part 828 will impact certified and/or funded providers. It is expected that the proposed Part 828 Opioid Treatment for Addiction regulations will require opioid treatment providers to amend some of their existing policies and procedures. However, these modifications will result in better patient treatment services and outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid addiction due to less restrictive procedures for methadone maintenance. As a result of patients receiving these services, local governments may see a decrease in services associ-

ated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

**Compliance Requirements:** There are no significant changes expected in compliance requirements. Since providers currently are required to provide a utilization review, it is not expected that this regulation will have additional costs associated with it.

**Professional Services:** While it is expected that programs may require additional professional services the impact is nominal because over half of the current opioid treatment providers already meet the criteria set forth in the regulation for qualified health professionals and the regulation allows for phased implementation over four years.

**Compliance Costs:** Some programs may need additional formally trained staff to meet the proposed requirements; however, new CASAC credentialing rules, acceptance of CASAC trainees and phased implementation will decrease any barriers for compliance. Laboratory fees may increase; however, existing reimbursement fees should be sufficient to meet these requirements.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the proposed Part 828 is not expected to have an economic impact or require any changes to technology for small businesses and government.

**Minimizing Adverse Impact:** Part 828 has been carefully reviewed to ensure minimum adverse impact to providers. The Alcoholism and Substance Abuse Providers of NYS, Inc., the Greater New York Hospital Association, the Healthcare Association of New York, the federal Center for Substance Abuse Treatment (CSAT), the federal Drug Enforcement Agency (DEA), the OASAS Methadone Transformation Team, the New York State Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services and approximately 50 methadone treatment providers were given the opportunity to comment on this proposal. Any impact this rule may have on small businesses and the administration of state or local governments and agencies will either be a positive impact or the nominal costs and compliance are small and will be absorbed into the already existing economic structure. The positive impact for OASAS patients and New York's health care systems outweigh any potential minimal costs.

**Small Business and Local Government Participation:** The proposed regulations were shared with New York's treatment provider community including the Alcoholism and Substance Abuse Providers of NYS, Inc., the Greater New York Hospital Association, the Healthcare Association of New York, the Federal Center for Substance Abuse Treatment, the Federal Drug Enforcement Agency, the OASAS Methadone Transformation Team, the New York State Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services.

#### **Rural Area Flexibility Analysis**

A rural flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The majority of opioid treatment providers (OTPs) are located in New York City (NYC). There are a few OTPs upstate, but they are in cities of various sizes. There are only three providers located in Ulster, Broome and Montgomery counties which may be considered a rural area; however, the OTPs are in towns where the density is greater than 150 people per square mile. The compliance, recordkeeping and paperwork requirements are the minimum needed to insure compliance with state and federal requirements and quality patient care.

#### **Job Impact Statement**

The implementation of Part 828 will have an impact on jobs in that it will require 50 percent of the staff at an opioid treatment provider (OTP) to be qualified health professionals (QHPs) which is in alignment with other New York State (NYS) treatment regulations (e.g. Part 822). This requirement is intended to improve patient outcomes. At the present time OASAS has determined that most programs already meet or exceed this requirement. In addition, the regulation allows for Credentialed Alcoholism and Substance Abuse Counselor (CASAC) trainees to be counted towards the 50 percent of QHPs on staff and there is a phased implementation over the course of four (4) years. Finally, the change in CASAC testing requirements should increase the number of CASACs in New York State. Accordingly, while the current staff may need to enter formal education programs in order to maintain their employment this will help create new professional staff in New York State. This regulation will not adversely impact jobs outside of the addiction field.

## **PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

### **Detoxification of Substances and Stabilization Services**

**I.D. No. ASA-49-08-00009-P**

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Repeal of Part 816 and addition of new Part 816 to Title 21 NYCRR. This rule is proposed pursuant to [SAPA § 207(3)], 5-Year Review of Existing Rules.

**Statutory authority:** Mental Hygiene Law, sections 19.09, 19.15, 19.40, 21.09 and 23.02

**Subject:** Detoxification of substances and stabilization services.

**Purpose:** To repeal and then add Part 816 services that are in alignment with NYS Statutory language in the 2008-2009 Article 7 bill.

**Substance of proposed rule (Full text is posted at the following State website: [www.oasas.state.ny.us](http://www.oasas.state.ny.us)):** Amendment of Part 816 of Title 14 of the New York Codes, Rules and Regulations (Chemical Dependence Crisis Services) is proposed to allow for implementation of Chapter 58 of the Laws of 2008, Part C, § 14-b, which added language to Section 2807-c of the Public Health Law changing rates from a Diagnostic Related Group (DRG) system to a per diem system.

The amendment adds definitions in section 816.5 for Detoxification, Medically Managed Withdrawal Services, Medically Supervised Withdrawal services-Inpatient, Medically Supervised Withdrawal Services-Outpatient, Medically Monitored, Observation Bed, Prescribing Professional, Program Sponsor, Recovery Care Plan, and updates Qualified Health Professionals to include Licensed Mental Health Counselors, in order to effectively integrate operation of the proposed regulation.

The proposed regulations updates section 816.7 (Standards applicable to medically managed withdrawal and stabilization services) defining inpatient services that can be offered by providers in this service. The proposed regulation establishes that providers of medically managed services could also provide medically supervised services within the same setting with no change to their OASAS certification. The proposed regulation also defines the differences in the two services.

The proposed regulation was developed by OASAS staff and providers of withdrawal and stabilization services to allow for greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on crisis stabilization and linkage to treatment. Recommendations from the Detoxification Task Force convened by the Commissioner in the summer of 2007 included revising Part 816 regulations and "identify and modify, where appropriate the regulatory requirements that currently impede development of community-based medically supervised withdrawal programs". The proposed regulations have been revised to protect patient safety and quality of care while providing greater flexibility to the role of medical and clinical staff to exercise clinical judgment.

These changes are one means of encouraging communities to develop increased community-based withdrawal and stabilization programs to meet the overall goal of the Detoxification Task Force of reducing unnecessary hospital detoxifications and increasing access to community based care where safe and appropriate.

The proposed changes to Part 816 also update section 816.8 (Standards applicable to inpatient medically supervised withdrawal and stabilization services). The regulation changes the type of paperwork required and staffing configuration for outpatient settings. The proposed regulation provides a separate section, 816.9, applying to medically supervised outpatient withdrawal and stabilization services. Changes to the outpatient regulation allow for a face to face visit with a medical professional including a registered nurse and allow for the physician to schedule visits less than daily if deemed safe and appropriate. These changes address the biggest previous barrier to the provision of outpatient services: the need for daily physician contact.

The proposed regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The proposed regulation no longer requires vocational and education assessments, changes the language from biopsychosocial assessment to a crisis assessment targeting only the information necessary to safely stabilize the patient, engage them in a change process and link them to appropriate treatment services. The proposed regulation requires targeted assessments aimed at crisis stabilization and linkages, thereby allowing more time for counseling services and providing more time to engage the client in the recovery process.

The proposed regulation expands clinical flexibility by providing individualized treatment when a patient is interested in withdrawal and

stabilization services. By triaging the patient a more efficient and cost effective level of care determination can be made, allowing for more individualized crisis assessment and stabilization.

The proposed Part 816 regulation supports implementation of the enacted 2008-2009 Health and Mental Hygiene Budget, which amended section 2807-c of the Public Health Law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and authorize the reimbursement methodology for a 48 hour detoxification observation period.

Section 816.9, entitled medically monitored withdrawal and stabilization services, remains the same.

**Text of proposed rule and any required statements and analyses may be obtained from:** Deborah Egel, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave, Albany, NY 12203, (518) 485-2312, email: Deborah.Egel@oasas.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### **Reasoned Justification for Modification of the Rule**

Amendment of Part 816 of Title 14 of the New York Codes, Rules and Regulations (Chemical Dependence Crisis Services) is proposed to allow for implementation of Chapter 58 of the Laws of 2008, Part C, § 14-b, which added language to Section 2807-c of the Public Health Law changing rates from a Diagnostic Related Group (DRG) system to a per diem system.

The amendment adds definitions in section 816.5 for Detoxification, Medically Managed Withdrawal Services, Medically Supervised Withdrawal services-Inpatient, Medically Supervised Withdrawal Services-Outpatient, Medically Monitored, Observation Bed, Prescribing Professional, Program Sponsor, Recovery Care Plan, and updates Qualified Health Professionals to include Licensed Mental Health Counselors, in order to effectively integrate operation of the proposed regulation.

The proposed regulations updates section 816.7 (Standards applicable to medically managed withdrawal and stabilization services) defining inpatient services that can be offered by providers in this service. The proposed regulation establishes that providers of medically managed services could also provide medically supervised services within the same setting with no change to their OASAS certification. The proposed regulation also defines the differences in the two services.

The proposed regulation was developed by OASAS staff and providers of withdrawal and stabilization services to allow for greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on crisis stabilization and linkage to treatment. Recommendations from the Detoxification Task Force convened by the Commissioner in the summer of 2007 included revising Part 816 regulations and "identify and modify, where appropriate the regulatory requirements that currently impede development of community-based medically supervised withdrawal programs". The proposed regulations have been revised to protect patient safety and quality of care while providing greater flexibility to the role of medical and clinical staff to exercise clinical judgment.

These changes are one means of encouraging communities to develop increased community-based withdrawal and stabilization programs to meet the overall goal of the Detoxification Task Force of reducing unnecessary hospital detoxifications and increasing access to community based care where safe and appropriate.

The proposed changes to Part 816 also update section 816.8 (Standards applicable to inpatient medically supervised withdrawal and stabilization services). The regulation changes the type of paperwork required and staffing configuration for outpatient settings. The proposed regulation provides a separate section, 816.9, applying to medically supervised outpatient withdrawal and stabilization services. Changes to the outpatient regulation allow for a face to face visit with a medical professional including a registered nurse and allow for the physician to schedule visits less than daily if deemed safe and appropriate. These changes address the biggest previous barrier to the provision of outpatient services: the need for daily physician contact.

The proposed regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The proposed regulation no longer requires vocational and education assessments, changes the language from biopsychosocial assessment to a crisis assessment targeting only the information necessary to safely stabilize the patient, engage them in a change process and link them to appropriate treatment services. The proposed regulation requires targeted assessments aimed at crisis stabilization and linkages, thereby allowing more time for counseling services and providing more time to engage the client in the recovery process.

The proposed regulation expands clinical flexibility by providing individualized treatment when a patient is interested in withdrawal and

stabilization services. By triaging the patient a more efficient and cost effective level of care determination can be made, allowing for more individualized crisis assessment and stabilization.

The proposed Part 816 regulation supports implementation of the enacted 2008-2009 Health and Mental Hygiene Budget, which amended section 2807-c of the Public Health Law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and authorize the reimbursement methodology for a 48 hour detoxification observation period.

Section 816.9, entitled medically monitored withdrawal and stabilization services, remains the same.

#### **Regulatory Impact Statement**

The proposed Chemical Dependence Withdrawal and Stabilization Services regulations are being submitted for public review and comment. The current Part 816 (Chemical Dependence Crisis Services) will be repealed and the proposed regulations will be added in order for OASAS to be in alignment with the enacted 2008-2009 Health and Mental Hygiene Budget. The 2008-09 Health and Mental Hygiene Budget amended section 2807-c of the Public Health Law to reconfigure reimbursement for hospital based medically managed withdrawal/detoxification and authorize the reimbursement methodology for a 48 hour detoxification observation period, which has an effective date of December 1, 2008.

Chemical dependence is a chronic illness which can be treated effectively when medications are administered under conditions consistent with their pharmacological efficacy, and when withdrawal and stabilization services include necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, and medical services as needed. Chemical dependence withdrawal and stabilization is the first step in facilitating recovery from addiction for many patients. The proposed regulations set forth standards to guide withdrawal services treatment.

##### **1. Statutory Authority:**

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

The relevant sections of the Mental Hygiene Law cited above allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within the State regulations and aligning the regulation with the statutory language of Chapter 58 of the Laws of 2008, Part C, § 14-b. The objective is to be aligned with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising this regulation will establish a new standard for all facilities, which will assist withdrawal programs in providing better health care services and withdrawal from chemical dependence.

##### **2. Legislative Objectives:**

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The legislature enacted Section 19 of the Mental Hygiene Law, enabling the Commissioner to establish best practices for treating chemical dependency.

##### **3. Needs and Benefits:**

Detoxification is a medical intervention that manages an individual safely through the process of withdrawal (McCorry et. al. 2000). The three successful components of detoxification have been identified in the Treat-

ment Improvement Protocol (TIP) #45 as evaluation, stabilization and linkage to treatment (CSAT, 2006). In addition, the American Society of Addiction Medicine (ASAM) recognizes that patients should be placed in the least restrictive setting that provides safe and effective treatment.

Under the proposed Part 816 regulations, hospital based detoxification units will be able to operate two levels of care simultaneously: medically managed and medically supervised. Medically managed services are designed for patients who are acutely ill from alcohol-related and/or substance-related addictions or dependence, including the need for medical management of persons with severe withdrawal or risk of severe withdrawal symptoms, and may include individuals with or at risk of acute physical or psychiatric co-morbid conditions. This level of care includes the 48 hour observation bed. Inpatient medically supervised withdrawal and stabilization services are appropriate for persons who are intoxicated by alcohol and/or substances, who are suffering from mild to moderate withdrawal, coupled with situational crisis, or who are unable to abstain with an absence of past withdrawal complications. Medically supervised services may require less staff due to the decreased medical needs of patients who are appropriate for this level of care.

The proposed regulations provide more clinical expertise in the management of patients, and will encourage the appropriate use of a broader array of withdrawal and stabilization services. Hospitals will be required to more thoroughly assess patients for appropriate level of care and community providers have been provided more flexibility in providing community-based care. This approach to detoxification has been supported by consensus opinion (CSAT, 2006).

This is supported by OASAS statistics. In 2007, 72,099 patients, representing 24% of all patients admitted in addiction treatment, entered hospital and community based withdrawal and stabilization services in New York State. Among the 2007 admissions to medically managed detoxification services, 10,029 patients, representing 19% of all patients, arrived at another level of care within 14 days of discharge. Among the 2007 admissions to medically supervised withdrawal, 8,265 patients, representing 40% of all patients, arrived at another level of care within 14 days of discharge.

The purpose of this regulatory change is to capitalize on better linkage and engagement to prevent multiple admissions without sustained recovery. Patients are more likely to enter and remain in subsequent substance abuse treatment if they believe that the services will help them with life problems (Fiorentine et. Al 1999). Better linkages to inpatient or outpatient rehabilitation have been found when case managers are able to directly link patients through a warm-hand-off or provide incentives. (Chutuape, et.al. 2001; CSAT 2006).

#### 4. Costs:

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

##### a. Costs to regulated parties:

There should be no additional outlay to regulated parties as a result of this regulation. The regulation changes the focus of withdrawal services from treatment to stabilization and discharge planning. The regulation is also necessary to support the enacted 2008-09 New York State Budget which:

- The current hospital detoxification reimbursement methodology will change from a DRG case payment to a per diem methodology effective December 1, 2008 pending Centers for Medicare and Medicaid Services (CMS) approval.
- The transition to per diem rates, based on 100 percent on the prices (established with 2006 base year cost, trended to the rate year) will take place over a four year period.
- The Phase in period begins December 1, 2008, and will ultimately end in the complete transition from DRGs to the reweighted and rebased per diem rate:
  - Effective December 1, 2008 thru December 31, 2009, the per diem rate will be based on 75 percent on the 2007 DRG rate converted to a per diem rate (trended to the rate year) and 25 percent on the regional prices (trended to the rate year).
  - In 2010 the per diem rate will be evenly split between these two components.
  - In 2011, the rate will be based 25 percent on the DRG rate (converted to a per diem and trended) and 75 percent regional prices trended).
  - By 2012, the rate will be at 100 percent based on the regional prices.

#### Year One:

- All Part 816 hospital inpatient detoxification services: Observation period services; Medically Managed Detoxification; and Medically Supervised Inpatient Withdrawal Services, provided in an OASAS certified Part 816 bed will receive the same, hospital specific amount.

#### Years Two through Four:

- The Part 816 Hospital Based Observation Period and Medically Managed Detoxification (MMD) Services will be reimbursed at the same amount. The Part 816 Hospital Based Medically Supervised Inpatient Withdrawal Period will be reimbursed at 75 percent of the prevailing hospital specific MMD rate in 2010.

##### b. Costs to the agency, state and local governments:

OASAS is not expected to see increased costs related to administering the rule, although the agency will need to modify the program review instrument currently used to certify chemical dependence withdrawal services along with providing technical assistance.

Additionally, there is an anticipated cost saving with the regulation changing from a DRG to a per diem rate. DRGs are a system used to classify hospital cases into one of approximately 500 groups that are expected to have similar hospital resource use, developed for Medicare as part of the prospective payment system. DRGs are assigned by a "grouper" program based on International Classification of Diseases (ICD) diagnoses, procedures, age, sex, and the presence of complications or co morbidities. DRGs have been used since 1983 to determine how much Medicare pays a hospital, since patients within each category are similar clinically and are expected to use the same level of hospital resources.

Therefore, patients will be treated within a system that is designed to appropriately place patients and move them from more intensive services into other levels of care that are more less expensive and effective in treating the patient resulting in savings for the State and local government.

#### 5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

#### 6. Paperwork:

The proposed Part 816 regulations will decrease the amount of individual patient assessments and treatment plans, saving providers considerable time and effort. Assessments will be targeted for this distinct population. Time previously spent on vocation and educational assessments will be eliminated. Services will be focused on crisis intervention, stabilization and discharge planning. On average, 60 percent of counselors' time is currently spent filling in required paperwork, which will instead be dedicated to serving the patient population.

The proposed regulations also include changes to allow more flexibility by reducing paperwork, targeting interventions to crisis stabilization and linkages, which will allow clinicians more time for individual contact.

#### 7. Duplications:

There is no duplication of other state or federal requirements.

#### 8. Alternatives:

A Task Force was convened by the Commissioner in June 2007 to review and make recommendations on chemical dependence crisis services. The Task Force published recommendations in January 2008. To the extent possible the proposed Part 816 regulations reflect the Task Force recommendations. There were no alternatives considered.

OASAS elicited comments on the proposed regulations. The regulations were shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. All comments received were reviewed and changes were made. Additionally, these proposed regulations were shared with the New York State Alcoholism and Substance Abuse Providers (ASAP).

Finally, the proposed regulations were shared with New York State's Advisory Council at the August meeting. At this meeting there were no comments generated by the group because the providers appeared to be comfortable with the current proposal.

#### 9. Federal Standards:

Federal standards governing Medicaid requirements for these services are incorporated into the proposed changes to Part 816.

#### 10. Compliance Schedule:

It is expected that full implementation of Part 816 will be completed by December 1, 2008 in order to be compliant with statutory language.

#### Regulatory Flexibility Analysis

Effect of the Rule: The proposed Part 816 will impact certified and/or funded providers. It is expected that the development of Crisis Withdrawal and Stabilization services will require providers to amend some of their policies and procedures. The new service will result in greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on crisis stabilization and linkage to treatment. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking crisis withdrawal and stabilization services due to less restrictive procedures. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

Compliance Requirements: There are some minor changes in compli-

ance requirements. In addition, providers are already required to provide utilization review, therefore, it is not expected that the proposed regulation will have additional costs.

**Professional Services:** Additional professional services are not expected.

**Compliance Costs:** Some programs may need additional formally trained staff to meet the proposed requirements. Training will be made available to hospital providers by OASAS and Island Peer Review Organization (IPRO), an independent, not-for-profit corporation which specializes in health care evaluation and quality improvement.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the proposed Part 816 is expected to have a nominal economic impact on small businesses and government.

**Minimizing Adverse Impact:** Part 816 has been carefully reviewed to ensure minimum adverse impact to providers by Alcoholism and Substance Abuse Providers of NYS, Inc., New York State's Council of Local Mental Hygiene Directors and the New York State Advisory Council on Alcoholism and Substance Abuse Services, Greater New York Hospital Association, Healthcare Association of New York, and a statewide representative coalition from hospital and community based organizations that provide Withdrawal and Stabilization services. All comments received were reviewed and numerous changes were made. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or have nominal costs. Compliance requirements are small and will be absorbed into the already existing economic structure. The positive impact for patients and the state health care system outweigh any potential minimal costs.

**Small Business and Local Government Participation:** The proposed regulations were shared with New York's treatment provider community including Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare Association of New York, the Council of Local Mental Hygiene Directors and the New York State Advisory Council on Alcoholism and Substance Abuse Services and a statewide representative coalition from hospital and community based organizations that provide Withdrawal and Stabilization services.

#### **Rural Area Flexibility Analysis**

1. Types and estimated number of rural areas: There are six (6) certified providers of medically managed detoxification services that are located in rural areas of the State, five of which are public.

2. Reporting: There will be new documentation requirements to maintain clients in the higher level of care that will have some impact on providers.

3. Costs: There will be minimum impact for rural providers to implement Part 816. Under the Proposed 816 hospital based units can now operate two levels of care simultaneously: medically managed and medically supervised. Medically supervised services may require less staffing.

4. Minimizing adverse impact: Regulatory reform of detoxification rates was driven by language in the enacted 2008-09 budget. In order to achieve optimal results, OASAS solicited input from over 40 providers of service representing each modality statewide. This group met for a period of six months and the hospitals agreed that it was important to align detoxification care with detoxification rates. Hospitals also realized this could increase opportunities for outpatient detoxification units with increased income.

5. Rural area participation: These amendments were shared with New York's treatment provider community and included a cross-section of up-state and downstate, as well as urban and rural programs.

#### **Job Impact Statement**

The implementation of Part 816 may have a minor impact on staffing at hospital based detoxification units. Hospital based units under the current Part 816 solely operate as medically managed units which requires more staffing than any other withdrawal service. Under the proposed Part 816, hospital based units can now operate two levels of care simultaneously: medically managed and medically supervised. Staffing for medically supervised services may require less staffing. This regulation will not adversely impact jobs outside of the few hospital based detoxification units.

## Consumer Protection Board

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### **Access to Records**

**I.D. No.** CPR-49-08-00001-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 4600.5, 4600.7 and 4600.9 of Title 21 NYCRR.

**Statutory authority:** Public Officers Law, sections 87 and 89

**Subject:** Access to records.

**Purpose:** To introduce consistency with state statutes.

**Text of proposed rule:** Subdivision (d) of section 4600.5 is amended to read as follows:

Section 4600.5 Requests for public access to records.

(d) If the records access officer does not provide or deny access to the record sought within five business days of receipt of a request, he or she shall furnish a written acknowledgement of receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within [10] 20 business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed. *However, if the records officer determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within 20 business days from the date of the acknowledgement of receipt, the records access officer shall state, in writing, both the reason for the inability to grant the request within 20 business days and provide a date certain for the grant of request.*

Section 4600.7 is amended to read as follows:

4600.7 Subject matter list.

(a) The records access officer shall maintain a reasonably detailed current list by subject matter of all records in [its] the agency's possession, whether or not records are available pursuant to subdivision two of section eighty-seven of the Public Officers Law.

(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated not less than [twice] once per year. The most recent update shall appear on the first page of the subject matter list.

(d) *The board will post a current subject matter list on its website and such posting shall be linked to the website of the Committee of Open Government.*

Section 4600.9 is amended to read as follows:

4600.9 Fees.

(a) There shall be no fee charged for

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part.

(b) [Copies of records shall ordinarily be provided with charging a fee, except that if the request is financially burdensome to the board,] T [t]he board reserves the right to require reimbursement of the cost of preparing a copy[ing (excluding labor costs)]. Fees for copies of records shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing the record. *No additional fee will be charged unless at least two hours of board employee time is needed to prepare a copy of the record requested. A person requesting the record shall be informed of the estimated costs of preparing a copy of the record if more than two hours of the board employee's time is needed, or if an outside professional service will be needed to prepare a copy of the record. In determining the actual cost of reproducing a record, the board shall include only:*

(1) *an amount equal to the hourly salary attributed to the lowest paid board employee who has the necessary skill required to prepare a copy of the requested record;*

(2) *the actual cost of the storage devices or media provided to the person making the request in complying with such request; and,*

(3) *the actual cost to the board of engaging an outside professional service to prepare a copy of a record, but only when the board's information technology equipment is inadequate to prepare a copy, if such service is used.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Laura Greco, Deputy General Counsel, Consumer Protection Board, 5 Empire State Plaza, Suite 2101, Albany, NY 12223, (518) 474-6175, email: laura.greco@consumer.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.  
**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**  
 Subdivision 1(d) of section 553 of the Executive Law as amended by Chapter 691 of the Laws of 2003, titled Powers and duties of the Board and the Executive Director, grants general rulemaking authority to the Consumer Protection Board to implement other powers and duties by regulation and otherwise as prescribed by any provision of law. Sections 87 and 89 of the Public Officers Law, as amended by Chapter 223 of the Laws of 2008, gives the Board authority to prescribe rules and regulations to comply with the Freedom of Information Law.

**2. LEGISLATIVE OBJECTIVES:**  
 The proposed amendments carry out the intent of the Freedom of Information Law by providing technical changes that both clarify and conform the rules to current State law.

**3. NEEDS AND BENEFITS:**  
 The purpose of the proposed amendments is to clarify and conform the Board's access to records provisions with the new FOIL amendments, as well as to make the rules consistent with the time requirements set forth in the Public Officers Law. The amendments will benefit the public because they will be consistent with existing law. The amendments will also benefit the Board because the rule will enable it to charge a reasonable fee for the time to prepare copies, where the time to prepare a copy exceeds two hours of employee time or requires the hiring of an outside vendor.

**4. COSTS:**  
 (a) Costs to State government: There will be no additional costs to the Board.  
 (b) Costs to private parties: The amendment clarifies the circumstances in which the Board may charge parties for preparing copies.  
 (c) Costs to local governments: The proposed amendments will not impose any costs on local government.

**5. PAPERWORK:**  
 This regulation does not impose the need for additional paperwork.

**6. DUPLICATION:**  
 This regulation does not duplicate any existing New York State rule or statute.

**7. ALTERNATIVE:**  
 There is no alternative to amending these regulations.

**8. LOCAL GOVERNMENT MANDATES:**  
 The proposed amendments do not impose any program, service, duty, or responsibility upon local government.

**9. FEDERAL STANDARDS:**  
 There are no applicable federal standard.

**10. COMPLIANCE SCHEDULE:**  
 The effective date of the proposed regulations is upon the publication of the notice of adoption in the State Register.

**Regulatory Flexibility Analysis**

**1. EFFECT OF RULE:**  
 The proposed amendments will have no effect on local governments or small businesses and will not impose reporting, record-keeping or other compliance requirements on local governments or small businesses, except if the local government or small business makes a FOIL request that requires over two hours to prepare copies. This is anticipated to be rare, as most requests require little time to fulfill. However, in such a rare case, the business or local government will be charged an amount equal to the hourly salary attributable to the lowest paid Board employee who has the necessary skill required to prepare a copy of the requested record. The benefits of the proposed amendments include making the Board's rules consistent with state law.

**2. COMPLIANCE REQUIREMENTS:**  
 There are no additional reporting requirements to the Board.

**3. PROFESSIONAL SERVICES:**  
 Affected small businesses and local governments will not need to retain additional professional services to comply with the proposed amendments.

**4. COMPLIANCE COSTS:**  
 There are no expected compliance costs as the result of the amendments.

**5. ECONOMIC & TECHNOLOGICAL FEASIBILITY:**  
 The proposed amendments do not impose new technological changes.

**6. MINIMIZING ADVERSE IMPACT:**  
 There is no adverse impact to small businesses and local government.

**7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**  
 The proposed amendments have no unique features which would require the participation of small business or local government.

**Rural Area Flexibility Analysis**

**1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**  
 Regulated businesses covered by the proposed amendments do business

in every county in the State. There are forty-four rural counties in New York State, which are defined in the Executive Law § 481 (7) as counties within the state having less than a population of two hundred thousand. The number of small businesses in the forty-four rural counties for the year 2005 is estimated by the Empire State Development Division for Small Businesses to be 264,295. The proposed amendments will not have an additional effect on small businesses located in rural areas.

**2. REPORTING, RECORDKEEPING OR OTHER COMPLIANCE REQUIREMENTS:**

The proposed amendments impose no new reporting requirements.

**3. COSTS:**  
 There will be no additional costs to rural areas.

**4. MINIMIZING ADVERSE IMPACT:**  
 The proposed amendments apply uniformly all those that request records from the Board under the Freedom of Information Law. The proposed amendments do not impose any additional burden on persons located in rural areas and the Board does not believe that the proposed amendments will have an adverse impact on rural areas.

**5. RURAL AREA PARTICIPATION:**  
 The proposed amendments have no unique features such that rural area participation was required. The Board will carefully consider any comments filed in response to this notice, and make changes to the extent necessary to reflect any impacts on rural areas.

**Job Impact Statement**

The proposed regulations should not have a substantial adverse impact defined as a decrease of 100 jobs (SAPA § 201-a (6)(c)). These amendments conform these regulations to existing state law. As it is evident from the nature of these amendments that they would not have an adverse impact on the number of jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required.

**Division of Criminal Justice Services**

**NOTICE OF WITHDRAWAL**

**Availability of Records**

**I.D. No. CJS-44-08-00018-W**

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Notice of proposed rule making, I.D. No. CJS-44-08-00018-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on October 29, 2008.

**Subject:** Availability of records.

**Reason(s) for withdrawal of the proposed rule:** The wrong files were inadvertently downloaded to the Department of State.

**PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

**Personal Privacy Protection Law**

**I.D. No. CJS-49-08-00008-P**

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to amend sections 6151.2(b), 6151.4, 6151.8(c) and 6151.9 of Title 9 NYCRR.

**Statutory authority:** Public Officers Law, section 94(2); Executive Law, section 837(13)

**Subject:** Personal Privacy Protection Law.

**Purpose:** Update the Division's address and the contact person for requests regarding the Personal Privacy Protection Law.

**Text of proposed rule:** 1. Subdivision (b) of section 6151.2 of Title 9 NYCRR is amended to read as follows:

(b) Communications shall be addressed to: Privacy Compliance Officer, [Executive Park Tower, Stuyvesant Plaza,] 4 Tower Place Albany, NY 12203[, telephone (518) 457-6113].

2. Section 6151.4 of Title 9 NYCRR is amended to read as follows:

6151.4 Location. Records shall be made available at: [the main office of the agency, which is located at: Executive Park Tower, Stuyvesant Plaza,] 4 Tower Place, Albany, NY 12203.

3. Subdivision (c) of section 6151.8 of Title 9 NYCRR is amended to read as follows:

(c) Any such denial may be appealed to: [Commissioner] Deputy Commissioner and Counsel, Office of Legal Services, Division of Criminal Justice Services, [Executive Park Tower, Stuyvesant Plaza,] 4 Tower Place, Albany, NY 12203.

4. Subdivision (a) of section 6151.9 of Title 9 NYCRR is amended to read as follows:

(a) Any person denied access to a record or denied a request to amend or correct a record or personal information pursuant to section 6151.8 of this Part may, within 30 business days of such denial, appeal to: [the Commissioner] Deputy Commissioner and Counsel, Office of Legal Services, [of the] Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mark Bonacquist, Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, (518) 457-8413

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Consensus Rule Making Determination

This proposal updates the Division's address and the contact person for requests regarding the Personal Privacy Protection Law. Accordingly, the Division believes this proposal makes technical changes and is otherwise non-controversial. As such, no person is likely to object to the adoption of this rule as written.

#### Job Impact Statement

This proposal updates the Division's address and the contact person for requests regarding the Personal Privacy Protection Law. As such, it is apparent from the nature and purpose of the proposal that it will have no impact on jobs and employment opportunities.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Migratory Game Bird Hunting Regulations for the 2008-2009 Season

**I.D. No.** ENV-39-08-00004-A

**Filing No.** 1138

**Filing Date:** 2008-11-18

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 2.30 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

**Subject:** Migratory game bird hunting regulations for the 2008-2009 season.

**Purpose:** To adjust migratory game bird hunting regulations to conform with federal regulations.

**Text or summary was published** in the September 24, 2008 issue of the Register, I.D. No. ENV-39-08-00004-EP.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Bryan L. Swift, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8866, email: blswift@gw.dec.state.ny.us

**Additional matter required by statute:** A programmatic environmental impact statement has been prepared and is on file with the Department of Environmental Conservation.

#### Assessment of Public Comment

The agency received no public comment.

## Department of Health

### EMERGENCY RULE MAKING

#### Criminal History Record Check

**I.D. No.** HLT-41-08-00005-E

**Filing No.** 1130

**Filing Date:** 2008-11-17

**Effective Date:** 2008-11-17

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 402 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2899-a(4); and Executive Law, section 845-b(12)

**Finding of necessity for emergency rule:** Preservation of public health, public safety and general welfare.

**Specific reasons underlying the finding of necessity:** Emergency agency action is necessary for preservation of the public health, public safety and general welfare.

The regulation is needed on an emergency basis to implement the Department of Health's statutory duty to act on requests for criminal history record checks which are required by law. The law is intended to protect patients, residents, and clients of nursing homes and home health care providers from risk of abuse or being victims of criminal activity. These regulations are necessary to implement the law as of its effective date so that the Department of Health can fulfill its statutory duty of ensuring that the health, safety and welfare of such patients, residents and clients are not unnecessarily at risk.

**Subject:** Criminal History Record Check.

**Purpose:** Criminal background checks of certain prospective employees of NHs, CHHAs, LHCSAs & long term home health care programs.

**Substance of emergency rule:** This regulation adds a new Part 402 to Title 10 NYCRR, which relates to prospective unlicensed employees of nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs who will provide direct care or supervision to patients, residents or clients of such providers.

The regulation establishes standards and procedures for criminal history record checks required by statute. Provisions govern the procedures by which fingerprints will be obtained and describe the requirements and responsibilities of the Department and the affected providers with regard to this process. The regulations address the identification of provider staff responsible for requesting the criminal history checks, supervision of temporary employees, notice to the Department when an employee is no longer employed, the content and procedure for obtaining consent and acknowledgment for finger printing from prospective employees. The Department's responsibilities for reviewing requests are set forth and specify time frames and sufficient information to process a request.

The proposed rule also describes the extent to which reimbursement is available to such providers to cover costs associated with criminal history record checks and obtaining the fingerprints necessary to obtain the criminal history record check.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-41-08-00005-P, Issue of October 8, 2008. The emergency rule will expire January 15, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

#### Regulatory Impact Statement

Statutory Authority:

Section 2899-a(4) of the Public Health Law requires the State Commissioner of Health to promulgate regulations implementing new Article 28-E of the Public Health Law which requires all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs ("the providers") to request, through the Department of Health ("the Department"), a criminal history record check for certain unlicensed prospective employees of such providers.

Subdivision (12) of section 845-b of the Executive Law requires the

Department to promulgate rules and regulations necessary to implement criminal history information requests.

#### Legislative Objectives:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 establish a requirement for all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs to obtain criminal history record checks of certain unlicensed prospective employees who will provide direct care or supervision to patients, residents or clients of such providers. This is intended to enable such providers to identify and employ appropriate individuals to staff their facilities and programs and to ensure patient safety and security.

#### Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of unlicensed employees in all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs are dedicated, compassionate workers who provide quality care, there are cases in which criminal activity and patient abuse by such employees has occurred. While this proposal will not eliminate all instances of abuse, it will eliminate many of the opportunities for individuals with a criminal record to provide direct care or supervision to those most at risk. Pursuant to Chapter 769 of the laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 ("the Chapter Laws"), this proposal requires the providers to request the Department to obtain criminal history information from the Division of Criminal Justice Services ("the Division") and a national criminal history check from the FBI, concerning each prospective unlicensed employee who will provide direct care or supervision to the provider's patients, residents or clients.

Each provider subject to these requirements must designate "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective unlicensed employee who will provide direct care or supervision to patients, residents or clients can be permanently hired, he or she must consent to having his/her fingerprints taken and a criminal history record check performed. Two sets of fingerprints will be taken and sent to the Department, which will then submit them to the Division. The Division will provide criminal history information for each person back to the Department.

The Department will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the Department disapproves the prospective employee's eligibility for employment, (e.g., the person has a felony conviction for a sex offense or a violent felony or for any crime specifically listed in section 845-b of the Executive Law and relevant to the prospective unlicensed employees of such providers). In some cases, a person may have a criminal background that does not rise to the level where the Department will disapprove eligibility for employment. The proposed regulations allow the provider, in such cases, to obtain sufficient information to enable it to make its own determination as to whether or not to employ such person. There will also be instances in which the criminal history information reveals a felony charge without a final disposition. In those cases, the Department will hold the application in abeyance until the charge is resolved. The prospective employee can be temporarily hired but not to provide direct care or supervision to patients, residents or clients of such providers.

The proposal implements the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her eligibility for employment should not be disapproved before the Department can finally inform a provider that it disapproves eligibility for employment. If the Department maintains its determination to disapprove eligibility for employment, the provider must notify the person that the criminal history information is the basis for the disapproval of employment.

The proposed regulations establish certain responsibilities of providers in implementing the criminal history record review required by the law. For example, a provider must notify the Department when an individual for whom a criminal history has been sought is no longer subject to such check. Providers also must ensure that prospective employees who will be subject to the criminal history record check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division, as well as with the FBI with regard to federal criminal history information.

#### COSTS:

##### Costs to State Government:

The Department estimates that the new requirements will result in approximately 108,000 submissions for a criminal history record check on an annual basis. This number of submissions for an initial criminal history record check will decrease overtime as the criminal history record check

database (CHRC) is populated. The Department will allow providers to access any prior Department determination about a prospective employee at such time as the prospective employee presents himself or herself to such provider for employment. In the event that the prospective employee has a permanent record already on file with the Department, this information will be made available promptly to the provider who intends to hire such prospective employee.

The provider will forward with the request for the criminal history review, \$75 to cover the projected fee established by the Division for processing a State criminal history record check, and a \$19.25 fee for a national criminal history record check. The Department estimates that the provider's administrative costs for obtaining the fingerprints will be \$13.00 per print. The total annual cost to providers is estimated to be approximately \$12 million.

Requests by licensed home care services agencies (LHCSAs) are estimated to constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual cost to LHCSAs is estimated to be approximately \$6 million. Reimbursement shall be made available to LHCSAs in an equitable and direct manner for the above fees and costs subject to funds being appropriated by the State Legislature in any given fiscal year for this purpose. Costs to State government will be determined by the extent of the appropriations.

The Department estimates that nursing homes, certified home health agencies and long term home health care programs will constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual costs to nursing homes, certified home health agencies and long term home health care programs is estimated to be approximately \$6 million. These providers may, subject to federal financial participation, claim the above fees and costs as reimbursable costs under the medical assistance program (Medicaid) and may recover the Medicaid percent of such fees and costs. Reimbursement to such providers will be determined by the percent of Medicaid days of care to total days of care. Therefore, approximately \$6 million of the total costs for these providers will be subject to a 50 percent federal share and approximately \$2.3 million will be borne entirely by the State.

##### Costs to Local Governments:

There will be no costs to local governments for reimbursement of the costs of the criminal history record check paid by LHCSAs. LHCSAs will receive reimbursement from the State subject to an appropriation (See "Costs to State Government").

Costs to local governments for reimbursement of the costs of the criminal history record check paid by nursing homes, certified home health agencies, and long term home health care programs will be the local government share of Medicaid reimbursement to such providers which is estimated to be annual additional cost to local governments of approximately \$700,000 (See "Costs to State Government").

##### Costs to Private Regulated Parties:

Costs to LHCSAs will be determined by the extent of annual appropriations by the State Legislature (See "Costs to State Government").

Costs to nursing homes, certified home health agencies and long term home health care programs will be determined by their Medicaid percentage of total costs (See "Costs to State Government").

##### Costs to the Department of Health:

Estimated start-up costs for the Department of Health which includes the purchase of equipment, activities and systems and staffing costs are approximately \$2.8 million.

##### Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts. The Chapter Laws state that they supercede any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

##### Paperwork:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 require that new forms be developed for use in the process of requesting criminal history record information. The forms are, for example, an informed consent form to be completed by the subject party and the request form to be completed by the authorized person designated by the provider. Temporarily approved employees are required to complete an attestation regarding incidents/abuse. Provider supervision of temporary employees must be documented. In addition, other forms will be required by the department such as a form to designate an authorized party or forms to be completed when someone who has had a criminal history record check is no longer subject to the check.

The regulations also contain a requirement to keep a current roster of subject parties.

##### Duplication:

This regulatory amendment does not duplicate existing State or federal requirements. The Chapter Laws state that they supercede and apply in lieu of any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

**Alternatives:**

No significant alternatives are available. The Department is required by the Chapter Laws to promulgate implementing regulations.

**Federal Standards:**

The regulatory amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

**Small Business Guide:**

A small business guide as required by section 102-a of the State Administrative Procedure Act is unnecessary at this time. The Department provided an intensive orientation of program operations to those providers affected by criminal history record program.

Information was provided and continues to be provided to providers about implementation; process and procedures; and compliance with rules and regulations through a message board, staff attendance at trade association meetings, dear administrator letters, a training script or frequently asked questions document, and a dedicated e-mail log.

**Compliance Schedule:**

The Chapter Laws mandate that the providers request criminal history record checks for certain unlicensed prospective employees on and after September 1, 2006. These regulations are proposed to be effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

**Effect of Rule on Small Businesses and Local Governments:**

For the purpose of this Regulatory Flexibility Analysis, small businesses are considered any nursing home or home care agency within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes and 200 home care services agencies would therefore be considered "small businesses," and would be subject to this regulation.

For purposes of this regulatory flexibility analysis, small businesses were considered to be long term home health care programs with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the long term home health care program cost report 77 out of 110 long term home health care programs were identified as employing fewer than 100 employees. Twenty-eight local governments have been identified as operating long term home health care programs.

**Compliance Requirements:**

Providers must, by statute, on and after September 1, 2006, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform prospective unlicensed employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State and the FBI. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not the prospective employee's eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

**Professional Services:**

No additional professional services will be required by small businesses or local governments to comply with this rule.

**Compliance Costs:**

For programs eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs which are unable to access reimbursement from state and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to an appropriation by the State Legislature (See "Regulatory Impact Statement - Costs to State Government").

There will be costs to local governments only to the extent such local governments are providers subject to the regulations.

**Economic and Technological Feasibility:**

The proposed regulations do not impose on regulated parties the use of any technological processes. Fingerprints will be taken generally by the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. Two cards would then need to be mailed to the Division by the Department. However, before the Department could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into the Department databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint cards is difficult to read.

The Department hopes to move in the future to Live Scan. Live Scan is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Department to obtain criminal history information.

**Minimizing Adverse Impact:**

The Department considered the approaches for minimizing adverse economic impact listed in SAPA Section 202-b (1) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Small Businesses and Local Government Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments were solicited from all affected parties. Informational briefings were held with such associations. There will be informational letters to providers prior to the effective date of the regulations.

**Rural Area Flexibility Analysis**

**Effect of Rule:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population of greater than 200,000 includes towns with population densities of 150 persons or less per square mile. The following 42 counties have a population less than 200,000.

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chemung	Livingston	Seneca
Chenango	Madison	Steuben
Clinton	Montgomery	Sullivan
Columbia	Ontario	Tioga
Cortland	Orleans	Tompkins
Delaware	Oswego	Ulster
Essex	Otsego	Warren
Franklin	Putnam	Washington
Fulton	Rensselaer	Wayne
Genesee	St. Lawrence	Wyoming
Greene	Saratoga	Yates

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Reporting, Recordkeeping and Other Compliance Requirements:**

Providers, including those in rural areas, must, by statute, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform covered unlicensed prospective employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

**Professional Services:**

No additional professional services will be necessary to comply with the proposed regulations.

**Compliance Costs:**

For programs located in rural areas eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers. (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs located in rural areas which are unable to access reimbursement from state/and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to appropriation by the State Legislature. (See "Regulatory Impact Statement - Costs to State Government").

**Minimizing Adverse Impact:**

The Department considered the approaches for minimizing adverse economic impact listed in SAPA section 202-bb(2) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Rural Area Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments solicited from all affected parties. Such associations include members from rural areas. Informational briefings were held with such associations. There will be informational letters to providers to include rural area providers prior to the effective date of the regulations.

**Job Impact Statement**

A Job Impact statement is not necessary for this filing. Proposed new 10 NYCRR Part 402 does not have any adverse impact on the unlicensed employees hired before September 1, 2006 as they apply only to future prospective unlicensed employees. The number of all future prospective unlicensed employees of providers who provide direct care or supervision to patients, residents or clients will be reduced to the degree that the criminal history record check reveals a criminal record barring such employment.

Since the inception of the program approximately 14% of all unlicensed employees applying for positions with nursing homes or home health care providers were found to have a criminal record barring such employment.

## EMERGENCY RULE MAKING

### Fingerprinting and Criminal Background Check Requirements (CBCR) for Unescorted Access to Radioactive Materials

**I.D. No.** HLT-49-08-00012-E

**Filing No.** 1133

**Filing Date:** 2008-11-18

**Effective Date:** 2008-11-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of section 16.112 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(r), 225(5)(p) and (q)

**Finding of necessity for emergency rule:** Preservation of public health.

**Specific reasons underlying the finding of necessity:** We are proposing that these regulations be adopted on an emergency basis as authorized by Section 202(6) of the State Administrative Procedure Act because immediate adoption is necessary to protect the public health from the threat posed by this radioactive material security gap.

New York is the only state that has not implemented these requirements for radioactive material licensees. The US Nuclear Regulatory Commission issued these requirements in December 2007 with an implementation date of June 2008. NRC directed all state programs to implement the fingerprinting requirements by the June 2008 deadline as well. NRC and other states implemented the fingerprinting requirements in a short timeframe via orders or license conditions. Because of the restrictions on fingerprinting in Section 201-a of NYS Labor Law, we were unable to implement these requirements as a license condition or as department orders, and could only impose these in regulation.

The fingerprinting requirements were discussed in February 2008 with Deputy Secretary Balboni, representatives of the Governor's office, Office of Homeland Security, Division of Criminal Justice Services and New York State Police and it was agreed that DOH should implement the fingerprinting requirements as soon as possible. Since we are the only program that has not yet implemented these security requirements we stand alone as not being fully protective of public health and safety. We need to implement these requirements as soon as possible to close that gap.

**Subject:** Fingerprinting and Criminal Background Check Requirements (CBCR) for Unescorted Access to Radioactive Materials.

**Purpose:** US NRC requirements-fingerprint. & CBCRs for individuals allowed unescorted access to large quantities of radioactive materials.

**Text of emergency rule:** Pursuant to the authority vested in the Public Health Council by sections 225(5)(p) and 225(5)(q) of the Public Health Law and in the Commissioner of Health by section 201(l)(r) of the Public Health Law, Part 16 of the State Sanitary Code, contained in Chapter I of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 16.112, to be effective upon filing with the Department of State, to read as follows:

*Section 16.112 Fingerprinting and criminal background check requirements*

(a) *Applicability*

*This section applies to any licensee who possesses, or is authorized to possess, radioactive material that is: (1) listed in Table 1 ("Radionuclides of Concern") of this Section and (2) in a quantity equal to or exceeding that listed in Table 1.*

(b) *Definitions*

(1) *Trustworthiness and Reliability (T&R) Official — means an individual appointed by the licensee who is responsible for determining the trustworthiness and reliability of another individual requiring unescorted access to one or more radioactive materials identified in Table 1 of this section.*

(2) *"Affected individual" means an individual who has or is seeking unescorted access to radioactive material identified in Table 1 of this section in a quantity equal to or exceeding that listed in Table 1.*

(3) *"Unescorted access" means access without an escort to radioactive material identified in Table 1 of this section which is in a quantity equal to or exceeding that listed in Table 1.*

(c) *Licensees shall, within ninety (90) days of the effective date of this section, establish and maintain a fingerprinting program that meets the requirements of this section for individuals who require unescorted access. Licensees shall implement this program in conformance with the following scheduled:*

(1) *Within sixty (60) days of the effective date of this section, the Licensee shall provide under oath or affirmation a certification that the Licensee's T & R Official is deemed trustworthy and reliable by the Licensee as required by subdivision (e) of this section.*

(2) *The Licensee shall, in writing, within thirty (30) days of the effective date of this section, notify the Department (1) if it is unable to comply with any of the requirements of this section, (2) if compliance with any of these requirements is unnecessary in its specific circumstances, or (3) if implementation of any of these requirements would cause the Licensee to be in violation of the provisions of any Department regulation or its license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement. Such justification must explain the necessity for the relief and alternative actions to be taken. The Department may accept the justification if it determines that the action to be taken in lieu of compliance with the requirement is consistent with public health and is necessary to avoid undue financial hardship for the licensee.*

(3) *The Licensee shall complete implementation of the program established in accordance with subdivision (j) of this section within 90 days from the effective date of this section. In addition to the notifications in paragraphs 1 and 2 above, the Licensee shall notify the Department, in writing, within twenty-five (25) days after it has achieved full compliance with the requirements of this section. If within 60 days from the effective date of this section, the Licensee is unable to complete implementation of one or more requirements of this section, the Licensee shall submit a written request to the Department explaining the need for an extension of time to implement those requirements and providing a justification for the additional time for compliance that it seeks. The Department may grant such request if it determines that the requested extension of time will not jeopardize public health and is necessary to avoid undue financial hardship for the licensee.*

(4) *Licensees shall notify the Department and the United States Nuclear Regulatory Commission (NRC) Headquarters Operations Office by telephone within 24 hours if the results from a criminal history records check indicate an individual is listed on the Federal Bureau of Investigation (FBI) Terrorist Screening Data Base.*

(d) *Except as provided in subdivision (h) for individuals who are currently approved for unescorted access, the Licensee shall grant access to radioactive material in Table 1 in accordance with the requirements of its Increased Controls license conditions and the requirements of this Section.*

(e) *The T&R Official, if he/she does not require unescorted access, must be deemed trustworthy and reliable by the Licensee in accordance with its Increased Controls license conditions before making a determination regarding the trustworthiness and reliability of another individual. If the T&R Official requires unescorted access, the Licensee must consider the results of the FBI identification and criminal history records check before approving a T&R Official.*

(f) *Prior to requesting fingerprints from any individual, the Licensee shall provide a copy of this section to that person.*

(g) *Upon receipt of the results of FBI identification and criminal history records checks, the Licensee shall control such information as specified in subdivision (m) of this section and its Increased Controls license conditions.*

(h) *The Licensee shall make determinations on continued unescorted access for persons currently granted unescorted access, within 90 days from the effective date of this section, based upon the results of the fingerprinting and FBI identification and criminal history records check. The Licensee may allow any individual who currently has unescorted access to certain radioactive material in accordance with its Increased*

Controls license conditions to continue to have unescorted access, pending a decision by the T&R Official as to whether that individual should continue to have such access. After 90 days from the effective date of this section, no individual may have unescorted access to any radioactive material listed in Table 1 of this section and in a quantity equal to or exceeding that listed in Table 1, without a determination by the T&R Official (based upon fingerprinting, an FBI identification and criminal history records check and a previous trustworthiness and reliability determination) that the individual may have unescorted access to such materials.

(i) Licensee responses to subdivisions (c)(1), (c)(2), (c)(3) and (c)(4) shall be submitted in writing to the Department. Licensee responses shall be marked as "Confidential - Security-Related Information".

(j) Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks

(1) Each Licensee subject to the provisions of this section shall fingerprint each affected individual.

(2) For affected individuals employed by the licensee for three years or less, and for affected individuals who are nonlicensee personnel, such as physicians, physicists, house-keeping personnel, and security personnel under contract, trustworthiness and reliability shall be determined, at a minimum, by verifying employment history, education, personal references, and fingerprinting and the review of an FBI identification and criminal history records check.

(3) The licensee shall also, obtain independent information to corroborate that provided by the employee (e.g. seeking references not supplied by the individual). For affected individuals employed by the licensee for longer than three years, trustworthiness and reliability shall be determined, at a minimum, by a review of the employees' employment history with the licensee and fingerprinting and an FBI identification and criminal history records check.

(4) Service provider licensee employees who are affected individuals shall be escorted unless they are determined to be trustworthy and reliable by a NRC-required background investigation. Written verification attesting to or certifying the person's trustworthiness and reliability shall be obtained by the licensee from the licensee providing the service.

(5) The licensee must submit one completed, legible standard FBI fingerprint card (Form FD-258, ORIMDNRCOOOZ)<sup>1</sup> for each affected individual, to the NRC's Division of Facilities and Security. The name and address of the individual (T&R Official) to whom the criminal history records should be returned must be included with the submission.

(6) The Licensee shall review and use the information received from the FBI identification and criminal history records check as part of its trustworthiness and reliability determination required by its Increased Controls license conditions.

(7) The Licensee shall notify each affected individual that his/her fingerprints will be used to secure a review of his/her criminal history record and inform the affected individual of the procedures for revising the record or including an explanation in the record, as specified in subdivision (l) "Right to Correct and Complete Information."

(8) Fingerprints for unescorted access need not be taken if an employed individual (e.g., a Licensee employee, contractor, manufacturer, or supplier) is:

(i) An employee of the US Nuclear Regulatory Commission or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history check;

(ii) A Member of Congress;

(iii) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history check;

(iv) The Governor or his or her designated State employee representative;

(v) Federal, State, or local law enforcement personnel;

(vi) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(vii) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC; or

(viii) documentation is provided which demonstrates that the employed individual has been favorably-decided by a U.S. Government program involving fingerprinting and an FBI identification and criminal history records check within the last five calendar years of the effective date of this regulation, or documentation is provided which demonstrates that any person has an active security clearance (provided in the later two cases they make available the appropriate documentation). Written confirmation from the agency/employer which granted the federal security clearance or reviewed the FBI criminal history records results based upon a fingerprint identification check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the employed individual no longer requires unescorted access associated with the Licensee's activities.

(9) All fingerprints obtained by the Licensee pursuant to this section must be submitted to the NRC.

(10) The Licensee shall review and use the information received from the FBI identification and criminal history records check and consider it as part of its trustworthiness and reliability determination, in conjunction with the trustworthiness and reliability requirements set forth in its Increased Controls license conditions, in making a determination whether to grant an affected individual unescorted access. The Licensee shall use any information obtained from a criminal history records check solely for the purpose of determining an affected individual's suitability for unescorted access.

(11) The Licensee shall document the basis for its determination whether to grant, or continue to allow, an affected individual unescorted access.

(k) Prohibitions

(1) A Licensee shall not base a final determination to deny an affected individual unescorted access solely on the basis of information received from the FBI involving:

(i) an arrest more than one (1) year old for which there is no information regarding the disposition of the case, or

(ii) an arrest that resulted in dismissal of the charge or an acquittal.

(2) A Licensee shall not use information received from a criminal history records check obtained pursuant to this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States or Article 1 of the New York State Constitution, nor shall the Licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

(l) Right to Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the affected individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an affected individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either a direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the FBI Identification Division.<sup>2</sup> The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access determination based upon an individual's criminal history record only upon receipt of the FBI's confirmation or correction of the record. Upon a final adverse determination on unescorted access the Licensee shall provide the individual its documented basis for denial. Unescorted access shall not be granted to an individual during the review process.

(m) Protection of Information

(1) Each Licensee who obtains a criminal history record on an affected individual pursuant to this section shall establish and maintain a system of files and procedures for protecting the record and the personal information in the record from unauthorized disclosure.

(2) The Licensee may not disclose the record or personal information collected and maintained to persons other than the affected individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining unescorted access. No individual authorized to have access to the information may disseminate the information to any other individual who does not have a need-to-know.

(3) The personal information obtained on an affected individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the affected individual's written request to provide the information contained in his/her file, and the receiving Licensee verifies information such as the affected individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

(4) The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the Department to determine compliance with this section.

(5) The Licensee shall retain all fingerprint and criminal history records from the FBI, or a copy if the affected individual's file has been transferred, for three (3) years after termination of employment or determination of unescorted access (whether unescorted access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

- <sup>1</sup> Copies of these forms may be obtained from NRC. The Licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards. Licensees must have fingerprints taken by local law enforcement (or a private entity authorized to take fingerprints) because an authorized official must certify the identity of the person being fingerprinted. If the FBI advises the fingerprints are unclassifiable based on conditions other than poor quality, the Licensee must submit a request to NRC for alternatives. When those search results are received from the FBI, no further search is necessary. The NRC will receive and forward to the submitting Licensee all data from the FBI as a result of the Licensee's application(s) for criminal history records checks, including the FBI fingerprint record(s).
- <sup>2</sup> In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency (see 28 CFR Part 16.30 through 16.34).

Table 1: Radionuclides of Concern

Radionuclide	Quantity of Concern <sup>1</sup> (TBq)	Quantity of Concern <sup>2</sup> (Ci)
Am-241	0.6	16
Am-241/Be	0.6	16
Cf-252	0.2	5.4
Cm-244	0.5	14
Co-60	0.3	8.1
Cs-137	1	27
Gd-153	10	270
Ir-192	0.8	22
Pm-147	400	11,000
Pu-238	0.6	16
Pu-239/Be	0.6	16
Ra-226	0.4	11
Se-75	2	54
Sr-90 (Y-90)	10	270
Tm-170	200	5,400
Yb-169	3	81
Combinations of radioactive materials listed above <sup>3</sup>	See Footnote Below <sup>4</sup>	

- <sup>1</sup> The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.
- <sup>2</sup> The primary values used for compliance with this Order are tera becquerel (TBq).
- <sup>3</sup> Radioactive materials are to be considered aggregated or co-located if breaching a common physical security barrier (e.g., a locked door at the entrance to a storage room) would allow access to the radioactive material or devices containing the radioactive material.
- <sup>4</sup> If several radionuclides are aggregated, the sum of the ratios of the activity of each source,  $i$  of radionuclide,  $n$ ,  $A_{(i,n)}$ , to the quantity of concern for radionuclide  $n$ ,  $Q_n$ , listed for that radionuclide equals or exceeds one. That is:

$$\sum_n \left\{ \sum_i \frac{A_{i,n}}{Q_n} \right\} \geq 1$$

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 15, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

**Regulatory Impact Statement**

**Statutory Authority:**

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(p) & (q) and 201(1)(r) authorize SSC regulation of the public health aspects of ionizing radiation. These provisions authorize the regulation of radioactive materials.

The Atomic Energy Act (see 42 USC § 2021(j)(1), 2021(o), and 2022) requires Agreement States such as New York to comply with and adopt federal standards or their authority to regulate certain radioactive material is jeopardized. The fingerprinting and criminal history records check requirements incorporated by these regulations are such federal standards.

**Legislative Objectives:**

The legislative objectives of PHL Sections 225(5) and 201(1)(p) and (q) are to protect public health and safety. These regulations enhance the security of radioactive material and are consistent with this purpose.

**Needs and Benefits:**

The possession and use of radioactive material is regulated by the US Nuclear Regulatory Commission (NRC). The NRC has relinquished that authority to states that have entered into agreements with NRC whereby the "Agreement State" takes over the authority for regulation of radioactive material. New York became the fourth Agreement State in 1962. Currently, 35 Agreement States exist.

DOH regulates the use of radioactive material at approximately 1100 facilities in order to protect people and the environment. DOH radioactive material licensees have the primary responsibility to maintain the security and accountability of the radioactive material in their possession. The events of 9/11 put new emphasis on security to prevent the malicious use of radioactive material, such as in dirty bombs. In 2002, the New York State Office of Public Security commissioned a study of radioactive material security in NYS. A task force comprised of state and federal radiation and security experts evaluated the current security posture. This evaluation included reviewing existing regulatory structure, policies and procedures and making site visits to several different types of facilities that possess and use radioactive materials. The task force developed several recommendations to improve radioactive material security. One of those recommendations was to explore using background investigations for assessing employees who have access to certain quantities of radioactive materials.

In 2005, the department implemented new security requirements called Increased Controls (ICs) on radioactive material licensees that possess certain quantities of radioactive materials. The NRC issued IC's on their licensees as well. The ICs included requirements for enhancing physical security of radioactive materials, coordination of security plans with local law enforcement and procedures for limiting unescorted access to radioactive materials to only those who have been determined to be trustworthy and reliable (T&R). The T&R determination is based on an evaluation of the individual's work history, employment records and personal references but does not include fingerprinting and FBI criminal background checks.

On August 8, 2005, section 652 of the US Energy Policy Act of 2005 (EPAct), was enacted. This provision amended the fingerprinting requirements of the Atomic Energy Act (AEA). Specifically, the EPAct amended Section 149 of the AEA (see 42 USC § 2169) to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check for "any individual who is permitted unescorted access to radioactive materials or other property subject to regulation by the Commission [NRC] that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." Therefore, in accordance with Section 149 of the AEA, as amended by the EPAct, on December 2, 2007, NRC imposed fingerprinting and FBI identification and criminal history records check requirements on all NRC IC licensees with an effective date of June 2, 2008 (NRC Order EA-07-305). Also, NRC directed the Agreement States to implement the fingerprinting requirements established in EA-07-305 on their licensees by the June 2, 2008 deadline. The DOH has determined that such requirements must be established in regulation. Since the DOH must establish these requirements in regulation, New York is the only state not to have implemented the fingerprinting requirements on its radioactive material licensees by the June 2, 2008 deadline. The NRC and all other Agreement States were able to impose the fingerprinting requirements immediately via department orders or license conditions.

**Costs:**

The cost impact of these regulations is a total of \$50 for each affected individual: \$36 for the Federal Bureau of Investigation identification and criminal history records check and \$10-15 fingerprint impressions by a law enforcement agency. The later cost varies with jurisdiction. This cost will apply to several New York State government entities including the Department of Health, Roswell Park Cancer Center, State Emergency Management Office, and several SUNY facilities.

**Local Government Mandates:**

No local governments, county, city, town, village, school district, fire department or any other district possess the type or quantity of radioactive materials that would subject them to fingerprinting requirements.

**Paperwork:**

Licenses will need to obtain fingerprint cards from the NRC. Also, licensees will need to maintain records of fingerprinting, criminal history and identification checks and trustworthiness and reliability determinations for review by the Department of Health.

**Duplication:**

There is no duplication of this requirement by any federal, state or local agency. New York State entered into an agreement with the federal government on October 15, 1962 by which the federal government discontinued its regulatory authority and New York assumed such authority.

**Alternatives:**

Taking no action was rejected as not consistent with NYS policies on public security. No other alternative exist for obtaining a FBI criminal background check.

**Federal Standards:**

These proposed fingerprinting and criminal background and identification checks are U.S. Nuclear Regulatory Commission's standards based on the Energy Policy Act of 2005.

**Compliance Schedule:**

The proposed rule will be effective upon filing with the Department of State. Affected licensees must begin to implement this immediately and it must be completed within 90 days after the effective date of the rule to implement the fingerprinting requirements. Licensees may submit a written request for more time to implement the fingerprinting requirements, in accordance with Section 16.112(c)(2). The DOH would review the request and make a determination.

**Regulatory Flexibility Analysis****Effect of rule:**

No local governments possess the quantity and type of radioactive material that would subject them to the proposed rule. There are 10 small businesses that will be affected by this regulation. Program staff have spoken with these facilities and 3 have already implemented the requirements since they have offices in other states and must comply with the NRC fingerprinting requirements in those states. All of these facilities were aware of the regulations and while some facilities had questions on implementation and timing, no one expressed opposition to the fingerprinting requirements.

**Compliance requirements:**

All affected facilities are required to establish policies and procedures for implementing the fingerprinting requirements, including designating a Trustworthy and Reliable (T&R) Official, obtaining fingerprint cards from NRC, having the fingerprints taken by local law enforcement, and submitting the cards to NRC. The T&R Official will receive and review the results of the criminal history records check and then make a determination on unescorted access for each affected individual. Also the T&R Official must notify DOH if any individual is identified on the FBI terror watchlist. Records of approvals for unescorted access must be maintained for inspection by the Department.

The proposed regulations do not impose significant new requirements since these facilities are already implementing procedures for determining the trustworthiness and reliability of these individuals. The proposed regulations will require that they take fingerprints and use the criminal history records check as part of their T&R determination.

**Professional services:**

Licenses will need the services of the FBI to perform the criminal history records check. Services of a law enforcement agency or other authorized party will be needed to verify identification and collect fingerprints.

**Compliance costs:**

The FBI criminal history records check cost is \$36 per individual, and the fee for taking fingerprinting is estimated to be \$10 - \$15 per individual. These are one-time costs per individual, not recurring or annual costs. Approximately 4-6 persons from each small business will be subject to fingerprinting. Indirect costs are estimated to be one-hour work time for fingerprinting for each individual.

**Economic and technological feasibility:**

There are no capital costs or new technology required to comply with the proposed rule.

**Minimizing adverse impacts:**

The proposed rule establishes requirements for obtaining and using information on an individual's criminal history for allowing access to radioactive material. However the proposed rule does not set criteria for making this determination. It is up to the licensee to set the criteria and make a determination on each affected individual. Since affected licensees have already made a T&R determination using other criteria, we do not foresee significant adverse impacts. Further, since there are a limited number of affected facilities, the program intends to conduct workshops to assist licensees with any questions related to implementing the fingerprinting requirements.

**Participation:**

The Department issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in NYS. In October 2007, the Department initiated a series of statewide workshops on security of radioactive materials for IC licensees. At the three most recent workshops conducted in Long Island, Buffalo and Rochester the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that the DOH is moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

**Rural Area Flexibility Analysis****Types and estimated numbers of rural areas:**

There are 55 facilities outside of NYC that are affected by this regulation. NYC Department of Health and Mental Hygiene will impose the same requirements on 24 facilities it regulates. The NYS DOH facilities are generally located in larger cities. A few licensees (industrial radiographers) are in commercially zoned facilities near metropolitan areas.

Reporting, recordkeeping and other compliance requirements and professional services:

Licenses will be required to obtain, process and mail fingerprint cards to the Nuclear Regulatory Commission (NRC). Licensees will maintain records of fingerprinting activities including determinations of trustworthiness and reliability for review by the Department. Licensees must notify the department if any individual is identified on the FBI terror watchlist. The need for professional services will be limited to use of the applicable local law enforcement for fingerprint impressions.

**Costs:**

The cost estimate for regulated parties is approximately \$50 for each applicable individual. This includes \$36 for the NRC to process the FBI identification and criminal history records check and approximately \$10-15 for taking fingerprint impressions by a law enforcement agency. The later varies with jurisdiction.

**Minimizing adverse impact:**

There are no alternatives with respect to rural areas. All affected licensees will need to use the services of an approved entity to take fingerprints.

**Rural area participation:**

The Department issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in NYS. In October 2007, the Department initiated a series of statewide workshops on security of radioactive materials for IC licensees. At the three most recent workshops conducted in Long Island, Buffalo and Rochester the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that the DOH was moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

**Job Impact Statement****Nature of impact:**

It is anticipated that few, if any, persons will be adversely affected. The fingerprinting and criminal background check is an additional element or enhancement to the existing trustworthiness and reliability (T&R) determination requirement. DOH inspections of these facilities during 2007 indicated that all persons were deemed to be trustworthy and reliable. No person was adversely affected by that evaluation. A history of criminal activity is not automatically disqualifying. The Trustworthiness and Reliability Official (TRO) will review an individual's record of criminal activity and determine if that individual will be granted unescorted access to

the applicable radioactive materials. If the determination indicates that an individual should not have unescorted access to radioactive materials, the person may be permitted to have escorted access. However, a situation where the licensee has no means to provide an escort, or has limited availability of an escort (e.g., shift work), could result in an affected individual not being able to perform tasks and duties that require access to applicable radioactive sources. In such situations the licensee may need to reassign the individual to tasks that do not require unescorted access, or reschedule tasks based on an escort's schedule.

Categories and numbers affected:

DOH inspections indicate that approximately 500 persons will be subject to fingerprinting, including physicians and medical staff, researchers/scientists, laboratory workers, and industrial radiographers.

Regions of adverse impact:

No region will be disproportionately affected. The affected facilities are large hospitals, universities, blood banks, research institutions and industrial radiographers. The affected parties are not rural entities.

Minimizing adverse impact:

The intent of a fingerprint check is to provide additional information on an employee's personal history. The licensee's TRO will make a determination of an employee's trustworthiness and reliability based on various factors (employment history, education, etc.) and the results of the criminal activity report. A history of criminal activity is not automatically disqualifying. The licensee, not the DOH, will establish disqualifying criteria.

Not all individuals who use these sources will require a criminal background check. If the radioactive material is used in the presence of more than one individual only one of those individuals must be determined to be trustworthy and reliable and may escort other individuals. During inspections of the affected licensees, DOH inspectors determine if the applicable radioactive sources are generally used in the presence of several persons. The use of radiation therapy units in hospitals involves a team of individuals including physicians, medical therapy physicists, nurses, and radiation therapy technologists. Use of industrial radiography sources is subject to two-person rule, meaning that two qualified individuals must be present. Blood banks/services are typically operated continuously (24/7) with several persons present.

## NOTICE OF ADOPTION

### External Appeals of Adverse Determinations

**I.D. No.** HLT-35-08-00010-A

**Filing No.** 1131

**Filing Date:** 2008-11-17

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 98-2.2, 98-2.6 and 98-2.10 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 4910 and 4916

**Subject:** External Appeals of Adverse Determinations.

**Purpose:** Provides that external appeal agents shall not be subject to legal proceedings to review their determinations.

**Text or summary was published** in the August 27, 2008 issue of the Register, I.D. No. HLT-35-08-00010-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### APGs Outpatient Reimbursement Methodology

**I.D. No.** HLT-36-08-00033-A

**Filing No.** 1132

**Filing Date:** 2008-11-18

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Subpart 86-8 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807(2-a)

**Subject:** APGs Outpatient Reimbursement Methodology.

**Purpose:** Provides a new more cost effective payment methodology based on service intensity.

**Substance of final rule:** General Summary for 86-8.1 through 86-8.12

The amendments to Part 86 adding sections 86-8.1 through 86-8.12 of Title 10 (Health) NYCRR are required to implement a new payment methodology for certain ambulatory care fee-for-service (FFS) Medicaid services based on Ambulatory Patient Groups (APGs). APGs group together procedures and medical visits that share similar characteristics and resource utilization patterns so as to pay for services based on relative intensity.

86-8.1 - Scope of services and effective dates

The proposed addition of section 86-8.1 of Title 10 (Health) NYCRR defines the categories of facilities subject to APGs and the time frames for implementation.

Outpatient services and ambulatory surgery services provided by general hospitals will be subject to the new payment methodology on and after December 1, 2008. Emergency department services provided by general hospitals will be subject to the new payment methodology on and after January 1, 2009. Ambulatory services provided by diagnostic and treatment centers and free-standing ambulatory surgery center services will be subject to the new payment methodology on and after March 1, 2009. However, this new payment methodology does not apply to: Federally Qualified Health Centers except when they voluntarily agree to participate; services which are not provided pursuant to a facility's licensure under article 28 of the public health law; payments on behalf of Medicaid managed care and family health plus enrollees; and facilities located outside New York State.

86-8.2 - Definitions

The proposed addition of section 86-8.2 of Title 10 (Health) NYCRR provides definitions for the following components of the new reimbursement methodology: Ambulatory Patient Group (APG); Allowed APG weight; APG relative weight; Base rate; Consolidation; Current Procedure Terminology, fourth edition (CPT-4); Discounting; APG software system; Final APG weight; International Classification of Diseases, 9th Revision (ICD-9); Packaging; Downstate region; Upstate region; Significant procedure APG; Medical visit APG; Visit; Peer Group; Ambulatory surgery permissible procedures; Ancillary services, and Case mix index.

86-8.3 Record keeping, reports and audits

The proposed addition of section 86-8.3 of Title 10 (Health) NYCRR requires general hospitals, diagnostic and treatment centers, and free-standing ambulatory surgery centers which are governed by this Subpart will continue to maintain financial and statistical data and records in accordance with regulations as set forth in Subpart 86-1 and 86-4 of this Part, as applicable. Affected providers will continue to submit cost reports, and make records and books available to the Department for audit.

86-8.4 Capital cost reimbursement

The proposed addition of section 86-8.4 of Title 10 (Health) NYCRR requires that a capital cost component be added to Medicaid payments. The computation of the capital cost component of payments for general hospital outpatient and emergency services and diagnostic and treatment center services shall remain subject to otherwise applicable statutory provisions. The computation of the capital cost component of payments for ambulatory surgery services provided by hospital-based and free-standing ambulatory surgery centers shall be the result of dividing the total capital cost reimbursement paid to each such facilities for the 2005 calendar year (CY) for upstate region and downstate region, respectively, and then dividing each regional amount by the total number of claims paid within each such region for the 2005 CY.

86-8.5 Administrative rate appeals

The proposed addition of section 86-8.5 of Title 10 (Health) NYCRR requires that administrative rate appeals of rates of payment must be submitted to the Department in writing within 120 days of the date such rates are published by the Department to the facility. Each rate appeal submitted to the Department must set forth the basis for the appeal and must be accompanied by relevant documentation. The Department will respond by affirming the original rates, revising the rates or requesting additional information. Failure of a provider to respond to the Department's request for additional information within 30 days will constitute a withdrawal of the appeal unless the Department grants an extension.

The Department's written response to a facility's rate appeal will be considered final unless a written request for further consideration is submitted within 30 days of the ruling, provided, however, that the Department's denial of an appeal on the grounds that it constitutes a challenge to the rate-setting methodology shall be considered final and there shall be no further administrative review available. Otherwise, the Department will respond in writing to the request for further consideration of the appeal and either affirm or revise its original rate appeal determination.

## 86-8.6 - Rates for new facilities during the transition period

The proposed addition of section 86-8.6 of Title 10 (Health) NYCCR stipulates that general hospital outpatient clinics which commence operation after December 31, 2007, and prior to January 1, 2012, and for which rates computed pursuant to public health law section 2807(2) are not available, will have the capital cost component of their rates based on a budget as submitted by the facility and as approved by the Department and shall have the operating component of their rates computed in accordance with the following:

A) for the period December 1, 2008 through December 31, 2009, 75% of such rates will reflect the historical 2007 regional average payment per visit as calculated by the department, and 25% of such rates will reflect APG rates as computed in accordance with this Subpart;

B) for the period January 1, 2010 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;

C) for the period January 1, 2011 through December 31, 2011, 25% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 75% of such rates shall reflect APG rates as computed in accordance with this Subpart;

D) for periods on and after January 1, 2012, 100% of such rates shall reflect APG rates as computed in accordance with this Subpart.

Further, Diagnostic and Treatment Centers which commence operation after December 31, 2007, and prior to January 1, 2012, and for which rates computed pursuant to public health law section 2807(2) are not available, will have their capital cost component of their rates based on a budget as submitted by the facility and as approved by the department and shall have the operating cost component of their rates computed in accordance with the following:

A) for the period March 1, 2009 through December 31, 2009, 75% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart;

B) for the period January 1, 2010 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;

C) for the period January 1, 2011 through December 31, 2011, 25% of such rates shall reflect the historical 2007 regional average peer group payment per visit as calculated by the department, and 75% of such rates shall reflect APG rates as computed in accordance with this Subpart;

D) for periods on and after January 1, 2012, 100% of such rates shall reflect APG rates as computed in accordance with this Subpart.

Freestanding ambulatory surgery centers which commence operation after December 31, 2007, and prior to January 1, 2012, and for which rates computed pursuant to public health law section 2807(2) are not available, will have the capital cost component of their rates based computed in accordance with section 86-8.4 of this subpart and the operating cost component of their rates computed in accordance with the following:

A) for the period March 1, 2009 through December 31, 2009, 75% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 25% of such rates shall reflect APG rates as computed in accordance with this Subpart;

B) for the period January 1, 2010 through December 31, 2010, 50% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 50% of such rates shall reflect APG rates as computed in accordance with this Subpart;

C) for the period January 1, 2011 through December 31, 2011, 25% of such rates shall reflect the historical 2007 regional average payment per visit as calculated by the department, and 75% of such rates shall reflect APG rates as computed in accordance with this Subpart;

D) for periods on and after January 1, 2012, 100% of such rates shall reflect APG rates as computed in accordance with this Subpart.

## 86-8.7 APGs and relative weights

The proposed addition of section 86-8.7 of Title 10 (Health) NYCCR provides a listing of APGs utilized in their relative weights.

## 86-8.8 Base rates

The proposed addition of section 86-8.8 of Title 10 (Health) NYCCR delineates the methodology for establishing APG base rates under the APG system. Separate base rates shall be established for each of the five categories of providers set forth in subdivision (a) of section 86-8.1 of this subpart. Further, separate rates for each of the five categories of providers shall be established based on the location of such providers in the upstate region or the downstate region and shall reflect differing regional cost factors as determined by the Department. Additional discrete base rates may be developed by the Department for such peer groups as may be established in regulation. Base rates will be established based on estimated historical per visit payment amounts, adjusted to reflect the level of State appropriations made available for such purposes and calculated on a per visit basis

utilizing the same historical visit volume. Base rates shall be peer group specific and reflect the estimated case mix index for each peer group and any projected changes in provider coding patterns for each peer group. These base rates may be periodically adjusted to reflect changes in provider coding patterns and case mix.

## 86-8.9 Diagnostic coding and rate computation

The proposed addition of section 86-8.9 of Title 10 (Health) NYCCR requires that facilities assign and submit ICD-9 diagnostic codes and HCPCS/CPT procedure codes to each claim as appropriate in accordance with written billing and reporting instructions issued by the Department. The Department will use the claim coding information to assign APG(s) for each patient visit identified on the claim, utilizing the APG software system to determine the significant procedure APG or the medical visit APG, the applicable ancillary services APGs and the final APG weight applicable to each such visit. The APG software system will incorporate methodologies for consolidation, packaging and discounting to be reflected in the final APG weight to be assigned to each patient visit on the claim.

The operating component of the payment rate will be computed by multiplying the final APG weight for each visit by the applicable base rate. A capital component will then be added to each such payment.

The Department's written billing and reporting instructions will define ambulatory surgery permissible procedures to which the ambulatory surgery rates apply. No visits may be billed as ambulatory surgery unless at least one procedure designated as ambulatory surgery permissible appears on the claim for the date of service for the visit.

In cases where the only reimbursable APGs for a visit are one or more ancillary service APGs, there shall be no reimbursement for capital costs included in the payment for that visit.

## 86-8.10 Exclusions from payment

The proposed addition of section 86-8.10 of Title 10 (Health) NYCCR stipulates which payments are not subject to the APG payment methodology, including:

A) Drugs and other pharmaceutical products; HIV counseling and testing visits; post-test HIV counseling visits (positive results); day health care service (HIV); TB/directly observed therapy -- downstate levels 1 and 2; TB/directly observed therapy -- upstate levels 1 and 2; AIDS clinic therapeutic visits in general hospital outpatient clinics; child rehabilitation services provided under rate code 2887 in general hospital outpatient clinics; and implantable family planning devices for which separate and distinct outpatient billing and payment were authorized by the Department as of December 31, 2007,

B) Visits solely for the purpose of receiving ordered ambulatory services.

C) Visits solely for the purpose of receiving pharmacy services.

D) Visits solely for the purpose of receiving education or training services, except with regard to services authorized pursuant to clause (A) of subparagraph (ii) of paragraph (f) of subdivision 2-a of section 2807 of the Public Health Law.

E) Visits solely for the purpose of receiving services from licensed social workers, except with regard to psychotherapy services provided by Federally Qualified Health Centers or Rural Health Centers subject to reimbursement pursuant to this Subpart.

F) Visits solely for the purpose of receiving group services, except with regard to clinical group psychotherapy services provided by Federally Qualified Health Centers or Rural Health Centers subject to reimbursement pursuant to this Subpart and provided, however, that reimbursement for such group services shall be determined in accordance with paragraph (h) of section 86-4.9 of this Title.

G) Offsite services, defined as medical services provided by a facility's outpatient staff at locations other than those operated by and under the facility's licensure under Article 28 of the Public Health Law, or visits related to the provision of such offsite services, except with regard to offsite services provided by Federally Qualified Health Centers or Rural Health Centers and provided, however, that reimbursement for such offsite services shall be determined in accordance with paragraph (i) of section 86-4.9 of this Title.

H) Specific listed APGs not eligible for payment in the initial implementation.

I) Specific listed APGs not eligible for reimbursement when they are presented as the only APG applicable to a patient visit or when the only other APGs presented with them are one or more of the APGs listed in subdivision (h).

## 86-8.11 System updating and incorporation by reference

The proposed addition of section 86-8.11 of Title 10 (Health) NYCCR stipulates that the following elements of the APG rate-setting system will be updated no less frequently than every three years:

A) The listing of reimbursable APGs and the relative weight assigned to each such APG;

B) base rates;

C) applicable ICD-9 codes utilized in the APG software system;  
 D) applicable CPT-4/HCPCS codes utilized in the APG software system, and  
 E) the APG software system.

This proposed section also incorporates by reference the ICD-9-CM, HCPCS and CPT-4 code systems utilized in the APG rate-setting system.

86-8.12 Payments for extended hours of operation during the transition period

The proposed addition of section 86-8.12 of Title 10 (Health) NYCCR stipulates that for visits provided on or after January 1, 2009, by hospital outpatient clinics and Diagnostic and Treatment Centers which are scheduled and occur on evenings, weekends and on holidays as specified by the Department, a supplemental APG payment amount shall be added on to the otherwise applicable payment amount for each such visit.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 86-8.7 and 86-8.10(a).

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

#### **Revised Regulatory Impact Statements**

A non-substantive change was made to the Compliance Schedule regarding the effective date of the regulation.

#### **Revised Regulatory Flexibility Analysis**

Changes made to the last published rule do not necessitate revision to the previously published RFA.

#### **Revised Rural Area Flexibility Analysis**

Changes made to the last published rule do not necessitate revision to the previously published RAFA.

#### **Revised Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published JIS.

#### **Assessment of Public Comment**

The Department received a total of six letters with comments relating to establishment of Part 86-8, regulations implementing the Ambulatory Patient Group (APG) patient classification and reimbursement system. Comments that were only tangentially related to the proposed regulation are not included in this assessment. The comments received and our response to them follows:

1. Comment: Blythedale Children's Hospital, through its legal counsel, recognized that the Department is unable to collect sufficient data at this time to enable inclusion of specialty rehabilitation services in the APG methodology.

Response: The Department is working on the technical issues relating to the service with the goal of including it in a future APG update.

The City of New York Department of Health had several requests regarding inclusion of several procedures in the APG methodology. The following are their comments with our response to each.

2. Comment: They request that an additional APG be created for administration of buprenorphine.

Response: Physician administered injectable drugs and their administration are paid for under APGs. Non-injectable drugs are paid through the Medicaid pharmacy benefit and the associated medical visit would be reimbursed under APGs.

3. Comment: They request that weights for dental services provided to developmentally delayed patients be enhanced to reflect increased time and resource consumption needed to care for these patients.

Response: The Department recognizes this issue and is considering establishment of a higher base-rate for services provided to these clients in certain settings.

4. Comment: They request that payments for provision of neurodevelopment evaluations conducted on developmentally delayed patients be enhanced or a distinct APG be created to account for increased time and resource consumption.

Response: The APG system accounts for costs associated with all visit types within each patient group and reimburses based upon the average cost. Using this methodology assures that we are reimbursing for the services provided to all types of clients. In addition, the Department is considering the development of a special base-rate for developmentally delayed patients, which would apply to services provided to them.

5. Comment: They request that APG account for collateral visits with relatives or care takers of patients.

Response: Many of these visits are accounted for via the APG for family counseling.

6. Comment: They request that level II and III immunization (APG 415 and 416) be removed from the list of "if stand alone" do not pay APG.

Response: Including these services on the stand alone list mirrors cur-

rent reimbursement policy, but we are carefully considering revising this list of services in the future if sufficient funding is available to pay for these services as stand alone visits.

7. Comment: Medtronic, Inc. has submitted a comment regarding a specific agent used for injection and infusion to treat severe spasticity. They request that APG 436 be adjusted to reflect 4 unit dosing.

Response: The Department recognizes their issue and is currently working on a solution for future implementation.

The Greater New York Hospital Association, the Healthcare Association of New York State, and the State Bar Association each submitted a list of comments. Because these organizations submitted similar comments in many cases, the comments and responses have been combined below.

8. Comment: Concern was expressed that the proposed regulations do not address the current rule that procedures must be performed in an operating room to be reimbursed through the products of ambulatory surgery system.

Response: The proposed rule sets no requirements regarding where a service must be provided to qualify for reimbursement because site of service is not a consideration for reimbursement under APG. The current regulation will be superseded by this proposed rule, making the former null and void once APG becomes the reimbursement methodology.

9. Comment: Clarification was requested as to the means by which a Federally Qualified Health Center (FQHC) may opt out of the APG system.

Response: A letter sent by the Department to all FQHC providers detailed the specific process for opting into or out of the APG system and the policy relating to supplemental payments.

10. Comment: The Department is asked to incorporate language in the regulation clarifying that existing, as well as, new facilities will have a four year phase-in of the APG system.

Response: The phase-in is clearly stipulated in the enabling statute. The Department will consider the addition of clarifying language when the regulation is amended.

11. Comment: They request that the Department explicitly address whether, and for which facilities, physician costs are included in APG rates.

Response: This issue is addressed in greater detail in billing instructions issued by the Department.

12. Comment: Comments were made regarding rate appeals within APG. Specifically, that the proposed rule is inconsistent with existing regulations governing rate appeals.

Response: The Department maintains that language in the proposed rule provides consistency and clarity as to when appeals are due.

13. Comment: Concern was expressed that new peer groups could be established without a formal review and comment period.

Response: The Department works closely with the provider community in the establishment of peer groups and these peer groups will be added, if necessary, through amendment to this regulation.

14. Comment: A request was made that we share the proposed list of ambulatory surgery procedures with the provider community prior to implementation.

Response: The list of ambulatory surgery procedures to be used in the APG system is under development and will be shared with the provider community prior to implementation.

15. Comment: A request was made to clarify the relationship of the new regulation (Part 86-8) to the existing sub-part 86-4.

Response: Part 86-8 does in fact make specific cross reference (e.g., Part 86-8.3, Reports and Record Keeping) identifying when pre-existing regulations continue to apply.

16. Comment: A question was posed regarding the relationship between diagnostic & treatment centers and freestanding ambulatory surgery centers.

Response: For reimbursement purposes, freestanding ambulatory surgery centers are clearly a distinct category of outpatient facility and have a separate base-rate under APGs.

17. Comment: Question was raised regarding what is meant by our intent to exclude payments for services not provided pursuant to a facility's licensure under Article 28.

Response: APG statute explicitly excludes from APG reimbursement, any services provided exclusively pursuant to a facility's licensure under the Mental Hygiene law. For reimbursement purposes, Article 28 licensure will be determined by specific rate codes applicable to current Article 28 services reimbursement.

18. Comment: Concern was expressed that the definition of packaging was vague and that the Department could change application of the definition without any notice or comment.

Response: The definition and application of the term packaging is set forth in the APG definitions manual that has been made available free of charge to all affected providers.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Relocation of Extension Clinics**

I.D. No. HLT-49-08-00003-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 710.1(c)(3) and (5) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2802

**Subject:** Relocation of Extension Clinics.

**Purpose:** Substitute prior limited review for administrative CON review of relocations of extension clinics within the same service area.

**Text of proposed rule:** Clause (h) of subparagraph (i) of paragraph (3) of subdivision (c) of Section 710.1 is amended to read as follows:

(3) Proposals eligible for administrative review.

\* \* \*

(h) the operation or relocation of an extension clinic as defined in section 401.1 of this Title[;], *when such relocation is to a site outside the current service area of the extension clinic, as defined in paragraph (5) of this subdivision, and does not entail an increase in scope of services or clinical capacity.*

Existing clause (a) of subparagraph (i) of paragraph (5) of subdivision (c) of Section 710.1 is amended to read as follows:

(5) Proposals requiring a prior review limited to architectural and engineering matters.

(i)(a) Proposals where total project cost does not exceed [\$1,000,000] \$3,000,000, and for which a certificate of need is not otherwise required under this Part, shall be subject to review under Article 28 of the Public Health Law limited to a determination of whether the proposal is consistent with applicable statutes, codes, rules and regulations relating to the structural, architectural, engineering, environmental, safety and sanitary requirements of licensed medical facilities where the proposal relates to the acquisition, relocation, installation or modification of:

\* \* \*

Existing clause (b) of subparagraph (i) of paragraph (5) of subdivision (c) of Section 710.1 is renumbered as (c) and a new clause (b) is added:

(b) *A proposal for the relocation of an extension clinic within the same service area, defined as (1) one or more postal zip code areas in each of which twenty-five (25) percent or more of the extension clinic's patients reside, or (2) the area within one mile of the current location of such extension clinic, which does not entail an increase in services or clinical capacity, and where total project cost does not exceed \$3,000,000, shall be subject to review under Article 28 of the Public Health Law limited to a determination of whether the proposal is consistent with applicable statutes, codes, rules and regulations relating to the structural, architectural, engineering, environmental, safety and sanitary requirements of licensed medical facilities.*

[(b)] (c) Notwithstanding anything in this Title to the contrary, proposals for the reallocation, relocation or redistribution of the following equipment and related services from one hospital to another hospital within the same established Article 28 network shall be subject to review under Article 28 of the Public Health Law limited to a determination of whether the proposal is consistent with applicable statutes, codes, rules and regulations related to the structural, architectural, engineering, environmental, safety and sanitary requirements of licensed medical facilities. This clause shall apply to the following equipment and related services:

- (1) magnetic resonance imagers (MRI);
- (2) CT scanners;
- (3) extracorporeal shockwave lithotripters; and
- (4) linear accelerators as replacements for cobalt units.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement****Statutory Authority**

The authority for the proposed revision to 10 NYCRR Parts 710 is section 2803(2)(a) of the Public Health Law (PHL), which authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of

Health, to effectuate the provisions and purposes of Article 28 of the PHL with respect to hospitals, including but not limited to, requirements for construction projects subject to Certificate of Need (CON) review.

**Legislative Objectives**

Article 28 of the PHL seeks to ensure that hospitals and related services are of the highest quality, efficiently provided and properly utilized at a reasonable cost. Consistent with this legislative intent, the Department seeks to focus staff effort and other resources on the analysis of CON applications where considerations of public need, financial feasibility and quality of care are most pertinent. The Department has found that Article 28 construction projects involving relocation of extension clinics and having total project costs of \$3 million or less rarely involve these larger and more fundamental CON concerns. Accordingly, the proposed amendment would remove this category of projects from CON review and subject them to only prior limited review.

**Current Requirements**

10 NYCRR Part 710 sets forth criteria governing the types of medical facility construction projects that require CON review. These criteria relate to a variety of factors, including the nature of the service, type of equipment, change in physical plant, and increase in overall service capacity. The CON approval process governed by this section takes two forms: administrative review and full review. Both entail a determination of public need for the proposed service, as well as a review of the project's financial feasibility. Projects subject to administrative review may be approved by the Commissioner alone, while those subject to full review require prior examination by the State Hospital Review and Planning Council (SHRPC).

Section 710.1(c)(3) subjects the relocation of an extension clinic to administrative CON review. This applies regardless of the cost of the relocation (unless the cost exceeds the \$10 million threshold for full review) and without respect to the distance from the current site of the extension clinic to the proposed new site. This requirement for administrative CON review also pertains even if the relocation involves no change in services or clinical capacity between the current site and the new location.

**Need and Benefits**

From time to time, hospitals and D & T centers relocate extension clinics within their service areas. This often occurs as the providers seek to serve changing populations within their communities but also comes about because of matters related to building and physical plant, such as the expiration of a lease or the operator's need to convert the existing site to other uses. As more and more services are delivered on an ambulatory basis, the need for extension clinics and the periodic relocation of these community-oriented sites of service is only likely to grow. This trend will be given added impetus with the implementation of the recommendations of the Commission on Health Care Facilities in the Twenty-First Century ("the Commission"), many of which call for the reduction of beds and inpatient services in favor of community-oriented primary and ambulatory care.

In a rapidly changing health care system, the need to undergo administrative CON review for the simple relocation of a clinic, often involving a move of only a short distance, undermines the ability of providers to respond quickly to changing health care needs in their communities. It also often complicates situations where unforeseen circumstances require the quick vacating of an existing site (e.g., a sudden escalation in rental fees) and where the finalization of arrangements at a new site is contingent upon CON approval. The additional time required for CON review may also temporarily jeopardize access to care by local residents.

The purpose of administrative CON review of the relocation of an extension clinic is to ensure that the operation of the clinic at the new site will continue to meet a public need for the services offered; that the costs of the relocation, including any associated construction, are financially feasible; and that the physical plant at the new site complies with applicable components of the medical facilities construction code. These are important considerations. However, the Department believes that the first of these criteria need not be examined for the relocation of a clinic, when the relocation involves no increase in services or capacity; and when the relocation is proposed to occur from a location in which a significant number of the clinic's current patients reside to another such area. In these instances, the use of the clinic by area residents attests to its need. And as long as the costs of the relocation do not exceed a \$3 million CON administrative review threshold, the Department believes that review for financial feasibility is not required. The Department proposes instead that these types of relocations be subject only to limited review pertaining to architectural and engineering matters. The retention of an architectural and engineering review requirement for these transactions is necessary to ensure that the new clinic site complies with applicable life safety and construction codes.

**COSTS**

Costs to the Department of Health

The proposed amendment would impose no new costs on the Depart-

ment and would actually result in savings by eliminating the additional staff time required to process administrative review CON applications compared to applications that are subject only to prior limited review.

**Costs to Other State Agencies**

There are no costs to other State agencies or offices of State government.

**Costs to Local Government**

There are no costs to local government.

**Costs to Private Regulated Parties**

Because the proposed amendment imposes no new burdensome requirements, duties or responsibilities on any entity subject to Article 28 of the PHL, there are no costs to private regulated parties. The amendment will, in fact, result in savings to regulated parties by eliminating the \$1,250 CON application fee associated with those projects that will no longer be subject to administrative CON review.

**Local Government Mandates**

The proposed amendment does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**Paperwork**

The proposed amendment imposes no new reporting requirements, forms or other paperwork. The amendment will actually reduce paperwork by removing the requirement for the filing of a CON application for affected projects.

**Duplication**

There are no relevant State or Federal rules which duplicate, overlap or conflict with the proposed amendment.

**Alternatives**

The Department considered requiring only a letter of notification, as provided for in section 710.1(c)(4), for the relocation of extension clinics within the same service area. However, the need to ensure that the site of the relocation complies with applicable medical facilities construction codes requires that these changes of clinic venue still be subject to some form of review. The proposed requirement for review under section 710.1(c)(5) serves this purpose.

**Federal Standards**

The proposed amendment does not exceed any minimum standards of the Federal government. There are no Federal rules currently addressing the CON process for the relocation of extension clinics.

**Compliance Schedule**

It is anticipated that the proposed amendment will be announced within one month of the effective date through the posting of an announcement on the Department of Health's Internet site.

The proposed amendment will be effective upon publication of a Notice of Adoption in the New York State Register. There is no schedule of compliance, since the proposed amendment only indicates how applications will be processed within the Department of Health.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

**Job Impact Statement**

No Job Impact Statement is required pursuant to section 201 a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Controlled Substances Data Submissions**

**I.D. No.** HLT-49-08-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of sections 80.2, 80.23, 80.67, 80.68, 80.69, 80.71, 80.73, 80.74, 80.132 and 80.134 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3308(2)

**Subject:** Controlled Substances Data Submissions.

**Purpose:** Govern and control-possession prescribing manufacturing dispensing administering and distribution of controlled substances within New York State.

**Text of proposed rule:** Pursuant to the authority vested in the Commissioner of Health by Article 33 of the Public Health Law, Sections 80.2, 80.23, 80.67, 80.68, 80.69, 80.71, 80.73, 80.74, 80.132 and 80.134 of Part 80, Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York are hereby amended to be effective upon filing with the Department of State as follows:

Part 80

RULES AND REGULATIONS ON CONTROLLED SUBSTANCES

Section 80.2, subdivision (a), paragraph (6), of Title 10 NYCRR is hereby amended to read as follows:

Section 80.2 Exemptions.

(a) Pursuant to section 3305 of the Public Health Law, the provisions of this Part restricting the possession of controlled substances shall not apply to:

\* \* \*

(6) a duly authorized agent of an incorporated society for the prevention of cruelty to animals or a municipal animal control facility for the limited purpose of purchasing, possessing and dispensing sodium pentobarbital to registered and certified personnel, to euthanize animals and ketamine hydrochloride to anesthetize animals prior to euthanasia.

\* \* \*

Section 80.23, a new subdivision (f), of Title 10 NYCRR is hereby added to read as follows:

Section 80.23 - Records and reports

\* \* \*

(f) Reports. Manufacturers and distributors shall report to the Department, in a manner approved by the Department, information from the sale of controlled substances. Such information shall be filed electronically with the Bureau of Narcotic Enforcement, utilizing a transmission format acceptable to the Department. The information filed with the Department shall include, but not be limited to:

- (i) the manufacturer's or distributor's name, address, phone number, DEA registration number and controlled substance license number issued by the Department;
- (ii) the name, address and DEA registration number of the entity to whom the controlled substance was sold;
- (iii) the date of the sale of the controlled substance;
- (iv) the name and National Drug Code (NDC) of the controlled substance sold; and
- (v) the number of containers and the strength and metric quantity of controlled substance in each container of controlled substance sold.

Section 80.67, subdivision (d), subparagraph (1), of Title 10 NYCRR is hereby amended to read as follows:

Section 80.67 - Schedule II and certain other substances

\* \* \*

(d)(1) A practitioner may issue a prescription for up to a three month supply of a controlled substance, including chorionic gonadotropin, or up to a six month supply of an anabolic steroid if used in accordance with the directions for use, provided that the prescription has been issued for the treatment of:

- (i) panic disorders, designated as code A;
- (ii) attention deficit disorder, designated as code B;
- (iii) chronic debilitating neurological conditions characterized as a movement disorder or exhibiting seizure, convulsive or spasm activity, designated as code C;
- (iv) relief of pain in patients suffering from conditions or diseases known to be chronic [and] or incurable, designated as code D;
- (v) narcolepsy, designated as code E; or
- (vi) hormone deficiency states in males, gynecologic conditions that are responsive to treatment with anabolic steroids or chorionic gonadotropin, metastatic breast cancer in women, anemia and angioedema, designated as code F.

\* \* \*

Section 80.68, subdivision (d) of Title 10 NYCRR is hereby amended to read as follows:

Section 80.68 - Emergency oral prescriptions for schedule II substances and certain other controlled substances

\* \* \*

(d)(1) The pharmacist filling the prescription shall endorse upon the prescription the date of delivery, and his/her signature.

(2) The endorsed prescription shall be retained by the proprietor of the pharmacy for a period of five years. The prescription information shall

be filed electronically with the Bureau of Narcotic Enforcement, utilizing a transmission format acceptable to the Department, not later than the 15th day of the next month following the month in which the substance was delivered. The information filed with the department shall include but not be limited to:

- (i) pharmacy prescription number;
- (ii) pharmacy's National Identification Number;
- (iii) patient name;
- (iv) patient address, including street, city, state, zip code;
- (v) patient date of birth;
- (vi) patient's sex;
- (vii) date prescription filled;
- (viii) metric quantity;
- (ix) national drug code number of the drug;
- (x) number of days supply;
- (xi) prescriber's Drug Enforcement Administration (DEA) number;

(xii) date prescription written; [and]  
 (xiii) serial number of official prescription form or an identifier designated by the department[.]; and  
 (xiv) payment method.

\* \* \*

Section 80.69, subdivision (d), subparagraph (1), of Title 10 NYCRR is hereby amended to read as follows:  
 80.69 Schedule III, IV and V substances.

\* \* \*

(d)(1) A practitioner may issue a prescription for up to a three month supply of a controlled substance if used in accordance with the directions for use, provided that the prescription has been issued for the treatment of:

- (i) panic disorders, designated as code A;
- (ii) attention deficit disorder, designated as code B;
- (iii) chronic debilitating neurological conditions characterized as a movement disorder or exhibiting seizure, convulsive or spasm activity, designated as code C;
- (iv) relief of pain in patients suffering from *conditions* or diseases known to be chronic [and] *or* incurable, designated as code D;
- (v) narcolepsy, designated as code E; or
- (vi) hormone deficiency states in males, gynecologic conditions that are responsive to treatment with anabolic steroids or chorionic gonadotropin, metastatic breast cancer in women, anemia and angioedema, designated as code F.

\* \* \*

Section 80.71, subdivision (e), of Title 10 NYCRR is hereby amended to read as follows:  
 Section 80.71 Practitioner; dispensing controlled substances

\* \* \*

(e) The practitioner shall submit dispensing information, for all controlled substances dispensed, electronically to the department utilizing a transmission format acceptable to the department by not later than the 15th day of the next month following the month in which the substance was delivered. The information filed with the department shall include but not be limited to:

- (1) dispenser [practitioner] identifier;
- (2) patient name;
- (3) patient address, including street, city, state, ZIP code;
- (4) patient date of birth;
- (5) patient's sex;
- (6) date controlled substance dispensed;
- (7) metric quantity;
- (8) national drug code number of the drug;
- (9) number of days supply; [and]
- (10) prescriber's Drug Enforcement Administration (DEA) number[.]; and

(11) payment method.

Section 80.73, subdivision (f) and subdivision (1), paragraph (5), of Title 10 NYCRR are hereby amended to read as follows:

Section 80.73 - Pharmacists; dispensing schedule II substances and certain other controlled substances

\* \* \*

(f) The endorsed official New York State prescription shall be retained by the proprietor of the pharmacy for a period of five years. The prescription information shall be filed electronically with the Bureau of Narcotic Enforcement, utilizing a transmission format acceptable to the department, not later than the 15th day of the next month following the month in

which the substance was delivered. The information filed with the department shall include but not be limited to:

- (1) pharmacy prescription number;
- (2) pharmacy's national identification number;
- (3) patient name;
- (4) patient address, including street, city, state, ZIP code;
- (5) patient date of birth;
- (6) patient's sex;
- (7) date prescription filled;
- (8) metric quantity;
- (9) national drug code number of the drug;
- (10) number of days supply;
- (11) prescriber's Drug Enforcement Administration number;
- (12) date prescription written; [and]
- (13) serial number of official prescription form, or an identifier designated by the department;
- (14) payment method;
- (15) number of refills authorized; and
- (16) refill number.

\* \* \*

(l) A pharmacist may partially fill an official New York State prescription for a schedule II controlled substance or those schedule III or schedule IV controlled substances listed in section 80.67(a) of this Part provided that:

\* \* \*

(5) The official New York State prescription shall be valid for a period not to exceed 30 days from the date the prescription was issued by the practitioner unless terminated sooner upon notification from the practitioner of the discontinuance of medication. All partial fillings filled under subdivision (1) of this section must occur within 30 days from the date the prescription was issued[.], *except that partial fillings of prescriptions issued for more than a 30 day supply for patients residing in a residential healthcare facility or for patients enrolled in a hospice program that is licensed or approved by the Department must occur within 60 days from the date the prescription was issued.*

\* \* \*

Section 80.74, subdivision (e), of Title 10 NYCRR is hereby amended to read as follows:

Section 80.74 - Pharmacists; dispensing schedule III, IV and V controlled substances

\* \* \*

(e) The pharmacist filling the official prescription shall endorse on such prescription his/her signature, the date of filling, and the number of the prescription under which it is recorded in the pharmacy prescription file. Such endorsed prescription shall be retained by the proprietor of the pharmacy for a period of five years. Prescription information from the [original] filling of such prescription shall be filed with the department in accordance with section 80.73(f) of this Part.

\* \* \*

Section 80.132, subdivision (a), paragraph 14, of Title 10 NYCRR is hereby amended to read as follows:

Section 80.132 Hypodermic syringes and needles; designation of persons or classes of persons.

\* \* \*

(14) a duly authorized agent of an incorporated society for the prevention of cruelty to animals or a municipal animal control facility for the limited purpose of purchasing, possessing and dispensing (i) sodium pentobarbital to registered and certified personnel to euthanize animals, and (ii) ketamine hydrochloride to registered and certified personnel to anesthetize animals prior to euthanasia;

\* \* \*

Section 80.134, subdivision (a), paragraphs (3) and (4) of Title 10 NYCRR are hereby amended to read as follows:

Section 80.134. Authorization for the purchase, possession and dispensing of ketamine hydrochloride only to anesthetize animals for euthanasia, and of sodium pentobarbital to euthanize animals.

\* \* \*

(3) Solution shall mean:

(i) a premixed solution of sodium pentobarbital, manufactured only and specifically for the euthanasia of animals, which contains such other ingredients as to place such solution within schedule III of the Controlled Substances Act (article 33, Public Health Law);

(ii) schedule II sodium pentobarbital; and

(iii) ketamine hydrochloride only for the purpose of anesthetizing animals for euthanasia.

(4) An agent is a person or persons other than a licensed veterinarian appointed by the incorporated society or municipal animal control facility, and duly registered with the department, authorized to purchase, possess and dispense (i) *ketamine hydrochloride only to anesthetize animals for euthanasia*, and (ii) sodium pentobarbital to euthanize animals.

\* \* \*

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

##### Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purposes and intent. Section 21 of the Public Health Law authorizes the Commissioner to promulgate emergency regulations in furtherance of Section 21, which expanded the Official Prescription Program, the Department's Prescription Drug Monitoring Program(PDMP).

Section 3305(1)(d) authorizes the Department to adopt regulations that provide for the safe and efficient use of ketamine hydrochloride to anesthetize animals only as part of the euthanasia procedure, and sodium pentobarbital to euthanize animals, by incorporated societies for the prevention of cruelty to animals and animal control facilities.

##### Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, administering and distribution of controlled substances within New York. The legislative purposes of Article 33 are to combat the illegal use of and trade in controlled substances and to allow the legitimate use of controlled substances in health care, including palliative care, veterinary care, research and other uses authorized by the law.

##### Needs and Benefits:

The Department of Health's most valuable means of combating drug abuse is its Official Prescription Program, which effectively monitors the prescribing and dispensing of controlled substances highly prone to diversion and trafficking. Current Part 80 regulations require pharmacies to submit specific information from the original fillings of all prescriptions dispensed for controlled substances. These regulations also require practitioners to submit information when they dispense controlled substances. Analysis of the prescription and dispensing data curtails diversion of controlled substances by detecting individuals who seek drugs because of addiction or for trafficking.

Because the existing regulations do not require pharmacies to submit information from the refilling of controlled substance prescriptions, the data may indicate that an individual has only obtained a controlled substance once, when it may have been obtained numerous times as refills. Because the current regulations also do not require pharmacies or practitioners to submit prescription or dispensing information indicating method of payment, drug-seeking individuals can obtain controlled substances or prescriptions from multiple practitioners. They do so by filling the prescriptions at different pharmacies, paying cash to evade detection by pharmacies and third party payers. Drug-seekers obtaining controlled substances directly from dispensing practitioners also avoid detection when the payment for dispensing the drugs is included in the practitioner's overall fee for the office visit.

The Department proposes amendments to Part 80 regulations to require pharmacies to submit prescription information indicating whether a controlled substance was dispensed as a new prescription or a refill. The proposed amendments will also require pharmacies and practitioners who dispense controlled substances to patients to submit information on the method of payment for the dispensed substance. These amendments will prevent diversion by allowing the Department to continue to monitor the dispensing of controlled substance prescriptions, as well as controlled substances dispensed to patients by practitioners, but with a more complete history of a drug-seeking individual's prescription and controlled substance activity.

The Department also combats drug diversion through the analysis of records and reports of licensed manufacturers and distributors to detect inappropriate procurement of controlled substances by practitioners, pharmacies and institutional dispensers. While four companies voluntarily submit reports to the Bureau of Narcotic Enforcement regarding their sales of controlled substances, more than 500 do not because it is not required by existing regulations.

Amendments to Part 80 will require all such companies to submit to the Department information from distribution of controlled substances. Such information will be reported electronically through a secure account established with the Department's Health Provider Network. These amendments will protect the public health by enhancing the Department's monitoring capability-through the use of remote analyses comparing distribution and dispensing records-to detect and prevent controlled substance diversion by healthcare professionals who are authorized by law to purchase and possess these drugs solely for legitimate use within their scope of practice.

In the past, the Bureau has discovered diversion by monitoring and analysis of company distribution records indicating individual practitioners ordering large quantities of controlled substances. These identified practitioners have obtained controlled substances under the guise of dispensing them to their patients. However, they instead abused these substances to sustain their own addiction or trafficked in them for profit.

Requiring that these records of distribution be reported electronically to the Department on a monthly basis will ensure a more efficient method of monitoring by the Bureau and result in timely identification of those practitioners who divert controlled substances to non-legitimate use. Controlled substance distribution records can be compared with controlled substance administration and dispensing records to detect unlawful activity.

While one purpose of the regulations is to prevent the diversion of controlled substances, an equally important purpose is to ensure access to controlled substances for treatment of legitimate medical conditions. The Department proposes to amend the regulations to allow practitioners who treat patients for chronic pain from conditions other than diseases the ability to issue prescriptions for greater than a thirty-day supply when such prescriptions are designated with the Code D. This flexibility in issuing prescriptions for larger quantities will aid those patients by not requiring them to obtain a new prescription from their practitioner each month, which they then must bring to their pharmacy. This amendment will ease some of the burden for these patients, who may be experiencing decreased mobility in addition to their chronic pain. By also amending the regulations to allow hospice patients up to 60 days to partial fill their controlled substance prescriptions, it will allow the patients to better adjust their changing medication needs.

Current Part 80 regulations authorize an incorporated society for the prevention of cruelty to animals and a municipal animal control facility to utilize sodium pentobarbital to euthanize animals. Such facilities and their agents also must first register with the Department and the federal Drug Enforcement Administration in order to purchase, possess, and dispense sodium pentobarbital for euthanasia.

Animal control facilities provide a valuable public service by treating stray, injured, aged, sick, and feral animals. However, current Part 80 regulations authorize such animal shelters to euthanize animals only with a schedule III formulation of sodium pentobarbital, which is not approved by the U.S. Food and Drug Administration for use with cats and smaller animals. While licensed veterinarians are authorized to euthanize with Schedule II sodium pentobarbital, they are not regularly available to perform the euthanasia in animal shelters.

Humane Societies and animal control facilities have apprised the Department that the available schedule III sodium pentobarbital formulation is recommended only for the euthanizing of dogs and larger animals. The formulation's high viscosity renders it difficult to utilize for cats and other small pets. Required use of this drug often results in seizures, fear and pain to the animals at the time of euthanasia and creates a hardship for the shelters. The facilities state that such difficulty results in less humane treatment of the animals when necessary to euthanize.

The Department is proposing amendments to Part 80 that authorize animal control facilities to utilize ketamine hydrochloride for anesthesia only as part of the euthanasia procedure and both a schedule II and a schedule III formulation of sodium pentobarbital for euthanasia. The amendments will allow pets and animals of all sizes to be more humanely treated when these drugs are indicated for use.

##### COSTS:

##### Costs to Regulated Parties:

Pharmacies currently collect and maintain the dispensing information that the Department proposes to be additionally included with the information that is now submitted; therefore, there are only minor anticipated additional costs to pharmacies. Because practitioners are currently required to electronically submit dispensing information to the Department, there are only minor anticipated increased costs to practitioners to submit a minimal addition to that information. Practitioners and pharmacies who dispense small amounts of controlled substances submit dispensing information through the Department's Health Provider Network (HPN) by manually uploading the data into fields already provided on the HPN site. A minimal addition to those data fields should only incur a minor increase in data submission costs. The American Society for Automation

in Pharmacy (ASAP) is the nationwide software system that pharmacies and practitioners that dispense large amounts of controlled substances utilize to submit required dispensing information to the Department. The ASAP software already contains the capability to transmit the additional data fields required by the proposed regulations. Activating those additional ASAP data fields will require only minor programming costs by pharmacies and dispensing practitioners.

Manufacturers and distributors are required to maintain records of distribution.

The requirement to report this information electronically to the Department may create a slight expenditure, but because manufacturers and distributors currently maintain these records in an electronic format, such expense is anticipated to be minimal to make the format compatible with the Department's system of receiving the information.

There will be no increased costs associated with the proposed amendment to allow practitioners to issue controlled substance prescriptions in quantities greater than a 30-day supply to treat patients suffering from chronic pain caused by an incurable condition or disease. No increased costs are anticipated by allowing hospice patients more time to partial fill their controlled substance prescriptions.

There may be a minimal cost to the incorporated society for the prevention of cruelty to animals, municipal animal control facility or animal shelter utilizing the additional drugs proposed for euthanasia. This cost is associated with the purchase of ketamine hydrochloride and schedule II pentobarbital for more humane euthanasia of all sizes of animals.

Costs to State and Local Government:

There will be no costs to state or local government.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

No additional paperwork is required for pharmacies, practitioners, manufacturers and distributors. Pharmacies and practitioners currently maintain the records that the Department will require to be transmitted electronically. Manufacturers and distributors are required to maintain records of distribution of controlled substances. The electronic transmission of such records will not create any additional paperwork, and may actually reduce some paperwork.

There will not be any additional paperwork associated with the proposed amendment to allow practitioners to issue controlled substance prescriptions in quantities greater than a 30-day supply to treat patients suffering from chronic pain caused by an incurable condition or disease. In fact, there may be less paperwork, as practitioners would be able to issue a controlled substance prescription every three months as opposed to monthly.

There may be a minimal increase in paperwork for pharmacies to document partially filled prescriptions for hospice patients.

Including ketamine hydrochloride for anesthesia only as part of the euthanasia procedure and schedule II formulation of sodium pentobarbital for euthanasia may involve a minimal increase in record-keeping paperwork for animal control facilities.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

There are no alternatives that would support the approach to be taken under the regulations. The information the Department is seeking through these new regulations is not available from any other source.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

These regulations will become effective upon filing with the Department of State.

#### **Regulatory Flexibility Analysis**

Effect of Rule on Small Business and Local Government:

This proposed rule would affect retail pharmacies that partially dispense controlled substance prescriptions for hospice patients. The rule will also affect practitioners who dispense controlled substances and prescribe them for the treatment of chronic pain. The rule will also affect licensed manufacturers and distributors of controlled substances.

According to the New York State Board of Pharmacy, there are approximately 4,500 registered pharmacies in New York State. According to the Bureau of Narcotic Enforcement, there are approximately 600 manufacturers and distributors licensed by the Department to distribute controlled substances in New York State.

Compliance Requirements:

The proposed regulations follow the intent of Article 33 of Public Health Law and will further enhance the Department's ability to curtail diversion of controlled substances.

Currently, pharmacies are required to submit the dispensing data for the original dispensing of all controlled substance prescriptions. The only new compliance requirement is the submission of the method of payment for the controlled substance prescription and whether the drug was the original dispensing or the refill dispensing of a controlled substance prescription. The only new compliance requirement for dispensing practitioners is to submit a minimal amount of additional information.

Manufacturers and distributors are required to maintain records of distribution of controlled substances. The proposed regulations will require reports based upon these records to be electronically transmitted to the Department.

Proposed regulations place compliance requirements on animal control facilities only if they choose to utilize ketamine hydrochloride for anesthesia only as part of the euthanasia procedure and/or schedule II sodium pentobarbital for euthanasia of animals.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Pharmacies and dispensing practitioners may require minor adjustments in computer software programming due to additional dispensing and prescription data submission requirements; however, this should require only minimal additional costs. The system utilized by pharmacies and practitioners already contains the additional data fields for submission of information. A slight expenditure may be necessary for activation of those fields by an Information Technology technician. Manufacturers and distributors may incur a slight expenditure due to the requirement for electronic transmission of data, but such expenditure should not create a financial hardship. There will be no compliance costs for authorizing practitioners to prescribe more than a 30-day supply of a controlled substance to treat a patient for chronic pain cause by an incurable condition or disease. Compliance costs to animal control facilities will be as a result of utilizing the proposed drugs for more humane euthanasia of animals, however, while the proposed regulations authorize the use of the additional drugs, the regulations do not require their use.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. The process utilizes existing electronic systems for reporting of dispensing by pharmacies and practitioners. The regulations will create new requirements for manufacturers and distributors but the Department expects most of these entities to currently maintain the required records of distribution in an electronic format. There are minimal technological and economic constraints anticipated for animal control facilities because the proposed rule authorizes the use of ketamine hydrochloride and schedule II pentobarbital for the euthanasia process but does not require that facilities utilize the additional drugs.

Minimize Adverse Impact:

The regulations require only a minimal increase in reporting requirements. These requirements are for the electronic transmission of records that current regulations require pharmacies, practitioners, manufacturers and distributors to maintain.

Small Business and Local Government Participation:

During the drafting of these regulations, the Department met with or solicited comment from the Pharmaceutical Society of the State of New York, the Medical Society of the State of New York, the National Association of Pharmaceutical Manufacturers, the Humane Society of the United States, the Community Hospice and the Mohawk & Hudson River Humane Society. Local governments are not affected, except for those municipalities operating animal shelters.

#### **Rural Area Flexibility Analysis**

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to pharmacies, practitioners, manufacturers and distributors located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain rural areas. These can range in extent from small towns and villages and their surrounding areas, to locations that are sparsely populated.

Compliance Requirements:

The only compliance requirements are for the electronic transmission of information to the Department that pharmacies, practitioners, manufacturers and distributors are required by current regulations to maintain.

Professional Services:

None necessary.

Compliance Costs:

The systems utilized by pharmacies and practitioners to submit dispensing data already contain the additional data fields. The compliance costs to activate those fields are anticipated to be minimal. The cost for an Information Technology technician to make electronic record systems of

manufacturers and distributors compatible with the Department's system of receipt of controlled substance sales information is also anticipated to require minimal expenditures.

**Minimizing Adverse Impact:**

The regulations require only a minimal increase in reporting and record-keeping requirements.

**Rural Area Participation:**

During the drafting of this regulation, the Agency met with and solicited comments from pharmacy, practitioner, hospice and manufacturer associations who represent these professions in rural areas. No particular issues relating to the effect of this program on rural areas were expressed.

**Job Impact Statement**

This proposal will not have a negative impact on jobs and employment opportunities. In benefiting the public health by ensuring that drug diversion is curtailed through enhanced analysis of information from controlled substance prescriptions and the dispensing and distribution of controlled substances, the proposed amendments are not expected to either increase or decrease jobs overall. No overall increase or decrease in jobs is anticipated for animal control facilities utilizing the proposed additional drugs for more humane euthanasia of animals.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content**

**I.D. No.** HLT-49-08-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of Part 59 of Title 10 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 1194(4)(c) and Environmental Conservation Law, section 11-1205(6)

**Subject:** Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content.

**Purpose:** To update the conforming products list of breath alcohol testing devices currently approved for use by the NHTSA.

**Text of proposed rule:**

Pursuant to the authority vested in the Commissioner of Health by Section 1194(4)(c) of the Vehicle and Traffic Law and Section 11-1205(6) of the Environmental Conservation Law, Part 59 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, to be effective upon publication of a Notice of Adoption in the *New York State Register*, to read as follows:

Subdivisions (c) and (d) of Section 59.1 are amended as follows:

(c) Chemical tests/analyses include breath tests conducted on those instruments found on the Conforming Products List of Evidential Breath Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, published in the *Federal Register* on [June 4, 1999. Such list is set forth in section 59.4 of this Part.] *December 17, 2007. Copies are available for public inspection and copying by appointment at the Department of Health, Records Access Office, Corning Tower, Empire State Plaza, Albany, New York.*

(d) Training agency or agencies means the [Bureau for Municipal Police] *Office of Public Safety* of the Division of Criminal Justice Services, the Division of State Police, *the Nassau County Police Department, the Suffolk County Police Department, and/or the New York City Police Department.*

The heading for Section 59.4 is amended, and existing subdivisions (b) of Section 59.4 is replaced by a new subdivision (b), as follows:

59.4 Breath [testing] *analysis* instruments.

(b) At the request of the training agency responsible for the maintenance of a breath analysis instrument, the commissioner shall approve the instrument provided the model has been accepted by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA) as an evidential breath measurement device. The commissioner's approval may be based on evidence that the model appears on NHTSA's current Conforming Products List as published in the *Federal Register*, or evidence that the device has been accepted by NHTSA as an evidential breath measurement device, but the device has not yet been added to the published Conforming Products List. The commissioner shall make available upon request a list of approved breath analysis instruments.

**Text of proposed rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement**

**Statutory Authority:**

The New York State Vehicle and Traffic Law, Section 1194(4)(c), and the Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath for alcohol content.

**Legislative Objectives:**

This amendment allows law enforcement/police agencies to use state-of-the-art equipment for breath alcohol testing, as approved by the Commissioner of Health. This action fulfills the legislative objective of ensuring effective enforcement of the law against driving while intoxicated.

**Needs and Benefits:**

In 1986, the Commissioner of Health adopted the Conforming Products List of Evidential Breath Measurement Devices, as established by the National Highway Traffic Safety Administration, under 10 NYCRR Sections 59.1(c) and 59.4(b). The Traffic Safety Administration's list is periodically revised to include additional approved testing devices. Affected parties are law enforcement agencies that train police organizations in the use of breath testing devices and the organizations/agencies whose staff conduct testing, including the New York State Police; the State Division of Criminal Justice Services' Office of Public Safety; and the Police Departments of Nassau County, Suffolk County, and the City of New York. This amendment updates the name of one training agency, and identifies the three more recently recognized training agencies that currently participate in breath analysis operator training of law enforcement officials statewide.

A new Conforming Products List was published in the *Federal Register* on June 29, 2006, and again on December 17, 2007, with each publication announcing approval of state-of-the-art evidential breath test instruments. The Division of Criminal Justice Services has requested approval to use the DataMaster DMT, due, in part, to a project fully funded through the Governor's Traffic Safety Committee, that will allow replacement of 475 breath test instruments currently used by more than 420 police agencies Statewide. Many of the new instruments have already been distributed and have been engaged in the field since emergency adoption of an amendment incorporating the June 29, 2006 Conforming Products List. The State Police have expressed an interest in using and training others in the use of the more recently federally-approved Draeger Alcotest 9510, pending amendment of this Part to include this device.

It is of great importance to the public welfare of the State that Part 59 be accurate and clear as a reference tool for the prosecutors and defense attorneys Statewide who rely on the provisions of Part 59 daily in adjudicating alcohol-related offenses. This amendment would remove from Part 59 the lengthy listing of breath analysis devices, and incorporate the listing by reference to the *Federal Register* date of publication. Although Department staff rigorously proofread the express terms in an effort to detect incorrect transcription of the multi-page listing's complex text, the *Federal Register* itself may contain errors. The proposed incorporation by reference would more surely eliminate either type of error that could be used by the defense to sway the outcome of a DWI case. Eliminating the need to duplicate in Part 59, in its entirety, the complex text of the Conforming Products List as published in the *Federal Register*, would also allow for more timely regulatory amendment by consensus rule, to simply revise the *Federal Register* publication date. More timely amendment would ensure more timely access to state-of-the-art technologies for breath alcohol analysis.

The amendment requires the Department to make the Conforming Products List available upon request; therefore, the Department will retain copies of the *Federal Register* editions that include such a list. The amendment also authorizes the Department to approve, upon request by a training agency, the use of an evidentiary breath analysis instrument prior to promulgation of the instrument's federal approval by publication in the *Federal Register*. This authorizing provision would eliminate the sometimes significant lag time between National Highway Traffic Safety Administration approval of a new device and publication of the updated device listing, thereby allowing more timely access by training agencies to state-of-the-art devices.

This proposed amendment, once adopted, will make these devices available for use by law enforcement agencies without risk of evidentiary challenge to prosecution, and will ensure effective enforcement of the laws against driving while intoxicated.

**COSTS:**

Costs to Private Regulated Parties:

The requirements of this regulation are not applicable to any private parties regulated by the Department.

Costs to State Government:

Adoption of additions and revisions to the Conforming Products List does not necessitate purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not require affected parties to incur new costs. Both the Division of Criminal Justice Services and the State Police have requested timely amendment of Part 59 in order that they may use state-of-the-art breath analysis devices to replace devices that are unable to be repaired as parts become increasingly scarce. Moreover, the Division of Criminal Justice Services expects the newer model instrument, which utilizes improved diagnostics, an enhanced operating system and an outboard printer, to generate cost savings from fewer instrument malfunctions, resulting in less downtime. Thus, this amendment's authorizing use of updated models of breath analysis devices will result in decreased costs to law enforcement agencies.

#### Costs to Local Government:

Adoption of additions and revisions to the Conforming Products List through incorporation by reference does not require purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not impose any additional costs to police departments operated by local governments, including the City of New York Police Department. Police departments operated by local governments may experience cost savings for the same reasons described under Costs to State Government.

#### Costs to the Department of Health:

Adoption of additions and revisions to the Conforming Products List does not impose any costs on the Department.

#### Local Government Mandates:

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district.

#### Paperwork:

No new reporting requirements or forms are imposed as a result of the proposed amendment.

#### Duplication:

This regulation is consistent with, but does not duplicate, other State and federal statutes concerning approved breath alcohol measurement devices.

#### Alternative Approaches:

Failure to update the regulation by incorporating by reference the most current list of evidentiary devices will result in confusion as to device approval for use in New York State, resulting in defense challenges to the admissibility of results obtained with the device. Such failure will obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older breath analyzer models become unusable, thereby adversely affecting public safety. At the present time, there are no acceptable alternatives to pursuing permanent adoption of the rule as written.

#### Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government; it merely adds new federally approved devices to the Conforming Products List, to be consistent with federal standards.

#### Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon filing a Notice of Adoption with the Secretary of State.

#### Regulatory Flexibility Analysis

No Regulatory Flexibility Analysis is required pursuant to Section 202-b (3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, record keeping or other compliance requirements on small businesses or local governments. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

#### Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb (4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse impact on facilities in rural areas, and does not impose any reporting, record keeping or other compliance requirements on regulated parties in rural areas. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

#### Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforce-

ment agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values for Preneed Life Insurance

**I.D. No.** INS-49-08-00002-E

**Filing No.** 1125

**Filing Date:** 2008-11-13

**Effective Date:** 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 102 (Regulation 192) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517

**Finding of necessity for emergency rule:** Preservation of general welfare.

**Specific reasons underlying the finding of necessity:** Regulation No. 192 needs to be adopted by December 31, 2008 for the general welfare.

Based on research conducted by the Deloitte University of Connecticut Actuarial Center and commissioned by the Society of Actuaries as a part of a study of preneed mortality, it was determined that reserves calculated using the 2001 CSO Mortality Table were inadequate for preneed policies. Development of a new valuation mortality table specifically designed for and based on preneed life insurance experience is currently being developed by the Society of Actuaries, but will not be ready for adoption prior to the mandatory use for both statutory and federal tax purposes of the 2001 CSO Mortality Table beginning on January 1, 2009. This regulation, which requires the use of the Ultimate 1980 CSO Mortality Table, subject to the conditions in the regulation, therefore is intended as an intermediate solution until such time that an adequate mortality table can be adopted. Adoption of this regulation will require insurers to hold statutory reserves at a level that are more appropriate for preneed life insurance products. Adoption of similar provisions by at least 25 other states will permit the alternative use of the Ultimate 1980 CSO Mortality Table for federal tax purposes as well.

If this regulation is not adopted by year-end, New York residents will be adversely affected, particularly those residents who have or will purchase policies to fund out-of-state burials, often near other members of their families. Without this regulation, it is likely that the higher reserves maintained to adequately fund these policies will result in a failure of these policies to qualify as life insurance for federal tax purposes, with the consequence that the death benefit will be taxable to the beneficiary and the insurer will face a higher tax burden.

This difficulty arises from the tension between the states' interest in ensuring solvency and adequate capital and the federal tax law's interest in limiting the maximum deduction for reserves supporting life insurance contracts. States generally require high reserves, while the federal tax law mandates standards that produce lower reserves (and thus deductions). Further, under the federal Internal Revenue Code (IRC), reserves for life insurance policies can only fund standard mortality charges. Higher mortality charges are permitted for federal tax purposes only if the individual insured is determined to be substandard. Because preneed life insurance policies are generally purchased by individuals who feel funeral costs may well be imminent, the entire category of insureds is felt to be substandard and thus to require uniformly higher charges.

If a special (higher charge) mortality table becomes the prevailing mortality table for federal tax purposes for this specific category of life insurance, then federal tax law will allow the higher reserves that the states feel are necessary for preneed life insurance policies. The exception to the 2001 CSO Mortality Table can only be used for federal tax purposes, however, if it is adopted by 26 or more states before January 1, 2009. If the mortality table is timely adopted, then the reserves permitted by both New York and the IRC will be high enough to pay for the higher future mortality charges. Further, insurers no longer will face the higher taxes that would result from a mismatch between statutory and tax reserves.

For all of the reasons stated above, an emergency adoption of Regulation No. 192 is necessary for the general welfare.

**Subject:** Minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

**Purpose:** To establish minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

**Text of emergency rule:** A new Part 102 is added to read as follows:

**Section 102.1 Purpose**

The purpose of this Part is to prescribe rules establishing minimum standards for reserves and nonforfeiture values for preneed life insurance in accordance with statutory reserve formulae.

**Section 102.2 Applicability**

This Part shall apply to every authorized life insurance company and licensed fraternal benefit society in this State and every insurer holding a certificate from the superintendent as being accredited for the reinsurance of life insurance (all hereafter referred to as insurers). This Part shall be applicable to such insurers for all statements filed after the effective date of this Part.

**Section 102.3 Definitions**

(a) 2001 CSO Mortality Table has the meaning contained in section 100.3(a) of Part 100 of this Title (Regulation 179).

(b) Actuarial Opinion has the meaning contained in section 95.4(a)(1) of Part 95 of this Title (Regulation 126).

(c) Actuarial Memorandum means the memorandum filed in support of the actuarial opinion. The form and substance of the actuarial memorandum shall be the same as that described in section 95.9 of this Title.

(d) Appointed Actuary has the meaning contained in section 95.4(e) of this Title.

(e) Preneed life insurance means any life insurance policy or certificate that is issued in combination with, in support of, with an assignment to, or as a guarantee for, a prearrangement agreement for goods and services, or other benefits, to be provided at the time of and immediately following the death of the insured. Goods and services may include embalming, cremation, body preparation, viewing or visitation, coffin or urn, memorial stone, and transportation of the deceased. The status of the policy or certificate as preneed life insurance is determined at the time of issue in accordance with the policy form filing.

(f) Ultimate 1980 CSO Mortality Table means the mortality table without ten-year select mortality factors, consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 National Association of Insurance Commissioners (NAIC) Amendments to the Model Standard Nonforfeiture Law and Standards Valuation Law for Life Insurance, and referred to in those models as the Commissioners 1980 Standard Ordinary Mortality Table without ten-year select mortality factors.

**Section 102.4 Minimum Valuation Standards**

(a) Minimum valuation mortality standard:

For preneed life insurance, the minimum standard for determining reserve liabilities and nonforfeiture values for both male and female insureds shall be the Ultimate 1980 CSO Mortality Table subject to the transition rules provided in section 102.5 of this Part.

(b) Minimum valuation interest rate standards:

(1) The interest rates used in determining the minimum standard for valuation shall be the calendar year statutory valuation interest rates as defined in section 4217(c)(4) of the Insurance Law.

(2) The interest rates used in determining the minimum standard for nonforfeiture values shall be the nonforfeiture interest rates as defined in section 4221(k)(10) of the Insurance Law.

(c) Minimum valuation method standards:

(1) The method used in determining the standard for the minimum valuation of reserves shall be the Commissioners Reserve Valuation Method as defined in section 98.3(b) of Part 98 of this Title (Regulation No. 147).

(2) The method used in determining the standard for the minimum nonforfeiture values shall be the method defined in section 4221(l)(3) of the Insurance Law.

**Section 102.5 Transition Rules**

(a) For a preneed policy or certificate issued on or after January 1, 2009 and before January 1, 2012, the 2001 CSO Mortality Table may be used as the minimum standard for reserves and nonforfeiture benefits for both male and female insureds.

(b) If an insurer elects to use the 2001 CSO Mortality Table as a minimum standard for any preneed policy or certificate issued on or after January 1, 2009 and prior to January 1, 2012, the insurer shall provide, as part of the actuarial opinion and memorandum submitted in support of the insurer's asset adequacy testing as specified in Part 95 of this Title, an annual written notification of such use to the superintendent. The notification shall include:

(1) A complete list of all preneed life insurance policy forms that use the 2001 CSO Mortality Table as a minimum standard;

(2) A certification signed by the appointed actuary stating that the reserve methodology, which is employed by the insurer in determining reserves for preneed life insurance issued after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard, develops adequate reserves. For the purposes of this certification, the preneed life insurance using the 2001 CSO Mortality Table as a minimum standard cannot be aggregated with any other policies and certificates; and

(3) Supporting information regarding the adequacy of reserves for preneed life insurance issued on or after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard for reserves.

(c) A preneed life insurance policy or certificate issued on or after January 1, 2012 shall use the Ultimate 1980 CSO Mortality Table in the calculation of minimum reserves and minimum nonforfeiture values.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 10, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Regulatory Impact Statement**

1. Statutory authority:

The Superintendent's authority derives from sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies. Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law enables the Superintendent to require any additional reserves as necessary on account of life insurers' policies and certificates.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, in particular the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance that is of such a nature that the minimum reserves cannot be determined by the methods described in section 4217(c)(6) and section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and be computed by a method that is consistent with the principles of sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the National Association of Insurance Commissioners after 1980, and approved by the Superintendent, for use in determining the minimum nonforfeiture standard.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives:

Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. Solvency serves several critical

functions. One purpose of the Insurance Law is to ensure that all insurers and fraternal benefit societies authorized to do business in New York State, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, hold the necessary reserve funds to the obligations made to policyholders. Insurers and policyholders also benefit from the Insurance Law's mandate to maintain adequate capital for company uses such as expansion, product development, and other forms of business development.

### 3. Needs and benefits:

Prior to 2004, the 1980 CSO Mortality Table was the minimum standard for calculating life insurance reserves and nonforfeiture values. Regulation No. 179 (11 NYCRR Part 100), adopted in 2004, established new minimum standards for both life insurance reserves and nonforfeiture values. That regulation allows the optional use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2004 and prior to January 1, 2009, and requires the use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2009. As of January 1, 2009, use of the 2001 CSO Mortality Table will be mandatory for both statutory and tax purposes.

This regulation establishes minimum reserve and nonforfeiture standards for preneed life insurance policies and certificates. Preneed life insurance provides a prearrangement agreement for goods and services to be provided at the time of death of the insured.

Based on research conducted by the Deloitte University of Connecticut Actuarial Center and commissioned by the Society of Actuaries as a part of a study of preneed mortality, it was determined that reserves calculated using the 2001 CSO Mortality Table were inadequate for preneed policies. Development of a new valuation mortality table specifically designed for and based on preneed life insurance experience is currently being developed by the Society of Actuaries, but will not be ready for adoption prior to the mandatory use of the 2001 CSO Mortality Table on January 1, 2009. This regulation therefore is intended as an intermediate solution until such time that an adequate mortality table can be adopted.

The regulation allows for the continued use of the 2001 CSO Mortality Table on an optional basis for preneed life insurance policies and certificates issued on or after January 1, 2009 and through December 31, 2011. For all preneed life insurance policies and certificates issued on or after January 1, 2012, the minimum standard will be the Ultimate 1980 CSO Mortality Table. This transition period allows those insurers currently using the Ultimate 1980 CSO Mortality Table as the minimum standard to continue using that table. Reserves produced under the table are more conservative than those calculated under the 2001 CSO Mortality Table.

As an additional safeguard during the transition period, any insurer using the 2001 CSO Mortality Table will need to provide an annual certification and supporting analysis that the reserves calculated on that basis are adequate on a stand-alone basis. The transition period also allows those insurers that have already converted their policy forms and valuation systems to reflect the 2001 CSO Mortality Table ample time to have revised policy forms approved by the various state insurance departments in which the insurers write business.

The regulation is necessary to help ensure the solvency of life insurers and fraternal benefit societies doing business in New York by providing an appropriate mortality table to be used for valuing reserves for preneed life insurance policies and certificates.

### 4. Costs:

Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance (hereafter, "insurers") will be minimal, since many insurers already have made modifications to allow the use of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of the special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates the cost to be approximately \$1,000, plus any filing fees charged by the state in which the form is filed.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers. There are no costs to other government agencies or local governments.

### 5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

### 6. Paperwork:

The regulation imposes reporting requirements related to the actuarial opinion and memorandum required for insurers using the 2001 CSO Mortality Table as the minimum standard for preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012.

### 7. Duplication:

The regulation does not duplicate any existing law or regulation.

### 8. Alternatives:

The only significant alternative considered was to allow the 2001 CSO Mortality Table to become the mandatory basis for minimum standards for reserves and nonforfeiture benefits, which would produce inadequate reserves for some insurers.

A copy of the draft regulation was distributed to the Life Insurance Council of New York (LICONY) in July 2008. LICONY is a trade association representing life insurance companies domiciled in the state of New York. LICONY suggested that the original definition of preneed insurance was too broad because it included references to annuity contracts and other insurance contracts. The Department agreed with LICONY and removed both references from the definition. A revised draft of the regulation, reflecting such changes was sent to LICONY in August 2008, and LICONY had no objections to the revised draft regulation.

A copy of the draft regulation was sent to the National Fraternal Congress of America (NFCA) in September 2008. NFCA is a trade association representing fraternal benefit societies in the United States and Canada. NFCA commented that the requirements in the proposed regulation appear to be reasonable.

### 9. Federal standards:

There are no federal standards in this subject area other than the general requirement under federal tax law to use 2001 CSO Mortality Tables to calculate federal tax reserves for all life insurance contracts on or after January 1, 2009. Implementation of this emergency regulation will, in conjunction with similar actions by at least 25 other states, create an exception to this general rule for preneed contracts.

### 10. Compliance schedule:

Compliance with this regulation with respect to the 2001 CSO Mortality Table is voluntary for all preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012. Insurers that are currently using the more conservative Ultimate 1980 CSO table may continue to do so for policies issued on or after January 1, 2009 and prior to January 1, 2012. Insurers must use the Ultimate 1980 CSO Mortality Table for all preneed life insurance policies and certificates issued on or after January 1, 2012, which will allow insurers subject to the regulation ample time to achieve full compliance.

### *Regulatory Flexibility Analysis*

#### 1. Small businesses:

The Insurance Department believes that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this belief is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, none of which falls within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. Indeed, the Insurance Department has reviewed filed Reports on Examination and Annual Statements of these insurers, and believes that none of them falls within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

#### 2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

### *Rural Area Flexibility Analysis*

The Insurance Department finds that this rule does not impose any significant burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas.

The entities covered by this regulation, life insurers and fraternal benefit societies licensed to do business in New York State, do business in every county in this state, including rural areas as defined under SAPA 102(10). Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance will be minimal, since many insurers began to use all versions of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of this special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates each insurer's costs to be approximately \$1,000, plus any filing fees charged by the state in which the form is filed.

### *Job Impact Statement*

Adoption of Regulation 192 will not adversely impact job or employment opportunities in New York. The rule is likely to have no measurable impact on jobs and employment opportunities because existing personnel should be able to monitor the insurer's compliance with the new requirements. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This rule would not have a measurable impact on self-employment opportunities.

**NOTICE OF ADOPTION**

**External Appeals of Adverse Determinations of Health Care Plans**

**I.D. No.** INS-35-08-00009-A  
**Filing No.** 1129  
**Filing Date:** 2008-11-13  
**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 410 (Regulation 166) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, art. 49, and chapter 586 of the Laws of 1998

**Subject:** External Appeals of Adverse Determinations of Health Care Plans.

**Purpose:** Provides that external appeal agents shall not be subject to legal proceedings to review their determinations.

**Text or summary was published** in the August 27, 2008 issue of the Register, I.D. No. INS-35-08-00009-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Insurance Sales Practices on Military Installations or Involving Military Personnel**

**I.D. No.** INS-39-08-00009-A  
**Filing No.** 1124  
**Filing Date:** 2008-11-13  
**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Addition of Part 223 (Regulation 186) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 308, 309, 2103, 2104, 2107, 2109, 2110, 2123, 3201 and 4226, and arts. 24 and 45

**Subject:** Insurance sales practices on military installations or involving military personnel.

**Purpose:** To declare certain sales practices occurring on military installations or involving military personnel as unfair trade practices.

**Text or summary was published** in the September 24, 2008 issue of the Register, I.D. No. INS-39-08-00009-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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**Office of Mental Health**

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**PROPOSED RULE MAKING  
 NO HEARING(S) SCHEDULED**

**Operation of Outpatient Programs**

**I.D. No.** OMH-49-08-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to amend Part 587 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 7.15, 31.04 and 43.02

**Subject:** Operation of Outpatient Programs.

**Purpose:** To correct an outdated reference.

**Text of proposed rule:** Paragraphs 1 and 2 of subdivision (e) of section 587.5 of Title 14 NYCRR are amended to read as follows:

(1) In a county with less than three percent of the projected population of children in New York State, as defined in section 587.4(a) of this Part, the criteria for inclusion as a designated interim specialty clinic treatment program serving children includes:

(i) any licensed clinic treatment program, including all licensed satellite locations within the county, that had total Medicaid visits by children exceeding 400 visits annually for *the most recent completed State [Federal] fiscal year [1992]*; or

(ii) any one licensed clinic treatment program location which had more than 200 Medicaid visits by children representing more than 75 percent of total Medicaid volume of visits at that location; or

(iii) all licensed clinic treatment programs in a county with two or fewer clinic treatment programs serving children; or

(iv) all county-operated clinic treatment programs serving children.

(2) In a county with three percent or more of the projected population of children in New York State, as defined in section 587.4(a)(4) and (8) of this Part, the criteria for inclusion as a designated interim specialty clinic treatment program serving children includes:

(i) any licensed clinic treatment program, including all licensed satellites within the county or the City of New York, which had total Medicaid visits by children exceeding 700 visits annually for *the most recent completed State [Federal] fiscal year [1992]*; or

(ii) any one licensed clinic treatment program location which had more than 300 Medicaid visits by children representing more than 50 percent of total Medicaid volume of visits at that location; or

(iii) all licensed clinic treatment programs primarily serving physically handicapped or non-English speaking children; or

(iv) all county operated clinic treatment programs.

**Text of proposed rule and any required statements and analyses may be obtained from:** Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

**Consensus Rule Making Determination**

This rulemaking is filed as a Consensus rule on the grounds that its purpose is to make technical corrections and is non-controversial. No person is likely to object to this rulemaking since it merely corrects an outdated reference in the regulation. The current language bases the determination for inclusion as a designated interim specialty clinic treatment program on Federal fiscal year 1992 Medicaid data. That data is not longer accessible, and, more importantly, does not reflect any changes in service utilization that have occurred in the twelve years since the regulation was adopted. Programs not in existence in 1992, or which have changed the population served, would not be eligible to serve as a designated interim specialty clinic, thereby restricting services to children with serious emotional disturbance. Since this rulemaking is non-controversial and makes a technical correction to an outdated reference, it is correctly filed as a consensus rulemaking.

**Statutory Authority:** Sections 7.09(b), 7.15 and 31.04(a) of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the power and responsibility to plan, establish and evaluate programs and services for the benefit of persons with mental illness, and to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 43.02(b) of the Mental Hygiene Law gives the Commissioner the authority to request from operators of facilities licensed by the Office of Mental Health such financial, statistical or program information as the Commissioner may deem necessary.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it merely corrects an outdated reference in the regulation. There will be no adverse impact on jobs and employment opportunities.

## Office of Mental Retardation and Developmental Disabilities

### NOTICE OF ADOPTION

#### Rights and Responsibilities of Persons Receiving Services

**I.D. No.** MRD-39-08-00003-A

**Filing No.** 1134

**Filing Date:** 2008-11-18

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 633.4 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Rights and Responsibilities of Persons Receiving Services.

**Purpose:** To amend the current language in the regulation regarding the right to a balanced diet.

**Text or summary was published** in the September 24, 2008 issue of the Register, I.D. No. MRD-39-08-00003-P.

**Text of final rule:** • Paragraph 633.4(a)(3) is amended as follows:

(3) The rights set forth in this section are intended to establish the living and/or program environment that protects individuals and contributes to providing an environment in keeping with the community at large, to the extent possible, given the degree of the disabilities of those individuals. Rights that are self-initiated or involve privacy or sexuality issues may need to be adapted to meet the need of certain persons with the most severe handicaps and/or persons whose need for protection, safety and health care will justify such adaptation. It is the responsibility of the agency/facility or the sponsoring agency to ensure that rights are not arbitrarily denied. [ Limitations of client rights ] *Rights limitations must be documented and must be on an individual basis, for a specific period of time, and for clinical purposes only.*

- Subparagraph 633.4(a)(4)(xvii) is amended as follows:

(xvii) a balanced and nutritious diet[, served at appropriate times and in as normal a manner as possible, and which is not altered or totally denied for behavior management or disciplinary (punishment) purposes;]. *This right shall provide that:*

(a) *meals are served at appropriate times and in as normal a manner as possible; and*

(b) *altering the composition or timing of regularly served meals for disciplinary or punishment purposes, for the convenience of staff, or for behavior modification shall be prohibited;*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 633.4(a)(4)(xvii)(b).

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

**Additional matter required by statute:** Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has filed a Negative Declaration with respect to this Action. OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Revised Job Impact Statement

The non-substantive change made to the text was simply a punctuation change and makes no substantive difference to the text whatsoever and therefore does not necessitate a revision to the previously published JIS.

#### Assessment of Public Comment

The agency received no public comment.

## Public Service Commission

### NOTICE OF ADOPTION

#### Issuance of Debt and Water Rates and Charges

**I.D. No.** PSC-27-06-00017-A

**Filing Date:** 2008-11-14

**Effective Date:** 2008-11-14

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order approving the petition of Dutchess Estates Water Co., Inc. for a five year emergency loan for \$11,535 and approve surcharges to repay the loan.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 89(f)

**Subject:** Issuance of debt and water rates and charges.

**Purpose:** To approve the issuance of debt to fund the construction of system replacement, improvements & recover the associated costs.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving the petition of Dutchess Estates Water Co., Inc. for a five year emergency loan for \$11,535 and approve surcharges to repay the loan, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0722SA1)

### NOTICE OF ADOPTION

#### Issuance of and Sale of Preferred Stock, Bonds and Other Forms of Indebtedness

**I.D. No.** PSC-44-07-00039-A

**Filing Date:** 2008-11-18

**Effective Date:** 2008-11-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order approving the petition of Rochester Gas and Electric Corporation to issue up to \$495 million of securities through December 31, 2010.

**Statutory authority:** Public Service Law, section 69

**Subject:** Issuance of and sale of preferred stock, bonds and other forms of indebtedness.

**Purpose:** To authorize the issuance of \$495 million of securities through December 31, 2010.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving the petition of Rochester Gas and Electric Corporation to issue up to \$495 million of securities through December 31, 2010, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-M-1194SA1)

## NOTICE OF ADOPTION

## Examine the Reasonableness of Temporary Rates and Charges

**I.D. No.** PSC-07-08-00015-A**Filing Date:** 2008-11-14**Effective Date:** 2008-11-14

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order directing Sagamor Water Corp. to decrease rates effective January 1, 2009.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10), 89(j), 113 and 114

**Subject:** Examine the reasonableness of temporary rates and charges.

**Purpose:** To determine the appropriate level of permanent rates.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order directing Sagamor Water Corp. to decrease rates by \$37,698 or 39.43% effective January 1, 2009 and to record a deferred credit of \$169,000 which will accrue carrying charges at the Commission approved Other Customer Capital rate, until future disposition, and final credit amount is to be reconciled by staff when actual billing and expense amounts for 2008 are known, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(99-W-1708SA2)

## NOTICE OF ADOPTION

## Mini Rate Filing

**I.D. No.** PSC-08-08-00018-A**Filing Date:** 2008-11-12**Effective Date:** 2008-11-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** The Commission, on November 12, 2008, adopted an order approving, with modifications the Village of Akron's amendments to PSC 1 – Electricity, to increase its annual electric revenues of \$248,950 or 10.1%, effective December 1, 2008.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Mini rate filing.

**Purpose:** To approve an increase in annual electric revenues of \$248,950 or 10.1%.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving, with modifications the Village of Akron's amendments to PSC 1 – Electricity, to increase its annual electric revenues of \$248,950 or 10.1%, effective December 1, 2008.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-E-0088SA1)

## NOTICE OF ADOPTION

## Exemption from the Requirement to Amend Its Tariff

**I.D. No.** PSC-14-08-00007-A**Filing Date:** 2008-11-17**Effective Date:** 2008-11-17

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 11/12/08, the Public Service Commission adopted an order granting the request of St. Lawrence Gas Company, Inc. for an exemption from the requirement to amend its tariff in accordance with the Order on Capacity Release Programs (CRP).

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Exemption from the requirement to amend its tariff.

**Purpose:** To approve the company for an exemption from the requirement to amend its tariff in accordance with the Order on CRP.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order granting the request of St. Lawrence Gas Company, Inc. for an exemption from the requirement to amend its tariff in accordance with the Order on Capacity Release Programs, issued and effective on August 30, 2007.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-G-0299SA2)

## NOTICE OF ADOPTION

## Liability Provisions

**I.D. No.** PSC-15-08-00011-A**Filing Date:** 2008-11-13**Effective Date:** 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order approving Central Hudson Gas & Electric Corporation's tariff filing to clarify the Company's limitation of liability provisions.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Liability provisions.

**Purpose:** To approve the revisions to clarify the Company's limitation of liability provisions.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving Central Hudson Gas & Electric Corporation's tariff filing to clarify the Company's limitation of liability provisions contained in its Schedule PSC No. 15 – Electricity, effective December 1, 2008.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-E-0282SA1)

## NOTICE OF ADOPTION

## Liability Provisions

I.D. No. PSC-15-08-00012-A

Filing Date: 2008-11-13

Effective Date: 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order approving Central Hudson Gas & Electric Corporation's tariff filing to clarify the Company's limitation of liability provisions.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Liability provisions.

**Purpose:** To approve the revisions to clarify the Company's limitation of liability provisions.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving Central Hudson Gas & Electric Corporation's tariff filing to clarify the Company's limitation of liability provisions contained in its Schedule PSC No. 12-Gas, effective December 1, 2008.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-G-0290SA1)

## NOTICE OF ADOPTION

## Issuance of Securities

I.D. No. PSC-31-08-00020-A

Filing Date: 2008-11-18

Effective Date: 2008-11-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 11/12/08, the PSC adopted an order approving the petition of National Fuel Gas Distribution Corporation to issue \$175,000,000 of promissory notes, and to assume the costs and benefits of certain derivative instruments for 2009-2011.

**Statutory authority:** Public Service Law, section 69

**Subject:** Issuance of securities.

**Purpose:** To approve the company's request to issue and sell securities.

**Text or summary was published** in the July 30, 2008 issue of the Register, I.D. No. PSC-31-08-00020-P.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving the petition of National Fuel Gas Distribution Corporation to issue up to \$175 million of promissory notes, and to assume the costs and benefits of certain derivative instruments for calendar years 2009-2011, subject to the terms and conditions set forth in the order.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-G-0741SA1)

## NOTICE OF ADOPTION

## Extending the Settlement Period of the Environmental Disclosure Program

I.D. No. PSC-31-08-00022-A

Filing Date: 2008-11-14

Effective Date: 2008-11-14

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted an order changing the settlement period in the Environmental Disclosure Program from six months to one year corresponding with the calendar year.

**Statutory authority:** Public Service Law, sections 4(1), 5(2), 66(1) and (2)  
**Subject:** Extending the settlement period of the Environmental Disclosure Program.

**Purpose:** To approve the change to the settlement period of the Environmental Disclosure Program.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order changing the settlement period in the Environmental Disclosure Program from six months to one year corresponding with the calendar year. The next settlement period will cover January 1, 2007 through December 31, 2007, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(94-E-0952SA39)

## NOTICE OF ADOPTION

## Adoption of the Joint Proposal and Closing the Prudence Proceeding

I.D. No. PSC-36-08-00020-A

Filing Date: 2008-11-13

Effective Date: 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On November 12, 2008, the PSC adopted the joint proposal filed by Consolidated Edison Company of New York, Inc., the State Consumer Protection Board and the Department of Public Service Commission and closing the prudence proceeding.

**Statutory authority:** Public Service Law, section 79

**Subject:** Adoption of the joint proposal and closing the prudence proceeding.

**Purpose:** To adopt the terms of the joint proposal and closing the prudence proceeding.

**Substance of final rule:** The Commission, on November 12, 2008, adopted the terms and provisions of the August 6, 2008 joint proposal filed by Consolidated Edison Company of New York, Inc., the State Consumer Protection Board and the Department of Public Service Staff and closing the prudence proceeding, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-S-0153SA3)

**NOTICE OF ADOPTION****Reallocate Surplus Ratepayer Funds to Provide Supplemental Energy Assistance Benefits****I.D. No.** PSC-36-08-00026-A**Filing Date:** 2008-11-13**Effective Date:** 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 11/12/08, the PSC adopted an order approving the petition of Central Hudson Gas & Electric Corporation to reallocate surplus ratepayer funds to provide supplemental energy assistance benefits to low-income customers.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Reallocate surplus ratepayer funds to provide supplemental energy assistance benefits.

**Purpose:** To approve the reallocation of surplus ratepayer funds to provide supplemental energy assistance benefits.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving the petition of Central Hudson Gas & Electric Corporation to reallocate surplus ratepayer funds to provide supplemental energy assistance benefits through account credits to low-income customers for the 2008 to 2009 heating season, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-E-0934SA8)

**NOTICE OF ADOPTION****Reallocate Surplus Ratepayer Funds to Provide Supplemental Energy Assistance Benefits****I.D. No.** PSC-36-08-00027-A**Filing Date:** 2008-11-13**Effective Date:** 2008-11-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 11/12/08, the PSC adopted an order approving the petition of Central Hudson Gas & Electric Corporation to reallocate surplus ratepayer funds to provide supplemental energy assistance benefits to low-income customers.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Reallocate surplus ratepayer funds to provide supplemental energy assistance benefits.

**Purpose:** To approve the reallocation of surplus ratepayer funds to provide supplemental energy assistance benefits.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving the petition of Central Hudson Gas & Electric Corporation to reallocate surplus ratepayer funds to provide supplemental energy assistance benefits through account credits to low-income customers for the 2008 to 2009 heating season, subject to the terms and conditions set forth in the order.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(05-G-0935SA7)

**NOTICE OF ADOPTION****Rehearing of Commission Order****I.D. No.** PSC-39-08-00012-A**Filing Date:** 2008-11-17**Effective Date:** 2008-11-17

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** On 11/12/08, the PSC adopted an order approving Warwick Water Corporation's petition for rehearing with respect to the water plant, but otherwise denying the petition, and allowing an increase in rates to produce \$40,203 or 15% in additional revenue.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 22

**Subject:** Rehearing of Commission Order.

**Purpose:** To grant the petition for rehearing for the water plant in service, but otherwise deny the petition and increase annual revenue.

**Substance of final rule:** The Commission, on November 12, 2008, adopted an order approving Warwick Water Corporation's petition for rehearing with respect to the water plant in service, but otherwise denying the petition, and the company be allowed to increase rates to produce \$40,203 or 15% in additional annual revenues.

**Final rule as compared with last published rule:** No changes.

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-W-1129SA2)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Policies and Procedures for TOA and LOE****I.D. No.** PSC-49-08-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering whether to delegate, in whole or in part, to the Director of the Office of Telecommunications the authority to issue Temporary Operating Authority (TOA) for franchise renewals and limited Orders of Entry (LOE).

**Statutory authority:** Public Service Law, sections 215, 216 and 228

**Subject:** Policies and procedures for TOA and LOE.

**Purpose:** To establish policies and procedures for TOA and LOE.

**Substance of proposed rule:** The Commission is considering whether to delegate, in whole or in part, to the Director of Telecommunications the authority to (1) issue six month Temporary Operating Authority (TOA) certificates for cable television companies negotiating renewals of existing franchises with municipalities and (2) to provide Limited Orders of Entry (LOE) for cable television companies seeking access to apartment buildings for the purpose of assessing the properties or premises to develop a proposal for a reasonable plan for installation of cable television facilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us**

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brilling@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-V-1289SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Water Rates and Charges**

**I.D. No.** PSC-49-08-00016-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Windover Water Works filed tariff revisions, to become effective April 1, 2009, to increase its annual operating revenues by \$1,260 or 32% and increase its Repair Escrow Account's maximum balance from \$400 to \$1,500.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Water rates and charges.

**Purpose:** For approval to increase Windover Water Works' annual revenues by \$1,260 and increase the maximum balance of its Repair Escrow.

**Substance of proposed rule:** On November 13, 2008 Windover Water Works (Windover or the company) electronically filed Leaf No. 12, Revision 2 to P.S.C. No. 2 – Water, to become effective on April 1, 2009. The company filed new rates to produce additional annual revenues of \$1,260 or approximately 32%. Windover also filed Repair Escrow Account Statement No. 2 requesting that the maximum balance of the Repair Escrow Account be increased from \$400 to \$1,500. The company provides metered water service to 9 residential customers in the Town of Evans, Erie County.

The company's tariff is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Access to Commission Documents – Tariffs). The Commission may approve or reject, in whole or in part, or modify the company's rates.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brilling@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-W-1349SA1)

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Hourly Pricing Provision - UCAP Charge**

**I.D. No.** PSC-49-08-00017-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** The Commission is considering a proposal filed by Central Hudson Gas & Electric Corporation to revise the method used to

determine capacity charges included in the Hourly Pricing Provision (HPP) UCAP charge.

**Statutory authority:** Public Service Law, section 66(12)

**Subject:** Hourly Pricing Provision - UCAP Charge.

**Purpose:** To revise the method used to determine capacity charges included in the HPP UCAP charge.

**Substance of proposed rule:** The Commission is considering Central Hudson Gas & Electric Corporation's (Central Hudson) proposal to revise the rate utilized in the determination of the capacity charges included in the UCAP charge paid by customers taking service under Central Hudson's Hourly Pricing Provision through Service Classification Nos. 2, 3 and 13. Central Hudson proposes to utilize the monthly NYISO Spot Auction price for the New York Control Area rather than its actual average monthly cost in the determination of the capacity charges included in the UCAP charge. The Commission may approve, reject or modify, in whole or in part Central Hudson's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn\_brilling@dps.state.ny.us

**Public comment will be received until:** 45 days after publication of this notice.

**Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-E-1365SA1)

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## Racing and Wagering Board

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**NOTICE OF ADOPTION**

**Claiming Procedure of Horses in Harness Racing**

**I.D. No.** RWB-34-08-00004-A

**Filing No.** 1126

**Filing Date:** 2008-11-14

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 4109.3(a), (b), (d), (e) and addition of section 4109.3(p) to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 301

**Subject:** Claiming procedure of horses in harness racing.

**Purpose:** To provide clarification and ensure consistent enforcement of the harness claiming rule by judges and horsemen.

**Text or summary was published** in the August 20, 2008 issue of the Register, I.D. No. RWB-34-08-00004-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Gail Pronti, Secretary to the Board, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305, (518) 395-5400, email: [info@racing.state.ny.us](mailto:info@racing.state.ny.us)

**Assessment of Public Comment**

The Board received a letter from Brenda Weidman on September 4, 2008 requesting clarification of subdivision (a) of section 4109.3 and stating her opposition to the provisions in that paragraph that refers to the applicable sales tax on the sale of a horse through a claim. Ms. Weidman states that the sales tax on claimed horses is "totally unwarranted."

The section that Ms. Weidman refers to is a provision of the rule that is not going to be amended as part of this rulemaking, and therefore is not germane to the purpose of the proposed rulemaking. The provision to

which she refers currently states: "The claimant must have to his credit with the track an amount equivalent to the specified claiming price, the applicable sales tax, the cost of transferring the registration, and the fee for the test for equine infectious anemia." The operative word as it applies to sales tax is "applicable." Currently, under Tax Law 1115 (a)(29), race horses are exempt from sales and use taxes. To be clear, the Racing and Wagering Board is not authorized to impose a sales tax on the sale of horses through the adoption of a rule. The rule as currently written merely recites a list of possible costs that should be included in assessing the claimant's credit. Therefore, there is no need to revise the language of the proposed rulemaking based on Ms. Weidman's comments.

## State University of New York

### NOTICE OF ADOPTION

#### State University of New York Tuition and Fees Schedule

**I.D. No.** SUN-36-08-00002-A

**Filing No.** 1137

**Filing Date:** 2008-11-18

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of section 302.1(h) of Title 8 NYCRR.

**Statutory authority:** Education Law, section 355(2)(b) and (h)

**Subject:** State University of New York Tuition and Fees Schedule.

**Purpose:** Amend the State University of New York Tuition and Fees Schedule to establish tuition for the nursing practice degree program.

**Text or summary was published** in the September 3, 2008 issue of the Register, I.D. No. SUN-36-08-00002-EP.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Marti Anne Ellermann, Senior Counsel, State University of New York, University Plaza, S-333, 353 Broadway, Albany, New York 12246, (518) 443-5400, email: Marti.Ellermann@suny.edu

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Appointment, Promotion, Vacation and Sick Leave Accruals of Professional Staff Employees of the State University of New York

**I.D. No.** SUN-40-08-00020-A

**Filing No.** 1136

**Filing Date:** 2008-11-18

**Effective Date:** 2008-12-03

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of sections 335.8(a), 335.14, 336.7, 337.2, 337.7, 337.10 and 355.15(g), (h); and addition of sections 326.1(p) and 335.14(f) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 353, 355 and 355-a

**Subject:** Appointment, promotion, vacation and sick leave accruals of professional staff employees of the State University of New York.

**Purpose:** To conform rules of the State University to agreements reached during collective bargaining.

**Text or summary was published** in the October 1, 2008 issue of the Register, I.D. No. SUN-40-08-00020-P.

**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** Michael D. Morgan, Senior System Counsel, State University of New York, University Plaza, S-319, Albany, New York 12246, (518) 443-5886, email: Michael.Morgan@SUNY.edu

#### Assessment of Public Comment

The agency received no public comment.

## Office of Temporary and Disability Assistance

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Child Support

**I.D. No.** TDA-49-08-00018-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** This is a consensus rule making to amend section 347.24 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3), 111-a and 111-b

**Subject:** Child Support.

**Purpose:** Reflect the revised case closure criteria as set forth in the Federal Department of Health and Human Services regulations.

**Text of proposed rule:** Section 347.24 of Title 18 NYCRR is amended to read as follows:

(a) *The Division of Child Support Enforcement within the Office of Temporary and Disability Assistance shall establish a system for case closure.*

(b) In order to be eligible for closing, a child support case must meet at least one of the following criteria:

(1) [in the case of a child who has reached the age of majority,] there is no longer a current support order and arrears are less than \$500 or unenforceable under State law;

(2) in the case of a child who has not reached the age of majority, there is no longer a current support order and arrears are less than \$500 or unenforceable under State law;

(3) (2) the [absent parent/putative] *noncustodial parent or putative father* is deceased and no further action, including a levy against the estate, can be taken;

[(4)] (3) paternity cannot be established because:

(i) the child is at least 21 years old in this State [or at least 18 years old in a responding state,] and an action to establish paternity is barred by [the] *an applicable statute of [limitation] limitations;*

(ii) a genetic test or a court or administrative process has excluded the putative father as the father of the child and no other putative father of such child can be identified; [or]

(iii) in accordance with section 347.6(a) of this Part, [it] *the child support enforcement unit* has [been] determined that it would not be in the best interests of the child to establish paternity in a case involving incest or forcible rape, or in any case where legal proceedings for adoption are pending; or

(iv) *the identity of the biological father is unknown and cannot be identified after diligent efforts, including at least one interview by the child support enforcement unit with the recipient of child support services;*

[(5)] the absent parent's location is unknown and regular attempts have been made unsuccessfully, using multiple sources, to locate the absent parent over a three-year period;]

(4) *the noncustodial parent's location is unknown and the child support enforcement unit has made diligent efforts using multiple sources, in accordance with section 347.7 of this Part, all of which have been unsuccessful, to locate the noncustodial parent:*

(i) *over a three-year period when there is sufficient information to initiate an automated locate effort; or*

(ii) *over a one-year period when there is not sufficient information to initiate an automated locate effort;*

[(6)] (5) the [absent] *noncustodial parent* cannot pay support for the duration of the child's minority because the parent has been institutionalized in a psychiatric facility, is incarcerated with no chance for parole, or has a medically verified total and permanent disability with no evidence of support potential. [It also] *The child support enforcement unit* must [be determined] *determine* that no income or assets are available to the [absent] *noncustodial parent* which could be levied upon or attached for support;

[(7)] (6) the [absent] *noncustodial parent* is a citizen of, and lives in, a foreign country, does not work for the Federal government or a company with headquarters or offices in the United States, and has no reachable domestic income or assets, and this State has been unable to establish reciprocity with [such foreign] *the country;*

[(8)] (7) the [custodial parent not in receipt of ADC has requested and has been] *Division of Child Support Enforcement within the Office of Temporary and Disability Assistance or the child support enforcement unit has provided location-only services to the resident parent, legal guardian, attorney, or agent of a child who is not receiving public assistance;*

[(9)] (8) the [custodial parent not in receipt of ADC] *non-public assistance recipient of child support services* requests closing of [a] *their* case and there is no assignment to the State of medical support or arrears which accrued under [the] *a support order;*

[(10)] (9) there has been a finding of good cause *or other exceptions to cooperation* as set forth in section 347.5 of this Part and the appropriate unit of the social services district has determined that support enforcement may not proceed without risk [or] *of harm to the child or caretaker relative;*

[(11)] (10) in a *non-public assistance* case [in which the custodial parent and child are not in receipt of ADC,] *receiving child support services or in a non-public assistance Medicaid case when cooperation with the child support enforcement unit is not required of the recipient of services, in which the child support enforcement unit is unable to contact the [custodial parent] recipient of child support services* within a [30] *60-calendar-day period despite [attempts by both telephone and,] an attempt of at least[,] one [certified] letter [with return receipt requested] sent by first class mail to the last known address; [or]*

[(12)] (11) in a *non-public assistance* case in receipt of child support services [which the custodial parent and child are not in receipt of ADC] *or in a non-public assistance Medicaid case when cooperation with the child support enforcement unit is not required of the recipient of services, the child support enforcement unit documents the circumstances of the [custodial parent's failure to cooperate] recipient of child support services's noncooperation with the child support enforcement unit and an action by the [custodial parent] recipient of child support services is essential for the next step in providing child support services[.]; or*

(12) *the child support enforcement unit documents failure by the initiating State to take an action which is essential for the next step in providing services.*

[(b)] (c) In cases meeting the criteria in paragraphs [(a)] (b) (1) through [(7)] (6) and [(11)] (10) [and] *through (12) of this section, the child support enforcement unit must notify the [custodial parent of the intent to close the case,] recipient of child support services, or in an interstate case meeting the criteria for case closing under (b) (12), the initiating State, in writing, 60 calendar days prior to closure of the case of the child support enforcement unit's intent to close the case. The case must be kept open if [, in response to the notice,] the [custodial parent] recipient of child support services or the initiating State supplies information which could lead to the establishment of paternity or a support order, or enforcement of an order, or, in the instance of paragraph [(a)(11)] (b) (10) of this section, if contact is re-established with the [custodial parent] recipient of child support services. If the case is closed, the [custodial parent] former recipient of child support services may request at a later date that the case be reopened, if there is a change in circumstances which could lead to the establishment of paternity or a support order or enforcement of [a support] an order by completing a new application for child support services and paying any applicable application fee.*

[(c)] (d) The child support enforcement unit must retain all records for cases closed pursuant to this section for a minimum of [six] *three* years.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Consensus Rule Making Determination

The Office of Temporary and Disability Assistance (OTDA) is proposing amendments to 18 NYCRR § 347.24, which governs the criteria for closing cases within the New York State child support enforcement program. This rule reflects the revised case closure criteria as set forth in the federal Department of Health and Human Services regulations at 45 CFR § 303.11. OTDA has determined that no person is likely to object to the adoption of the proposed rule as written. The revised regulation does not reflect discretion exercised by OTDA. Thus the proposed amendments are not establishing new criteria. Instead they are setting forth existing requirements. Thus the proposed amendments will conform 18 NYCRR § 347.24 to current federal regulation. It is expected that no person will object to the proposed amendments contained in this consensus rule since the amendments are necessary to comply with the federal regulation.

#### Job Impact Statement

A job impact statement has not been prepared for the proposed regulatory amendments. It is evident from the subject matter of the amendments that the jobs of the persons making the decisions required by the proposed amendments will not be affected in any real way. Thus, the changes will not have any impact on jobs and employment opportunities in the State.

## Worker's Compensation Board

### PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Suspension and Resumption of Benefits

I.D. No. WCB-49-08-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

**Proposed Action:** Amendment of section 300.23 and addition of section 300.35 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 10(4), 15(3)(w) and 117

**Subject:** Suspension and resumption of benefits.

**Purpose:** To set forth the requirements for the suspension and resumption of benefits of incarcerated felons.

**Text of proposed rule:** Section 300.23 of Title 12 NYCRR is hereby amended to read as follows:

(a) In any case where the carrier or employer has made payment without waiting for an award by the board, the filing of a form C-8/8.6 with the chair[man] by a carrier or an employer is not authority to suspend or reduce payments of compensation [for temporary or permanent disability in an open and pending claim] unless there accompanies it supporting evidence that the suspension or reduction of payment is in order, such as:

(1) a copy of the payroll report if the compensation rate is not based on information contained in the C-2 and is below the maximum;

(2) medical or other reports (including notice of return to work) justifying the suspension or reduction of payments, or by indicating on such notice the name and date of the medical or other reports, if they have been previously filed[.]; *or*

(3) *proof of incarceration upon conviction of a felony, which allows for the suspension of both wage replacement benefits and payment for causally related medical treatment.*

(b) In [an] *any* [open] case where [an award has been made for temporary or permanent disability] *the board has made an award of compensation for a temporary total or temporary partial disability* at an established rate of compensation, and there is a direction for continuation of payments, the employer or carrier shall continue payments at such rate [beyond the period covered by the award], and such payments shall not be suspended or reduced until:

(1) there is filed with the [chairman] *chair* in the district office where the case is [pending] *assigned*, a notice of intention to suspend or reduce on a prescribed form accompanied by supporting evidence justifying such suspension or reduction together with proof of mailing of copies thereof upon the claimant, his/her doctor and his/her representative, and,

(2) the [chairman] *chair*, upon receipt of above, has scheduled a hearing *or meeting or conference* on the issue within 20 days during any period when regular hearings *or meetings or conferences* are scheduled, and there is a [determination by the referee and] finding that such suspension or reduction is justified. At said hearing *or meeting or conference*, if either party fails to appear or fails to submit any evidence as to the above issue, the [referee] *board* shall take such action as [he deems proper] *is appropriate* under the circumstances including continuation, suspension or reduction of the award. Cases at hearing points which do not have regularly scheduled hearings *or meetings or conferences* within the 20 days, may be scheduled at another available hearing point.

(3) Notwithstanding any provision to the contrary in this subdivision, the employer or carrier upon the filing of a form C-8/8.6 may suspend or reduce such payments:

(i) where a notice of return to work (form C-11), or other written substantial legal evidence of claimant's return to work, has been filed with the [chairman] *chair*, or

(ii) where the supporting evidence submitted therewith includes payroll records for at least two calendar weeks which warrant such suspension or reduction, or

(iii) where the claimant's medical evidence indicates that the claimant has no disability[.] or

(iv) where supporting evidence submitted therewith includes proof of incarceration upon conviction of a felony.

(c) (1) In any [closed] case where the board has made an award for compensation [has been made] for permanent total or permanent partial disability, payments shall not be suspended or modified until an application on a prescribed form[.] accompanied by supporting evidence, is made [to reopen the claim] to reconsider the degree of impairment or wage-earning capacity together with proof of mailing of copies thereof upon the claimant, his/her doctor and his/her representative and [there has been] the board has made a final determination of such application [by the board], finding that such suspension or modification is justified; provided, however, that if such supporting evidence includes [payrolls] payroll records which show earnings for at least eight weeks immediately prior to the date of the application which warrant modification of the rate fixed and evidence identifying the claimant as the person whose [payrolls] payroll records are being submitted, the employer or carrier shall continue to pay compensation at such modified rate as the evidence submitted indicates is proper, or may suspend payments if the evidence submitted supports such suspension, pending final determination of the application by the board.

(2) Notwithstanding any provision to the contrary in this subdivision, the employer or carrier may stop, suspend or reduce such payments:

(i) where supporting evidence includes proof of incarceration upon conviction of a felony, or

(ii) where compensation payable for permanent partial disability has reached the maximum benefit weeks allowed pursuant to Workers' Compensation Law Section 15(3)(w).

In either of the above circumstances, the employer or carrier must file form C-8/8.6 with the board within sixteen days of stopping such payments in accordance with Workers' Compensation Law Section 25(1)(d).

(3) Payment of death benefits shall not be suspended unless an application on a prescribed form [to reopen the claim] is made, accompanied by supporting evidence, and the board approves such suspension.

(d) Whenever an employer or carrier shall terminate medical care or refuse authorization for special medical services, prescribed form C-8.1 Part A, [Notice of Termination of Care or Refusal of Authorization] Notice of Treatment Issues(s)/Disputed Bill Issue(s), shall be completed and filed with the [chairman] chair within five days after such termination or refusal, together with:

(1) medical report by authorized physician that need for medical care has ended;

(2) copy of notice to claimant's physician to discontinue medical care, or to refrain from commencing medical care, together with report of authorized physician establishing basis of discontinuance or refusal; and

(3) proof of mailing notice under paragraph (2) of this subdivision to the claimant and his physician.

(e) In any case in which a penalty has been imposed arising out of the failure to make payment of compensation according to the terms of the award within 10 days thereafter, the employer or his insurance carrier must file notice with the [chairman] chair, on board form C-8/8.6, of the payment of such penalty within 10 days after the imposition thereof.

Section 300.35 is added to 12 NYCRR to read as follows:

**300.35 Resumption of Benefits upon release from custody**

All those whose benefits have ceased by operation of Workers' Compensation Law section 10(4) may apply to the board for resumption of benefits upon their release from custody, by providing notice to the board of release from custody on a request for further action, Form RFA-1, and accompanied by the following information:

(a) proof of release from custody, and

(b) up to date medical evidence where the claimant has not, as of the date of conviction, been classified as permanently partially disabled.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl M Wood, Special Counsel to the Chair, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 45 days after publication of this notice.

#### Regulatory Impact Statement

##### 1. Statutory Authority:

The Workers' Compensation Board (Board) is authorized to amend 12 NYCRR § 300.23, and add 12 NYCRR § 300.35. Workers' Compensation Law (WCL) § 117(1) authorizes the Board to adopt reasonable rules and regulations consistent with and supplemental to, the provisions of the WCL and Labor Law. WCL § 10(4) provides that any person incarcerated upon conviction of a felony shall be deemed ineligible for all benefits provided under this chapter. All those whose benefits have ceased by

operation of this section may apply to the Board for benefits upon their release from custody pursuant to regulation of the Board. WCL § 15(3)(w) provides a limit to the number of weeks permanent partial disability benefits are payable based upon the claimant's degree of impairment where the date of accident or disability is on or after March 13, 2007.

##### 2. Legislative Objectives:

Chapter 6, § 37 of the Laws of 2007, added a new subdivision 4 to section 10 of the WCL to deem ineligible for all benefits under the WCL those persons incarcerated upon conviction of a felony. The law further provides that upon release from custody, these individuals may apply to the Board for reinstatement of their benefits pursuant to regulation of the Board. The provision codified existing case law, except that it allows carriers and self-insured employers to suspend causally related medical treatment in addition to wage replacement benefits. Section 4 of Chapter 6 amended WCL § 15(3)(w) to create a schedule of maximum number of weeks that a claimant classified with a permanent partial disability, with a date of accident or date of disability on or after March 13, 2007, may receive indemnity benefits. The maximum number of weeks range from 225 weeks where the loss of wage-earning capacity is 15 percent or less, to 525 weeks where the loss of wage-earning capacity is greater than 95 percent.

##### 3. Needs and Benefits:

Section 300.23 governs the requirements to suspend or reduce compensation benefits. The proposal amends several portions of § 300.23. There are five categories of changes: 1) amendments necessary to achieve compliance with the statutory changes made by the 2007 workers' compensation reform legislation; 2) amendments so the regulation reflects current Board practice; 3) structural amendments; 4) amendments that change the wording of a provision for clarity; and 5) amendments that make the rule gender neutral.

##### Reform Changes:

The 2007 reform legislation codified case law that claimants who are incarcerated after conviction for a felony are no longer entitled to indemnity benefits. In addition, the reform legislation eliminated the entitlement to medical benefits. The 2007 reform legislation also amended the WCL to cap the number of weeks that claimants classified with permanent partial disabilities may receive indemnity benefits. After the completion of the number of weeks set in WCL § 15(3)(w), the claimant is no longer entitled to indemnity benefits. Section 300.23 has been amended in several places to reflect the ability of the carrier to suspend or reduce compensation benefits where there is proof of incarceration upon conviction of a crime. Subsection (c) of section 300.23 has been amended by adding a new subparagraph (ii) to allow carriers to suspend payments for permanent partial disability when payments have reached the maximum number of benefit weeks under WCL § 15(3)(w). These amendments provide uniform procedures on how insurance carriers must proceed to stop paying benefits pursuant to the new provisions.

##### Practice Changes:

The Board no longer refers to compensation cases as being open or closed. Cases are pending or they are marked no further action. 12 NYCRR § 300.23 is being amended in several places to delete the words open, closed and reopen. Section 300.23(b) is being amended to delete the word open and to make clear that the subsection applies to any case where temporary disability awards have been made. Section 300.23(c) is amended to delete the word closed and to clarify that the subsection applies to awards for permanent disability. These changes align the regulation with current practices.

The Board decides issues in compensation cases in several other ways besides holding hearings. Issues related to settlement agreements under WCL § 32 are handled at meetings, and conferences are held in an attempt to settle issues prior to scheduling a hearing. Section 300.23(b)(2) is being amended to reflect that the Board conducts business via the use of meetings and conferences in addition to hearings. Again, these changes align the regulation with actual practice.

Issues in compensation claims in certain circumstances are decided by conciliators as well as referees. The word referee in § 300.23(b)(2) is being replaced with the word Board so as not to limit the type of employee involved in resolving compensation claims. This change allows the Board to make full use of the statutorily provided tools to resolve cases.

##### Structural Changes:

Section 300.23 is a lengthy rule that addresses a variety of situations pertaining to suspending or reducing benefits. Several changes have been proposed to help make the rule easier to navigate. The first un-numbered paragraph in § 300.23(b) has been numbered as paragraph (3), and lists the situations where temporary disability payments may be suspended by a carrier without a hearing. A paragraph has been added to § 300.23(c) to delineate the situations where a carrier can suspend permanent disability payments without a hearing. These changes will improve the readability of the regulation.

Clarity:

Some of the wording in § 300.23 is cumbersome. Words have been changed or rearranged to make the rule easier to read and understand. These changes can be found at § 300.23(b), § 300.23(b)(1) and (2), and § 300.23(c). These changes will also improve the readability of the regulation so it is easily understood.

#### Gender Neutral Changes:

Section 300.23 has been amended in several places to replace chairman with chair and to replace his with his/her.

Section 300.35 is added by this proposal to 12 NYCRR to provide direction to a claimant recently released from custody on how to reapply for benefits. The issuance of such regulation is required by the recently enacted WCL § 10(4). The addition of 12 NYCRR § 300.35 will benefit claimants released from custody by providing a process for reapplying for benefits.

This regulation provides needed direction to parties and practitioners regarding the action they may or must take when suspending or reducing benefits or seeking the resumption of benefits. By following this regulation, parties and practitioners will respond properly when a claimant is incarcerated for a felony or he/she reaches the maximum number of weeks to receive benefits.

#### 4. Costs:

The Board estimates there will be little or no additional costs as a result of the amendments of § 300.23 and the addition of § 300.35. While the Board will have to scan the notice of release from custody and the accompanying information into the electronic case folder, the number of documents will be small as only a small number of claimants have their benefits suspended due to incarceration for a felony.

Costs may be reduced for carriers and self-insured employers because there will be clear direction on the actions carriers must take when a claimant is incarcerated after conviction. Further it is now clear that carriers and self-insured employers are no longer responsible for causally related medical expenses while claimants are incarcerated upon conviction of a felony.

New § 300.35 instructs claimants on how to reapply for benefits following their release from custody. The addition will not result in any added or reduced costs for the parties. The carriers' and self insured employers' resumption of benefits is not an added cost but a payment of causally related benefits under the WCL.

#### 5. Local Government Mandates:

There are approximately 2300 local governments that are self-insured for workers' compensation purposes. The proposed amendments to § 300.23 and proposed addition of § 300.35 do not impose any additional responsibilities or duties on local governments. Section 300.23 relieves local governments from having to pay for causally related medical treatment while the claimant is incarcerated upon conviction of a felony. Section 300.35 provides a process for claimants released from custody to reapply for benefits. The resumption of benefits after release from custody provided adequate proof is supplied, is not an additional responsibility for local governments but rather is already required under the WCL.

#### 6. Paperwork:

The amendments to § 300.23 will require the carrier or self-insured employer to file an application or a C-8/8.6 to suspend benefits together with proof of the claimant's incarceration upon conviction of a felony. The carrier or self-insured employer will also have to file a C-8/8.6 to suspend payments based when the cap on permanent partial disability benefits is reached. This provision reiterates the requirement in WCL § 25(1)(d) that carriers and self-insured employers must provide notice to the Board that the payment of compensation has ceased upon a form prescribed by the Chair.

In order to resume benefits, § 300.35 will require a claimant released from custody to file a form prescribed by the Board together with proof of release from custody, and up to date medical evidence where the claimant has not, as of the date of conviction, been classified with a permanently partially disability. However this is the current practice so this provision merely codifies existing law and practice.

#### 7. Duplication:

This rule does not duplicate any existing state or federal rules. This merely sets forth the process to implement amendments to WCL § 10(4) and § 15(3)(w).

#### 8. Alternatives:

The alternative to amending § 300.23 and creating § 300.35 would be to do nothing and rely on the newly enacted WCL § 10(4), and the newly amended WCL § 15(3)(w). This course of action is unsatisfactory because the statutes do not outline a procedure as to how a carrier or self-insured employer should suspend benefits, and § 10(4) specifically requires the Board to issue regulations on the process for reinstatement of benefits following incarceration. The requirements relative to suspension of compensation benefits are contained in 12 NYCRR § 300.23, which is the proper place to include the procedure for how a carrier or self-insured employer can suspend benefits for a claimant incarcerated upon conviction of a felony or for a claimant who has received the permanent partial disability

payments for the maximum number of weeks. WCL § 10(4) provides that claimants whose benefits have ceased by operation of that provision may apply to the Board for benefits pursuant to a regulation of the Board, thereby clearly contemplates rulemaking by the Board and making the addition of § 300.35 mandatory. The Board seeks to implement the simplest process for the resumption of benefits for those whose benefits ceased pursuant to § 10(4).

#### 9. Federal Standards:

There are no federal standards applicable.

#### 10. Compliance Schedule:

Affected parties will be able to achieve compliance with the rule upon adoption.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

The rule amends § 300.23 to require self-insured employers, insurance carriers, the State Insurance Fund and Third Party Administrators to file certain forms and certain evidence to suspend or stop workers' compensation benefits when a claimant is incarcerated for a felony or has reached the maximum number of benefits weeks under Workers' Compensation Law § 15(3)(w) for a permanent partial disability. The amendments also conform the rule to current practice, improve the structure of the rule and insert gender neutral and clearer language. Small businesses cannot be individually self-insured but must purchase coverage from the State Insurance Fund or private insurance carrier, or join a group self-insured trust. While neither the State Insurance Fund nor private insurance carriers are considered small employers, some group self-insured trusts and Third Party Administrators are small employers and will have to comply with this rule. There are approximately 70 active and inactive groups with claims and there are over 100 Third Party Administrators licensed by the Board, some of which are local governments. The rule changes will also affect all local governments, including the approximately 2300 that are self-insured for workers' compensation. However, if a small business or local government is not self-insured, the insurance carrier or State Insurance Fund is responsible for ensuring compliance with this rule.

#### 2. Compliance Requirements:

To comply with the changes to 12 NYCRR § 300.23, and in order to suspend benefits, the State Insurance Fund, private insurance carriers, group self-insured trusts, self-insured local governments and the attorneys or third party administrators they may hire, some of which may be small businesses, will have to file the required form and appropriate evidence. The forms are what all businesses, carriers, and self-insureds would file in any other circumstance to suspend benefits and are not burdensome. The additional amendments to § 300.23, which include changes to conform to the Board's current practice, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate, do not impose any burden.

When a claimant files an application to resume benefits after release from custody, pursuant to § 300.35, all small businesses and self-insured local governments will proceed as they normally would when a claimant seeks to resume benefits. The addition of § 300.35 will not alter the process.

#### 3. Professional Services:

As stated above, small businesses must be covered for workers' compensation by the State Insurance Fund, or a private insurance carrier or group self-insured trust, whose responsibility it is to either handle such matters or retain the services of attorneys or third party administrators. Such attorneys and third party administrators handle these matters regularly and the modifications and additions from these amendments do not deviate from standard workers' compensation procedures and practice. It is not anticipated that small businesses and self-insured local governments will have to secure additional professional services in order to comply with the rule changes.

#### 4. Compliance Costs:

Compliance costs for small businesses and self-insured local governments would include filing applications to suspend payments. These particular costs should be minimal as small businesses and self-insured local governments already file the same forms for when seeking to reduce or suspend payments for other reasons. Small businesses and self-insured local governments would save money by complying with the proposed changes to § 300.23 because under the proposed changes and the newly enacted WCL § 10(4), and newly amended WCL § 15(3)(w), small businesses and self-insured governments no longer have to provide causally related medical treatment to claimants who are incarcerated upon conviction of a felony, and will no longer have to indefinitely pay permanent partial disability benefits. The Board does not know how much savings will be generated by eliminating the requirement to provide medical treatment when a claimant is incarcerated for a felony as it does not collect medical cost data. The Board also does not know how much will be saved due to the limitation on the maximum number of benefit weeks of permanent partial disability claims as it does not know how the cases will be

distributed over the schedule of maximum number of benefit weeks. However, in its 2007 rate filing with the New York State Insurance Department, the Compensation Insurance Rating Board (CIRB) estimated that the caps would result in a 28% decrease in rates. The Insurance Department approved a 20.5% rate decrease in 2007, which the Department estimated would save about \$1 billion in the 2007-2008 fiscal year. Based on CIRB's estimates, a large portion of the savings is due to capping of permanent partial disability benefits. The additional amendments to § 300.23 which include changes to conform to the Board's current practice, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate, should not result in any compliance costs for small businesses and self-insured employers.

#### 5. Economic and Technological Feasibility:

The economic costs for this rule change are negligible and it is expected that small businesses and self-insured employers will be able to comply with the changes without any new technology.

#### 6. Minimizing Adverse Impact:

The proposal to amend § 300.23 and add § 300.35 will not cause an adverse impact on any small business or self-insured local governments. Section 300.23 outlines procedures governing when a carrier or self-insured employer can suspend benefits following a claimant's incarceration upon conviction of a felony and upon the claimant reaching the proscribed number of benefit weeks for a permanent partial disability. Procedures on how and when a carrier or self-insured employer can suspend benefits are already contained in § 300.23. The rule is amended to include a claimant's incarceration upon conviction of a felony, and the claimant's reaching the maximum number of benefit weeks for a permanent partial disability as reasons a carrier or self-insured employer may suspend benefits. The additional amendments to § 300.23 which include changes to conform to the Board's current policy, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate, should not result in an adverse impact.

The addition of § 300.35 will not cause an adverse impact on small businesses or self-insured local governments. WCL § 10(4) directs the Board to create a regulation providing for a procedure whereby claimants released from custody can apply to the Board to resume payments. A claimant has always had the opportunity to reapply for benefits following his/her release from incarceration, and § 300.35 merely outlines what a claimant is required to do in order to reapply for benefits.

#### 7. Small Business and Local Government Participation:

The rule was reviewed by the Business Council of New York State which represents businesses, including small businesses across New York State, and the American Federal of Labor - Congress of Industrial Organization (AFL-CIO), which represents labor. Neither organization had any objection to the rule.

#### **Rural Area Flexibility Analysis**

##### 1. Types and estimated number of rural areas:

The proposed changes will apply to all carriers, the State Insurance Fund, self-insured employers and claimants including those located in rural areas.

##### 2. Reporting, recordkeeping and other compliance requirements; and professional services:

To comply with the changes to 12 NYCRR § 300.23 and suspend benefits, insurance carriers, the State Insurance Fund and self-insured employers, including those located rural areas, will be required to file applications for suspension. The applications are similar to what carriers and self-insured employers file in any other circumstance to suspend benefits and will not be burdensome. The additional amendments to § 300.23, which include changes to conform to the Board's current practice, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate, are not burdensome to carrier's and self-insured employers, wherever located, including those in rural areas.

When a claimant files an application to resume benefits after release from custody, pursuant to § 300.35, insurance carriers and self-insured employers will proceed as they normally would when a claimant seeks to resume benefits. The addition of § 300.35 will not alter the process. Further, Workers' Compensation Law (WCL) § 10(4) requires the Board to adopt regulations establishing a process for the resumption of benefits. Without receiving notice from the claimant and proof of release, neither the Board nor the carrier or self-insured employer will know that benefits possibly should resume.

In order to comply with the proposed changes to § 300.23 and the addition of § 300.35 insurance carriers and self-insured employers will most likely utilize the services of attorneys, or third party administrators they already use to handle workers' compensation issues. It is not anticipated that insurance carriers and self-insured employers, including those located in rural areas, will have to secure additional professional services in order to comply with the rule changes.

##### 3. Costs:

Compliance costs for insurance carriers and self-insured employers, including those located in rural areas, would include filing applications to suspend payments, and opposing applications to resume benefits. These particular costs should be minimal as insurance carriers and self-insured employers are already set up to deal with these types of situations. Insurance carriers and self-insured employers, including those located in rural areas, will save money by complying with the proposed changes because under the proposed changes and the newly enacted WCL § 10(4) and newly amended WCL § 15(3)(w), small businesses and self-insured governments no longer have to provide causally related medical treatment to claimants who are incarcerated upon conviction of a felony, and will no longer have to indefinitely pay for permanent partial disability benefits.

The additional amendments to section § 300.23 which include changes to conform to the Board's current policy, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate should not result in any additional costs to carriers and self-insured employers including those located in rural areas.

##### 4. Minimizing adverse impact:

The proposal to amend § 300.23 and add § 300.35 will not cause an adverse impact on insurance carriers and self-insured employers, including those located in rural areas. Section 300.23 outlines procedures for when a carrier or self-insured employer can suspend benefits following a claimant's incarceration upon conviction of a felony and upon the claimant reaching the proscribed number of benefit weeks for a permanent partial disability. Procedures on how and when a carrier or self-insured employer can suspend benefits are already contained in § 300.23. The rule is amended to include a claimant's incarceration upon conviction of a felony and the claimant's reaching the maximum number of benefit weeks for a permanent partial disability as reasons a carrier or self-insured employer may suspend benefits. The additional amendments to § 300.23 which include changes to conform to the Board's current practice, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate, should not result in an adverse impact on insurance carrier and self-insured employers, including those located in rural areas.

The addition of § 300.35 will not cause an adverse impact on insurance carriers or self-insured employers, including those located in rural areas. WCL § 10(4) directs the Board to create a regulation providing for a procedure whereby claimants released from custody can apply to the Board to resume payments. A claimant has always had the opportunity to reapply for benefits following his/her release from incarceration, and § 300.35 merely outlines what a claimant is required to do in order to reapply for benefits.

##### 5. Rural area participation:

The rule was reviewed by the Business Council of New York State which represents businesses, including those located in rural areas across New York State. The Business Council had no objections to the rule. The rule was also reviewed by the AFL-CIO on behalf of injured workers, which did not have any objections.

#### **Job Impact Statement**

The amendment to § 300.23 will add the claimant's incarceration upon conviction of a felony and the claimant reaching the maximum number of benefit weeks for a permanent partial disability as reasons a carrier or self-insured employer may suspend benefits. The amendments to § 300.23 also include changes to conform to the Board's current practice, the addition of gender neutral language, and changes to the wording and the format of § 300.23 in order to make the rule easier to understand and navigate. The addition of § 300.35 outlines the steps a claimant must take in order to reapply for benefits after release from custody. It is apparent from the nature and purpose of the rules that there will be no substantial adverse impact on jobs or employment, and therefore a Job Impact Statement is not required.