

RULE MAKING ACTIVITIES

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; or C for first Continuation.)

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

Education Department

NOTICE OF ADOPTION

Mentoring Programs

I.D. No. EDU-05-03-00007-A

Filing No. 1277

Filing date: Nov. 18, 2003

Effective date: Dec. 4, 2003

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

Action taken: Amendment of section 100.2(dd)(2) and (5) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1), (2) and (7), 3004(1) and 3604(8)

Subject: Mentoring programs at school districts and BOCES.

Purpose: To require school districts and boards of cooperative educational services to include a mentoring program for new teachers in their professional development plans covering the time period, Feb. 2, 2004 and thereafter.

Text of final rule: 1. Paragraph (2) of subdivision (dd) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 4, 2003, as follows:

(2) Content of the plan. The professional development plan shall be structured in a format consistent with commissioner's guidelines and shall include:

- (i) . . .
- (ii) . . .
- (iii) provision for the training of employees holding a teaching certificate or license in the classroom teaching service, school service, or administrative and supervisory service in school violence prevention and intervention. Each such employee shall be required to complete at least one training course in school violence prevention and intervention, which shall consist of at least two clock hours of training that includes but is not limited to, study in the warning signs within a developmental and social context that relate to violence and other troubling behaviors in children; the statutes, regulations, and policies relating to a safe nonviolent school climate; effective classroom management techniques and other academic supports that promote a nonviolent school climate and enhance learning; the integration of social and problem solving skill development for students within the regular curriculum; intervention techniques designed to address a school violence situation; and how to participate in an effective school/community referral process for students exhibiting violent behavior. Upon request of the employee who successfully completes such training course, the school district or board of cooperative educational services shall provide the employee with a certificate of completion attesting to the completion of the two clock hours of training in school violence prevention and intervention [.] ; and

(iv) for plans covering the time period, February 2, 2004 and thereafter, provision for a mentoring program.

(a) *The purpose of the mentoring program shall be to provide support for new teachers in the classroom teaching service in order to ease the transition from teacher preparation to practice, thereby increasing retention of teachers in the public schools, and to increase the skills of new teachers in order to improve student achievement in accordance with the State learning standards.*

(b) *The professional development plan shall describe how the school district or BOCES will provide a mentoring program for teachers in the classroom teaching service who must participate in a mentoring program to meet the teaching experience requirement for the professional certificate, as prescribed in section 80-3.4 of this Title.*

(c) *The mentoring program shall be developed and implemented consistent with any collective bargaining obligation required by Article 14 of the Civil Service Law, provided that nothing herein shall be construed to impose a collective bargaining obligation that is not required by Article 14 of the Civil Service Law.*

(d) *The information obtained by a mentor through interaction with the new teacher while engaged in the mentoring activities of the program shall not be used for evaluating or disciplining the new teacher; unless withholding such information poses a danger to the life, health, or safety of an individual, including but not limited to students and staff of the school; or unless such information indicates that the new teacher has been convicted of a crime, or has committed an act which raises a reasonable question as to the new teacher's moral character; or unless the school district or BOCES has entered into an agreement, negotiated pursuant to Article 14 of the Civil Service Law whose terms are in effect, that provides that the information obtained by the mentor through interaction with the new teacher while engaged in the mentoring activities of the program may be used for evaluating or disciplining the new teacher.*

(e) *The professional development plan shall describe the following elements of the mentoring program:*

(1) *the procedure for selecting mentors, which shall be published and made available to staff of the school district or BOCES and upon request to members of the public;*

(2) the role of mentors, which shall include but not be limited to providing guidance and support to the new teacher;

(3) the preparation of mentors, which may include but shall not be limited to the study of the theory of adult learning, the theory of teacher development, the elements of a mentoring relationship, peer coaching techniques, and time management methodology;

(4) types of mentoring activities, which may include but shall not be limited to modeling instruction for the new teacher, observing instruction, instructional planning with the new teacher, peer coaching, team teaching, and orienting the new teacher to the school culture; and

(5) time allotted for mentoring, which may include but shall not be limited to scheduling common planning sessions, releasing the mentor and the new teacher from a portion of their instructional and/or non-instructional duties, and providing time for mentoring during superintendent conference days, before and after the school day, and during summer orientation sessions.

2. Paragraph (5) of subdivision (dd) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective December 4, 2003, as follows:

(5) Recordkeeping [requirement] requirements.

(i) School districts and BOCES shall be required to maintain a record of professional development successfully completed by certificate holders, who are subject to the professional development requirement prescribed in section 80-3.6 of this Title, and who take professional development offered by the school district or BOCES or by entities on behalf of the school district or BOCES. Such record shall include: the name of the professional certificate holder, his or her teacher certification identification number, the title of the program, the number of hours completed, and the date and location of the program. Such record shall be retained by the school district or BOCES for at least seven years from the date of completion of the professional development by the professional certificate holder and shall be available for review by the department.

(ii) School districts and BOCES shall maintain documentation of the implementation of the mentoring program described in the professional development plan. Such documentation shall include for each individual receiving mentoring pursuant to the mentoring program: the name of that individual, his or her teacher certificate identification number, the type of mentoring activity, the number of clock hours successfully completed in the mentoring activity, and the name and the teacher certificate identification number of the individual who provided the mentoring. Such record shall be maintained by the school district or BOCES for at least seven years from the date of completion of the mentoring activity and shall be available for review by the department.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 100.2(dd)(2)(iv)(e)(4).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on February 5, 2003 and the Notice of Continuation on July 16, 2003, the following nonsubstantial revision was made to the proposed rule:

Section 100.2(dd)(2)(iv)(e)(4) was revised to clarify the regulation by adding team teaching as an example of a mentoring activity that may be included, among others, in the mentoring program of a school district or BOCES.

The above revision to the proposed rule does not require any changes to the previously published Regulatory Impact Statement.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on February 5, 2003 and the Notice of Continuation on July 16, 2003, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

This revision to the proposed rule does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments or Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on February 5, 2003 and the Notice of Continuation on July 16, 2003, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The purpose of the proposed amendment, as revised, is to require school districts and boards of cooperative educational services (BOCES) to include a mentoring program for new teachers in their professional development plans covering the time period, February 2, 2004 and thereafter. The new teacher certification requirements state that candidates for the professional certificate must have three school years of teaching experience. For candidates who complete this requirement in total or in part through teaching in New York public schools, the teaching experience must include participation in a mentoring program in the first year in most cases. The proposed amendment, as revised, is needed to implement this new teacher certification requirement.

The amendment, as revised, can only have a positive impact on the number of jobs and employment opportunities in teaching. Where school districts and BOCES permit mentors and new teachers release time from their regular teaching duties, additional teaching staff may have to be hired to fulfill these teaching responsibilities. In addition, the amendment, as revised, will assist new teachers to meet teacher certification requirements, and the mentoring of new teachers will encourage them to remain in the profession.

Because it is evident from the nature of the rule, as revised, that it could only have a positive impact on 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, and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

School Bus Monitors and Attendants

I.D. No. EDU-34-03-00009-A

Filing No. 1279

Filing date: Nov. 18, 2003

Effective date: Dec. 4, 2003

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

Action taken: Amendment of section 156.3(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3624 (not subdivided); Vehicle and Traffic Law, section 1229-d(3); and L. 2003, ch. 159

Subject: Requirements for school bus monitors and attendants.

Purpose: To clarify the training and testing requirements for school bus monitors and attendants.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-34-03-00009-P, Issue of August 27, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Mandatory Continuing Education Requirements for Professional Engineers

I.D. No. EDU-35-03-00008-A

Filing No. 1275

Filing date: Nov. 18, 2003

Effective date: Jan. 1, 2004

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

Action taken: Addition of section 68.11 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided); 212(3); 6502(1); 6504 (not subdivided); 6507(2)(a); 6508(1); 7211(1)(a)-(d), and (2)-(6); and L. 2002, ch. 146, section 2

Subject: Mandatory continuing education for professional engineers.

Purpose: To establish continuing education requirements and standards that licensed professional engineers must meet to be registered to practice in New York State and requirements for approval of sponsors of such continuing education.

Substance of final rule: The Commissioner of Education proposes to add section 68.11 of the Regulations of the Commissioner of Education, relating to mandatory continuing education for professional engineers. The following is a summary of the substance of the proposed regulation:

A new section 68.11 is added to the regulations of the Commissioner of Education, establishing continuing education requirements for licensed professional engineers.

Subdivision (a) of section 68.11 defines the term acceptable accrediting agency.

Subdivision (b) of section 68.11 cites the applicability of the continuing education requirement, namely that each licensed professional engineer required to register with the department to practice in New York State shall comply with the mandatory continuing education requirements prescribed in the section. This subdivision also provides for exemptions and adjustments to the requirement.

Exemptions are allowed for those licensed professional engineers who are: (a) in their first triennial registration period during which they are first licensed to practice engineering in New York State, except those first licensed pursuant to an endorsement of a license of another jurisdiction; and (b) licensees whose first registration date following January 1, 2004 occurs prior to January 1, 2005, for periods prior to such registration date; and (c) licensees who are not engaged in the practice of engineering in New York State, as evidenced by not being registered to practice in New York State, except as otherwise provided.

An adjustment to the requirement is permitted for the licensee who documents good cause that prevents compliance, such as poor health certified by a physician, or a specific physical or mental disability certified by an appropriate health care professional, or extended active duty with the armed forces of the United States, or other good cause beyond the licensee's control which in the judgment of the department makes it impossible for the licensee to comply with the continuing education requirements in a timely manner.

Paragraph (1) of subdivision (c) of section 68.11 sets the general mandatory continuing education requirement for professional engineers.

Subparagraph (i) establishes the requirement: 36 hours of continuing education acceptable to the Department for each triennial registration period, provided that at least 18 hours of such continuing education shall be in courses of learning, and no more than 18 hours of such continuing education shall be in other educational activities. Licensees whose first registration following January 1, 2004 is less than three years from that date but on or after January 1, 2005 shall be required to complete continuing education hours on a prorated basis at the rate of one hour of acceptable continuing education per month beginning January 1, 2004 up to the first registration date thereafter. Subparagraph (ii) sets forth the continuing education requirement during each registration period of less than three years.

Paragraph (2) of subdivision (c) of section 68.11 sets forth the continuing education requirement for certain licensees who are deemed to have satisfied the continuing education requirement by meeting prescribed conditions, in accordance with section 7211(1)(d) of the Education Law. This provision applies to a licensed professional engineer who on December 31, 2003 was directly employed on a full-time basis by the State of New York; or agencies, public authorities, or public benefit corporations of the State of New York; or local government units of the State of New York in a position requiring licensure in engineering and is represented by a collective bargaining unit at all times when so employed and meet other prescribed conditions. This paragraph also prescribes requirements for licensees who no longer meet the conditions.

Paragraph (3) of subdivision (c) defines continuing education that is acceptable to the State Education Department. Such continuing education must be in the subjects prescribed in subparagraph (i) of this paragraph and be the types of learning activities prescribed in subparagraph (ii) of this paragraph.

Subparagraph (i) of paragraph (3) prescribes that acceptable continuing education shall contribute to professional practice in professional engineering and shall have as its focus one or more of the subjects which are listed in the subparagraph.

Subparagraph (ii) of paragraph (3) prescribes that acceptable continuing education shall be the types of learning activities prescribed in this subparagraph and be subject to the limitations prescribed in the subparagraph. The subparagraph specifies acceptable learning activities.

Subdivision (d) of section 68.11 provides that at each re-registration, the licensed professional engineer must certify to the Department compliance with or exemption or adjustment to the continuing education requirement.

Subdivision (e) of section 68.11 prescribes the requirement for a licensee returning to the practice of engineering after a lapse in practice, defined as not being registered to practice in New York State.

Subdivision (f) of section 68.11 prescribes the requirement for the issuance of a conditional registration to a professional engineer who attests to or admits to noncompliance with the continuing education requirement.

Subdivision (g) of section 68.11 requires the licensed professional engineer to maintain and ensure access by the Department to records of completed continuing education as specified in the subdivision.

Subdivision (h) of section 68.11 provides for the measurement of continuing education study, specifically, that 50 minutes of study equal one hour of continuing education credit and, for credit bearing college or university courses, each semester-hour of credit equals 15 hours of continuing education credit and each quarter-hour of credit equals 10 hours of continuing education credit.

Subdivision (i) of section 68.11 prescribes sponsor approval requirements. Paragraph (1) of subdivision (i) states that sponsors of continuing education to licensed professional engineers in the form of courses of learning or self-study programs shall meet the requirements of either paragraphs (2) or (3) of this subdivision.

Paragraph (2) of subdivision (i) provides that the Department will deem approved as a sponsor of continuing education to licensed professional engineers in the form of courses of learning or self-study programs a sponsor approved by organizations prescribed in the paragraph, or a post-secondary institution that has authority to offer programs that are registered pursuant to Part 52 of this Title or authority to offer equivalent programs that are accredited by an acceptable accrediting agency.

Paragraph (3) of subdivision (i) sets the standards for Department review of sponsors to offer continuing education to licensed professional engineers in the form of courses of learning or self-study programs.

Subdivision (j) of section 68.11 sets the fees for mandatory continuing education, conditional registration, and the fee for an organization desiring to offer continuing education to licensed professional engineers in the form of courses of learning or self-study programs for a three-year term based upon a Department review.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 68.11(c)(1)(ii), (3), (i)(a), (ii)(b)(3), (d) and (i)(1).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making on September 3, 2003, the following nonsubstantial revisions were made to the proposed rule:

Section 68.11(c)(1)(ii) is nonsubstantially revised to correct a typographical error by removing the hyphen between the words "three" and "year" and adding an apostrophe after the word "year".

The opening paragraph of section 68.11(c)(3) is nonsubstantially revised to correct a typographical error by adding a comma after the word "department" in the first sentence.

Section 68.11(c)(3)(i)(a) is nonsubstantially revised to correct a typographical error by replacing the word "in" between the words "practice" and "engineering" with the word "of".

Section 68.11(c)(3)(ii)(b)(3) is nonsubstantially revised to correct a typographical error by removing the unnecessary word "a" before the words "an organization".

Section 68.11(d) is nonsubstantially revised to correct a typographical error by removing a semicolon between the words "section" and "or" and substituting a comma.

Section 68.11(i)(1) is nonsubstantially revised to correct a typographical error by replacing the word "paragraphs" with the word "paragraph".

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 3, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments or Rural Area Flexibility Analysis.

Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 3, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

Section 7211 of the Education Law, as added by Chapter 146 of the Laws of 2002, establishes mandatory continuing education requirements for licensed professional engineers registered to practice in New York State. The proposed regulation, as revised, establishes standards for acceptable continuing education to meet the statutory requirement.

The proposed regulation implements specific statutory requirements and directives. Section 7211 of the Education Law establishes the requirement that licensed professional engineers must complete a prescribed number of hours of continuing education in order to be registered to practice in this State. Therefore, any impact on jobs and employment opportunities by establishing a continuing education requirement for professional engineers is attributable to the statutory requirement, not the proposed rule, which simply establishes consistent standards as directed by statute.

In any event, a similar statutory continuing education requirement was established for individuals licensed in public accountancy in 1985, and the Department is not aware that the requirement significantly affected jobs or employment opportunities in that profession. In addition, the statutory requirement should increase job and employment opportunities for instructors and administrators who will be needed to provide the continuing education instruction to licensees.

Because it is evident from the nature of the proposed regulation, as revised, which implements specific statutory requirements and directives, that the proposed rule will have no impact on jobs or employment opportunities attributable to its adoption or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

Assessment of Public Comment

The proposed rule was published in the *State Register* on September 3, 2003. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of issues raised by the comments.

COMMENT: Mandating continuing education is not the way to ensure engineering quality.

RESPONSE: The continuing education is mandated by section 7211 of the Education Law. The amendment simply implements the statutory requirements.

COMMENT: The amendment includes an exemption for certain public employees that is discriminatory, unfair and unethical. If continuing education is necessary, then public employees should be required to take it.

RESPONSE: Section 7211(d) of the Education Law establishes an exemption for certain professional engineers who work for the State of New York, its agencies, public authorities, public benefit corporations or local government units. The amendment incorporates this statutory exemption. The Department is without authority to impose a continuing education requirement by regulation on individuals exempted by statute.

COMMENT: The proposed rule implementing the exemption for State employees limits the exemption in a manner not contemplated by the legislation by requiring the State engineer to be in a position requiring a license to qualify for the exemption.

RESPONSE: The Department disagrees. Section 7211(1)(d) of the Education Law exempts from the continuing education requirement certain professional engineers who work for the State of New York, its agencies, public authorities, public benefit corporations or local government units prior to January 1, 2004. The Department believes that both the language of the statute and the sponsor's memorandum in support of the legislation (Chapter 146 of the Laws of 2002), indicate that the exemption is limited to professional engineers practicing engineering for the State of New York or its localities, among other limitations. The exemption was not intended for professional engineers holding any position for the State or its localities. In line with this intent, the amendment reasonably limits the exemption to licensed professional engineers in a position requiring licensure in engineering.

COMMENT: The exemption should include any union represented State employee serving in an engineer title.

RESPONSE: The term "engineer" is not title protected. Consequently, individuals employed in civil service titles which use the term "engineer" may not be practicing engineering. The amendment limits the exemption to licensed professional engineers in a position requiring licensure in engineering, in accordance with statutory intent.

COMMENT: The list of qualifying subjects should be expanded to include general management.

RESPONSE: Section 7211(4) of the Education Law mandates that acceptable continuing education must contribute to the professional practice in professional engineering. Continuing education is intended to assist licensees in maintaining and enhancing their professional competency. The Department does not believe the subject general management rises to this standard.

COMMENT: Project management should be an acceptable subject.

RESPONSE: The amendment permits continuing education to be in specified subjects and in other topics which contribute to the professional practice of engineering, as defined in section 7201 of the Education Law. Consequently, if the particular subject matter under the heading "project management" contributes to the practice of engineering, it would be acceptable.

COMMENT: The \$900 fee for sponsor approval is too high. It should be reduced for non-profit organizations and small businesses.

RESPONSE: The amendment establishes two routes to becoming an approved sponsor of continuing education coursework. Sponsors that are approved by prescribed organizations that approve continuing education for professional engineers and colleges that offer registered programs or their equivalent are deemed approved. These sponsors will not have to pay the \$900 fee to the Department. The \$900 fee is assessed against sponsors that undergo a State Education Department review for approval for a three-year term. The review is to determine whether the sponsor has adequate staff, resources, curricula, and procedures to offer continuing education coursework to professional engineers. The fee is established to meet the cost associated with reviewing the sponsor's application for approval and conducting site visits during the term of approval. A similar fee is assessed for review of sponsors in other professions. The fact that the sponsor is a not-for-profit entity or small business does not affect the costs associated with the review and site visit.

COMMENT: I am opposed to the \$45 continuing education fee.

RESPONSE: Section 7211(6) of the Education Law establishes the continuing education fee of \$45. The amendment simply restates the fee.

COMMENT: The regulations are overly geared toward classroom instruction. Active participation in professional or technical associations should be acceptable.

RESPONSE: The amendment permits professional engineers to meet the continuing education requirement through educational activities other than formal classroom coursework. Section 7211(2) of the Education Law requires the professional engineer to complete 36 hours of acceptable continuing education in a registration period, with a minimum of 18 hours in "courses of learning." The remaining hours may be fulfilled through other "educational activities." Course of learning may include, among other activities, attendance in a technical training session by a professional association or engineering firms, provided that session is in an acceptable subject and the professional association or engineering firm is an approved sponsor. In addition, the amendment defines numerous other activities that qualify as "educational activities," including: teaching one of the above mentioned courses or sessions, publishing in a peer reviewed journal, obtaining a patent, and completing a self-study program by an approved sponsor.

Section 7211(4) of the Education Law defines acceptable continuing education as courses of learning and educational activities, which contribute to the professional practice of professional engineering. The State Education Department does not believe that active participation in a professional association by itself meets the intent of the statute.

COMMENT: The regulation should follow the National Council of Examiners for Engineers and Surveyors (NCEES) model in defining what is acceptable continuing education since this will minimize the increased financial burden and be consistent with the requirements of other states.

RESPONSE: The Department consulted the NCEES model in developing the list of "other educational activities" that would be acceptable continuing education. While the NCEES model permits limited active participation in a professional association to count, the Department does not believe that this activity by itself meets the intent of the statute, which requires licensees to complete courses of learning and other educational activities that contribute to professional practice.

COMMENT: Attendance at formal technical/professional meetings where engineering issues are presented should qualify for continuing education.

RESPONSE: The continuing education requirement may be met through completion of technical sessions of professional associations, pro-

vided that they are in acceptable subjects and the professional association is an approved sponsor.

COMMENT: Professional engineers should determine the educational activities and subjects that will improve and expand the knowledge and skills relevant to the individual's practice.

RESPONSE: The amendment provides professional engineers with a great deal of flexibility to select subjects and educational activities. Continuing education may be chosen from a long list of specified subjects, or in other topics which contribute to the professional practice of engineering. Continuing education may be taken through courses of learning by an approved sponsor, which include formal college courses, technical sessions and professional development programs, or through other educational activities, such as preparing or teaching a course offered by an approved sponsor, authoring an article published in a peer-reviewed journal or a published book, making a technical presentation at a professional conference, obtaining a patent, or completing a self-study program provided by an approved sponsor. Section 7211(2) of the Education Law mandates that no more than 18 of the 36 hours in a registration period may be in non-course activities.

COMMENT: Many companies offer in-house seminars and technical sessions that should be acceptable as continuing education.

RESPONSE: In-house seminars and technical sessions of companies that employ professional engineers will be acceptable, provided that the offerings are in acceptable subjects and the company is an approved sponsor.

COMMENT: Credit should be given to all authors of a work that would qualify for continuing education.

RESPONSE: The amendment allows credit to be given to multiple authors of a published work that meets the prescribed requirements.

COMMENT: Those living in areas of small population areas and remote from a university may have difficulty and expense meeting the requirement.

RESPONSE: Licensees will be permitted to meet the requirement through many types of educational activities, in addition to university study. Individuals who live in remote areas may engage in self-study and distance learning, among other activities.

COMMENT: Dual licensed professional engineers and land surveyors should be eligible to receive credit toward both the professional engineer and land surveying continuing education requirements for the same activity.

RESPONSE: The amendment does not prohibit a licensee from receiving credit for both engineering and land surveying continuing education for the same educational activity, provided that the activity meets the requirements for both professions.

COMMENT: Retention of records for six years is excessive; four years is sufficient.

RESPONSE: Retention of records for six years is reasonable and consistent with records retention requirements in the design professions and other professions.

COMMENT: The timetable for implementing the requirement should be delayed so that a series of preliminary activities may be undertaken, such as assembling a list of acceptable sponsors and courses.

RESPONSE: The amendment implements statutory requirements that are effective on January 1, 2004. Therefore, the regulation may not be delayed. The Department will issue guidance documents.

COMMENT: The requirement that sponsors must be approved removes from consideration activities or courses that are offered generally.

RESPONSE: The Department believes that requiring continuing education in the form of courses of learning and self-study programs to be offered by approved sponsors is needed to ensure the quality of the education.

COMMENT: The standard that must be met by sponsors reviewed by the State Education Department relating to instructors is unclear.

RESPONSE: The standard is clear. Sponsors must show that course instructors are qualified to teach the offered courses.

COMMENT: Professional engineers that have a certain level of achievement in leadership or management should be exempted (*i.e.*, chief engineer). The regulation should exempt retired and semi-retired engineers who do occasional consulting work.

RESPONSE: The statute does not establish an exemption for licensees who have achieved leadership or are retired or semi-retired consultants. The Department is without authority to exempt such licensees by regulation.

COMMENT: The maximum that may be earned by a licensee for teaching a course (18 hours) is insufficient.

RESPONSE: The limitation is imposed by statute. Section 7211(2) of the Education Law provides that no more than 18 hours in a registration period may be earned in non-course activities, such as teaching a course.

COMMENT: The maximum that may be earned by a licensee for authoring a peer reviewed journal article or publishing book or obtaining a patent (nine hours) is insufficient.

RESPONSE: The Department believes that nine hours for each written work or patent in a registration period are reasonable and based on the NCEES national model.

COMMENT: Support documents to the amendment do not adequately address cost to licensees and impact on local governments.

RESPONSE: The amendment implements statutory requirements. Costs to licensees result from the statutory requirements, not the amendment. Any indirect impact on local government also results from the statutory requirements.

COMMENT: The proposed amendment should have been sent to every licensed professional engineer for comment.

RESPONSE: The Department did extensive and adequate consultation with the field during the development of the amendment, including with professional associations representing the engineering profession in the State.

COMMENT: I think the regulation generally does a good job of dealing with the topic of continuing education for licensed professional engineers.

RESPONSE: No response is necessary.

NOTICE OF ADOPTION

Licensure as a Certified Public Accountant

I.D. No. EDU-38-03-00007-A

Filing No. 1276

Filing date: Nov. 18, 2003

Effective date: Dec. 4, 2003

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

Action taken: Amendment of sections 70.3 and 70.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6501 (not subdivided), 6502(1), 6504 (not subdivided), 6507(2)(a) and (3)(a), 6508(2), 7404(1)(4), 7409(1)(a), (b), (c), (2) and (4)

Subject: Licensure as a certified public accountant.

Purpose: To establish standards for the examination required for licensure as a certified public accountant.

Text of final rule: 1. Section 70.3 of the Regulations of the Commissioner of Education is amended, effective December 4, 2003, as follows:

70.3 Licensing examinations.

(a) Content. The examination shall consist of the following [subjects] sections:

(1) financial accounting and reporting;

[(2) . . .]

[(3) . . .]

[(4) . . .]

(2) *business environment and concepts;*

(3) *regulation; and*

(4) *auditing and attestation.*

(b) Passing score. The passing score in each [subject] section shall be 75.0 and shall be reported on a pass/fail basis.

(c) Retention of credit. A candidate shall be subject to the retention of credit requirements of paragraph (1) of this subdivision, unless the candidate passed two or more sections of the paper-and-pencil version of the examination administered prior to December 4, 2003 in which case the candidate shall be subject to the retention of credit requirements of paragraph (2) of this subdivision.

[(1) . . .]

(1) A candidate may take the required sections of the examination individually and in any order. Credit for any section passed shall not be valid for more than eighteen months from the actual date the candidate took that section of the examination. A candidate must pass all four sections of the examination within a rolling eighteen-month period, which begins on the date that a passed section of the examination is taken. A candidate may not retake a failed section of the examination in the same examination window, meaning a two-month period in which the examination is available within a quarter of the year.

(2) Transitional retention period. A candidate who has acquired credit for passing two or more sections of the paper-and-pencil version of

the examination administered prior to December 4, 2003 shall be allowed a transitional retention period to obtain a passing score on the remaining sections of the computer-based format of the examination. The transitional retention period shall consist of the three-year period in which the candidate was required to pass all sections of the paper-and-pencil examination, extended to the last day of the month in which the three-year period ends, provided that such period shall terminate before the end of such three-year period as extended, if the candidate has exhausted six opportunities to pass the remaining sections of the licensing examination in whatever format before the end of that period. In that case, the transitional retention period shall terminate on the date the candidate has exhausted the six opportunities. A candidate may not retake a failed section of the examination in the same examination window, meaning a two-month period in which the examination is available within a quarter of the year.

(2) (3) A candidate who has been awarded credit for [any subject or subjects of an] passing a section of the licensing examination administered prior to [November 11, 1994 shall receive credit as follows:] December 4, 2003 shall receive credit for the corresponding section of the licensing examination administered after that date, as follows, provided that the candidate has met the retention of credit requirements of this subdivision:

(i) a candidate who has been awarded credit for [accounting theory] financial accounting and reporting shall be awarded credit for financial accounting and reporting;

(ii) a candidate who has been awarded credit for [business law shall be awarded credit for] business law and professional responsibilities shall be awarded credit for business environment and concepts;

(iii) a candidate who has been awarded credit for [accounting practice shall be awarded credit for] accounting and reporting shall be awarded credit for regulation; and

(iv) a candidate who has been awarded credit for auditing shall be awarded credit for [auditing] auditing and attestation.

(d) The department shall accept passing scores on the uniform certified public accountant examination, or an examination determined to be comparable in content, as meeting the requirement of the licensing examination, except where the department determines that the administration, scoring, content or other comparable factors concerning such examination have affected the validity and/or integrity of such examination so as to render acceptance of such scores inappropriate. Candidates shall complete their professional study prior to the licensing examination [, except that a candidate who will complete college study within 60 days after the date of the examination may be admitted to the examination with credit for successful completion of the examination or its parts being conditional upon meeting the professional study requirement and subject to the limitations provided in subdivision (c) of this section].

(e) Transfer of examination credit. Candidates who have passed, in another state, [subjects] sections of the licensing examination used by New York State may have their grades transferred upon application, if the requirements of this Part concerning education, and retention of credit for [subjects] sections passed have been met. A score of 75.0 or higher shall be considered passing for the purposes of transferring grades from another jurisdiction.

2. Section 70.6 of the Regulations of the Commissioner of Education is amended, effective December 4, 2003, as follows:

70.6 Continuing education.

(a) Applicability of requirement. (1) . . .

(2) Exemptions and adjustments in the requirement. (i) The following licensees are exempt from the continuing education requirement:

(a) licensees whose practice is restricted to services provided for an employer other than a licensee, partnership, [or] professional service corporation [offering or practicing public accountancy], or other entity authorized to practice public accountancy, and who have filed a statement with the department declaring such status;

(b) . . .

(c) . . .

(ii) . . .

(b) Minimum continuing education requirement. (1) . . .

(2) . . .

(3) Licensees reentering public practice shall notify the department and shall document 24 hours of continuing education completed in the 12-month period prior to return to public practice. Following reentry, the licensee shall complete a pro rata portion of the mandated [three-year] yearly requirement for the option selected pursuant to paragraph (1) of this subdivision on the basis of one-half of the number of hours required under the option selected for each full six-month period from the date of reentry to the [next registration date] end of the current reporting year.

(c) Eligible Programs. (1) . . .

(2) . . .

(3) In addition to instruction pursuant to paragraph (2) of this subdivision, the following activities may contribute to meeting the continuing education requirement, provided that the number of [continuing education] contact hours allowed for such activities for any licensee shall not exceed one half of the total number of hours of continuing education claimed [for three-year continuing education requirement] during a triennial registration period:

(i) . . .

(ii) . . .

(4) . . .

(d) Measurement of continuing education study. Continuing education credit shall be granted only for formal programs of learning that meet the requirements set forth in subdivision (c) of this section. One continuing education unit of credit shall equal one contact hour. Contact hours shall be measured [in full hours of attendance only] by program length, with a minimum of 50 minutes equaling one contact hour. Contact hours in one-half hour increments, equal to 25 minutes, shall be permitted after the first continuing education unit of credit has been earned in a given program. For credit-bearing university or college courses, each semester-hour credit shall equal 15 contact hours and each quarter-hour shall equal 10 contact hours. Self-study programs shall be pretested to determine average completion time. Contact hours for interactive self-study programs shall equal the average completion time. Contact hours for noninteractive self-study programs shall equal one-half the average completion time. Interactive self-study programs shall mean programs designed to use interactive learning methodologies that simulate a classroom learning process by employing software, other courseware, or technology-based systems that provide significant ongoing, interactive feedback to participants regarding the licensees' learning progress. Noninteractive self-study programs shall mean self-study programs that do not meet such requirements for interactive self-study programs.

(e) Sponsor Approval. (1) . . .

(2) To be approved, each applicant shall submit evidence acceptable to the department that the applicant has and will maintain adequate resources to support all programs and will comply with the following development and presentation standards:

(i) sponsors [should] shall state the learning objectives and level of knowledge of the program and state the educational and experience prerequisites for the participants;

(ii) sponsors [should] shall assure that program developers are qualified in the subject matter and knowledgeable in instructional design;

(iii) sponsors [should] shall assure that program materials are technically accurate, current and sufficient to meet the programs' learning objectives through advance review;

(iv) sponsors [should] shall inform participants in advance of the program's learning objectives, prerequisites, level of knowledge, content, specific field of study, advance preparation, teaching method, recommended CPE credit, sponsor identification number, and relevant administrative policies;

(v) sponsors [should] shall select instructors qualified with respect to both program content and teaching methods used; and

(vi) sponsors [should] shall provide a means for evaluating the quality of the program and update programs in response to the evaluations.

(3) . . .

(4) . . .

(5) . . .

(f) . . .

(g) . . .

(h) . . .

Final rule as compared with last published rule: Nonsubstantive changes were made in section 70.6(d).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making on September 24, 2003, the following nonsubstantial revisions were made to the proposed rule:

Subdivision (d) of section 70.6 was revised by adding the words "unit of" before the word "credit" in the second and fourth sentences to use appropriate terminology and clarify that study is not limited to degree study.

The above revisions to the proposed rule do not require any changes to the previously published Regulatory Impact Statement.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the *State Register* on September 24, 2003, nonsubstantial revisions were made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions to the proposed rule do not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments or Rural Area Flexibility Analysis.

Job Impact Statement

The proposed amendment, as revised, will establish standards for the examination required for licensure as a certified public accountant, continuing education requirements that certified public accountants and public accountants must meet to be registered to practice in New York State, and notification requirements that sponsors of the continuing education must meet to be approved by the State Education Department. The proposed amendment, as revised, will have no effect on the number of jobs or the number of employment opportunities available in this field. Because it is evident from the nature of the rule, as revised, that it will have no impact on the number of jobs and number employment opportunities in public accounting or any other field, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Driver Education

I.D. No. EDU-38-03-00009-A

Filing No. 1278

Filing date: Nov. 18, 2003

Effective date: Dec. 4, 2003

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

Action taken: Addition of section 107.2 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 305(1) and (2) and 806-a(2); and L. 2002, ch. 644, section 13

Subject: Driver education.

Purpose: To establish a certification process by driver education courses of the amount of time a holder of a class DJ or class MJ learner's permit has spent operating a motor vehicle while under the immediate supervision of a driver education teacher.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-38-03-00009-P, Issue of September 24, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

**New York State Energy
Research and Development
Authority**

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

Minimum Energy Efficiency Standards

I.D. No. ERD-48-03-00006-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 506 to Title 21 NYCRR.

Statutory authority: Energy Law, section 5-108-a; and Public Authorities Law, section 1855(4)

Subject: Minimum energy efficiency standards for energy using products purchased by or for the State and State agencies.

Purpose: To establish minimum energy efficient standards for appliances and energy using products purchased by or for the State or any agency thereof.

Substance of proposed rule: Section 506.1

Scope and Purpose provides that the provisions of this Part apply to purchases by or for the State or any agency thereof of a new or replacement energy using product and to building designs or specifications for new construction and for substantial renovation of any existing building owned or leased in whole by a State agency. The purpose is to establish minimum energy efficiency standards for energy using products purchased by or for a State agency. The standards are designed to achieve cost effective savings to the maximum extent practicable, taking into account market availability.

Section 506.2 Definitions defines "Btu", "building addition", "building designs or specifications", "energy using product", "new construction", "purchase", "State agency", "substantial renovation", and "subsystem".

Section 506.3 Purchase of an Energy Using Product; Building Designs and Specifications provides that, except as otherwise provided in Section 506.5, neither a State agency nor other person making a purchase on behalf of a State agency for a building owned or leased in whole by a State agency may purchase an energy using product, unless such energy using product meets the applicable minimum energy efficiency standard set forth in Section 506.4. All building designs or specifications by or for a State agency must incorporate energy using products which meet the applicable minimum energy efficiency standards set forth in Section 506.4.

Section 506.4 Minimum Energy Efficiency Standards defines the various energy using products and sets the minimum efficiency standards. Fluorescent lamp ballasts are defined and standards set for replacement ballasts powering 32 watt or 59 watt lamps that are designed to operate at nominal input of 120 or 277 volts and have input current frequencies of 60 Hertz. For F32T8 (32 Watt), the ballast efficacy factor for one lamp rapid start is 2.61, for two lamp rapid start is 1.41, for three lamp rapid start is .96 and for four lamp rapid start is .72; and the ballast efficacy factor for one lamp instant start is 2.84, for two lamp instant start is 1.49, for three lamp instant start is 1.04 and for four lamp instant start is .79. For F96T8 (59 Watt), the ballast efficacy factor for two lamp instant start is .79. For fluorescent lamp ballasts in new construction, no T12 ballast can be purchased and the minimum energy efficiency standards for T8 ballasts must meet the standards set forth in the preceding sentence. The ballast efficacy factors are determined in accordance with the test procedures set forth in 10 Code of Federal Regulations (CFR) Part 430, Subpart B, Appendix Q.

Residential central air conditioners and heat pumps are defined and the minimum energy efficiency standards are set at a seasonal energy efficiency ratio (SEER) of 13 and a heating seasonal performance factor (HSPF) of 8 for split systems; and a SEER of 12 and a HSPF of 7.6 for single package systems. The standards are to be determined in accordance with the test procedures set forth in 10 CFR Part 430, Subpart B, Appendix M.

Commercial central air conditioners and heat pumps and ground source heat pumps are defined and the standards are set. For air-source, 3 phase commercial central air conditioners and the cooling mode of commercial heat pumps of less than 65,000 Btu per hour, the air-conditioning portion of a split-system must meet a 13 SEER and an 11 energy efficiency ratio (EER), and the heat pump portion must meet a 13 SEER, 11 EER, and an 8 HSPF, using Air-Conditioning & Refrigeration Institute Standard (ARI) 210/240-94; single package air-conditioning of this size must meet a 12 SEER and 10.5 EER, and the heat pump must meet a 12 SEER, 10.5 EER, and 7.6 HSPF, using ARI 210/240-94. For air-source commercial central air conditioners and heat pumps of equal to or more than 65,000 Btus per hour but less than 135,000 Btus per hour the air-conditioner portion must meet an 11 EER and 11.4 integrated part load value (IPLV), and the heat pump portion must meet a 10.1 EER, 10.4 IPLV, and 3.2 coefficient of performance ("COP"), using ARI 210/240-94. For air-source commercial central air conditioners and heat pumps of equal to or more than 135,000 Btus per hour but less than 240,000 Btus per hour the air-conditioner portion must meet a 10.8 EER and 11.2 IPLV, and the heat pump must meet a 9.3 EER, 9.5 IPLV, and 3.1 COP, using ARI 340/360-93. For air-source commercial central air conditioners and heat pumps of equal to or more than 240,000 Btus per hour but less than 760,000 Btus per hour, the air-conditioner portion must meet a 9.5 EER and 9.7 IPLV, and the heat

pump portion must meet a 9 EER, 9.2 IPLV, and 3.1 COP, using ARI 340/360-93. For air-source commercial central air conditioners and heat pumps of equal to or more than 760,000 Btus per hour, the air-conditioner portion must meet a 9.2 EER and 9.4 IPLV, and the heat pump portion must meet a 9 EER, 9.2 IPLV, and 3.1 COP, using ARI 340/360-93. For water cooled, evaporatively cooled, and water-source commercial central air conditioners and heat pumps of less than 17,000 Btus per hour, the air-conditioner portion must meet a 12.1 EER and the heat pump portion must meet 11.2 EER and 4.2 COP, using ARI 210/240-94, unless it is a water-source unit in which case International Standards Organization (ISO) ISO-13256-1 is used. For water cooled, evaporatively cooled, and water-source commercial central air conditioners and heat pumps of equal to or more than 17,000 Btus per hour, but less than 65,000 Btus per hour, the air-conditioner portion must meet 12.1 EER and the heat pump portion must meet 12 EER and 4.2 COP, using ARI 210/240-94, unless it is a water-source unit in which case ISO-13256-1 is used. For water cooled, evaporatively cooled, and water-source commercial central air conditioners and heat pumps of equal to or more than 135,000 Btus per hour, but less than 240,000 Btus per hour, the air-conditioner must meet a 11 EER, using ARI 340/360-93. For water cooled, evaporatively cooled, and water source commercial central air conditioners of equal to or more than 240,000 Btus per hour, the air-conditioner must meet an 11 EER and 10.3 IPLV, using ARI 340/360-93. Ground water source heat pumps of less than 135,000 Btus per hour must meet a 16.2 EER and 3.6 COP, using ISO-13256-1. Ground source heat pumps of less than 135,000 Btus per hour must meet a 14.1 EER and 3.3 COP, using ISO-13256-1.

Packaged terminal air conditioners and heat pumps are defined and the minimum energy efficiency standards are set. The air conditioner portion of packaged terminal air conditioners and heat pumps of less than 7,000 Btus per hour must meet a 11 EER, and the heat pump portion must meet a 11 EER and 3 COP. The air conditioner portion of packaged terminal air conditions and heat pumps equal to or greater than 7,000 Btus and equal to or less than 15,000 must meet a 12.5-(0.213 X CAP) EER and the heat pump portion must meet a 12.5-(0.213CAP)EER and a 3.2-(0.026 X CAP)COP. The air conditioner portion of packaged terminal air conditioners and heat pumps of greater than 15,000 Btus per hour must meet a 9.3 EER and the heat pump portion must meet a 9.3 EER and a 2.8 COP. The minimum efficiency levels are to be determined in accordance with the test procedures set forth in ARI 310/380-93.

Room air conditioners are defined and the standards set. For room air conditioners with a cooling capacity of less than 8,000 Btu per hour, the minimum EER is 10.7, for room air conditioners with a capacity of equal to or greater than 8,000 Btus per hour but less than 16,000, the minimum EER is 10.8; for room air conditioners with a cooling capacity of equal to or greater than 16,000 but equal to or less than 20,000 Btus per hour, the minimum EER is 10.7; and for room air conditions of greater than 20,000 Btus per hour capacity, the minimum EER is 9.4. The standards are to be determined in accordance with 10 CRF Part 430, Subpart B, Appendix F. The standards apply solely to room air conditioners without reverse cycles, but with louvers.

506.5 Waivers prescribes the conditions that must be made in order for a State agency to waive the standards with respect to a particular energy using product. These conditions include, among others, because the purchase of an energy using product meeting the standards would be incompatible with or adversely affect the operation of other building systems or equipment in accordance with the purposes for which they are to be used; would cause energy losses or inefficiencies in other systems, equipment, or elements of the building that would exceed the energy savings of using such energy using product; would necessitate substantial revisions or alterations to other existing systems, equipment, or elements of the building, or would create an undue burden in operating and maintaining the building; or would result in a substantial delay of the purchase of an energy using product or have a substantial adverse effect on the construction of a new building or substantial renovation of an existing building because: (A) the energy using product is not widely available, or (B) the building specifications have been approved, construction or pre-installation renovation or other work has commenced, or substantial design has been completed prior to the effective date of a standard.

Section 506.6 lists the materials referenced in the regulations and indicates where copies of the references may be found.

Text of proposed rule and any required statements and analyses may be obtained from: Jacquelyn L. Jerry, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, NY 12203, (518) 862-1090, ext. 3284

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: Energy Law Section 5-108-a requires the Authority to promulgate minimum energy efficiency standards for appliances and energy using products purchased by or for the State or any agency thereof; Public Authorities Law Section 1855(4) authorizes the Authority to promulgate rules and regulations; and the State Administrative Procedures Act Section 102 generally authorizes the promulgation of rules and regulations.

2. Legislative Objectives: The legislature has declared that the New York State Energy Research and Development Authority, in consultation with the Commissioner of the Office of General Services, should promulgate minimum energy efficiency standards for appliances and energy using products purchased by or for the State, based on cost-effectiveness criteria.

3. Needs and Benefits: The State of New York spends over \$320 million annually in energy costs. One way to ensure that those costs are kept as low as reasonably possible, is to set minimum efficiency standards for appliances and energy-using products that are purchased by the State. As an additional benefit, the State, through its purchasing power, can influence appliance manufacturers' efficiency standards, and set a positive example for private industry and consumers. Accordingly, the purpose of the proposed regulations is to establish minimum energy efficiency standards for appliances and energy using products purchased by or for the State or any agency thereof. The standards are designed to achieve cost effective savings to the maximum extent practicable, taking into account market availability.

4. Costs: Energy Law Section 5-108-a requires the promulgation of minimum energy efficiency standards for certain energy using products purchased by or for the State or any agency thereof. Section 5-108-a requires the Authority to establish the standards in consultation with the Commissioner of the Office of General Services (OGS). Standards for fluorescent lamp ballasts, central air conditioners, room air conditioners, packaged terminal air conditioners, and heat pumps are to be established.

In carrying out its responsibilities, the Authority established an Advisory Committee to provide input and guidance. The Advisory Committee consists of representatives from industry trade associations, energy-efficiency and environmental advocate organizations, and OGS and other State agencies who will be subject to the standards once they are promulgated. Specific organizations on the Committee include: Association of Home Appliance Manufacturers, Air Conditioning and Refrigeration Institute, Consortium for Energy Efficiency, National Electrical Manufacturers Association, Gas Appliance Manufacturers Association, New York State Dormitory Authority, State University Construction Fund, Northeast Energy Efficiency Partnerships, Inc., Natural Resources Defense Council, and the U.S. Department of Energy. While the standards were being developed, the Committee met four times and also discussed issues and provided guidance through an Authority established listserv.

In determining what standards should be established for fluorescent lamp ballasts, central air conditioners, room air conditioners, packaged terminal air conditioners, and heat pumps, a combination of individuals from the Authority, its Contractor, and its Advisory Committee (together, the "Group") contacted various major State agencies including the State University of New York ("SUNY") and others. These agencies assisted in identifying the types of these energy using products that they typically purchased as commodity purchases or for new construction or substantial renovation projects and should be covered by Section 5-108-a. The minimum efficiency standards were then established using this and other information as described below.

In setting the standards, the Group reviewed the various sizes and types of products, their availability, and determined life cycle costs based upon equipment prices, annual operating hours, unit energy consumption, useful life, electric operating costs, and discount rates.

Once the Group determined the types of products that should be covered, it researched other existing government and industry standards that apply to such products, the various sizes of such products in the marketplace, and the number of manufacturers. To determine the cost-effectiveness of the products, the Group reviewed life-cycle costs of the various

products taking into account, when appropriate, such factors as the efficiency of the product, replacement labor costs, annual operating hours, life hours, electricity costs, and discount rates.

Based on the availability analyses and the life-cycle cost results, the Authority, in consultation with OGS, determined the energy efficiency minimum standards.

The Group was unsuccessful in identifying a central or comprehensive data base from which to determine how many of the covered products were purchased by or on behalf of the State. In some cases, purchases were made through OGS, but in other cases, the State agency makes its own purchases directly. Detailed records were not available which indicated the level of energy efficiency of the products being purchase. The Group was also unable to identify related sales information from manufacturer's of the covered products. In addition, since Energy Law Section 5-108-a required the Authority to consider cost-effectiveness and market availability in establishing the standards, an analysis based on cost of the product alone was not appropriate. Accordingly, the Group concluded that estimating a range of cost savings for each covered product was appropriate.

Based upon the analyses conducted, the Group believes that, by purchasing products that meet the proposed minimum energy efficiency standards, the State is expected to save in the range of 6% of the costs typically spent over the life of low-cost electromagnetic ballasts, 3% to 14% of the cost typically spent over the life of central air conditioners, less than 1% over the life of room air conditioners, 3% to 7% of the cost typically spent over the life of packaged terminal air conditioners, and 2% to 8% of the cost typically spent over the life of heat pumps.

5. Local Government Mandates: None.

6. Paperwork: State agencies will be required to document the procedure used when purchasing an appliance or energy using product that does not meet the minimum energy efficient standard, but the regulations allows them to incorporate this requirement into existing recordkeeping procedures.

7. Duplication: To the extent a new building or a substantial renovation of an existing building may be subject to the State Energy Conservation Construction Code, there may be some duplication.

8. Alternatives: In carrying out its responsibilities, the Authority established an Advisory Committee to provide input and guidance. Specific organizations on the Committee include: Association of Home Appliance Manufacturers, Air Conditioning and Refrigeration Institute, Consortium for Energy Efficiency, National Electrical Manufacturers Association, Gas Appliance Manufacturers Association, New York State Dormitory Authority, New York State Office of General Services, State University Construction Fund, Northeast Energy Efficiency Partnerships, Inc., Natural Resources Defense Council, and the U.S. Department of Energy. While the standards were being developed, the Committee met four times and also discussed issues and provided guidance through an Authority-established "listserv". The private sector members of the Group provided valuable information on product availability and helped the Group resolve technical compatibility issues with respect to various building systems and designs.

Together, the Group, contacted various major State agencies. Input from these State agencies was solicited in identifying the types of energy using products that they typically purchased as commodity purchases or for new construction or substantial renovation projects and should be covered by Section 5-108-a. The minimum efficiency standards were then established using this and other information as described below.

In setting the standards, the Group reviewed the various sizes and types of products, their availability, and determined life cycle costs based upon equipment prices, annual operating hours, unit energy consumption, useful life, electric operating costs, and discount rates. When appropriate, the Group researched other existing government and industry standards that apply to such products, the various sizes of such products in the marketplace, and the number of manufacturers. To determine the cost-effectiveness of the products, the Group reviewed life-cycle costs of the various products taking into account, when appropriate, such factors as the efficiency of the product, replacement labor costs, annual operating hours, life hours, electricity costs, and discount rates.

For example, in setting the seasonal energy efficiency rating ("SEER") for residential packaged air conditioners and heat pumps, the Group considered products at a 12 SEER, a 13 SEER, and a 14 SEER. The Group determined to set the minimum energy efficiency standard at the 12 SEER level, after concluding that there were limited supplies of product for air conditions that met the 13 SEER and limited supplies of product for heat pumps that met the 14 SEER.

After consideration of the above factors for the various products, the Authority, in consultation with OGS, determined the energy efficiency minimum standards.

9. Federal Standards: There are no applicable federal standards to State agency purchases.

10. Compliance Schedule: The Authority will implement the regulations as soon as they are made final.

Regulatory Flexibility Analysis

The proposed regulations prescribe standards that must be followed by State agencies in procuring appliances and energy using equipment, there should be no direct effect on small businesses and local governments.

Rural Area Flexibility Analysis

Since the proposed regulations prescribe standards that must be followed by State agencies in procuring appliances and energy using equipment, there should be no effect on rural areas.

Job Impact Statement

There should no impact on jobs since the regulations merely prescribes the energy efficient level of appliances and energy using products that may be purchased by State agencies.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Resource Management Plan for Surfclams

I.D. No. ENV-48-03-00003-EP

Filing No. 1271

Filing date: Nov. 14, 2003

Effective date: Nov. 14, 2003

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

Action taken: Amendment of Subpart 43-2 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0308 and 13-0309

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This rulemaking will implement the Department of Environmental Conservation's (department) management plan for the protection of surfclams, and thereby enable the department to increase the annual surfclam harvest limit for 2004 and alleviate the economic hardship imposed on the New York surfclam industry by current regulations.

ECL subdivision 13-0309(15) states that until regulations are adopted implementing a management plan for the protection of surfclams, the annual harvest limit for surfclams taken from certified waters of the Atlantic Ocean may not exceed 500,000 bushels. The 2002 surfclam population assessment survey shows a significant increase in the surfclam biomass since the previous survey in 1999. Upon analyzing the results from the survey, examining surfclam catch reports, and receiving recommendations from the surfclam industry, the department has decided to raise the annual harvest limit for surfclams taken from the Atlantic Ocean. However, the limit cannot be increased beyond 500,000 bushels until the regulations implementing the management plan are adopted. With the adoption of these amendments to Subpart 43-2, the department may, in accordance with ECL section 13-0309(15), increase the surfclam annual harvest limit to allow the fishery to remain economically viable and yet remain protective of the surfclam resource in the State.

The promulgation of this regulation on an emergency basis is necessary in order that the department may increase the annual harvest limit for surfclams for 2004. If the emergency rule were not adopted, the surfclam industry would continue to operate under the 500,000 bushel annual harvest limit until January 1, 2005, and would lose the economic benefit of the increased harvest limit for 2004.

Secondly, this rulemaking will eliminate the daily harvest limit, but retain a weekly harvest limit. This will allow surfclam harvesters to take more surfclams during a single trip and reduce the number of fishing trips needed to take the weekly harvest limit. During the winter and at times of poor weather, it is of vital importance to reduce the number of trips a commercial fisherman must make but still remain economically viable in a competitive fishery.

Lastly, this rulemaking will implement provisions of the management plan that call for streamlining the process of issuing surfclam permits. The rule will reduce the number of surfclam permits the department issues each year, and will also decrease the number of permits an individual must possess to be allowed to take surfclams. These changes in the process of issuing surfclam permits must become effective as soon as possible; current surfclam permits will expire on December 31, 2003 and the process must be complete before the need arises to issue permits for the upcoming year.

Subject: Resource management plan for surfclams found in the New York State waters of the Atlantic Ocean.

Purpose: To changes the time frame within which the department must evaluate surfclam population survey data and announce changes in the annual harvest limit; remove the daily harvest limit for surfclams taken by mechanical means from the Atlantic Ocean; and amend the process of issuing surfclam/ocean quahog Atlantic Ocean permits.

Text of emergency/proposed rule: Section 43-2.1 is amended to read as follows:

§ 43-2.1 Purpose.

The purpose of this Subpart is to promote and support the maintenance of viable surf clam and ocean quahog populations in the Atlantic Ocean portion of the Marine and Coastal District. The Marine and Coastal District includes the waters of the Atlantic Ocean within three nautical miles from the coastline and all other tidal waters within the State, including the Hudson River up to the Tappan Zee Bridge. The provisions of this Subpart require [resident and nonresident] surf clam and ocean quahog mechanical harvesting permits, establish specific controls over the possession and design of mechanical harvesting gear, set weekly vessel harvest limits and [yearly] annual harvest [quotas] limits, establish container and tagging requirements and require record keeping and reporting. Such requirements are intended to support the continuation of a viable fishery in the involved waters of the Atlantic Ocean so that the fishery continues to operate in balance with available surf clam and ocean quahog stocks.

Section 43-2.2 through subdivision 43-2.3(a) remains unchanged.

Subdivisions 43-2.3(b) through (j) are renumbered as subdivisions 43-2.3(c) through (k).

New subdivision 43-2.3(b) is adopted to read as follows:

(b) *Certified waters means waters which are certified to be in such sanitary condition that shellfish therefrom may be taken for use as food pursuant to Part 41 of this Title.*

Renumbered subdivision 43-2.3(j) is amended to read as follows:

(j) Resident means a person whose domicile [has been] *is* within New York State [for a period of six months or more].

Section 43-2.4 is REPEALED and a new Section 43-2.4 is adopted to read as follows:

§ 43-2.4 *Permit requirements; issuance and revocation procedures.*

(a) *Each person participating in harvest operations on board a vessel harvesting surfclams and ocean quahogs from the Atlantic Ocean shall possess a New York State shellfish diggers permit.*

(b) *Any owner or lessee of a vessel eligible to take surfclams and ocean quahogs by mechanical means from the Atlantic Ocean shall obtain a Surfclam/Ocean Quahog Atlantic Ocean permit prior to harvesting. This permit shall authorize a holder to take surfclams or ocean quahogs, or both, with the vessel identified on the permit. Nonresidents of the state and foreign corporations may be issued a Surfclam/Ocean Quahog Atlantic Ocean permit provided that the vessel identified on the permit is registered in a state which accords reciprocal clamming privileges to residents of New York and provided that such nonresident is a resident of a state which accords such reciprocal privileges and, in the case of a foreign corporation, it is organized under the laws of a state which accords reciprocal privileges.*

(c) *Application for a Surfclam/Ocean Quahog Atlantic Ocean permit may be made by fully completing the application form provided by the department for that purpose.*

(d) *A permit issued to a vessel owner or lessee shall identify the vessel to be used in the harvest of surfclams and ocean quahogs. No vessel may be used in the surfclam and ocean quahog fishery without being specifically identified on a permit issued in the name of the owner or lessee of the*

vessel. Only a vessel owned by a resident may be identified on a permit issued to a resident.

(e) *If an application is made by a domestic corporation, the application shall be signed by the members of the board of directors of such corporation. If all members of the board of directors and all stockholders are residents, such corporation shall be eligible for a resident Surfclam/Ocean Quahog Atlantic Ocean permit. If any member of the board of directors or any stockholder is not a resident, such corporation shall be eligible for a nonresident Surfclam/Ocean Quahog Atlantic Ocean permit only.*

(f) *Any operator or captain of a vessel eligible to take surfclams and ocean quahogs by mechanical means from the Atlantic Ocean shall obtain a Surfclam/Ocean Quahog Atlantic Ocean Captain/Operator permit. This permit authorizes the resident permit holder to operate a vessel used to take surfclams or ocean quahogs, or both, by mechanical means. Nonresidents of the state may be issued a Surfclam/Ocean Quahog Atlantic Ocean Captain/Operator permit provided that the nonresident is a resident of a state which accords reciprocal clamming privileges to residents of New York. No vessel may be used in the surfclam and ocean quahog mechanical fishery without there being a person on board such vessel whose permit identifies the permit holder as captain or operator.*

(g) *Permits issued pursuant to this subdivision shall expire on December 31 of the year of issuance.*

(h) *Licenses or permits issued pursuant to this Part may be revoked by the department pursuant to the provisions of Part 175 of this Title.*

(i) *Nothing in this Subpart precludes or affects the commissioner's authority to issue summary abatement orders pursuant to Environmental Conservation Law, Section 71-0301, and rules and regulations adopted pursuant thereto, or to take emergency actions summarily suspending a permit as provided in Section 401(3) of the State Administrative Procedure Act.*

Section 43-2.5 remains unchanged.

Section 43-2.6 is REPEALED and a new Section 43-2.6 is adopted to read as follows:

§ 43-2.6 *Harvest restrictions; surfclams.*

(a) *The annual harvest limit for surfclams in the certified waters of the Atlantic Ocean shall be 500,000 bushels in the aggregate, provided however that the department may direct that the maximum quantity of surfclams to be taken from certified waters during a given calendar year be increased or decreased. In establishing such adjustment, the department shall afford an opportunity for public comment and consider stock assessments, catch reports and other relevant biological and statistical information. If made, such adjustment shall be announced no later than November 15 of the year preceding its effective date of January 1. Any such adjustment shall be by written directive of the commissioner or the commissioner's designee and written notice of any such directive shall be provided to all permit holders.*

(b) *The maximum quantity of surfclams to be taken in a calendar year pursuant to subdivision (a) of this section shall be allocated by percent into four calendar quarters as follows:*

First Quarter (January, February, March) — 25 percent

Second Quarter (April, May, June) — 25 percent

Third Quarter (July, August, September) — 25 percent

Fourth Quarter (October, November, December) — 25 percent

(c) *Any quantity allowed to be taken pursuant to subdivision (b) of this section not taken during a calendar quarter shall be allowed to be taken in the next calendar quarter and shall be in addition to the quantity allocated to that quarter.*

(d) *Any quantity taken in excess of the quantity allowed to be taken pursuant to subdivision (b) of this section during a calendar quarter shall be deducted from the quantity allowed to be taken in the next calendar quarter.*

(e) *If it is determined by the department that the maximum allowable harvest of surfclams pursuant to subdivision (b), (c), or (d) of this section may be met before the end of any given calendar quarter, harvesting from certified waters shall be terminated for the remainder of that calendar quarter. Any such termination shall be by directive of the commissioner or the commissioner's designee, and no less than 48 hours written notice of any such directive shall be provided to all permit holders.*

(f) *No vessel may be used to harvest more than 28 standard cages of surfclams (equivalent to 896 industry standard bushels) in any one week. However, in order to minimize the duration of a fishery closure, no vessel may be used to harvest more than such quantity of surfclams as the commissioner or the commissioner's designee shall direct in any weekly, Sunday through Saturday, or bi-weekly period. Harvest limits shall be by directive of the commissioner or the commissioner's designee, and no less*

than 48 hours written notice of any such directive shall be provided to all permit holders.

(g) In order to preserve and protect surfclams of less than legal size, the department may establish one or more areas, containing a total of no more than fifteen percent of the estimated standing stock of surfclams, where harvesting is prohibited. In establishing such areas, the department shall consider the effect of any such areas on stocks in harvestable areas. In addition, the department shall consult with the Surfclam/Ocean Quahog Management Advisory Board, afford an opportunity for public comment, and consider stock assessments, catch reports, and other relevant biological and statistical information. Such areas shall, by estimation, contain more than fifty percent sublegal size surfclams by number and, once established, any such area shall be re-evaluated within eighteen months of establishment. In the event that any such area is not re-evaluated, such area shall become available for harvest. The establishment of any such area shall be by written directive of the commissioner or the commissioner's designee, and a minimum of 48 hours written notice of any such directive shall be provided to all permit owners.

(h) It shall be unlawful for any person to exceed the harvest restrictions set forth in this section or in any directive issued pursuant hereto.

Section 43-2.7 through the end of Subpart 43-2 remains unchanged.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire February 11, 2004.

Text of rule and any required statements and analyses may be obtained from: Maureen Davidson, Department of Environmental Conservation, 205 N. Belle Mead Rd., Suite 1, East Setauket, NY 11733, (631) 444-0496, e-mail: mcdavids@gw.dec.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:

Environmental Conservation Law (ECL) Section 13-0308 established the Surfclam/Ocean Quahog Management Board (Board) to assist the Department of Environmental Conservation (Department) on surfclam and ocean quahog management issues. Subdivision 7 of this section states that the Board shall assist the Department in the development and preparation of a comprehensive long-term management plan for the protection of surfclams in New York waters. Subdivision 13-0309(12) authorizes the Department to fix by regulation open seasons, harvest areas, size limits, catch limits, manner of taking and possession, transportation, identification, sale and permit requirements for surfclams.

2. Legislative objectives:

Surfclams are a commercially important shellfish harvested from New York state ocean waters. The legislature sought to protect the valuable surfclam resource by directing the Department to develop a management plan (ECL 13-0308, 13-0309) and giving the Department the authority to fix regulations controlling the harvest, sale, and permit requirements for surfclams (ECL 13-0309). The proposed rule will implement the provisions of the management plan developed by the Department with the assistance and guidance of the Board.

3. Needs and benefits:

The proposed rule streamlines the process of issuing Surfclam/Ocean Quahog Atlantic Ocean permits by consolidating the resident Atlantic Ocean Permit and the nonresident Atlantic Ocean Permit into a single Surfclam/Ocean Quahog Atlantic Ocean permit and eliminating the permit requirement for crew of surfclam harvesting vessels.

The proposed regulation removes the need for operators and captains of surfclam harvesting vessels to be issued a permit for each vessel they operate in the fishery. Instead vessel operators/captains will be issued a single Surfclam/Ocean Quahog Atlantic Ocean Operator/Captain permit that will allow them to operate any surfclam vessel permitted to take surfclams from the Atlantic Ocean.

The proposed regulation will provide the Department adequate time to properly evaluate survey data collected during the year before having to announce changes in annual harvest limit in the fall. Most importantly, the proposed rule will eliminate the daily harvest limit of 14 cages per vessel. This will allow surfclam harvesters to take more surfclams during a single trip and reduce the number of fishing trips needed to take the weekly harvest limit. During the winter and at times of poor weather, it is of vital importance to commercial fishermen that they be able to reduce the number of trips while remaining economically viable in a competitive fishery.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no costs to regulated parties resulting from this action. Permitted surfclam harvesters will be able to continue to take surfclams at current levels. The adoption of this rule may allow harvesters to take increased amounts of surfclams once the Department evaluates the most recent surfclam population assessment survey.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

By streamlining the permit process and eliminating two permit types, the proposed rule will save the Department the cost of processing and issuing approximately 112 surfclam permits in 2004. This can represent a substantial savings for the Department, since the surfclam permits are issued at no cost to the permit holder.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

A no action alternative was considered. However, if this rule is not adopted, the Department will not be able to establish, in a timely manner, new surfclam harvest limits that reflect the increase in surfclam biomass found during the most recent surfclam population assessment survey conducted in 2002. The industry has been operating under an additional harvest restriction since April 2003, when the weekly surfclam harvest limit was reduced by a third to prevent the total harvest taken by surfclam harvesters from exceeding the annual harvest limit allowed by law. The proposed regulations will provide the Department the time and opportunity to determine appropriate harvest limits for the surfclam fishery and to remove the economically burdensome restrictions currently in existence. If this rule is not adopted, surfclam harvesters will continue to fish under a daily harvest limit, which increases the number of days they must fish to take the weekly limit, increasing fuel costs, salary costs and exposure to bad weather conditions for the surfclam harvester. Lastly, if this proposed rule is not adopted the Department will not be able to streamline the surfclam permit process and reduce the costs related to issuing these permits. For these reasons, the Department has rejected the no action alternative.

9. Federal standards:

This rule does not exceed any minimum standard of the federal government. There are no federal standards for surfclams found within New York state territorial waters.

10. Compliance schedule:

There is no compliance time necessary for regulated persons to achieve compliance. The proposed rule will streamline the permit process and eliminate the daily harvest limit for surfclams taken from the Atlantic Ocean. The rule will also provide the Department the time and opportunity to evaluate surfclam population survey data and determine annual harvest limits for surfclams that will maintain the economic viability of the surfclam industry and adequately protect the surfclam resources of the state. The regulations will take effect upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of the regulations:

There are approximately 60 harvesters permitted to take surfclams by mechanical means from New York state waters of the Atlantic Ocean. The proposed rule will streamline the process of processing surfclam permits by removing the requirement for crew members and deck hands to possess surfclam permits to participate in the fishery. Boat captains and operators in the surfclam fishery will no longer be required to possess a permit for each vessel they operate in the fishery, but will only need to apply for a single Surfclam Ocean Quahog - Atlantic Ocean Captain/Operator permit to operate any permitted vessel in the fishery.

The proposed rule will eliminate the daily harvest limit of 14 cages per vessel. This will allow surfclam harvesters to take more surfclams during a single trip and reduce the number of fishing trips needed to take the weekly harvest limit. During the winter and at times of poor weather, it is of vital importance to reduce the number of trips a commercial fisherman must make while allowing the fisherman to remain economically viable in the fishery.

2. Compliance requirements:

There are no new compliance requirements associated with the proposed rule. The Department may increase or decrease the annual or the weekly harvest limits for surfclams, and surfclam harvesters must comply with the new harvest limits. Currently, harvesters who take surfclams by mechanical means must file weekly trip reports with the Department. This requirement will remain in effect.

3. Professional services:

None.

4. Compliance costs:

There are no capital costs associated with compliance with this rule.

5. Minimizing adverse impact:

The proposed rule is beneficial for permitted surfclam harvesters. It removes the surfclam permit requirement for crew and deck hands on surfclam harvesting vessels and reduces the number of days needed for harvesters to take the weekly harvest limit. This last change will reduce the exposure of surfclams harvesters to bad weather and rough seas. The proposed regulations will also enable the Department to increase the surfclam harvest limit, thus leading to a potential increase in revenue for surfclam harvesters.

6. Small business and local government participation:

The proposed rule implements the surfclam resource management plan recently adopted by the Department. The Department developed this management plan with the assistance and guidance of the Surfclam/Ocean Quahog Management Advisory Board. The Board was established in law, Environmental Conservation Law Section 13-0308, to assist the Department in the development of the management plan, serve as a forum for the review of scientific data and the exchange of ideas, concerns, and recommendations about the surfclam fishery. The management plan was published in the Environmental Notice Bulletin and public comment was solicited in the notice. The proposed rule has no impact on local governments.

7. Economic and technological feasibility:

The changes required by this action have been determined to be economically feasible for all affected parties. There is no additional technology required for small businesses, and this action does not apply to local governments, so there are no economic or technological impacts for any such bodies.

Rural Area Flexibility Analysis

The proposed amendments to Subpart 43-2 will not impose an adverse impact on rural areas. The proposed regulations involve the harvesting of surfclams from New York state waters of the Atlantic Ocean. Surfclams are found only in waters of the marine and coastal district of New York, which area includes the counties of Nassau, Suffolk and Queens. The Department of Environmental Conservation (Department) has determined that there are no rural areas within the marine and coastal district. Consequently, the Department has determined that this rule does not impact rural areas or any public or private entities located in rural areas. Further, the emergency rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The Department of Environmental Conservation (Department) has determined that the proposed regulations will not have a substantial adverse impact on jobs and employment opportunities. Therefore, a job impact statement is not required.

The proposed rule implements the Department's management plan for the protection of surfclams. The amendments to 6 NYCRR subpart 43-2 will streamline the permit process and remove the requirements for crew and deck hands to possess a surfclam permit and for boat operators or captains to possess multiple permits if they operate more than one boat in the fishery. The proposed rule will eliminate the daily harvest limit of 14 cages per vessel, allowing surfclam harvesters to take more surfclams during a single trip and reduce the number of fishing trips needed to take the weekly harvest limit. Lastly, the proposed rule will allow the Department time to evaluate surfclam population assessment data and determine appropriate annual harvest limits in a timely fashion.

The 2002 surfclam population assessment survey shows a significant increase in the surfclam biomass since the previous survey in 1999. Upon analyzing the results from the survey, examining surfclam catch reports, and receiving recommendations from the surfclam industry, the Department has determined that surfclam harvest limits can be increased while maintaining protection of the surfclam resource. Additional proposed changes will streamline the surfclam permit process, and will have no negative effect on jobs. Based on the above and the Department's experi-

ence in adopting regulations similar to those contained in this proposal, the Department has concluded that there will not be a substantial adverse impact on jobs or employment opportunities as a consequence of these amendments. These proposed amendments will likely have a positive impact on employment opportunities in the surfclam fishery.

Department of Health

EMERGENCY RULE MAKING

Severe Acute Respiratory Syndrome (SARS)

I.D. No. HLT-41-03-00005-E

Filing No. 1269

Filing date: Nov. 14, 2003

Effective date: Nov. 14, 2003

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

Action taken: Amendment of sections 2.1 and 2.5 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 225(4), (5)(a), (g), (h), (i) and 226(1)(d) and (e)

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

Specific reasons underlying the finding of necessity: On April 10, 2003 the New York State Commissioner of Health designated Severe Acute Respiratory Syndrome (SARS) as a communicable disease pursuant to authority set forth in 10 NYCRR Section 2.1(a). In order for this designation to continue, regulations adding SARS to the list of communicable diseases were adopted by the Public Health Council at its next scheduled meeting. Such emergency regulations were adopted by the Council on May 16, 2003 and June 20, 2003 and will expire on November 16, 2003. By adopting this rule, the Public Health Council will continue SARS on the list of communicable diseases which providers are required to report to local and/or the State health departments and require physicians to submit specimens for laboratory examination when they suspect a person is infected with SARS. Continuing SARS on the list of communicable diseases will also permit isolation of patients if necessary for disease control. Immediate adoption of this rule is necessary for accurate identification and monitoring of SARS cases and to prevent community transmission through enforcement of isolation measures if needed. Between November 1, 2002, and July 31, 2003, there have been a total of 8,098 suspected or probable SARS cases reported worldwide. The majority of cases have been from China and Hong Kong. SARS has been diagnosed primarily in previously healthy adults aged 25-70 years. Some close contacts, including health care workers, have developed similar illnesses. Early manifestations of SARS have included influenza-like symptoms such as fever, myalgias, headache, sore throat, dry cough, shortness of breath, or difficulty breathing. In some cases, these symptoms are followed by hypoxia, pneumonia, and occasionally acute respiratory distress requiring mechanical ventilation and death. There have been 774 deaths worldwide. There is no known vaccine to prevent, treat or cure SARS. In the United States, there have been 192 suspect cases of SARS with 63 cases in New York State. Ontario, Canada, which includes Toronto, has had 438 probable or suspect SARS cases and 44 deaths, as of September 3, 2003. Identification of suspect SARS cases with laboratory evidence of SARS-associated corona virus in Toronto, Canada and seven U.S. states, including New Jersey and Pennsylvania reinforces the need for enhanced surveillance in New York State. To date, all but one suspect SARS case in New York State have been related to travel to Asia or Toronto. If SARS spreads in the general population, there could be severe public health consequences; therefore, immediate adoption of this rule is necessary. Surveillance efforts for SARS cases in New York State rely on the immediate reporting of suspect or probable SARS. Adding SARS to the list of communicable diseases will trigger mandatory provider reporting of SARS cases and enable mandatory isolation of suspect or confirmed cases if necessary. Requiring physicians to submit specimens from suspected cases for laboratory examination will further efforts to identify and respond to cases. Complete and timely reporting by physicians to the city, county or district health officer of all cases of SARS will assist local health departments and the State Depart-

ment of Health in the earliest possible recognition of an outbreak, and enable steps to contain it.

Subject: SARS reporting and laboratory specimen submission.

Purpose: To add SARS to the communicable disease list.

Text of emergency rule: Subdivision (a) of Section 2.1 is amended to read as follows:

2.1 Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health.

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

- Amebiasis
- Anthrax
- Babesiosis
- Botulism
- Brucellosis
- Campylobacteriosis
- Chancroid
- Chlamydia trachomatis infection
- Cholera
- Cryptosporidiosis
- Cyclosporiasis
- Diphtheria
- E. coli 0157:H7 infections
- Ehrlichiosis
- Encephalitis
- Giardiasis
- Glanders
- Gonococcal infection
- Group A Streptococcal invasive disease
- Group B Streptococcal invasive disease
- Hantavirus disease
- Hemolytic uremic syndrome
- Hemophilus influenzae (invasive disease)
- Hepatitis (A; B; C)
- Hospital-associated infections (as defined in section 2.2 of this Part)
- Legionellosis
- Listeriosis
- Lyme disease
- Lymphogranuloma venereum
- Malaria
- Measles
- Melioidosis
- Meningitis
 - Aseptic
 - Hemophilus
 - Meningococcal
 - Other (specify type)
- Meningococemia
- Mumps
- Pertussis (whooping cough)
- Plague
- Poliomyelitis
- Psittacosis
- Q Fever
- Rabies
- Rocky Mountain spotted fever
- Rubella
- Congenital rubella syndrome
- Salmonellosis
- Severe Acute Respiratory Syndrome (SARS)
- Shigellosis
- Smallpox
- Staphylococcal enterotoxin B poisoning
- Streptococcus pneumoniae invasive disease
- Syphilis, specify stage
- Tetanus
- Toxic Shock Syndrome
- Trichinosis
- Tuberculosis, current disease (specify site)

- Tularemia
- Typhoid
- Vaccinia disease (as defined in section 2.2 of this Part)
- Viral hemorrhagic fever
- Yellow Fever
- Yersiniosis

* * *

Section 2.5 of Part 2 is amended as follows:

2.5 Physician to submit specimens for laboratory examination in cases or suspected cases of certain communicable diseases. A physician in attendance on a person affected with or suspected of being affected with any of the diseases mentioned in this section shall submit to an approved laboratory, or to the laboratory of the State Department of Health, for examination of such specimens as may be designated by the State Commissioner of Health, together with data concerning the history and clinical manifestations pertinent to the examination:

- Anthrax
- Babesiosis
- Botulism
- Brucellosis
- Campylobacteriosis
- Chlamydia trachomatis infection
- Cholera
- Congenital rubella syndrome
- Conjunctivitis, purulent, of the newborn (28 days of age or less)
- Cryptosporidiosis
- Cyclosporiasis
- Diphtheria
- E. coli 0157:H7 infections
- Ehrlichiosis
- Giardiasis
- Glanders
- Gonococcal infection
- Group A Streptococcal invasive disease
- Group B Streptococcal invasive disease
- Hantavirus disease
- Hemophilus influenzae (invasive disease)
- Hemolytic uremic syndrome
- Legionellosis
- Listeriosis
- Malaria
- Melioidosis
- Meningitis
 - Hemophilus
 - Meningococcal
- Meningococemia
- Plague
- Poliomyelitis
- Q Fever
- Rabies Rocky Mountain spotted fever
- Salmonellosis
- Severe Acute Respiratory Syndrome (SARS)
- Shigellosis
- Smallpox
- Staphylococcal enterotoxin B poisoning
- Streptococcus pneumoniae invasive
- Syphilis
- Tuberculosis
- Tularemia
- Typhoid
- Viral hemorrhagic fever
- Yellow Fever
- Yersiniosis

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 published a notice of proposed rule making, I.D. No. HLT-41-03-00005-P, Issue of October 15, 2003. The emergency rule will expire January 12, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5)(a), (g), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health, designation of diseases for which specimens shall be submitted for laboratory examination, and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection and control of persons and things infected with or exposed to such diseases.

Legislative Objectives:

This regulation meets the legislative objective of protecting the public health by adding Severe Acute Respiratory Syndrome (SARS) to reportable disease and laboratory specimen submission requirements, thereby permitting enhanced disease monitoring and authorizing isolation and quarantine measures if necessary to prevent further transmission.

Needs and Benefits:

SARS is a disease associated with fever and signs and symptoms of pneumonia or other respiratory illness. It is transmitted from person to person predominantly by the direct contact or droplet route.

SARS is believed to have emerged as a human pathogen in China in November 2002. As of May 1, 2003, 5,865 suspected and/or probable cases of SARS were reported to the World Health Organization from countries around the world, including Canada and the United States, with 391 deaths reported.

As of May 1, 2003, 20 suspect or probable cases of SARS were reported in New York City and 22 cases of SARS were reported in New York State outside of New York City. Two cases involving non-New York State residents diagnosed in New York State were reported also. Ontario, Canada has had 265 probable or suspect SARS cases and 19 deaths, as of April 25, 2003. The proximity of Ontario, Canada, which includes Toronto, to the New York State border, has raised additional concerns about travel-related transmission. To date, all SARS cases in New York State have been related to travel to Asia or Toronto.

If SARS spreads in the general population, there could be severe public health consequences. On April 10, 2003, the New York State Commissioner of Health determined that SARS is communicable, rapidly emergent and a significant threat to the public health, and designated SARS as a communicable disease under 10 NYCRR Section 2.1. The Public Health Council confirmed this change at its next scheduled meeting on May 16, 2003, and also at the Public Health Council meeting on June 20, 2003. Adding SARS to the reportable disease list permits the Department of Health to systematically monitor for the disease, make its progress known to both State and federal officials, and permit decisions about isolation or quarantine of suspect or confirmed cases to be made on a timely basis.

COSTS:

Costs to Regulated Parties:

Since SARS is a newly emerging disease, it is not possible to accurately predict the extent of the outbreak or potential costs. In the event of the occurrence of SARS cases, however, it is imperative to the public health that they be reported immediately and investigated thoroughly to curtail additional exposure and potential morbidity and mortality and to protect the public health.

The costs associated with implementing the reporting of this disease are lessened as reporting processes and forms already exist. Hospitals, practitioners and clinical laboratories are accustomed to reporting communicable disease to public health authorities.

SARS testing is currently conducted only at the New York State Department of Health Wadsworth Laboratory and the Centers for Disease Control and Prevention (CDC). These tests are under development and are continually being optimized. Costs to hospitals, practitioners and clinical laboratories relate to the cost of shipping specimens to the Wadsworth Laboratory. Two samples must be shipped per patient to the Wadsworth Laboratory, at an estimated cost of \$80.00 (shipping box \$15.00 plus FedEx \$25.00).

Costs to Local and State Governments:

The additional cost of reporting SARS is expected to be mitigated because the staff who are involved in reporting this disease at the local and State health departments are the same as those currently involved with reporting of other communicable diseases listed in 10 NYCRR Section 2.1.

The cost of laboratory testing is expensive (discussed in the section below), and is paid for by the New York State Department of Health Wadsworth Laboratory and CDC. There is no charge to local governments for this testing.

The additional cost to local or state governments associated with investigating and implementing control strategies to curtail the spread of SARS are also significant. Control efforts include each case being isolated for 10 days after resolution of fever. Close contacts are closely monitored with daily follow-up by local health departments for 10 days post-exposure. These intensive efforts are critical to minimize spread.

By potentially decreasing the spread of SARS savings may include reducing costs associated with public health control activities, morbidity, treatment and premature death.

Costs to the Department of Health:

The New York State Department of Health already collects communicable disease reports from local health departments, checks the reports for accuracy and transmits them to the federal Centers for Disease Control and Prevention. The addition of SARS to the list of communicable diseases should not lead to substantial additional costs for data entry, particularly as the Department adopts systems for electronic submission of case reports.

As mentioned above, SARS testing is expensive. In New York State, SARS testing is currently only performed by the New York State Department of Health Wadsworth Laboratory. The Wadsworth Laboratory, in turn, sends samples to CDC for additional testing. The cost per patient tested by the Wadsworth Laboratory is approximately \$430.00. The cost for laboratory testing is about \$350.00 per patient, which includes supplies and reagents only, not technician time. Two samples must be shipped per patient to CDC, at an additional cost of \$80.00 (shipping box \$15.00 plus FedEx \$25.00). These samples include diagnostic samples for testing for the presence of the SARS agent and also convalescent sera from the same patient.

There are additional costs associated with ongoing SARS enhanced surveillance; amounts cannot yet be predicted. New York State Department of Health staff and local health department staff have been aggressively monitoring and investigating reports of SARS in New York State. Due to the SARS activity in Toronto and its proximity to New York State, and at the recommendation of the New York State Association of County Health Officers (NYSACHO) Executive Committee, the New York State Department of Health is requesting that local health departments reinstitute 7 day a week emergency department surveillance for SARS. The Department will assist counties in the investigation of SARS, as it does in the investigation of other communicable diseases.

Paperwork:

The existing general communicable disease reporting form (DOH-389) will be revised. This form is familiar to and is already used by regulated parties.

Local Government Mandates:

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports from physicians in attendance on persons with or suspected of being affected with SARS, will be required to immediately forward such reports to the State Health Commissioner and to investigate and monitor the cases reported.

Duplication:

There is no duplication of this initiative in existing State or federal law.

Alternatives:

No other alternatives are available.

Reporting of cases of SARS is of critical importance to public health. There is an urgent need to conduct surveillance, identify human cases in a timely manner, and reduce the potential for further exposure to contacts.

Federal Standards:

Currently there are no federal standards requiring the reporting of SARS. On April 4, 2003, President George W. Bush issued an Executive Order adding SARS to the list of communicable diseases for which patients can be quarantined under federal authority and which are specified pursuant to Public Health Service Act Section 361(b).

Compliance Schedule:

Reporting of SARS is currently mandated, pursuant to the authority vested in the Commissioner of Health by 10 NYCRR Section 2.1(a). This mandate will be extended upon filing of a Notice of Emergency Adoption of this regulation with the Secretary of State and made permanent by

publication of a Notice of Adoption of this regulation in the New York State Register.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

It is unclear what impact the proposed reporting change will have on small business (hospitals, clinics, nursing homes, physicians, and clinical laboratories). The ultimate impact is dependent on the extent of the SARS outbreak. There are approximately 6 hospitals, 15 nursing homes and 1,000 clinical laboratories that employ less than 100 people in New York State. There are 397 licensed clinics; information about how many operate as small businesses is not available. There are approximately 70,000 physicians in New York State but it is not known how many can be categorized as small businesses. This regulation will apply to all local health departments.

Compliance Requirements:

Hospitals, clinics, physicians, nursing homes, and clinical laboratories that are small businesses and local governments will utilize revised Department of Health reporting forms and specimen shipping procedures.

Professional Services:

No additional professional services will be required since providers are expected to be able to utilize existing staff to report occurrences of SARS and to ship samples to the Wadsworth Laboratory for testing.

Compliance Costs:

No initial capital costs of compliance are anticipated. Annual compliance costs will depend upon the number of SARS cases. The reporting of SARS should have a negligible to modest effect on the estimated cost of disease reporting by hospitals, but the exact cost cannot be estimated. The cost would be less for physicians and other small businesses.

Isolation authority, and the related costs, may also need to be invoked by local governments. The magnitude of these costs is dependent on the number of SARS cases in New York State.

SARS testing is currently conducted only at the New York State Department of Health Wadsworth Laboratory and the CDC. Costs to hospitals, practitioners and clinical laboratories relate to the cost of shipping two specimens per patient to the Wadsworth Laboratory. Shipping costs are estimated at \$80.00 per patient (shipping box \$15.00 plus FedEx \$25.00). Once SARS testing is refined and validated, other laboratories may begin testing.

Minimizing Adverse Impact:

There are no alternatives to the reporting or laboratory testing requirements. Adverse impacts have been minimized since revised forms and reporting staff will be utilized by regulated parties. Electronic reporting will save time and expense. The approaches suggested in the State Administrative Procedure Act Section 202-b(1) were rejected as inconsistent with the purpose of the regulation.

Feasibility Assessment:

Small businesses and local governments will likely find it easy to report conditions due to the availability to them of electronic reporting and tabulation.

There is an additional burden and cost to hospitals, practitioners and local health departments of shipping SARS samples to the Wadsworth Laboratory.

Small Business and Local Government Participation:

Local governments have been consulted in the process through ongoing communication on this issue with local health departments and the New York State Association of County Health Officers (NYSACHO).

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed rule will apply statewide. Given that the number of cases that will be reported from rural areas is unknown, it is not possible to calculate the actual impact on local health units, physicians, hospitals and laboratories that are located in rural areas.

Compliance Requirements:

Local health units, hospitals, clinics, physicians and clinical laboratories in rural areas will continue to utilize Department of Health reporting forms that will be revised to include SARS. Existing procedures will be used to ship specimens to the Wadsworth Laboratory for testing.

Professional Services:

No additional professional services will be required. Rural providers are expected to use existing staff to comply with the requirements of this regulation.

Compliance Costs:

No initial capital costs of compliance are anticipated. See cost statement in Regulatory Impact Statement for additional information.

Minimizing Adverse Impact:

There are no alternatives to the reporting requirements. Adverse impacts have been minimized since familiar forms and reporting staff will be utilized by regulated parties. The approaches suggested in State Administrative Procedure Act Section 202-bb(2) were rejected inconsistent with the purpose of the regulation.

Rural Area Input:

The New York State Association of County Health Officers, including representatives of small counties, has been informed about this change and support the need for it.

Job Impact Statement

This regulation adds Severe Acute Respiratory Syndrome (SARS) to the list of diseases that health care providers must report to public health authorities and submit laboratory specimens. The staff who are involved in reporting SARS at the local and State health departments are the same as those currently involved with reporting, monitoring and investigating other communicable diseases. Similarly, existing staff at the local and State health departments collect and submit SARS specimens, and current State laboratory staff test SARS specimens. Since SARS is a newly emerging disease, it is not possible to accurately predict the extent of the outbreak and the degree of additional demands it will place on existing staff. The Department of Health has determined that this regulatory change will not have a substantial adverse impact on jobs and employment.

EMERGENCY RULE MAKING

Expedited HIV Testing of Women and Newborns

I.D. No. HLT-48-03-00008-E

Filing No. 1273

Filing date: Nov. 18, 2003

Effective date: Nov. 18, 2003

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

Action taken: Amendment of section 69-1.3 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 576, 2500-a and 2500-f

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

Specific reasons underlying the finding of necessity: Immediate adoption of this amendment is necessary to protect the public health and welfare and to prevent harm to infants born in New York State. The New York State Department of Health is actively engaged in the prevention of mother-to-child HIV transmission. Recent advances in medical knowledge concerning the prevention of perinatal HIV transmission have demonstrated that antiretroviral therapy, given to prevent HIV transmission, is most efficacious when given prenatally, during labor, or within the first 12 hours of an infant's birth. Although approximately 94 percent of women are tested for HIV during prenatal care, the HIV status of six percent is unknown at presentation for delivery. Women at high risk for HIV who have received no prenatal care are over-represented within this group. In 1999, the Department implemented expedited HIV testing in the labor and delivery setting so that providers can initiate partial antiretroviral regimens either to the mother in labor or to the infant immediately after birth. The turn-around-time for reporting the result was 48 hours from the drawing of blood from the mother (with her consent) or from the newborn (no consent required). Heretofore, the program has been limited by the lack of a point-of-care rapid HIV test. In cases of HIV-exposure in a newborn where prenatal and/or intrapartum antiretroviral therapy (ART) were not given, studies have shown that therapy must be started for the newborn within 12 hours of birth to be effective in reducing the risk of transmission. The current expedited HIV testing protocols in most New York State birth facilities do not meet this 12-hour timeline for initiating prophylactic newborn ART. In 2001 to 2002, over 1400 HIV-infected women gave birth in New York State. Of these, one hundred mother/infant pairs were first identified as HIV-infected/exposed through expedited HIV testing in the labor, delivery or in the immediate newborn period. In the vast majority of cases (98 of 100), the median time from the mother's admission to the collection of the specimen for expedited HIV testing was 2.5 hours. However, even when testing was performed on-site, results were not returned for at least 20 hours, and treatment was not initiated in the newborn until 22.5 hours after birth. Clearly, achieving timelier reporting of expedited HIV test results is hampered by the lack of a point-of-care rapid test. In November 2002, the U.S. Food and Drug Administration approved the first of a new generation of point-of-care rapid HIV tests. The test is waived under the Clinical Laboratories Improvement Act (CLIA) and may be

performed under the supervision of a licensed physician, nurse practitioner or physician assistant, provided the facility performing the test has obtained a CLIA number and is registered with the Clinical Laboratories Evaluation Program (CLEP). The availability of point-of-care HIV testing offers providers the opportunity to intervene during this most critical time frame for perinatal HIV transmission: labor and delivery. The purpose of this emergency and proposed rule making, which amends 10 NYCRR, Subpart 69-1.3(1)(2), is to ensure that the HIV exposure status is available as soon as possible for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring a maximum turn-around-time of twelve hours from the time the mother consents to testing or from the time of the infant's birth to the receipt of the result of the expedited HIV test, medical providers and patients will have information that is critical for the administration of antiretroviral medication during labor and delivery and to the newborn immediately after birth. As a result of the Expedited HIV Testing regulations (effective August 1999) and the consequent increase of prenatal and expedited HIV testing, along with the prompt initiation of treatment to HIV-infected mothers, the rates of perinatal HIV transmission in New York State have decreased: from 10.9% in 1997 to 3.9% in 2001. New, rapid, point-of-care HIV testing technology can provide test results within 20 to 40 minutes. In most cases, this technology will allow obstetricians to have preliminary HIV test results before the mother delivers, when the initiation of antiretroviral therapy can be of significant benefit. In light of the advances in testing technology, the Department is proposing a regulatory change to 10 NYCRR 69-1.3(1)(2) that would apply in cases where a woman presents for delivery with no documentation of her HIV status. In these cases, the amended regulation would require the birth facility to arrange an immediate HIV screening test of the mother with her consent or of her newborn without consent with results available as soon as possible, but in no event longer than 12 hours after the mother provides consent for testing or, if she does not consent, 12 hours after the time of the infant's birth. Reducing the turn-around-time for expedited HIV testing allows health care providers to provide antiretroviral therapy in time to reduce the risk of mother-to-child transmission of HIV. The emergency rule will take effect upon filing a Notice of Adoption in the *New York State Register*.

Subject: Expedited HIV testing of women and newborns.

Purpose: To amend the current comprehensive program in response to recent advances in medical knowledge and the rapid HIV testing technology to enhance protection of newborns.

Text of emergency rule: Paragraph (2) of Subdivision (1) of Section 69-1.3 of NYCRR is amended to read as follows:

(2) if no HIV test result obtained during the current pregnancy is available for the mother not known to be HIV-infected, arrange an immediate screening test of the mother with her consent or of her newborn for HIV antibody with results available as soon as practicable, but in no event longer than [48 hours] *12 hours after the mother provides consent for testing or, if she does not consent, 12 hours after the time of the infant's birth.*

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, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) section 2500-f requires the commissioner to promulgate regulations to implement a comprehensive program for the testing of newborns for HIV and/or the presence of HIV antibodies. The proposed revision to the regulation amends the current comprehensive program in response to recent advances in medical knowledge concerning the prevention of perinatal HIV transmission and the availability of rapid HIV testing technology, with at least one device suitable for "point-of-care" use.

Legislative Objectives:

In the memorandum accompanying the comprehensive newborn testing bill (Chapter 220 of the Laws of 1996), the legislature indicated its purpose was "to ensure that newborns who are born exposed to HIV receive prompt and immediate care and treatment and counseling that can enhance, prolong and possibly save their lives". Transmission of HIV from mother to newborn can be prevented in many cases by the administration

of antiretroviral medications, which are recommended to be given to the mother starting during the second trimester of pregnancy, continued during labor, and given to the newborn after birth. The proposed amendment to 10 NYCRR, Subpart 69-1.3(2) will ensure that the HIV exposure status is available for all newborns whose mothers have not been tested for HIV during the current pregnancy or for whom HIV test results are not available at delivery. By requiring that HIV test results be available as soon as is practicable but in no case later than twelve hours from the time of the mother's consent to testing or the time of the infant's birth, the Department intends to ensure that medical providers and patients have the information they need to make decisions about preventive treatment in a timely manner.

Needs and Benefits:

Improvements in medical knowledge and major advances in medical technology have occurred since the current program for the Expedited HIV Testing of Women and Newborns was implemented in August 1999. To date, the success of New York State's efforts to reduce perinatal HIV transmission to the lowest possible level has resulted in a decrease in the rate of perinatal HIV transmission for all HIV-exposed infants born in New York from 10.9% in 1997 to 3.9% in 2001. However, transmission is still occurring in instances where the HIV exposure status of an infant was identified too late to provide effective intervention. In such infants therapy must begin within 12 hours of birth to be effective in reducing the risk of transmission. In an addendum to the NYSDOH PCR study, published in the *New England Journal of Medicine* on 4/1/99, it was demonstrated that when ARV was given to the newborn within 12 hours of birth there was a 5.9% rate of HIV transmission. There was no significant benefit if ARV was begun after 12 hours birth as the transmission rate increased to 25%. The ability to have results from expedited HIV testing as soon as possible in cases where there was no history of prenatal HIV testing, coupled with the administration of prophylactic antiretroviral therapy, ideally during labor but no later than 12 hours of birth, is of vital importance in further reducing perinatal HIV transmission. To reduce perinatal HIV transmission to the greatest extent possible, facilities are urged not to view the 12-hour turn-around-time as the goal of testing, but as the outside limit for offering effective therapeutic interventions to prevent transmission of HIV from the mother to her newborn.

Costs:

Costs to State and Local Governments:

The cost to State Government is minimal and can be covered by existing programs and staff. There is no cost to local government except to the extent they own and operate maternity hospitals. Any cost to the State and local governments will be reduced by the savings to the Medicaid program by reducing the costs of care as fewer incidences of HIV transmission to newborns occur. Local governments that operate medical facilities will incur costs as described in the section on Costs to Regulated Parties noted below.

Costs to Regulated Parties:

The approved rapid test is CLIA-waived due to low complexity and may be performed either in the centralized laboratory or at the point-of-care, subject to appropriate NYSDOH approvals. The Department will work closely with facilities to assist them in meeting the turn-around-time requirements of this proposal.

The vast majority (141) of the 159 birthing facilities currently hold a clinical laboratory permit in HIV testing or are eligible for fast-track approval for a permit in HIV testing. These facilities already have or could readily develop the capability of generating HIV test results on-site within twelve hours without additional costs. This is especially true for facilities with around-the-clock centralized laboratory services. Reagent, equipment, personnel and overhead costs for testing a single specimen using an instrument-based method (*i.e.*, EIA) are approximately \$15 for routine testing, but up to ten times that amount for "on demand" (STAT) testing. Birth facilities would incur costs directly related to this proposal whenever expedited testing needed to be performed in the laboratory outside normal testing hours, and qualified staff needed to be called in specifically to run one test. Facilities using such an on-call staffing approach to expedited newborn HIV testing would incur up to 1.5 times the usual hourly wage for a medical technologist, which is estimated to be \$40 per hour (including benefits) or \$50 per hour (including benefits) if the technologist is a supervisor.

The Department will work closely with facilities that do not have current capacity to consistently generate results in 12 hours or less, and assist them in meeting regulatory requirements. Costs of introducing in-house HIV testing include costs of reagents, devices and human resources necessary to validate the test method and write protocols, at an estimated

maximum one-time cost of \$1000. Facilities that conduct testing at point of care, *i.e.*, in the labor and delivery department, would also incur minimal costs associated with initial training and ongoing competency assessment of non-laboratory testing personnel, *i.e.*, labor and delivery nursing staff, although technologists may also travel to patient floors to lend their expertise in the performance of tests and interpretation of results. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training in device use, troubleshooting, recordkeeping and quality assurance activities, and adding the cost of 25 test devices. The device designated for point-of-care testing has a list price of \$10.00-\$15.00 for each test kit.

Overall, the Department estimates that the costs of performing tests at the point-of-care are likely to be less than, or equal to, the costs of expedited HIV tests currently performed in a centralized laboratory. This estimate is based on the fact that rapid HIV tests do not require the purchase or maintenance of expensive laboratory equipment and that the cost of testing devices (OraQuick®, SUDS®) and the salaries of personnel conducting the tests are comparable. The cost of expedited HIV testing done in a reference laboratory (cost at one commercial laboratory is \$75.00/ expedited test) may not change, but birth facilities using these laboratories will have to ensure that they will be able to report results within the 12-hour turn-around-time. The cost to the birth facility in time spent to provide pre-test HIV counseling is not expected to differ from the current cost of expedited HIV testing, which includes reimbursement rates of \$52 for testing and \$44 for counseling (\$96.00/expedited test).

In light of the advances in testing technology, and the benefits of early initiation of antiretroviral therapy to prevent mother-to-child transmission of HIV, many birth facilities will opt to use a rapid HIV test device that generates results in a half-hour or less. Facilities may perform rapid HIV testing either in the laboratory itself or at the point-of-care subject to appropriate NYSDOH approval. Laboratories with an HIV testing permit may choose to conduct "stat" testing 24 hours a day, 7 days a week using a standard instrument-based (*e.g.*, EIA) testing technology within the 12 hour time limit. However, testing using rapid testing devices is encouraged to obtain HIV tests results as soon as possible. While procedures such as immediate transport of specimens by courier to a near-by laboratory, may, in theory, be effective for meeting a 12-hour turn-around-time, the Department's experience with such complex arrangements shows them to usually be an unacceptable alternative for on-site expedited testing.

Of the 159 regulated hospitals and birthing centers affected by this amendment, 141 hold laboratory permits that include HIV and/or diagnostic immunology testing, the latter of which would be allowed, in response to the adoption of this amendment, to add HIV testing through a fast-track mechanism. For any of these 141 facilities that choose to add a new test to an existing HIV or fast-tracked diagnostic immunology permit, costs for protocol development, staff training, test validation and implementation of quality assurance measures are expected to be approximately \$1000. There are no additional costs associated with modifying an existing permit to add a category or test. The remaining 18 birth facilities would incur an additional cost if they seek to provide HIV testing on-site, including an initial cost of \$1000 plus annual fees based on gross annual receipts.

Facilities offering on-site testing at the point-of-care, *i.e.*, in the labor and delivery suite under the auspices of an existing permitted laboratory, would incur minimal costs for initial training and ongoing competency assessment of non-laboratory testing personnel, *i.e.*, labor and delivery nurses. The cost of conducting initial training for a group of 8 or fewer nurses can be estimated by multiplying the hourly wage of a supervisor-qualified technologist by 8 hours of training (on average approximately \$50.00/hour by 8 hours equating to \$400.00) in device use, troubleshooting, record keeping and quality assurance activities, and adding the cost of 25 test devices (\$15 per test by 25=\$375). Therefore, the total training costs would be approximately \$775. Cost attributable to periodic competency assessments of one to two hours could be calculated using the same formula. A materials cost of approximately \$10.00 - \$15.00 a test would be attributable to one single-use device and control materials.

Costs would be offset by revenue generated from third party billing, including Medicaid. Costs of expedited HIV testing in labor, delivery and newborn nursery settings will continue to diminish as efforts to increase prenatal HIV counseling and testing succeed. Any other provider costs associated with rapid HIV testing in the labor and delivery settings are medically appropriate and must continue to be considered part of labor and delivery costs.

Costs to the Department of Health:

The Department will use existing staff to review and approve HIV testing applications, and to conduct on-site surveys of applicant facilities.

Local Government Mandates:

This amendment to the current regulation will not impose any new program services, duties or responsibilities upon any county, city, town, village, school district, fire district or any other special district, except for those local governments operating hospitals with maternity services.

Paperwork:

Paperwork related to point-of-care rapid HIV tests does not significantly differ from that currently required by expedited testing regulations. This paperwork includes the clinician's written order for testing, notation of the completion of pre- and post-test counseling, documentation of the acquisition of the test specimen and recording the test result in the medical record. Some paperwork will be required of birth facilities that seek an addition to an existing permit, and for those that choose to seek a new HIV testing permit.

Duplication:

None.

Alternatives:

There are no alternatives to the 12-hour time limit proposed by this amendment because a longer time period would result in some HIV-exposed infants not being detected in time to administer therapy to prevent HIV transmission. Because advances in scientific knowledge and medical technology allow for rapid HIV testing, the Department determined that the proposed revision to the regulation is the best approach to protect the public health.

Federal Standards:

There are currently no Federal regulations related to prenatal or newborn testing. The Federal government has provided only recommendations and guidelines for these activities. The proposed regulatory change is consistent with current federal recommendations.

Compliance Schedule:

The Department has already advised regulated parties that this amendment will be going into place. The Department understands that many facilities are already undertaking activities to implement rapid HIV testing. The Department expects that facilities will be in compliance by the emergency regulation's November 1, 2003 effective date.

Regulatory Flexibility Analysis

Effect on Small Businesses:

The proposed rule will impact an estimated three birth hospitals and four birthing centers that meet the definition of a small business (independently owned and employs 100 or fewer individuals). No real impact on small businesses is expected, since regulations requiring expedited HIV testing are already in place. No new costs to local governments are anticipated, except for those operating hospitals with maternity services.

Compliance Requirements:

The reporting, record keeping and other affirmative acts that impact small businesses or local governments would not change with this proposed amendment. Current regulations require hospitals and birthing centers to assess whether mothers who present for delivery have a negative HIV test result from the current pregnancy or a positive HIV test result during or prior to the pregnancy. If no test result is documented, the mother is offered consented expedited HIV testing. If she declines, an expedited HIV test is performed on her infant, without consent. Current regulations require a turn-around-time for preliminary HIV test results of no more than 48 hours from the time the specimen is collected. The proposed rule change would decrease the turn-around-time to within 12 hours after the mother's consent for testing, or if she does not consent, within 12 hours of the infant's birth.

Professional Services:

Impacted small businesses and local governments would need the same staff of health care providers (doctors, nurses, nurse practitioners, physicians assistants), counseling and support staff as they currently employ. No additional staff would be needed.

Compliance Costs:

The percentage of women receiving prenatal counseling and testing is steadily increasing, and the need for expedited HIV testing in the intrapartum period is decreasing. As of December 2002, hospital data indicate that approximately 94% of all women giving birth have documentation of their HIV status before delivery. This rate was 62% in July 1999, one month before expedited testing in delivery settings was implemented. Using these data, the need for expedited HIV testing has clearly decreased through the years, from an estimated 120,000 mothers/infants in 1999 to less than 15,000 in 2002. At \$52 per test, the total statewide testing cost in 1999, estimated to be \$6.24 million per year, has decreased to \$780,000 per year.

This number is expected to continue to decline as more women accept prenatal HIV testing. The cost for expedited HIV testing using rapid, point-of-care testing kits is not expected to exceed the cost of expedited testing as currently performed and would be considerably less if facilities choose to take advantage of point-of-care rapid testing.

Economic and Technological Feasibility:

The proposed amendment to the regulatory program is economically and technologically feasible since it is not anticipated that additional staff would be required and rapid, point-of-care testing technology is readily available.

Minimizing Adverse Impact:

Provider costs associated with rapid, point-of-care expedited HIV testing are medically appropriate and must be considered part of labor and delivery costs. Current reimbursement rates for expedited HIV testing subsidize the costs incurred by the delivery facility (\$44 for counseling and \$52 for testing), and will continue. Since preventing HIV transmission saves the high treatment costs for HIV-infected persons, expedited HIV testing in the labor and delivery setting is actually cost effective. Hospitals and birthing centers also realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

Small Businesses and Local Government Participation:

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a video conference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

Forty-four counties meet the definition of a rural area (population less than 200,000) and an additional 11 counties have towns that are classified as rural (towns with population densities of 200 persons or less per square mile). The proposed amendment to the current regulation applies to hospitals and birthing facilities in 55 counties. These facilities already follow the Expedited HIV Testing regulation; significant program expansion is not expected. There are no birth facilities in the remaining seven counties.

Reporting, Recordkeeping and Other Compliance Requirements:

The reporting, recordkeeping and other affirmative acts that will impact hospitals in rural areas have already been undertaken to comply with the Expedited HIV Testing regulation. Current regulations require maternity hospitals and freestanding birthing centers to ensure that all women who present for delivery with no documentation of HIV status are counseled about expedited HIV testing, and, arrange that an immediate HIV screening test of the mother with her consent or of her newborn without consent is performed. Technological advances mean that rapid HIV screening tests can now be performed at the point-of-care. Birth facilities can choose to use the new technology for rapid HIV testing, or to continue with the expedited HIV testing program already in place at their facilities. If the new technology is not chosen, the decreased turn-around-time for the return of preliminary test results will have to be negotiated with either the hospital-based or the commercial laboratories that perform expedited HIV testing.

Professional Services:

Hospitals in rural areas would not need additional professional staff to provide this service for women without known HIV test results.

Costs:

According to current annualized data, fewer than 50 maternity patients or newborns in any hospital or birthing center operated in rural areas require expedited HIV testing. This number will continue to diminish as efforts to promote prenatal HIV testing succeed. If an average of \$52 (the total per test average cost of ELISA or SUDS testing, exclusive of counseling) for each expedited HIV test is used to estimate the total cost of expedited testing (test device, equipment and personnel), the total annual cost for rapid expedited HIV testing in each rural birth facility will be approximately \$2,600, or less, depending on the number of maternity patients or newborns needing rapid testing.

Minimizing Adverse Impact:

Additional provider costs associated with testing are medically appropriate and must be considered part of labor and delivery costs. However, preventing HIV transmission is cost effective because of the high cost of treatment for HIV-infected persons. Hospitals and birthing centers will realize savings as a result of this program by not having to employ outreach staff to find mothers after discharge since post-test counseling can be done while the mother is still in the hospital.

Rural Area Participation:

In advance of publication, the proposed amendment to the regulation was discussed at a two hour meeting held on March 23, 2003 by the Greater New York Hospital Association with representatives from 31 birthing facilities and the Health and Hospitals Corporation attending, and on April 30, 2003 at a video conference hosted by the Hospital Association of New York State and broadcast to birthing facilities statewide.

Job Impact Statement

A Job Impact Statement is not attached because this amended rule will not have a substantial adverse impact on jobs and employment opportunities as apparent from its nature and purpose.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Need Methodology for Residential Health Care Facility Beds

I.D. No. HLT-48-03-00002-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 709.3 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2802 and 2803(2)

Subject: Need methodology for residential health care facility beds.

Purpose: To update the need methodology to reflect the 2000 census and changes in long-term care services.

Substance of proposed rule: The proposed amendments would update the current bed need methodology for residential health care facilities (RHCs) codified at 10 NYCRR Section 709.3. They would reflect the findings of the 2000 Census and the effects on bed need of wider availability of alternatives to RHC care, but would not change the major elements of the current methodology. The proposed changes also provide for the consideration of local circumstances affecting bed need that formerly were addressed by Health System Agencies (HSAs).

The first change in the regulations is in subdivision (b), where the current base year of 1986 is replaced with the year 2000, and the planning target year of 1993 is changed to 2007. Other updates appear in subdivision (d), where the years 2005 and 2010 replace the years 1985, 1990 and 1995 for purposes of calculating linear interpolations of population projections by county. These interpolations for the population age 0-64 and for the population in several age intervals over age 65 are to be calculated using year 2000 Census data and population projections derived therefrom by Empire State Development.

As in the current regulations, subdivision (d) of the proposed rules estimates the need for three general settings of care:

- Residential health care facilities (RHCs), which are usually referred to as nursing homes;
- Long term community-based care, including the Long Term Home Health Care Program, certified home health agency (CHHA) clients who are served for an extended period of time; and the personal care program;
- Supportive housing. This consists of adult care facilities, both adult homes and enriched housing programs serving the elderly population.

Need estimates for each type of long-term care service are calculated for each county using both the statewide pattern use rates and existing local patterns for the distribution of long-term care services found in that county in 2000. A new provision of paragraph (10) of subdivision (d) states that the need for RHC beds calculated using the statewide pattern and the local pattern shall be averaged to estimate the blended need for each service category in the county for the planning target year. However, paragraph 11 of subdivision (d) states that the RHC bed need in each county derived from the blended need shall be adjusted to reflect a 99 percent occupancy rate. This proposed rate is higher than the 97 percent in the current regulations because of the decline in nursing home occupancy over the past several years, the shorter length of stay for non-rehabilitative RHC admissions statewide, and the growing proportion of RHC admissions for patients requiring only short-term rehabilitative care.

Paragraph 13 of subdivision (d) lists the RHC bed need in each of the State's 62 counties. These estimates include beds needed for dementia patients (e.g., Alzheimer's disease and related disorders) and for ventilator-dependent patients. They do not include RHC bed need estimates for special pediatric beds, nor for beds for patients with AIDS or for those in need of long-term rehabilitation for head injury.

Subdivision (e), which addresses the development of long-term care plans by the Health Systems Agencies (HSAs), remains in the proposed rules, but new language in paragraph (2) allows need estimates to be determined without reference to HSA regional long-term care plans when

such plans have not been developed. The revised subdivision thus maintains a potential role for HSAs in the determination of need but recognizes their current diminished role in the planning process, and their absence altogether in some areas of the State.

Subdivision (f) maintains the current provision that public need estimates for RHCf beds in the City of New York shall be obtained from the sum of need estimates for the city's individual five counties. However, new language is added stating that the public need for RHCf beds in the counties of Nassau and Suffolk shall be obtained from the summed need estimates for those two counties.

The current paragraph (3) of subdivision (f) is replaced with a new paragraph stating that it shall be presumed that there is no need for additional beds in a planning area if the overall occupancy rate for existing RHCf beds in the planning area is less than 97 percent, indications of need derived from the methodology set forth in subdivisions (d) and (e) notwithstanding. However, this revision also allows the applicant in such instances the opportunity to demonstrate that there is a need for additional RHCf beds, utilizing the factors set forth in the new subdivision (h).

The existing subdivision (h) would be repealed and replaced with a new subdivision that would allow estimates of need developed in accordance with the methodology in subdivisions (d) and (e) to be modified, based on information and data relating to significant local factors pertaining to an applicant's service/planning area, or on statewide factors, where relevant. These factors include but are not limited to:

- The impact of requirements pertaining to the placement of persons with disabilities into the most integrated setting appropriate to their needs;
- The growth and availability of long-term home and community-based services, other non-institutional residential programs;
- Patient migration patterns that vary from those included in the bed need methodology;
- The health status of residents of the planning area;
- Waiting lists for RHCf admission made up of patients who cannot be served adequately in other settings.

It is such factors as these that applicants may employ to demonstrate that there is a need for additional RHCf beds in their planning areas, despite prevailing occupancy rates of less than the 97 percent specified in subdivision (f).

The proposed rules provide for a reserve of up to 300 additional RHCf beds for the State as a whole. The revised subparagraph (l) states that these beds may be approved only to meet emergency situations or other unanticipated circumstances, such as natural disasters and unexpected changes in population census, migration patterns, or health characteristics. These additional beds may be approved in response to applications to add a single bed or multiple beds to an existing facility, to add an extension unit to an existing facility or to construct a new facility.

Paragraph (2) of section 2802 of the Public Health Law sets forth the Commissioner of Health's role in the approval of certificate of need applications for the construction of nursing homes and authorizes the Commissioner to approve such applications following review by the State Hospital Review and Planning Council. In accordance with section 2801(1), (2) and (3) of the Public Health Law, a nursing home or residential health care facility falls within the definition of a hospital.

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: 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

Paragraph (2) of section 2802 of the Public Health Law details the Commissioner of Health's role in the approval of Certificate of Need (CON) applications for the construction of new nursing homes and authorizes the Commissioner to approve such applications following review by the State Hospital Review and Planning Council (SHRPC). In addition, paragraph (2)(a) of section 2803 of the Public Health Law authorizes the SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of Article 28 of the Public Health Law. Pursuant to section 2801(1), (2) and (3) of the Public Health Law, a nursing home or residential health care facility falls within the definition of a hospital.

Legislative Objectives

Article 28 of the Public Health Law seeks to protect and promote the health of the inhabitants of the State by assuring the efficient, accessible, and affordable provision of health services of the highest quality and that such services are properly utilized. Paragraph (2) of section 2802 states that the Commissioner shall not act upon an application for construction until he or she is satisfied as to the public need for the construction at the time and place and under the circumstances proposed. Consistent with this legislative objective, the proposed amendments will ensure that the criteria for determination of public need for residential health care facility (RHCf) beds will provide access to nursing home care for New Yorkers, while avoiding unnecessary excess RHCf bed capacity.

Current Requirements

Construction projects undertaken by hospitals, nursing homes, clinics and other health care facilities are subject to approval under Article 28 of the Public Health Law. Construction is defined under Article 28 to include the erection or building of a health care facility and the "substantial acquisition, alteration, reconstruction, improvement, extension or modification of a facility, including its equipment . . ." Such "equipment" includes inpatient beds for hospitals and residential health care facilities (nursing homes).

The review of public need under Article 28 helps ensure that beds and services are distributed throughout the State in a manner that both provides sufficient access to care and guards against the costs associated with the operation and maintenance of beds in excess of those needed. By limiting the beds in a given area to the number appropriate for the population, the public need methodology also discourages inappropriate admissions to inpatient care.

The approval process for RHCf beds is subject to a determination of public need using the need methodology set forth in section 709.3. The need methodology is based on a number of factors, including the distribution in each county of the population 0-64 years and the number of functionally dependent individuals in the county population 65 and older. It is further based on normative use rates for RHCfs, for long-term community-based care and for supportive housing. It also takes into account special populations and migration between counties for purposes of obtaining RHCf care. The current methodology employs a base year of 1986 and a planning target year of 1993.

The section 709.3 need methodology also is, and will continue to be, used with respect to establishment applications considered by the Public Health Council (PHC) pursuant to Section 2801-a of the Public Health Law and is incorporated by reference in the PHC's RHCf bed need methodology under 10 NYCRR Section 670.3.

Needs and Benefits

The recent decline of high occupancy rates in nursing homes throughout the State, the absence of significant waiting lists for nursing home placement over the past several years and the low level of patients on hospital alternative level of care (ALC) status suggest that the overall framework of the current RHCf bed need methodology remains adequate today. Based on this experience, the Department does not propose to change the major elements of the current RHCf bed need methodology. Rather, the proposed rule changes seek to update section 709.3 to reflect the findings of the 2000 U.S. Census and the wider availability of alternatives to RHCf care. The proposed changes also provide a means for the consideration of distinctive local and regional circumstances affecting bed need that formerly were addressed in the regional long-term care plans developed by Health Systems Agencies (HSAs).

The current RHCf bed need methodology was developed by the Department in 1989 with the assistance of an advisory group comprised of representatives of health care providers, consumer advocates, State agencies involved in long-term care services, members of the SHRPC, and others. The methodology was guided by the principle that the long-term care system should meet the needs of the dependent population through a mix of services, including nursing facilities, adult care facilities, Long-Term Home Health Care programs, personal care programs, certified home health agencies, other home care programs and informal supports. To the extent possible, the same approach should be employed for the new target year of 2007.

Elements of the Need Methodology

The need methodology in section 709.3 estimates the need for three general settings of care:

- Residential health care facilities (RHCfs), which are usually referred to as nursing homes;
- Long term community-based care, including the Long Term Home Health Care Program, certified home health agency (CHHA) clients who are served for an extended period of time; and the personal care program;

- Supportive housing. This consists of adult care facilities, both adult homes and enriched housing programs serving the elderly population.

Use rates that reflect the proportion of the population served in each of these settings are based on an analysis of the long term care system as it existed in 2000, the base year for the revised methodology. The need for services is then estimated in relation to the projected population for the year 2007 of individuals aged 0-64 and the number of functionally dependent individuals aged 65 and older.

The need for the three service types listed above is summed to derive the total number of people who need to be served across all three long-term care settings. Need estimates for each type of long-term care service are calculated for each county using both the statewide pattern use rates and existing local patterns for the distribution of long-term care services found in that county in 2000. The need for each type of care is then estimated at the mid-point between the statewide pattern need estimate and that derived using the local pattern. The need for residential health care facility beds calculated from the statewide and local pattern need estimates is then adjusted to reflect a 99 percent occupancy rate. This rate is higher than the 97 percent in the current regulations because of the decline in nursing home occupancy over the past several years, the shorter length of stay for non-rehabilitative RHCf admissions statewide, and the growing proportion of RHCf admissions for patients requiring only short-term rehabilitative care.

Application of the Need Methodology

Despite the fact that the application of a portion of the need formula in a given planning area may indicate a need for additional RHCf beds, the proposed methodology also provides that there shall be a rebuttable presumption that there is no need for any additional beds if the overall occupancy rate for existing RHCf beds in the planning area is less than 97 percent, based on the most recent available data. This is to ensure that optimum use is being made of existing bed resources before new beds are approved. Therefore, an initial finding of a need for more beds according to the need methodology may be offset by a relatively low occupancy rate for established RHCf beds *in toto* in the planning area.

Nevertheless, the Department acknowledges that distinctive local circumstances which cannot be recognized in a methodology meant to apply statewide may inhibit access to existing care and warrant the approval of additional beds, despite low occupancy. In such instances, it is the responsibility of the applicant to demonstrate that there is a need for additional RHCf beds in the planning area. Subdivision (h) of the proposed rules sets forth a number of factors that applicants may cite in arguing for additional beds. These factors include, but are not limited to:

- The impact of requirements pertaining to the placement of persons with disabilities into the most integrated setting appropriate to their needs. (This recognizes the need for compliance with the requirements of the U. S. Supreme Court ruling in *Olmstead v. L. C.*, "the Olmstead decision");
- The growth and availability of long-term home and community-based services, other non-institutional residential programs and of other programs and services that may reduce the need for nursing home care;
- Patient migration patterns that vary from those included in the bed need methodology;
- The health status of residents of the planning area;
- Waiting lists for RHCf admission made up of patients who cannot be served adequately in other settings;
- Recommendations made by the local HSA, if applicable.

In allowing consideration of these local factors, the proposed revisions provide the updated methodology with a flexibility that will enable the Department to recognize the ongoing effects of a steadily aging population, and a continually changing long-term care service sector, on the demand for nursing home beds in New York State. The weighing of local factors in the review of CON applications will also permit the Department, the SHRPC and the PHC to acknowledge distinctive regional and area circumstances formerly identified in the regional long-term care plans developed by HSAs. And further, this flexibility will obviate the need for frequent revision of section 709.3, even as the population and the long-term care sector continue to change.

To help ensure that the revised methodology remains flexible, adequate and timely, the proposed rules require the Department to conduct an evaluation of the revised need formula by December 31, 2007. The rules also require the Department to evaluate, by December 31, 2005, the appropriateness of the 99 percent occupancy rate employed to adjust the bed numbers derived for each county from the averaging of the statewide and local pattern use rates. The rules further require that the Department also evaluate by December 31, 2005 the appropriateness of the 97 percent threshold criterion for consideration of applications for new beds.

COSTS:

Costs to State Government Other than the Department of Health

There are no costs to State government other than the Department of Health.

Costs to Local Government

There are no costs to local governments. For local governments that operate nursing homes, the proposed rules represent merely a change in the existing bed need methodology, with which local governments must already comply.

Costs to Private Regulated Parties

Because the proposed amendments merely amend existing rules with which nursing homes must already comply, these changes carry no costs for private regulated parties.

Costs to the Department of Health

There will be no additional costs to the Department of Health because CON review is an established function of the agency.

Local Government Mandates

The proposed amendments do 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 amendments impose no new reporting requirements, forms or other paperwork.

Duplication

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

Alternatives

The Department considered a repeal of the existing need methodology and its replacement with a completely new formula. However, the decline of high occupancy rates in RHCfs over the past several years and the general absence of long waiting times for RHCf admission in most areas suggested that the current methodology was sound and would be adequate for the coming years, if updated to reflect the 2000 Census and the wider availability of alternatives to RHCf care.

In drafting the proposed amendments, the Department also initially considered use of a 98 percent imputed occupancy rate for calculation of the blended need estimates for RHCf beds for each county. However, the Department raised this rate to 99 percent based on reported declines of three percent in overall RHCf bed occupancy statewide in the most recent five years for which data were available (1996 through 2000). The 99 percent rate is more reflective of an expected and continued gradual decline in occupancy rates as home- and community-based long-term care services become more widely available.

The Department also considered the employment of a 95 percent minimum county-wide occupancy rate for existing nursing homes as the threshold criterion for consideration of new beds. That is, the overall occupancy of existing beds within a county would have to be 95 percent before applications for new beds in that county could be considered. Based on declining RHCf bed occupancy rates over the past several years, however, the Department concluded that a 95 percent threshold could lead to approval of unneeded beds and that a 97 percent rate was more appropriate.

Because actual long-term care market areas often involve more than one county, the Department explored the notion of employing a region or subregion, rather than the individual county, as the planning area for purposes of calculating the 97 percent minimum occupancy rate. After examining this alternative, however, the Department concluded that because of the difficulty of developing a meaningful definition of a region from one part of the State to another, regional factors (such as bed occupancy rates in counties contiguous to the applicant's county) would be among those that could be considered under subdivision (h) of the proposed rules. This provision permits the modification of estimated need for additional RHCf beds based on significant local factors pertaining to the applicant's planning/service area.

Federal Standards

The proposed amendments do not exceed any minimum standards of the Federal government. There are no Federal rules affecting CON approval of RHCf beds.

Compliance Schedule

The proposed rules will take effect upon filing. Because CON applications may be submitted at any time, there is no schedule of compliance.

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, recordkeep-

ing 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, recordkeeping or other compliance requirements on facilities in rural areas.

Smaller populations may make it difficult for rural counties to maintain the 97 percent occupancy rates that would allow consideration of applications for additional RHCf beds. However, this concern is addressed in subdivision (h) of the proposed rules, which permits the modification of estimated need for additional RHCf beds based on significant local factors pertaining to the applicant's planning/service area. The rural nature of a county would be one such factor and would allow the consideration of applications from counties where existing RHCf bed occupancy did not meet the 97 percent occupancy criterion.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a (2)(a) of the State Administrative Procedure Act. Because the proposed rule is aimed at maintaining high occupancy in nursing homes, the jobs and employment opportunities associated with such optimum use of residential health care facilities will be affected favorably.

Insurance Department

EMERGENCY RULE MAKING

Claim Submission Guidelines for Medical Service Claims Submitted in Paper Form

I.D. No. INS-48-03-00001-E

Filing No. 1268

Filing date: Nov. 12, 2003

Effective date: Nov. 12, 2003

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

Action taken: Addition of Part 230 (Regulation 178) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 2402, 2404, 2601, 3201, 3216, 3217, 3221, 3224, 3224-a, 4235, 4303, 4304, 4305, 4321 and 4322

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

Specific reasons underlying the finding of necessity: The Insurance Department has received over 88,000 complaints against HMOs and insurers concerning late payment of claims since the prompt payment statute (Chapter 666 of the Laws of 1997) became effective in 1998. The Insurance Department has levied monetary penalties against insurers and HMOs for untimely payment and untimely denial of claims for health care services. The health care industry and the insurance industry have conflicting views concerning the manner in which the prompt payment statute should be administered. Insurers and HMOs would prefer the imposition of penalties based on general business practices instead of being based on a per claim violation. The healthcare industry believes that timeframes for payments should be shortened and more fines should be assessed. Providers contend that they continue to carry large amounts of receivables on their books; insurers and HMOs contend that providers are submitting claims that are less than complete, requiring requests for basic information that should have been included on the claim form. There are still many debates about what needs to be done in order to alleviate the disagreement over whether the prompt payment statute has been an effective tool in resolving some of the issues that led to its enactment. The Insurance Department convened the Healthcare Roundtable in order to foster discussion and agreement between the health care providers and the health insurance industry. The Healthcare Roundtable is comprised of associations that represent providers, insurers and HMOs. As a result of the Roundtable discussions, the health insurance industry and the health care providers reached agreement on what information must be included in a claim form

to make it ready for processing. Roundtable meetings are still continuing, and will discuss additional changes that are necessary to streamline and effectuate the prompt payment requirements. This regulation must be promulgated as an emergency measure so that, as discussions continue, the clean claim parameters can be put in place and assessed by the Roundtable to determine what other claim payment guidelines are needed. This agreement referred to above on the claim payment guidelines component of the prompt payment process is being memorialized in a regulation, which should go a long way in developing a healthy relationship between the health care provider community and the health insurance industry. This regulation will ensure that claims are adjudicated more quickly and could help to ensure continued financial viability of certain health care providers.

Subject: Claim submission guidelines for medical service claims submitted in paper form.

Purpose: To create claim payment guidelines.

Text of emergency rule: A new Part 230 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation 178) is adopted to read as follows:

Section 230.1. Claim Submission Guidelines. A claim for payment of medical services submitted on paper shall not be returned on the basis that it is incomplete if, when it is received by the insurer or entity with a certificate of authority issued pursuant to Article 44 of the Public Health Law, it contains accurate responses to each and every one of the data elements listed below, except as otherwise provided below. Nothing in this regulation shall prohibit an insurer from requesting specific additional information distinct from information on the claim form, which is needed to determine liability or make the payment, or from determining that the claim is not payable due to other reasons.

(a) In the case of a medical claim submitted on the national standard form known as a CMS 1500 the claim shall contain at least the items in the following fields of the claim form, except as otherwise provided below:

- 1a. Insured's I.D. Number
2. Patient's Name
3. Patient's Date of Birth and Gender
4. Insured's Name (Last Name, First Name)
5. Patient's Address
9. Other Insured's Name (if appropriate)
- 9a. Other Insured's Policy or Group Number (if appropriate)
- 9b. Other Insured's Date of Birth and Gender (if appropriate)
- 9c. Employer's Name or School Name (if appropriate)
- 9d. Insurance Plan Name or Program Name (if appropriate)
- 10a. Is Patient's Condition Related to Employment?
- 10b. Is Patient's Condition Related to Auto Accident?
- 10c. Is Patient's Condition Related to Other Accident?
11. Insured's Policy, Group or FECA Number if provided on ID Card
- 11d. Is There Another Health Benefit Plan?
12. Patient's or Authorized Person's Signature (Can be completed by writing "signature on file" where appropriate)
13. Insured's or Authorized Person's Signature (if appropriate)
17. Name of Referring Physician or Other Source (if appropriate)
- 17a. I.D. Number of Referring Physician (if appropriate)
18. Hospitalization Dates Related to Current Services (if appropriate)
21. Diagnosis or Nature of Illness or Injury
- 24A. Dates of Service
- 24B. Place of Service
- 24D. Procedures, Services, or Supplies
- 24E. Diagnosis Code (refer to item 21)
- 24F. \$ Charges
- 24G. Days or Units (for DME) (if appropriate)
25. Federal Tax I.D. Number
28. Total Charge
29. Amount Paid (if appropriate)
30. Balance Due
31. Signature of Physician or Supplier Including Degrees or Credentials (if not already on file, except as required by applicable Federal and State laws)
33. Personal Identifying Number of the particular practitioner rendering the care plus, if practicing in a group, the Identifying Number of the group as well.

For items listed above with the notation "(if appropriate)" the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases the insurer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the insurer. If an item is not applicable at

all it should be left blank rather than inserting a notation that it is not applicable.

(b) The list set forth in subdivision (a) of this section shall apply to all claims submitted on paper subject to this section, regardless of whether the policy form is health insurance issued by an insurer pursuant to Articles 32, 42 or 43 of the Insurance Law or coverage issued by an entity with a certificate of authority issued pursuant to Article 44 of the Public Health Law. Nothing in this Part shall prohibit an insurer or entity with a certificate of authority issued pursuant to Article 44 of the Public Health Law from electing to accept some or all claims with less information than the complete list above.

(c) For the purposes of this section, the term "submitted on paper" shall include claims submitted via non-electronic format, such as mail and facsimile

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 29, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Terri Marchon, Insurance Department, 25 Beaver St., New York, NY 10004-2319, (212) 480-2280, e-mail: tmarchon@ins.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: The Superintendent's authority for the adoption of Part 230 of Title 11 (Regulation 178) is derived from Sections 201, 301, 1109, 2402, 2404, 2601, 3201, 3216, 3217, 3221, 3224, 3224-a, 4235, 4303, 4304, 4305, 4321 and 4322 of the Insurance Law.

Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the Superintendent to promulgated regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization (HMO) and its subscribers. Section 2402 authorizes the Superintendent to levy civil penalties as a separate violation for each violation of Section 3224-a. Section 2404 authorizes the Superintendent to levy civil penalties against any person for failure to provide a good faith response to request for information. Section 2601 sets forth the unfair claims settlement practices that are prohibited by the statute. Section 3201 authorizes the Superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state. Section 3216 sets forth the standard provisions to be included in individual accident and health insurance policies written by commercial insurers. Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 3224-a sets forth the timeframes and penalties for untimely payment of undisputed claims for health care services under contracts issued pursuant to Articles 32, 42 and 43 of the Insurance Law and Article 44 of the Public Health Law. Section 3224 gives the Superintendent the authority to establish a standard claim form for physicians or other health care providers to be used for accident and health insurance claims. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Section 4303 sets forth benefits that must be covered under accident and health insurance contracts written by non-profit corporations. Section 4304 includes requirements for individual health insurance contracts written by non-profit corporations. Section 4305 includes requirements for group health insurance contracts written by non-profit corporations. Sections 4321 and 4322 establish standards for individual direct payment contracts issued by health maintenance organizations.

2. Legislative Objectives: Chapter 666 of the Laws of 1997 amended the Insurance Law relating to the settlement of claims for health care and payment for health care services and took effect January 22, 1998. The law was intended to set timeframes within which insurers and HMOs must pay undisputed claims for health care services submitted by subscribers and health care providers. The legislation prescribed penalties in the form of interest payable on claims paid later than 45 days. The law also amended Section 2402 and gave the Superintendent the power to levy monetary penalties against insurers and HMOs for their failure to pay undisputed claims within 45 days of receipt, or untimely denials of claims, or for requesting additional information needed to process the claim beyond 30

days of receipt of the claim. The Insurance Department established mechanisms for accepting complaints from health care providers and created procedures for levying monetary penalties against insurers and HMOs for violation of the prompt payment statute.

Since January of 1998, the Department has received over 88,000 complaints from health care providers against HMOs and insurers regarding the timely payment of health care claims. The Department has collected monetary penalties of approximately 5 million dollars from insurers and HMOs for violations of Section 3224-a of the Insurance Law. Insurers and HMOs have altered their processes to accommodate the handling of large volumes of complaints generated as a result of the prompt payment statute.

Since 1998, several bills have been sponsored by providers in attempts of tightening the timeframe requirements for timely claim payments and increasing the penalties for non-compliance with prompt payment requirements. Conversely, insurers and HMOs have sponsored legislation attempting to establish a general threshold of substantial compliance only, beyond which monetary penalties would be assessed.

3. Needs and Benefits: Prompt payment laws have been enacted in a number of states with varying degrees of penalties. There are many debates amongst the various associations that represent health care providers, insurers and HMOs regarding when a claim is determined to be clean and therefore ready for payment.

The Superintendent of Insurance convened the Healthcare Roundtable to encourage dialogue between the various associations representing health care providers, insurers and HMOs in order to ameliorate many of the issues surrounding what constitutes a clean or undisputed claim, with agreement to discuss more challenging issues at a later date. The Roundtable agreed that it must first set parameters for determining the information required to be included in a claim form for it to be considered complete. The group agreed that the guidelines established by the State of Connecticut in the form of a regulation, would assist in resolving much of the discussion surrounding the information or data fields that must be included in a claim form in order for it to be considered complete.

The attached regulation is the result of several meetings, discussions and agreements, and represents a consensus of the Healthcare Roundtable. Members of the Roundtable include the Medical Society of the State of New York, The Healthcare Association of New York, The Greater New York Hospital Association, The Conference of Blue Cross Blue Shield Plans, the Health Plan Association, the American College of Obstetricians and Gynecologists, and various provider representatives.

The following is a brief description of how the proposed regulation is consistent with the legislative intent.

The statement in support of the legislation indicates that HMOs and insurers do not pay claims and bills in a timely fashion, to the detriment of providers and patients alike. Before the enactment of the prompt payment statute, existing law did not require insurers and HMOs to pay specific claims or bills for health care services within any particular timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The lack of specific statutory provisions encouraged payers to delay payments to take advantage of interest, which can be earned on the moneys being withheld from payment. The intent of the prompt payment law is to provide protection to both patients and health care providers relative to the timely payment of claims by insurers and HMOs. The powers granted to the Superintendent of Insurance to investigate and enforce compliance with the prompt payment requirements established by the law as well as the interest and penalty sanctions established by the law, help assure that payments are made in a timely fashion.

Prior to the legislation, there were generally no repercussions for paying claims late. Healthcare providers complained that there were no incentives or penalties for honoring claims, and hospitals were accumulating large receivables because insurers paid late. Since the enactment of the legislation, the argument has changed to a discussion of what the necessary elements are for a substantially complete claim. Insurers and HMOs contend that providers are filing complaints with the Insurance Department for late payment of claims when in many instances the claims submitted are deficient.

The State of Connecticut recognized that guidelines were required in order to determine those instances where the insurer or HMO had all of the information necessary to pay the claim but paid the claim late nonetheless. This regulation is similar to Connecticut's in that the parameters are clear and consistent with the healthcare claims process for provider claims submitted on paper. This regulation is also based on agreement with the industry on what needs to be accomplished to curtail the arguments on whether the claim in question is complete.

4. Cost: Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, who readied their claims processing functions in early 1998 in order to process claims within the requisite timeframes. In fact, insurers have already established procedures to handle the increased number of complaints filed by health care providers. Insurers and HMOs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

5. Local Government Mandates: The proposed regulation does not impose any new mandates on any county, city, town, village, school district or fire district.

6. Paperwork: The proposed regulation does not impose any reporting requirements on insurers, HMOs, or health care providers. No additional paperwork will be required from insurers, HMOs or health care providers, other than what is already required by statute.

7. Duplication: The proposed regulation does not overlap or duplicate any other state regulations, or federal mandates.

8. Alternatives: Interest groups representing providers and payers met on numerous occasions to develop the parameters for determining what constitutes a substantially complete claim. There are no alternative approaches to resolving the discussion other than the agreement reached between the provider associations, and the health insurer and HMO associations. These interested parties prefer that the agreement should be memorialized in a regulation.

9. Federal Standards: There are no federal laws that require timely payment of undisputed health care claims. There is a new claims payment regulation issued by the United States Department of Labor, which relates to the processing of claims under employer group contracts, but the federal regulation does not address timely payment of health care claims.

10. Compliance Schedule: Since interested parties representing providers, HMOs, and insurers developed the regulation, these parties are aware of the regulatory provisions and will be able to bring practices into compliance with the requirements. Insurers and HMOs are ready to accept the guidelines, as they will improve insurers' and HMOs' relationships with the provider community, which is essential for the viability of health insurance in New York State.

Regulatory Flexibility Analysis

1. Effect of the rule: The regulation will affect HMOs and insurers paying claims under contracts written pursuant to Articles 32, 42, and 43 of the Insurance Law and Article 44 of the Public Health Law. Insurers licensed to do business in New York do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act. The regulation will also affect health care providers submitting claims for payment for health care services submitted on the CMS 1500 claim form. It sets forth guidelines for determining when a claim is considered complete and ready for processing. This regulation is the result of meetings with the health care providers and insurers and HMOs, and represents a consensus finally reached between the Department and various interested parties on what needs to be accomplished in order for a claim to be considered substantially complete. The regulation could affect small businesses that are comprised of health care providers. The regulation does not apply to or affect local governments.

2. Compliance requirements: Prompt payment reporting, recordkeeping and other compliance requirements are imposed by statute. Insurers and HMOs are already paying claims for healthcare services to providers. There are no compliance requirements for local governments. There are no compliance requirements for small businesses including health care providers other than clarifying what constitutes a substantially complete claim.

3. Professional services: Insurers and HMOs are not required to obtain professional services to comply with this regulation. Providers do not have to obtain additional professional services as a result of this regulation.

4. Compliance costs: The implementing legislation requires that insurers and HMOs pay undisputed claims within 45 days of receipt, or deny the claim, or request additional information within 30 days of receipt. Insurers and HMO are already responding to the mandates of the prompt payment statute. This regulation is requested by interested parties in order to establish the framework for what is considered a substantially complete claim that is ready for processing. The regulation does not impose any additional cost to HMOs and insurers. As a result of this regulation, insurers and HMOs will need to request additional information less frequently, reducing their costs of processing claims.

5. Economic and technological feasibility: The regulation is designed to foster better understanding among interested parties about what is

needed to speed the processing of health care claims. Adherence on the part of the health care provider will speed the processing of health care claims and curtail the various requests from insurers and HMOs for additional information.

6. Minimize adverse impact: The regulation minimizes the adverse impact on health care providers, many of which are small businesses. If claims are substantially complete when submitted, HMOs and insurers do not need to request additional information. Consequently, payment to providers will be faster, resulting in lower receivables on the books of health care providers. Differing compliance timetables or exemption from coverage by the regulation is not feasible given existing statutory requirements for prompt payment of claims.

7. Small businesses and local government participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory agenda, accessible to small businesses and local governments. Interested parties representing HMOs, insurers and providers developed the regulation during meetings convened by the Department and therefore had an opportunity to participate in the rule making process.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Health maintenance organizations and insurers to which this regulation is applicable do business in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Health care providers in New York State are comprised of mostly physicians, but include other health care providers in individual practices or small groups throughout the state.

2. Reporting, recordkeeping and other compliance requirements and professional services: This regulation requires no additional recordkeeping or reporting by insurers or HMOs other than that which they are required to perform by statute. Although health care providers are being asked to include certain elements on the claim form to make it substantially complete, these elements have always been required by HMOs and insurers for claims that are submitted on paper by health care providers. The regulation will not add any new reporting requirements for health care providers, and professional services will not be needed to comply with the proposed regulation.

3. Costs: Any cost in relation to the prompt payment of claims was imposed by statute. Insurers and HMOs are already responding to the mandate of the statute. It is also anticipated that payments for healthcare services will get to health care providers faster resulting in lower amounts of receivables being carried as assets by healthcare providers, and a faster infusion of money into the community.

4. Minimize adverse impact: Because the same requirements apply to both rural and non-rural entities, the regulation will impact all affected entities the same. In fact, the regulation has the potential to decrease insurers' and HMOs' expenses, possibly reducing rate increase requests. It will also accelerate payment to providers for the delivery health care services. This acceleration of payment will help in keeping local doctors in family practice in their respective communities, and will foster consumers' continued access to health care providers.

5. Rural area participation: Notification of the Department's intent to propose the regulation was included in the Department's regulatory agenda. In addition, interested parties representing HMOs, insurers and providers, potentially located in rural areas, discussed the regulation during meetings convened by the Department and therefore had an opportunity to participate in the rule making process.

Job Impact Statement

This regulation will not adversely affect jobs or employment opportunities in New York State. The regulation is intended to improve the relationship between payers and providers, ultimately getting payment to providers more quickly, and keeping providers in their communities. As a result of the regulation, insurers will spend less time requesting information from health care providers. The regulation will also ease the confusion surrounding whether insurers have exercised bad faith in requesting additional information.

There is no anticipated adverse impact on job opportunities in this state.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Change of Address by Licensees

I.D. No. INS-48-03-00004-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 Parts 21, 22, 23, 25 and 26 of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 2134

Subject: Change of address by licensees.

Purpose: To conform language relating to notification of the Insurance Department of a change of address of licensees under art. 21 of the Insurance Law.

Substance of proposed rule: The amendments conform language relating to notification of change of address of licensees under Article 21 of the Insurance Law to reflect language set forth in new Section 2134 of the Insurance Law, added by Chapter 687 of the Laws of 2003, requiring notification of the Superintendent of Insurance within thirty days of the change of address.

Text of proposed rule and any required statements and analyses may be obtained from: Terri Marchon, Public Affairs, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-2283, e-mail: tmarchon@ins.state.ny.us

Data, views or arguments may be submitted to: John Gemma, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5276, e-mail: jgemma@ins.state.ny.us

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

This action was not under consideration at the time this agency's regulatory agenda was submitted.

Consensus Rule Making Determination

The agency has determined that no person is likely to object to the rule as written. The amendment merely conforms language relating to notification of change of address of licensees under Article 21 of the Insurance Law to reflect a change in statutory language as set forth in new Section 2134, added by Chapter 678 of the Laws of 2003, requiring notification of the Superintendent of Insurance within thirty days of the change of address. The existing language in the regulations requires that notification of the change of address be provided "as it occurs".

Job Impact Statement

The proposed rule change will have no impact on jobs and employment opportunities in New York State. The amendment merely amends language of various regulations concerning notification of change of address to conform to newly enacted statutory language added by Chapter 678 of the Laws of 2003.

for the return of a patient in the custody of his or her facility where that patient's mental status has changed in terms of their capability of understanding the court proceedings and participating in their own defense. The current regulation involves a review by the hospital forensic committee in accordance with requirements of Section 510.09. This rule will streamline the process of making determinations regarding the fitness to stand trial and the return to court of the patients involved. It will establish that the clinical director is responsible for determining whether a patient remains an incapacitated person or is fit to stand trial. It outlines that the clinical director may designate certain facility psychiatrists to examine the patient and prepare a report and recommendation to the clinical director. While the clinical director will review and consider these recommendations, he or she need not follow them.

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, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Sections 7.09(b), 7.09(c) and Section 31.04(a) of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, the authority to administer the forensic psychiatric program, and the power to adopt regulations for quality control, respectively. Article 730 of the Criminal Procedure Law establishes the role of the Commissioner of Mental Health in the process of determining the fitness to stand trial.

2. Legislative Objectives: Article 7 and Article 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 730 of the Criminal Procedure Law reflects the role of the Commissioner of Mental Health in the process of determining the fitness to stand trial.

3. Needs and Benefits: This amendment will streamline proper decision making regarding changes in custody status of patients who have been committed to the custody of an Office of Mental Health (OMH) forensic facility by a criminal court after having been found to have a mental illness which renders them incapable of understanding the court proceedings against them or participating in their own defense. OMH has a responsibility to take steps, in the interest of public safety, to see that these individuals are kept at the appropriate level of custody and are promptly returned to the court when their mental status changes.

Currently Part 540 provides that the clinical director may apply to the court for the return of a patient in the custody of his or her facility where that patient's mental status has changed in terms of their capability of understanding the court proceedings and participating in their own defense. The current regulation involves a review by the hospital forensic committee in accordance with requirements of Section 510.09. The hospital forensic committee reviews, due to difficulty of scheduling and additional paperwork, often consume a period of several weeks. This adds unnecessarily to the patient's length of stay and delays the defendant's ability to face a fair and speedy trial. It also results in over crowding as patients who might otherwise return to court await the committee's action. This situation has become critical and immediate action is necessary to address it.

This rule will streamline the process of making determinations regarding the fitness to stand trial and the return to court of the patients involved. It will establish that the clinical director is responsible for determining whether a patient remains an incapacitated person or is fit to stand trial. It outlines that the clinical director may designate certain facility psychiatrists to examine the patient and prepare a report and recommendation to the clinical director. While the clinical director will review and consider these recommendations, he or she need not follow them.

In summary, this amendment streamlines the process of determining fitness to stand trial. It supports sound decision making and it maintains the final decision making authority of the clinical director. This new process will meet all the requirements and expectations of the court orders involved.

4. Costs: It is estimated that this amendment could result in a savings of at least 2,000 hours of staff time per year at Mid-Hudson Forensic Psychiatric Center. It is also estimated that by streamlining this process there will be a reduction at that facility in patient length of stay, averaging between

Office of Mental Health

EMERGENCY RULE MAKING

Patients Committed to the Custody of the Commissioner

I.D. No. OMH-48-03-00007-E

Filing No. 1272

Filing date: Nov. 18, 2003

Effective date: Nov. 18, 2003

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

Action taken: Amendment of Part 540 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), (c) and 31.04(a); and Criminal Procedure Law, art. 730

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: This rule is necessary to streamline the currently lengthy and involved process of making determinations regarding fitness to stand trial and return to court of patients against whom criminal charges are pending.

Subject: Patients committed to the custody of the commissioner pursuant to Criminal Procedure Law, art. 730.

Purpose: To establish a faster and more appropriate process for determination of fitness to stand trial and return to court of a patient against whom criminal charges are pending.

Substance of emergency rule: Part 540 currently provides that the clinical director of a State operated forensics facility may apply to the court

14 to 21 days and resulting in a savings to the State of at least \$100,000 in associated costs.

There will also be significant savings to local governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH currently provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be between \$1,475,000 to \$2,212,000.

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts. This regulation applies only to state-operated forensic facilities.

6. Paperwork: This rule should decrease and simplify the paperwork requirements.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected. This change is critical and is needed immediately to address census and staffing issues, improve treatment for patients, and provide for a safer environment for patients and staff.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: These regulatory amendments will be effective upon their adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not impose any adverse economic impact on small businesses, or local governments. There will be significant savings to local governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH currently provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be \$1,475,000 to \$2,212,000.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. This rule will have a positive economic impact on rural counties.

There will be significant savings to rural county governments. As required by subdivision (c) of Section 43.03 of the Mental Hygiene Law, the costs of care of patients receiving services while being held pursuant to order of a criminal court must be paid by the county in which such court is located. OMH provides services to approximately 350 patients admitted under Article 730 of the Criminal Procedure Law. Counties are currently billed at a rate of \$301.00 per day of inpatient service. Based on an estimated 14 to 21 days reduction in length of stay the annual savings to counties, on a statewide basis, will be between \$1,475,000 to \$2,212,000.

Rural counties have been especially concerned about these costs since they can have a proportionately larger budget impact and are difficult to plan for or to address in the local budget process.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves procedural changes to custody determinations regarding patients at state operated forensic facilities and will not have any adverse impact on jobs and employment activities. It will have a positive impact on staffing at Mid-Hudson Forensic Psychiatric Center by reducing the amount of staff time necessary to conduct reviews and prepare documentation regarding custody determinations under Criminal Procedure Law Article 730.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operation and Medical Assistance for Outpatient Programs

I.D. No. OMH-48-03-00009-P

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

Proposed action: Amendment of Parts 587 and 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b), 31.04(a) and 43.02(a); and Social Services Law, sections 364(3) and 364-a(1)

Subject: Operation of outpatient programs and medical assistance for outpatient programs.

Purpose: To explicitly permit the provision of family treatment, through the addition of a definition of the service and standards for reimbursement.

Text of proposed rule: Part 587 is amended as follows:

Paragraphs (8) through (28) of subdivision (c) of Section 587.4 are renumbered paragraphs (9) through (29), and a new paragraph (8) is added to read as follows:

(8) *Family treatment means therapeutic interventions designed to treat the recipient's psychiatric condition (whether the recipient is an adult or a minor) to address family issues that have a direct impact on the symptoms experienced by the recipient, and to promote successful problem solving, communication, and understanding between a recipient and family members as it relates to the recipient's symptoms, treatment, and recovery.*

Subdivision (f) of Section 587.8 is amended to read as follows:

(f) A clinic treatment program may also provide the following additional services:

- (1) case management services;
- (2) crisis intervention services; [and]
- (3) clinical support services; and
- (4) family treatment services.

Subdivision (e) of Section 587.9 is amended to read as follows:

(e) A clinic treatment program serving children with a diagnosis of emotional disturbance may also provide the following services:

- (1) case management; [and]
- (2) crisis intervention services; and
- (3) family treatment services.

Part 588 is amended as follows:

Paragraphs (5) and (6) of subdivision (a) of Section 588.6 are amended, and a new paragraph (7) is added, to read as follows:

(5) Collateral visit: shall be reimbursed for: (i) clinical support services of at least 30 minutes in duration of face-to-face interaction between one or more collaterals and one therapist with or without a recipient; or

(ii) family treatment services of at least 30 minutes in duration of face-to-face interaction among all of the following: a recipient, one or more family members, and a therapist.

(6) Group collateral visit: shall be reimbursed for: (i) clinical support services, [in accordance with paragraph 587.4(c)(5)] as defined in paragraph (5) of subdivision (c) of Section 587.4 of this Title, of at least 60 minutes in duration but not more than two hours and shall represent services to more than one recipient and/or his or her collaterals. Such visits need not include recipients but shall not include more than 12 collaterals and/or recipients in a face-to-face interaction with a therapist for which reimbursement is claimed. Such limitation does not preclude the non-reimbursed participation of additional persons in the group session but such participation shall not be separately reimbursed; or

(ii) family treatment services of at least 60 minutes in duration but not more than 2 hours and shall include services to more than one recipient. For each recipient participant, at least one family member shall participate. However, only one group collateral bill per recipient is allowed per day. Such visits shall not include more than 12 participants, including recipients and family members, for which reimbursement is claimed. Such limitation does not preclude the non-reimbursed participation of additional persons in the group session.

(7) Family visit: Shall be reimbursed for family treatment services, as defined in paragraph (8) of subdivision (c) of Section 587.4 of this Title, of at least 60 minutes in duration of face-to-face interaction between one recipient, one or more of his or her family members, and one therapist. For purposes of billing family visits which meet these criteria, providers shall bill one regular visit and one collateral visit.

Text of proposed rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@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.

Regulatory Impact Statement

1. Statutory authority: Section 7.09(b) of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

Section 31.04(a) of the Mental Hygiene Law provides that the Commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of Article 31.

Section 43.02(a) of the Mental Hygiene Law provides that payments under the medical assistance program for outpatient services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget.

Sections 364(3) and 364-a (1) of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Article 43 of the Mental Hygiene Law established the Commissioner's authority regarding fees and rates.

Sections 364 and 364-a of the Social Services Law reflect the objective that the Office of Mental Health shall be responsible for establishing and maintaining standards for Medicaid reimbursed mental health programs.

3. Needs and benefits: Parts 587 and 588 do not explicitly promote or preclude the provision of family treatment. In the absence of such recognition, some providers have appropriately billed for such services using a combination of a regular visit (*i.e.*, a 30-minute session with a recipient) and a collateral visit (*i.e.*, a 30-minute session with a collateral). To ensure compliance with the regulations, providers must maintain clear documentation that at least 30 minutes of the session was devoted to the provision of services to the recipient, and that at least another 30 minutes was devoted to the provision of clinical support services to the collateral. Without such a distinction and the associated documentation, billing is not permissible.

In light of the importance of family treatment in many recipients' recovery, it is proposed that the regulations be amended to explicitly permit its provision while ensuring Medicaid neutrality. Many providers have requested such explicit permission. Family treatment will be an optional, not a required service.

As a general rule, there are limits on the number of outpatient visits which may be provided to, or on behalf of, any single recipient in a given day. With the exception of crisis visits, clinic visits with recipients are restricted to one brief, regular or group visit per day; clinic visits with a collateral are restricted to one collateral or group collateral visit per day. Such restrictions are ensured through the use of unique codes for each of the billing categories, as well as Medicaid Management Information System (MMIS) edits.

As an alternative to the establishment of a new family visit rate code, it is proposed that providers bill a family visit using the combination of a regular visit and a collateral visit, as is currently done by some providers. However, the regulations need to be amended to include a definition of family treatment which would allow greater flexibility within the 60-minute time frame. Providers will need to document the overall participation of the recipient and the family members during the hour, but would no longer need to meet the requirement that the 60 minutes be split exactly in half (30 minutes and 30 minutes) between the regular visit and the collateral visit. The amended regulations will also accommodate 30-minute family treatment sessions, as well as family treatment sessions with multi-family groups.

4. Costs: This proposal is cost neutral.

5. Local government mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should decrease and simplify the paperwork requirements of affected providers. Providers will only need to document a single 60-minute family treatment service and they will no longer be required to document a 30-minute regular visit plus a 30-minute collateral visit.

7. Duplication: These regulatory amendments do not duplicate existing State or Federal requirements.

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative would have failed to support the provision of family treatment as detailed in Section 3. This alternative was rejected.

9. Federal standards: The regulatory amendments do not exceed any minimum standards of the Federal government for the same or similar subject areas.

10. Compliance schedule: These regulatory amendments will be effective upon their adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments. The rule adds family treatment as an optional service to the list of clinic services. It simplifies and clarifies a billing procedure for this optional service.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not impose any adverse economic impact on rural areas. Additional flexibility regarding billing for the optional service of family treatment will be available to rural and other providers.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice because it is apparent from the nature and purpose of this rule that it involves only adding an optional service, family treatment, to the list of clinic services and providing for a more flexible and simplified billing process.

Department of Motor Vehicles

NOTICE OF ADOPTION

Drivers' Schools

I.D. No. MTV-37-03-00007-A

Filing No. 1274

Filing date: Nov. 18, 2003

Effective date: Dec. 3, 2003

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

Action taken: Amendment of Part 76 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 394 and 501

Subject: Drivers' schools.

Purpose: To impose an age requirement that driving school instructors must be at least 21 years of age before they can provide behind-the-wheel instruction to learner permit holders and also require such instructors to certify the number of hours of behind-the-wheel instruction received by the student while under the immediate supervision of the instructor.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-37-03-00007-P, Issue of September 17, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Sean J. Martin, Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Provision of High Capacity Loops as Unbundled Network Elements by Verizon New York Inc.

I.D. No. PSC-48-03-00010-P

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

Proposed action: The Public Service Commission is considering action on a request filed by Verizon New York Inc. (Verizon) on Oct. 8, 2003 to close Case 02-C-1233 without further proceedings, on the ground that all pending issues have been resolved by the Federal Communications Commission in its order no. FCC 03-36 and implemented by Verizon through a proposed amendment to its interconnection agreements. The commission may grant, deny or modify Verizon's request or take other actions as necessary to conclude Case 02-C-1233 and/or to ensure compliance with FCC order 03-36.

Statutory authority: Public Service Law, sections 91, 92, 94 and 96

Subject: Provision of high capacity loops as unbundled network elements by Verizon New York Inc., consistent with FCC order 03-36.

Purpose: To determine whether further NYPSC proceedings are necessary to ensure compliance by Verizon New York Inc. with FCC order 03-36 regarding the provision of high capacity loops as unbundled network elements.

Substance of proposed rule: The Public Service Commission is considering action on a request filed by Verizon New York Inc. ("Verizon") on October 8, 2003 to close Case 02-C-1233 without further proceedings, on the ground that all pending issues have been resolved by the Federal Communications Commission in its Order No. FCC 03-36 and implemented by Verizon through a proposed amendment to its interconnection agreements, offered to all competitive local exchange carriers by letter posted at http://www22.verizon.com/wholesale/clecsupport/content/1,16835_east-wholesale-resources-2003_industry_letters-clec-10_02b,00.html. The Commission may grant, deny or modify Verizon's request or take other actions as necessary to conclude Case 02-C-1233 and/or to ensure compliance with FCC Order 03-36.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaelyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (02-C-1233SA1)

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

Submetering of Electricity by Sea Park East L.P.

I.D. No. PSC-48-03-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a request filed by Sea Park East L.P. to submeter electricity at 2980 W. 28th St., 2970 W. 27th St. and 2727 Surf Ave., Brooklyn, NY.

Statutory authority: Public Service Law, sections 65(1) and 66(1)-(5), (12) and (14)

Subject: Submetering of electricity for master-metered residential rental units owned or operated by private or government entities.

Purpose: To permit electric submetering at 2980 W. 28th St., 2970 W. 27th St. and 2727 Surf Ave., Brooklyn, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of master metered residential rental properties owned or operated by private or government entities. The Sea Park East L.P. has submitted a proposal to master meter and submeter this residential rental complex. The total building electric usage for this complex will be master metered and each unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, economic benefits, security, dispute resolution, grievance procedures, and metering in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal

to submeter electricity at 2980 West 28th Street, 2970 West 27th Street and 2727 Surf Avenue, Brooklyn, NY.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaelyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (03-E-1575SA1)

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

Submetering of Electricity by Sea Park West L.P.

I.D. No. PSC-48-03-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a request filed by Sea Park West L.P. to submeter electricity at 2929 W. 31st St. and 2930 W. 30th St., Brooklyn, NY.

Statutory authority: Public Service Law, sections 65(1) and 66(1)-(5), (12) and (14)

Subject: Submetering of electricity for master-metered residential rental units owned or operated by private or government entities.

Purpose: To permit electric submetering at 2929 W. 31st St. and 2930 W. 30th St., Brooklyn, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of master metered residential rental properties owned or operated by private or government entities. The Sea Park West L.P. has submitted a proposal to master meter and submeter this residential rental complex. The total building electric usage for this complex will be master metered and each unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, economic benefits, security, dispute resolution, grievance procedures, and metering in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at 2929 West 31st Street and 2930 West 30th Street, Brooklyn, NY.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaelyn A. Brillig, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (03-E-1576SA1)

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

Submetering of Electricity by Sea Park North L.P.

I.D. No. PSC-48-03-00013-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a request filed by Sea Park North L.P. to submeter electricity at 2828 W. 28th St., Brooklyn, NY.

Statutory authority: Public Service Law, sections 65(1) and 66(1)-(5), (12) and (14)

Subject: Submetering of electricity for master-metered residential rental units owned or operated by private or government entities.

Purpose: To permit electric submetering at 2828 W. 28th St., Brooklyn, NY.

Substance of proposed rule: The Commission will consider individual submetering proposals on a case-by-case basis in the category of master metered residential rental properties owned or operated by private or government entities. The Sea Park North L.P. has submitted a proposal to master meter and submeter this residential rental complex. The total building electric usage for this complex will be master metered and each unit will be individually submetered.

The submetering plan sets forth proposals on electric rates, economic benefits, security, dispute resolution, grievance procedures, and metering in compliance with the Home Energy Fair Practices Act (HEFPA). The Commission may accept, deny or modify, in whole or in part, the proposal to submeter electricity at 2828 West 28th Street, Brooklyn, NY.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(03-E-1577SA1)

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

Lightened Regulation and Financing Approval by Calpine Eastern Corporation

I.D. No. PSC-48-03-00014-P

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

Proposed action: The Public Service Commission is considering whether to approve, reject or modify requests of Calpine Eastern Corporation (Calpine Eastern), on behalf of an as-yet unformed affiliated entity, for an order providing for lightened regulation and approving financing.

Statutory authority: Public Service Law, sections 4(1), 66(1), 69, 70 and 110

Subject: Calpine Eastern's requests for lightened regulation of its as-yet unformed affiliate as an electric corporation and for financing approval of up to \$95 million.

Purpose: To consider the requests in connection with a proposed electric generating facility.

Substance of proposed rule: By petition filed on November 5, 2003 Calpine Eastern Corporation ("Calpine Eastern"), on behalf of an as-yet unformed affiliated entity, seeks an order granting a Certificate of Public Convenience and Necessity to allow it to construct and operate an electric generating facility located in Bethpage, Town of Oyster Bay, New York, providing for lightened regulation of it as an electric corporation, and granting financing approval of up to \$95 million. The request for a Certificate of Public Convenience and Necessity seeks a license, so it is not the subject of this notice.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(03-E-1581SA1)

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

Mini Rate Increase by Village of Arcade

I.D. No. PSC-48-03-00015-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a proposal filed by Village of Arcade to make various changes to the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Electricity, to become effective March 1, 2004.

Statutory authority: Public Service Law, section 66(12)

Subject: Mini rate increase.

Purpose: To increase annual electric revenues by approximately \$297,000 or 7.5 percent.

Substance of proposed rule: The Village of Arcade proposes to increase its annual electric revenues by approximately \$297,000 or 7.5% to become effective March 1, 2004. The increase will be applied equally to all service classes.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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.

(03-E-1592SA1)

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

Exchange of Retail Access Data by Rochester Gas & Electric Corporation

I.D. No. PSC-48-03-00016-P

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

Proposed action: The Public Service Commission (PSC) is considering the request of an ESCO currently participating in Rochester Gas & Electric Corporation's (RG&E) retail access program that RG&E continue to provide detailed metered usage data via EDI following implementation of a multi-retailer model in its service territory. The EDI TS867 monthly usage standard would be modified to provide ESCO/marketers with detailed metered usage data at the discretion of the commission rather than upon mutual agreement of specific trading partners.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To ensure that ESCO/marketers currently participating in RG&E's service territory under the single retailer model will continue to receive detailed metered usage data, necessary to maintain the current level of customer service, after RG&E's move to a multi-retailer model.

Substance of proposed rule: In its Opinion and Order No. 01-03 Approving EDI Data Standards and Data Protocols and Modifying the New York Uniform Business Practices for EDI Implementation, issued and effective July 23, 2001, the Commission directed the development of data standards for the EDI transactions necessary to support its retail access billing and payment processing practices, as described in its orders issued on May 18, 2001 and March 14, 2002 in Case 98-M-1343.

Business processes and data exchange standards necessary to support billing and payment processing under the Single Retailer Model were

subsequently approved on August 26, 2002. In that model, the ESCO/Marketer serving the end use customer has, by definition, the sole responsibility for providing all retail services including billing, payment processing and customer inquiry/complaint handling. Accordingly, ESCOs functioning as Single Retailers must have access to meter reading data to both calculate and present charges on customers' bills. Pending modifications to the TS867 Monthly Usage Standard to enable transmission of such data via EDI, metered usage data was made available to ESCO/Marketers in spreadsheet format.

In version 2.0 of the TS867 Monthly Usage Standard, subsequently approved on November 26, 2002, Single Retailer utilities were required to use a new PTD loop (PTD*PM) to transmit metered usage data. This new loop could also be used in other billing models 'with the agreement of the trading partners'.

In its last rate and restructuring order (Case 02-E-0198, *et al.*), Rochester Gas and Electric Corporation was directed to transition to a multi-retailer model for retail access effective March 2004. Coincident with the implementation of this model, the utility plans to provide only billed consumption data in its 867 Monthly Usage transactions. The Village of Hilton, an ESCO currently providing gas commodity services in Rochester's service territory, has requested that the Commission direct Rochester to continue to provide it with metered usage data via EDI after the change from the Single Retailer model to a multi-retailer option. If the Village does not receive this data, its customers would have no choice but to call RG&E regarding the Village's commodity charges.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaelyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (98-M-0667SA41)

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

Enrollment Request and Change Request Standards

I.D. No. PSC-48-03-00017-P

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

Proposed action: The Public Service Commission (PSC) is considering modifications to the TS814 enrollment request and TS814 change request standards to add data elements to enable ESCO/marketers to report a customer's tax rate to the utility when a customer's bill option is utility rate ready consolidated billing. Previously approved modifications to the uniform business practices now require ESCOs to provide the utility with the customer's tax rate, either at the time of enrollment when the bill option requested is utility rate ready consolidated billing, or at the time a change to the utility rate ready consolidated bill option is requested.

Statutory authority: Public Service Law, section 5(2)

Subject: Rules and guidelines for the exchange of retail access data between jurisdictional utilities and eligible ESCO/marketers.

Purpose: To revise certain EDI transaction set standards to bring those standards into compliance with recently adopted changes in the uniform business practices and, thereby, enable ESCOs to provide the new data in EDI format.

Substance of proposed rule: The Uniform Business Practices, initially approved in January 1999, established basic statewide business procedures governing the interactions necessary between distribution utilities and energy service companies (ESCOs) to facilitate retail access programs in the state. In October 1998, the Commission directed a collaborative of interested parties to assess the data communication needs associated with implementing retail access program and make recommendations regarding the most efficient means for data exchange. In an order issued April 5, 2000, the Commission endorsed the development and statewide implementation of various Electronic Data Interchange (EDI) Transaction Set

Standards to effect the data exchange necessary to support retail access initiatives.

The majority of EDI Transaction Set Standards necessary for common data exchanges were developed and subsequently approved by the Commission based upon the Uniform Business Practices in effect in 2002. In October 2003, the Practices were substantially revised and updated to reflect new business and/or data exchange requirements. Accordingly, modifications in various published EDI Data Standards will be necessary to support the revised Practices.

This notice seeks comments on changes in the TS814 Enrollment Request and Response and the TS814 Account Maintenance (Change) Standards necessary to facilitate the transmission of customer's tax rate information when the customer's bill option is utility rate ready consolidated billing. Specifically, Attachment 4 of Section 5 and Section 9.D.1.e. of the Practices as amended requires the non-billing party (an ESCO) to provide its customer's sale and use tax rates to the billing party (the utility) when the utility is issuing a rate ready consolidated bill on behalf of the ESCO. The published standards for Enrollment and Change would be revised to add the data segments/elements necessary for the ESCO to communicate tax information to the utility either at the time enrollment is requested or at the time the customer's bill option is changed to utility rate ready consolidated billing.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaelyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (98-M-0667SA42)

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

Calculation of Franchise Fees by Cablevision of Wappingers Falls, Inc.

I.D. No. PSC-48-03-00018-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees.

Statutory authority: Public Service Law, section 216(1)

Subject: Calculation of franchise fees by Cablevision of Wappingers Falls, Inc.

Purpose: To allow Cablevision of Wappingers Falls, Inc. and the Village of Pomona to agree to exclude the amount of the franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Village of Pomona (Rockland County). Section 595.1(o)(2) requires franchise contract language to express franchise fees as a percentage of gross revenues derived from the operation of the cable system. Gross revenues are defined in the referenced section as "all revenues required to be reported to the commission...pursuant to 9 NYCRR Part 599". Section 595.1(o)(2) permits exclusions from that revenue base, but requires that such base include all "revenues received directly from subscribers for any cable services purchased by subscribers on a regular, recurring monthly basis". Franchise fee collections fall within these definitions of gross revenues. Therefore, a waiver of rules is required to permit exclusion of franchise fee collections from calculation of gross revenues.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (98-V-0942SA1)

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

Franchising Process by the Town of Lorraine

I.D. No. PSC-48-03-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Lorraine (Jefferson County) for a waiver of 9 NYCRR sections 594.1 through 594.4 pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Franchising process by the Town of Lorraine.

Purpose: To waive certain franchising standards to expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Lorraine (Jefferson County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process. Cable television service will be provided by Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN), d/b/a Time Warner Cable-Syracuse Division.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (518) 474-3204

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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. (03-V-1604SA1)

**Office of Temporary and
Disability Assistance**

**EMERGENCY
RULE MAKING**

Temporary Shelter Supplements

I.D. No. TDA-24-03-00001-E

Filing No. 1270

Filing date: Nov. 14, 2003

Effective date: Nov. 14, 2003

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

Action taken: Addition of section 370.10 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 158, 350(2) and art. 5, title 10; and L. 2001, 2002 and 2003, ch. 53

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: To ensure that persons who are no longer eligible for family assistance because of the 60-month time limit on receipt of such assistance but who are receiving safety net assistance and meet other eligibility requirements can pay their rent and avoid eviction.

Subject: Temporary shelter supplements.

Purpose: To provide temporary shelter supplements to certain persons who are no longer eligible for family assistance because of the time limit on receipt of such assistance.

Text of emergency rule: Section 370.10 is added to read as follows:

370.10(a) Scope.

This section governs the provision of supplements known as Temporary Shelter Supplements (TSS). Such supplements may be provided to recipients of Safety Net Assistance (SNA) who would otherwise be eligible for Family Assistance (FA) but for the time limits on receipt of such assistance and who meet the conditions set forth below. Such supplements are provided pursuant to an authorization and appropriation in the State budget. This section shall be effective only for so long as a specific appropriation in the State budget is made therefore.

370.10(b) Application of other regulations.

TSS is provided only to recipients of non-federally participating SNA program. TSS recipients are subject to all the regulations of this Title governing SNA unless otherwise specified in this section.

370.10(c) District responsibilities.

All social services districts authorized to provide a TSS benefit must:

(1) Upon this office's eligibility determination for a TSS benefit or the local districts determination of eligibility for such a benefit, if directed by this office to make such determination, provide such benefits to eligible individuals.

(2) Ensure that all SNA recipients in receipt of a TSS benefit comply with all training requirements and case management services.

(3) Periodically report to this office on the recipients of TSS at such times and in such manner as this office may direct.

370.10(d) Eligibility requirements for applicants who are not receiving a supplemental shelter allowance when they apply for TSS.

(1) Applicants for TSS who were not receiving a supplemental shelter allowance must apply for TSS on a form prescribed by this office.

(2) To be eligible for TSS, there must be a court proceeding concerning the nonpayment of rent, maintenance or mortgage where the applicant resides. The application shall include documentation demonstrating that the case is on file with a court including the caption, index number and an official court stamp or signature.

(3) The applicant must reside in a social services district in which a lawsuit challenging the adequacy of the shelter allowance maxima in the FA program was commenced prior to December 1, 2001 and preliminary relief has been ordered.

(4) Receipt of TSS must enable the applicant to remain in his or her housing. The district may pay up to \$3,000 or six times the monthly rental obligation in full satisfaction of tenant liability for rent arrears, whichever is higher, in accordance with paragraph (4) of subdivision (f) of this section. This office may require the applicant to move to a similar priced apartment in lieu of paying arrears.

370.10(e) Eligibility requirements for all applicants for TSS, including persons receiving a supplemental shelter allowance when they apply for TSS.

(1) All individuals requesting a TSS benefit must be eligible for SNA, have exhausted their FA eligibility as a result of the 60 month time limitation and be eligible for FA except for the application of the time limits.

(2) The TSS benefit must not exceed the amounts established in subdivision (f) of this section.

(3) The public assistance recipient must be the tenant of record and have a lease for the housing or obtain an agreement in writing to stay for at least one year if the tenancy is not covered by rent regulation.

(4) In addition, the following case circumstances must be met in order to receive a TSS benefit:

(i) No one in the public assistance case can be sanctioned.

(ii) The public assistance household must contain a child under the age of 18 or under the age of 19 and a full-time student.

(iii) The household cannot have willfully lost section 8 assistance provided by the federal Department of Housing and Urban Development, without good cause, within the past two years.

(iv) The household must apply for section 8 assistance, if permitted to do so, and take the benefit, if offered.

(v) The household must verify household composition and rent must be paid by non public assistance (NPA) household members as described below.

(vi) Any changes that affect eligibility must be reported to this office, if acting on behalf of the local district, and the district within 10 days of the change. Failure to report any change may result in permanent discontinuance of TSS benefits.

(5) NPA household members, including persons not eligible for public assistance due to their immigration status and recipients of supplemental security income (SSI) or foster care, must agree to contribute either their pro rata share of the rent or 30 percent of their gross income to the rent, whichever is less. In addition:

(i) The NPA's income must be verified.

(ii) If the NPA claims to have no income, the person must apply for public assistance before the additional allowance can be authorized.

(iii) Persons reported as not eligible for public assistance due to their immigration status, who are without income will not be expected to contribute toward their rent or be included in the shelter number.

370.10(f) Needs and allowances.

(1) TSS allowance. The amount of the TSS benefit will be established by this office. The maximum benefit an SNA household may receive is equal to the amount which was or would have been previously authorized for that household size by a court ordered supplement under FA. SNA households that were not in receipt of a court ordered supplement prior to their receiving SNA assistance, may receive an allowance equal to the difference between the shelter allowance determined in accordance with section 352.3 of this Title and the actual rental obligation; provided however, that the TSS allowance must not exceed an amount equal to the shelter allowance maximum or an amount, when combined with the allowable shelter allowance, is equal to the following rent table, whichever is greater:

By family size

1	2	3	4	5	6	7	8+
\$450	\$550	\$650	\$700	\$725	\$750	\$775	\$800

(2) TSS benefit increase limitations. Once TSS benefits have been authorized for a household, the TSS benefit amount may increase for that household up to the maximum established in paragraph (1) of this subdivision, provided that the increase is documented in the recipient's lease or rental agreement.

(3) TSS rental amounts. The temporary assistance household's rental obligation may exceed the amount authorized under paragraphs (1) and (2) of this subdivision by up to one hundred dollars. The household is responsible for this excess amount and must agree to have this amount restricted from their regular public assistance benefit authorized under section 352.2 of this Title.

(4) Arrears payments. Rent arrears may be authorized as part of the TSS request. Arrears payments for rent cannot exceed the higher of \$3,000 or six times the monthly rental obligation. Under extenuating circumstances (e.g. need to keep current housing for medical reasons), and subject to approval by this office, an arrears amount can be authorized for a higher amount not to exceed 10 times the monthly rental obligation. Once arrears payments are made for the household under this section, no future rental arrears payments will be made for any month in which a TSS benefit was authorized for household or for any month in which the case was sanctioned.

370.10(g) Budgeting.

The following general provisions apply:

(1) A recipient is no longer eligible for a TSS benefit once he or she has lost eligibility for public assistance.

(2) The undue hardship reduction procedures found in section 352.31(d)(2) of this Title do not apply in relationship to TSS benefits.

(3) As a condition for receiving a TSS benefit, recipients must agree to have their entire rent paid directly to the landlord.

(4) TSS is not part of the standard of need for determining eligibility for public assistance. Eligibility shall be determined without regard to TSS.

370.10(h) Notice and procedural rights.

To the extent not inconsistent with this section, desk reviews of case discrepancies will forgo the procedures in Part 358 of this Title.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency/proposed rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. TDA-24-03-00001-EP, Issue of June 18, 2003. The emergency rule will expire January 12, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

Regulatory Impact Statement

1. Statutory Authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Department of Social Services to promulgate regulations to carry out its powers and duties. Section 122 of Part B of Chapter 436 of the laws of 1997 reorganized the Department of Social Services into the Department of Family Assistance with two distinct offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance (OTDA). Chapter 436 transferred the functions of the former Department of Social Services concerning financial support services to OTDA.

Section 34(3)(f) of the SSL requires the Commissioner of the Department of Social Services to establish regulations for the administration of public assistance and care within the State. Section 122 of Part B of Chapter 436 provides that the Commissioner of the Department of Social Services will serve as the Commissioner of OTDA.

Section 158 of the SL contains the eligibility requirements for the Safety Net Assistance (SNA) program.

Title 10 of Article 5 of the SSL authorizes the Family Assistance program (FA) which provides allowances for the benefit of children who are financially needy for their support, maintenance and needs.

Section 350(2) of the SSL provides that FA shall not be granted to any family which includes an adult who has received FA or any other form of assistance funded under the Federal Temporary Assistance to Needy Families Block Grant program for a cumulative period of longer than 60 months.

Chapter 53 of the Laws of 2001, Chapter 53 of the Laws of 2002 and Chapter 53 of the Laws of 2003 (the State Operations and Aid to Localities Budget) appropriated funds to be used to reimburse one-half of the non-federal share of the cost of the rent supplement authorized by this regulatory amendment.

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that people who are unable to provide for themselves can, whenever possible, be restored to a condition of self-support.

3. Needs and Benefits:

The proposed amendments authorize the payment of a rent supplement to cases that include a child in receipt of SNA when such supplement is necessary to prevent eviction and when such cases were in receipt of such supplement as FA recipients pursuant to a decision of the Commissioner of OTDA as determined necessary to address litigation or pursuant to a court order pending final adjudication of litigation and transferred to SNA or when such case would have met the eligibility criteria for such supplement except for FA ineligibility.

In *Jiggetts v. Grinker*, a case commenced in 1987, plaintiffs were recipients of Aid to Dependent Children (ADC) residing in New York City whose actual rent exceeded the agency shelter allowance maxima and who were facing eviction for non-payment of their rent. The plaintiffs alleged that the shelter allowance provided to ADC recipients was inadequate to maintain their housing and therefore violated section 350 of the Social Services Law. Similar cases were brought and are still pending in three other counties. In each of the cases, either by court order or by an informal intervention process, families receiving ADC who have alleged similar claims to the plaintiff have received rent supplements to prevent eviction while the court cases pending.

In 1997, the ADC program was abolished in New York and a successor program, the FA program, was established. The FA program contains a 60 month limitation on receipt of assistance (See section 350 of the Social Services Law). Beginning on December 1, 2001, the first cohort of families reached the 60 month limit. Such families can transition to the SNA program if they apply. However, section 350 of the Social Services Law, which is the linchpin of the *Jiggetts* case, does not apply to families receiving SNA. See *Deleo v. Kaladjian* 215 A.D.2d 520 (1995) and *Gautam v. Perales* 179 A. D. 2d 509 (1992). Therefore, such families would no longer be eligible for the preliminary relief being provided in the various cases.

To ease the transition from FA to SNA, the Legislature, in Chapter 53 of the Laws of 2001, appropriated funds to reimburse one-half of the cost of a rent supplement to be provided to families formerly receiving preliminary relief in the various shelter allowance cases or who might be eligible for such relief but for the time limits. In order to receive the shelter supplement, a person must be in receipt of SNA, have exhausted their FA eligibility as a result of the 60-month time limit or receipt of such assistance and be eligible for FA except for the application of the time limit. Because the allowance is a creature of the appropriation language and is not a special needs allowance in the SNA program, it does not increase the standard of need or standard of payment for that program. Funds also were appropriated in the recently passed 2003-04 State Operations and Aid to Localities Budget to continue the rent supplement program.

4. Costs:

Assuming that 6,855 cases reach the 60-month limit in December 2001, with additional cases reaching the limit in each month thereafter, and factoring in a 10 percent caseload decrease due to restrictions on the payments and attrition, it is estimated that the cumulative costs to be as follows, based on a benefit level of \$280 per month in New York City and \$377 per month in the rest of the State:

Cumulative Cost (millions)	Gross	Federal	State	Local
State Fiscal Year 2001-02	\$8.337	\$0	\$4.168	\$4.168
State Fiscal Year 2002-03	\$32.270	\$0	\$16.135	\$16.135

It is important to note that any additional State and local expenditures would count toward meeting the State's federal maintenance of effort requirement.

5. Local Government Mandates:

When requested by this Office, social services districts would be required to determine whether persons are eligible for a temporary shelter supplement.

6. Paperwork:

A new form would be developed by this Office that would be used when a person applies for a temporary shelter supplement.

7. Duplication:

The proposed regulatory amendments do not duplicate any existing State or federal requirements.

8. Alternatives:

This Office is required to establish a rent supplement program as described in Chapter 53 of the Laws of 2001, Chapter 53 of the Laws of 2002 and Chapter 53 of the Laws of 2003. These regulations comply with the requirements of those chapter laws and reflect this Office's experience and the experience of social services districts in operating informal intervention programs.

9. Federal Standards:

There are no Federal standards concerning temporary shelter supplements.

10. Compliance Schedule:

Social services districts would be required to begin complying with the requirements of these regulatory amendments when they become effective.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed regulations will not affect small business but will have an impact on the 58 social services districts in the State.

2. Compliance requirements:

Social services districts would be required to determine eligibility for temporary shelter supplement benefits when directed to do so by the Office of Temporary and Disability Assistance.

3. Professional services:

No new professional services will be required for social services districts to comply with the proposed regulations.

4. Compliance costs:

The proposed regulations will not require the social services districts to incur any initial capital costs. It is estimated that local costs of the regulations for State Fiscal Year 2001-02 will be \$4,168,000; for State Fiscal year 2002-03, the local costs will be \$16,135,000.

5. Economic and technological feasibility:

The social services districts have the economic and technological feasibility to comply with the proposed regulations.

6. Minimizing adverse impact:

The proposed regulations will not have an adverse economic impact on social services districts.

7. Small business and local government participation:

Staff of the Office of Temporary and Disability Assistance have informed social services districts in New York City, Nassau County, Suffolk

County and Westchester County about the proposed amendments since those are the only districts that will be affected by the amendments. Those districts were invited to submit comments on the amendments.

Rural Area Flexibility Analysis

A rural area flexibility analysis statement has not been prepared for the regulations establishing a temporary shelter supplement since only those social services districts in New York City, Nassau County, Suffolk County and Westchester County will be affected by the regulations.

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 job of the worker 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.

Assessment of Public Comment

During the public comment period for the proposed regulations concerning temporary shelter supplements (TSS), the Office of Temporary and Disability Assistance received comments from one social services district and a State agency. No changes have been made to the proposed amendments as a result of the comments.

Comment:

The social services district asked that 18 NYCRR 370.10(f)(4) be revised to allow for multiple shelter arrears payments when there are extenuating circumstances. The current regulation only allows arrears payments to be made once while the applicant/recipient is in receipt of a TSS.

Response:

This Office disagrees with this comment and no change is being made to the regulation. Under the TSS program, there is a requirement to have shelter payments vendor restricted, that is, have the rental payment paid directly to the landlord. Therefore, any arrears accumulated while on TSS would be the sole responsibility of the person receiving the TSS payment and would not warrant an additional arrears payment.

Comment:

The State agency asked that 18 NYCRR 370.10(g) be revised to include a statement that would make clients ineligible for TSS benefits if they are sanctioned for failing to comply with any public assistance program requirement.

Response:

This Office agrees with this comment. However, this is already a requirement for TSS benefits as set forth in 18 NYCRR 370.10(e)(4). Therefore, no change to the regulation is necessary.

NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

Temporary Shelter Supplements

I.D. No. TDA-24-03-00001-C

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

The notice of proposed rule making, I.D. No. TDA-24-03-00001-EP was published in the *State Register* on June 18, 2003.

Subject: Temporary shelter supplements.

Purpose: To provide temporary shelter supplements to certain persons who are no longer eligible for family assistance because of the time limit on receipt of such assistance.

Substance of rule: The proposed amendments authorize the payment of a rent supplement to cases that include a child in receipt of safety net assistance (SNA) when such supplement is necessary to prevent eviction and when such cases were in receipt of such supplement as family assistance (FA) recipients pursuant to a decision of the Commissioner of OTDA as determined necessary to address litigation or pursuant to a court order pending final adjudication of litigation and transferred to SNA or when such case would have met the eligibility criteria for such supplement except for FA ineligibility.

Changes to rule: No changes.

Expiration date: June 17, 2004.

Text of proposed rule and changes, if any, may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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