

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.

Banking Department

EMERGENCY RULE MAKING

High Cost Home Loans

I.D. No. BNK-50-04-00002-E

Filing No. 1334

Filing date: Nov. 24, 2004

Effective date: Nov. 25, 2004

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

Action taken: Amendment of Part 41 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 6-i and 6-l

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

Specific reasons underlying the finding of necessity: L. of 2002, ch. 626 became effective on April 1, 2003. Provisions of ch. 626, by the enactment of section 6-l of the Banking Law, affect the making of certain home mortgage loans, known as high cost home loans, on after the effective date. Part 41 of Title 3 NYCRR has governed the making of such loans prior to the effective date and is not in conformity with certain provisions of the ch. 626. Also, in certain limited instances, the proposed amendments to part 41 will clarify certain provisions enacted by ch. 626. The revised Part 41 provides a comprehensive regulatory scheme under which mortgage lenders and brokers will be able to make high cost home loans.

Subject: High cost home loans.

Purpose: To conform the provisions of Part 41 of Title 3 NYCRR to various provisions of section 6-l of the Banking Law; and clarify certain provisions of such section 6-l.

Substance of emergency rule: Summary of proposed amendments to Part 41:

Section 41.1(a) is amended to revise the definition of a lender subject to Part 41.

Section 41.1(b) is amended to revise the definition of an affiliate.

Section 41.1(c) is amended to make technical revisions.

Section 41.1(d) is amended to revise the definition of a bona fide loan discount point.

Section 41.1(e) is amended to revise the definition of a high cost home loan in regard to the points and fees threshold for determining such loans and limiting the exclusion of certain discount points in the computation of points and fees.

Section 41.1(f) is amended to revise the definition of loan amount.

Section 41.1(g) is amended to substitute a definition of “borrower” for “obligor”.

Section 41.1(h) is amended to revise the definition of points and fees.

Section 41.1(j) is amended to make certain technical revisions.

Section 41.2(a) is amended to clarify the exceptions to the prohibition upon accelerating the indebtedness of high cost home loans.

Section 41.2(b) is amended to increase the term of a balloon mortgage payment to fifteen years.

Section 41.2(e) is amended to make certain technical revisions.

Section 41.2(g), relating to modification and deferral fees, is repealed and then added as a new paragraph 2 to section 41.3(d), relating to refinancing of high cost home loans.

Section 41.3(a) is amended by adding a new disclosure requirement and revising the time limits pertaining to an existing disclosure requirement.

Section 41.3(b) is amended to revise requirements relating to the residual income guidelines and the presumption of affordability; to add certain conditions in order to determine that repayment ability has been “corroborated by independent verification”; and to substitute “borrower(s)” for “obligor(s)” where the term appears in the text.

Section 41.3(c) is amended to revise the percentage of points and fees that may be financed in making a high cost home loan, and to revise the charges that may be excluded from such financed points and fees.

Section 41.3(d) is re-titled and amended to revise the limitations upon points and fees that may be charged by any lender when refinancing high cost home loans and to add a previously repealed paragraph (see revisions to section 41.2(g)) relating to modification of an existing high cost home loan.

Section 41.3(f) is added to prohibit the refinancing of special mortgages, except under certain conditions.

Section 41.3(g) is amended to delete a reference to median family income and to revise certain references.

Section 41.4(a) is amended to revise certain time limits applicable to a disclosure requirement.

Section 41.4(b) is amended to make a technical revision.

Section 41.4(d) is amended to revise certain time limits applicable to a disclosure requirement and to clarify the location of the disclosure upon certain mortgage loan application forms.

Section 41.5(a) is amended to clarify deceptive acts relating to splitting or dividing loan transactions.

Section 41.5(b)(2) is amended to clarify retention of fees by lenders and brokers in relation to unfair, deceptive or unconscionable practices.

Section 41.5(b)(4) is amended to revise the definition of loan flipping, as an unfair or deceptive practice, and to add revised conditions to determine whether a loan has a "net tangible benefit" to the borrower.

Section 41.5(b)(5) is amended to revise the definition of packing to make it consistent with other revisions to Part 41 and to revise certain time limits applicable to a disclosure requirement.

Section 41.5(b)(6) is amended to clarify the standards to determine that recommending or encouraging default of a home loan or other debt is an unfair or deceptive practice.

Section 41.7 is amended to revise the legend that appears on a high cost home loan mortgage.

Section 41.8 is amended to delete VA and FHA mortgage loans from the definition of exempt products.

Section 41.9 is amended to repeal the current provisions relating to correction of errors and to add new provisions.

Section 41.11, relating to prohibiting the financing of single premium insurance, is re-titled and amended to include other insurance premiums or payments for any cancellation or suspension contract or agreement.

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 21, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary to the Banking Board, Banking Department, One State St., 6th Fl., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Banking Law section 14(1) authorizes the Banking Board to adopt regulations not inconsistent with the law. Section 6-i of the Banking Law specifically states that no banking organization, partnership, corporation exempt organization, or other entity (hereafter "lenders") can make a mortgage loan in New York State unless those entities conform to Banking Law requirements pertaining to mortgage bankers (Article 12-D of the Banking Law) and rules and regulations promulgated by the Banking Board. Section 6-l of the Banking Law imposes new requirements upon the making of certain mortgage loans. Part 41 of the rules and regulations of the Banking Board was adopted pursuant to section 6-i of the Banking Law, and prior to approval of chapter 626 of the Laws of 2002, which enacted section 6-l. Provisions of section 6-l, which are inconsistent with certain provisions of Part 41, supersede such regulatory provisions, and the Banking Board, in promulgating the amendments to Part 41, makes Part 41 consistent with section 6-l.

2. Legislative objectives:

Part 41 is intended to provide consumer protections by establishing important consumer disclosure requirements and prohibiting contractual terms and practices that are unfair in the making of residential mortgage loans that are offered on a high-cost basis. Section 6-l is intended to have the same objectives. Since Part 41 provides the broad regulatory scheme under which high cost mortgage loans are made, it is necessary that its provisions be in conformity with section 6-l and also, in limited instances, clarify certain provisions of such section in order that lenders and brokers appropriately make high cost loans in conformity with the intended legislative objectives.

3. Needs and benefits:

Part 41 was intended to regulate the making of residential mortgage loans within a certain segment of the mortgage loan market, referred to as the sub-prime, or non-conventional, mortgage loan market. The regulatory scheme defined by Part 41, by requiring certain disclosures and practices to be followed in the making of such loans, sought to prevent occurrences of predatory lending. Predatory lending occurs when the borrower or debtor does not have sufficient income or other financial resources to pay the monthly principal and interest payments or when equity in a residential property is stripped by repeated re-financings, primarily by the charging of excessive points and fees, when the borrower realizes no economic benefit.

Since the Legislature established a number of different standards regarding disclosures and practices in the making of such residential mortgage loans by enactment of section 6-l of the Banking Law, it is necessary that the comparative standards in Part 41 be made consistent with section 6-l.

Further, it is also necessary that certain provisions of section 6-l be clarified by the amendments to Part 41 in order that lenders and brokers may be in compliance with the requirements section 6-l when making such

loans, given that such provisions are not otherwise defined by section 6-l nor has the Legislature provided any other guidance which would clarify the intended meaning of those provisions. The clarifying provisions of the amendments to Part 41 address determining "corroboration by independent verification" of a borrower's repayment ability and "net tangible benefit" to a borrower, both of which are critical standards in assessing whether instances of predatory lending have occurred.

4. Costs:

The amendments to Part 41 should impose no additional cost upon mortgage lenders or brokers not otherwise imposed by the enactment of the comparative provisions of section 6-l of the Banking Law to which the amendments conform Part 41. The amendments impose no additional cost upon the Banking Department or any other state agency, or any unit of local government.

5. Local government mandates:

The amendments to Part 41 do not impose any requirements or burdens upon any units of local government.

6. Paperwork:

The amendments to Part 41 do not impose any new paperwork requirements.

7. Duplication:

None.

8. Alternatives:

The Banking Department considered whether to forego amending Part 41 or to repeal Part 41 in light of the enactment of section 6-l of the Banking Law, given that section 6-l may be viewed legally as occupying the field of regulation of high cost home loans in the state of New York. It was determined that Part 41 provides a more extensive regulatory scheme than section 6-l for the making of such mortgage loans, and therefore it is appropriate to make the non-conforming provisions of Part 41 consistent with the comparative statutory provisions of section 6-l. In addition, the provisions of section 6-l that are clarified by the amendments will eliminate uncertainty among mortgage lenders and brokers in the making of such loans by articulating appropriate conditions, which such lenders and brokers must meet in order to be in compliance with certain non-defined statutory standards established by section 6-l.

9. Federal standards:

In the initial promulgation of Part 41, the Banking Department stated the regulations established thresholds that were lower than the thresholds set by the Home Ownership Equity Protection Act (HOEPA). Subsequently, federal regulators modified the annual percentage rate threshold for first mortgages under HOEPA by making it identical to the corresponding threshold in Part 41. Section 6-l of the Banking Law establishes modified points and fees thresholds in certain instances that are more lenient for brokers and lenders than the comparable threshold in HOEPA. The definition of points and fees, in part, established by section 6-l refers to certain—but not all—provisions of HOEPA that define points and fees. The amendments would adopt the thresholds and definition established by section 6-l.

10. Compliance schedule:

None. Any modification of existing disclosures or practices by lenders or brokers in regard to any cost home loans made on or after April 1, 2003 are the result of standards established by section 6-l of the Banking Law. Chapter 626, which enacted section 6-l, was approved on October 3, 2002, and brokers and lenders have had sufficient time to familiarize themselves with these standards and subsequently modify their disclosures and practices, if necessary, to comply with the standards of section 6-l. The revised provisions of Part 41 will assist brokers and lenders in complying with the section 6-l requirements.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic or technological impact upon small business beyond any such effects that may be caused by the requirements established by section 6-l of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse economic or technological impact upon local governments. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic impact upon private entities in rural areas beyond any such effects that may be caused

by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse economic impact upon public entities in rural areas. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements private on public entities in rural areas.

Job Impact Statement

A Job Impact Statement is not attached because the proposed amendments to Part 41 will not have any appreciable and/or substantial adverse impact on jobs and employment opportunities beyond any such effects that may be caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41.

EMERGENCY RULE MAKING

Supervision of Art. XII Investment Company Holding Companies and Their Subsidiaries

I.D. No. BNK-50-04-00003-E

Filing No. 1336

Filing date: Nov. 24, 2004

Effective date: Dec. 1, 2004

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

Action taken: Addition of Part 114 to Title 3 NYCRR.

Statutory authority: Banking Law, section 14(1), (1)(k) and art. XII

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

Specific reasons underlying the finding of necessity: Need to meet European Commission timetable for being designated as providing equivalent supervision for certain U.S. headquartered financial groups with business activities in the European Economic Community.

Subject: Supervision of art. XII investment company holding companies and their subsidiaries for purposes of the European Union Financial Conglomerates Directive.

Purpose: To clarify the examination, supervision, regulation and enforcement authority of the Superintendent of Banks over financial conglomerates for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

Text of emergency rule: Part 114

SUPERVISION AND REGULATION OF ARTICLE XII INVESTMENT COMPANY HOLDING COMPANIES AND THEIR SUBSIDIARIES FOR PURPOSES OF THE EUROPEAN UNION FINANCIAL CONGLOMERATES DIRECTIVE

(Statutory Authority: Banking Law §§ 14[1], 14[1][k], Article XII)

§ 114.1 Purpose and Scope.

Article XV of the Banking Law authorizes the formation of investment companies and Article XII of the Banking Law sets forth the rights and obligations of such investment companies. The purpose of this Part is to clarify the Superintendent's examination, supervision, regulation, and enforcement authority over financial conglomerates for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

§ 114.2 Definitions.

For purposes of this Part:

"Banking Law" means the New York Banking Law.

"Banking organization" means all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies organized under the Banking Law.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of an investment company, whether by means of the ownership of the voting stock or equity interests of such investment company or of one or more persons controlling such investment company, by means of a contractual arrangement or otherwise. Control shall be presumed to exist if any company, directly or indirectly, owns, controls or holds with the power to vote ten per centum or more of the voting stock or other equity interests of any investment company or of any company which owns, controls or holds with power to vote ten per centum or more of the voting stock or other equity interests of such investment company.

"Equivalent supervision" means a supervisory and regulatory regime meeting the standards required under the Financial Conglomerates Directive.

"Financial conglomerate" means a group meeting the definition of financial conglomerate under the Financial Conglomerates Directive and having an investment company within its structure.

"Financial Conglomerates Directive" means the European Union Financial Conglomerates Directive 2002/87/EC, as it may be amended from time to time.

"Investment company" means a banking organization organized pursuant to the Banking Law and subject to the provisions of Article XII of the Banking Law.

"Investment company holding company" means the top tier corporation or other entity that controls an investment company.

"Subsidiary" means a corporation or other entity at least 10 per centum of the voting stock or other equity interests of which is controlled directly or indirectly by an investment company holding company.

"Supervision Agreement" means an individual agreement entered into between a financial conglomerate and the Superintendent which provides for a detailed plan of supervision by the Superintendent over the financial conglomerate, including specific regulatory requirements applicable to the investment company holding company and its subsidiaries.

§ 114.3 Examination, Supervision, Regulation, and Enforcement Authority of the Superintendent over Investment Company Holding Companies and their Subsidiaries for Purposes of the European Union Financial Conglomerates Directive.

To assist the Banking Department in carrying out equivalent supervision of a financial conglomerate for purposes of carrying out the requirements of the Financial Conglomerates Directive, the Superintendent shall have examination, supervision, regulation, and enforcement authority over an investment company holding company and any of its subsidiaries to the same extent as he or she has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

This authority includes, but is not limited to, the authority to:

(1) apply Banking Law Section 36 relating to examinations and confidentiality of information to an investment company holding company and its subsidiaries, as if such entities were banking organizations;

(2) issue orders to an investment company holding company and its subsidiaries as provided in Banking Law Section 39, as if such entities were banking organizations;

(3) impose monetary penalties for violation of law or regulation, as provided in Banking Law Section 44, as if such entities were banking organizations;

(4) impose capital requirements on an investment company holding company and its subsidiaries, as appropriate or required in the judgment of the Superintendent;

(5) prescribe requirements for the keeping of books and records by the investment company holding company and its subsidiaries;

(6) require filing by the investment company holding company and its subsidiaries with the Superintendent of periodic reports of condition, reports of income, risk profiles, large exposures and such other reports as may be required by the Superintendent;

(7) levy assessments on the investment company holding company and its subsidiaries, as provided in Banking Law Section 17, as if such entities were banking organizations;

(8) issue such general or specific rules or regulations as may be necessary to effectuate the examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries for purposes of meeting the requirements of equivalent supervision under the Financial Conglomerates Directive.

§ 114.4 Supervision Agreements with Financial Conglomerates. The Superintendent may enter into one or more Supervision Agreements with each financial conglomerate. Such Supervision Agreements will set forth the specific plan of supervision and detailed regulatory requirements applicable to an investment company holding company and its affiliates (e.g. capital requirements, reporting requirements, transactional limitations, etc.). The Superintendent may exercise enforcement authority under Banking Law Sections 39 and 44 for breaches or violations of such Supervision Agreements.

Such Supervision Agreements shall be in addition to, and shall not serve as a limitation on, the Superintendent's examination, supervision, regulation and enforcement authority provided under this Part over investment holding companies and their subsidiaries to the same extent as the

Superintendent has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

§ 114.5 Limitations.

The Superintendent's examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries as provided in this Part is limited to those cases in which the Banking Department needs to provide equivalent supervision for a specific financial conglomerate under the Financial Conglomerates Directive.

The provisions of Banking Law Article XIII governing voluntary and involuntary liquidations of banking organizations shall not be applicable to investment company holding companies, although they are applicable to investment companies.

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 21, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary to the Banking Board, Banking Department, One State St., 6th Fl., New York, NY 10004-1417, (212) 709-1658, e-mail: sam.abram@banking.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Section 14(1) of the Banking Law empowers the Banking Board to make, alter and amend rules and regulations not inconsistent with law. In addition, Section 14(1)(k) permits the Banking Board to prescribe the methods and standards to be used in examinations and valuations of assets of banking organizations. Article XII sets forth the powers as well as the duties and responsibilities of Article XII investment companies.

2. Legislative objective:

The rule promotes the legislative objective of maintaining the safety and soundness of banking organizations through effective examination and supervision. Banking Law Section 10 declares it to be the policy of New York that all banking organizations shall be supervised and regulated by the Banking Department in such manner as to ensure the safe and sound conduct of such business and to protect the public interest. Article XII sets forth the powers as well as the duties and responsibilities of Article XII companies. Such duties include recordkeeping and the provision of reports to the Superintendent. As banking organizations, Article XII companies are subject to examination by the Superintendent (B.L. Section 36) as well as to enforcement actions by the Superintendent (*e.g.*, enforcement actions under B.L. 39; monetary penalties under B.L. 44).

The new rule clarifies the Superintendent's ability to carry out this supervision in those cases where equivalent supervision is required under the European Union Financial Conglomerates Directive (2002/87/EC) (the "Financial Conglomerates Directive" or "Directive") recently passed by the European Parliament.

3. Needs and benefits:

The purpose of the new rule is to clarify the Superintendent's examination, supervision, regulation and enforcement authority over Article XII investment companies (*i.e.*, banking organizations formed pursuant to Article XII of the Banking Law) and their affiliates in situations where the Banking Department is responsible for providing "equivalent supervision" (as defined in the rule) for such banking organizations and their affiliates, under the Financial Conglomerates Directive.

The Directive will require supervisors in non-European countries to provide so-called "equivalent supervision" over a financial conglomerate to that which would be required in Europe. Under the Directive, groups or conglomerates that have activities in one or more financial business areas, including banking, insurance and securities, will be required to demonstrate that a financial regulator in their home country provides adequate supervision for the conglomerate on a consolidated basis.

The Banking Department currently has several conglomerates or financial groups with operations in Europe that will become subject to the supervision requirements of the Financial Conglomerates Directive in January 2005. These are large organizations which own Article XII banking corporations in New York and, as a result thereof, it is possible that the Banking Department would be required or requested to provide the required equivalent supervision for these organizations.

The ability of a U.S. supervisor fulfilling the role of equivalent supervisor to effectively examine and supervise a financial conglomerate must be clear. The requirements of the so-called "equivalent supervision" are broader than the supervision currently exercised by the Superintendent over Article XII investment companies owned by such entities, in that the

Directive requires that the U.S. regulators effectively supervise the broader organization (*i.e.*, from the parent level down) on a consolidated basis.

While this does not necessarily require that one supervisor functionally supervise and regulate each entity within a conglomerate, one supervisor will be relied upon to provide a coordinating role, and that supervisor must have a demonstrable ability to supervise, examine and regulate and take enforcement action against, if necessary, the organization as a whole. The Directive recognizes that many countries, including the U.S., regulate diverse financial conglomerates on a "functional" basis (*i.e.*, insurance regulators regulate the insurance entities, securities regulators regulate the securities entities, etc.).

The Department has significant experience in providing consolidated supervision to large banking organizations, both in its role as supervisor of banks within a holding company structure and in its role as a consolidated supervisor for several Article XII companies owned by large financial institutions that have operations in Europe and abroad. The Department is also very accustomed to coordinating supervision among various regulators, including the banking, insurance and securities regulators in the U.S., as well as banking and other financial regulators in Europe and in other countries abroad.

The new rule is necessary to demonstrate and set forth unambiguously the Superintendent's powers and duties vis-à-vis the larger conglomerate organization in a situation where comprehensive equivalent supervision is required to be provided by the Superintendent. The regulation therefore serves the purpose of making it clear to both the European Union regulators and to the conglomerate organization the authority of the Superintendent in this regard. Specifically, the regulation makes explicit that the parent company of an Article XII organization within a financial conglomerate is an Article XII holding company and that, to carry out the required equivalent supervision, the Superintendent has the authority to exercise examination, supervision, regulation and enforcement authority over the Article XII holding company and any of its subsidiaries in the same manner as over any banking organization. In this way, the Superintendent can exercise the supervisory tools necessary to provide effective consolidated supervision. The regulation makes clear that this authority to supervise and regulate the Article XII holding company and its subsidiaries in the same manner as a banking organization only is necessary and therefore only will be employed when the Superintendent is required to provide equivalent supervision under the Financial Conglomerates Directive. Thus, the applicability of the rule is limited to such situations involving these financial conglomerates.

The Superintendent's authority to examine and exercise certain control over affiliates (*e.g.*, parent, sister companies) of any banking organization is already quite broad (see *e.g.*, Banking Law Section 36). However, in order for a U.S. supervisor to be deemed capable of equivalent supervision, the authority to both regulate and take enforcement action against the affiliates of a banking organization must be apparent. The new rule provides that clarification. The financial conglomerate organizations themselves favor such clarification since they wish to demonstrate that their home country supervisors can provide the required equivalent supervision.

If the European Union determines that the supervision in the organization's home country is not "equivalent" to that provided to an entity headquartered in the European Economic Community, the organization will be forced to restructure its European operations so that equivalent supervision may be provided by a European regulator from a top tier entity located in Europe. For most U.S. organizations, this is a highly undesirable result that would involve costly restructuring in Europe and added layers of regulatory oversight.

Accordingly, the new rule demonstrating the Superintendent's authority and ability to carry out supervision in a manner deemed acceptable under the Directive serves the public need for U.S. financial conglomerate organizations to demonstrate consolidated supervision by a home country regulator.

4. Costs:

No significant new costs are imposed as a result of this rule. Banking organizations are already subject to monitoring and reporting requirements. This reporting would now be required at a consolidated level within the organization, which in many cases, is already being done. Any additional reporting or compliance requirements are a direct result of European Union Financial Conglomerates Directive itself. As noted in Section 3, "Needs and Benefits" above, U.S. organizations that are deemed to be financial conglomerates are in favor of the Superintendent's regulatory authority since, without such clarification, heavy costs of restructuring operations or duplicative regulation might be required to satisfy the European Union Directive.

5. Local government mandates:

The regulation imposes no burdens on local governments.

6. Paperwork:

Banking organizations, including Article XII companies, are currently subject to monitoring and reporting requirements. These requirements will continue and may need to be supplemented by reporting at the consolidated organizational level, which, in many cases is already done. Any such additional paperwork requirements, however, are a direct result, not of the new rule, but of new requirements imposed on the organizations under the European Union Directive which imposes new requirements on these organizations as a result of their European operations. These organizations favor reporting to a U.S. supervisor as a less costly alternative to direct reporting to European supervisors.

7. Duplication:

None. Various other U.S. supervisors, such as the Federal Reserve, the U.S. Securities and Exchange Commission, the Office of the Comptroller of the Currency and the Office of Thrift Supervision may be required to provide equivalent supervision to institutions under their jurisdiction that have European operations. However, supervision by federal regulators and the Banking Department would not be conflicting or duplicative, as an organization would only have one designated "equivalent supervisor" for purposes of the European Union Directive.

8. Alternatives:

a. Rely on Existing Authority

Consideration was given to relying on the Superintendent's existing authority to examine banking organizations and their affiliates, including the authority of the Superintendent to enter into quasi-contractual Supervision Agreements with an organization, such as a financial conglomerate. Although it was thought that it might be possible to demonstrate to the European Union that the Superintendent could carry out equivalent supervision based on existing authority, it was ultimately determined, in part based upon outreach to the European Commission ("Commission") and one organization that will be required to have consolidated equivalent supervision (see Section 11, "Outreach" below), that a regulation was necessary to clarify the extent of the Superintendent's examination, supervision, regulation and enforcement authority.

Banking Law Section 36 clearly grants the Superintendent the authority to examine banking organizations (which includes Article XII investment companies) as well as affiliates of banking organizations when necessary to determine the financial condition of a banking organization. The Superintendent can also issue enforcement orders against banking organizations under B.L. Section 39, and it is possible that certain activities of affiliates (*e.g.*, ordering cease and desist, etc.) might be reachable through such orders. However, based on discussions with the Commission and European supervisors, it was clear to Department staff that the Commission, in order to make a determination that a supervisor could effectively provide equivalent supervision, strongly preferred, and would likely require, demonstrable express statutory or regulatory authority of the supervisor to carry out examination, supervision, regulation and enforcement over the conglomerate.

In the absence of the proposed rule, the Superintendent's authority to supervise the conglomerate in the manner required would be less clear. While the Superintendent has clear examination authority over affiliates when necessary to determine the financial condition of a banking organization, it is not clear that the Superintendent's authority to issue regulations applicable to, or enforcement orders or monetary penalties against, the financial conglomerate, extends to the banking organization's affiliates or parent company directly. The European Union as well as the financial conglomerate organizations for which the Banking Department may serve as equivalent supervisor both desire clarification to this effect. The proposed rule therefore would clarify that, for those organizations for which the Department is equivalent supervisor, the Superintendent's examination, supervision, regulation and enforcement authority extends to the Article XII company's top tier parent organization and other affiliates to the same extent as to any other banking organization.

A second approach utilizing the Department's existing authority would be to rely on the Superintendent's authority to enter into formal "Supervision Agreements" which set forth the Superintendent's plan of supervision, as well as the Superintendent's authority over the organization, and the organization's responsibilities as a supervised entity. Such agreements have been used in the past where consolidated supervision is required, and the uniqueness of each organization requires a tailored agreement. In fact, the new rule still calls for the use of such agreements with individualized supervision plans as part of the equivalent supervision framework. While in the past such comprehensive Supervision Agreements alone would be

sufficient to demonstrate to European regulators that the U.S. regulator has a comprehensive plan of supervision for the organization, the new European Directive appears to require a firm statutory or regulatory expression of a U.S. supervisor's authority.

b. Promulgate a Regulation to Further Define Superintendent's Examination Authority Under Banking Law Section 36.

Another alternative that was considered was to adopt a general regulation of the Banking Board which would further define the scope of the Superintendent's examination authority under Banking Law Section 36. Such a regulation would also have been limited in nature and would have sought to define what is meant by "examination" of a banking organization in a situation where the banking organization is part of a group or conglomerate that requires equivalent supervision in the U.S. under the European Union Financial Conglomerates Directive.

This alternative was rejected by Department staff as less clear and less effective than the approach decided upon. For example, to accomplish the required end, the regulation would have needed to very broadly define the term "examination" to encompass the ability of the Superintendent to issue regulations and enforcement actions against both the banking organization and its affiliates.

Rather than demonstrate the Superintendent's authority as based solely on the examination authority described in B.L. Section 36, Department staff believes it is more appropriate to demonstrate the Superintendent's authority as arising out of her overall ability to supervise and regulate Article XII banking organizations and their affiliates.

The new rule is therefore a general Banking Board regulation based on Banking Law Section 14(1), 14(1)(k) and Article XII defining the Superintendent's specific expanded supervisory powers over the entities in a conglomerate whose top tier company is defined as an Article XII holding company in those cases in which the Banking Department needs to provide equivalent supervision as required under the Financial Conglomerates Directive.

9. Federal standards:

Not applicable. As noted above, various federal financial supervisors may also demonstrate their authority to provide consolidated equivalent supervision, but there are no specific standards which can be compared to those the Banking Department would apply to organizations under its supervision. While the supervisory regimes would likely be similar in order to accommodate the requirements of the European Union Directive, the specific requirements applicable to any given organization are individualized and part of a unique supervision plan.

10. Compliance schedule: Not applicable. Organizations under the Department's supervision do not need to take affirmative steps to comply with the rule. Based upon the decision of European regulators whether the Banking Department will be required to provide equivalent supervision, the rule will either be applicable to such organizations or it will not. An individualized Supervision Agreement will then be worked out between the Banking Department and the organization, in consultation with European regulators. The Banking Department expects to know whether it will be required to provide equivalent supervision in the fall of 2004. The requirements of the European Directive are applicable to financial conglomerates starting in January 2005.

11. Outreach:

In March 2004, a delegation of the Banking Department traveled to Brussels, Belgium and London, England to meet with staff of the Commission and the U.K.'s Financial Services Authority ("FSA"), respectively. The Commission is responsible for providing guidance to the various European financial supervisors on the supervisory regimes in other countries, including the U.S. Therefore, this body (including its technical committees) has the responsibility and the authority to determine whether the supervisory regimes in other countries are sufficiently "equivalent" to European regimes as required by the Directive. The Commission is therefore analyzing other supervisors' laws and regulations and practical approaches to supervision.

The FSA is one of the European financial supervisors with a major role in carrying out the Directive, particularly with respect to several of the U.S.-based financial conglomerates. This is because significant decision-making about which U.S. supervisor is best qualified to provide equivalent supervision to a particular organization rests with the European financial supervisor where the majority of the conglomerate organization's operations reside.

The Banking Department delegation explained to both the Commission and the FSA how the Banking Department conducts supervision of banking organizations, the authority of the Superintendent, and the legal and regulatory framework for supervision. The FSA has worked extensively

with the Department over the years and was already quite familiar with the Department as a supervisor. In addition, in March, the delegation shared with both these entities a draft of the new rule and explained how it would clarify the Superintendent's authority over conglomerates for purposes of the Financial Conglomerates Directive. The Commission staff indicated that it would provide comments as this body has the primary responsibility for evaluating equivalence. In May 2004, the Commission staff commented favorably on the proposed rule and indicated its belief that the rule would be found sufficient for the purposes of the Directive. The staff suggested only a few minor wording changes to more closely conform certain terminology to that of the Directive.

The draft regulation was also shared with one of the organizations under the Department's supervision that will require equivalent supervision and for which it is most likely that the Department might be required to be the supervisor to provide such supervision.

The organization in general found the draft rule to be helpful and acceptable in form. After consideration of the organization's comments the Department determined to adopt the rule on an emergency basis in its present form.

The organization also questioned whether the language in the rule stating that the Superintendent has authority over an Article XII holding company and its subsidiaries "to the same extent" as over banking organizations implied that all such affiliates of an Article XII must therefore be regulated as if they were banking organizations. The Banking Department advised that is that this is clearly not the intent of the rule or of the European Union Directive. Rather, this language reflects the Department's understanding that the European Commission wishes to see the equivalent authority available to the Superintendent for the supervision of the conglomerate as it would have over banking organizations.

The organization also had some inquiries about the technical terminology employed in the rule vis-à-vis the European Union Directive. These questions were cleared up to the organization's satisfaction based upon further discussions between the Department and the Commission staff to clarify this terminology.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not submitted because the proposed rule will not impose any adverse economic impact, or reporting, or record-keeping or other compliance requirements on small businesses or local governments. The proposed rule relates to supervision of the parents and affiliates of Article XII investment companies having financial business operations within the European Union. These entities are large financial conglomerates, which do not qualify as small businesses in New York State and are not local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted because the rule does not result in any hardship to a rural area based on the character and nature of a rural area. The rule relates to supervision of large financial conglomerates. It is apparent from the nature and purpose of the rule that it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted because the proposed rule has no effect on the creation or elimination of jobs. The rule clarifies the Superintendent's examination, supervision, regulation and enforcement authority over Article XII companies and their affiliates in situations where the Banking Department needs to provide equivalent supervision for purposes of the European Union Financial Conglomerates Directive. Accordingly, it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

Department of Environmental Conservation

NOTICE OF ADOPTION

Migratory Game Bird Hunting Regulations

I.D. No. ENV-40-04-00001-A

Filing No. 1343

Filing date: Nov. 30, 2004

Effective date: Dec. 15, 2004

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

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

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

Subject: Migratory game bird hunting regulations for the 2004-2005 season.

Purpose: To adjust hunting areas, season dates, bag limits and other migratory game bird hunting regulations to conform with Federal regulations and provide recreational opportunities consistent with desires of New York's 30,000+ waterfowl hunters.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ENV-40-04-00001-EP, Issue of October 6, 2004.

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

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

Additional matter required by statute: State Environmental Quality Review Act (SEQR; ECL art. 8). Establishment of hunting regulations is covered by a final programmatic impact statement (FPIS) on wildlife game species management (DEC 1980) and supplemental findings (DEC 1994), and by a Federal EIS on issuance of annual regulations permitting the sport hunting of migratory birds (USFWS 1988). The proposed action does not involve any significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "type II" action pursuant to DEC's SEQR regulations (6 NYCRR § 618.2[d][5]).

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Self Attestation of Resources for Medicaid Applicants and Recipients

I.D. No. HLT-50-04-00005-E

Filing No. 1342

Filing date: Nov. 29, 2004

Effective date: Nov. 29, 2004

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

Action taken: Amendment of section 360-2.3(c)(3) of Title 18 NYCRR.

Statutory authority: Social Services Law, section 366-a(2)

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

Specific reasons underlying the finding of necessity: The specific reasons underlying the finding of necessity to adopt an emergency rule: Chapter 1 of the Laws of 2002 provides that Medicaid applicants and recipients seeking coverage of long-term care services, other than short-term rehabilitation, must provide adequate documentation to verify the

amount of their accumulated resources. Persons who are not seeking coverage of long-term care services, or who are seeking coverage of short-term rehabilitation services, as defined by the Commissioner of Health, are allowed to attest to the amount of their resources.

The proposed regulation would provide the definition of the term "short-term rehabilitation" required by Chapter 1 of the Laws of 2002 and necessary to implement the provisions of such Chapter. The sooner the provisions of the statute can be implemented, the sooner the statutory goal of simplifying Medicaid enrollment and recertification will be achieved, with a consequent benefit to public health in terms of easier access to necessary health care. Therefore, complying with the normal rulemaking requirements would be contrary to the public interest, and the immediate adoption of the rule is necessary.

Subject: Self attestation of resources for Medicaid applicants and recipients.

Purpose: To allow an applicant or recipient to attest to the amount of his or her resources unless the applicant or recipient is seeking Medicaid payment for long term care services.

Text of emergency rule: Paragraph (3) of subdivision (c) of Section 360-2.3 is amended to read as follows:

(3) Verification of resources. (i) *The applicant may attest to the amount of his or her resources, unless the applicant is seeking coverage for long-term care services. For purposes of this paragraph, long-term care services shall include those services defined in subparagraph (ii) of this paragraph, with the exception of short-term rehabilitation as defined in subparagraph (iii) of this paragraph.* The applicant must provide documentation of all available or potentially available resources when applying for long-term care services. The social services district must record the documentation provided and determine the availability of such resources.

(ii) *Long-term care services shall include, but not be limited to care, treatment, maintenance, and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided in an intermediate care facility certified under article sixteen of the mental hygiene law; provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of mental hygiene law; provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; provided by a home care services agency, certified home health agency or long-term home health care program as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the department of health; provided by a personal care provider licensed or regulated by any other state or local agency; provided in a hospital that is equivalent to the level of care provided in a nursing facility; and provided by an assisted living program in accordance with regulations of the department of health. Long-term care services also shall include: private duty nursing; limited licensed home care services; hospice services including services provided by the hospice residence program in accordance with the regulations of the department of health; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program.*

(iii) *Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.*

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 26, 2005.

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:

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the Medical Assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the pro-

gram of medical assistance for needy persons (Medicaid). Section 366-a(2)(a) of the SSL provides that a Medicaid applicant must provide information and documentation necessary for the determination of initial and ongoing eligibility. A new section 366-a(2)(b) of the SSL, as enacted by the Health Care Reform Act of 2002, provides that an applicant may attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term care services. An exception is made for short-term rehabilitation. For purposes of this provision, section 366-a(2)(b) of the SSL references the long-term care services described in paragraph (b) of section 367-f(1) of the SSL and authorizes the Commissioner of the Department to define the term "short-term rehabilitation".

Legislative Objectives:

Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendment is necessary to define long-term care services and short-term rehabilitation for purposes of attestation of resources.

Needs and Benefits:

The purpose of the proposed regulatory amendment is to revise section 360-2.3(c)(3) of the Medicaid regulations concerning verification of resources. Currently, in determining whether an applicant is financially eligible for Medicaid, the applicant must provide documentation of all available or potentially available resources. A new subdivision (2) of section 366-a of the SSL, as enacted by the Health Care Reform Act of 2002, allows an applicant to attest to the amount of his or her resources, unless the applicant is seeking Medicaid coverage of long-term services. The section also allows an applicant to attest to the amount of his or her resources if Medicaid coverage is needed for short-term rehabilitation. The proposed regulatory amendment to section 360-2.3(c)(3) allows certain applicants to attest to the amount of their resources and to define the long-term care services for which resource documentation will still be required. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

As required by section 366-a(2)(b) of the SSL, the proposed regulatory amendment includes in the definition of long-term care services, those services described in section 367-f(1)(b) of the SSL. These services include care, treatment, maintenance and services: provided in a nursing facility licensed under article twenty-eight of the public health law; provided by a home care services agency, certified home health agency or long term home health care program, as defined in section thirty-six hundred two of the public health law; provided by an adult day health care program in accordance with regulations of the Department of Health; or provided by a personal care provider licensed or regulated by any other state or local agency. In addition, the proposed regulatory amendment designates as long-term care services, for purposes of resource attestation, the following: a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility ("alternate level of care"); services provided in an intermediate care facility certified under article sixteen of the Mental Hygiene Law; services provided in a residential treatment facility certified by the Commissioner of Mental Health pursuant to Section 31.02(a)(4) of the Mental Hygiene Law; services provided in a developmental center operated by the Office of Mental Retardation and Developmental Disabilities; services provided by an assisted living program; private duty nursing; limited licensed home care services; hospice care including the hospice residence program; services provided in accordance with the consumer directed personal assistance program; services provided by the managed long-term care program; personal emergency response services; and care, services or supplies provided by the Care at Home Waiver program, Traumatic Brain Injury Waiver program, or Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program.

Section 366-a(2)(b) of the SSL allows attestation of resources by applicants seeking Medicaid coverage of short-term rehabilitation as defined by the Commissioner of the Department. Short-term rehabilitation means one period of certified home health care, up to a maximum of 29 consecutive days, and/or one period of nursing home care, up to a maximum of 29 consecutive days, commenced within a twelve-month period.

Costs:

There should be no additional costs associated with this regulatory amendment. An analysis of several eligibility simplification proposals was performed in 2001 and it was concluded that while a fiscal impact could occur if applicants provided inaccurate information about their resources,

this was unlikely. Since neither the Child Health Plus (CHP) nor the Family Health Plus (FHP) program have resource tests, it was determined that those Medicaid applicants who had excess resources would most likely still be eligible for either CHP or FHP. Therefore, this proposal has been considered to be cost neutral.

Local Government Mandates:

The proposed regulatory amendment does not impose any new mandates. The amendment would remove the requirement that a Medicaid applicant submit proof of his or her resources for purposes of determining Medicaid eligibility, if the applicant is not seeking Medicaid coverage of long-term care services. The change simplifies the documentation requirements for local departments of social services administering the Medicaid program at the county level.

Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Currently, in determining Medicaid eligibility for long-term care services, social services districts must review resource documentation.

Duplication:

The proposed regulatory amendment does not duplicate any existing State or federal requirements.

Alternatives:

Section 366-a(2)(b) of the SSL requires that the services specifically listed in Section 367-f(1)(b) of the SSL be included in the definition of long-term care services. No alternatives were considered to the inclusion of these services in the definition.

In addition, in accordance with the authority granted in Section 367-f(1)(b) of the SSL, the proposed regulatory amendment designates a number of services as long-term care services for purposes of resource attestation: hospice care; private duty nursing; alternate level of care in a hospital; assisted living program; intermediate care facility; residential treatment facility; developmental center; the Care at Home Waiver program; the Traumatic Brain Injury Waiver program; the Office of Mental Retardation and Developmental Disabilities Home and Community-Based Waiver program; limited licensed home care services; personal emergency response services; and the consumer directed personal assistance program. Alternatives were considered with respect to the inclusion or exclusion of particular services in this list. However, given the nature, duration, and cost of these services, as well as the fact that many of these services are delivered by the same providers who furnish the long-term care services specifically listed in SSL Section 367-f(1)(b), the Department determined that the best alternative was to require documentation of resources by applicants seeking coverage of these services.

For purposes of defining short-term rehabilitation, the Department formed a work group with representatives from local social services districts and solicited feedback from the local social services districts' provider community. It was reported that there is no durational difference between inpatient and community-based short-term rehabilitation. Therefore, the workgroup recommended that short-term rehabilitation not be defined solely by type of service. The workgroup recommended defining short-term rehabilitation as receipt of one annual episode of services lasting less than 30 days, because 30 days was the median length of stay for rehabilitation purposes according to information gathered from providers, and because this would eliminate cases that are subject to spousal impoverishment budgeting, which is not viewed as short-term care.

The workgroup recommended that alternate level of care in a hospital not be included in the definition, because the average alternate level of care stay extends beyond 30 days and because none of the providers viewed this as a short-term rehabilitation situation. Similarly, investigation by Department staff indicated that personal care services are provided to individuals who are chronically ill and require care on a long-term basis. Consequently, these services were not included in the definition of short-term rehabilitation.

Federal Standards:

The proposed regulatory amendment complies with federal statute.

Compliance Schedule:

Social services districts will be advised of the change when the amendment becomes effective.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would allow certain Medicaid applicants to attest to the amount of their resources for purposes of determining Medicaid eligibility. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

Job Impact Statement

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to allow certain Medicaid applicants to attest to the amount of their resources for purposes of determining eligibility for Medicaid.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medicaid Utilization Thresholds

I.D. No. HLT-50-04-00001-P

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

Proposed action: Amendment of sections 511.10-511.13 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 365-g

Subject: Medicaid utilization thresholds.

Purpose: To more properly reflect the maximum number of physician, pharmacy, mental health and laboratory services a recipient requires in a benefit year.

Text of proposed rule: Subdivision (a) of section 511.10 of Title 18 NYCRR is amended to read as follows:

(a) General rule. The department will pay for up to 10 physician and clinic service encounters in a benefit year for MA recipients. *Commencing with the recipient's benefit year beginning on or after October 1, 2005, the department will pay for up to 5 physician and clinic service encounters in a benefit year for Medicaid recipients.* As used in this subdivision, the term clinic means hospital outpatient department, free-standing diagnostic and treatment center, or hospital emergency room. As used in this section, the term encounter is defined as follows:

Section 511.11 of Title 18 NYCRR is amended to read as follows:

This section describes the utilization threshold that the department has established for pharmacy services. Beginning July 1, 1992, the department will pay for up to 28 pharmacy service formulary codes in a benefit year for MA recipients described in sections 360-3.3(a)(1) or (b)(7) of this Title. Beginning September 1, 1992, the department will pay for up to 40 pharmacy service formulary codes in a benefit year for MA recipients described in sections 360-3.3(a)(2)-(6), (b)(1)-(6), or (8) of this Title. *Commencing with the recipient's benefit year beginning on or after October 1, 2005, the department will pay for up to 30 pharmacy service formulary codes in a benefit year for all Medicaid recipients.* As used in this section, a formulary code is defined as follows:

(a) for prescription drugs, the first time a pharmacist fills a prescription is one formulary code; [each refill of the original prescription is also one formulary code;] and

(b) for nonprescription drugs and medical and surgical supplies, each initial fiscal order for the drug or supply is one formulary code; each refill of the fiscal order is also one formulary code].

Section 511.12 of Title 18 NYCRR is amended to read as follows:

This section describes the utilization threshold that the department has established for laboratory services. The department will pay for up to 18 laboratory service procedures in a benefit year. *Commencing with the recipient's benefit year beginning on or after October 1, 2005, the department will pay for up to 10 laboratory service procedures in a benefit year for Medicaid recipients.* For purposes of this subdivision, a procedure consists of all services which are claimed for a single date of service and which are represented by a single laboratory procedure code, as listed and defined in the Medicaid Management Information System laboratory fee schedule [(July 1990; a new laboratory fee schedule becomes effective on July 1, 1991)]. These fee schedules are available from the department and may also be found in the Medicaid Management Information System Provider Manual for laboratories. Copies of the fee schedules are available from the Department of [Social Services, Division of Medical Assistance,] *Health, Office of Medicaid Management*, 99 Washington Avenue, Albany, NY 12210. These manuals are provided free of charge to every MA laboratory provider.

Section 511.13 of Title 18 NYCRR is amended to read as follows:

This section describes the utilization threshold that the department has established for mental health clinic programs. The department will pay for up to 40 mental health clinic encounters in a benefit year. *Commencing with the recipient's benefit year beginning on or after October 1, 2005, the department will pay for up to 30 mental health clinic encounters in a benefit year for Medicaid recipients.* As used in this section, the term mental health clinic means a clinic treatment program certified by the office of Mental Health under article 31 of the Mental Hygiene Law.

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:

Section 365-g of the Social Services Law (SSL). The intent of establishing section 365-g of the SSL was to protect the Medicaid program from abusive behavior by providers or recipients through the unnecessary utilization of medical care and services. This section authorizes the Department "to implement a system of utilization controls." At the same time, the rights of recipients in obtaining necessary care were required to be protected through the use of notices and hearing rights for those recipients affected by the utilization controls.

Legislative Objective:

This regulation change authorizes the Department to modify a system of utilization controls. Based on frequency distributions of historical Medicaid utilization patterns, this proposal adjusts the maximum number of physician, pharmacy, mental health and laboratory services a recipient is allowed in a benefit year. These new limits will help ensure that only appropriate levels of care are permitted.

The Department will use the new data to analyze utilization patterns of chronically ill Medicaid populations to develop new programs to protect recipients from the over utilization of unnecessary services, including prescription drugs. This is especially important in cases where recipients are incapable to understand the appropriate levels of care which they should receive. Recipients approaching these levels or otherwise potentially adversely affected are entitled to notice and the right to a hearing. Recipients approaching these levels can also continue to request that their physician submit "threshold override applications" (TOA) to increase their maximum level of medically necessary services.

Needs and Benefits:

This proposed rule is a Budget initiative. Since its inception in 1990, this program has resulted in cost savings to the Medicaid program by ensuring that certain medical services were not abused. The program limits were first instituted to address those at the 95th percentile of service use, which allowed the vast majority of recipients to obtain care within program guidelines yet required that statistically high service using outlier recipients obtain Threshold Override Applications (TOA) from certain of their providers (for physician/clinic, drug, mental health clinic, services and laboratory tests). It has been demonstrated that the oversight provided by the medical professionals that submit the TOAs results in greater awareness of the service utilization habits of their recipients that might, if unmonitored, result in health and safety issues for recipients and in fiscal harm to the Medicaid program from paying for potentially excessive services. The TOA process still permits medically necessary services to be available to recipients based on their unique needs and through mandatory participation by the treating providers access to services is managed in a more appropriate manner. For example, physicians are required to submit TOAs for patients who exceed their maximum number, five (5), of physician/clinic visits in a benefit year. However, these TOAs may be for the number of service encounters that the physician deems medically appropriate for that particular recipient. The change in Pharmacy limits to 30, from the previous limit of 40, original prescriptions or fiscal orders, including refills, thus more fully recognizing that the ordering of a medication is part of an overall treatment plan and that control on originals, not refills, will still yield maximum effectiveness without creating additional paperwork for providers.

Cost and Savings:

Anticipated costs in the first full year of implementation are \$1.3 million. This annually recurring cost results from increased administrative oversight required by the new utilization levels. This cost will be paid by the Medicaid program with traditional allocation between the federal and

state governments. It will be shared as follows: \$650,000 Federal share, and \$650,000 State share. There will be no local share for these administrative costs.

Anticipated savings in the first full year of implementation and annually thereafter is \$8.1 million due to further reduction of medically unnecessary care and services. It is anticipated that the breakdown will be as follows: \$4 million Federal share, \$2 million State share and \$2 million Local share. Savings estimates are based on statistical modeling using frequency distributions by service type. Medicaid eligibility data from the Medicaid Management Information System (MMIS) Recipient Master File and frequency distributions of claims and expenditure data from the MMIS Adjudicated Claims File was used.

Costs to regulated parties are minimal to nonexistent. It is anticipated that affected providers will incur the historical costs from compliance with this Program's new rule earlier in the recipient benefit year. The rule causes the service limits for recipients to be reached more quickly in their benefit year, but providers have the authority to submit TOAs for a medically necessary amount at that point in time. Given the ease of requesting TOAs, resulting savings from service level reductions are expected through a decline in medically unnecessary services without associated elevated costs. Recipients incur no costs due to this new rule.

Local Government Mandate:

No new mandates to local governments in the administration of the Medicaid program. This program is administered by the State Department of Health.

Paperwork:

The State will be responsible for notification to providers and recipients of the changes in utilization levels.

Duplication:

The regulations do not duplicate, overlap or conflict with any other state or federal law or regulation.

Alternatives:

No alternatives were identified to achieve the stated purpose of the regulatory amendment. Not changing this regulation will result in the provision of medically unnecessary services to recipients resulting in potential harm to the health of recipients and in the fiscal harm to the Medicaid program. Modification of this existing program helps ensure provider acceptance and ease of compliance.

Federal Standards:

The amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendments will become effective on the first day of the month following publication of a Notice of Adoption in the *State Register*.

Regulatory Flexibility Analysis

Effect on small business and local government:

This regulatory proposal changes the utilization level for Medicaid recipients receiving care and services in the following areas: physician/clinic services, drugs, mental health clinic services, laboratory tests. This program is administered by the New York State Health Department as part of its responsibility in supervising the Medicaid program. There are, therefore, no new requirements imposed on small businesses or state and local government.

Compliance requirements:

This proposal does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Professional services:

No new professional services are required as a result of this proposal.

Compliance costs:

In the first full year of implementation, state costs charged to the Medicaid program are estimated at \$1.3 million. Savings to the Medicaid program are estimated at \$8.1 million.

Economic and technological feasibility:

The proposal does not change the way providers bill for Medicaid services or the rate of reimbursement for such services. Therefore, there is no economic or technological impact.

Minimizing adverse impact:

This proposed rule has no adverse economic impact on small businesses or local governments. It is a modification to the existing program's service limits, which only requires that providers respond earlier in the recipient benefit year. The rule change to no longer include refills for prescription and fiscal orders will have a positive impact on providers because it will decrease their amount of administrative oversight. There is no direct local government involvement in the current administration of this program or in its proposed rule.

Opportunity for small business and local government participation:

Inasmuch as this proposal has no impact on small business or local governments, no overall discussions were conducted. However, the New York State Clinical Laboratory Association had concerns regarding their ability to obtain reimbursement for laboratory tests legitimately ordered and performed because laboratories do not obtain service authorizations. In April 2004, this concern was resolved through discussions with the Office of Medicaid Management, Division of Program and Policy Development. Labs, when requesting a TOA from the ordering provider can use the service authorization code P on the lab claim form. This code will allow payment of the laboratory claim while the threshold authorization is being completed. Laboratories must keep documentation that they requested the TOA.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required because the proposed rule, which merely revises utilization levels of certain services in the Medicaid program, does not have an adverse impact on rural areas and will not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

The Department has determined that this rule will not have a substantial adverse impact on jobs or employment opportunities. This rule makes changes to the utilization levels for certain services in the Medicaid program.

Insurance Department

EMERGENCY RULE MAKING

Rules for Key Person Corporate-Owned Life Insurance

I.D. No. INS-50-04-00014-E

Filing No. 1346

Filing date: Nov. 30, 2004

Effective date: Nov. 30, 2004

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

Action taken: Addition of Part 48 (Regulation 180) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3205

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

Specific reasons underlying the finding of necessity: Corporate-owned life insurance covering rank-and-file employees, also called "janitors insurance" or "dead peasant insurance," has been the focus of numerous negative press articles and public commentaries over the last several years. In many cases, the covered employees were not notified and did not consent to such insurance. In addition, the Internal Revenue Service has pursued litigation against some companies using corporate-owned life insurance as a means of evading taxes.

Most recently in response to criticism concerning COLI, the United States Senate has drafted legislation that provides for the taxation of death proceeds of corporate-owned life insurance under certain circumstances. The Senate's proposal addresses the abuses of "janitor insurance" and recognizes the legitimate business need for COLI to serve as a funding vehicle for employee benefit plans. As a result, the Senate's legislative proposal provides that death benefits under corporate-owned life insurance policies will not be taxable if the employee is a key employee as defined in the proposed legislation.

The potential for abuse in the corporate-owned life insurance market has long been a concern of the New York Legislature. Chapter 491 of the Laws of 1996 added a new subsection (d) to Section 3205 to provide notice, consent and termination rights to employees, including rank-and-file employees, whose lives were insured under corporate-owned life insurance programs designed to fund employee benefit plans. Such notice, consent and termination rights were designed to reduce the potential for abuse in the COLI market.

Since the notice, consent and termination rights only apply in the case of Section 3205(d) COLI and not key person COLI under Section

3205(a)(1)(B), it is imperative that insurers only insure key employees under Section 3205(a)(1)(B). This will also ensure that rank and file employees and other non-key employees receive the notice, consent and termination rights prescribed by Section 3205(d) and to curb some of the reported abuses associated with COLI on rank-and-file employees. This will serve to ensure that employees insured pursuant to the insurable interest provisions of Section 3205(a)(1)(B) are key employees.

The establishment of a key employee standard based on the proposed federal legislation will aid in curbing abuse in the corporate-owned life insurance market. Therefore, for the reasons stated above, this rule must be promulgated on an emergency basis for the preservation of the general welfare.

Subject: Rules for key person corporate-owned life insurance.

Purpose: To provide guidance to insurers in defining the term key person for the purpose of compliance with the requirements of Insurance Law, section 3205(a)(1)(B) and (d).

Text of emergency rule: A new Part 48 of Title 11 NYCRR (Regulation No. 180) is adopted to read as follows:

§ 48.0 Preamble and Purpose.

(a) Section 3205(b)(2) of the Insurance Law provides in part that "No person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable . . . to a person having, at the time when such contract is made, an insurable interest in the person insured."

(b) Section 3205(a)(1)(B) of the Insurance Law defines the term "insurable interest", for the purposes of life and accident and health insurance, to include "a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured."

(c) Under Section 3205(a)(1)(B), an employer has an insurable interest in the lives of certain employees and other persons, commonly referred to as "key employees" or "key persons", whose services and qualifications are of such nature that their death or disability would cause the employer to incur a substantial pecuniary loss.

(d) The purpose of this Part is to establish standards for life insurers and fraternal benefit societies issuing key person company-owned life insurance to ensure that the employees or other persons on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key persons.

§ 48.1 Underwriting Guidelines.

An insurer using key person company-owned life insurance shall establish and apply appropriate underwriting guidelines to ensure that the employees or other persons on whose lives policies are written pursuant to Section 3205(a)(1)(B) are actually key persons.

§ 48.2 Standards.

For purposes of this Part and for establishing whether there exists an insurable interest under Section 3205(a)(1)(B) at the time the policy is issued, the term key person shall include the following persons:

(a) An employee who is one of the five highest paid officers of the employer;

(b) An employee who is a five-percent owner of the employer. A "five-percent owner" shall mean:

(1) If the employer is a corporation, any person who owns or controls more than five percent of the outstanding stock of the corporation or stock possessing more than five percent of the total combined voting power of all stock of the corporation; or

(2) If the employer is not a corporation, any person who owns more than five percent of the capital or profits interest in the employer;

(c) An employee who had compensation from the employer in excess of \$90,000 in the preceding year;

(d) An employee who is among the highest paid 35 percent of all employees; or

(e) An employee or other person who makes a significant economic contribution to the company, including but not limited to, an employee who is responsible for management decisions, has a significant impact on sales or a special rapport with customers and creditors, possesses special skills, or would be difficult to replace. Criteria for the employer's determination shall be included in the insurer's underwriting guidelines.

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 27, 2005.

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

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the adoption of Regulation 180 (11 NYCRR 48) is derived from Sections 201, 301, and 3205 of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him (under the provisions of the Insurance Law) to prescribe forms or otherwise to make regulations.

Section 3205 of the Insurance Law defines the term "insurable interest" and sets forth insurable interest requirements for any policy of life insurance and accident and health insurance.

2. Legislative objectives:

The insurable interest requirements contained in Section 3205 reflect the state's public policy against contracts wagering on human life. Section 3205(b)(2) prohibits the issuance of any policy upon the life of another person unless the beneficiary is the insured, personal representative of the insured, or a person having an insurable interest in the insured at the time the policy is issued.

Section 3205(a)(1)(B), applicable when policies are purchased by persons not closely related to the insured by blood or by law, defines "insurable interest" to include a lawful and substantial economic interest in the continued, life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured. Employers and insurers have historically relied upon Section 3205(a)(1)(B) to satisfy the insurable interest requirement for the purchase of insurance on the lives of "key persons" or "key employees."

In 1996, the Legislature added new subsections (d) and (e) to Section 3205 of the Insurance Law (L. 1996 c. 491) to specifically grant employers an insurable interest in any employee or retiree who is eligible to participate in an employee benefit plan. The Legislature enacted Section 3205(d) in order to assist employers with the financing of employee benefit plans through the use of corporate-owned life insurance ("COLI") purchased on the lives of employees.

The purpose of the proposed regulation is to establish standards for life insurers issuing key employee COLI, pursuant to Section 3205(a) rather than Section 3205(d) COLI, to ensure that the employees on whose lives coverage is being written pursuant to Section 3205(a)(1)(B) of the Insurance Law are actually key employees.

3. Needs and benefits:

As noted in the Federal Standard section below, the definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate's proposal is intended to eliminate well-publicized abuses of COLI. The proposal also recognizes the legitimate business need for employers to use corporate owned policies as a funding vehicle for employee benefits, and specifically provides that COLI death benefits would not be taxable if the covered employee meets the definition of a key employee.

The potential for abuse in the COLI market has historically been a concern of the New York legislature as evidenced by the enactment of notice, consent and termination rights in Section 3205(d) and (e) of the Insurance Law in 1996, establishing an insurable interest for the purchase of life insurance used to fund employee benefit plans. Since the employee notice, consent and termination rights are not required when company-owned life insurance is purchased under Section 3205(a)(1)(B), it is imperative that insurers be provided with standards for key employees to ensure that such employees are key employees and to avoid the potential for any further abuses in the market. The establishment of a key employee standard would provide such guidance.

In addition, a key employee standard would enhance the Department's market conduct exams by providing field examiners with a reference point. Field examiners currently lack statutory or regulatory standards for determining the proper application of Section 3205(a) and, specifically, whether COLI insurance issued pursuant to Section 3205(a) is on key employees.

The key employee standard is particularly important in the bank-owned life insurance market, in which employees do not receive Section 3205(d) protections. Currently, banks do not purchase coverage under Section 3205(d) because the employee's ability to terminate coverage makes the

policy an unreliable mechanism for funding plan liabilities and results in adverse tax consequences to the bank. When bank-owned life insurance is issued as key employee coverage under Section 3205(a)(1)(B), the key employee standard created by this proposed regulation will help ensure that the covered employees will in fact be key employees.

4. Costs:

Life insurers licensed in New York that sell key employee COLI are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key employee COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the proposed regulation. Any insurers in the key employee COLI market that lack established key person underwriting guidelines would incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the proposed regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

5. Local government mandates:

The proposed regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The proposed regulation imposes no new reporting requirements.

7. Duplication:

The proposed regulation does not duplicate any existing law or regulation.

8. Alternatives:

The Department considered but rejected the prospect of issuing a Circular Letter to establish the standard for key person. The Department was concerned that the Circular Letter proposal would not have the same force and effect of a regulation, and would therefore be an inadequate mechanism to apply and enforce the insurable interest requirements of Section 3205.

9. Federal standards:

The definition of key employee in this proposed regulation is based on the definition of key employee set forth in a draft COLI bill pending in the United States Senate which provides for the taxation of death proceeds of COLI under certain circumstances. The Senate bill, which was approved by the Senate Finance Committee in February, 2004, provides that a key employee may be either a "highly compensated employee" under Section 414(q) of the Internal Revenue Code or a "highly compensated individual" under Section 105(h)(5) of the Internal Revenue Code (except that 35 percent shall be substituted for "25 percent" in subparagraph (C) thereof). The purpose of the definition of key employee in the Senate bill is to create an exemption from tax for death proceeds paid to employers in connection with COLI, and does not relate to state insurable interest laws. There is no federal standard that defines key employee in the context of insurable interest for life insurance.

10. Compliance schedule:

The proposed regulation establishes a standard for all key employee life insurance policies issued before and after the effective date of the Regulation.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurance companies licensed to do business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Insurers covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The regulation provides guidance to insurers in defining the term key person.

3. Costs:

Life insurers that sell key person COLI to fund broad-based employee benefit plans are required to establish and apply appropriate underwriting guidelines to ensure that the employees on whose lives policies are written under Section 3205(a)(1)(B) are key employees. It is expected that most insurers in the key person COLI market already have established key person underwriting guidelines and therefore will not incur any costs with the promulgation of the Regulation. Any insurers in the key person COLI market that lack established key person underwriting guidelines will incur costs associated with the development of such guidelines. Insurers that do not participate in the key person COLI market should incur no costs in connection with the Regulation.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact:

It does not impose any adverse impact on rural areas.

5. Rural area participation:

The regulation was drafted after consultation with the Life Insurance Council of New York, a trade organization representing life insurers in New York.

Job Impact Statement

Nature of impact: The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation provides guidance to insurers in defining the term key person for the purpose of compliance with the requirements of section 3205(a)(1)(B) of the Insurance Law.

Categories and number affected: No categories of jobs or number of jobs will be affected.

Regions of adverse impact: This rule applies to all insurers licensed to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact: No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities: This rule would not have a measurable impact on self-employment opportunities.

Text of emergency/proposed rule: Section 349.3 General Requirements for the transfer of supervision of all probationers.

Amend paragraph (a) to read as follows:

(a) All interstate transfers of probation supervision shall be in accordance with the provisions of the interstate compact for the supervision of parolees and probationers, the juvenile compact, any other governing compact, and applicable rules, regulation and procedures as adopted by the State compact administrator for such compacts with reference to the transfers of probation supervision. Any sending probation department shall take all necessary steps to ensure the following are completed prior to transfer:

(1) fingerprinting of any convicted adult, youthful offender, juvenile offender/youthful offender, and juvenile delinquent adjudicated of a fingerprintable offense;

(2) DNA testing, where applicable; and

(3) Sex Offender Registration, where applicable.

A sending department shall indicate what actions it has taken with regard to these aforementioned requirements.

Section 349.4 Requirement for the intrastate transfers of supervision.

Amend paragraph (a) to read as follows:

(a) Any intrastate transfer must be pursuant to a designation and order of the court. A probationer must agree in writing to comply with any and all conditions set forth by the receiving court and be subject to any other fees and/or surcharges authorized by law. No intrastate transfer shall be initiated by a sending probation department when there exists a pending violation of probation in its jurisdiction unless the receiving probation department expresses in writing willingness to accept transfer. No transfer of interim probation cases shall be initiated unless statutorily authorized. Transfers are prohibited whenever there exists pending criminal charge(s) in the sending jurisdiction unless the probationer is a resident of the receiving jurisdiction at time of commission of the offense or at sentencing/disposition or has family residing in the receiving jurisdiction with whom he/she will reside, the transfer enhances public safety, and the receiving probation department expresses in writing willingness to accept transfer.

Amend paragraph (b) to read as follows:

(b) Prior to a transfer, the sending probation department shall provide the court with information relevant to a probationer's [program] prospective plan of transfer, including residence, [whenever there is a question concerning the availability of a probation program] in the jurisdiction to which supervision is to be transferred.

Amend paragraph (c) to read as follows and renumber paragraphs 2, 3 and 4, to be paragraphs 4, 5 and 6 respectively:

(c)(1) Immediately upon knowledge that a person being considered for probation or on probation resides or desires to reside in another jurisdiction, the sending probation department may request the receiving probation department to verify the subject's residence or prospective residence except those cases enumerated in paragraph (2) of subdivision (c). All efforts shall be made to afford the receiving department adequate time so as not to delay disposition of the case.

Factors that may be considered when determining suitability to transfer to another probation department are the individual's address for mailing and/or tax purposes, where he/she lives the majority of time, votes, and where his/her vehicle is registered.

(2) Prior to a transfer involving any person convicted or adjudicated of an offense defined in Article 130, 235, 263 of the Penal Law or Section 255.25 of such law, or of an offense between spouses, parent and child, or between members of the same family or household, or any other crime where an order of protection exists, and where a probationer is not a resident of the receiving jurisdiction at the time of sentencing or disposition, the sending probation department shall afford the receiving probation department the opportunity to investigate the prospective transfer and verify actual residence prior to his/her movement and transfer of supervision to a receiving jurisdiction. For purposes of this section, offense shall include the criminal offense or matter for which convicted or adjudicated, as well as any other criminal offense or matter that is part of the same criminal transaction or underlying behavior or that is contained in any other accusatory instrument or petition disposed of by a plea of guilty or finding of fact or admission of guilt in satisfaction.

(3) The sending probation department shall provide the receiving department at a minimum the following information:

- (i) subject's current address and prospective address if different;
- (ii) subject's current home and business telephone number;
- (iii) the order and conditions of probation;
- (iv) a copy of any existing order of protection;
- (v) a brief description of the underlying offense or act;

Division of Probation and Correctional Alternatives

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interstate/Intrastate Transfer and Related Supervision Rule

I.D. No. PRO-50-04-00013-EP

Filing No. 1345

Filing date: Nov. 30, 2004

Effective date: Nov. 30, 2004

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

Action taken: Amendment of Parts 349 and 351 of Title 9 NYCRR.

Statutory authority: Executive Law, section 243(1); and Criminal Procedure Law, section 410.80

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

Specific reasons underlying the finding of necessity: To increase offender accountability and ensure continuity of supervision to safeguard against inappropriate transfer and guarantee appropriate recordkeeping of fingerprintable probationers.

Subject: Interstate/intrastate transfer and related supervision rule.

Purpose: To regulate interstate and intrastate transfers.

[(iv)] (vi) where applicable, subject's current employer and prospective employer if different; and

[(v)] (vii) where applicable, the name, address, and telephone number of the subject's residential treatment provider or educational institution.

Amend paragraph (e) to read as follows:

(e) *The sending probation department shall take all necessary steps to ensure fingerprinting, DNA testing, and Sex Offender Registration, where applicable, are completed prior to transfer and shall indicate what actions it has taken with regard to these requirements. The sending probation department [upon], within ten calendar days of receipt of a court order of transfer, shall transmit to the receiving probation department designee the following information:*

(1) a completed DPCA-16, DPCA-16a or DPCA-16b, whichever is applicable;

(2) the pre-sentence or pre-disposition investigation report where available or in lieu of the report, a completed pre-sentence or pre-disposition report facesheet, the accusatory instrument or the petition, whichever is applicable, and police report(s) where available;

(3) periodic supervision reports;

(4) any mental health/substance abuse evaluation and/or treatment summary;

(5) any records regarding outstanding financial obligations;

(6) a photograph if available;

(7) a copy of any existing or recent orders of protection *and/or victim information, including name and address;*

(8) *whether the probationer is subject to sex offender registration and where applicable all documents relating to sex offender registration, including photograph;*

(9) any other information authorized by law;

(10) information required by either the court ordering the transfer or the court to which supervision is transferred; [and]

(11) name, address, phone number of probationer's prospective or existing employer, residential treatment provider, and/or educational institution;

(12) proposed residence, phone number, and information pertaining to others living in the household; and

(13) whether the individual is subject to fingerprinting and/or DNA testing.

[A completed form DPCA-200 for registering probationers shall be promptly forwarded to the Division of Probation and Correctional Alternatives and the Division of Criminal Justice Services] *Where any convicted adult, youthful offender, juvenile offender/youthful offender, or juvenile delinquent adjudicated of a fingerprintable offense, is under probation supervision, a copy of the DPCA-200 or through an equivalent process which indicates the sending probation department's ORI number and the probationer's registration number associated with the underlying offense for which such individual is under supervision shall be transmitted to the DPCA via DCJS with a copy to the receiving probation department.*

Paragraph (f) is renumbered paragraph (h) and a new paragraph (f) shall read as follows:

(f) *If it is determined that the probationer: resides at the specified address in the order of transfer; has absconded; does not reside; or will not be residing at the specified address in the order of transfer; the receiving probation department shall immediately upon knowledge, but no later than sixty calendar days after the date the initial court transfer order is received, notify the sending probation department of its finding with respect to residency or non-residency. If the address in the order of transfer is inaccurate, the correct address shall be provided. Any verbal notification shall be immediately confirmed in writing. The sending probation department shall notify the sending court of the finding. The sending probation department shall retain the duty of supervision for the probationer and the sending court shall retain jurisdiction over the case prior to verification of residence or upon notification of probationer non-residence within the time period. If no notification of residency or non-residency occurs within sixty calendar days of the date the court transfer order is received, the transfer shall be effective and the receiving court shall assume those powers and duties as otherwise specified in the court order and the receiving probation department shall assume the duty of supervision. Upon knowledge of residency or non-residency, the receiving probation department shall complete the acknowledgment section contained in the appropriate DPCA transfer form and return two duly executed copies to the sending probation department. Upon acceptance, the receiving probation department shall transmit to DPCA via DCJS a DPCA-200 or through an equivalent process which updates information and shall pro-*

vide a copy to the sending probation department. After sixty calendar days of the court order being received, if the receiving department has not already done so, the sending department shall transmit to DPCA via DCJS a DPCA-200 or an equivalent electronic process which updates information and provide a copy or notification to the receiving department of its action. Where non-residency is determined, the receiving probation department shall return all appropriate transfer material to the sending probation department within ten calendar days of such a determination.

A new paragraph (g) shall read as follows:

(g) *Where the receiving probation department recommends additional conditions, it shall seek to calendar the case with the receiving court for modification of conditions within twenty business days of acceptance of transfer. Nothing shall preclude the ability of the receiving probation department to request modification of conditions and/or a court to modify conditions during the term of supervision.*

Section 351.6. Reporting Requirements.

Amend Section 351.6 to read as follows:

Each probation director shall report to the State Director of Probation and Correctional Alternatives in the form and manner prescribed, including any and all such information requested pertaining to each person sentenced to probation by a criminal court *and each juvenile delinquent adjudicated of a fingerprintable offense* and under the supervision of the probation director's department in accordance with timeframes established by the division.

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 January 28, 2005.

Text of rule and any required statements and analyses may be obtained from: Linda J. Valenti, Counsel, Division of Probation and Correctional Alternatives, 80 Wolf Rd., Suite 501, Albany, NY 12205, (518) 485-2394

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:

Executive Law Section 243(1) empowers the State Director of Probation and Correctional Alternatives to promulgate rules and regulations governing the administration of probation services, including but not limited to the supervision of probationers. Executive Law Sections 259-m and 259-mm. Sections 1801 *et seq.* of the Unconsolidated Laws, Criminal Procedure Law Section 410.80, and Family Court Act Section 176 authorize interstate and intrastate transfer of probation supervision of criminal court and family court probationers. Further, Criminal Procedure Law Section 410.80(1) states that criminal courts may authorize intrastate transfers of probation supervision and that such transfers must be in accordance with regulations adopted by the State Director.

2. Legislative Objectives:

This regulation is consistent with legislative intent that the State Director adopt regulations in areas relating to critical probation functions. It is in keeping with legislative intent to promote uniformity that the Division of Probation and Correctional Alternatives issue regulations establishing standardized procedures for handling transfers. Standardization and strengthened procedures in this area will promote consistency, good professional practice, ensure effective application and prevent disruption in supervision.

Further, there exist various state laws governing fingerprinting, sex offender registration, and DNA collections of certain individuals involved in the criminal justice or juvenile justice system, namely Criminal Procedure Law Section 160.10, Family Court Act Section 306.1, Article 6-C of the Correction Law, and Article 49-B of the Executive Law. Certain provisions of this regulation which establish that sending departments take all necessary steps to ensure such are completed where applicable will optimize compliance in these areas.

3. Needs and Benefits:

The proposed amendments to the interstate/intrastate and supervision rules are designed to increase offender accountability, ensure continuity of supervision, promote public safety, and improve data reporting. It is in the best interests of the state and local government that these amendments be adopted to address and optimize public and victim safety and to safeguard against inappropriate transfers.

The Division of Probation and Correctional Alternatives is aware of several problems that have arisen in the area of interstate and intrastate transfer that can be remedied by establishing restrictions and conditions that must be met before transfers are initiated and completed. A recent

incident involved an upstate sex offender with other pending sex crimes being judicially transferred and allowed to relocate to another jurisdiction. The transfer occurred before the receiving probation agency could verify residency or conduct a criminal history check. Public safety was compromised as the offender was subsequently arrested for another sex offense in the receiving jurisdiction while the transfer was pending. The proposed rule amendment will ensure that this situation does not happen again by establishing stronger measures that clearly delineate responsibilities of sending and receiving jurisdictions that will both guarantee offender accountability and compliance and protect public and victim safety.

Examples of new key regulatory provisions are highlighted below:

- Since transfer of probation is a privilege not a right, an intrastate probationer will be required to agree in writing to comply with any and all conditions set forth by the receiving court and to be subject to any other fees and/or surcharges. This is consistent with current law in the area of interstate transfer which recognizes that a probationer must agree to abide by any conditions set by a supervising agency, compact administrator or designee.
- It is reasonable and sound that no intrastate transfer shall be initiated by a sending probation department when there exists a pending violation of probation in its jurisdiction unless the receiving department consents and that sending department take all necessary steps to ensure fingerprinting, DNA testing and Sex Offender Registration are completed prior to transfer and that orders of protection are provided with application papers in a timely manner.
- Several provisions will establish better intrastate transfer procedures by prohibiting transfers whenever there exists pending criminal charge(s) in the sending jurisdiction except under certain enumerated circumstances, and disallowing transfers involving sex offenders and domestic violence where a probationer is not a resident of the receiving jurisdiction at the time of sentencing or disposition until the receiving jurisdiction has had sufficient opportunity to investigate the prospective transfer and verify actual residence prior to the probationer's movement to the receiving jurisdiction.
- Fingerprinting provisions will help ensure that all enumerated cases, subject to fingerprinting laws are indeed fingerprinted prior to leaving the original jurisdiction. Fingerprinting guarantees notification to the probation department of record of any new arrest. Further, it is important to law enforcement that criminal history records are accurate.
- DNA collection is recognized as a vital law enforcement investigatory and prosecutorial tool as technology provides for positive identification of offenders. It has proven instrumental in solving previously unsolved crimes and in assisting defense in their efforts to prove their client's innocence.
- Sex Offender registration helps ensure that offenders are registered in a timely fashion and that risk assessments are conducted, and that appropriate law enforcement agencies are notified. Through registration and risk assessment, the public and/or entities with vulnerable populations may have access to certain information that is timely and accurate.
- New language which will require affording the receiving department the opportunity to investigate enumerated sex offenses and those involving domestic violence of nonresidents will promote victim safety, enhance supervision and as a result foster community safety.
- The change in our supervision rule as to reporting requirements merely clarifies a previous written communication on this subject to guarantee that the Division of Probation and Correctional Alternatives has a more comprehensive database of individuals under probation supervision.

These proposed amendments strengthen and clarify procedural requirements in the area of interstate and intrastate transfer and offender compliance with the new fingerprinting, DNA collection and sex offender registration provisions. These amendments will serve the additional important functions of enhancing public and victim safety, promoting offender accountability, ensuring continuity of services, and establishing better safeguards in the transfer process.

4. Costs:

These changes are procedural in nature and will require some training. However, we do not foresee these proposed reforms leading to significant additional costs to probation departments. Clearly, any minimal costs are significantly outweighed by increased public safety interests and offender accountability provided by these new provisions.

5. Local Government Mandates:

The proposal establishes new procedures for interstate and intrastate transfers and clarifies supervision reporting. It imposes clear duties upon sending and receiving probation departments to facilitate transfers consistent with offender accountability and public safety. The Division circulated earlier drafts to the Executive Committee of the Council of Probation Administrators, (the statewide professional association of probation administrators) and a final draft subsequently to all probation agencies. We incorporated in these amendments certain verbal suggestions earlier raised by probation professionals to address problems which they previously experienced in this area and to clarify certain provisions. For example, additional language was added to establish that a sending probation department shall take all necessary steps to ensure fingerprinting, DNA testing, and Sex Offender Registration, where applicable, are completed prior to transfer and that indication of actions taken be included in transfer papers. To promote offender accountability and compliance, language was added to establish that the probationer must agree to comply with any conditions imposed by the receiving court and to be subject to any other fees or surcharges authorized by law. To emphasize this importance, additional language was included to require any receiving probation department recommending additional conditions to seek to calendar the case with the receiving court for modification of such conditions within 20 business days and to recognize the ability of the receiving probation department to request and the authority of the receiving court to modify conditions during the term of supervision. Due to numerous requests across the state, the Division reinstated a past regulatory time frame requirement with respect to intrastate transfer processing and the outside time period when the transfer becomes effective because prior flexibility in this area with respect to a receiving department's processing of cases has led to excessive delays in response to transfer requests and concerns as to continuity of supervision. We also modified prior draft language to establish that this 60 calendar day time period commences on the date the transfer paperwork is received by the receiving department rather than when judicially signed so that receiving department's are not adversely affected by mail delays.

Overall, the Division has received favorable support from probation agencies that these new standards are manageable and consistent with good professional practice. New York City has previously commented on an earlier draft and raised some points that we referenced above and which were incorporated in these amendments. Other perceived workload issues raised reflected a misunderstanding of what was being required. For example, there was a misconception that probation itself was responsible for undertaking fingerprinting activities rather than facilitating and documenting efforts to promote compliance in applicable cases. Where probationers are subject to fingerprinting, DNA, and/or Sex Offender Registration requirements, the Division does not believe it is unreasonable or burdensome for probation as the supervising agency to take a stronger role in ensuring compliance of these requirements. Additionally, their concern over the time frame with respect to calendaring a case for modifying conditions was not valid as our regulatory amendment language refers to seeking to calendar within this time period not requiring the actual calendar date occur during this time frame. The Division disagreed with other NYC concerns that a few of these regulatory amendments would be burdensome. For example, we believe their perception that providing information "pertaining to others living in the household is a substantial workload increase if required in all cases" is inaccurate, as such information is routinely gathered in the course of investigatory and/or supervision services and is clearly outweighed by its intrinsic value to a receiving probation department. Similarly, comments surrounding workload concerns arising from our regulatory language of factors that may be considered when determining suitability to transfer are also misplaced as they are illustrative in terms of good professional practice and not essential verification requirements. Other comments raised by NYC reflected resistance to change internal procedures and are outweighed by the importance of court notification and offender accountability.

6. Paperwork:

The proposed rule will not lead to additional paperwork. In an effort to assist in identifying critical information, the Division redesigned interstate and intrastate forms to capture new requisite information.

7. Duplication:

This proposed rule does not duplicate any State or Federal law or regulation. It clarifies and reinforces certain laws with respect to Sex Offender Registration, DNA, and fingerprinting to promote compliance.

8. Alternatives:

In view of the need to ensure uniformity in transfer procedures, establish stronger minimum standards to promote offender accountability and

protect public and victim safety, regulation in this area is critical and no other alternatives were determined appropriate.

9. Federal Standards:

There are federal standards governing interstate transfers of probationers and Sex Offender registration, and this regulation requires local probation departments to adhere to these requirements.

10. Compliance Schedule:

Through prompt dissemination and because amendments are not unduly burdensome, local departments should be able to immediately implement these amendments.

Regulatory Flexibility Analysis

A regulatory flexibility analysis for small businesses is not required by Section 202-a of the State Administrative Procedure Act, no small business recordkeeping requirements, needed professional services, or compliance requirements will be imposed on small businesses.

Any impact a local government is addressed in both the Regulatory Impact Statement and the Rural Area Flexibility Analysis.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the proposed rule.

2. Reporting, recordkeeping, and other compliance requirements, and professional services:

The proposed rule strengthens procedural requirements and improves probation practice, yet should not impose significant additional local probation costs. There are no professional services likely to be needed in any rural area to comply with proposed rule changes. Recordkeeping and compliance provisions will improve transfer operations and offender accountability, thus enhancing public safety.

3. Costs:

There are no significant additional costs or new annual costs required to comply with the proposed rule changes. Clearly, any minimal costs, are significantly outweighed by increased public safety interests and offender accountability provided by these new provisions.

4. Minimizing adverse impact:

The proposed rule amendments will have no adverse impact on rural areas.

5. Rural area participation:

DPCA has discussed the proposed rule changes with the Executive Committee of the Council of Probation Administrators, which include a cross-section of urban, rural, and suburban jurisdictions, and we have circulated and submitted comments on a prior draft of this regulatory reform to all probation directors and the State Probation Commission. The current emergency regulatory amendments incorporate numerous verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experience in the area of interstate and intrastate transfers and supervision reporting and to clarify certain procedural provisions. Details of many of these changes are highlighted in the regulatory impact statement. Moreover, DPCA did not find differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

Job Impact Statement

A job impact statement is not being submitted with the proposed rule because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature and clarify interstate and intrastate work responsibilities and functions that are consistent with good professional practice. These changes are not onerous in nature and can be implemented through correspondence and training of probation staff.

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 proposal filed by Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and South Canaan Cellular for approval of an interconnection agreement executed on Aug. 19, 2004.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and South Canaan Cellular have reached a negotiated agreement whereby Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and South Canaan Cellular will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until August 19, 2005, or as extended.

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, 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.

(04-C-1440SA1)

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

Hourly Pricing by Central Hudson Gas & Electric Corporation

I.D. No. PSC-50-04-00009-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 proposal filed by Central Hudson Gas & Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 15—Electricity to become effective April 1, 2005.

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

Subject: Hourly pricing.

Purpose: To modify the hourly pricing provision applicable to Service Classification Nos. 2, 3, 13 and 14.

Substance of proposed rule: On November 1 and 23, 2004, Central Hudson Gas & Electric Corporation (Central Hudson or the Company) filed proposed tariff revisions to modify its Hourly Pricing Provision (HPP) applicable to Service Classifications (S.C.) Nos. 2, 3, 13 and 14 to become effective April 1, 2005. Central Hudson proposes to: (1) eliminate the Market Price Charge and the Market Price Adjustment pricing option for S.C. Nos. 3 and 13 customers who continue to purchase their electricity requirements from Central Hudson. As a result, these customers would be required to purchase their electricity requirements from the Company under the HPP or choose an alternative supplier under the company's Retail Access Program. Customers taking service under S.C. No. 2 would continue to be able to select to take service under the HPP on a voluntary basis; and (2) rename the HPP-ICAP Charge to UCAP Charge (unforced capacity) and revise the method for determining this charge as follows: (a) allocate UCAP Charges from the Market Price Charge to the HPP-UCAP Charge based on the sum of HPP customers' UCAP requirements multiplied by the company's monthly average UCAP rate per kW as included in the Market Price Charge; (b) add an energy balancing component to the UCAP charge to reflect company purchases and sales in the Real-Time Market which are required to balance load. This component will be calcu-

Public Service Commission

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

Interconnection Agreement between Citizens Telecommunications Company of New York, Inc. d/b/a Frontier Citizens Communications of New York and South Canaan Cellular

I.D. No. PSC-50-04-00008-P

lated, using current month data, by subtracting the Day-Ahead Locational Based Market Price from the Real-Time Locational Based Market Price as set forth by the NYISO for Zone G for each hour and multiplying the difference by any purchases or sales that occurred in the respective hour. The net total will be divided by total estimated full service sales, including HPP sales, consistent with the calculation set forth for the Market Price Charge, to arrive at an energy balancing component per kWh; and (c) the HPP-UCAP charge per kWh will then be comprised of the UCAP Charges as set forth in (a) above, the energy balancing component proposed in (b) above, and allowances for working capital carrying charges and bad debts equal to the amounts for these charges included in the Market Price Charge. The Company also proposed to delete from its tariff references to the Customer Refund for S.C. Nos. 3 and 13 since these customers are no longer eligible for this item. The Commission may approve, modify, or reject, in whole or in part, the company's filing.

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. Brillig, 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.

(00-E-1273SA9)

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

Submetering of Electricity by Environmentally Sustainable Design Solutions, Ltd.

I.D. No. PSC-50-04-00010-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 whether to approve or reject, in whole or in part, the petition filed by Environmentally Sustainable Design Solutions, Ltd. to submeter electricity at 15 Broad St., New York, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (5), (12) and (14)

Subject: Submetering of electricity.

Purpose: To submeter electricity at 15 Broad St., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Environmentally Sustainable Design Solutions, Ltd. to submeter electricity at 15 Broad Street, New York, New York.

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. Brillig, 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.

(04-E-1450SA1)

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

Billing Procedures by Central Hudson Gas & Electric Corporation

I.D. No. PSC-50-04-00011-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 proposal filed by Central Hudson Gas & Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12.

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

Subject: Billing procedures for deliverability demand billing determinants.

Purpose: To change the company's current practice of including the deliverability demand billing determinants on the customer's bills to a system where the charges are sent to the retail suppliers.

Substance of proposed rule: Central Hudson Gas & Electric Corporation (Central Hudson) proposes to change its current practice of including the deliverability demand billing determinants on the customer's bills to a system where the charges are sent to the Retail Suppliers. The charges related to the deliverability demand billing determinants will be calculated each month by Central Hudson for each customer and sent to the Retail Suppliers for billing purposes. Central Hudson will summarize the customers' deliverability demand billing determinant charges and will provide the appropriate customer summary to each Retail Supplier providing service to the customers operating under S.C. Nos. 6 - Firm Transportation Rate - Core, 12 - Aggregated Firm Transportation Rate - Residence and 13 - Aggregated Firm Transportation Rate - Commercial and Industrial.

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. Brillig, 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.

(00-G-1274SA4)

Department of State

**EMERGENCY
RULE MAKING**

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-50-04-00015-E

Filing No. 1347

Filing date: Nov. 30, 2004

Effective date: Nov. 30, 2004

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

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

Specific reasons underlying the finding of necessity: Based on testimony received at two public hearings, the Secretary of State has determined that some owners of residential property in the Borough of Queens are subject to intense and repeated solicitation by real estate brokers and real estate salespersons and that such solicitations seek to have the owners place their home for sale with the real estate brokers and real estate salespersons. The Secretary of State has further determined that the homeowners have no practical means of stopping the unwanted and intrusive solicitations and that those homeowners need immediate relief. Therefore, compliance with section 201(1) of the State Administrative Procedure Act would be contrary to the public interest of providing for the general

welfare of those homeowners who seek immediate relief from the continuation of the unwanted and unwelcomed solicitations by real estate brokers and salespersons.

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in the Borough of Queens.

Text of emergency rule: Paragraph (c)(2) of section 175.17 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add the following designated cease and desist zone:

<i>Zone:</i>	<i>Expiration Date:</i>
<i>County of Queens</i>	<i>August 1, 2009</i>

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 published a notice of proposed rule making, I.D. No. DOS-50-04-00007-P in this issue of the *State Register*. The emergency rule will expire February 27, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3)(a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearings on May 20, 2004, and on May 27, 2004, the Secretary of State has determined that some homeowners within the Borough of Queens are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Borough of Queens are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

Public hearings were held in the Borough of Queens at P.S. 18, 86-35 235th Court, Bellrose, on May 20, 2004, and at P.S. 63, 90-15 Sutter Avenue, Ozone Park on May 27, 2004. At the public hearings testimony was given by community leaders who spoke on behalf of their constituents. Speakers included State Senator Frank Padavan, State Senator Serphin Maltese, Assemblywoman Audrey Pheffer, and Alexandra Rosa, Chief of Staff for Borough President, as well as representatives of homeowners associations and representatives of civic associations from within the Borough of Queens. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the proposed zone. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Borough of Queens have no practical means of stopping the unwanted and intrusive solicitations and that the homeown-

ers need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. Approximately 12,000 homeowner’s statements were filed for the previous cease-and-desist list, which expired on September 1, 2004.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Borough of Queens. There are approximately 4,800 real estate brokers and approximately 10,000 real estate salespersons with offices in the Borough of Queens.

The Department of State will have the cease-and-desist list available, at no cost, on its website, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

The Department of State expects that most licensees will access the list, at no cost, on the Department’s website. However, some licensees may purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the Borough of Queens.

Some real estate brokers may use commercial mailing lists to solicit, and, for those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list because the broker will have to invest time and expense to delete the addresses that appear in the cease-and-desist list. The Department of State is not, however, able to estimate the cost to those brokers because the cost will depend on a number of factors such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology available to the broker, and the broker’s cost for technology and labor. On the other hand, there may be some savings resulting from the elimination of “unproductive addresses” from the list.

If a broker uses the telephone, delivery services or personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person who may be on the list. There is, of course, a cost associated with that expenditure of the time taken to check the list. On the other hand, there may be some savings resulting from the elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each broker. Accordingly, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ \$29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	2,372
Total:	\$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department’s website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an “owner’s statement” with the Department of State. The owner’s statement will indicate the owner’s desire not to be solicited and will set forth the owner’s name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner’s statements will be provided to community leaders for distribution to their constituents. In

addition, owner's statements will be available from the Department of State on request, as well as available on the Department's website. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies throughout the Borough of Queens. There are approximately 4,800 real estate brokers and approximately 10,000 real estate salespersons in the Borough of Queens. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who deal only with commercial properties, and those who do not deal in residential properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Borough of Queens but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears on a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the

Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted open public hearings in the Borough of Queens on May 20, 2004, and on May 27, 2004. The time, date and place of the public hearing was well advertised within the affected communities. At the public hearings testimony was given by community leaders who spoke on behalf of their constituents. Speakers included State Senator Frank Padavan, State Senator Serphin Maltese, Assemblywoman Audrey Pheffer, and Alexandra Rosa, Chief of Staff for Borough President, as well as representatives of homeowners associations and representatives of civic associations from within the Borough of Queens.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Borough of Queens, and this rule only affects those real estate brokers and salespersons who do business in that community.

The Borough of Queens is not rural and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the Borough of Queens can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

**EMERGENCY
RULE MAKING**

Cease and Desist Zone for Real Estate Brokers and Salespersons

I.D. No. DOS-50-04-00016-E

Filing No. 1348

Filing date: Nov. 30, 2004

Effective date: Nov. 30, 2004

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

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

Specific reasons underlying the finding of necessity: Based on testimony received at a public hearing, the Secretary of State has determined that some owners of residential property in Community Districts 9, 10, 11 and 12 of the Bronx are subject to intense and repeated solicitation by real estate brokers and real estate salespersons and that such solicitations seek to have the owners place their home for sale with the real estate brokers and real estate salespersons. The Secretary of State has further determined that the homeowners have no practical means of stopping the unwanted and intrusive solicitations and that those homeowners need immediate

relief. Therefore, compliance with section 201(1) of the State Administrative Procedure Act would be contrary to the public interest of providing for the general welfare of those homeowners who seek immediate relief from the continuation of the unwanted and unwelcomed solicitations by real estate brokers and salespersons.

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in Community Districts 9, 10, 11 and 12 of the Bronx.

Text of emergency rule: Paragraph (c)(2) of section 175.17 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add the following designated cease and desist zone:

<i>Zone:</i>	<i>Expiration Date:</i>
<i>County of Bronx</i>	<i>August 1, 2009</i>

Within the County of Bronx as follows:

All that area of land in the County of Bronx, City of New York, otherwise known as Community Districts 9, 10, 11 and 12, and bounded and described as follows: Beginning at a point at the intersection of Bronx County and Westchester County boundary and Long Island Sound; thence southerly along Long Island Sound while including City Island to East River; thence westerly and northwesterly along East River to Bronx River; thence northwesterly and northerly along Bronx River to Sheridan Expressway; thence northeasterly along Sheridan Expressway to Cross Bronx Expressway; thence southeasterly and easterly along Cross Bronx Expressway to Bronx River Parkway; thence northerly and northeasterly along Bronx River Parkway to East 233rd Street; thence westerly along East 233rd Street to Van Cortlandt Park East; thence northerly along Van Cortlandt Park East to the boundary of Westchester County and Bronx County; thence easterly along the boundary of Westchester County and Bronx County to Long Island Sound and the point of beginning.

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 published a notice of proposed rule making, I.D. No. DOS-50-04-00006-P in this issue of the *State Register*. The emergency rule will expire February 27, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Section 442-h(3) (a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on June 10, 2004, the Secretary of State has determined that some homeowners within Community Districts 9, 10, 11 and 12 of the Bronx are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in Community Districts 9, 10, 11 and 12 of the Bronx are subject to intense and repeated solicitations to list their homes

for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and benefits:

A public hearing was held at P.S. 14, 3041 Bruckner Blvd. in the Bronx on June 10, 2004.

At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included Assemblyman Stephen Kaufman, James Vacca of Community Board 10, representatives of homeowners associations and representatives of civic associations within the affected areas of the proposed zone. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the proposed zone. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in Community Districts 9, 10, 11 and 12 of the Bronx have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. One thousand sixty-four homeowner’s statements were filed for the previous cease-and-desist list, which expired on September 1, 2004.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in Community Districts 9, 10, 11 and 12 of the Bronx. There are approximately 1,350 real estate brokers and approximately 2,100 real estate salespersons with offices in the Bronx.

The Department of State will have the cease-and-desist list available, at no cost, on its website, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

The Department of State expects that most licensees will access the list, at no cost, on the Department’s website. However, some licensees may purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the Bronx.

Some real estate brokers may use commercial mailing lists to solicit, and, for those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list because the broker will have to invest time and expense to delete the addresses that appear in the cease-and-desist list. The Department of State is not, however, able to estimate the cost to those brokers because the cost will depend on a number of factors such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology available to the broker, and the broker’s cost for technology and labor. On the other hand, there may be some savings resulting from the elimination of “unproductive addresses” from the list.

If a broker uses the telephone, delivery services or personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person who may be on the list. There is, of course, a cost associated with that expenditure of the time taken to check the list. On the other hand, there may be some savings resulting from the elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each broker. Accordingly, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ \$29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	2,372
Total:	\$11,712

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the

Department's website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an "owner's statement" with the Department of State. The owner's statement will indicate the owner's desire not to be solicited and will set forth the owner's name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner's statements will be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's website. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule applies to an area commonly known as Community Districts 9, 10, 11 and 12 of the Bronx. There are approximately 1,350 real estate brokers and approximately 2,100 real estate salespersons in the Bronx. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who deal only with commercial properties, and those who do not deal in residential properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Bronx but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears on a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to adopt the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on June 10, 2004, at P.S. 14, 3041 Bruckner Blvd. in the Bronx. The time, date and place of the public hearing was well advertised within the affected communities. Testifying at the hearing on behalf of their constituents were Assemblyman Stephen Kaufman, James Vacca of Community Board 10, representatives of homeowners associations and representatives of civic associations from within the affected communities.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in Community Districts 9, 10, 11 and 12 of the Bronx, and this rule only affects those real estate brokers and salespersons who do business in that community.

Community Districts 9, 10, 11 and 12 of the Bronx are not rural and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in Community Districts 9, 10, 11 and 12 of the Bronx can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Cease and Desist Zone for Real Estate Brokers and Salespersons
I.D. No. DOS-50-04-00006-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 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in Community Districts 9, 10, 11 and 12 of the Bronx.

Text of proposed rule: Paragraph (c)(2) of section 175.17 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add the following designated cease and desist zone:

<i>Zone:</i>	<i>Expiration Date:</i>
<i>County of Bronx</i>	<i>August 1, 2009</i>

Within the County of Bronx as follows:

All that area of land in the County of Bronx, City of New York, otherwise known as Community Districts 9, 10, 11 and 12, and bounded and described as follows: Beginning at a point at the intersection of Bronx County and Westchester County boundary and Long Island Sound; thence southerly along Long Island Sound while including City Island to East River; thence westerly and northwesterly along East River to Bronx River; thence northwesterly and northerly along Bronx River to Sheridan Expressway; thence northeasterly along Sheridan Expressway to Cross Bronx Expressway; thence southeasterly and easterly along Cross Bronx Expressway to Bronx River Parkway; thence northerly and northeasterly along Bronx River Parkway to East 233rd Street; thence westerly along East 233rd Street to Van Cortlandt Park East; thence northerly along Van Cortlandt Park East to the boundary of Westchester County and Bronx County; thence easterly along the boundary of Westchester County and Bronx County to Long Island Sound and the point of beginning.

Text of proposed rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

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 442-h(3)(a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearing on June 10, 2004, the Secretary of State has determined that some homeowners within Community Districts 9, 10, 11 and 12 of the Bronx are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative Objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in Community Districts 9, 10, 11 and 12 of the Bronx are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives

which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and Benefits:

A public hearing was held at P.S. 14, 3041 Bruckner Blvd. in the Bronx on June 10, 2004.

At the public hearing testimony was given by community leaders who spoke on behalf of their constituents. Speakers included Assemblyman Stephen Kaufman, James Vacca of Community Board 10, representatives of homeowners associations and representatives of civic associations within the affected areas of the proposed zone. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the proposed zone. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in Community Districts 9, 10, 11 and 12 of the Bronx have no practical means of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. One thousand sixty-four homeowner’s statements were filed for the previous cease-and-desist list, which expired on September 1, 2004.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in Community Districts 9, 10, 11 and 12 of the Bronx. There are approximately 1,350 real estate brokers and approximately 2,100 real estate salespersons with offices in the Bronx.

The Department of State will have the cease-and-desist list available, at no cost, on its website, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

The Department of State expects that most licensees will access the list, at no cost, on the Department’s website. However, some licensees may purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the Bronx.

Some real estate brokers may use commercial mailing lists to solicit, and, for those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list because the broker will have to invest time and expense to delete the addresses that appear in the cease-and-desist list. The Department of State is not, however, able to estimate the cost to those brokers because the cost will depend on a number of factors such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology available to the broker, and the broker’s cost for technology and labor. On the other hand, there may be some savings resulting from the elimination of “unproductive addresses” from the list.

If a broker uses the telephone, delivery services or personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person who may be on the list. There is, of course, a cost associated with that expenditure of the time taken to check the list. On the other hand, there may be some savings resulting from the elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each broker. Accordingly, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ \$29,110	
10 weeks	5,600
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Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	<u>2,372</u>
Total:	<u>\$11,712</u>

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department’s website. For those few who want to purchase a paper copy,

the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local Government Mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an "owner's statement" with the Department of State. The owner's statement will indicate the owner's desire not to be solicited and will set forth the owner's name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner's statements will be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's website. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to propose the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal Standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance Schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule will apply to an area commonly known as Community Districts 9, 10, 11 and 12 of the Bronx. There are approximately 1,350 real estate brokers and approximately 2,100 real estate salespersons in the Bronx. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who deal only with commercial properties, and those who do not deal in residential properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Bronx but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears on a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule. The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to propose the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted an open public hearing on June 10, 2004, at P.S. 14, 3041 Bruckner Blvd. in the Bronx. The time, date and place of the public hearing was well advertised within the affected communities. Testifying at the hearing on behalf of their constituents were Assemblyman Stephen Kaufman, James Vacca of Community Board 10, representatives of homeowners associations and representatives of civic associations from within the affected communities.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in Community Districts 9, 10, 11 and 12 of the Bronx, and this rule only affects those real estate brokers and salespersons who do business in that community.

Community Districts 9, 10, 11 and 12 of the Bronx are not rural and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in Community Districts 9, 10, 11 and 12 of the Bronx can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Cease and Desist Zone for Real Estate Brokers and Salespersons
I.D. No. DOS-50-04-00007-P**

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

Proposed action: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h(3)(a) and (c)

Subject: Cease and desist zone for real estate brokers and salespersons.

Purpose: To establish a cease and desist zone in the Borough of Queens.

Text of proposed rule: Paragraph (c)(2) of section 175.17 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to add the following designated cease and desist zone:

<i>Zone:</i>	<i>Expiration Date:</i>
<i>County of Queens</i>	<i>August 1, 2009</i>

Text of proposed rule and any required statements and analyses may be obtained from: Bruce Stuart, Department of State, Division of Licensing Services, 84 Holland Ave., Albany, NY 12208, (518) 473-2728

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 442-h(3) (a) of the Real Property Law (“RPL”) provides that the Secretary of State may adopt a rule establishing a cease-and-desist zone if the Secretary determines that some homeowners within a defined area are subject to intense and repeated solicitation by real estate brokers and salespersons to list their homes for sale. Upon the establishment of such a zone, a homeowner may file with the Secretary a statement of desire not to be solicited. Thereafter, the Secretary will publish a list of the names and addresses of the persons who have filed the statement, and brokers and salespersons are then prohibited from soliciting persons on that list. That list is commonly referred to as a “cease-and-desist list”.

Section 442-h(3)(c) of the RPL provides that no rule establishing a cease and desist zone shall be effective for more than five years; provided, however, that the Department of State may re-adopt the rule to continue a cease and desist zone for additional periods not to exceed five years.

Based testimony received at a public hearings on May 20, 2004, and on May 27, 2004, the Secretary of State has determined that some homeowners within the Borough of Queens are subject to intense and repeated solicitations from real estate brokers and salespersons. As a result, the Secretary has express statutory authority to propose and adopt a cease-and-desist zone for that community.

2. Legislative Objectives:

According to the Statement of Legislative Findings for section 442-h of the Real Property Law, the Legislature has found that, from time to time, homeowners in some neighborhoods have been subject to intense and repeated solicitation by real estate brokers and salespersons to place their homes for sale, with the implication that property values would be decreasing because persons of different ethnic, social or religious backgrounds were moving into the neighborhood in greater numbers. The Statement of Legislative Findings also concluded that this type of solicitation technique constitutes a churning of the market and generates panic selling in the neighborhood. By enacting § 442-h, the Legislature sought to provide a means by homeowners could effectively express their wish not to be solicited by real estate brokers or salespersons. The Secretary has found that some homeowners in the Borough of Queens are subject to intense and repeated solicitations to list their homes for sale. Therefore, this rule accords with the public policy objectives which the Legislature sought to advance by enacting § 442-h of the Real Property Law.

3. Needs and Benefits:

Public hearings were held in the Borough of Queens at P.S. 18, 86-35 235th Court, Bellrose, on May 20, 2004, and at P.S. 63, 90-15 Sutter Avenue, Ozone Park on May 27, 2004. At the public hearings testimony was given by community leaders who spoke on behalf of their constituents. Speakers included State Senator Frank Padavan, State Senator Serphin Maltese, Assemblywoman Audrey Pheffer, and Alexandra Rosa, Chief of Staff for Borough President, as well as representatives of homeowners associations and representatives of civic associations from within the Borough of Queens. Each of the speakers spoke in support of the proposed cease-and-desist zone citing the need to curb the aggressive solicitation practices of real estate agents in the proposed zone. The speakers cited frequent telephone calls, unwanted mail and flyers, as well as door-to-door solicitations, as intrusive and unwanted solicitation practices by real estate brokers and salespersons. Accordingly, the Secretary of State has determined that homeowners in the Borough of Queens have no practical means

of stopping the unwanted and intrusive solicitations and that the homeowners need immediate relief. This rule will provide those homeowners who do not wish to be solicited with an effective and practical means of so notifying real estate brokers and salespersons. Approximately 12,000 homeowner’s statements were filed for the previous cease-and-desist list, which expired on September 1, 2004.

4. Costs:

a. Costs to regulated parties:

Regulated parties include licensed real estate brokers and salespersons who do residential sales in the Borough of Queens. There are approximately 4,800 real estate brokers and approximately 10,000 real estate salespersons with offices in the Borough of Queens.

The Department of State will have the cease-and-desist list available, at no cost, on its website, www.dos.state.ny.us. The cease-and-desist list will also be sold to the public, including real estate brokers and salespersons, for \$10 per copy, in accordance with existing 19 NYCRR Section 175.17(c)(5). Copies will also be made available for inspection and copying at Department of State offices.

The Department of State expects that most licensees will access the list, at no cost, on the Department’s website. However, some licensees may purchase one or more copies. Some will share the expense by sharing a copy. Others will not access or purchase a copy because they do not solicit residential listings in the Borough of Queens.

Some real estate brokers may use commercial mailing lists to solicit, and, for those brokers, the cease-and-desist list may increase the cost of using a commercial mailing list because the broker will have to invest time and expense to delete the addresses that appear in the cease-and-desist list. The Department of State is not, however, able to estimate the cost to those brokers because the cost will depend on a number of factors such as the number of names on the mailing list, the number of addresses in the cease-and-desist list, the technology available to the broker, and the broker’s cost for technology and labor. On the other hand, there may be some savings resulting from the elimination of “unproductive addresses” from the list.

If a broker uses the telephone, delivery services or personal contact to solicit residential listings, the licensee may have to spend time checking the cease-and-desist list to avoid contact with any person who may be on the list. There is, of course, a cost associated with that expenditure of the time taken to check the list. On the other hand, there may be some savings resulting from the elimination of unproductive calls or deliveries. Whether there is a net cost or savings will depend on the circumstances and practices of each broker. Accordingly, the Department of State is not able to estimate those costs.

b. Costs to the Department of State:

The estimated costs for preparing the cease-and-desist list are as follows:

Printing owners statements	\$2,200
Mailing owners statements	640
Processing statements:	
Staff: SG-14 @ \$29,110	
10 weeks	5,600
Data entry:	
Staff: SG-6 (NYC) @ \$23,385	
10 days	900
Fringe benefits @ 36.5%	<u>2,372</u>
Total:	<u>\$11,712</u>

The costs for printing and mailing are unknown. The Department anticipates that most licensees will access the list, at no cost, on the Department’s website. For those few who want to purchase a paper copy, the Department will likely print a copy, on an order-by-order basis, on existing equipment. The mailing costs will be dependent on the number of copies that are ordered. However, the Department expects that the costs for printing and mailing will be incidental to the costs of preparing the list.

The Department of State expects that revenues from the sale of the list will be incidental to the costs of preparing, printing and mailing.

5. Local Government Mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Homeowners who do not want to be solicited will have to file an “owner’s statement” with the Department of State. The owner’s statement will indicate the owner’s desire not to be solicited and will set forth the owner’s name and the address of the property within the cease-and-desist zone. The Department of State will provide homeowners with a standard form although use of the form is not mandatory. Owner’s statements will

be provided to community leaders for distribution to their constituents. In addition, owner's statements will be available from the Department of State on request, as well as available on the Department's website. The Department of State will prepare a cease-and-desist list containing the names and addresses of all of the homeowners who filed an owner's statement. The list will be available, at no cost, on the Department's website. The publication will also be sold to the public, including real estate brokers and salespersons. The price will be \$10 per copy. Except for orders submitted by mail, real estate brokers and salespersons will not have to complete any paperwork or file any paperwork as a result of this rule.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to propose the cease-and-desist order rather than a non-solicitation order.

The Department of State did not consider any other alternatives.

9. Federal Standards:

There are no federal standards regulating the frequency or intensity of solicitations by real estate brokers or salespersons. Consequently, this rule does not exceed any existing federal standard.

10. Compliance Schedule:

Real estate brokers and salespersons can comply with the cease-and-desist order immediately upon publication of the list.

Regulatory Flexibility Analysis

1. Effect of rule:

This cease-and-desist rule will apply throughout the Borough of Queens. There are approximately 4,800 real estate brokers and approximately 10,000 real estate salespersons in the Borough of Queens. Most of those licensees are small businesses, or they work for a small business. This rule will apply to most of the licensees. The exceptions will be those who deal only with commercial properties, and those who do not deal in residential properties located within the cease-and-desist zone.

The cease-and-desist rule will also apply to licensed real estate brokers and salespersons who are located outside of the Borough of Queens but who solicit residential properties within the designated area. The Department of State does not have a practical way of estimating how many brokers and salespersons fall within this category.

The rule does not apply to local governments.

2. Compliance requirements:

The rule does not impose any reporting or recordkeeping requirements on the licensees. The rule does prohibit each licensee from soliciting the sale, rental or listing from any homeowner whose name appears on a cease-and-desist list published by the Department of State.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

A licensee will not need professional services in order to comply with the rule.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The cost of compliance and the variations in the costs of compliance are detailed in section 4(c) of the Regulatory Impact Statement.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the names and addresses of the homeowners who do not want to be solicited will be published by the Department of State and since the cost of the publication is \$10 per copy or free if accessed on the Department's website, it will be economically and technologically feasible for real estate brokers and salespersons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State did not identify any alternative that would provide relief for homeowners and, at the same time, be less restrictive and less burdensome on the solicitation activities of real estate brokers and salespersons. Consideration was given to the adoption of a non-solicitation

order pursuant to § 442-h(2) of the Real Property Law. However, the Department concluded that a cease-and-desist order could provide homeowners with relief from intense and repeated solicitation without imposing the more restrictive and more burdensome regulation of a non-solicitation order, which would prohibit all direct solicitation activities within the non-solicitation zone. Consequently, the Secretary of State decided to propose the cease-and-desist order rather than a non-solicitation order.

To provide homeowners in the designated area with relief from intense and repeated solicitations from real estate brokers and salespersons, the rule must apply equally to all licensees regardless of the size of their business or the size of their employer's business. Consequently, the rule does not make special accommodations for different classes of licensees.

7. Small business participation:

The Department of State conducted open public hearings in the Borough of Queens on May 20, 2004, and on May 27, 2004. The time, date and place of the public hearing was well advertised within the affected communities. At the public hearings testimony was given by community leaders who spoke on behalf of their constituents. Speakers included State Senator Frank Padavan, State Senator Serphin Maltese, Assemblywoman Audrey Pfeffer, and Alexandra Rosa, Chief of Staff for Borough President, as well as representatives of homeowners associations and representatives of civic associations from within the Borough of Queens.

There were no real estate brokers or real estate salespersons who identified themselves at the public hearing, and no real estate broker or salesperson spoke at the hearing. In addition, no real estate broker or salesperson submitted any written testimony regarding the proposed re-adoption of the cease-and-desist zone.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

This rule establishes a cease-and-desist zone in the Borough of Queens, and this rule only affects those real estate brokers and salespersons who do business in that community.

The Borough of Queens is not rural and, therefore, a rural flexibility analysis is not required for this rule.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for real estate brokers or real estate salespersons.

The rule provides a means by which homeowners in the Borough of Queens can notify real estate brokers and real estate salespersons that the homeowners do not want to be solicited for the purchase, sale or rental of their homes.

Since the homeowners who file a homeowner's statement with the Department of State are not interested in receiving solicitations from real estate brokers or real estate salespersons, publication of names and addresses of those homeowners and the resulting notification to real estate brokers and salespersons will not have any substantial impact on jobs or employment opportunities for real estate brokers or salespersons.

Department of Taxation and Finance

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Refunds and Credits for Vessel Operators Engaged in Local Transit Service

I.D. No. TAF-50-04-00004-EP

Filing No. 1339

Filing date: Nov. 29, 2004

Effective date: Nov. 29, 2004

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

Action taken: Amendment of section 534.4(a) and (b); and addition of section 534.10 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 1119, subdivision (b); 1142, subdivisions (1) and (8); 1250 (not subdivided); and L. 2004, ch. 60, part M

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

Specific reasons underlying the finding of necessity: L. 2004, ch. 60, part M (signed by the Governor on Aug. 20, 2004) applies to sales made, services rendered, and uses occurring on and after Dec. 1, 2004. Part M requires the Commissioner of Taxation and Finance to define “local transit service,” “vessel hours,” and “total hours operated” by rule. An emergency measure is the only way for the commissioner to put regulatory amendments in place in compliance with the mandate of ch. 60 to implement part M on its Dec. 1, 2004, effective date and to comply with the new statutory requirements as well as the rule making requirements of the State Administrative Procedure Act. When the Legislature mandates that a law take effect on short notice and that a rule must be done to implement it at that time, then an emergency measure is justified for the preservation of the general welfare because the Legislature determines what is the general welfare.

Subject: Refunds and credits of sales and compensating use taxes for vessel operators engaged in local transit service.

Purpose: To implement L. 2004, ch. 60, part M.

Text of emergency/proposed rule: Section 1. Paragraph (1) of subdivision (a) of section 534.4 of such regulations is amended to read as follows:

(1) Omnibus carrier. For purposes of this section, an “omnibus carrier” is a carrier [which] that provides local transit service in this State and [which] that operates pursuant to a certificate of public convenience and necessity issued by the Commissioner of Transportation of this State[,] or by [the Interstate Commerce Commission] a like officer or agency of the United States[,] or pursuant to a contract, franchise, or consent between the carrier and a city in this State having a population of more than one million inhabitants, or any agency of such city.

Section 2. Examples 2 and 3 of subdivision (a) of section 534.4 of such regulations are amended to read as follows:

“Example 2:” Buses of the Y Company operate[, pursuant to a certificate of the Interstate Commerce Commission,] from a terminal in A, a city within the State of New York, to a terminal in B, a city outside the State of New York. Between the terminal in A and the State boundary, the buses do not pick up or discharge any passengers. These buses are not being operated in local transit service because they are not carrying passengers from one point in this State to another point in this State.

“Example 3:” Buses of the Z Company operate[, pursuant to a certificate of the Interstate Commerce Commission,] from a terminal in A to a station in B and proceed to a terminal in C. Cities A and C are in New York State and city B is outside of New York State. The distance between each of the cities along the route traveled is 20 miles. The company carries passengers from city A to cities B and C. The buses will be considered as operating in local transit service[,] since the total distance between points A and C is less than 75 miles, even though the distance from A to C includes some mileage outside of the State.

Section 3. Subparagraph (ii) of paragraph (2) of subdivision (b) of section 534.4 of such regulations is amended to read as follows:

(ii) The following lists of equipment and supplies are intended to indicate the scope of items applicable to omnibus carriers covered by section 1119(b) of the Tax Law. [Since it is recognized that these] These lists are not all inclusive[, questions about specific items not listed should be addressed to the Instructions and Interpretations Unit, Sales Tax Section, Technical Services Bureau, at the address listed in subdivision (b) of section 525.3 of this Title].

Section 4. A new section 534.10 is added to such regulations to read as follows:

Section 534.10 Refunds and credits for vessel operators engaged in local transit service. (Tax Law, section 1119(b)) (a) “Definitions.” (1) Vessel operator. For purposes of this section, a “vessel operator” is a person that operates a vessel used to provide local transit service in this State and that operates pursuant to a certificate of public convenience and necessity issued by the Commissioner of Transportation of this State or by a like officer or agency of the United States or pursuant to a contract, franchise, or consent between such person and a city in this State having a population of more than one million inhabitants, or any agency of such city.

(2) *Vessel. For purposes of this section, a “vessel” is any type of watercraft with a seating capacity of more than 20 passengers that is used for the transportation on water of passengers for hire.*

(3) *Local transit service. (i) For purposes of this section, “local transit service” means a mass transit service provided by a vessel operator in which passengers are carried by a vessel from one point in this State to another point in this State and in performance of which the vessel:*

“(a)” regularly picks up and discharges such passengers as scheduled, or at their convenience, at designated piers, slips, docks, or other landings along waterways, as distinguished from buildings or similar facilities used as terminals or stations;

“(b)” picks up and discharges passengers at terminals or stations, the distance between which is not more than 75 miles (5,280 feet per mile), measured along the route traveled by the vessel; or

“(c)” picks up and discharges passengers as described in both clauses “(a)” and “(b)” of this subparagraph.

(ii) *Local transit service does not include charter, contract, excursion, sight-seeing, or other passenger service.*

“Example 1:” A vessel operator uses vessels to provide mass transit service. The vessels pick up passengers from Terminal A and make scheduled landings at designated piers throughout the city to pick up and discharge passengers before returning to the terminal at the end of the day. The terminal and all of the landings are located in New York State. The vessels are operated in local transit service.

“Example 2:” A vessel operator uses vessels to provide mass transit service. The vessels pick up passengers from Terminal A, proceed to Stations B and C, and continue to Terminal D. All of these facilities and all of the mileage are located in New York State. The distance along the route traveled from A to B is 80 miles, from B to C is 80 miles, and from C to D is 60 miles. Between Terminal A and Station B, the vessels pick up and discharge passengers at designated piers along the waterway. However, they do not do this between Stations B and C or between Station C and Terminal D. Between A and B and between C and D, these vessels are operated in local transit service. Between Stations B and C, however, the vessels are not operated in local transit service because they do not stop to pick up and discharge passengers and the facilities are more than 75 miles apart.

“Example 3:” A vessel operator uses vessels to provide mass transit service. The vessels transport passengers to and from Terminals A and B. Terminal A is located in New York State. Terminal B is located outside of the State. There are no scheduled landings at which to pick up or discharge passengers between Terminal A and the State boundary. These vessels are not being operated in local transit service because they are not carrying passengers from one point in this State to another point in this State.

“Example 4:” A vessel operator uses vessels to provide mass transit service. The vessels pick up passengers from Terminal A, proceed to Station B, and continue to Terminal C. Terminals A and C are located in New York State, and Station B is located outside of the State. The distance from Terminal A to Station B along the route traveled by the vessels is 20 miles, as is the distance from Station B to Terminal C. There are no scheduled landings made along the way. The vessels are operated in local transit service because the total distance traveled between Terminals A and C is less than 75 miles, even though the route from A to C includes some mileage outside of the State.

“Example 5:” Assume the facts in Example 4, except that the distance between Terminal A and Station B and between Station B and Terminal C is each 40 miles. The vessels are not operating in local transit service because the total distance traveled between Terminals A and C is greater than 75 miles. The fact that the vessel operator carries passengers from Terminal A to Station B, a distance of 40 miles, does not qualify as local transit service because it is not between two points within New York State.

(4) *Vessel hours. For purposes of this section, “vessel hours” means the number of hours that all vessels are operated by a vessel operator in the performance of local transit service, plus the number of idle hours used to reach the point at which such service begins and from the point at which such service terminates. Such hours include only those hours operated in this State.*

(5) *Total hours operated. For purposes of this section, “total hours operated” means the vessel hours computed pursuant to paragraph (4) of this subdivision, plus the number of hours used in charter, contract, excursion, sight-seeing, and all other passenger service, which hours are not included in the meaning of vessel hours. Such hours include only hours operated in this State.*

(6) *Local transit service percentage. (i) For purposes of this section, the “local transit service percentage” is the proportion that the*

vessel operator's "vessel hours" occurring in local transit service in this State, as defined in paragraph (4) of this subdivision, bear to the vessel operator's "total hours operated" in this State, as defined in paragraph (5) of this subdivision, for the calendar year immediately preceding the end of the quarterly return period ("i.e.," the last day of February, May, August, or November) to which a refund or credit under this section relates.

(ii) *Special computation.* For the first four quarterly return periods of a vessel operator that is not engaged in local transit service in the preceding calendar year, such vessel operator shall compute its local transit service percentage by using the proportion that such operator's vessel hours in local transit service in this State in the first three months of such operation bear to the operator's total hours operated in this State in such period.

"Example 6:" Under the facts of Example 4 set forth in paragraph (3) of this subdivision, the vessel operator operates its vessels for 15,000 hours. Of this number of hours: 4,000 hours are operated between Terminal A and Station B, of which 500 hours are operated outside of New York State; 4,000 hours are also operated between Station B and Terminal C, of which 500 hours are operated outside of the State; 3,500 hours are operated in charter services in New York State; and another 3,500 hours are operated in sight-seeing services in this State. The vessel hours in local transit service is 7,000 hours, which is composed of the 3,500 hours operated in this State between Terminal A and Station B (4,000 - 500) and the 3,500 hours operated in this State between Station B and Terminal C (4,000 - 500). Total hours operated is 14,000 hours, which is all of the hours operated except the 1,000 hours that were operated outside of the State. The local transit service percentage is 50 percent (the percentage that 7,000 vessel hours bear to 14,000 total hours operated).

(b) "Refund or credit of taxes paid." A vessel operator engaged in local transit service is allowed a refund or a credit of taxes paid on the sale to or use by the vessel operator of a "vessel," as defined in this section, and of parts, equipment, lubricants, diesel motor fuel, maintenance, servicing, and repair purchased and used in the operation of any such vessel by the operator.

(c) "Determination of the amount of refund or credit." The refund or credit is determined in accordance with the following table:

<p>"If the local transit service percentage is:"</p> <p>Less than 10 percent</p> <p>10 percent</p> <p>Greater than 10 percent, but less than 70 percent</p> <p>70 percent or more</p>	<p>"The refund or credit is:"</p> <p>None</p> <p>10 percent of the combined State and local taxes paid</p> <p>10 percent plus the product of 1.5 times each whole percent in excess of 10 percent of the combined State and local taxes paid</p> <p>100 percent of the combined State and local taxes paid</p>
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"Example 7:" Under the facts of Example 6, as set forth in paragraph (6) of subdivision (a) of this section, it was determined that the local transit service percentage of the vessel operator is 50 percent. The vessel operator is entitled to a refund or credit of 70 percent of the combined State and local taxes paid on items eligible for such refund or credit, computed as follows:

Initial 10% = 10%
 + 40% x 1.5 = 60%
 Total 70%

(d) "Application for refund or credit." An application for refund or credit must be filed with the Department of Taxation and Finance and must cover a period of not less than three months. (For the administrative provisions on applying for a refund or credit, see section 534.2 of this Part).

(e) "Records to be maintained." (1) A vessel operator must maintain records relating to its purchases and uses of all vessels and of all property and services described in subdivision (b) of this section. Each record must disclose:

- (i) the vendor's name;
 - (ii) the invoice number;
 - (iii) the invoice date;
 - (iv) the amount of the purchase;
 - (v) the amount of the sales or use tax paid; and
 - (vi) a brief description of the item(s) or service(s) purchased.
- (2) A vessel operator must also maintain records that disclose:
- (i) vessel hours operated in local transit service in this State;

(ii) vessel hours operated in this State in charter, contract, excursion, sight-seeing, and other passenger service not included in vessel hours; and

(iii) total hours operated within the State.

Section 5. This measure will take effect on the date that the Notice of Emergency Adoption and Proposed Rule Making is filed with the Secretary of State, and will apply to sales made, services rendered, and uses occurring on or after December 1, 2004, in the manner provided in Part M of Chapter 60 of the Laws of 2004.

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 26, 2005.

Text of rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Data, views or arguments may be submitted to: Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, First; 1119(b); 1142(1) and (8); and 1250 (not subdivided) and Part M of Chapter 60 of the Laws of 2004. Section 171, First of this statutory authority provides for the Commissioner of Taxation and Finance to make reasonable rules and regulations, which are consistent with law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Section 1119(b) of the Tax Law, as amended by Part M of Chapter 60, provides that the Commissioner shall define certain implementing terms by rule or regulation. Sections 1142(1) and (8) of Article 28 and section 1250 of Article 29 of the Tax Law also provide for the adoption of rules and regulations that are appropriate to carry out and jointly administer the New York State and local sales and compensating use taxes imposed by and pursuant to the authority of such Articles.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives that the Commissioner equitably administer the provisions of the Tax Law and take regulatory action when required by law, as explained herein, and when otherwise warranted.

3. Needs and benefits: The purpose of this rule is to add a new section 534.10, "Refunds and credits for vessel operators engaged in local transit service," to the Department's regulations to reflect Part M of Chapter 60 of the Laws of 2004. Part M amended section 1119(b) of the Tax Law to provide that the refund and credit provisions currently applicable to omnibus carriers also apply to certain vessel operators. As further described in the rule, in order to qualify for the refund or credit, a vessel operator must provide "local transit service" in this State. The amount of the refund or credit is based on the "local transit service percentage," which is the proportion that the vessel operator's "vessel hours" in local transit service bear to the operator's "total hours operated" in the State. Section 1119(b) requires the Commissioner of Taxation and Finance to define "local transit service," "vessel hours," and "total hours operated" by regulation. In accordance with the legislative intent, these amendments parallel the omnibus rules set out in 20 NYCRR 534.4 to the extent practicable. In addition, technical amendments have also been made to section 534.4 of the regulations to conform to Part M by deleting dated references to the Interstate Commerce Commission, which was abolished a number of years ago, and to delete an erroneous reference to section 525.3 of the regulations, which was repealed in 1999.

4. Costs: There are no costs to regulated parties associated with the implementation of and continued compliance with this rule. Nor are there any costs to this agency, New York State, or its local governments for the implementation and continued administration of the rule. Any costs are attributable to the underlying statutory changes to section 1119(b) of the Tax Law. This analysis is based upon discussions among personnel from the Department's Office of Counsel, Office of Tax Policy Analysis, Planning and Management Analysis Bureau, and Office of Budget and Management Analysis.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties beyond that required by law or

existing regulations. Pursuant to section 1119(b) of the Tax Law, a qualified vessel operator that wishes to avail itself of the subject refund or credit must apply to the Department and must maintain satisfactory records to establish that the refund or credit is due.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: No significant alternatives to the rule were considered by this Department. As indicated, the rule is in accord with section 1119(b), as amended, of the Tax Law and the existing, similar rules found in section 534.4 of the Department's regulations as they pertain to omnibus operators engaged in local transit service.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: There is no period of time necessary to enable regulated parties to achieve compliance with this rule. The rule takes effect on the date that the Notice of Emergency Adoption and Proposed Rule Making is filed with the Secretary of State and applies to sales made, services rendered, and uses occurring on and after December 1, 2004, in the manner provided in Part M of Chapter 60 of the Laws of 2004.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because it will not impose any adverse economic impact on small businesses or local governments nor any additional reporting, recordkeeping, or other compliance requirements on such entities. This rule simply amends the sales and compensating use tax regulations to implement Part M of Chapter 60 of the Laws of 2004, which provides a refund or credit of sales and use taxes that are paid by certain vessel operators engaged in local transit service. Qualified vessel operators, as prescribed in the statute, that wish to avail themselves of the subject refunds or credits must apply to the Department and must maintain satisfactory records to establish that such refunds or credits are due.

The following organizations were also notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Small Business Council of the NYS Business Council, the Division of Small Business of NYS Empire State Development, the National Federation of Independent Businesses, the Retail Council of NYS, the NYS Association of Counties, the Association of Towns of NYS, the NYS Conference of Mayors and Municipal Officials, and the Office of Local Government and Community Services of the NYS Department of State.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas nor any additional reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. This rule simply amends the sales and compensating use tax regulations to implement Part M of Chapter 60 of the Laws of 2004, which provides a refund or credit of sales and use taxes that are paid by certain vessel operators engaged in local transit service. Qualified vessel operators, as prescribed in the statute, that wish to avail themselves of the subject refunds or credits must apply to the Department and must maintain satisfactory records to establish that such refunds or credits are due.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no impact on jobs and employment opportunities. This rule simply amends the sales and compensating use tax regulations to implement Part M of Chapter 60 of the Laws of 2004, which provides refunds or credits of sales and use taxes that are paid by certain vessel operators engaged in local transit service.

NOTICE OF ADOPTION

New York State, City of New York and City of Yonkers Withholding Tables and Other Methods

I.D. No. TAF-40-04-00003-A
Filing No. 1341
Filing date: Nov. 29, 2004
Effective date: Dec. 15, 2004

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

Action taken: Repeal of Appendixes 10, 10-A and 10-C; and addition of new Appendixes 10, 10-A, and 10-C to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 671(a)(1); 697(a); 1309; 1312(a); 1329(a); 1332(a); and section 7 of the Model Local Law found in section 1340(c); Codes and Ordinances of the City of Yonkers, sections 15-105; 15-108(a); 15-121 and 15-130; Administrative Code of the City of New York, sections 11-1771(a); 11-1797(a); 11-1909; and 11-1943

Subject: New York State, City of New York and City of Yonkers withholding tables and other methods.

Purpose: To reflect the revision of certain tax rates and the tax table benefit recapture for wages and compensation paid on or after Jan. 1, 2005.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-40-04-00003-P, Issue of October 6, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254

Assessment of Public Comment

The agency received no public comment.

Office of Temporary and Disability Assistance

**EMERGENCY
RULE MAKING**

Section 8 Housing Vouchers

I.D. No. TDA-50-04-00012-E
Filing No. 1344
Filing date: Nov. 30, 2004
Effective date: Nov. 30, 2004

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

Action taken: Amendment of sections 352.3(d)(2)(i), 352.5(b), (f)(2) and (5)(i); and addition of section 352.3(d)(2)(ii) to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 355(3)

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

Specific reasons underlying the finding of necessity: Under the current shelter rules, recipients of public assistance who participate in the Section 8 Voucher Program receive a lesser section 8 subsidy than other families based solely on the fact that they also receive public assistance. As a result of the reduced section 8 subsidy, a family receiving public assistance will receive a greater amount of assistance but will also receive lower food stamp benefits. The proposed amendments are aimed at ensuring that public assistance recipients who are in receipt of section 8 subsidies are not disadvantaged when compared to non-public assistance recipients with the same level of income.

Subject: Section 8 housing vouchers.

Purpose: To establish a reasonable shelter schedule for persons and families receiving temporary assistance and rent subsidies under the Section 8 Voucher Program.

Text of emergency rule: Section 352.3(d)(2)(i) is amended to read as follows:

(a) [Section 236 rental assistance program.] *Subsidized housing other than section 8 housing vouchers* [, section 8 housing program (noncertificate)]. The rent allowance for tenants of housing subsidized under [the section 236 rental assistance program or the section 8] a housing assistance payments program, *except as provided in subparagraph (ii) of this paragraph*, is the amount of rent actually paid (exclusive of the subsidy) but not more than the amount in the applicable schedule in subdivisions (a) and (b) of this section.

Section 352.3(d)(2) (ii) is added to read as follows:

(ii) Section 8 voucher program.

(a) *The rent for recipients whose rental housing payments are subsidized under the section 8 voucher program (not including a recipient participating in the program of special allowances for owners of manufactured homes) shall be the amount actually paid, but not in excess of the amount (rounded to the nearest whole dollar) equal to 30 percent of the applicable standard of need by family size and district of residence, considering only the SA-2a, SA-2b, SA-2c schedules contained in section 352.3(d) of this Part, and the local agency monthly shelter allowance schedule with children, exclusive of any supplement. For the purpose of this subparagraph, the allowance amounts are those in Office regulation and in effect on the filing date of this subparagraph.*

(b) *Subparagraph (a) of this subdivision shall not apply to recipients whose section 8 vouchers are provided by public housing authorities or other local section 8 voucher issuing agencies that routinely determined the tenants' share of the rent due and payable for months commencing on or before October 1, 2004 to be the local agency shelter maximums under subdivision (a) of this section.*

(c) *The Office shall develop an administrative process to certify whether subparagraph (a) or (b) shall apply to each individual public housing authority or other local section 8 voucher issuing agency.*

The introductory language of section 352.5(b) and sections 352.5(f)(2) and 352.5(f)(5)(i) are amended to read as follows:

(b) Fuel for heating allowances.

Each social services district must grant an allowance for fuel for heating to a public assistance applicant/recipient or self-maintaining grantee in receipt of public assistance for a dependent child or children when it is documented that the applicant/recipient/grantee is the tenant of record, as defined in subdivision (a) of this section, with primary responsibility for payment of the residential heating costs. A fuel for heating allowance must also be granted to a public assistance applicant/recipient/grantee whose utility heating bill may include costs for service for the applicant/recipient/grantee's own residential unit and for space outside that unit or whose non-utility heating bill includes costs for the applicant/recipient/grantee's own residential unit and for other residential units when it is documented that the applicant/recipient/grantee is the tenant and customer of record as defined in subdivision (a) of this section. When a fuel for heating allowance is granted to an applicant/recipient/grantee who is the customer of record for a utility bill which may include costs for service for the applicant/recipient/grantee's own residential unit and for space outside that unit, the social services district must determine whether a referral for a shared meter investigation, in accordance with the provisions of section 52 of the Public Service Law, is appropriate. [A fuel for heating allowance is not granted to an applicant/recipient/grantee budgeted in accordance with the Section 8 certificate housing provisions outlined in section 352.3(d)(2)(ii) of this Part.] To have primary responsibility for the payment of residential heating costs, the applicant/recipient/grantee must be the customer of record, as defined in subdivision (a) of this section, for the residential heating bill with a home energy vendor. Fuel for heating allowances must be provided on a 12-month heating season (October 1st September 30th) in accordance with the following schedules and must be based upon the applicant/recipient/grantee's primary residential heating source:

(2) Payment must be provided as a nonrecoupable grant when it is documented that during the period specified in paragraph (1) of this subdivision the recipient has fully applied the public assistance grant to purposes intended to be included in such grant. Such documentation for recipients [not budgeted in accordance with the Section 8 certificate housing provisions outlined in section 352.3(d)(2)(ii) of this Part] must include proof of payment of: an amount at least equal to the combined Home Energy Allowance and Supplemental Home Energy Allowance (HEA and SHEA) budgeted in the public assistance grant to domestic (lights, cooking, hot water) energy costs; the monthly fuel for heating allowance budgeted in the public assistance grant to incurred heating costs; and the monthly shelter allowance budgeted in the public assistance grant to shelter costs. In addition, there must be no other evidence of mismanagement. Documentation for recipients budgeted in accordance with the provisions outlined in section 352.3(d)(2)(ii) of this Part must include proof of payment of: an amount at least equal to the combined Home Energy Allowance and Supplemental Home Energy Allowance (HEA and SHEA) budgeted in the public assistance grant to domestic energy costs (lights, cooking, hot water); an amount at least equal to the shelter allowance budgeted in the public assistance grant towards shelter, heating, water, and other shelter-related items covered by the federal Department of Housing and Urban

Development utility allowance. In addition, there must be no other evidence of mismanagement.

(i) if the recipient's utility bill represents "heat only," [and the recipient does not reside in or is not budgeted in accordance with the Section 8 certificate housing provisions outlined in section 352.3(d)(2)(ii) of this Part,] the recipient's monthly fuel for heating allowance is removed from the recipient's monthly grant. [If the recipient's utility bill represents "heat only" and the recipient does reside in Section 8 certificate housing or is budgeted in accordance with section 352.3(d)(2)(ii) of this Part, the balance of the shelter allowance minus the actual rent obligation, up to an amount equal to the appropriate fuel allowance schedule set forth in subdivision (b) of this section for the appropriate heating type and public assistance household size, is removed from the grant.] Heating costs paid by the district which exceed the amount removed from the recipient's grant are considered to be overpayments subject to recoupment in accordance with section 352.31(d) of this Part.

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 27, 2005.

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). The functions of the former Department of Social Services concerning financial support services were transferred by Chapter 436 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 131(1) of the SSL requires social services officials, insofar as funds are available therefor, to provide adequately for those unable to maintain themselves.

Section 355(3) of the SSL authorizes OTDA to promulgate regulations for the Family Assistance (FA) program.

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes that the Office establish rules, regulations and policies so that adequate provision could be made for those persons unable to provide for themselves and that, whenever possible, such persons can be restored to a condition of self-support and self-care.

3. Needs and Benefits:

The regulations of the Housing and Urban Development (HUD) Section 8 voucher program provide that the tenant's share of the rent is the highest of three calculated amounts: (1) 10% of the family's total income; (2) 30% of the family's gross income adjusted to reflect certain deductions; or (3) in states (such as New York) that pay separate, identifiable shelter allowances for rent up to the amount of the actual charges, the maximum allowable shelter allowance. In New York, the third of these amounts, the applicable maximum shelter and fuel allowances, are almost invariably the highest of the three and are the amount that HUD requires to be charged.

This Office has recently become aware that housing authorities throughout the State have varied greatly in their implementation of HUD requirements, with many charging 30% of income and applying HUD adjustments instead of using New York's maximum shelter and fuel allowances, resulting in vastly differing amounts paid by social services districts for shelter allowances. This disparity caused by the failure to charge tenants the highest of the three calculated amounts affects the amount of the federal Section 8 subsidy, the amount of the recipient's income when calculating food stamp benefits and the amount of assistance owed by the recipient to the social services district and State for past assistance under various provisions of State law providing for recovery or recoupment.

HUD has recently directed housing authorities to recalculate the rent payable by public assistance recipients to conform to its regulations by January 1, 2005. The impending increases in rent will strain the budgets of

the affected social services districts, which have not had sufficient time to prepare for this cost, impairing their ability to meet administrative obligations and to provide services and supports to recipients, while simultaneously reducing federal subsidies and the food stamp allotments of Section 8 tenants.

These changes to the State's regulations governing the shelter allowance of applicants and recipients of public assistance who participate in the Section 8 voucher program provide that New York will pay a rent allowance of up to 30% of the total of the maximum allowances otherwise available for basic needs, shelter, fuel and energy. This will provide a measure of uniformity and insure that participants in the voucher program will not receive a lower subsidy than other families based only on the fact that they also receive public assistance. The reduced Section 8 voucher subsidy that would otherwise be paid on January 1, 2005, would increase public assistance benefits without increasing spending power. Since food stamp benefits are generally reduced by any increase in income, the change would produce a reduction in food stamps. Public assistance families who participate in the Section 8 voucher program are therefore likely to be disadvantaged in a way that non-public assistance families with the same level of income are not. The Office has taken into consideration the effect of this change on the income of public housing authorities. For public housing authorities that were not charging the applicable New York State maximum shelter and fuel allowances, these changes will produce a moderate increase in rental income, although not so large as would have been generated by using the State's maximum allowances. The Office recognizes that some public housing authorities have already been calculating the tenant's share using the local district shelter maximums. If this rule were applied to those public housing authorities, the resulting substantial reduction in shelter allowances would be highly disruptive. In order to mitigate any negative financial impact of this change on those authorities, and since their tenants have already absorbed any negative impact on the food stamps benefit, this change includes a grandfathering provision. The Office will develop an administrative process for determining whether or not a public housing authority or other local Section 8 voucher issuing agency will qualify under the grandfathering provision.

4. Costs:

The regulatory change will result in cost avoidance to the State, local and federal governments. If the change is not made and housing authorities are allowed to increase rents to the maximums allowed for each social services district, it is projected that there will be additional costs of approximately \$52 million gross annually, with a State and local share of \$19 million each and a federal share of \$14 million.

Adoption of the proposed amendments would potentially result in a slight increase in costs due to the need to revise the budgeting methodology for determining the amount of assistance to be provided to public assistance recipients. Based on an extensive analysis of current average shelter allowances, case sizes and the current resident rent calculation worksheet, it is anticipated that the regulatory change will result in an average shelter increase of \$12 per month per recipient. Gross annual costs as a result of this increase are projected to be \$5.25 million with a State and local share of approximately \$1.9 million each and a federal share of \$1.45 million.

Taking into account the cost avoidance plus the anticipated cost associated with the amendments, the net result of the regulatory change is a cost avoidance of \$47 million gross with the State and local shares estimated to be \$17 million each and the federal share estimated to be \$13 million.

5. Local Government Mandates:

This change will result in local social services districts having to rebudget the benefits for individuals and families receiving Section 8 voucher subsidies. Although local social services districts already must communicate with the public housing authorities or other local Section 8 voucher issuing agencies in their districts, a greater level of communication will be required at the initial implementation stage of this change.

6. Paperwork:

Local social services districts will have to rebudget affected cases and provide timely and adequate notice to those households. The change is likely to result in increased requests for administrative fair hearings, at least initially.

Those public housing authorities or other local Section 8 voucher issuing agencies which claim to qualify under the grandfathering provision of the proposed regulations must verify that they qualify and will have to provide this Office and/or the local social services office with documentation necessary to validate that claim.

7. Duplication:

This regulation does not duplicate any other requirements. Rather, it establishes a separate budgeting methodology that applies only to certain public assistance households with Section 8 voucher program subsidies.

8. Alternatives:

The alternative is to leave the budgeting unchanged. This is not a desirable alternative since it results in public assistance households with Section 8 voucher program subsidies being treated less favorably than Section 8 voucher families who do not receive public assistance.

9. Federal Standards:

There are no federal standards that impact OTDA's decisions about how to determine a family's shelter allowance.

10. Compliance Schedule:

The changes will be effective when the regulations become effective and local social services districts will be required to implement the changes no later than the next contact with the family.

Regulatory Flexibility Analysis

1. Effect of Rule:

The proposed amendments will have no impact on small businesses but will have an impact on the 58 local social services districts in the State. The proposed amendments also will have an impact on the federal offices of the Department of Housing and Urban Development located in this State that issue section 8 housing vouchers.

2. Compliance Requirements:

The proposed amendments will require social services districts to rebudget the public assistance benefits for individuals and families receiving section 8 housing vouchers unless the issuing agency is exempt under the grandfathering provision of the proposed regulations.

3. Professional Services:

The proposed amendments will not require local governments to incur costs for additional professional services.

4. Compliance Costs:

The proposed amendments will not require additional compliance costs for small businesses. Local social services districts will experience an additional workload during the implementation stage of this change. The costs associated with this additional workload will not be extensive but cannot be projected at this time.

5. Economic and Technological Feasibility:

Local governments have the electronic and technological ability to comply with these regulations when they become effective.

6. Minimizing Adverse Impact:

There will be no adverse impact on small businesses. Local social services districts will have an initial increased workload but the workload will stabilize after the proposed amendments become operational.

7. Small Business and Local Government Participation:

Social services districts were not made aware of the proposed amendments prior to the regulations being adopted on an emergency basis. Upon filing the emergency regulations, the social services districts will be made aware of the proposed amendments and it is anticipated that they will support the amendments.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The proposed regulations will affect the 44 rural social services districts in the State.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed regulations will require social services districts to rebudget the public assistance benefits for individuals and families receiving section 8 housing vouchers unless the issuing agency is exempt under the grandfathering provision of the proposed regulations. No new professional services will be imposed on the social services districts in rural areas in order for those districts to comply with the proposed regulations.

3. Costs:

Local social services districts in rural areas will experience an additional workload during the implementation stage of the change. The costs associated with this additional workload will not be extensive but cannot be projected at this time.

4. Minimizing adverse impact:

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

5. Rural area participation:

Social services districts in rural areas were not made aware of the proposed amendments prior to the regulations being adopted on an emergency basis. Upon filing the emergency regulations, the social services districts in rural areas will be made aware of the proposed amendments and it is anticipated that they will support the amendments.

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.