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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Budget Planners

I.D. No. BNK-06-04-00005-P

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

Proposed action: Repeal of Part 402 and addition of new Part 402 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-C, section 587

Subject: Regulation of budget planning activities conducted by entities licensed under art. 12-C of the Banking Law.

Purpose: To set forth the regulatory requirements and standards of operation for entities to conduct the business of budget planning.

Text of proposed rule: Part 402 is repealed and a new Part 402 is added to read as follows:

PART 402
BUDGET PLANNERS

§ 402.1 Definitions.

For purposes of this Part:

(a) The term "control party" shall mean any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a licensee.

(b) The term "director" shall mean any member of the governing board of the licensee whether designated as a director, officer, trustee, manager, governor or by any other title.

(c) The term "capital certificate" shall have the same meaning as is set forth in Article 5 of the New York Not For Profit Corporation Law.

(d) The term "debtor" shall mean an individual who enters into a contract with a licensee while the individual is a New York resident.

(e) The term "licensee" shall mean any entity licensed pursuant to Article 12-C of the New York Banking Law.

§ 402.2 Application for a license.

(a) Application form. Application for a license shall be made upon a form provided by the New York State Banking Department ("Banking Department"). Each application shall be signed by every individual or entity that will be a control party if a license is granted.

(b) Application procedure. Applications should be delivered to the New York State Banking Department, Attn: Licensed Financial Services Division, and must be accompanied by check payable to the order of "Superintendent of Banks of the State of New York", for an investigation fee in the statutory amount. The application shall include the following information:

(1) The exact name and the address of the applicant and its date of incorporation.

(2) The name and the complete business and residential address and occupation of each director, whether or not a member of the governing board, and any other individual who supervises the daily operations of the applicant.

(3) The complete address where the business of the applicant is to be conducted, showing the street and number, if any, post office and building and room number, if any, the office building and room number, if any, and the municipality, county and state.

(4) If the applicant engages in the business of budget planning, as defined in Section 455(1) of the New York General Business Law, in another state(s), identify such state(s) and provide the name and address of the regulatory agency, if any.

(5) A copy of the applicant's filing receipt, certified by the Secretary of State of New York, or, for out of state budget planners, a certificate of qualification to do business certified by the Secretary of State of New York.

(6) A copy of the applicant's bylaws.

(7) Letter of Tax Exemption from the Internal Revenue Service indicating 501(c)(3) tax status, if applicable.

(8) Charities Registration Statement from the State of New York Office of the Attorney General, Charities Bureau.

(9) Schedule providing the following information with respect to each control party: name, prospective corporate title with licensee, employer's name, occupation and title, business address, and residential address.

(10) The name and residence of each holder of capital certificate whether voting or non-voting and/or subvention certificate.

(11) Documentation demonstrating that a director, whether or not a member of the governing board, of such applicant has at least one year of experience in financial services or related fields applicable to budget planning. The superintendent may require that a director have more than one year experience if it is determined that such enhanced experience is in accordance with the purposes of Article 12-C of the New York Banking Law.

(12) A set of completed fingerprint cards must be submitted by each individual who signs the application. In the case of an applicant which is not a natural person, each control party shall submit completed fingerprint cards.

(13) A background report prepared by an independent licensed private investigation firm for every applicant. In the case in which an individual is signing an application on behalf of an applicant that is not a natural person, a background report shall be prepared for both such individual and the entity for which he or she is signing the application.

(14) A description of the services that will be provided to the debtor by the applicant citing specifically the topics to be discussed and the related timeframes involved.

(15) A litigation affidavit prepared for each applicant.

(16) A statement of merit describing the proposed operation including but not limited to: 1) a list of all fees to be charged by the applicant 2) the sources of funding and financing available to the applicant and 3) a business plan which describes in detail the budgeting, educational, and counseling services to be offered; the policies and procedures governing each such service including the curriculum to be utilized to provide the educational services; the person(s) responsible for administering each such service and the training to be provided to employees engaged in the rendering of each such service.

(17) The applicant's financial statements for the past three years or, for new corporations, a pro-forma financial statement. Financial statements shall include a balance sheet, a statement of revenues and expenses, and a statement of cash flows.

(18) A copy of the contract to be used with debtors or potential debtors which shall at a minimum include:

(i) a complete list of the debtor's obligations to be adjusted, including the name of each creditor;

(ii) the total fees agreed to for such services, including any adjustments for estimated available rebates from creditors, provided that nothing in this subdivision shall require a licensee to share rebates with its clients;

(iii) the commencement and termination date of the contract;

(iv) a pro forma statement of the total fees to be charged, including expected available rebates from creditors, expressed as a percentage of the total obligations, principal and interest to be adjusted under such contract.

§ 402.3 Services to be provided by licensee.

(a) Every licensee shall make an initial assessment of the potential debtor's financial situation taking into account at a minimum, the potential debtor's available and projected income and the existence of other liquid assets as well as the potential debtor's indebtedness to determine if it is in the best economic interest of the potential debtor to enter into a budget planner contract. If not, the licensee shall recommend that the potential debtor seek legal or other appropriate advice as to other alternatives, including bankruptcy.

(b) Every licensee shall provide adequate budgeting, educational and counseling services directly to the debtor, consistent with the purposes of Article 12-C of the New York Banking Law.

(c) Upon receipt of funds from the debtor, the licensee shall promptly transmit such funds, less any contractual fees which are due and owing to it from the debtor, to the creditor(s).

§ 402.4 Duration of qualifier experience.

If at any time the licensee ceases to be in compliance with the requirement of section 402.2(b)(11) of this Part, it shall notify the superintendent within ten calendar days of such noncompliance. Within three calendar days of making such notification, the licensee shall submit to the superintendent, the name and qualifications of any other director, whether or not a member of the governing board, who has been engaged by the licensee to satisfy the requirements of section 402.2(b)(11).

§ 402.5 Provision for surety bond.

(a) Except as provided in section 402.6 below, every licensee shall file with the superintendent a corporate surety bond in the principal amount of $250,000, or such larger or smaller amount as the superintendent may require. If the licensee is notified that a larger bond is required, such larger bond shall be in full force within 30 days. A copy of the larger bond shall be submitted to the superintendent. The corporate surety bond required by the section shall be issued by a bonding company or insurance company authorized to do business in this State. The form of the bond shall be obtained from the Licensed Financial Services Division of the Banking Department.

(b) Such bond shall be in favor of the superintendent. The bond, or deposit agreement entered into pursuant to section 402.7 below, shall contain substantially the following language: "The proceeds of this [bond/deposit agreement] shall constitute a trust fund in favor of the superintendent to be used exclusively to reimburse payments by debtors that have not been properly distributed to creditors or to reimburse fees determined by the superintendent to be improperly charged or collected and, in the event of the insolvency, liquidation or bankruptcy of such licensee, to pay outstanding banking department examination costs and assessments."

(c) Within 90 days of the effective date of Banking Law Section 580, as amended by Chapter 629 of the laws of 2002, which date is April 7, 2003, each licensee shall comply with the provisions of this section.

§ 402.6 Deposit of assets in lieu of surety bond; assets eligible for deposit.

(a) A licensee, in lieu of obtaining a bond pursuant to this Part, may keep on deposit with such banks, savings banks, savings and loan associations, trust companies, private bankers, national banks, federal savings banks, or federal savings and loan associations in this State, as such licensee may designate and the superintendent may approve, interest-bearing bonds, notes, debentures, or other obligations of the United States or any agency or instrumentality thereof, or guaranteed by the United States, or of this State, or of a city, county, town, village, school district, or instrumentality of this State or guaranteed by this State, or dollar deposits. The amount of the deposit shall be $250,000 (based on the lower of principal amount or market value), or such larger or smaller amount as the superintendent may require.

(b) In addition to the assets described in paragraph (a) of this section, the following assets are eligible for deposit for purposes of this Part:

(1) commercial paper payable in dollars in the United States provided such paper is accorded the highest rating of a rating service designated by the Banking Board pursuant to section 61.1 of Part 61 of this Title. In the event that an issue of commercial paper is rated by more than one designated rating service, it must have the highest rating of each;

(2) negotiable certificates of deposit that are payable in the United States and issued by an unaffiliated domestic banking institution or a domestic office of an unaffiliated foreign banking corporation;

(3) banker's acceptances that are payable in the United States and issued by an unaffiliated domestic banking institution or a domestic office of an unaffiliated foreign banking corporation;

(4) bonds which have an investment grade rating from either Moody's Investors Services, Inc., Standard & Poor's Corporation or Fitch Investors' Service, Inc.; and

(5) such other assets as approved by the superintendent upon written application.

(c) If the superintendent determines that an asset which otherwise qualifies under subdivisions (1) through (5) of this section is valued for purposes of this Part at less than the amount otherwise required by this Part, the superintendent shall so notify the licensee which shall thereafter value such asset for purposes of this Part as directed by the superintendent.

(d) Within 90 days of the effective date of Banking Law Section 580, as amended by Chapter 629 of the laws of 2002, which date is April 7, 2003, each licensee shall comply with the provisions of this section.

§ 402.7 Deposit agreement; certificate of licensee.

A licensee, which elects to deposit assets of the type listed in section 402.6, shall execute with an approved depository a deposit agreement, which shall be in the form prescribed by the Licensed Financial Services Division of the Banking Department. An executed copy of such deposit agreement shall be filed with the superintendent. As part of the deposit agreement, the licensee shall agree that prior to the release or substitution of any pledged assets subject to the deposit agreement, the licensee shall file a certificate with the depository which shall specify the following:

(a) the complete title of each pledged asset being withdrawn;

(b) the complete title of each pledged asset being deposited in place thereof;

(c) the interest rate, series, serial number (if any), face value, maturity date, call date, principal amount and market value of each replacement pledged asset;

(d) the aggregate principal amount of all such replacement pledged assets;

(e) the amount, if any, of the funds being withdrawn or deposited; and

(f) a certification that any pledged assets being deposited in exchange for pledged assets being withdrawn comply as to type with the provisions of section 402.6, and that, after giving effect to the exchange, the aggregate of all pledged assets remaining on deposit by the licensee, based in the case of such pledged assets upon the principal amount or market value, whichever is lower, shall be $250,000, or such larger or smaller amount as the superintendent may require.

§ 402.8 Reports of changes in directors, bylaws and certificate of incorporation of licensee.

(a) The licensee shall notify the superintendent in writing, within 10 days of the following: 1) the name and address of any director or individual who supervises the daily operations of the licensee who terminates or alters his or her status with the licensee; and (2) the name of any individual who becomes associated with the business of the licensee as a director or any new individual who supervises the daily operations of the licensee. Any new director or individual shall also furnish a resume. The superintendent may request other information and documentation from the licensee in determining whether to approve any such director or individual. If the superintendent objects to any new director or individual, the superintendent shall notify the licensee of such objection setting forth the reasons therefore.

(b) If the superintendent finds that a proposed new director, who is not a control party, fails to meet the standards set forth in section 581 of the New York Banking Law, the superintendent may prohibit such person from serving in any capacity on behalf of the licensee or, in the case of an application for a change of control, deny such application. The superintendent may request other information and documentation from the licensee in determining whether to approve any such director. If the superintendent objects to any new director, the superintendent shall notify the licensee of such objection setting forth the reasons therefore.

(c) The licensee shall submit to the superintendent changes to its bylaws or certificate of incorporation within 30 days of such change.

§ 402.9 Debtors contact with licensees and Banking Department.

(a) Every licensee must establish either (i) a toll-free number or (ii) a phone number which may be called "collect" for the purpose of enabling debtors to make inquiries of or complaints to the licensee. Every debtor must be informed, in writing, of this phone number and the Banking Department's toll-free phone number at the time he or she executes the contract.

(b) Every licensee shall furnish to the debtor at least quarterly a periodic statement of account on which the Banking Department's toll-free telephone number, 1-800-522-3330, shall be set forth conspicuously in at least ten point bold type.

§ 402.10 Right of debtors to rescind contract.

(a) Every contract between a licensee and a debtor must provide that the debtor may rescind the contract until midnight of the third business day after the day on which the debtor signed the contract. The licensee shall expressly inform every debtor of such provision prior to or simultaneously with the execution of the contract.

(b) Notice of rescission is effective when it is given in writing to the licensee by the debtor.

(c) Notice of rescission, if given by mail, shall be deemed given when deposited in a mailbox with the correct address and proper postage.

(d) If a debtor exercises the right of rescission within the timeframe specified in this section, the licensee shall promptly return to the debtor all fees associated with the contract that were paid to it by the debtor. Such fees shall not include reasonable counseling fees imposed on debtors separate and apart from the execution of a budget planner contract.

§ 402.11 Term and termination; assignment.

(a) Every contract between a licensee and a debtor shall be limited to a payment period not to exceed 60 months.

(b) Every contract between a licensee and a debtor shall contain a provision which states that the debtor may terminate the contract upon 10 days written notice to the licensee without any fee or penalty. Upon receiving such notice, the licensee shall return to the debtor all monies received from the debtor which are in its possession. No licensee shall communicate any derogatory information about a debtor to a creditor based solely on the fact that a debtor has terminated his or her contract with the licensee. Derogatory information does not include notification that the debtor is no longer a client.

(c) Every contract between a licensee and a debtor shall contain a provision which states that the contract may not be assigned without the written consent of the debtor.

§ 402.12 Unfair or deceptive acts or practices.

No licensee shall seek to avoid compliance with this Part by any device, subterfuge or pretense whatsoever.

§ 402.13 Reports to be filed with the superintendent.

(a) Each licensee shall annually, on or before the first day of February, furnish a report containing the following information and documentation, which shall be certified as accurate by a control party:

(1) Number of clients nationwide and number of debtors in the preceding calendar year;

(2) Number of new clients nationwide and number of new debtors in the preceding calendar year;

(3) For debtors, a schedule of fees charged, including initial fee, monthly fee and specific details as to how these fees are computed;

(4) The agreement utilized for debtors if it has been modified since the date of application or subsequently and has not been previously submitted.

(b) Each licensee shall, on a quarterly basis, report to the superintendent the highest daily amount of debtor funds held by the licensee for disbursement to creditors. This information shall be certified as accurate by a control party and shall be provided by no later than 10 business days after the end of the preceding quarter.

(c) Each licensee shall, within 90 days of the close of the licensee's fiscal year, submit an independently audited financial statement to the superintendent.

§ 402.14 Changes to licensee's fee structure.

Any modification of the licensee's fee structure for debtors shall require that the licensee notify the superintendent in writing of the proposed change(s) at least thirty calendar days prior to implementation. The superintendent shall review the fee structure taking into consideration the expenses of the operation, the financial status of the debtor(s) and such other factors as the superintendent shall deem relevant. The licensee may implement the modified fee structure unless the superintendent disapproves of the change(s) in writing within thirty days of notification of the proposed change(s) unless such time period is extended in writing by the superintendent.

§ 402.15 No commingling of licensee's funds.

(a) Accounts established by the licensee to maintain debtor(s) funds must be held in the title of "Budget Planner as Agent for the Benefit of Principal(s) (i.e. Debtor(s))." The licensee must maintain, at all times, debtor records in such a manner as to make ascertainable the interests of the debtors, i.e., the records must sufficiently identify the deposit balance of each debtor on any given day.

(b) Accounts must be maintained in a New York branch of a bank, savings bank, savings and loan association, trust company, private banker, national bank, federal savings bank, or federal savings and loan association.

§ 402.16 Licensee's privacy policy.

Each licensee shall comply with the privacy provisions contained in Title V of the "Gramm-Leach-Bliley Act" of 1999, which is found in 15 United States Code Section 6801 et seq., and the regulations promulgated thereunder by the Federal Trade Commission, which are found in Title 16, Code of Federal Regulations, Part 313 et seq. 15 United States Code Section 6801 et seq. and Title 16, Code of Federal Regulations referred to herein, may be viewed at the New York State Banking Department, located at One State Street, New York, NY 10004 and the Department of State located at 41 State Street, Albany, NY 12231. The United States Code is published by the Office of the Law Revision Council of the House of Representatives. This publication is for sale by the United States Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328. The Code of Federal Regulations is published by the Office of the Federal Register; National Archives and Records Administration. The Code of Federal Regulations is for sale by the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-0001.

§ 402.17 Office Display.

(a) Every licensed budget planner shall display in full public view at both its principal office and any branch office in New York State, a sign(s) which shall be no less than 20 inches wide and 12 inches high with letters one-half inch in size indicating:

(1) the name and principal address of the licensee

(2) that the budget planner is licensed and regulated by the New York State Banking Department; and

(3) that if a debtor has any inquiries or complaints, he or she may call the Banking Department's toll-free number, 1-800-522-3330, write to the New York State Banking Department, c/o Consumer Services Division, One State Street, New York, New York 10004, or submit a complaint filed electronically via the Banking Department's website at www. banking.state.ny.us.

(b) The sign required in subdivision (a) of this section must be in the English language and in any other predominant language(s) spoken by the debtors of the licensee.

(c) The above information shall be conspicuously displayed in at least ten point bold type in the appropriate language(s) on the front page of every contract with every debtor.

§ 402.18 Change of location.

A licensee seeking to change the location of one of its offices must give written notice to the superintendent at least 30 days prior to such change. The notice shall:

(a) state the reason(s) for the change;

(b) provide a projection of any increased expenses which may be incurred; and

(c) state the extent, if any, to which the licensee intends to increase fees to its debtors as a result of the change in location.

If the superintendent determines that there is no reasonable objection to such change of location, the superintendent shall attach a rider to the license setting forth the change in location.

§ 402.19 Reports of arrests, convictions, etc.

A written report shall be made to the superintendent of any arrest, indictment or conviction (including any plea bargaining agreement) of any control party, director, or employee of the licensee, for the violation of any law within 10 days after such arrest, indictment or conviction becomes known to the licensee.

§ 402.20 Reports of misconduct.

Every licensee shall submit a report to the superintendent immediately upon the discovery of any of the events listed in Part 300 of the superintendent's regulations. Such report shall be submitted as set forth in Part 300.

§ 402.21 Books and records.

(a) Every licensee shall keep its books and records in a manner which will allow the superintendent to determine whether the licensee is complying with article 12-C of the Banking Law. Every licensee shall preserve its books and records for inspection for a minimum of six years. Specifically, every licensee shall establish and maintain the following to be kept readily available for review by the superintendent:

(1) All rejected debtor application files which shall contain all documentation relating to the applications. A list of rejected files shall be maintained.

(2) All cancelled debtor application files which shall contain all documentation relating to the applications. A list of cancelled files shall be maintained.

(3) A correspondence folder to contain all correspondence to and from the Banking Department, or copies thereof.

(4) A separate file for all written debtor complaints to contain the original complaint, documentation of actions taken and any related correspondence.

(5) A current business plan which describes in detail the budgeting, educational and counseling services offered; the policies and procedures governing each service including the curriculum utilized that provides the educational and counseling services; the person(s) responsible for administering each such service and the training provided to employees engaged in the rendering of each such service.

(b) Ledgers. Each licensee shall maintain a general ledger and such subsidiary ledgers as is necessary to accurately record all assets, liabilities, net assets, income and expenses, and contingencies. Such ledgers shall be posted at least monthly. As of the end of each month a trial balance shall be prepared and kept readily available for inspection by Banking Department personnel.

(c) In the event the licensee conducts business in more than one state, New York debtor files are to be kept separate from the individual client files of other states. Upon request, the New York client files are to be made readily available to the superintendent or the superintendent's duly appointed representative.

(d) In the event that books and records are maintained at a location that is not within the dominion and control of the licensee, the licensee shall provide the superintendent with a written authorization to examine, have access to, and retain copies of all its books and records relating to its budget planning business.

§ 402.22 Licensee's return of unused debtor funds.

The licensee must demonstrate a 'good faith effort' to locate and refund any monies to the debtor that, for whatever reason, cannot be sent to a creditor.

§ 402.23 Effective date.

The effective date of these amendments to Part 402 shall be April 7, 2003.

Text of proposed rule and any required statements and analyses may be obtained from: Christine M. Tomczak, Secretary to the Banking Board, Banking Department, One State St., 6th Fl., New York, NY 10004-1417, (212) 709-1642, e-mail: christine.tomczak@banking.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 587 of Article 12-C of the New York Banking Law, as amended by chapter 629 of the laws of 2002, provides the statutory authority for the superintendent to propose this rule with respect to entities licensed under Article 12-C of the Banking Law to conduct the business of budget planning. Provisions of chapter 629 include the enactment of amendments to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law that relate to the business of budget planning. Article 12-C of the New York Banking Law provides for the licensing and regulation of entities engaged in the business of budget planning. The business of budget planning is defined in Section 455 of Article 28-B of New York's General Business Law.

2. Legislative Objective:

Entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning are authorized to enter into contracts with individuals ("Debtors") who seek to pay off their debts. The Debtors agree to pay sums of money periodically to the licensed budget planner. The licensed budget planner in turn uses the money received from the Debtors to pay the creditor(s) of the Debtors based on payment terms set forth in the contracts between the licensed budget planner and the Debtors. Debtors pay a fee to licensed budget planners for this service.

Typically, Debtors who enter into such contracts with licensed budget planners have incurred significant amounts of consumer debt primarily through credit-card financed purchases. The expansion of unsecured consumer credit to the general public has resulted in an explosion of consumer debt. This has created situations where credit has been extended to, and utilized by, individuals who, if not for the available credit, would have been unable to engage in the consumer spending based on their disposable income. Individuals who have no funds to repay such debts may only possibly resolve their financial problems by either seeking out personal bankruptcy or by looking to the services provided by credit counselors or licensed budget planners. Debtors often have little ability to satisfy their creditors without the use of a structured payment plan negotiated with the creditors that may include some modification of the outstanding debt due to the creditor. Licensed budget planners perform an intermediary role between the Debtors and the creditors in negotiating a payment plan and in insuring that periodic payments are made to the creditors.

Under these circumstances the individuals in debt are often in dire economic circumstances. Consequently, they are potential targets of persons or entities that may seek to take advantage of them by accepting fees for the promise of services or programs that may not actually eliminate the debt.

The Legislature in amending various sections of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of entities engaged in the business of budget planning, did so generally to establish a more rigorous regulatory environment within which entities licensed under New York law may engage in the business of budget planning. The Legislature, among other things, addressed financial and experience standards, contractual conditions, advertisement parameters and public representations made by licensed budget planners.

Notably, the amendments to Article 12-C intended to increase consumer protections for the Debtors who contract with licensed budget planners include, but are not limited to: a) requiring licensed budget planners to obtain a surety bond to be used to reimburse Debtors for payments that may not have been properly distributed to their creditors, or to reimburse fees determined by the superintendent to be improperly charged or collected; b) specifying that a written contract is required between a licensee and a Debtor and that it must specify all debts and all creditors, disclose the fees agreed to for the services, include the commencement and termination dates of the contract, disclose the settlement terms in the event of cancellation of the contract or prepayment of the debt, disclose the Debtor's statutory right to rescind the contract, and set forth the terms under which payments are to be made by the Debtor; c) specifying prohibited practices, which include prohibiting any media advertisement that is false or deceptive, prohibiting the use of the title "budget planner" or "licensed budget planner" or the term "budget planning" in any public advertisement, business card or letterhead by any person or entity, other than a licensee; and d) prohibiting the licensee from commingling monies received from Debtors with funds associated with the operation of the budget planning business.

In addition to the amendments to Article 12-C of the New York Banking Law, amendments were also made to Article 28-B of the New York General Business Law in connection with the business of budget planning. Specifically, Section 455 of Article 28-B of the New York General Busi-

ness Law requires a person or entity, wherever located, that enters into a contract for budget planning with an individual then resident in New York State, to first obtain a license from the Superintendent of Banks to conduct the business of budget planning. Such a license is obtained pursuant to Article 12-C of the New York Banking Law. Because of the requirement that out-of-state entities that contract with New York residents for budget planning services be licensed under the Banking Law, New York residents who partake of the budget planning services offered by the out-of-state entities will also be afforded the consumer protections that have been put in place under Article 12-C of the Banking Law.

The proposed New Part 402 sets forth a comprehensive framework for the regulation of entities licensed under Article 12-C of the New York Banking to conduct the business of budget planning. New Part 402 was drafted in furtherance of the public policy objectives that the Legislature sought to advance in enacting the amendments to Article 12-C of the New York Banking Law and Article 28-B of New York's General Business Law.

3. Needs and Benefits:

Proposed New Part 402 is needed to enable the Banking Department to carry out its existing supervisory and regulatory responsibilities with respect to entities licensed under Article 12-C of New York's Banking Law to conduct the business of budget planning. In response to the recent legislation in this area, the rule facilitates the stricter regulation of budget planning activities to provide more consumer protections for the clients of licensed budget planners. Notably, in this regard, Section 455 of Article 28-B of New York's General Business Law was recently amended to require the licensing of out-of-state entities that enter into budget planning contracts with New York residents. Since the out-of-state entities that enter into budget planning contracts with New York residents are now subject to the same licensing requirements as the in-state entities that enter into similar contracts, the reporting/disclosure, recordkeeping and compliance requirements that make up New Part 402 will also apply to these entities. Having regulatory standards now applicable to the in-state as well as the out-of-state entities in budget planning contracts with New York residents, will provide the increased consumer protections envisioned by the Legislature otherwise not previously afforded to New York residents, party to budget planning contracts with the out-of-state entities.

Budget Planning is a regulated financial service in this state. Therefore, it is the obligation of the Superintendent of Banks, as the State financial regulator, to establish a rule as proposed in accordance with the legislative intent to protect vulnerable consumers from entities that may operate without the necessary business standards required to appropriately provide budget planning services.

While the proposed rule is primarily needed because its provisions provide for the greater consumer protections envisioned by the Legislature with respect to the business of budget planning, the rule is also needed in the form proposed because it sets forth more effectively, the regulatory requirements and standards of operation for New York licensed budget planners. Specifically, certain reporting/disclosure, recordkeeping and compliance requirements that make up new Part 402 are currently imposed on licensed budget planners under the following: a) Article 12-C or other provisions of New York's Banking Law and General Business Law; b) current Superintendent's regulations; or c) as administrative requirements of the Banking Department. However, to the extent that certain requirements are mandated elsewhere, they have been purposefully brought together under the proposed new Part 402, along with the necessary new requirements resulting from the recent legislative amendments. This was done to enable licensed budget planners to understand, in a clear and concise way, the scope of the activities that they are permitted to partake in, as well as those activities that are prohibited, in addition to the reporting/disclosure, recordkeeping and other compliance requirements that they must adhere to.

It is the Banking Department's belief that the rule as proposed is necessary to eliminate any confusion that licensed budget planners may have with respect to the regulatory framework within which they must conduct their business. Notably, the rule has been updated to provide clarity in that it sets forth definitions as well as all of the new reporting/disclosure, recordkeeping and compliance requirements that are reflective of the increased consumer protections afforded to clients of budget planners based on recently enacted legislation intended for that purpose. At the same time, the proposed rule is reflective of reporting/disclosure, recordkeeping and other requirements currently followed by licensed budget planners.

4. Costs:

(a) Costs to State Government: None.

Any and all additional examination costs that may be incurred by the Banking Department as a result of the requirement to regulate and supervise out-of-state persons or entities newly licensed in New York to conduct the business of budget planning will be borne by the licensees.

(b) Costs to Local Government: None.

(c) Costs to Regulated Entities:

Reporting/Disclosure and Recordkeeping

The proposed rule contains certain recordkeeping and reporting/disclosure requirements not currently required of licensed budget planners either under New York's Banking Law, the Superintendent's regulations, or administratively by the Banking Department. It is anticipated that costs will be incurred by the regulated entities to comply with the new requirements, but that the costs will be minimal. In particular, most of the information newly required by the proposed rule to be maintained and reported is of the type likely to already be maintained by the licensees for their management and operational purposes. For example, for examination and supervisory purposes, the proposed rule requires that licensees maintain general ledgers, subsidiary ledgers, and individual client files. In addition, the rule requires licensees to report certain information regarding changes in fee structure, and the number of New York clients, and the amount of client funds held by the licensee for disbursement to creditors. These types of records and information are fundamental to the operation of a budget planning business. As such, they should be readily available for reporting/disclosure as required by proposed new Part 402. The annual cost of continued compliance should also be minimal for the same reason.

Budgeting, Educational and Counseling Services

The proposed rule requires licensed entities to provide adequate budgeting, educational and counseling services directly to their clients, consistent with the purposes of Article 12-C of the New York Banking Law. It is anticipated that there will be minimal, if any new costs to the current licensed budget planners to provide these services. Specifically, most, if not all of the current New York State licensed budget planners are already presumed to be providing some type of educational services to their clients, since they are Type B not-for-profit corporations formed for an educational purpose under New York's Not-for-Profit Corporation Law.

Recent information obtained from the current licensees indicates that all but two of the licensees already provide some educational counseling to consumers. The licensees that do not provide educational counseling indicated that it could cost them up to approximately $1000 to provide educational pamphlets for clients. It is possible, however, that the current licensees may incur some additional costs to perhaps reorganize or make additional plans to provide the level of budgeting, educational and counseling services required by this rule, in the event that such services currently offered by the licensees do not satisfy the requirement.

For entities that will be newly licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning, it is possible that they will incur some costs to comply with this requirement. This may be particularly true for the out-of-state entities seeking New York budget planning licenses, if in the course of their current businesses, they do not provide the budgeting, educational and counseling services referred to above. However, since the Banking Department has no way of knowing for certain how many such out-of-state entities will seek and obtain budget planning licenses under Article 12-C, much less the extent to which any such entities currently have budgeting, educational and counseling services in place, it is impossible to estimate the costs that may be incurred in this area.

Establishment of Toll Free Number or "Collect" Calling Number

The proposed rule requires licensed budget planners to establish either a toll free number or a phone number that may be called on a "collect" basis. This requirement was put in place to facilitate the ease with which clients who are in budget planning contracts with licensees may make inquiries of, or complaints to, the licensee. With respect to the current licensees, they reported that prior to the recent amendments to the budget planning laws and the proposal of this rule, they already had in place a toll free number system for client calls. Therefore, there should be no new costs to the current licensed budget planners in this respect.

The Banking Department is unable to estimate what the cost will be for future licensees to comply with this requirement for the following reasons. First, as the Banking Department understands the billing arrangements for the establishment of toll free numbers, rates to establish such are negotiable based upon, among other things, the particular service provider, and the services that a company may already obtain with the provider. Second, the cost per minute for such a call is negotiable as well. Finally, the volume of calls made either to a toll free number or on a "collect" basis to a particular

licensee is not certain. Therefore, based on factors that are unknown, it is not possible to develop an estimate of the costs for such calling arrangements.

d) Costs to the Banking Department for Implementation and Continued Administration of the Rule: Since out-of-state persons or entities that enter into contracts with New York residents for budget planning services will now have to be licensed under Article 12-C of New York's Banking Law, the Banking Department may incur certain initial administrative costs with respect to the processing of applications, and the providing of regulatory services by Banking Department staff for these newly licensed entities. It is not possible to estimate these costs at this time since the Banking Department is not certain of the number of such new licensees.

5. Local Government Mandates:

The proposed rule imposes no burdens on local governments.

6. Paperwork:

Under the proposed rule, licensed budget planners will have to comply with existing reporting/disclosure and recordkeeping requirements in addition to newly established reporting/disclosure and recordkeeping requirements. The newly established requirements include providing to the Superintendent the following, as described in the proposed rule: a) a business plan that details the budgeting, educational, counseling services to be offered to clients; b) documentation demonstrating that at a minimum one required individual in the employ of the licensee has at least one year of experience in financial services, or a related field that is applicable to the business of budget planning, and notification of changes with respect to the person meeting such qualifications; c) a copy of the deposit agreement with respect to assets on deposit in lieu of obtaining a bond; d) notice of changes in by-laws or certificates of incorporation; e) the number of clients nationwide and the number of new clients nationwide, both to be given on an annual basis; f) the highest daily amount of debtor funds held by the licensee for disbursement to creditors for the licensees New York budget planning business, to be given quarterly; g) changes to the licensees fee structure; h) a written report of any arrest or conviction of any individual who possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of the licensee; and i) a list of states in which they conduct the business of budget planning and the name and address of the applicable regulator for those states.

In addition, a new requirement in the proposed rule mandates that licensed budget planners furnish certain information to the clients of their New York budget planning businesses, including quarterly statements of account. Licensed budget planners who choose to keep assets on deposit in lieu of obtaining a surety bond, are also required to file a certificate with their depository prior to the release of, or substitution of, any pledged asset on deposit specifying the details of assets being deposited or withdrawn.

With respect to recordkeeping, the newly established requirements under the proposed rule mandate that licensed budget planners maintain certain records for review by the Superintendent including the following: a) rejected application files; b) cancelled client application files; c) general and subsidiary ledgers; d) monthly trial balances; and e) separate client files for the New York budget planning business.

The addition of new reporting/disclosure recordkeeping and compliance requirements set forth in the rule will enable the Banking Department to provide the necessary supervisory oversight of the licensees in furtherance of the legislative objective to provide more consumer protections for clients of licensed budget planners.

7. Duplication:

The proposed New Part 402 repeals the existing regulation at the State level with respect to licensed budget planners and adds a new regulation at the State level with respect to licensed budget planners. As is more fully explained in the Needs and Benefits discussion contained herein, New Part 402 repeals the existing regulation at the State level and adds a new regulation because the rule was needed in the form proposed because it sets forth, in one place, in a clear and concise way, the scope of the activities that budget planners are permitted to partake in, as well as those activities that are prohibited, in addition to the reporting/disclosure, recordkeeping and other compliance requirements that they must adhere to. The Banking Department believes that this will eliminate confusion that licensed budget planners may have with respect to the regulatory framework within which they must conduct their business.

8. Alternatives:

(a) Proposal — During the drafting of the proposed rule, the Banking Department asked the law firm of Traiger & Hinckley LLP to comment on the proposal. The firm represents and advises budget planners. The draft proposal was also shared for comment with Budget & Credit Counseling Services, Inc., an entity licensed under the New York Banking Law to conduct the business of budget planning. Representatives from both concerns were generally pleased with the proposal. To the extent that they had a few comments or suggestions, some of which sought clarity with respect to certain aspects of the rulemaking, the Banking Department carefully reviewed the comments and considered the suggestions. Where appropriate, the Banking Department made changes to the proposal to address the suggestions and comments.

The Banking Department recently received comments from Paul Kaplan, counsel to Cambridge/Brighton Budget Planning Corp. ("Cambridge"), which is currently licensed in New York to conduct the business of budget planning. In the context of the way in which Cambridge conducts its business of budget planning, the comments focused on the following: a) the requirement that a licensee include in its contracts with its debtor clients a pro forma statement of the total fees to be charged to the debtor clients, as set forth in Section 584-a of the Banking Law; b) the prohibition against a licensee paying any bonus or other consideration to any person for the referral of a debtor to its business, as mandated in Banking Law Section 584-b; and c) New Part 402's requirement that every contract between a licensee and a debtor client be limited to a payment period not to exceed 60 months. Cambridge has certain concerns regarding its ability to comply with these requirements set forth in the newly enacted law and the proposed rule. Cambridge has asked the Banking Department to consider making changes to rule in order to resolve the issues. The Banking Department is reviewing and considering the comments and suggestions made by Cambridge.

As was previously discussed in the Legislative Objective section contained herein, the recent amendments to Article 12-C of New York's Banking Law include the requirement that New York State licensed budget planners obtain a surety bond, or in lieu of such bond, place certain assets on deposit to be used to reimburse their New York resident clients in contract with them for budget planning services, should payments not be properly distributed to their creditors. Additionally, the bond or assets on deposit may be used to reimburse fees determined by the superintendent to be improperly charged or collected. The requirement under the law to obtain a bond, or in the alternative, to place assets on deposit has been restated in the proposed rule. The Banking Department has been informed by a few licensees and some prospective licensees that the number of years that they have been in the budget planning business and their willingness to put up personal guarantees have presented issues in obtaining a bond from the bonding companies. While these issues exist, the requirement to obtain the bond, or place assets on deposit, is not imposed by the rule, but rather is a statutory requirement.

(b) Do not propose the rule.

If this alternative were considered, failure to propose the rule would mean that the newly proposed reporting, recordkeeping/disclosure and other compliance requirements set forth therein would be non-existent or unclear. From a regulatory and supervisory perspective, it would be irresponsible for the Superintendent of Banks, as the State financial regulator to do this. This is true, particularly since, the new reporting, recordkeeping/disclosure and other compliance requirements in the proposal were purposefully formulated in furtherance of the legislative intent to provide increased consumer protection for the clients of licensed budget planners, as reflected in recent amendments to the budget planning laws.

Additionally, if this rule is not proposed, the ability to provide a comprehensive framework to enable licensed budget planners to understand, in a clear and concise way, the scope of the activities that they are permitted to partake in, as well as those that are prohibited in addition to all of the reporting/disclosure, recordkeeping and other compliance requirements that they must adhere to, would not be realized.

9. Federal Standards:

None.

10. Compliance Schedule:

As was explained in the section on Costs to Regulated Entities contained herein, most of the information newly required by the proposed rule to be maintained and reported/disclosed is of the type likely to be already maintained by licensed budget planners for management and operational purposes. As such, the Banking Department anticipates that the current licensees will be able to come into compliance with these newly imposed requirements within the time frames required by the rule.

With regard to the establishment of a toll free, or a "collect" calling number, the Banking Department's outreach to current licensees has revealed that prior to the recent amendments to the budget planning laws and the proposal of this rule, they already had in place a toll free number system for client calls. The Banking Department does not anticipate that newly licensed entities coming into compliance with this requirement

would take more than a day or two in order to arrange for the required telephone systems.

With respect to the requirement that licensed budget planners provide adequate budgeting, educational and counseling services to their clients, most, if not all of the current licensees already provide some type of educational services to their clients, as Type B not-for-profit corporations formed for an educational purpose under New York's Not-for-Profit Corporation Law. Recent information obtained from the current licensees indicates that all but two of the licensees already provide some educational counseling to consumers. The licensees that do not currently provide budgeting, educational and counseling services would need to do so. In this regard, it is possible that the current licensees may need a short period of time to perhaps reorganize or make some additional plans to provide the level of budgeting, educational and counseling services required by this rule, in the event that the services they currently offer in this area do not satisfy the requirement. It is possible that the same may hold true for budget planners from out-of-state who may become licensed in New York to conduct the business of budget planning, presuming that they currently offer some form of budgeting, educational and counseling services.

In the case of entities newly licensed in New York to conduct the business of budget planning and out-of-state entities now under the requirement to obtain a New York budget planning license that do not offer any budgeting, educational or counseling services, it may take several weeks to plan for, design programs, and train personnel to provide the budgeting, educational and counseling services required by the rule.

Regulatory Flexibility Analysis

The rule affects entities that are licensed under Article 12-C of the New York Banking Law to conduct the business of budget planning. Section 579 of Article 12-C requires entities that conduct the business of budget planning to be Type B not-for-profit corporations under the New York Not-For-Profit Corporation Law. Under New York's Not-For-Profit Corporation Law, there can be no ownership interest in Type B not-for-profit corporations. Accordingly, there can be no ownership interest in budget planners licensed in New York. However, all of the budget planners currently licensed under Article 12-C of the New York Banking Law have less than 100 employees.

Prior to the enactment of recent amendments to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law relating to the business of budget planning, members of the Banking Department had a number of conversations with budget planning industry representatives regarding changes to the State's budget planning laws. In particular, in January 2002, a meeting was held with representatives of the New York State Association of Licensed Budget Planners (the "Association"), whose members represent New York State licensed budget planners. At the meeting, issues regarding the business of budget planning in New York State and elsewhere were discussed, including a proposal to amend New York's budget planning laws to require the licensing, in New York, of out-of-state entities that enter into budget planning contracts with New York residents. The Association was in favor of such licensing of out-of-state entities. By doing so, all entities that entered into budget planning contracts with New York residents, regardless of the entities' location, would be subject to New York's regulatory and supervisory standards designed to provide consumer protections for New York residents, party to budget planning contracts. Absent a licensing requirement for the out-of-state entities, New York residents contracting with such entities for budget planning services would continue to do so without the benefits of regulatory oversight.

Ultimately, when the Legislature enacted the recent amendments to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law, it established a more rigorous regulatory environment within which entities licensed under New York law were to engage in the business of budget planning. This was done in order to provide for increased consumer protection. The amendments included the requirement that out-of-state entities in contract with New York residents for budget planning services be licensed in New York. In addition, laws were put in place that addressed, among other things, financial and experience standards of certain employees of budget planners, contractual terms and conditions, advertising parameters and public representations made by license budget planners.

In response to the legislation, the rule was drafted to facilitate the stricter regulation of budget planning activities in furtherance of the legislative objective to provide more consumer protections for New York residents in contract for budget planning services with licensees. During the drafting of the rule, the Banking Department asked the law firm of Traeger and Hinckley LLP to comment on the proposed rule. The firm represents and advises budget planners. The proposed rule was also shared for comment with Budget & Credit Counseling Services, Inc., and entity currently licensed in New York to conduct the business of budget planning. Representatives from both concerns were generally pleased with the proposed rule. To the extent that they had a few comments or suggestions, some of which sought clarity with respect to certain aspects of the rulemaking, the Banking Department carefully reviewed the comments and considered the suggestions. Where appropriate, the Banking Department made changes to the proposal to address the suggestions and comments.

Based on the aforementioned policy dialogue that the Banking Department has had with the industry representatives during the legislative and proposed rulemaking process, it is not apparent, thus far, that the rule will impose any appreciable or substantial adverse economic impact on entities licensed under New York law to conduct the business of budget planning.

Rural Area Flexibility Analysis

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. Specifically, the rule contains certain reporting, recordkeeping and compliance requirements currently imposed on licensed budget planners, as well as new reporting, recordkeeping and compliance requirements related to recent legislation in this area enacted in response to the need for increased consumer protection for the clients of licensed budget planners. However, there is nothing about the character and nature of the rules requirements that would make it difficult for, or prevent, licensed budget planners from complying with the rule based on a particular office location. Therefore, it is unlikely that the rule would cause regulated parties to seek flexibility with respect to any part, or parts thereof, even if the regulated parties were located in a designated rural area as defined in New York State Executive Law Section 481(7).

To the extent that the rule, if adopted, may have any impact on rural areas, it has the ability to provide increased consumer protection to residents in rural areas who enter into contracts with licensees for budget planning services.

Job Impact Statement

The purpose of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of persons or entities engaged in the business of budget planning, is to ensure that budget planners operate in accordance with rigorous standards. Recent amendments to Article 12-C of New York's Banking Law and Article 28-B of New York's General Business Law were adopted in connection with the business of budget planning to increase consumer protections for the clients of licensed budget planners.

In particular, Section 455 of Article 28-B of the New York General Business Law was recently amended in connection with budget planning in New York State. It now requires a person or entity, wherever located, to first obtain a license from the Superintendent of Banks before entering into contracts for budget planning with individuals then resident in New York State. Such a license is obtained pursuant to Article 12-C of the New York Banking Law. Out-of-state entities that obtain licenses in New York to conduct the business of budget planning will also have to comply with the reporting/disclosure, recordkeeping and compliance requirements set forth in the rule.

It is possible that new jobs will be created in New York State if the newly licensed out-of-state budget planners decide to establish office locations in the State in order to conduct their New York budget planning business. In particular, it is possible that persons will be newly employed at the New York locations of these licensed entities to perform tasks necessary to comply with the reporting/disclosure, recordkeeping and compliance requirements under the proposed regulation.

Department of Health

EMERGENCY RULE MAKING

Smoking Cessation Products

I.D. No. HLT-39-03-00003-E
Filing No. 138
Filing date: Jan. 27, 2004
Effective date: Jan. 27, 2004

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

Action taken: Addition of section 85.21(t) to Title 10 NYCRR and amendment of 505.3(f)(3) of Title 18 NYCRR.

Statutory authority: Social Services Law, section 365-a(4)

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

Specific reasons underlying the finding of necessity: Immediate adoption of this rule is necessary to preserve the public health. Curtailing tobacco use is a public health priority. Numerous studies have shown the health risks associated with cigarette smoking including higher incidences of lung cancer, asthma and heart disease. The Medicaid program began covering prescription smoking cessation products on October 1, 1999. Since that time, drug manufacturers have changed the prescription status of the majority of these products, including nicotine replacement patches, so that they are now available only as over-the-counter items. This rule is needed for Medicaid recipients who are being treated with such smoking cessation and nicotine replacement products to get Medicaid coverage of them. Failure to adopt this regulation immediately will result in an interruption in patient care and increased health risk detrimental to the public health.

Subject: Smoking cessation products.

Purpose: To add over-the-counter (OTC) smoking cessation products to the list of Medicaid reimbursable OTC products.

Text of emergency rule: A new subdivision (t) is added to section 85.21 of Part 85 of 10 NYCRR to read as follows: 85.21 Establishment of list of reimbursable, nonprescription drugs. Pursuant to section 365-a of the Social Services Law, nonprescription drugs included in the therapeutic categories listed in this section may be reimbursed in the New York State Medical Assistance Program.

* * * * *

(t) Smoking Cessation

The first sentence of paragraph (3) of subdivision (f) of section 505.3 of 18 NYCRR is hereby amended to read as follows:

(3) Payment will only be made for nonprescription drugs listed in [Part 528 of this Title] *10 NYCRR section 85.21.*

* * * * *

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-39-03-00003-P, Issue of October 1, 2003.The emergency rule will expire March 26, 2004.

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

Regulatory Impact Statement

Statutory Authority:

The authority for the amendment of this regulation is contained in Section 365-a (4) of Social Services Law which allows the Commissioner of the New York State Department of Health (DOH), by regulation, to specify certain non-prescription drugs to be reimbursed as an item of medical assistance.

Legislative Objective:

The legislative objective of this authority is to provide Medicaid reimbursement for medically necessary care, services, and supplies.

Needs and Benefits:

Governor Pataki and Commissioner of Health Novello have acknowledged that curtailing tobacco use is a matter of public health and have made a strong commitment to support New Yorkers' efforts to quit smoking. As a result, the Medicaid Program began coverage of prescription smoking cessation agents October 1, 1999. Since that time drug manufacturers have changed the prescription status of the majority of these products, especially nicotine replacement patches, so that they are now available only as over-the-counter (OTC) items. These amendments are needed for Medicaid recipients who are being treated with these smoking cessation and nicotine replacement products to get Medicaid coverage of these OTC products. Interruption of Medicaid coverage would be particularly threatening to Medicaid recipients who have initiated treatment successfully with prescription versions of these products and who may find them unavailable now that they have been converted to OTC products. Failure to continue smoking cessation therapy brings the high risk of resumption of tobacco use.

Numerous studies have shown the health risks associated with cigarette smoking including higher incidences of lung cancer, asthma, and heart-related diseases such as coronary artery disease. The Commissioner has determined that an interruption in patient treatment and the health risk of non-coverage of these products poses an immediate health risk to the Medicaid population. As a result, it is the Department's commitment to make OTC smoking cessation products immediately available to the Medicaid population.

Costs:

Costs for the Implementation of, and Continuing Compliance with, this Regulation to Regulated Entity:

This amendment will not increase costs to the regulated parties. It will increase revenues to providers to the extent that Medicaid will provide reimbursement for products not currently covered by the Medicaid Program, such as nicotine replacement gum.

Costs to State and Local Government:

The only cost to State and Local Government is associated with Medicaid reimbursement of OTC agents in the form of State and local shares. For SFY 00-01, State share amounted to $312,596 and the local share was $312,596.

Costs to the Department of Health:

There will be no additional costs to DOH for implementation of this rule.

Local Government Mandates:

This amendment will not impose any program service, duty or responsibility upon any county, city, town, village, school district, fire district, or other special district, other than that described in "Costs to State and local Government".

Paperwork:

This amendment will not impose any additional paperwork requirements.

Duplication:

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:

The Department has examined and supports other methods of smoking cessation activities and has provided smoking cessation resource information to our Medicaid providers and local tobacco coalitions. However, many of these resources include the use of smoking cessation products as an integral part of a successful smoking cessation regimen. The Department has covered these products on a prescription basis but now needs to cover the OTC as soon as possible so that Medicaid recipients will not suffer any lapse in treatment.

The Department recognizes that other changes need to be made to regulations governing Medicaid coverage of prescription and OTC drugs and is committed to a full review and revision of these regulations to reflect current practices. However, due to the immediate need to cover OTC smoking cessation products, that action will take place following the filing of this amendment.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective on the date of filing.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This amendment affects 4085 pharmacies actively enrolled in the Medicaid Program. This amendment will allow pharmacies to receive Medicaid reimbursement for over-the-counter (OTC) smoking cessation agents. The cost of providing OTC tobacco cessation products is provided in the following table. This data represent gross amounts unless otherwise noted.

Smoking Cessation Products	Fiscal Year 00-01*	Fiscal Year 01-02**
All Agents-Prescription and OTC	$5,138,892	$3,885,960
Prescription Agents	$3,888,508	$2,971,488
OTC Agents	$1,250,384	$914,472
	$312,596 (58 county share)	

* Data Source DOH/OMM Audit, Fiscal & Program Planning Data Mart (5/15/2001)

** Data from 4/1/01 through 11/30/01

Fifty-eight (58) local social services districts administer the Medicaid Program in New York State and share in the cost of services provided to eligible recipients who receive Medicaid through their districts. For SFY 00-01, the local share for OTC smoking cessation products was $312,596.

Compliance Requirements:

This amendment 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 proposed action.

Compliance Costs:

There are no initial capital costs of compliance with this rule. The Department has provided data regarding the increase in gross pharmacy expenditures in the above table. The local government share of is also detailed in the above table.

Economic and Technological Feasibility:

The slight increase in Medicaid pharmacy costs associated with OTC smoking cessation products is offset by the long term savings in decreased hospital stays and other health care costs related to smoking and its secondary effects.

The proposed amendment will not change the way provider's bill for services or affect the way the local districts contribute their local share of Medicaid expenses for pharmacy. Therefore, there is no concern about the technological feasibility of this amendment.

Minimizing Adverse Economic Impact:

This regulation has no specific impact on small businesses other than to allow Medicaid reimbursement to pharmacies for OTC smoking cessation products. This should be seen by those pharmacies as a benefit. The slight increase in Medicaid costs to local governments as a result of the proposed rule should ultimately be offset by long term savings on healthcare associated with smoking related illnesses in the Medicaid population. Both the Governor and the Commissioner have made public statements regarding their commitment to helping Medicaid eligible individuals to quit smoking.

Opportunity for Small Business and Local Government Participation:

The Department has discussed this proposed rule with representatives of the Pharmacists' Society of the State of New York and has presented it to the Department's Pharmacy Advisory Committee (composed of pharmacists actively participating in the Medicaid program) and the Department's Medical Advisory Committee (composed of physicians actively participating in the Medicaid program). Information regarding the rule finalization was sent to all local districts and the Office of Medicaid Management did not receive any comments.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required because the proposed rule, which merely adds over the counter smoking cessation products to the list of products covered by Medicaid, does not impose an adverse impact on rural areas and will not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based on the fact that almost all of the products being added to the list of covered OTC products have previously been covered as prescription items.

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 available Medicaid reimbursement for over the counter smoking cessation products which were previously available by prescription only. No impact on employment is anticipated.

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

Severe Acute Respiratory Syndrome (SARS)

I.D. No. HLT-41-03-00005-E
Filing No. 131
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

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

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

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

Specific reasons underlying the finding of necessity: On April 10, 2003 The New York State Commissioner of Health designated Severe Acute Respiratory Syndrome (SARS) as a communicable disease pursuant to authority set forth in 10 NYCRR Section 2.1(a). In order for this designation to continue, regulations adding SARS to the list of communicable diseases were adopted by the Public Health Council at its next scheduled meeting. Such emergency regulations were adopted by the Council on May 16, 2003 and June 20, 2003 and will expire on November 16, 2003. By adopting this rule, the Public Health Council will continue SARS on the list of communicable diseases which providers are required to report to local and/or the State health departments and require physicians to submit specimens for laboratory examination when they suspect a person is infected with SARS. Continuing SARS on the list of communicable diseases will also permit isolation of patients if necessary for disease control. Immediate adoption of this rule is necessary for accurate identification and monitoring of SARS cases and to prevent community transmission through enforcement of isolation measures if needed.

Between November 1, 2002, and July 31, 2003, there have been a total of 8,098 suspected or probable SARS cases reported worldwide. The majority of cases have been from China and Hong Kong. SARS has been diagnosed primarily in previously healthy adults aged 25-70 years. Some close contacts, including health care workers, have developed similar illnesses. Early manifestations of SARS have included influenza-like symptoms such as fever, myalgias, headache, sore throat, dry cough, shortness of breath, or difficulty breathing. In some cases, these symptoms are followed by hypoxia, pneumonia, and occasionally acute respiratory distress requiring mechanical ventilation and death. There have been 774 deaths worldwide. There is no known vaccine to prevent, treat or cure SARS.

In the United States, there have been 192 suspect cases of SARS with 63 cases in New York State. Ontario, Canada, which includes Toronto, has had 438 probable or suspect SARS cases and 44 deaths, as of September 3, 2003. Identification of suspect SARS cases with laboratory evidence of SARS-associated corona virus in Toronto, Canada and seven U.S. states, including New Jersey and Pennsylvania reinforces the need for enhanced surveillance in New York State. To date, all but one suspect SARS case in New York State have been related to travel to Asia or Toronto.

If SARS spreads in the general population, there could be severe public health consequences; therefore, immediate adoption of this rule is necessary. Surveillance efforts for SARS cases in New York State rely on the immediate reporting of suspect or probable SARS. Adding SARS to the list of communicable diseases will trigger mandatory provider reporting of SARS cases and enable mandatory isolation of suspect or confirmed cases if necessary. Requiring physicians to submit specimens from suspected cases for laboratory examination will further efforts to identify and respond to cases. Complete and timely reporting by physicians to the city, county or district health officer of all cases of SARS will assist local health departments and the State Department of Health in the earliest possible recognition of an outbreak, and enable steps to contain it.

Subject: SARS reporting and laboratory specimen submission.

Purpose: To add Severe Acute Respiratory Syndrome (SARS) to the communicable disease list.

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

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

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in

the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioners authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

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

* * *

Section 2.5 of Part 2 is amended as follows:

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-41-03-00005-P, Issue of October 15, 2003. The emergency rule will expire March 22, 2004.

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

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5)(a), (g), (h), and (i) of the Public Health Law ("PHL") authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to designation of communicable diseases dangerous to public health, designation of diseases for which specimens shall be submitted for laboratory examination, and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1)(d) authorizes the commissioner to "investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health." PHL Section 206(1)(e) permits the commissioner to "obtain, col-

lect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state." PHL Article 21 requires local boards of health and health officers to guard against the introduction of such communicable diseases as are designated in the sanitary code by the exercise of proper and vigilant medical inspection and control of persons and things infected with or exposed to such diseases.

Legislative Objectives:

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

Needs and Benefits:

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

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

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

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

Costs:

Costs to Regulated Parties:

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

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

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

Costs to Local and State Governments:

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

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

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

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

Costs to the Department of Health:

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

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

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

Paperwork:

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

Local Government Mandates:

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

Duplication:

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

Alternatives:

No other alternatives are available.

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

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

as small businesses. This regulation will apply to all local health departments.

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

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

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

Minimizing Adverse Impact:

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

Feasibility Assessment:

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

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

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Rural Area Input:

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Monkeypox

I.D. No. HLT-47-03-00003-E
Filing No. 130
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

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

Statutory authority: Public Health Law, sections 225(4), (5)(a), (g), (h), (i) and 206(1)(d) and (e)

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

Specific reasons underlying the finding of necessity: On July 11, 2003 The New York State Commissioner of Health designated monkeypox as a communicable disease pursuant to authority set forth in 10 NYCRR Section 2.1(a). In order for this designation to continue, emergency regulations adding monkeypox to the list of communicable diseases were adopted by the Public Health Council on July 25, 2003. By adopting this rule, the Public Health Council will continue monkeypox on the list of communicable diseases which providers are required to report to local and/or the State health departments and require physicians to submit specimens for laboratory examination when they suspect a person is infected with monkeypox. Continuing monkeypox on the list of communicable diseases will also permit isolation of patients if necessary for disease control. Immediate adoption of this rule is necessary for accurate identification and monitoring of monkeypox cases and to prevent community transmission through enforcement of isolation measures if needed.

Monkeypox is a rare viral disease that manifests itself in animals with a rash, or blisters, fever, eye discharge and swollen lymph nodes. In humans, it resembles smallpox and is associated with fever, headache, backache, swollen lymph nodes, and a blister-like rash. It is transmitted from animal to person and from person to person through direct contact or respiratory droplets. Monkeypox is found mostly in central and western Africa and was first noted in monkeys in 1958. The human fatality rate has ranged from 1 to 10 percent in Africa. The first cases in humans were seen in 1970.

In May 2003, the first outbreak of human monkeypox in the United States was reported with 19 confirmed or suspected cases in Wisconsin, Illinois and Indiana. Clinical onset was as early as May 15th, as late as June 3rd. Since then, there have been other suspect cases in other states. To date, no cases have been identified in New York State. These human cases of monkeypox were a result of contact with ill prairie dogs. The sick prairie dogs became infected through contact with infected African rodents that had been imported to the United States. There is concern that monkeypox could spread to other animals housed with affected prairie dogs or African rodents from the infected shipment. The New York State Department of Health (NYSDOH) has identified 20 prairie dogs that have been shipped to dealers or individuals in New York State. Twelve of these prairie dogs have been identified, collected and euthanized per guidance issued by CDC and lab results were negative. The NYSDOH continues to work with the local health department to track down the remaining 8 prairie dogs.

If monkeypox spreads in the general population, there could be severe public health consequences; therefore, immediate adoption of this rule is necessary. Surveillance efforts for monkeypox cases in New York State rely on the immediate reporting of suspect or probable monkeypox in animals and humans. Adding monkeypox to the list of communicable diseases will trigger mandatory provider reporting of monkeypox cases and enable mandatory isolation of suspect or confirmed cases if necessary. Requiring physicians to submit specimens from suspected cases for laboratory examination will further efforts to identify and respond to cases. Complete and timely reporting by physicians to the city, county or district

health officer of all cases of monkeypox will assist local health departments and the State Department of Health in the earliest possible recognition of an outbreak, and enable steps to contain it.

Subject: Monkeypox.

Purpose: To require reporting of suspected cases of monkeypox.

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

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

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

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

* * *

Section 2.5 of Part 2 is amended as follows:

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. HLT-47-03-00003-P, Issue of November 26, 2003. The emergency rule will expire March 22, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415,

Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

Monkeypox is a rare viral disease that manifests itself in animals with a rash, or blisters, fever, eye discharge and swollen lymph nodes. In humans, it resembles smallpox and is associated with fever, headache, backache, swollen lymph nodes, and a blister-like rash. It is transmitted from animal to person and from person to person through direct contact or respiratory droplets.

Monkeypox is found mostly in central and western Africa and was first noted in monkeys in 1958. The human fatality rate has ranged from 1 to 10 percent in Africa. The first cases in humans were seen in 1970.

In May 2003, the first outbreak of human monkeypox in the United States was reported with 19 confirmed or suspected cases in Wisconsin, Illinois and Indiana. Clinical onset was as early as May 15th, as late as June 3rd. Since then, there have been other suspect cases in other states. To date, no cases have been identified in New York State. These human cases of monkeypox were a result of contact with ill prairie dogs. The sick prairie dogs became infected through contact with infected African rodents that had been imported to the United States. There is concern that monkeypox could spread to other animals housed with affected prairie dogs or African rodents from the infected shipment. The New York State Department of Health (NYSDOH) has identified 20 prairie dogs that have been shipped to dealers or individuals in New York State. Twelve of these prairie dogs have been identified, collected and euthanized per guidance issued by CDC and lab results were negative. The NYSDOH continues to work with the local health department to track down the remaining 8 prairie dogs. The Centers for Disease Control has issued guidelines for pet owners so that they can be on the lookout for monkeypox symptoms. The NYSDOH is developing documents for pet owners and veterinarians providing monkeypox information and guidance for handling of sick animals and reporting and testing procedures.

If monkeypox spreads in the general population, there could be severe public health consequences. On July 11, 2003, the New York State Commissioner of Health determined that monkeypox is communicable and a significant threat to the public health, and designated monkeypox as a communicable disease under 10 NYCRR Section 2.1. The Public Health Council confirmed this change at its next scheduled meeting on July 25, 2003. Adding monkeypox to the reportable disease list will confirm the Commissioners designation and permit the NYSDOH to systematically monitor for the disease, make its progress known to both State and federal officials, and permit decisions about isolation or quarantine of suspect or confirmed cases to be made on a timely basis.

COSTS:

Costs to Regulated Parties:

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

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

Human monkeypox testing is currently conducted only at the NYSDOH Wadsworth Laboratory and the federal Centers for Disease Control and Prevention (CDC). These tests are under development and are continually being optimized. At this time, it is not possible to accurately predict the extent of an outbreak or potential costs. However, thus far, costs appear to be minimal. Costs to hospitals, practitioners and clinical laboratories relate to the cost of shipping specimens to the Wadsworth Laboratory. One sample must be shipped per patient to the Wadsworth Laboratory using a collection kit and shipping containers provided by Wadsworth. Shipping costs are estimated to be $25.00 per sample.

Animal monkeypox testing is currently conducted only at the NYSDOH Wadsworth Laboratory. The Wadsworth Rabies Laboratory is conducting necropsies on the submitted animals and the Clinical Bacteriology Laboratory is conducting tissue testing. Wadsworth is providing shipping containers for animal specimens to local health departments. Shipping costs are estimated to be $25.00 per sample. Local health departments are also hand-delivering specimens to the NYSDOH.

Costs to Local and State Governments:

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

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

The additional cost to local or state governments associated with investigating and implementing control strategies to curtail the spread of monkeypox could become significant depending upon the extent of an outbreak. Because the possibility of human-to-human transmission cannot be excluded, a combination of standard, contact and airborne precautions should be applied in health care settings to minimize spread. Suspect cases are to be reported to the local health department, who should immediately notify the Regional Epidemiologist or the NYSDOH after-hours duty officer.

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

Costs to the Department of Health:

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

As mentioned above, monkeypox testing is expensive. In New York State, human monkeypox testing is currently only performed by the NYSDOH Wadsworth Laboratory. Positive samples are sent to CDC for additional testing. The cost per patient tested by the Wadsworth Laboratory is approximately $390.00. The cost for laboratory testing is about $350.00 per patient, which includes supplies and reagents only, not technician time. One sample must be shipped per patient at a cost of $40.00 (shipping container, estimated to cost $15.00; shipping estimated to cost $25.00). These samples include diagnostic samples for testing for the presence of the monkeypox agent and also convalescent sera from the same patient.

Animal monkeypox testing is currently performed by the NYSDOH Wadsworth Laboratory. The cost per animal specimen is approximately $50 per specimen, which includes supplies and reagents only, not staff time. Wadsworth Laboratory is providing shipping containers to local health departments. The estimated cost of these containers is $15 each.

To date, the Wadsworth Center has conducted testing on 2 human specimens and 13 animal specimens, costing several thousand dollars. Should an extensive outbreak occur, costs could be significant.

Paperwork:

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

Local Government Mandates:

Under Part 2 of the State Sanitary Code (10 NYCRR Part 2), the city, county or district health officer receiving reports from physicians in at-

tendance on persons with or suspected of being affected with monkeypox, will be required to immediately forward such reports to the State Health Commissioner and to investigate and monitor the cases reported.

Duplication:

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

Alternatives:

No other alternatives are available.

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

Federal Standards:

Currently there are no federal standards requiring the reporting of monkeypox. The Department of Health and Human Services Centers for Disease Control (CDC) and the Food and Drug Administration have issued a joint order of embargo and prohibition on the sale, transport and importation of prairie dogs and certain rodents from Africa to mitigate the harm of further introductions of monkeypox virus into the United States. This further includes a ban on the intrastate sale or offering for any other type of commercial or public distribution of these species. The CDC has issued infection-control/exposure management guidelines for suspected human cases that include: general precautions, patient placement, vaccination of healthcare workers and household contacts of suspected cases of monkeypox, monitoring of exposes healthcare personnel of patients, and isolation precautions. CDC has also issued guidelines for animal cases that include: case definition and classification, guidance for veterinarians, pet owners.

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

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

Compliance Requirements:

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

Professional Services:

No additional professional services will be required since providers are expected to be able to utilize existing staff to report occurrences of monkeypox and to ship samples to the Wadsworth Laboratory for testing. Local health departments have also hand-delivered animal specimens to NYSDOH utilizing existing local and regional staff.

Compliance Costs:

No initial capital costs of compliance are anticipated. Annual compliance costs will depend upon the number of monkeypox cases. The reporting of monkeypox should have a negligible to modest effect on the estimated cost of disease reporting by hospitals, but the exact cost cannot be estimated. The cost would be less for physicians and other small businesses. Isolation authority, and the related costs, may also need to be invoked by local governments. The magnitude of these costs is dependent on the number of monkeypox cases in New York State.

Human and animal monkeypox testing is currently conducted only at the NYSDOH Wadsworth Laboratory and the CDC. Costs to hospitals, practitioners and clinical laboratories relate to the cost of shipping one specimen per patient to the Wadsworth Laboratory. Costs to local governments relate to the cost of shipping animal specimens to the Wadsworth Laboratory. Shipping costs for both human and animal specimens are estimated at $25.00 per specimen. Shipping containers are provided by the Wadsworth Laboratory. Once monkeypox testing is refined and validated, other laboratories may begin testing.

Minimizing Adverse Impact:

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

Feasibility Assessment:

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

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

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

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

Rural Area Input:

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

Job Impact Statement

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

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Watershed Rules and Regulations for the City of Syracuse

I.D. No. HLT-33-03-00008-C

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

The notice of proposed rule making, I.D. No. HLT-33-03-00008-P was published in the *State Register* on August 20, 2003.

Subject: Watershed rules and regulations for the City of Syracuse.

Purpose: To update the existing watershed rules.

Substance of rule: Application

This is a revision of the rules and regulations that were last updated in 1974. These rules are authorized under provisions of Section 1100 of the Public Health Law. They apply to the source of the public water supply of

the City of Syracuse. This water supply, Skaneateles Lake, is located approximately 19 miles southwest of the City of Syracuse. The lake and its watershed are located within parts of Onondaga, Cayuga, and Cortland Counties.

Definitions

Included are 59 definitions determined necessary to clarify the intent of the rules. Specific provisions are included to define terms such as "agricultural associated animal waste" and the "Whole Farm Planning Program" established by the City of Syracuse. The three zones that encompass the lake and watershed are also defined here.

General Provisions

This section outlines requirements for the City of Syracuse to be notified by the applicant of permit applications or environmental impact statements for building or land disturbance activities in order for the City to make comment within the statutory or procedural time frames of the permitting agency. Notification is also required for spills. Disposal of snow into the lake is prohibited other than incidental deposition.

Specific Regulations Zone I (the area within 500 feet of the water supply intakes)

Recreational use or discharge of materials in this area is prohibited.

Specific Regulations Zone II (the entire lake surface area excluding Zone 1)

Discharge of materials in this area is prohibited unless approved by the agencies having jurisdiction.

Specific Regulations Zone III (the tributary watershed)

Wastewater Treatment

Outlines provisions dealing with both new and replacement of onsite wastewater treatment systems including holding tanks and privies. For new construction, conformance with existing New York State standards is required, however holding tanks are required to be 50 feet from the lake or watercourse. Existing or new holding tanks that pose a potential risk for contamination may be required to be provided with containment structures or similar provisions. Alterations to existing wastewater systems are required to conform with new construction standards unless a waiver is obtained. Proposals for alteration, addition to or change in use of existing structures are subject to the county health department having jurisdiction over the adequacy of the existing wastewater treatment system.

Septage and Sludge

Prohibits storage or land application of septage, sludge or human excreta. Animal Waste Storage and Disposal and Fertilizer and Manure Use

Requires that storage and use of these materials be in accordance with "Agricultural Management Practices Catalogue for Non-point Source Pollution Prevention and Water Quality Protection in New York State" or conform to a plan developed within the context of the Whole Farm Planning Program.

Pesticide and Herbicide Use

Requires conformance with New York State Department of Environmental Conservation (NYSDEC) standards.

Sediment Generation and Control

Requires that farm tillage practices be in accordance with "Agricultural Management Practices Catalogue for Non-point Source Pollution Prevention and Water Quality Protection in New York State" or conform to a plan developed within the context of the Whole Farm Planning Program.

Land disturbing activities such as general construction, highway construction and maintenance, and forestry operations (silviculture) which expose 5,000 or more square feet of soil (i.e., vegetation has been removed, or the landscape has been graded or filled resulting in bare soil surfaces) are prohibited within environmentally sensitive areas as defined in the regulations, except where measures have been put in place to prevent erosion and sediment production. The applicant is required to submit a plan outlining the measures to the City of Syracuse at least 10 business days prior to undertaking the activity. Also requires that highway construction activities be performed so as to preclude erosion and sediment production and that plans be developed to address this issue.

New Solid Waste Management Facilities

Prohibits new facilities whether regulated or exempt from regulation under 6 NYCRR Part 360 or any other local laws or regulations. Exceptions include composting at residences and farms, liquid storage of leachate other than in surface impoundments, construction debris landfills at residences and farms, transfer stations, recyclables handling facilities exempted under Part 360, used oil storage at farms and gas stations, and construction debris processing but not disposal.

Hazardous Material

Prohibits disposal of this material.

Radioactive Material

Prohibits disposal of this material.

Petroleum Storage

Requires that the City of Syracuse also be notified of required notifications to the NYSDEC regarding inventory monitoring, leak detection reports and leaks.

Stockpiles

Storage of chloride salts (road salt) and coal is prohibited except in structures designed to minimize contact with precipitation and built on low permeability pads which control seepage and runoff, and is located at a lineal distance of no less than 500' from the lake or watercourse.

Chloride Salt (road salt) Application

Chloride salt (road salt) use for deicing is restricted to the minimum amount needed for public safety.

Construction and Closure of Wells

Requires conformance with existing New York State Department of Health and/or NYSDEC regulations.

Cemeteries

All cemeteries must be operated to prevent contamination of the public water supply.

Inspections

Authorizes the City of Syracuse to conduct inspections of the watershed and requires an annual report of violations both cited and abated and an ongoing inventory and census of watershed activities.

Remedies for Violation

Cites remedies for violation of the rules and regulations.

Variances

Outlines provisions for variances; including application requirements and review by the City of Syracuse and New York State Commissioner of Health.

Changes to rule: No substantive changes.

Expiration date: August 19, 2004.

Text of proposed rule and changes, if any, 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.

Insurance Department

NOTICE OF ADOPTION

Healthy New York Program

I.D. No. INS-46-03-00004-A
Filing No. 133
Filing date: Jan. 23, 2004
Effective date: Feb. 11, 2004

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

Action taken: Amendment of sections 362-2.3 and 362-4.3 (Regulation 171) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4318, 4326 and 4327

Subject: Healthy New York Program standardized applications and clarification on household income requirements.

Purpose: To simplify the application process by requiring health maintenance organizations and participating insurers to accept simplified, standardized Health NY applications provided by the Insurance Department that will facilitate the appropriate enrollment and ease administrative processes. Furthermore, clarifying household income requirements removes complexity in determining household income, an essential eligibility component for the Healthy NY program.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-46-03-00004-P, Issue of November 19, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Terri Marchon, Insurance Department, 25 Beaver St.,

New York, NY 10004-2319, (212) 480-5262, e-mail: tmarchon@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Labor

NOTICE OF ADOPTION

Special September Eleventh Bidders Registry

I.D. No. LAB-33-03-00003-A

Filing No. 134

Filing date: Jan. 27, 2004

Effective date: Feb. 11, 2004

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

Action taken: Addition of Part 127 to Title 12 NYCRR.

Statutory authority: Labor Law, section 349

Subject: Special September Eleventh Bidders Registry.

Purpose: To establish procedures for the application process in which apparel manufacturers and contractors may quality for placement on the registry and the removal of manufacturers and contractors from the registry.

Text or summary was published in the notice of proposed rule making, I.D. No. LAB-33-03-00003-P, Issue of August 20, 2003.

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

Text of rule and any required statements and analyses may be obtained from: Diane Wallace Wehner, Department of Labor, Counsel's Office, Bldg. 12, Rm. 509, State Campus, Albany, NY 12240, (518) 457-4380, e-mail: diane.wehner@labor.state.ny.us

Assessment of Public Comment

We received comments on our proposed rule from the Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC, ("UNITE").

- The comments suggested that the regulation adopt an allowance for reorganization and renaming of businesses as a result of September 11th. However, the Statute does not provide for recognition of new business entities. A statutory change would be required.
- The comments suggested language to clarify how the 15% price preference for Registry bidders will be applied/assessed in the state apparel bids. However, the 15% preference is found in the State Finance Law not the Labor Law. The language that was suggested will not be incorporated into the regulations since the Department of Labor ("DOL") does not know how it will be applied/assessed by the Office of General Services.
- The comments recommended that DOL clarify "evidence of cooperative labor-management efforts" by adding further examples to section .4(a)(3), however, the language proposed is unnecessary and not well defined. The regulation states that the manufacturer or contractor has made and continues to make a commitment to improving the economic well being of its employees. The efforts listed are clearly just examples and will be sufficient to inform concerned parties of the meaning of the rule.

Department of Motor Vehicles

NOTICE OF ADOPTION

Dealer Document Fee

I.D. No. MTV-49-03-00015-A
Filing No. 137
Filing date: Jan. 27, 2004
Effective date: Feb. 11, 2004

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

Action taken: Amendment of sections 77.8 and 78.19 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 415(9)(d)

Subject: Dealer document fee.

Purpose: To increase the fee a dealer may charge a customer for processing registration and title paperwork.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-49-03-00015-P, Issue of December 10, 2003.

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

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

Assessment of Public Comment

The Greater New York Auto Dealers expressed support for increasing the fee a dealer may charge a consumer for registration and title processing.

The New York Independent Automobile Dealers Association also expressed support for the increased fee. However, NYIADA conveyed concerns about the amendment that permits DMV to take action against a dealer who represents that the dealer document fee is a DMV fee. NYIADA writes that, "[w]hile dealers can provide training to their employees, they cannot control what these employees ultimately say to other persons."

Response: The Department does not agree that the proposed amendment is overbroad in nature. A dealership is responsible for training its employees and informing them about all relevant laws and regulations. The dealership is ultimately responsible for insuring that the employees are in full compliance with the law, and that the employees convey accurate information to all customers.

A private citizen expressed opposition to the fee increase, stating that it is not justified.

Response: Although the Department appreciates the citizen's concerns, we believe that the cost to dealers in processing titles and registrations has increased substantially in the past several years, justifying the increased fee.

Public Service Commission

NOTICE OF ADOPTION

Request for Waiver by Neptune Regional Transmission System LLC

I.D. No. PSC-07-02-00035-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, adopted an order in Case 02-T-0036, granting Neptune Regional Transmission System, LLC (Neptune) a waiver of certain filing requirements of the commission's rules.

Statutory authority: Public Service Law, sections 4(1) and 122(1)

Subject: Filing requirements in art. VII proceedings.

Purpose: To allow Neptune to waive certain filing requirements of the commission's rule.

Substance of final rule: The Commission approved a request by Neptune Regional Transmission System LLC for a waiver of 16 NYCRR §§ 86.3(a)(2), 86.3(b)(1) and (b)(2) in its application for a Certificate of Environmental Compatibility and Public Need to construct electric transmission lines from Sayreville, N.J. to Newbridge Road, Levittown, Long Island, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-T-0036SA1)

NOTICE OF ADOPTION

Rider X Tariff by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-42-03-00010-A
Filing date: Jan. 22, 2004
Effective date: Jan. 22, 2004

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

Action taken: The commission, on Jan. 21, 2004, adopted an order in Case 03-M-0789 amending Consolidated Edison Company of New York, Inc.'s (Con Edison) Rider X tariff.

Statutory authority: Public Service Law, section 66

Subject: Rider X tariff provisions.

Purpose: To reduce the conduit rate and establish a separate charge for the manholes that telecommunications firms use.

Substance of final rule: The Commission authorized Consolidated Edison Company of New York, Inc. (Con Edison) to cancel its current Rider X tariff provisions and directed Con Edison to file tariff amendments necessary to implement the terms and provisions of the joint proposal, on not less than one day's notice, to become effective on February 1, 2004, subject to the terms and conditions set forth in the Order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-M-0789SA1)

NOTICE OF ADOPTION

Standby Rates Issues

I.D. No. PSC-43-03-00001-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, in Case 02-E-0551, *et al.*, directed Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas & Electric Corporation to tariff criteria for exempting certain combined heat and power facilities from the application of standby rates, and to tariff other conditions establishing eligibility for and the requirements of other standby rate exemptions and rate phase-ins, in accordance with the discussion in a commission notice issued Oct. 21, 2003.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), (2), (3), (5), 66(1), (4), (5), (10), (12), 71 and 72

Subject: New standby services.

Purpose: To offer existing on-site generation customers the option of a phase-in to full standby service rates.

Substance of final rule: The Commission directed Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas & Electric Corporation to modify electric tariff filings to simplify the rate options available to eligible standby service customers by offering one phase-in instead of two; to clarify eligibility for and the requirements of the standby rate phase-ins and exemptions and to tariff criteria for exempting certain combined heat and power generation facilities from the application of standby rates, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0551SA2)

NOTICE OF ADOPTION

Wireless Attachments by Niagara Mohawk Power Corporation and Nextel Partners

I.D. No. PSC-44-03-00011-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, adopted an order in Case 03-M-1459, authorizing the attachment of wireless facilities owned by Nextel Partners to Niagara Mohawk Power Corporation's (Niagara Mohawk) transmission facilities.

Statutory authority: Public Service Law, section 70

Subject: Wireless attachments.

Purpose: To allow Niagara Mohawk to use its transmission facilities for the provision of safe and reliable service.

Substance of final rule: The Commission approved a joint proposal by Niagara Mohawk Power Corporation (Niagara Mohawk) and Nextel Partners (Nextel) allowing Nextel to make wireless attachments to a Niagara Mohawk transmission tower located on the Gardenville-Dunkirk #73/74 230 kV transmission line, in the Town of West Seneca, New York, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-M-1459SA1)

NOTICE OF ADOPTION

Standby Service by Rochester Gas and Electric Company

I.D. No. PSC-47-03-00020-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, approved in Case 02-E-0551, revisions to Rochester Gas & Electric Corporation's electric tariff schedules, P.S.C. Nos. 19 and 20.

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

Subject: Tariff provisions.

Purpose: To revise the rates, terms and conditions for the provisions of standby service.

Substance of final rule: The Commission approved amendments to Rochester Gas and Electric Corporation's electric tariff schedules, P.S.C. Nos. 19 and 20 to revise the rates, terms and conditions for the provisions of standby service pursuant to Clause 5 of the Commission Order issued July 29, 2003, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0551SA3)

NOTICE OF ADOPTION

Standby Service by New York State Electric & Gas Corporation

I.D. No. PSC-47-03-00021-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, approved in Case 02-E-0779, revisions to New York State Electric & Gas Corporation's electric tariff schedule, P.S.C. No. 115.

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

Subject: Tariff provisions.

Purpose: To revise the rates, terms and conditions for the provisions of standby service.

Substance of final rule: The Commission approved amendments to New York State Electric & Gas Corporation's electric tariff schedule, P.S.C. No. 115 to revise the rates, terms and conditions for the provisions of standby service pursuant to Clause 5 of Commission Order issued July 30, 2003, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0779SA2)

NOTICE OF ADOPTION

Standby Service by Orange and Rockland Utilities, Inc.

I.D. No. PSC-47-03-00022-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, approved, in Case 02-E-0780, revisions to Orange and Rockland Utilities, Inc.'s electric tariff schedule P.S.C. No. 2.

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

Subject: Tariff provisions.

Purpose: To revise the rates, terms and conditions for the provisions of standby service.

Substance of final rule: The Commission approved amendments to Orange and Rockland Utilities, Inc.'s electric tariff schedule, P.S.C. No. 2 to revise the rates, terms and conditions for the provisions of standby service pursuant to Clause 5 of Commission Order issued July 29, 2003, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0780SA3)

NOTICE OF ADOPTION

Standby Service by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-47-03-00023-A
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: The commission, on Jan. 21, 2004, adopted, in Case 02-E-0781, modifications to Consolidated Edison Company of New York, Inc.'s electric tariff schedules P.S.C. No. 9, No. 2—Retail Access, No. 4—PASNY and No. 2—EDDS.

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

Subject: Tariff provisions.

Purpose: To establish new standby electric services.

Substance of final rule: The Commission approved amendments to Consolidated Edison Company of New York Inc.'s electric tariff schedules, P.S.C. Nos. 9, No. 2—Retail Access, No. 4—PASNY nad No. 2—EDDS to establish rates, terms and conditions for the provisions of standby service pursuant to Clause 5 of Commission Order issued July 29, 2003, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(02-E-0781SA4)

NOTICE OF ADOPTION

Initial Electronic Tariff Schedule by James V. Lettiere Jr., d/b/a Lettiere Water System

I.D. No. PSC-47-03-00026-A
Filing date: Jan. 26, 2004
Effective date: Jan. 26, 2004

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

Action taken: The commission, on Jan. 21, 2004, adopted an order in Case 03-W-1470, approving James V. Lettiere, Jr. d/b/a Lettiere Water System's initial electronic tariff schedule, P.S.C. No. 1—Water.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Electronic tariff filing.

Purpose: To set forth the rates, charges, rules and regulations.

Substance of final rule: The Commission approved James V. Lettiere, Jr. d/b/a Lettiere Water System's new tariff schedule which includes Surcharge Statement No. 1 Escrow Account Statement No. 1, to become effective February 1, 2004, subject to the terms and conditions set forth in the order.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-W-1470SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of Networks between AT&T Communications of New York, Inc. and Berkshire Telephone Corporation

I.D. No. PSC-06-04-00007-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 AT&T Communications of New York, Inc. and Berkshire Telephone Corporation for approval of a mutual traffic exchange agreement executed on Dec. 19, 2003.

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: AT&T Communications of New York, Inc. and Berkshire Telephone Corporation have reached a negotiated agreement whereby AT&T Communications of New York, Inc. and Berkshire Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-C-0023SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Lightened Regulation by Astoria Energy LLC

I.D. No. PSC-06-04-00008-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 lightly regulate Astoria Energy LLC, as the beneficial owner and operator of a 1,000 megawatt generating facility in the Astoria section of Queens County.

Statutory authority: Public Service Law, sections 2(12), (13), 18-a, (21), and (22), 64, 65, 66, 67, 68, 69, 70, 71, 72, 72-a, 75, 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 88, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 116, 117, 118, 119-b and 119-c

Subject: Lightened regulation of electric generating facilities.

Purpose: To approve lightened regulation for Astoria Energy LLC, as the beneficial owner and operator of an electric generating plant.

Substance of proposed rule: The Public Service Commission is considering whether to lightly regulate Astoria Energy LLC, as the beneficial owner and operator of a 1,000 megawatt generating facility in the Astoria Section of Queens County. The Commission may grant, deny or modify the relief requested.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-E-0058SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Ownership Interest by SCS Energy LLC and AE Investors LLC

I.D. No. PSC-06-04-00009-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 joint petition filed by SCS Energy LLC and subsidiaries and AE Investors LLC (petitioners) for a declaratory ruling declining further review, or, alternatively, to authorize under section 70 of the Public Service Law a transfer of a portion of ownership assets.

Statutory authority: Public Service Law, section 70

Subject: Change in ownership of lightly regulated electric generation assets, and related matters.

Purpose: To approve declaratory ruling declining further review and request for expedited action.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a joint petition filed by SCS Energy LLC and Subsidiaries and AE Investors LLC ("Petitioners") for a declaratory ruling declining further review, or, alternatively, to authorize under Section 70 of the Public Service Law a transfer of a portion of ownership assets. Under the proposed transaction, SCS Energy LLC would transfer 15 percent of its ownership interest in Steinway Creek Electric Generating Company LLC to AE Investors LLC.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0059SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mini Rate Increase by Hamilton Municipal Utilities Commission

I.D. No. PSC-06-04-00010-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, or modify, a proposal by Hamilton Municipal Utilities Commission to make various changes to its rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 1—Electricity, to become effective May 1, 2004.

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

Subject: Mini rate increase.

Purpose: To increase annual electric revenues by approximately $299,999 or 14.3 percent.

Substance of proposed rule: Hamilton Municipal Utilities Commission proposes to increase its annual electric revenues by approximately $299,999 or 14.3%.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(04-E-0072SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rehearing and Clarification of Revised Uniform Business Practices by Niagara Mohawk Power Corporation, *et al.*

I.D. No. PSC-06-04-00011-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, the petition filed by Niagara Mohawk Power Corporation (NMPC), Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), New York State Electric & Gas Corporation (NYSEG), and Rochester Gas and Electric Corporation (RG&E) (New York Utilities) and multiple intervenors seeking rehearing and clarification of certain provisions of the commission's Nov. 1, 2003 order adopting revised uniform business practices (UBP).

Statutory authority: Public Service Law, sections 22, 65 and 66

Subject: Rehearing of various provisions of the commission's Nov. 21, 2003 order adopting a revised UBP.

Purpose: To clarify certain provisions.

Substance of proposed rule: The Public Service Commission (Commission) is considering whether to grant or reject, in whole or in part, the petitions filed by Niagara Mohawk Power Corporation (NMPC), Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc. (O&R), New York State Electric & Gas Corporation (NYSEG), and Rochester Gas and Electric Corporation (RG&E) (New York Utilities) and Multiple Invervenors seeking rehearing and clarification of certain provisions of the Commission's November 21, 2003 Order (November Order) adopting revised Uniform Business Practices (UBP). The Commission will consider whether the parties seeking rehearing meet the criteria set forth in Public Service Law section 22 and 16 NYCRR section 3.7. Additionally, the Commission will consider, among other issues, requests from utilities to reconsider the reduction of security associated with gas imbalance charges for non-credit worthy energy service companies (ESCO) and elimination of security for creditworthy ESCOs providing consolidated billing. Further, the Commission will consider several requests for clarification of the November Order, including whether direct customers are required to be electronic data interchange ready by February 19, 2004, UPB requirements associated with customer relocations and date for applicable customer switches, and that a utility discontinuing and ESCOs participation in its retail access program may not stay such action by filing a dispute under the UBP's dispute resolution procedures.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(98-M-1343SA11)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Consumer Protections for Residential Customers

I.D. No. PSC-06-04-00012-P

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

Proposed action: Amendment of Parts 11 and 12 of Title 16 NYCRR.

Statutory authority: Public Service Law, sections 30-53; 4(1), 66 and 80(1)

Subject: Consumer protections for residential customers.

Purpose: To implement L. 2002, ch. 686.

Substance of proposed rule (full text is posted at the following State website: www.dps.state.ny.us): Section 11.2 (Applicability of the rules)

In an effort to clarify and streamline the rules, staff proposes additional definitions. The additional definitions will allow staff to easily distinguish those instances where the Home Energy Fair Practices Act (HEFPA) amendments imposed different obligations on the different types of utilities.

The obligations that are imposed on the distribution utilities, for the most part, will remain the same as they were before the HEFPA amendments. However, as a result of the HEFPA amendments (PSL §§ 30, 31(6), 53) taking effect on June 18, 2003, any entity that sells or facilitates the sale or furnishing of gas or electricity to residential customers now will be subject to most of the requirements of PSL Article 2, and, thus, to most of the regulations promulgated thereunder.

Section 11.3 (Applications for residential service)

The HEFPA amendments include a new section (PSL § 31(6)) that indicates that residential service is not required in response to applications for service which seek the provision of "gas or electricity commodity only." This amendment relieves energy services companies (ESCOs), but not distribution utilities, from the obligation to serve applicants who otherwise qualify for service pursuant to PSL § 31. Accordingly, the proposed modifications to section 11.3 will continue to limit its application only to distribution utilities.

Sections 11.4 (Termination of residential service) and 11.4-a (Suspension of distribution service pursuant to PSL § 32(5))

The HEFPA amendments include a new section (PSL § 32(5)) that gives ESCOs the right to "suspend" distribution utility service. An ESCO can request suspension of a customer's distribution service if the customer fails to pay the ESCO portion of a consolidated bill. This amendment is reflected in the rules by (1) clarifying that § 11.4 now applies to termina-

tions where (a) the utility provides distribution service only and is seeking to terminate it, (b) the utility provides both distribution service and commodity service and is seeking to terminate them both, or (c) the utility provides commodity service only and seeks to terminate it, and (2) proposing § 11.4-a which sets forth the statutorily-mandated procedures to be followed where an ESCO seeks suspension of a residential customer's distribution service due to the customer's non-payment of the ESCO portion of a consolidated bill.

Section 11.5 (Termination of residential service – special procedures)

PSL § 32(3) mandates special procedures that must be followed for medical emergencies, customers who are elderly, blind or disabled, or during cold weather periods. These customer protections are health and safety precautions that are designed to prevent the threat to or loss of life that could result when utility service is terminated. The proposed modifications would require ESCOs and submeterers to also follow HEFPA's special procedures before terminating their service.

Sections 11.9 (Reconnection of service by a distribution utility) and 11.9-a (Restoration of commodity supply)

With the proposed modifications, § 11.9 continues to apply only to distribution utilities. Proposed § 11.9-a would establish similar requirements for ESCOs and submeterers. Since such entities do not physically "reconnect" service, the word "reconnect has been replaced with the word "restore."

Section 11.9-b (Reconnection of suspended distribution service)

Section 11.9-b implements the HEFPA amendments (PSL § 32(5)) giving ESCOs the right to request and get suspension of delivery service if a customer fails to pay the ESCO-portion of a consolidated bill.

Section 11.10 (Deferred Payment Agreements)

Section 11.10 is changed to incorporate the HEFPA amendments that require ESCOs and submeterers to offer deferred payments agreements to customers.

Section 11.12 (Residential service deposits)

Subsection b prohibits distribution utilities, ESCOs and submeterers from requiring a new residential customer to post a security deposit as a condition of receiving service, unless such customer is seasonal or short-term. The changes proposed for subdivision c, consistent with the statute's plain language, would prohibit requiring security deposits from current customers who are not delinquent. If a utility is holding deposits from current, nondelinquent customers whose agreements for the provision of commodity were renewed on or after June 18, 2003, the utility must return such deposits.

Section 11.13 (Meter reading and estimated bills)

Except where indicated, this section applies to distribution utilities, ESCOs and submeterers. Distribution utilities are specifically identified where the section refers to residential service functions that only distribution utilities perform.

Sections 11.15, 11.16 (Late payment/other charges; bill content)

These sections would require distribution utilities, ESCOs and submeterers to explain charges for service in clear and understandable language. It would maintain requirements in the rules applicable to the content of service bills for distribution utilities. No requirements for the content of ESCO bills are established in the HEFPA rules. ESCOs are subject to the content requirements of the Commission's Uniform Business Practices.

Section 11.17 (Notification requirements)

This section requires that distribution utilities continue to provide annual notices of HEFPA rights and responsibilities to all residential customers. This recommendation is consistent with the recent PSC orders interpreting the HEFPA amendments. Since the distribution utilities currently perform this function, leaving the requirement with the distribution utilities, in the first instance, should impose few, if any, additional costs, and will implement the HEFPA amendments' directive to avoid duplicative notification (PSL § 44(3)).

Sections 11.18, 11.19, 11.32 (Emergency disconnections, Inspection/examination of utility apparatus, Termination of service to shared meter account)

The proposed changes would identify distribution utilities as the entities that make emergency disconnections for health and safety reasons, inspect pipes and wires, and terminate service upon certain shared meter conditions. Only the distribution utility can perform these residential service functions.

16 NYCRR Part 12 (Consumer Complaint Procedures)

The proposed changes incorporate the statutory requirement that make the Commission's complaint handling procedures available to ESCOs' and submeterers' residential customers.

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. Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

Regulatory Impact Statement

1. Statutory Authority:

The Home Energy Fair Practices Act (HEPFA), Article 2 of the Public Service (PSL), provides protections to residential utility customers, including, but not limited to requirements to provide certain safeguards prior to terminating service, to reconnect service under certain circumstances, and to offer deferred payment agreements and budget payment plans. Prior to June 18, 2002, only regulated utilities were required to comply with all provisions of HEFPA.

Chapter 686 of the Laws of 2002 amended HEFPA, extending its provisions to "any entity that, in any manner, sells or facilitates the sale or furnishing of gas and electricity to residential customers." This definition includes, among others, owners of submetered residential buildings (submeterers) and private companies that supply residential customers with gas or electricity (referred to as energy services companies or ESCOs). Chapter 686 requires full compliance with HEFPA and prohibits the Public Service Commission (PSC or Commission) from waiving HEFPA's requirements (PSL § 53). That means, for example, that ESCOs now have to offer the same HEFPA protections that regulated utilities have had to offer. The provisions of HEFPA were extended to ESCOs by virtue of amendments to PSL § 30 and the addition of PSL § 53, which, respectively, apply PSL Article 2 to "all or any part of gas, electric or steam service" to residential customers and define the utilities subject thereto as "any entity that, in any manner, sells or facilitates the sale or furnishing of gas and electricity to residential customers."

Specific amendments to HEFPA include: PSL §§ 30 (residential gas, electric and steam service policy), 35 (reconnection of service), 37 (deferred payment agreements), 39 (meter reading and estimated bills), 44 (utility bills; informational notices), 46 (emergency disconnections to residences), 49 (residential steam service), and 52 (gas, electric and steam service to tenants provided through shared meters). New sections include: PSL §§ 31(6) (exempting those who provide gas or electricity commodity only from the requirement to provide service to any and all applicants), 32(5) (providing for suspension of distribution utility service at the request of an ESCO), 32(6) (preserving contractual remedies that are not otherwise inconsistent with PSL Article 2), 43(3) (investigation and review provisions) and 53 (application).

These amendments and additions provide the general statutory authority for the proposed changes to the HEFPA rules. New subsection PSL § 32(5)(a)(i), however, provides specific authority when it states that ". . .the commission shall, by regulation, prescribe. . ." the manner and form of termination notices that comply with Article 2 and subdivision 5 of section 32. In addition, existing section 51 of the PSL authorizes the Commission to adopt such rules and regulations as it deems necessary and proper to implement the provisions PSL Article 2.

General statutory authority for HEFPA rules is also provided by PSL §§ 4(1), 66, 80(1), and PSL Article 2.

2. Legislative Objectives:

To extend the provisions of HEFPA to ESCOs and to level the playing field between ESCOs and the regulated utilities, which have had to comply with all HEFPA provisions since the original HEFPA statute was enacted in 1981.

3. Needs and Benefits:

The legislature enacted Chapter 686 in order to extend the provisions of the HEFPA to energy services companies providing service in New York State. Prior to the statutory amendment, ESCOs did not have to provide all of the HEFPA protections, whereas regulated utilities did. Accordingly, the HEFPA rules needed to be updated in order to be consistent with the amended authorizing statute and to reflect the application HEFPA and HEFPA rules to ESCOs. In addition, the statutory amendments prohibit the Commission from waiving compliance with any requirement of HEFPA for any of the private companies or entities that provide gas and/or electricity in New York State.

The benefits of the statutory amendments and the required, corresponding rule changes are that customers who "shop" for their gas and electric needs will enjoy the same protections as they have become accustomed to receiving from the regulated utilities. In addition, applying the same stan-

dards to the ESCOs and regulated utilities will level the playing field between said entities.

4. Costs:

(a) Costs for implementation and continuing compliance with the rule to regulated persons:

The rules should not significantly increase costs for distribution utilities (the utilities that own the pipes, wires, or other such equipment used to deliver gas and/or electricity) because they are already subject to the requirements of PSL Article 2. With respect to the new requirement imposed upon distribution utilities to suspend distribution service at the request of an ESCO, the statutory amendments provide for recovery of any such (reasonable) costs incurred by the distribution utility from the ESCO (PSL § 32(5)(c)). Still, some regulated utilities estimated the costs of implementing and continuing to comply with the required statutory amendments/rules to be anywhere from approximately $82,950 to $17.3 million. Some of these estimates, however, may have included the costs of changes that may not be solely attributable to the Chapter 686 amendments. We are unable to more precisely estimate expected compliance costs for regulated utilities because not all regulated utilities provided estimates and because some of the estimates that were provided may have included costs that may not be solely attributable to Chapter 686's requirements.

The statutory amendments will impose additional costs on ESCOs because as noted above, they were not previously required to comply with all provisions of HEFPA. Some ESCOs estimated the costs of implementing and continuing to comply with the required statutory amendments/rules to be anywhere from $25,000 to $100,000. Again, we are unable to more precisely estimate expected compliance costs for ESCOs because not all of the ESCOs provided estimates.

We are unable to provide expected compliance costs for submeterers because the submeterers we were able to identify and invite to our collaborative meetings did not attend or respond.

(b) Costs for implementation and continued administration of the rules to the agency, state and local government:

The workload and costs of the Commission are expected to increase because the statutory amendments added energy services companies' residential customers to the pool of potential customers who may file complaints with the commission. There are no increased costs to the state and local governments as a result of the rule.

5. Paperwork:

The proposal should not significantly increase paperwork requirements for distribution utilities. It will increase paperwork requirements for energy services companies and the Commission.

6. Local Government Mandates:

Not affected.

7. Duplication:

The proposed rule does not duplicate, overlap or conflict with other Federal or State requirements.

8. Alternate Approaches:

The proposed revisions are based on staff discussions and its review of written submissions from interested parties. Staff held several, informal collaborative meetings with interested parties, including representatives of approximately 7 of the large regulated utilities, approximately 6 (or more) ESCOs (individual ESCOs plus several individuals who represented ESCO groups/associations), consumer groups and other state agencies. Numerous possible changes were considered, and some, such as eliminating duplicative efforts by continuing to have the regulated utility provide annual notices and clarifying that regulated utilities will not have to repeat all termination safeguards that have been performed by ESCOs, were incorporated into the proposed rules. The use of alternate approaches, however, was and is constrained as the statutory amendments prohibit the Commission from waiving compliance with the provisions or requirements of HEFPA.

9. Federal Standards:

There are no federal standards in this area.

10. Compliance Schedule:

The affected companies and agencies should be able to implement and maintain compliance with most of the rules by the end of 2003.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments:

The proposed rules apply to landlords and residential tenants in the State. They also apply to all entities which provide all or any part of residential gas, electric or steam service, which includes small electric and gas companies and small energy service companies.

2. Compliance Requirements:

Most of the affected companies should be able to comply by the end of 2003.

3. Professional Services:

Not necessary.

4. Compliance Costs:

The statutory amendments will impose additional costs on energy services companies and submeterers, many of whom are small businesses, because they were not previously required to comply with all provisions of HEFPA. Some of the ESCOs estimate the costs of implementing and complying with the required statutory amendment/rule to be anywhere from $25,000 to $100,000. We are unable to be more precise because not all ESCOs provided estimates.

We are unable to provide expected compliance costs for submeterers because the submeterers we were able to identify and invite to our collaborative meetings did not attend or respond.

5. Economic and Technological Feasibility:

As there are no additional requirements established by these rules, there are no issues regarding economic or technological feasibility of the rule for small business. Local governments are not affected by the rule.

6. Minimizing Adverse Impacts:

The proposed statutory amendments may have unmitigated adverse impacts on small businesses. Local governments are not affected by the rule.

7. Small Business Participation:

Possible rule changes have been the subject of collaborative meetings with interested parties, including some small energy services companies and groups that represent them.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas to which the rules apply:

The rules apply to all rural areas of the State.

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

No new requirements are being established that specifically affect rural areas. No professional services will be required.

3. Costs:

No additional costs are being imposed by these revisions.

4. Minimizing adverse impacts:

No adverse impacts in rural areas.

5. Rural area participation:

Possible rule changes have been the subject of collaborative meetings with interested parties. No new requirements are being established that specifically affect rural areas.

Job Impact Statement

Overall, the statutory amendments may have a slight positive impact on jobs in the state, since some parties indicated they may have to hire additional staff to handle the new requirements that are imposed by the statutory amendments.

(03-M-0117SA3)

Racing and Wagering Board

EMERGENCY RULE MAKING

Video Lottery Gaming Occupational Licensing

I.D. No. RWB-06-04-00002-E
Filing No. 132
Filing date: Jan. 23, 2004
Effective date: Jan. 23, 2004

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

Action taken: Amendment of sections 4002.1 and 4101.24 of Title 9 NYCRR.

Statutory authority: Tax Law, section 1617-a(a); and Racing, Pari-Mutuel Wagering and Breeding Law, section 101

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

Specific reasons underlying the finding of necessity: To immediately permit occupational licensing of video lottery employees and not delay the commencement of video lottery gaming by the Division of the Lottery.

Subject: Video lottery gaming occupational licensing.

Purpose: To permit the occupational licensing of video lottery gaming employees.

Substance of emergency rule: This rule establishes a new category of New York State Racing and Wagering Board license. The rule provides that the Board shall deem an individual licensed as a video lottery gaming employee upon written notification from the Division of the Lottery that said individual will be issued a video lottery gaming license pursuant to Part 2836 of Title 21 of the New York Code of Rules and Regulations if licensed as a video lottery gaming employee by the Board. The Board will grant such license unless information existing and immediately available in Board records indicate that the applicant's financial responsibility, experience, character and general fitness are such that the participation of such person will not be consistent with the public interest, convenience or necessity and with the best interests of racing. The rule is limited to those engaged exclusively in the employ of a video lottery gaming operation, provided however no employee engaged in the preparation, service and handling of food and beverages in the operation of a restaurant or a food or beverage dispensing facility at a track will be required to hold an independent racing license for employment outside the video lottery gaming operation unless employed in the backstretch, stable area, paddock, racing strip, infield, mutuel area of a track, or other restricted area of the racetrack as designated by the Board.

Each such video lottery gaming employee license granted by the board, unless revoked for cause, shall be effective for a period equal to that of the license issued by the Division of the Lottery. Such license shall also terminate upon the end of a licensee's video lottery gaming employment.

No annual license or renewal fee will be charged applicants for a video lottery gaming employee license.

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 April 21, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Sheila H. Osterhout, Secretary to the Board, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206, (518) 453-8460, e-mail: Info@Racing.State.NY.US

Regulatory Impact Statement

1. Statutory Authority: Section 1617-a of Article 34 of the Tax Law provides that the Division of the Lottery is authorized to license, pursuant to rules and regulations to be promulgated by the Division of the Lottery, the operation of video lottery gaming at Aqueduct, Monticello, Yonkers, Finger Lakes and Vernon Downs racetracks, or at any other racetrack licensed pursuant to article three of the racing, pari-mutuel wagering and breeding law that are located in a county or counties in which video lottery gaming has been authorized pursuant to local law, excluding the licensed racetrack commonly referred to in article three of the racing, pari-mutuel wagering and breeding law as the "New York State Exposition" held in Onondaga county and the racetracks of the non-profit racing association known as Belmont Park racetrack and the Saratoga thoroughbred racetrack. The statute requires that the Division's rules and regulations shall provide, as a condition of licensure, *inter alia*, that racetrack employees involved in the operation of video lottery gaming are licensed by the Racing and Wagering Board. Pursuant to Racing, Pari-Mutuel Wagering and Breeding Law Section 101, the New York State Racing and Wagering Board has general jurisdiction over pari-mutuel horse racing and requires the licensing of all individuals who work at a racetrack.

2. Legislative Objective: This regulation meets the legislative objective of ensuring that racetrack employees involved in the operation of video lottery gaming are licensed by the Board.

3. Needs and Benefits: This regulation is needed to enable the Division of the Lottery to carry out its responsibilities with respect to chapter 383 of the laws of 2001, as amended by chapters 85 of the laws of 2002 and 62 of the laws of 2003. These laws require that racetrack employees involved in the operation of video lottery gaming are licensed by the Board.

The Board does not currently have occupational license categories for video lottery gaming employees. This proposed rule would establish a category for video lottery gaming employees. It is the Board's belief that the proposed rule will eliminate duplicative applications and procedures.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. No local mandates are imposed by rule upon any county, city, village, etc. There are no fees imposed by this rule.

(a) Costs to the Racing and Wagering Board: The costs to the New York State Racing and Wagering Board are expected to be minimal. An overwhelming majority of the Board's responsibilities in executing the provisions of this rule will be automated.

(b) Costs to other state agencies: None.

(c) Costs to Local Government: None.

(d) Costs to Regulated Entities: None.

5. Local Government Mandates: The proposed rule imposes no burdens on local government.

6. Paperwork: Under the proposed rule, applicants for a video lottery gaming employee license need only execute a single release form as the Board will be utilizing the applicant's existing filings with the Division of the Lottery.

7. Duplication: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules. Currently, the Division of the Lottery must license the operation of video lottery gaming at the racetracks as well as licensing video lottery gaming employees. Because the operation of video lottery gaming is separate and distinct from pari-mutuel wagering, and further because only the Lottery may license the operation of video lottery gaming, dual licensing of the racetracks is not duplicative. Pursuant to a Memorandum of Understanding between the Board and that agency, potential duplicative licensing requirements for the racetrack employees have been eliminated.

8. Alternatives: No other alternatives are available.

9. Federal Standards: This rule will not duplicate, overlap or conflict with any State or Federal statute or rules.

10. Compliance Schedule: These regulatory amendments will be effective upon their adoption and compliance can be achieved immediately.

Regulatory Flexibility Analysis

1. Effect of Rule. The Board finds that the rule will not adversely affect local government. The rule will impact a number of types of businesses:

(a) Licensed racetracks. It is expected that the racetracks will employ greater than 100 employees at their facilities and, therefore, are not "small businesses: as that term is defined in New York State Administrative Procedure Act § 102.

(b) Gaming vendors. Vendors wishing to supply gaming products and services must be licensed by the Lottery. These include the supplier of the central computer system that will support the video lottery games; and the companies supplying the games and terminals. Employees of those vendors who will conduct their business on-site within the property of licensed racetracks will have to be licensed by the Board.

(c) Non-Gaming Vendors. Vendors wishing to supply goods and services not directly related to gaming will be required to complete a registration process or licensing process by the Lottery. Employees of those vendors who will conduct their business on-site within the property of licensed racetracks will have to be licensed by the Board.

2. Compliance Requirements. This rule will not require small businesses to complete burdensome forms or reports. To the extent that any small businesses have employees who will conduct their business on-site and thus require a Board license, the applicants need only execute a single release form as the Board will be utilizing the applicant's existing filings with the Division of the Lottery.

3. Professional Services. It is not anticipated that any professional services by a small business or local government will be needed to comply with these proposed rules.

4. Compliance Costs. This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. There are no fees associated with this rule amendment.

5. Economic and Technological Feasibility. The economic and technological impact of these rules on local government is minimal. There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impacts. None.

7. Small Business and Local Government Participation. None.

Rural Area Flexibility Analysis

Many of the racetracks eligible for video lottery gaming licenses are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7): Batavia Downs in Genesee County, Finger Lakes Racetrack in Ontario County, Saratoga Harness Track in Saratoga County, and Monticello Racetrack in Sullivan County.

However, the Board has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional

requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

The Board believes that there will be positive impact on these rural areas, as this new industry brings increased levels of business and employment to the communities.

Job Impact Statement

The Board has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities. This rule will facilitate the license application process by eliminating duplicative detailed license applications.

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ upwards of 1900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to $65 per hour, with annual salaries between $22,000 to $250,000. Total annual payroll for each racetrack will range from $1.8 million to over $10.8 million, with an average payroll of over $6.6 million.

In addition to added employment from gaming operations, needed construction to the racetrack facilities will generate many new jobs at prevailing labor rates. Undoubtedly, employment in the surrounding communities will increase to service the increased labor population and influx of patrons to the racetracks.

Office of Real Property Services

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Annual License Fees

I.D. No. RPS-06-04-00003-P

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

Proposed action: Amendment of section 190-3.2 of Title 9 NYCRR.

Statutory authority: Real Property Tax law, section 202(1)(l); State Finance Law, section 97-kk

Subject: Annual license fees for users of the Real Property System (RPS).

Purpose: To revise the annual license fee schedule.

Public hearing(s) will be held at: 1:30 p.m., March 2, 2004 at Office of Real Property Services, 16 Sheridan Ave., Albany, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Text of proposed rule: The State Board of Real Property Services hereby amends section 190-3.2 of Title 9 of the Official compilation of Codes, Rules and Regulations to read as follows:

§ 190-3.2 Services to local government. (a) The State Office shall provide technical services, including the provision of electronic data processing time and software, and technical valuation processing services for the improvement of local real property tax administration.

(b) Each county, city, town and village assessing unit which uses RPS shall pay an annual licensing fee to defray the cost of ongoing software development, software maintenance, system documentation, user documentation and distribution of software and documentation. Those municipalities that have executed a coordinated assessment agreement, consolidated their assessing units or contracted with the county for all assessment services pursuant to sections 579, 1602 or 1537 of the Real Property Tax Law are considered a single assessing unit for this purpose. The annual licensing fee shall be as follows:

Number of Parcels		
Over 40,000	*$1450*	[$1200]
20,001 - 40,000	*$1400*	[$1150]
10,001 - 20,000	*$1300*	[$1050]
8,001 - 10,000	*$1150*	[$ 950]
6,001 - 8,000	*$1100*	[$ 900]
4,001 - 6,000	*$1000*	[$ 800]
3,001 - 4,000	*$ 850*	[$ 700]
2,001 - 3,000	*$ 800*	[$ 650]
1,001 - 2,000	*$ 650*	[$ 550]
501 - 1,000	*$ 550*	[$ 450]
0 - 500	*$ 500*	[$ 400]

In any county where the county coordinates the use of RPS by providing RPS processing or support services to the assessing unit, the county shall pay the annual fee for each city, town and assessing unit village which uses such system. This payment shall constitute full payment for all assessing units for which that county coordinates the use of RPS.

(c) In addition to the fees described in Paragraph (b), the following shall be imposed:

(1) Where a county uses RPS to process data from municipalities not using RPS, the county will be charged an annual licensing fee for each such municipality processed. The annual licensing fee charged shall be equal to the lowest licensing fee listed in 9 NYCRR 190-3.2(b).

(2) School districts wishing to purchase RPS software will be charged an annual licensing fee equal to the lowest licensing fee listed in 9 NYCRR 190-3.2(b).

(3) Anyone wishing to purchase RPS for purposes other than those described above will be charged [$2,000] *$2,500* (per version) for the initial purchase of the software and will be charged an annual license fee equal to the highest annual licensing fee listed in 9 NYCRR 190-3.2(b) except as provided in Paragraph (d).

(d) A vendor who has a processing agreement in effect with a municipality who is paying a licensing fee for the use of RPS may install RPS at a site other than the municipal processing site for purposes of completing required work for that municipality at no additional charge upon authorization by the municipality.

(e) Payment of the licensing fee shall provide for the use of any or all of the available RPS software. No partial payment of the licensing fee will be accepted.

(f) In addition to the annual fee prescribed in subdivision (b) of this section, the Executive Director or his or her designee shall establish a fee schedule, for each State fiscal year, for computer and technical valuation processing services provided to local governments using RPS. This schedule shall also include costs of materials used in conjunction with the services provided. This schedule shall be established on or before June 1st of the preceding fiscal year and shall be available at the State Office of Real Property Services located in Albany and at each regional office.

Text of proposed rule and any required statements and analyses may be obtained from: James J. O'Keeffe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: jim.o'keeffe@orps.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.

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

Regulatory Impact Statement

1. Statutory Authority: Section 202(1)(l) of the RPTL authorizes the State Board to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

Section 97-kk of the State Finance Law directs that all revenue received by the Office of Real Property Services from charge-backs and fees for services related to the Real Property System shall be deposited to the Local Services Account within the Miscellaneous Special Revenue Fund.

2. Legislative Objectives: The proposal will further the objective of recovering a portion of the expenses incurred by the State in providing technical assistance and software to local governments and in making this software available to private contractors.

3. Needs and Benefits: At its January 11, 2000 meeting, the State Board of Real Property Services (State Board) adopted amendments (RPS 40-99-00008-A) to revise the schedule of annual fees paid by users of the Real Property System (RPS), a set of computer programs developed by the agency for use by local governments in the administration of the real property tax. Fees were first imposed by the State Board in 1988 (Resolu-

tion 88-84, adopting amendments to 9 NYCRR 190-5). The present schedule was developed, at the Board's direction (Resolution 98-20), in consultation with representatives of local government. Those fees reflected a division of the cost, with one-third of the costs of the development, implementation and support of the RPS program being derived from the annual license fees and two-thirds from the funds of the Office of Real Property Services (ORPS). The participation of local governments has been institutionalized by the creation of the RPS Governance Group, made up of local government and ORPS representatives. The Governance Group has met periodically to discuss various issues having to do with RPS.

The existing 2000 fees were intended to continue for three years. The existing agreement between ORPS and the Governance Group suggests that a three-year average be used to determine the program's cost in calculating the fee. Given actual costs of $2,866,700 (FY 2000-01), $3,731,400 (FY 2001-02) and $3,698,600 (FY 2002-03), an average cost of $3,432,000 would be the result; one-third of which is roughly $1,144,000. This would, if implemented through an increase in the annual license fees, represent an increase of 43 percent.

Costs to support the RPS program for the State fiscal year 2003-04 have been estimated at $2,946,000, one-third of which is roughly $980,000. The original 2000 schedule was based on recouping $750,000-800,000 per year. This 2003-04 projection is based on 2002-2003 levels in the areas of travel, training, supplies and equipment remaining constant. The projection also reflects somewhat reduced levels in staff support, both in the central office and in regional offices, as a lower level of installation of the most recent version of RPS is expected based upon the number of municipalities that have already had the latest version installed. Additionally, and most significantly, it represents a reduction of direct staffing costs due to loss of six central office staff. The projection for the cost of the program represents an increase of 22 percent that is reflected in the proposed increase in the fees that would first be implemented with fees collected in 2004-05. By holding costs constant, and reflecting reduced staff support and retirements, the proposal represents this 22 percent increase rather than the possible 43 percent increase discussed above.

4. Costs: (a) To State Government: None.

(b) To local governments: The bulk of the 22% increase in fees will be absorbed by local governments, with the increase ranging from $100 to $250 per year.

(c) To private regulated parties: None.

This amendment does not apply to private regulated parties. Contractors who wish to purchase the software will experience an increase of $250 in their annual fee and $500 in their installation fee.

(d) Basis of cost estimates: Review of the amendment.

5. Local Government Mandates: None. RPS is a set of software that is available to local governments to assist them in complying with the their statutory and regulatory requirements. Use of RPS is optional.

6. Paperwork: None.

7. Duplication: There are no comparable State or Federal requirements.

8. Alternatives: Lack of sufficient funds for support of RPS. As described above, under the existing agreement an increase of 43% could have been proposed. In addition, the possibility of a "flat fee", rather than a sliding scale, was discussed. This alternative would have placed a heavier burden on smaller municipalities.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: The increased fees would first be imposed in 2004 for the 2004-2005 State fiscal year.

Regulatory Flexibility Analysis

This proposal does not impose any adverse economic conditions or any reporting, record-keeping or other compliance requirements on small businesses. The proposal imposes no reporting or record-keeping requirements upon local governments. The proposal does increase the annual license fee for local governments that use the Real Property System, as well as private contractors that purchase the system, by 22%. An increase of 43% was discussed pursuant to the existing process, but the smaller increase is proposed. There is no separate requirement that the system be purchased or used by governments or their contractors.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this rule making because the amendments would not impose any adverse economic conditions, any reporting, recordkeeping or compliance requirements on public or private entities in rural areas. The proposal increases the fees for users of the Real Property System by $100 to $250 per year. The proposal applies state-wide to local governments or private contractors that purchase the system. There is no specific impact on rural areas. The proposal maintains the sliding scale for fees based upon parcel count rather than imposing a flat fee as has been suggested. Imposition of a flat fee would have impacted small, rural, cities and towns more than the current proposal. There is no separate requirement that governments or their contractors use this system.

Job Impact Statement

A job impact statement is not required for this rule making because the amendments only concern the fees paid by users of the Real Property System, The largest annual license fee is $1450, the highest purchase price is $2,500. The proposal thus will have no impact on employment opportunities.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

State Advisory Appraisals

I.D. No. RPS-06-04-00004-P

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

Proposed action: Amendment of Subpart 195-2 of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1)(l) and 1544

Subject: State advisory appraisals.

Purpose: To simplify the existing program of State advisory appraisals.

Public hearing(s) will be held at: 2:00 p.m., March 2, 2004 at Office of Real Property Services, 16 Sheridan Ave., Albany, NY

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Interpreter Service: Interpreter services will be made available to deaf persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Text of proposed rule: 1. Subdivision (a) of section 195-2.1 is amended to read as follows:

Request for State advisory appraisal. (a) The request for a State advisory appraisal shall be in writing and shall be filed with the State Board by the chief executive officer or assessor of a city or town or of a county with the power to assess real property. A request for a State advisory appraisal must be received at least [22] *12* months in advance of taxable status date and will not be deemed to have been made until all information required by these rules, or otherwise requested by the State Board, is supplied to the State Board. *No additional request is necessary if the assessing unit is implementing a reassessment in conformance with a local plan pursuant to section 201-2.5 of this Title and used that advisory appraisal on the prior year assessment roll.*

2. Section 195-2.2 is amended to read as follows:

Notification. (a) [Upon receiving a request for a State advisory appraisal, the] *The* State Office shall [promptly] notify the subject property owner, [in writing,] of the receipt of an application for a State advisory appraisal, and ask for the property owner's cooperation in completing the appraisal.

(b) State Office staff shall [review the advisory appraisal data with] *provide a draft report of the advisory appraisal to* the assessor and the property owner. The property owner and the assessor shall have 14 days from the date [of mailing of] the draft report *was sent* to comment [thereon, in writing,] to the State [Board] *Office*.

3. Section 195-2.3 is amended to read as follows:

Performance of appraisal. [(a)] Report and certification. The report of a State advisory appraisal shall be issued three and one half months prior to the tentative roll date *for a city or town or a county with the power to assess real property, unless that city, town or county received an advisory appraisal that was used on the prior year assessment, in which case the report shall be issued 2 months prior to the tentative roll date.* A copy shall be provided to the assessor, the property owner and the county director.

4. Section 195-2.4 is amended to read as follows:

Use of State advisory appraisals. [After the next tentative assessment roll is filed following the certification of a State advisory appraisal, the] *The* assessor shall report to the State Board the manner in which that advisory appraisal [has been] *will be* used in preparing an assessment for [that] *the* tentative assessment roll. *The notification to the State Board must be received at least 45 days prior to the tentative assessment roll.*

(b) Forms. The notification of the manner in which the advisory appraisal has been used shall be made on a form provided by the State Board. Communications pursuant to this Part may be transmitted by electronic means if all parties so agree.

Text of proposed rule and any required statements and analyses may be obtained from: James J. O'Keeffe, General Counsel, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, e-mail: jim.o'keeffe@orps.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority: Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

Section 1544 of the RPTL requires the State Board to, upon request, provide advisory appraisals to municipalities implementing reassessments.

2. Legislative Objectives: Providing State assistance to municipalities preparing equitable assessment rolls.

3. Needs and Benefits: The advisory appraisal program was created by chapter 957 of the Laws of 1970, the Assessment Improvement Law of 1970. Chapter 844 of the Laws of 1990 limited advisory appraisals to municipalities implementing revaluations or updates, reflecting an agency policy that had been implemented. At the time Chapter 844 was drafted, revaluations were seen as rare, multi-year projects. In the late 1980's and early 1990's, less than 100 municipalities would implement reassessments in a single year. Current Subpart 195-2 reflects this perception of revaluations as lengthy and unusual.

Advances in technology now allow reassessments to be more timely and common. Chapter 405 of the Laws of 1999 created a State financial assistance program for municipalities conducting annual reassessments pursuant to approved six-year plans. Thus in many localities, reassessments are no longer events that occur once every decade or so. We estimate that 334 municipalities will implement reassessments on 2003 assessment rolls. Of these, approximately 264 are annual programs. Only ten of these municipalities did not request advisory appraisals. Staff provided 1795 appraisals for use by the 324 municipalities.

Section 1544 requires a written request for an advisory appraisal. Subpart 195-2 establishes a process for requests and furnishing information. The proposal would simplify the process for municipalities conducting annual programs, shorten the times for providing requests and information, and clarify that communications may be electronic if the parties so agree.

4. Costs: (a) To State Government: None. This amendment does not affect the cost to the State of the advisory appraisal program. There will be some minimal savings if electronic correspondence is used in place of U.S. Mail.

(b) To local governments: None. Possible minimal savings will result for those municipalities in the annual program that would not have to file annual requests. Possible minimal savings will result for local governments that use electronic correspondence in place of U.S. Mail.

(c) To private regulated parties: None. Possible minimal savings to owners who use electronic correspondence in place of U.S. Mail.

(d) Basis of cost estimates: The nature of the amendment.

5. Local Government Mandates: None.

6. Paperwork: At present a form (RP 5051) is available for use by municipalities to comply with the reporting requirement of 195-2.4. The proposal would mandate use of a State Board form. Reduction in paperwork required by local governments participating in the annual program due to the removal of the requirement to file annual requests. Use of electronic communications may reduce paperwork.

7. Duplication: There are no comparable State or Federal requirements.

8. Alternatives: Continuation of duplicative paperwork under an out of date time schedule.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: Not applicable.

Regulatory Flexibility Analysis

The amendments proposed would not impose any adverse economic conditions or any reporting, recordkeeping or other compliance requirements on small businesses. The rule imposes no additional recordkeeping or reporting requirements on local governments. The rule reduces some of the information required to be submitted by local governments. The rule does require use of particular formats for submitting material by local governments, which may require some expense for compliance.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this rule making because the amendments would not impose any adverse economic conditions, any reporting, recordkeeping or compliance requirements on public or private entities in rural areas. It changes the dates for existing reporting requirements by local governments, reduces some of the reports currently required of local governments, and creates the possibility of increased efficiencies by use of electronic correspondence.

Job Impact Statement

A job impact statement is not required for this rule making because the amendments only concern filing requirements for local governments and the use of electronic correspondence in an existing program. The amendments thus have no impact on employment opportunities.

Department of Taxation and Finance

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Estimated Tax Payments on Sales or Transfers of Real Property by Nonresident Taxpayers

I.D. No. TAF-06-04-00001-EP
Filing No. 129
Filing date: Jan. 22, 2004
Effective date: Jan. 22, 2004

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

Action taken: Addition of Part 163 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 664 and 697(a)

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

Specific reasons underlying the finding of necessity: Section 663 of the Tax Law requires nonresident taxpayers to estimate and pay the personal income tax liability on the gain, if any, on sales or transfers of real property within New York State. Section 663 was added by part V3 of chapter 62 of the Laws of 2003, and subsequently amended by chapter 686 of the Laws of 2003. Chapter 686 became law on October 21, 2003 and part P of such chapter, which contains the amendments to section 663, applies to sales or transfers of real property on or after September 1, 2003. The Commissioner of Taxation and Finance is required by section 663 to promulgate regulations implementing the section. Since the law was already in effect, an emergency action was necessary so the commissioner could put regulatory amendments in place immediately. This first emergency action, filed on November 12, 2003, will expire on February 9, 2004. There is insufficient time to comply with the requirements of the State Administrative Procedure Act for proposal and adoption before the expiration of the first emergency action. The emergency readoption will ensure the continuation of the rule.

Subject: Estimated tax payments on sales or transfers of real property by nonresident taxpayers.

Purpose: To implement the estimated tax on sales or transfers of real property within New York State by nonresident taxpayers as required by new section 663 of the Tax Law.

Text of emergency/proposed rule: Section 1. A new part 163 is added to such regulations to read as follows:

PART 163

ESTIMATED PERSONAL INCOME TAX DUE UPON THE SALE OR TRANSFER OF REAL PROPERTY BY A NONRESIDENT TAXPAYER

(Statutory authority: Tax Law, §§ 171, 663, 697)

Section 163.1 General and definitions.

(a) Section 663 of the Tax Law requires that a nonresident taxpayer must estimate and pay the personal income tax liability on the gain, if any, upon the sale or transfer of real property within New York State. For purposes of section 663, the following rules and definitions apply:

(1) "Date of sale or transfer" is the date the deed effecting the conveyance is delivered by the seller or transferor to the transferee.

(2) "Nonresident taxpayer." (i) A nonresident tax payer is an individual who qualifies as a nonresident individual under section 605(b)(2) of the Tax Law, or an estate or trust that qualifies as a nonresident estate or trust under section 605(b)(4) of the Tax Law, on the date of sale or transfer of real property.

(ii) An individual who is not domiciled in New York State but who may be considered a resident of New York State for tax purposes under section 605(b)(1)(B) of the Tax Law at the end of a taxable year, by virtue of maintaining a permanent place of abode in New York State for substantially all of the taxable year and by spending in aggregate more than one hundred eighty-three days of the taxable year in New York State, is a nonresident for purposes of this requirement unless the individual has already qualified as a resident on the date of sale or transfer of real property. (See section 105.20 of this Title concerning qualifying as a resident under section 605(b)(1)(B).)

(3) "Gain" on the sale or transfer has the same meaning as used in section 1001 of the Internal Revenue Code as that section applies to the sale or transfer of real property.

(4) "Sale or transfer of real property" means the change of ownership of a fee simple interest in real property by any method.

(5) "Seller or transferor" means the individual, estate, or trust making the sale or transfer of a fee simple interest in real property.

(6) "Recording officer" means the county clerk of the county, except in a county having a register, where it means the register of the county, or in the city of New York where it means the city register and any other employee of the Department of Finance, as appropriate.

Section 163.2 Estimation of tax due.

(a) A nonresident taxpayer must estimate the personal income tax due on a form prescribed by the commissioner, using an estimated tax rate that equals the highest rate of tax for the taxable year provided in section 601 of the Tax Law. The estimated tax due will equal the gain, if any, multiplied by that rate. The amount of the gain used in the computation is equal to the amount reportable for federal income tax purposes for the taxable year.

(b) If the real property being sold or transferred is located partly within and partly without New York State, then the nonresident taxpayer must estimate the tax due using only the portion of the gain reasonably attributable to the portion of the real property located within New York State.

(c) If the nonresident taxpayer is an estate or trust, it must estimate the tax due based on the gain, if any, computed without reduction for any distribution of income to the beneficiaries during the tax year of the sale or transfer.

Section 163.3 Filing and payment.

(a) A nonresident taxpayer must file the estimated tax form with the recording officer, along with payment of any estimated tax due, at the time a deed is recorded or accepted for recording. The taxpayer must make a payment payable to the Department of Taxation and Finance for the estimated tax that is separate from any other payment made to the recording officer at this time. (For an alternate payment and certification procedure which is available for sales with a date of sale or transfer on or before December 31, 2003, see Part 163 of Title 20 NYCRR (adopted on August 26, 2003) and section 663 of the Tax Law enacted by Chapter 62, Laws of 2003. The payment and certification procedure set forth in the August 26, 2003 regulation is in lieu of the procedure set forth herein.) Except for a nonresident taxpayer who meets one of the exemptions from the requirements described in section 163.4 of this Part, all nonresident taxpayers who are sellers or transferors of real property within New York State must file the estimated tax form whether or not they have a gain.

Section 163.4 Exemption from requirements.

(a) Section 663(d) of the Tax Law provides that the requirements of section 663 do not apply where:

(1) the real property being sold or transferred is the principal residence of the seller or transferor within the meaning of section 121 of the Internal Revenue Code (see subdivision (b) of this section);

(2) the seller or transferor is a mortgagor conveying the mortgaged property to a mortgagee in foreclosure or in a transfer in lieu of foreclosure with no additional consideration (see definition of "consideration" in section 575.1(d) of this Title); or

(3) the seller or transferor, or transferee is an agency or authority of the United States of America, an agency or authority of New York State, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or a private mortgage insurance company.

(b) The principal residence exemption set forth in paragraph (a)(1) of this section applies only where the property being sold or transferred qualifies in total as the principal residence of the seller or transferor. If the property being sold or transferred includes both the principal residence and other property, then the taxpayer must file and pay any estimated tax due based on the gain from the other property.

Section 163.5 Requirements for recording of deed.

(a) No deed shall be recorded or accepted for recording by any recording officer unless the recording officer has received with respect to every seller or transferor who is an individual, estate or trust: (1) a form prescribed by the commissioner, along with payment in full of the estimated tax due, if any, or, (2) a form prescribed by the commissioner containing a certification by the individual, estate or trust that section 663 is inapplicable to the sale or transfer. The method for taxpayers to make the certification is prescribed in forms and instructions.

Section 163.6 Designation of and duties of agents.

The recording officers in New York State shall act as the agents of the commissioner to collect the estimated tax due, if any, shown to be payable on the form prescribed by the commissioner. The recording officer must collect the estimated tax at the time that a deed is recorded or accepted for recording and must collect a payment payable to the Department of Taxation and Finance for the estimated tax that is separate from any other payment made to the recording officer at this time. Every recording officer must remit to the commissioner any funds collected and returns filed with such recording officer in a timely manner, not to exceed three business days after receipt of the funds and returns.

Section 163.7 Liability of recording officer.

A recording officer is not liable for any inaccuracy in any statement on the form prescribed by the commissioner or in the amount of estimated tax collected so long as he or she collects the estimated tax shown as payable on the form.

Section 163.8 Validity of record of deed.

When a deed is recorded notwithstanding an omission or inaccuracy in the form prescribed by the commissioner or in any certification by the transferor on such form or a deficiency in the payment of estimated tax, the record of such deed is not invalidated by reason of such omission, inaccuracy, erroneous certification or deficiency and the title founded on such deed is not impaired thereby.

Section 2. This emergency readoption is effective on January 22, 2004, the date that the Notice of Emergency Adoption and Proposed Rule Making is filed with the Secretary of State, and will remain in effect for a period of 60 days (March 21, 2004). These amendments shall take effect as a permanent rule on the day the Notice of Adoption regarding such amendments is published in the *State Register*. Both the amendments readopted on an emergency basis and the amendments adopted as a permanent rule shall apply to all sales or transfers of real property within New York State by taxpayers subject to Article 22 of the Tax Law on or after September 1, 2003.

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 March 21, 2004.

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, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; Section 663 of the Tax Law which was added by part V3 of Chapter 62 of the Laws of 2003 and amended by Part P of Chapter 686 of such Laws, provides that the Commissioner shall promulgate rules and regulations implementing the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers; and section 697(a) provides the authority for the Commissioner to make such rules and regulations that are necessary to enforce the personal income tax.

2. Legislative objectives: The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers, contained in section 663 of the Tax Law. Section 663 was added by part V3 of Chapter 62 of the Laws of 2003, and amended by Part P of Chapter 686 of such Laws.

3. Needs and benefits: New section 663(h) of the Tax Law provides that the Commissioner shall promulgate rules and regulations implementing the estimated tax on the sale or transfer of real property within New

York State by nonresident taxpayers. The adoption of this regulation will satisfy that requirement. The rule will benefit taxpayers by providing guidance about the new statutory requirements by clarifying (1) who the new law applies to, (2) what sales or transfers are covered by the law, and (3) how the exceptions to the requirements apply to taxpayers.

Section 663(e) of the Tax Law provides that every recording officer in New York State shall act as an agent of the Commissioner for purposes of collecting the estimated personal income tax, if any, shown to be payable upon the form prescribed pursuant to section 663(b). The section also provides that the Commissioner, by regulation, shall prescribe one or more methods for the recording officer's collection of such estimated tax and the due dates for the recording officer's remittance to the Commissioner of any funds collected and any returns filed with such recording officer. To meet the statutory directives, the proposal requires that the recording officer must collect a payment which is separate from any other payments made at the time the deed is recorded or accepted for recording, and must remit any funds collected and returns filed within three business days after receipt of the funds and returns.

The requirement for the separate payment will benefit any taxpayers subject to paying the estimated tax by ensuring that their estimated tax payments are properly recorded and credited to their estimated personal income tax account. The requirement that the funds and returns be sent by the recording officer to the Department within three business days will benefit taxpayers by ensuring that the money is properly credited to their accounts on a timely basis so that it may be matched to their personal income tax return at year end. If the money is not properly credited on a timely basis, the processing of the taxpayer's return will be delayed. The proposed regulatory requirements will help prevent any unnecessary delays or backlogs in processing.

This rule was previously adopted as an emergency measure on November 12, 2003. The emergency measure is scheduled to expire on February 9, 2004. This emergency readoption is necessary to extend the life of these provisions past the February 9, 2004 expiration date. The proposal to make the rule permanent will ensure the continuation of the regulatory requirements.

4. Costs: There are no fiscal or nonfiscal costs related to the promulgation of the regulation to the State, to this agency, to local governments, or to regulated parties beyond those imposed by the statute. This analysis is based on a review of the statutory provisions and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Bureau of Fiscal Management, and Planning and Management Analysis Bureau.

5. Local government mandates: The requirements imposed on local recording officers to act as agents of the Commissioner and collect and remit estimated tax forms and payments are imposed by section 663 of the Tax Law rather than by this regulation. The regulation provides the separate payment method for collection of tax and the due date of three business days, discussed above.

6. Paperwork: Since the requirements for nonresident taxpayers to estimate the tax upon the sale or transfer of real property within New York State were established by new section 663 of the Tax Law, any paperwork required is attributable to the statute and not the regulation.

7. Duplication: There are no relevant rules which are duplicated, overlapped, or in conflict with the regulation.

8. Alternatives: Because the regulation is specifically required by sections 663(e) and 663(h) of the Tax Law, no significant alternative to promulgating the regulation was considered.

Alternative ways to meet the statutory directives regarding the method of collection and due dates were considered. The separate payment method and the due date of three business days were discussed with the County Clerks' Association, and were determined to be the best policies to satisfy the needs of the recording officers, taxpayers, and the Department in response to section 663 of the Tax Law.

To allow for a transition period for the procedure provided by Chapter 686, the Department's policy and this proposal provides that the prior procedure can be used for sales with a date of sale or transfer on or before December 31, 2003.

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

10. Compliance schedule: Section 663 of the Tax Law, which imposes new requirements on nonresident taxpayers and local recording officers, applies to sales or transfers of real property within New York State on or after September 1, 2003. This effective date was set by Part V3 of Chapter 62 of the Laws of 2003. Section 663 was amended by Part P of Chapter 686 of the Laws of 2003 and the September 1, 2003 effective date was retained in this amendment. The schedule for parties to comply with the regulation is affected by the fact that Chapter 686 became law after September 1, 2003 and changed the procedure for taxpayers. Under Chapter 62, taxpayers were required to file the estimated tax form and pay any tax due directly to the Department. A regulation was adopted as an emergency measure on August 26, 2003 reflecting section 663 as in Chapter 62. Chapter 686 changed the requirement so that taxpayers are now required to file and pay any tax due with the recording officer at the time the deed is recorded or accepted for recording. Because the original effective date was retained by the later amendments, a transitional provision is included in this proposal to allow taxpayers to continue to use the prior procedure as an alternative for sales of real estate with a date of sale or transfer on or before December 31, 2003. To provide the recording officers adequate time to prepare, a meeting was held with the County Clerks' Association to discuss the new procedures and to receive their input regarding the proposed requirements and advance copies of forms and instructions were provided to the recording officers. A technical memorandum has also been issued to notify taxpayers and real estate professionals about the changes.

Regulatory Flexibility Analysis

1. Effect of rule: Section 663 of the Tax Law provides that every recording officer in New York State shall act as an agent of the Commissioner of Taxation and Finance for purposes of collecting the estimated personal income tax. The section also provides that the Commissioner, by regulation, shall prescribe one or more methods for the recording officer's collection of such estimated tax and the due dates for the recording officer's remittance of funds collected and returns filed. The effect on local governments is the addition of responsibilities placed on local recording officers, which is primarily due to the statute. The rule has a small effect on local governments because it provides the collection method and due date for remitting funds collected and returns filed.

It is anticipated that the rule will have little or no effect on small businesses.

2. Compliance requirements: Local recording officers are required by the statute to act as agents of the Commissioner and collect and remit tax payments and returns. The recording officers must build this new process into their office procedures. The rule provides the method for the collection of the estimated tax and that the recording officer must remit to the Department any funds collected and returns filed in a timely manner, not to exceed three business days after receipt of the funds and returns.

3. Professional services: No professional services are necessary in order to comply with the rule. Some taxpayers may choose to utilize professional services in order to comply with the rule, and because the requirements involve the sale of real property, it is likely that the taxpayers affected already utilize professionals to perform these types of services.

4. Compliance costs: Because the requirements on the recording officers are primarily imposed by section 663 of the Tax Law rather than the regulation, there are no compliance costs to local governments as a result of the rule. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: In order to minimize any adverse impact on the local recording officers, the Department met with the County Clerks Association to discuss the new procedures and to receive their input regarding the proposed requirements. Advance copies of estimated tax forms and instructions were provided to the recording officers so they could prepare for the change in procedure.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Deputy Secretary of State for Local Government and Community Services; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors; the Small Business Council of the New York State Business Council; and the Retail Council of New York State.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Section 663 of the Tax Law provides that all recording officers in New York State, including those in rural areas, shall act as agents of the Commissioner of Taxation and Finance for purposes of collecting the estimated personal income tax. According to information supplied by the former New York State Office of Rural Affairs, there are 44 counties throughout New York State that are

rural areas (having a population of less than 200,000) and 71 towns in the remaining 18 counties of New York State that are rural areas (with population densities of 150 people or less per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The requirement imposed on local recording officers to collect the estimated tax forms and payments are imposed by section 663 of the Tax Law rather than by this regulation. This regulation, as required by section 663, requires that the recording officer collect a payment which is separate from any other payments made at the time the deed is recorded or accepted for recording, and that the recording officer must remit any funds and returns within three business days after receipt of the funds and returns.

The reporting, recordkeeping and other compliance requirements imposed on taxpayers and recording officers are attributable to the statute and not the regulation. This regulation will not encourage or discourage the use of any professional services regardless of the taxpayer's geographical location.

3. Costs: There are no fiscal or nonfiscal costs related to the promulgation of the regulation to local governments or to regulated parties located in rural areas beyond those imposed by the statute. This analysis is based on a review of the statutory provisions and on discussions among personnel from the Department's Technical Services Bureau, Office of Counsel, Division of Tax Policy Analysis, Bureau of Fiscal Management, and Planning and Management Analysis Bureau.

4. Minimizing adverse impact: In order to minimize any adverse impact on the local recording officers, the Department met with the County Clerks' Association to discuss the new procedures and to receive their input regarding the proposed requirements. The separate payment method and the due date of three business days were discussed with the County Clerks' Association, and were determined to be the best policies to satisfy the needs of the recording officers, taxpayers, and the Department in response to section 663 of the Tax Law. Advance copies of estimated tax forms and instructions were provided to the recording officers so they could prepare for the change in procedure. A technical memorandum has been issued to explain the new requirements to taxpayers and tax professionals.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the New York Conference of Mayors, the Association of Towns of New York State, the New York State Association of Counties, the Deputy Secretary of State for Local Government and Community Services, the Small Business Council of the New York State Business Council, the National Federation of Independent Businesses, the Division of Small Business of the New York State Department of Economic Development and the Retail Council of New York State.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is anticipated that the rule will have no adverse impact on jobs and employment opportunities. The purpose of these amendments is to implement the estimated tax on the sale or transfer of real property within New York State by nonresident taxpayers, as required by section 663 of the Tax Law. Section 663 was added to the Tax Law by part V3 of Chapter 62 of the Laws of 2003, and amended by Part P of Chapter 686 of the Laws of 2003. Neither section 663 nor the rule imposes any additional tax liability.

NOTICE OF ADOPTION

Taxation of Foreign Corporations Participating in a Trade Show

I.D. No. TAF-45-03-00003-A
Filing No. 128
Filing date: Jan. 22, 2004
Effective date: Feb. 11, 2004*

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

Action taken: Amendment of sections 1-3.2, 1-3.3 and 1-3.4 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First and 1096(a)

Subject: Taxation of foreign corporations participating in a trade show.

Purpose: To provide in the regulations that limited participation in a trade show or shows in New York State is an activity that is deemed insufficient to subject a foreign corporation to tax under art. 9-A of the Tax Law. The rule also amends the regulations to reflect various statutory and nonsubstantive technical changes.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-45-03-00003-P, Issue of November 12, 2003.

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.

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*These amendments shall take effect on the date the Notice of Adoption regarding such amendments is published in the *State Register* except the amendments relating to participation in a trade show or shows made by section 5 which added paragraph (7) to subdivision (a) of section 1-3.3 of the regulations and by section 9 which added clause (*i*) to subparagraph (iv) of paragraph (9) of subdivision (b) of section 1-3.4 of the regulations shall apply to taxable years beginning on or after January 1, 2002.

NOTICE OF ADOPTION

Registration of Wholesale Dealers of Cigarettes

I.D. No. TAF-45-03-00004-A
Filing No. 126
Filing date: Jan. 22, 2004
Effective date: Feb. 11, 2004*

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

Action taken: Amendment of sections 70.2, 72.1, 73.2, 74.4, 78.4, 82.1-82.3 and 85.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 475 (not subdivided), 482-a and 488

Subject: Registration of wholesale dealers of cigarettes that also sell cigarettes at retail.

Purpose: To require wholesale dealers of cigarettes that sell cigarettes at retail, to also register as retail dealers of cigarettes and update regulations to reflect statutory changes.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-45-03-00004-P, Issue of November 12, 2003.

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.

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*These amendments shall take effect on the date the Notice of Adoption regarding such amendments is published in the *State Register* provided, however, that the amendments in sections 1, 2, and 3 shall take effect 45 days after the date that the Notice of Adoption is published in the *State Register*.

NOTICE OF ADOPTION

Fuel Use Tax

I.D. No. TAF-45-03-00005-A
Filing No. 127
Filing date: Jan. 22, 2004
Effective date: Jan. 22, 2004

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

Action taken: Amendment of section 492.1(b) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Jan. 1, 2004, and ending March 31, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for the

purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-45-03-00005-P, Issue of November 12, 2003.

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:

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Office of Temporary and Disability Assistance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operational Plans for Room and Board Facilities

I.D. No. TDA-06-04-00006-P

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

Proposed action: Amendment of sections 352.8(b) and 900.1(a) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 131(1); and L. 1953, ch. 562

Subject: Operational plans for room and board facilities.

Purpose: To require an operational plan to be submitted under certain circumstances for facilities that provide room and/or board.

Text of proposed rule: Paragraph (1) of subdivision (b) of section 352.8 is amended to read as follows:

(1) An allowance for each recipient or family purchasing room and/or board to cover the cost of board, room rent and other expenses, except where such items and services are furnished by a legally responsible relative or a recipient of public assistance. *This allowance is subject to review and approval in accordance with paragraph (2) of this subdivision.* For each recipient or family purchasing room and/or board from an individual, family or from a commercially operated boarding house, such allowance cannot exceed the sum of the statewide monthly grant and allowance, the statewide monthly home energy payments, the statewide monthly supplemental home energy payments and the local agency maximum monthly shelter allowance with heat.

Subdivision (b) of section 352.8 is amended by adding a new paragraph (2) to read as follows:

(2) Thirty days after this paragraph becomes effective and annually on the fifteenth day of April thereafter, a social services district must notify the office whenever a single entity or organization has continuously housed twenty or more homeless families in one or more residential structures throughout the previous three full calendar months. Such notification need only be made if the social services district pays an allowance to the entity or organization to purchase room and/or board pursuant to paragraph (1) of this subdivision. Notification must include the name and address of the entity or organization that the allowance is paid to, the number of families housed and the rate paid. After reviewing this information, the office may require that the district submit an operational plan for such residential structure or structures pursuant to Part 900 of this Title. The operational plan information will be used to determine the appropriateness of the rate charged and to evaluate the services designed to reduce the length of homelessness of the families. After reviewing the operational plan, the office may require that the residential structure or structures be operated in accordance with Part 900 of this Title. Social services districts are not required to notify the office when seeking reimbursement for the use of a hotel/motel to shelter homeless families pursuant to this Part or for a facility that has been approved pursuant to Part 900 of this Title. A social services district may submit a request to the office stating the reasons why it believes the requirement to submit an operational plan pursuant to this paragraph should be waived. A waiver request may be approved at the discretion of the office for good cause shown including, but not limited to, the cost effectiveness of the current arrangement, the adequacy of services provided and the emergency housing resources in the social services district. A waiver request approved by the office pursuant to this paragraph will remain in effect only for so long as the office determines it to be appropriate, based upon the continuation of the factors that led to the approval of the waiver.

Paragraphs 2, 3, 4 and 5 of subdivision (b) of section 352.8 are renumbered paragraphs 3, 4, 5 and 6 respectively.

Subdivision (a) of section 900.1 is amended to read as follows:

(a) The provisions of the Part apply to any facility providing shelter and services to homeless families which:

(1) shelters 10 or more homeless families;

(2) is operated by a local social services district or receives payment from such district for the provision of shelter and services to homeless families; and

(3) is not a hotel or motel, or a facility which provides families with shelter substantially similar to a house or an apartment, and which includes individual private cooking areas and private bathrooms except as provided in subdivision (b) and (c) of this section.

In addition, this Part applies to any facility requiring an operational plan pursuant to section 352.8(b)(2) of this Title.

Text of proposed 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

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 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 shelters for adults and facilities providing room and board services to homeless families were transferred by Chapter 436 of the Laws of 1997 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 of the Laws of 1997 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 for that purpose, to provide adequately for those unable to maintain themselves.

Chapter 562 of the Laws of 1953 authorizes State reimbursement for care provided in a public home, lodging house or shelter only when such facility is operated in compliance with regulations of the former Department of Social Services, now OTDA.

2. Legislative Objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies concerning the provision of assistance to persons residing in shelters for families.

3. Needs and Benefits:

The proposed regulations would require a social services district to annually notify OTDA if it had provided an allowance to purchase room and/or board from an entity or organization for 20 or more homeless families housed in one or more residential structures throughout the previous three months. A district would be required to provide OTDA with the name and address of the entity or organization to which the allowance is paid, the number of families housed and the rate paid. If OTDA determined that the residential structure or structures should be operated in accordance with 18 NYCRR Part 900, it would advise the district to submit an operational plan, unless the district seeks and the OTDA determines to grant a waiver to this requirement. The factors that OTDA would use to determine if a residential structure or structures should be operated in accordance with 18 NYCRR Part 900 include, but are not limited to the following: the number of families housed and duration of stay; rate charged for the temporary housing; services needed and provided to the families; availability of Part 900 like services in the community; expected term of use of

the residential structure or structures; and results of inspections that relate to the structure(s) and services provided. Part 900 of 18 NYCRR contains the regulations for the operation of shelters for families. Section 900.3 of 18 NYCRR contains the provisions relating to the contents of the operational plan. That plan contains specific information concerning how the program will be operated, including the services to be provided. Based upon the information contained in an operational plan, a reimbursement rate is established for the social services district.

The room and board regulations, 18 NYCRR 352.8(b), provide that each social services district will establish an allowance for each recipient or family purchasing room and/or board to cover the cost of board, room rent and other expenses, except where such items and services are furnished by a legally responsible relative or a recipient of public assistance. Room and board may be authorized for temporary as well as long-term stays. The room and board regulations do not include standards for the accommodations and services that are to be provided and there is no restriction on the amount of payment that can be made, except where the room and board is being purchased from an individual, family or commercially operated boarding house. Historically, this has provided social services districts with flexibility to negotiate a rate based upon local housing costs and case circumstances.

This flexibility has allowed social services districts to utilize funding under the room and board regulations but without the controls on costs and services that apply to the family shelters governed by 18 NYCRR Part 900. Although local zoning codes would apply to residential structures used by entities or organizations, the room and board regulations do not require the districts to secure State approval for such use.

The proposed regulations would permit the State to identify entities or organizations that have continuously housed twenty or more families in one or more residential structures throughout the previous three full calendar months where a room and board rate has been negotiated to determine if reimbursement should be made under room and board provisions or under 18 NYCRR Part 900, thereby permitting the State to be involved in the decisions relating to cost and services provided to homeless families.

4. Costs:

The fiscal impact of the proposed regulations is expected to be minimal. The regulations provide OTDA with a way to control reimbursement rates and thus contain costs. Under the room and board provisions, the social services districts negotiate the reimbursement rate with the provider; for services provided under Part 900 of the Office's regulations, OTDA reviews the operational plans submitted by the districts to determine whether the reimbursement rates are allowable and reasonable. Without this change, a social services district could claim reimbursement at the higher room and board rate without any oversight from OTDA.

5. Local Government Mandates:

The proposed regulations would require a social services district to annually inform OTDA whenever the district provided an allowance to purchase room and/or board from an entity or organization that has continuously housed 20 or more homeless families in one or more residential structures throughout the previous three months. The information provided to the Office would be the name and address of the entity or organization that the allowance is paid to, the number of families housed and the rate paid. After reviewing the information, the Office may require the district to submit an operational plan for such residential structure or structures as required by Part 900 of Title 18 NYCRR. The district could request a waiver of the requirement to submit an operational plan.

6. Paperwork:

A social services district may be required to submit an operational plan to this Office pursuant to 18 NYCRR Part 900 if it is determined that the district has provided an allowance to an entity or organization to purchase room and/or board in one or more residential structures housing 20 or more homeless families throughout the previous three months.

7. Duplication:

The proposed amendments do not duplicate State or Federal requirements.

8. Alternatives:

One alternative was to continue permitting room and/or board allowances to be made in the same manner as currently provided, without considering the standards for the accommodations and services that are provided. This alternative was rejected since it would not address the need to assess the appropriateness of the rate charged and to evaluate the services designed to reduce the length of homelessness of the families residing in the residential structures.

9. Federal Standards:

The proposed amendments do not exceed Federal minimum standards for the same subject.

10. Compliance Schedule:

Social services districts will be able to implement the proposed regulations when they become effective.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed amendments would not have any impact on small businesses in the State. The amendments would need to be implemented by the 58 social services districts in the State.

2. Compliance requirements:

The proposed regulations would require a social services district to annually inform the Office of Temporary and Disability Assistance (the Office) whenever the district provided an allowance to purchase room and/or board from an entity or organization for 20 or more homeless families housed in one or more residential structures throughout the previous three months. The information provided to the Office would be the name and address of the entity or organization to which the allowance is paid, the number of families housed and the rate paid. After reviewing the information, the Office may require the district to submit an operational plan for the residential structure or structures as required by Part 900 of Title 18 NYCRR.

3. Professional services:

No new professional services will be needed by the social services districts in order for them to comply with the proposed regulations.

4. Compliance costs:

The proposed regulations will not require the social services districts to incur any initial capital costs. The districts will not be required to incur any costs for continuing compliance with the proposed regulations.

5. Economic and technological feasibility:

Social services districts have the economic and technological feasibility to implement the proposed amendments.

6. Minimizing adverse impact:

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

7. Small business and local government participation:

The proposed rule has no impact on small businesses. The six local social services districts that are most likely to be affected by the rule (including New York City) were contacted to solicit comments on the proposed rule. No social services district expressed opposition to the proposed rule. Four of the districts indicated that they did not believe that the proposed rule would apply to them since there is no entity or organization within those districts that provide housing to 20 or more homeless families.

One social services district questioned what the impact would be if the entity that provides housing provides minimal services, and therefore, would not generally be considered as meeting the requirements for approval as a Tier II family shelter under Part 900 of 18 NYCRR. In response, we indicted that under current regulations the Office may waive requirements for operating a Tier II shelter and may determine whether organizations that provide minimal services are appropriate for approval under Part 900. These provisions of the current regulations will not be affected by the new rules.

Another district requested that the Office attempt to utilize existing sources of automated data to meet the reporting requirement of the proposed rule. The Office will consider the availability of automated data to meet the reporting requirement, although past experience has shown that the required information is not consistently maintained.

Rural Area Flexibility Analysis

Because the proposed regulations will not affect social services districts in rural areas, a rural area flexibility analyses has not been prepared. The proposed regulations apply to entities or organizations that have continuously housed 20 or more homeless families in one or more residential structures for a three-month period and reimbursement has been made under the room and board provisions of the Office of Temporary and Disability Assistance's (Office) regulations. There are no entities or organizations in rural areas that meet this criteria. Therefore, it is the position of the Office that a rural area flexibility analyses does not have to be prepared for the proposed regulations.

Job Impact Statement

A job impact statement has not been prepared for these proposed regulations. It is evident from the subject matter of the regulations that the job of the worker making the decision in the social services district will not be affected in any real way. Thus, these changes will not have any impact on jobs and employment opportunities in the state.