

# 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.

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## Office of Children and Family Services

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

#### Market Rates for Subsidized Child Care

I.D. No. CFS-07-04-00004-P

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

**Proposed action:** Amendment of sections 415.6 and 415.9 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 410 and 410-x(4)

**Subject:** Market rates for subsidized child care.

**Purpose:** To update the market rates social services districts can pay for subsidized child care.

**Text of proposed rule:** Paragraph (1) of subdivision (e) of section 415.6 is amended to read as follows:

(1) Payments do not exceed the actual cost of care. *For purposes of this Part, the actual cost of care is:*

(i) *for care provided pursuant to a contract between the social services district and the provider, the payment rate set forth in the contract;*

(ii) *for care provided other than pursuant to a contract between the social services district and the provider, the amount charged to the*

*general public for equal care in the providing facility or home; provided, however, if the facility or home cares only for subsidized children, then the actual cost of care is the amount the provider currently is receiving from the social services district for such children unless the provider can demonstrate to the social services district that the actual cost of providing care to such children is higher than that amount.*

Subdivision (j) of section 415.9 is amended as follows and a new rate schedule is added to read as follows:

(j) Effective [December 31, 2001] *October 1, 2003*, following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week. The market rates are established in five groupings of social services districts. Except for districts noted as an *exception* [with an asterisk (\*)] in the market rate schedule, the rates established for a group apply to all districts in the designated group. The district groupings are as follows:

- Group A: *Nassau, Putnam, Rockland, Suffolk, Westchester*
- Group B: *Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren*
- Group C: *Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates*
- Group D: *Albany, Dutchess, Orange, Ulster*
- Group E: *Bronx, Kings, New York, Queens, Richmond*

GROUP A COUNTIES: <i>Nassau, Putnam, Rockland, Suffolk, and Westchester</i>					
Age of Child:	<i>Under 1½</i>	<i>1½ - 2</i>	<i>3 - 5</i>	<i>6 - 12</i>	
<b>DAY CARE CENTER</b>					
<i>Weekly</i>	\$260.00	\$240.00	\$215.00	\$215.00	
<i>Exceptions</i>					
<i>Westchester</i>	\$300.00	\$281.00	\$233.00	-----	
<i>Daily</i>	\$65.00	\$60.00	\$54.00	\$54.00	
<i>Exceptions</i>					
<i>Westchester</i>	\$75.00	\$70.00	\$58.00	-----	
<i>Part-Day</i>	\$43.00	\$40.00	\$36.00	\$36.00	
<i>Exceptions</i>					
<i>Westchester</i>	\$50.00	\$47.00	\$39.00	-----	
<i>Hourly</i>	\$8.00	\$8.50	\$7.50	\$7.00	
<b>REGISTERED FAMILY DAY CARE</b>					
<i>Weekly</i>	\$225.00	\$225.00	\$220.00	\$200.00	
<i>Daily</i>	\$56.00	\$56.00	\$55.00	\$50.00	
<i>Part-Day</i>	\$37.00	\$37.00	\$37.00	\$33.00	
<i>Hourly</i>	\$8.00	\$8.00	\$7.00	\$7.00	
<b>GROUP FAMILY DAY CARE</b>					
<i>Weekly</i>	\$233.00	\$225.00	\$220.00	\$225.00	
<i>Daily</i>	\$58.00	\$56.00	\$55.00	\$56.00	
<i>Part-Day</i>	\$39.00	\$37.00	\$37.00	\$37.00	
<i>Hourly</i>	\$8.00	\$7.00	\$7.00	\$7.00	
<b>SCHOOL AGE CHILD CARE</b>					
<i>Weekly</i>	\$0.00	\$0.00	\$0.00	\$215.00	
<i>Daily</i>	\$0.00	\$0.00	\$0.00	\$54.00	
<i>Part-Day</i>	\$0.00	\$0.00	\$0.00	\$36.00	
<i>Hourly</i>	\$0.00	\$0.00	\$0.00	\$7.00	
<b>LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE</b>					
<i>Weekly</i>	\$158.00	\$158.00	\$154.00	\$140.00	
<i>Daily</i>	\$40.00	\$40.00	\$39.00	\$35.00	

Part-Day	\$27.00	\$27.00	\$26.00	\$23.00
Hourly	\$5.60	\$5.60	\$4.90	\$4.90

GROUP B COUNTIES: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

Age of Child: Under 1 1/2 1 1/2 - 2 3 - 5 6 - 12

DAY CARE CENTER

Weekly	\$178.00	\$170.00	\$157.00	\$150.00
Daily	\$45.00	\$43.00	\$39.00	\$38.00
Part-Day	\$30.00	\$27.00	\$26.00	\$25.00
Hourly	\$7.00	\$7.00	\$6.25	\$7.00

REGISTERED FAMILY DAY CARE

Weekly	\$135.00	\$130.00	\$125.00	\$125.00
Exceptions				
Columbia	\$140.00	-----	-----	-----
Erie	\$150.00	\$150.00	\$135.00	\$135.00
Saratoga	\$140.00	\$140.00	-----	\$130.00
Warren	-----	-----	-----	\$130.00
Daily	\$34.00	\$33.00	\$31.00	\$31.00
Exceptions				
Columbia	\$35.00	-----	-----	-----
Erie	\$38.00	\$38.00	\$34.00	\$34.00
Saratoga	\$35.00	\$35.00	-----	\$33.00
Warren	-----	-----	-----	\$33.00
Part-Day	\$23.00	\$22.00	\$21.00	\$21.00
Exceptions				
Erie	\$25.00	\$25.00	\$23.00	\$23.00
Saratoga	-----	\$23.00	-----	\$22.00
Warren	-----	-----	-----	\$22.00
Hourly	\$5.00	\$5.00	\$5.00	\$4.00

GROUP FAMILY DAY CARE

Weekly	\$150.00	\$140.00	\$135.00	\$130.00
Daily	\$38.00	\$35.00	\$34.00	\$33.00
Part-Day	\$25.00	\$23.00	\$23.00	\$22.00
Hourly	\$5.00	\$5.00	\$5.00	\$5.00

SCHOOL AGE CHILD CARE

Weekly	\$0.00	\$0.00	\$0.00	\$150.00
Daily	\$0.00	\$0.00	\$0.00	\$38.00
Part-Day	\$0.00	\$0.00	\$0.00	\$25.00
Hourly	\$0.00	\$0.00	\$0.00	\$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

Weekly	\$95.00	\$91.00	\$88.00	\$88.00
Daily	\$24.00	\$23.00	\$22.00	\$22.00
Part-Day	\$16.00	\$15.00	\$15.00	\$15.00
Hourly	\$3.50	\$3.50	\$3.50	\$2.80

GROUP C COUNTIES: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates

Age of Child: Under 1 1/2 1 1/2 - 2 3 - 5 6 - 12

DAY CARE CENTER

Weekly	\$150.00	\$145.00	\$136.00	\$125.00
Daily	\$38.00	\$36.00	\$34.00	\$31.00
Part-Day	\$25.00	\$24.00	\$23.00	\$21.00
Hourly	\$5.00	\$5.00	\$4.50	\$5.00

REGISTERED FAMILY DAY CARE

Weekly	\$125.00	\$125.00	\$120.00	\$120.00
Exceptions				
Clinton	-----	-----	-----	\$135.00
Sullivan	-----	-----	-----	\$125.00
Daily	\$31.00	\$31.00	\$30.00	\$30.00
Exceptions				
Clinton	-----	-----	-----	\$34.00
Sullivan	-----	-----	-----	\$31.00
Part-Day	\$21.00	\$21.00	\$20.00	\$20.00
Exceptions				
Clinton	-----	-----	-----	\$23.00
Sullivan	-----	-----	-----	\$21.00
Hourly	\$3.00	\$3.00	\$3.00	\$3.00

GROUP FAMILY DAY CARE

Weekly	\$135.00	\$130.00	\$125.00	\$120.00
Daily	\$34.00	\$33.00	\$31.00	\$30.00
Part-Day	\$23.00	\$22.00	\$21.00	\$20.00
Hourly	\$4.00	\$4.00	\$4.00	\$4.00

SCHOOL AGE CHILD CARE

Weekly	\$0.00	\$0.00	\$0.00	\$125.00
Daily	\$0.00	\$0.00	\$0.00	\$31.00
Part-Day	\$0.00	\$0.00	\$0.00	\$21.00
Hourly	\$0.00	\$0.00	\$0.00	\$5.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

Weekly	\$88.00	\$88.00	\$84.00	\$84.00
Daily	\$22.00	\$22.00	\$21.00	\$21.00

Part-Day	\$15.00	\$15.00	\$14.00	\$14.00
Hourly	\$2.10	\$2.10	\$2.10	\$2.10

GROUP D COUNTIES: Albany, Dutchess, Orange, and Ulster

Age of Child: Under 1 1/2 1 1/2 - 2 3 - 5 6 - 12

DAY CARE CENTER

Weekly	\$195.00	\$177.00	\$165.00	\$176.00
Daily	\$49.00	\$44.00	\$41.00	\$44.00
Part-Day	\$33.00	\$29.00	\$27.00	\$29.00
Hourly	\$6.00	\$6.30	\$6.30	\$6.00

REGISTERED FAMILY DAY CARE

Weekly	\$175.00	\$165.00	\$150.00	\$150.00
Exceptions				
Dutchess	-----	\$180.00	\$175.00	\$180.00
Orange	-----	-----	-----	\$175.00
Daily	\$44.00	\$41.00	\$38.00	\$38.00
Exceptions				
Dutchess	-----	\$45.00	\$44.00	\$45.00
Orange	-----	\$44.00	-----	-----
Part-Day	\$29.00	\$27.00	\$25.00	\$25.00
Exceptions				
Dutchess	-----	\$30.00	\$29.00	\$30.00
Orange	-----	-----	-----	\$29.00
Hourly	\$6.00	\$5.00	\$5.00	\$5.00

GROUP FAMILY DAY CARE

Weekly	\$175.00	\$175.00	\$165.00	\$160.00
Daily	\$44.00	\$44.00	\$41.00	\$40.00
Part-Day	\$29.00	\$29.00	\$27.00	\$27.00
Hourly	\$6.00	\$6.00	\$5.00	\$5.00

SCHOOL AGE CHILD CARE

Weekly	\$0.00	\$0.00	\$0.00	\$176.00
Daily	\$0.00	\$0.00	\$0.00	\$44.00
Part-Day	\$0.00	\$0.00	\$0.00	\$29.00
Hourly	\$0.00	\$0.00	\$0.00	\$6.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

Weekly	\$123.00	\$116.00	\$105.00	\$105.00
Daily	\$31.00	\$29.00	\$26.00	\$26.00
Part-Day	\$21.00	\$19.00	\$17.00	\$17.00
Hourly	\$4.20	\$3.50	\$3.50	\$3.50

GROUP E COUNTIES: Bronx, Kings, New York, Queens, and Richmond

Age of Child: Under 1 1/2 1 1/2 - 2 3 - 5 6 - 12

DAY CARE CENTER

Weekly	\$267.00	\$255.00	\$180.00	\$177.00
Daily	\$67.00	\$64.00	\$45.00	\$44.00
Part-Day	\$45.00	\$43.00	\$30.00	\$29.00
Hourly	\$13.75	\$17.00	\$13.00	\$11.65

REGISTERED FAMILY DAY CARE

Weekly	\$135.00	\$130.00	\$125.00	\$125.00
Daily	\$34.00	\$33.00	\$31.00	\$31.00
Part-Day	\$23.00	\$22.00	\$21.00	\$21.00
Hourly	\$15.00	\$10.00	\$11.00	\$11.60

GROUP FAMILY DAY CARE

Weekly	\$150.00	\$150.00	\$145.00	\$135.00
Daily	\$38.00	\$38.00	\$36.00	\$34.00
Part-Day	\$25.00	\$25.00	\$24.00	\$23.00
Hourly	\$15.00	\$13.00	\$11.00	\$16.00

SCHOOL AGE CHILD CARE

Weekly	\$0.00	\$0.00	\$0.00	\$177.00
Daily	\$0.00	\$0.00	\$0.00	\$44.00
Part-Day	\$0.00	\$0.00	\$0.00	\$29.00
Hourly	\$0.00	\$0.00	\$0.00	\$11.65

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

Weekly	\$95.00	\$91.00	\$88.00	\$88.00
Daily	\$24.00	\$23.00	\$22.00	\$22.00
Part-Day	\$16.00	\$15.00	\$15.00	\$15.00
Hourly	\$10.50	\$7.00	\$7.70	\$8.12

**SPECIAL NEEDS**  
 The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.  
 The highest applicable market rates in the State are:  
 Weekly \$300.00  
 Daily \$75.00  
 Part-Day \$50.00  
 Hourly \$17.00

**Text of proposed rule and any required statements and analyses may be obtained from:** Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

**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 Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

Section 34(3)(f) of SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State. Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rate that will establish a ceiling for State and federal reimbursement for payments made under the New York Child Care Block Grant. The amount to be paid or allowed for child care assistance funded under the block grant and under Title XX shall be the actual cost of care but no more than the applicable rate established in regulations. Payment rates must be sufficient to ensure equal access for eligible children to comparable child care assistance in the substate area that are provided to children whose parents are not eligible to receive assistance under any federal or State programs. Payment rates must take into account the variations in the costs of providing child care in different settings and to children of different age groups, and the additional cost of providing child care for children with special needs.

Federal statute, 42 USC 9858c(C)(4)(A), and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure such equal access for eligible children. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan covers the period of October 1, 2003 through September 30, 2005. The market rates that are being replaced were issued in October of 2001 and were based on a survey conducted in 2001.

#### 2. Legislative objectives:

The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

#### 3. Needs and benefits:

The regulations are needed to adjust existing rates that were established based on a survey done in 2001. Since then, child care providers have experienced increased costs in operating their businesses. These costs are reflected in the higher rates that they are charging as compared to the existing rates. The rates need to be updated to reflect the increased rates in order to continue to provide subsidized families with equal access to child care comparable to that received by unsubsidized families as required by federal and State laws.

The methodology used by the Office to establish the payment rates for the regulations meets the federal and State statutory requirements for conducting a local survey of child care providers. Prior to conducting the market rate survey, the Office convened a work group of stakeholders including local department of social services, family advocacy groups and provider organizations. These stakeholders provided input in the development of the market rate methodology and the process used to survey child care providers. Based upon stakeholder recommendations, a letter was mailed to all licensed and registered providers to inform them that they might be among the sample of providers who would be asked to participate in the market rate survey. The Office contracted with a market research firm to conduct the telephone survey in English and Spanish and had resources available to assist providers in other languages. The sample was drawn so that it encompassed the full range of providers within all geographic areas.

The payment rates were established based on approximately 4,000 completed telephone market rate surveys from licensed and registered providers throughout the State. Providers were asked for the rates they charge for full-time and part-time care, if applicable, based on the age of the child.

These rates were analyzed to determine the 75th percentile. The federal Administration of Children and Families has indicated in the preamble to the final rule for the Child Care and Development Fund that it regards the 75th percentile of the actual cost of care as sufficient to provide subsidized

parents with equal access to child care providers. The rates that resulted were then clustered into five distinct groupings of social services districts based on rate similarities. Within each group, rates are differentiated by type of provider (*i.e.* day care center, school-age child care, family day care, group family day care and legally-exempt family child care and in-home child care), age of child (*i.e.* under 1½, 1½-2, 3-5, 6-12), and amount of time in care (*i.e.* weekly, daily, part-day, and hourly). This data was compiled and analyzed by Eric Petersen, Assistant Director within the Office's Bureau of Budget Management.

The market rates for legally-exempt family child care and in-home child care were established based on a 70 percent differential applied to the market rate established for family day care. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider. Revising the existing rates will help subsidized families to avoid losing their child care arrangements or being unable to find appropriate child care. This will help prevent such families from being forced to place their children in child care settings that are inappropriate or unsafe or to leave their children unsupervised. Avoiding such results is important because it can be detrimental to children's development for them to experience disruption in care or to receive substandard or no care at all. The updated rates also will help subsidized families avoid having to choose whether to use their own income to supplement the cost of child care services, thereby enabling the families to use their limited family income for other basic living costs.

Social services districts are required to make payments based on the actual cost of care up to the applicable market rate. The regulations amend the definition of actual cost of care to clarify how that cost should be determined for those providers that only serve subsidized children and that do not have a contract with the applicable social services district. For each of those providers, the actual cost of care is the amount the provider currently receives from the district for subsidized children unless the provider can demonstrate that the actual cost of providing care to such children is higher than that amount. As a result of this clarification, social services districts will need to review the payments for these providers to determine whether the payments reflect the revised definition of actual cost of care up to applicable market rates.

4. Costs: Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year. Districts that exceed their Block Grant allocations for a particular year may receive additional reimbursement under the Child Care Reserve Fund provided monies are appropriated for that Fund.

Under the State Budget for SFY 2003-04, social services districts will receive their allocations of \$694,543,234 in federal and State funds under the New York State Child Care Block Grant, an increase of \$38 million from the amount allocated to districts for SFY 2002-03. In addition, districts that are projected to use all of their Block Grant allocations will receive allocations from \$78 million available under the Child Care Reserve Fund for federal fiscal year 2002-2003 and from an amount to be determined under the Child Care Reserve Fund for federal fiscal year 2003-2004. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the new market rates as well as to allow for growth in the number of children receiving child care services.

#### 5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as needed.

#### 6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

#### 7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

#### 8. Alternatives:

The adjustments in rates set forth in the regulations are necessary to implement the federal and State statutory and regulatory mandates.

## 9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

## 10. Compliance schedule:

These provisions must be implemented effective on October 1, 2003.

**Regulatory Flexibility Analysis**

## 1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 29,000 informal providers.

## 2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to the new market rates. Payment adjustments will have to be made, as needed.

## 3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

## 4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year. Districts that exceed their Block Grant allocations for a particular year may receive additional reimbursement under the Child Care Reserve Fund provided monies are appropriated for that Fund.

Under the State Budget for SFY 2003-04, social services districts will receive their allocations of \$694,543,234 in federal and State funds under the New York State Child Care Block Grant, an increase of \$38 million from the amount allocated to districts for SFY 2002-03. In addition, districts that are projected to use all of their Block Grant allocations will receive allocations from the \$78 million available under the Child Care Reserve Fund for federal fiscal year 2002-2003 and from an amount to be determined under the Child Care Reserve Fund for federal fiscal year 2003-2004. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the new market rates as well as to allow for growth in the number of children receiving child care services.

## 5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

## 6. Minimizing adverse impact:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. Prior to conducting the market rate survey the Office convened a work group of stakeholders including local department of social services, family advocacy groups and provider organizations. These stakeholders provided input in the development of the market rate methodology and the process used to survey child care providers.

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of approximately 4,000 licensed and registered child care providers throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care within the counties.

Social services districts will benefit from the increases in the rates. The increases will enable districts to provide public assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable

more public assistance and low-income families to work, thereby reducing the number of families in need of public assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

## 7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from almost 4,000 providers and that information formed the basis for the updated market rates.

**Rural Area Flexibility Analysis**

## 1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the new market rates. Payment adjustments will have to be made, as needed.

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

## 3. Costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year. Districts that exceed their Block Grant allocations for a particular year may receive additional reimbursement under the Child Care Reserve Fund provided monies are appropriated for that Fund.

Under the State Budget for SFY 2003-04, social services districts will receive their allocations of \$694,543,234 in federal and State funds under the New York State Child Care Block Grant, an increase of \$38 million from the amount allocated to districts for SFY 2002-03. In addition, districts that are projected to use all of their Block Grant allocations will receive allocations from \$78 million available under the Child Care Reserve Fund for federal fiscal year 2002-2003 and from an amount to be determined under the Child Care Reserve Fund for federal fiscal year 2003-2004. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the new market rates as well as to allow for growth in the number of children receiving child care services.

## 4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of approximately 4,000 completed surveys from licensed and registered child care providers throughout the State. The rates were analyzed to establish market rates at the 75th percentile of the amounts charged. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for rural counties are based on the actual costs of care within the counties.

Social services districts in rural areas will benefit from the increases in the rates. The increases will enable districts to provide public assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more public assistance and low-income families to work, thereby reducing the number of families in need of public assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care. Child care providers in rural areas also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. Prior to conducting the market rate survey the Office convened a work group of stakeholders including local departments of social services, family advocacy groups and provider organizations. Several rural departments of social services districts and the New York State Public Welfare Association were invited to attend. The Family Day Care Association of New York State, which has a strong representation from rural areas in its membership, participated in the workgroup. The workgroup provided input in the development of the market rate methodology and the process used to survey child care providers.

In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from almost 4,000 providers and that information formed the basis for the updated market rates.

**Job Impact Statement**

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

These regulations will have a positive impact on jobs or employment opportunities as the increased rates will allow child care providers to hire additional staff or improve the compensation they pay existing staff. Individuals who may have been discouraged from starting up new child care programs in low-income communities because the existing rates would not have been sufficient to support their operational costs may be encouraged by the new rates to establish such programs. In addition, by making child care more available and affordable for low-income working families, the regulations will improve the ability of employers to attract and retain employees and the ability of low-income workers to obtain and maintain jobs.

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Executive Department

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Science, Technology and Academic Research," by increasing the number of positions of Secretary from 2 to 3.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: sjl@cs.state.ny.us

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

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

**Consolidated Regulatory Impact Statement**

1. Statutory authority: The New York State Civil Service Commission is authorized to promulgate rules for the jurisdictional classification of offices within the classified service of the State by Section 6 of the Civil Service Law. In so doing, it is guided by the requirements of Sections 41, 42 and 43 of this same law.

2. Legislative objectives: These rule changes are in accord with the statutory authority delegated to the Civil Service Commission to prescribe rules for the jurisdictional classification of the offices and positions in the classified service of the State.

3. Needs and benefits: Article V, Section 6, of the New York State Constitution requires that, wherever practicable, appointments and promotions in the civil service of the State, including all its civil divisions, are to be made according to merit and fitness. It also requires that competitive examinations be used, as far as practicable, as a basis for establishing this eligibility. This requirement is intended to provide protection for those individuals appointed or seeking appointment to civil service positions while, at the same time, protecting the public by securing for it the services of employees with greater merit and ability. However, as the language suggests, the framers of the Constitution realized it would not always be possible, nor indeed feasible, to fill every position through the competitive process. This point was also recognized by the Legislature for, when it enacted the Civil Service Law to implement this constitutional mandate, it provided basic guidelines for determining which positions were to be outside of the competitive class. These guidelines are contained in Section 41, which provides for the exempt class; 42, the non-competitive class and 43, the labor class. Thus, there are four jurisdictional classes within the classified service of the civil service and any movement between them is termed a jurisdictional reclassification.

The Legislature further established a Civil Service Department to administer this Law and a Civil Service Commission to serve primarily as an appellate body. The Commission has also been given rule making responsibility in such areas as the jurisdictional classification of offices within the classified service of the State (Civil Service Law Section 6). In exercising this rule making responsibility, the Commission has chosen to provide appendices to its rules, known as Rules for the Classified Service, to list those positions in the classified service which are in the exempt class (Appendix 1), non-competitive class (Appendix 2), and labor class (Appendix 3).

In effect, all positions, upon creation at least, are, by constitutional mandate, a part of the competitive class and remain so until removed by the Civil Service Commission, through an amendment of its rules upon showing of impracticability in accordance with the guidelines provided by the Legislature. The guidelines are as follows. The exempt class is to include those positions specifically placed there by the Legislature, together with all other subordinate positions for which there is no requirement that the person appointed pass a civil service examination. Instead, appointments rest in the discretion of the person who, by law, has determined the position's qualifications and whether the persons to be appointed possess those qualifications. The non-competitive class is to be comprised of those positions which are not in the exempt or labor classes and for which the Civil Service Commission has found it impracticable to determine an applicant's merit and fitness through a competitive examination. The qualifications of those candidates selected are to be determined by an examination which is sufficient to insure selection of proper and competent employees. The labor class is to be made up of all unskilled laborers in the service of the State and its civil divisions, except those which can be examined for competitively.

4. Costs: The removal of a position from one jurisdictional class and placement in another is descriptive of the proper placement of the position

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## Department of Civil Service

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-04-00005-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

in question in the classified service, and has no appreciable economic impact for the State or local governments.

5. Local government mandates: These amendments have no impact on local governments. They pertain only to the jurisdictional classification of positions in the State service.

6. Paperwork: There are no new reporting requirements imposed on applicants by these rules.

7. Duplication: These rules are not duplicative of State or Federal requirements.

8. Alternatives: Within the statutory constraints of the New York State Civil Service Commission, it is not believed there is a viable alternative to the jurisdictional classification chosen.

9. Federal standards: There are no parallel Federal standards and, therefore, this is not applicable.

10. Compliance schedule: No action is required by the subject State agencies and, therefore, no estimated time period is required.

#### **Consolidated Regulatory Flexibility Analysis**

The proposal does not affect or impact upon small businesses or local governments, as defined by Section 102(8) of the State Administrative Procedure Act, and, therefore, a regulatory flexibility analysis for small businesses is not required by Section 202-b of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on small businesses or local governments.

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

The proposal does not affect or impact upon rural areas as defined by Section 102(13) of the State Administrative Procedure Act and Section 481(7) of the Executive Law, and, therefore, a rural area flexibility analysis is not required by Section 202-bb of such act. In light of the fact that this proposal only affects jurisdictional classifications of State employees, it will not have any adverse impact on rural areas.

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

The proposal has no impact on jobs and employment opportunities. This proposal only affects the jurisdictional classification of positions in the Classified Civil Service.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-07-04-00006-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Executive Department.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office for Technology," by increasing the number of positions of Deputy Director from 1 to 2.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: sjl@cs.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, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-07-04-00007-P

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

**Proposed action:** Amendment of Appendix(es) 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the exempt class in the Department of Transportation.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Transportation, by deleting therefrom the title of Associate Counsel.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: sjl@cs.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, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-07-04-00008-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the non-competitive class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by adding thereto the position of Community Interpretation Program Specialist 1 (1) and Community Interpretation Program Specialist 2 (4).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: sjl@cs.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, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-07-04-00009-P

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

**Proposed action:** Amendment of Appendix(es) 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and classify a position in the non-competitive class in the Department of Family Assistance.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Temporary and Disability Assistance," by deleting therefrom the position of Director of Services Systems Support (1) (Until first vacated after March 20, 1985); and, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Director Services Systems Support (1) (Until first vacated after January 15, 2004).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6205, e-mail: sjl@cs.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, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

The proposed rule is subject to consolidated statements and analyses printed in the issue of February 18, 2004 under the notice of proposed rule making I.D. No. CVS-07-04-00005-P.

## Department of Correctional Services

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

**Approval of Time Allowance and Temporary Release Committees**

**I.D. No.** COR-07-04-00002-P

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

**Proposed action:** This is a consensus rule making to amend sections 261.1(b) and 1900.2(b) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Approval of time allowance and temporary release committees.

**Purpose:** To delegate approval functions.

**Text of proposed rule:** Subdivision (b) of section 261.1 of Title 7, NYCRR, is hereby amended as follows:

(b) Such committee shall consist of at least three members designated by the superintendent. The superintendent shall appoint one of the members as chairman. The members shall be selected from a list of eight employees preselected by the superintendent and filed with the *deputy commissioner for correctional facilities*. The list of names filed by the superintendent shall be deemed approved by the *deputy commissioner for correctional facilities* unless and until the *deputy commissioner for correctional facilities* removes an individual from the list in writing.

Subdivision (b) of section 1900.2 of Title 7, NYCRR, is hereby amended as follows:

(b) The chairperson, two committee members, and no more than three alternates for each of the three committee positions shall be nominated by the superintendent and shall be subject to approval by the *associate commissioner* or his designee. One of the two members shall also be designated as an alternate chairperson. Members shall continue service at the pleasure of the *associate commissioner*. To assure familiarity of members of the committee with the process and consistency in decisionmaking, changes in the membership of the committee shall not be made frequently and only with the approval of the *associate commissioner* or his designee.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony J. Annucci, Deputy Commissioner and Counsel, Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050, (518) 457-4951

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

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

**Consensus Rule Making Determination**

The Department of Correctional Services has determined that no person is likely to object to the proposed rule as written because by it the commissioner has merely delegated the functions of approving memberships for time allowance and temporary release committees to appropriate executive staff.

**Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal has merely delegated the functions of approving memberships for time

allowance and temporary release committees to appropriate executive staff.

## Department of Health

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

**Criminal History Record Check of Certain Non-Licensed Nursing Home and Home Care Staff**

**I.D. No.** HLT-07-04-00027-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 763.13, 766.11 and addition of section 400.23 to Title 10 NYCRR; and amendment of section 505.14 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201, 2803 and 3612

**Subject:** Criminal history record check of certain non-licensed nursing home and home care staff.

**Purpose:** To protect nursing home residents and home care clients by requiring non-licensed nursing home and home care staff who are employed or used to provide direct care or supervision to residents/clients to undergo criminal history checks.

**Text of proposed rule:** A new section 400.23 is added to Title 10 NYCRR to read as follows:

*Section 400.23. Criminal history record check for certain applicants for employment in certain health care facilities and programs.*

(a) *The operator of a residential health care facility, licensed home care services agency, certified home health agency, long term home health care program, personal care services agency or AIDS home care program ("the operator") shall obtain a criminal history record check from the United States Attorney General ("the Attorney General") to the extent provided for under section 124 of Public Law 105-277 for any prospective employee prior to any employment.*

(1) *For purposes of this section, employee shall mean any person to be employed or used by the facility or program including, those persons employed by a temporary employment agency, to provide direct care or supervision to patients. Persons licensed pursuant to Title 8 of the Education Law or Article 28-D of the Public Health Law are excluded from the meaning of employee pursuant to this section.*

(b)(1) *The operator shall, as part of an application for employment, obtain all information from a prospective employee necessary for the purpose of initiating a criminal history record check under section 124 of Public Law 105-277, including, at a minimum, a fingerprint card of the prospective employee.*

(b)(2) *As part of such application for employment, the operator shall obtain from the prospective employee the following authorization:*

*Authorization for Search and Exchange of Information*

I, \_\_\_\_\_ (Name of applicant for employment), hereby authorize \_\_\_\_\_ (Name of facility), to submit a request to the Attorney General of the United States to conduct a search of the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation for any criminal history records corresponding to the fingerprints or other identification information submitted by me. I further authorize the exchange of such information between the Attorney General of the United States, the New York State Department of Health and \_\_\_\_\_ (Name of facility). This information may be used only by \_\_\_\_\_ (Name of facility) and only for the purpose of determining my suitability for employment in a position involved in direct patient care.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_  
(print)

(c) Prior to initiating the fingerprinting process, the operator must inform the prospective employee of the requirement to conduct a criminal history record check, and provide a description of the process set forth in this section for obtaining the criminal history record. The operator shall also inform the prospective employee that he or she:

(1) will have an opportunity to obtain, review and explain the information contained in the criminal history record check; and

(2) may withdraw his or her application for employment at any time, without prejudice, prior to the operator's decision on employment, and that upon such withdrawal any fingerprints and criminal history record concerning such prospective employee received by the operator shall be destroyed.

(d)(1) The operator shall submit the fingerprint card, the cost of such record check charged by the Attorney General ("the fee"), and all other required information to the Department which shall, in turn, submit the fingerprint card, the fee, and such required information to the Attorney General for its full search of the records of the Federal Bureau of Investigation to the extent provided for in federal law.

(2) Notwithstanding any inconsistent rule or regulation in this Title, no operator shall include the fee, any costs associated with obtaining the fingerprint card and any administrative services costs incurred in implementing the criminal history record check as an allowable cost on any cost report or rate appeal filed by the operator and the operator shall separately identify all such costs on any report of costs submitted to the department for the purpose of determining the facility's rate of reimbursement under any other regulation of this Title.

(3) No operator may seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this Section.

(e) The Department shall promptly, after receiving from the Attorney General the criminal history record check, forward such criminal history record information to the operator.

(f)(1) Except as provided for in paragraph (2) of this subdivision, the operator shall not hire or utilize the prospective employee if the criminal history record check reveals a conviction for any of the following criminal offenses:

(i) any Class A felony defined in the Penal Law;

(ii) any Class B or C felony defined in the Penal Law occurring within ten years preceding the date of the criminal history record check;

(iii) any Class D or E felony listed in article 120, article 130, article 155, article 160, article 178 or article 220 of the Penal Law occurring within ten years preceding the date of the criminal history record check;

(iv) any crime defined in sections 260.32 or 260.34 of the penal law occurring within ten years preceding the date of the criminal history record check; and

(v) any comparable offense in any other jurisdiction. Where the criminal history record check reveals a conviction for any other criminal offense, the operator in determining the suitability of the prospective employee in such employment position, shall make such decision in accordance with article 23-A of the State Correction Law.

(2) In making a determination with regard to certain applicants for employment pursuant to this section, the operator shall give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the prospective employee or any information produced by the prospective employee, or on his/her behalf as identified in Correction Law section 753(1)(g). In such cases where such certificates are produced or such information provided, the operator, in determining the suitability of the prospective employee in such employment position, shall make such decision in accordance with article 23-A of the State Correction Law.

(g) Any criminal history record information provided by the federal government is confidential as required by federal law and, after transmission to the operator, shall be used only by the operator requesting such information and only for the purpose of determining the suitability of the applicant for employment in a position involved in direct patient care including supervision of patients as required by federal law, provided however, nothing herein shall prevent the operator from disclosing such criminal history record information at any administrative or judicial proceeding relating to a denial of an application for employment. Unauthorized disclosure of such records shall subject the operator to civil penalties in accordance with the provisions of subdivision 1-a of section 12 of the Public Health Law.

(h) The operator shall provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check and the operator shall set forth in writing the basis for not hiring the prospective employee when any such decision is based on the criminal history record information.

(i) The department may conduct periodic inspections, as needed, to determine the compliance of the operator with the requirements of this Section.

(j) This section shall apply to applications for employment made by prospective employees on and after the effective date of this section and shall continue to be valid in whole or in part to the extent permitted by federal law or regulation.

Subdivision (b) of section 763.13 of Title 10 NYCRR is amended to read as follows:

(b)(i) that qualifications as specified in section 700.2 of this Title are met; and

(ii) a criminal history record check to the extent required by section 400.23 of this Title.

Subdivision (f) of section 766.11 of Title 10 NYCRR is amended to read as follows:

(f)(i) that prior to patient contact, employment history from previous employers, if applicable, and recommendations from other persons unrelated to the applicant if not previously employed, are verified; and

(ii) a criminal history record check to the extent required by section 400.23 of this Title.

A new subparagraph (v) is added to section 505.14(d)(4) of Title 18 NYCRR to read as follows:

(d) Providers of personal care services.

\* \* \*

(4) The minimum criteria for the selection of all persons providing personal care services shall include, but are not limited to, the following:

\* \* \*

(v) a criminal history record check to the extent required by 10 NYCRR 400.23.

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

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

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

#### Regulatory Impact Statement

Statutory Authority:

These proposed regulations are promulgated under the authority of Sections 201, 2803, and 3612 of the Public Health Law (PHL) and Section 363-a of the Social Services Law (SSL). PHL § 201(1)(v) authorizes the Department to act as the single state agency for Medical Assistance (MA) pursuant to § 363-a of the Social Services Law, with responsibility to supervise the plan for MA as required by Title XIX of the federal Social Security Act, and to adopt regulations as may be necessary to implement this plan. This section of law further requires the Department to make such regulations, not inconsistent with law, as may be necessary to implement these provisions.

Public Health Law § 2803(2)(a)(v) authorizes the State Hospital Review and Planning Council (SHRPC) to promulgate changes in the minimum acceptable standards and procedures for nursing homes to qualify as providers, upon approval of the Commissioner, for purposes of ensuring that the health and safety of the residents of those nursing homes are not endangered.

Similarly, PHL § 3612(5) authorizes SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health, to effectuate the provisions and purposes of law with respect to certified home health agencies (CHHAs), providers of long-term home health care programs (LTHHCPs) and providers of AIDS home care programs, including, but not limited to, uniform standards for quality of care and services to be provided by CHHAs, providers of LTHHCPs and providers of AIDS home care programs. PHL § 3612(6) authorizes the Commissioner of Health to adopt and amend rules and regulations to effectuate the provisions and purposes of law relating to licensed home care services agencies (LHCSAs) with regard to uniform standards for quality of care and services.

Section 124 of federal Public Law (PL) 105-277, enacted in 1998, enables nursing facilities (NFs) and home health care agencies (HHAs) to

request from the FBI fingerprint-based national criminal history checks for employees or job applicants for positions involving direct patient care.

#### Legislative Objectives:

The Department of Health possesses the comprehensive responsibility for the development and administration of programs, standards and methods of operation, and all other matters of State policy with respect to nursing home and home care services. Furthermore, through the Social Security Act, the federal government authorizes the State to administer programs and services provided through Medical Assistance (i.e., Medicaid). This includes responsibility for the minimum qualifications, standards and/or certification of personnel within those settings, in order to ensure the health and safety of recipients of such care and services.

Documented instances of abuse which have occurred in relation to nursing facilities and home care settings illustrate the need for enhanced protective measures, such as allowing employers access to past and present criminal records of potential direct care employees. The review of these records will allow licensed operators to better carry out their statutory mandate and protect the residents of nursing facilities and recipients of home care services from abuse.

The Attorney General's Medicaid Fraud Control Unit (MFCU) is responsible for investigating and prosecuting cases of patient abuse in New York's nursing homes. In 1999, MFCU received 1,600 complaints of patient abuse, of which 131 became the subject of investigation. Of those complaints, 26 resulted in prosecution.

Several counties have recently enacted their own requirements for the performance of criminal background histories for health care workers. New York is one of only 16 states which does not require health care workers to undergo criminal background checks as a condition of working with the elderly. Several large states including Florida, California and Texas as well as New York's neighboring states New Jersey, Massachusetts and Pennsylvania have already enacted laws requiring a check of the criminal histories of prospective nursing home and home care employees.

These regulations will protect nursing home residents and those who receive home health care by requiring non-licensed nursing home and home care staff who are employed or used to provide direct care or supervision to residents/clients to undergo criminal history checks. Further, it shall ensure that frail and vulnerable New Yorkers receive the highest quality care and are treated with the respect and dignity they deserve.

#### Needs and Benefits:

Over 700,000 ill or disabled people in New York State rely on the services of health aides in their home and in nursing facilities each year. Most of these people are elderly, frail and vulnerable to theft, physical and sexual abuse. Often they suffer from memory loss or Alzheimer's disease and are unable to recall the details of a crime committed against them, or that the crime occurred, or to tell a family member or friend.

When the records of prospective in-home support service workers in one California county were checked, over 15 percent were found to have criminal records. In Texas, where certain convictions bar employment in long-term care and home health care settings, 9 percent of applicants in 2000 were found to have convictions. When New Jersey passed legislation requiring all home care workers to have FBI fingerprint checks, 400 employees, some of whom had been working for years, were found to have committed disqualifying crimes.

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hand of the very persons charged with providing care for them. While the majority of certified nurse aides, home health aides and personal care aides provide quality care and perform their duties with compassion, a significant number of cases of abuse and criminal activity have been reported. While this proposal will not eliminate all instances of abuse in nursing homes or in individual homes, it will eliminate many of the opportunities for individuals with a criminal record to be alone with those most at risk.

These regulations would require the operator of a nursing home, licensed home care services agency, certified home health agency, long-term home health care program, personal care services agency or AIDS home care program to obtain a criminal history record check from the U.S. Attorney General for any prospective employee, other than certain licensed professionals, prior to employment or use of the individual. For these regulations, "employee" is defined to mean all prospective employees, including those persons employed by a temporary employment agency, not licensed by the State Education Department under Title 8 of the Education Law or by the Department of Health under Article 28-D of the Public Health Law, providing direct care or supervision to residents or

patients in nursing homes or through a home care service agency. If the criminal history record check reveals that the prospective employee was convicted of any of a number of specified criminal offenses, the nursing home/home care operator will be prohibited from hiring or using that individual. Those offenses are:

- any Class A felony defined in the Penal Law;
- any Class B or C felony defined in the Penal Law occurring within 10 years preceding the date of the criminal history record check;
- any Class D or E felony listed in Articles 120, 130, 155, 160, 178 or 220 of the Penal Law occurring within 10 years preceding the date of the criminal history record check;
- any crime defined in Sections 260.32 or 260.34 of the Penal Law occurring within 10 years preceding the date of the criminal history record check; and
- any comparable offense in any other jurisdiction.

Where the criminal history record check reveals a conviction for any other criminal offense, the operator in determining the suitability of the prospective employee in such employment position shall make such decision in accordance with Article 23-A of the State Correction Law. In making a determination with regard to certain applicants for employment, the operator shall give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the prospective employee or any information produced by the prospective employee on his/her behalf, as identified in Correction Law § 753(1)(g). In such cases, where such certificates are produced or such information provided, the operator, in determining the suitability of the prospective employee in such employment position, shall make such decision in accordance with Article 23-A of the Correction Law. This information will enable nursing homes and home care agencies to make better informed decisions about the employment status of prospective employees.

#### Costs:

##### Costs to Regulated Parties:

The proposed regulations would require nursing home and home care operators to obtain all information from a prospective employee necessary for the purpose of initiating a criminal history record check, including, at a minimum, a fingerprint card of the prospective employee. As part of such application for employment, the operator must also obtain from the prospective employee an "Authorization for Search and Exchange of Information", in the format contained in the proposal, and inform the individual of the requirement and process for conducting a criminal history record check.

Once all information has been obtained, the operator shall then submit such authorization, along with proper processing fees, to the Department, which will then forward all information and fees to the United States Attorney General for a full search of the records of the Federal Bureau of Investigation, to the extent provided for in federal law.

For all cost calculations, the following estimates and assumptions have been used:

- The number of new caregivers entering the field each year is approximately 17,500 certified nursing home nurse aides, 50,000 home health aides and personal care aides, and 5,000 other direct caregivers not licensed under Title 8 of the Education Law or Article 28-D of the Public Health Law.
- The average annual "turnover" rates are estimated at 40% for CNAs in nursing homes, and 40% for HHAs and 50% for PCAs in home care settings. This would result in an estimated additional 105,500 employees (30,000 CNAs, 67,500 HHAs, PCAs and 8,000 "other" non-licensed) required to be checked each year when caregivers change employers.

The cost to obtain the FBI criminal history check is currently \$24 per check, as of November 2003, and employer administrative costs associated with obtaining the fingerprint cards and such required information for the FBI search are estimated at approximately \$13 per check.

Utilizing these estimates and assumptions, costs to operators for implementing the proposed regulation for non-licensed direct caregivers new to the health care industry are approximately \$2,682,500 annually (\$37 × 72,500), plus an approximate \$3,903,500 for such workers who change employment during the year (\$37 × 105,500), for a total annual impact of approximately \$6,586,000.

The \$24 fee for the criminal background check and the estimated facility/agency associated administrative costs shall not be included as an allowable cost on any cost report or rate appeal filed by the operator, and the operator shall separately identify all such costs on any report of costs submitted to the Department for the purpose of determining the facility's rate of reimbursement. Operators also may not seek to obtain from a

prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this section.

#### Costs to State and Local Government:

There are currently 52 publicly-operated nursing facilities, and 83 public home care agencies (49 certified home health agencies, 5 licensed home care services agencies, and 29 long-term home health care programs). In addition, New York State operates four Veterans' Nursing Homes in Oxford, Batavia, St. Albans and Montrose.

These nursing facilities and home care services agencies would also be subject to the \$24 FBI criminal history and employer administrative costs associated with obtaining the fingerprint cards, for all prospective non-licensed staff who are employed or used to provide direct care or supervision to residents/clients also see "Costs to Regulated Parties".

#### Costs to the Department of Health:

Performing the functions required by this regulation will require the addition of staff to the Department, as existing staff and resources are insufficient to carry out the duties described in the regulations. In particular, staff would be necessary to handle the approximately 178,000 annual submission of criminal history record check applications estimated to be received from nursing homes and home care agencies. In addition, due to the increased activity of determining operator compliance with the requirements of this regulation, the addition of nursing home and home care surveillance staff will be required.

#### Local Government Mandates:

None, except as local governments may operate as regulated parties see "Costs to State and Local Government". Several counties have recently enacted their own requirements for the performance of criminal background histories for health care workers.

#### Paperwork:

As part of an application for employment or use agreement, this regulation would require nursing home and home care operators to obtain all information necessary for the purpose of initiating a criminal history record check, including a fingerprint card. This information shall include an "Authorization for Search and Exchange of Information", in the format contained within the proposal, signed by the prospective applicant.

The operator shall submit the fingerprint card, the fee for such record check, and all other required information to the Department, which shall then submit the same to the U.S. Attorney General's Office for its full search of the records of the FBI. After receiving the criminal history record check from the FBI, the Department is directed to promptly forward the information on to the operator.

#### Duplication:

There is no duplication of federal or State requirements for a mandatory criminal history record check.

#### Alternative Approaches:

Legislation has also been proposed during previous legislative sessions by the Department, including in year 2001 as part of the Nursing Home Quality Improvement Act, to establish a Criminal History Databank for healthcare employers to assess and verify the criminal history of potential or current direct care employees. While this legislation has failed to secure passage by the Senate and Assembly, the Department has continued discussions over the past few years with other State agencies on the best means to facilitate the criminal background checks of direct caregivers working in nursing homes and home care agencies. This regulatory proposal is the result of those discussions.

#### Federal Standards:

Section 124 of federal Public Law (PL) 105-277, enacted in 1998, permits nursing facilities (NFs) and home health care agencies (HHAs) to request from the FBI fingerprint-based national criminal history checks for employees or job applicants for positions involving direct patient care. This proposed regulation would mandate all such entities in New York State to conduct said criminal history checks.

#### Compliance Schedule:

The proposed regulations will be effective 45 days after publication of a Notice of Adoption in the *New York State Register*.

### **Regulatory Flexibility Analysis**

#### Effect on Small Business and Local Governments:

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

The new regulation requires all prospective employees, other than those licensed under Title 8 of the Education Law or Article 28-D of the Public Health Law, providing direct care to residents or patients in nursing homes or through a home care agency to undergo a FBI criminal history check. Nursing home and home care operators must secure fingerprint cards and specified information/statements from such prospective employees necessary for initiating a criminal history record check. The Department shall submit the information to the U.S. Attorney General for a full search of the records of the FBI. The operator must also inform the individual of the requirement and process for conducting a criminal history record check, and is prohibited from hiring any individual whose history check reveals a disqualifying offense.

These regulations will impact local governments which operate nursing homes or home care services agencies.

#### Compliance Requirements:

As part of an application for employment or use agreement, this regulation requires nursing home and home care operators to obtain all information necessary for the purpose of initiating a criminal history record check, including a fingerprint card. The operator shall submit the fingerprint card, the fee for such record check, and all other required information to the Department, which shall then submit the same to the U.S. Attorney General's Office for its full search of the records of the FBI.

After receiving the criminal history record check from the Attorney General, the Department is directed promptly to forward the information to the operator.

Operators must inform any prospective employee of the criminal history record check process required by this regulation, and that a prospective employee may withdraw his/her application for employment at any time, without prejudice, prior to the operator's decision on employment. The operator is prohibited from hiring any individual whose history check reveals a disqualifying offense as defined within proposal, and must provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check.

#### Professional Services:

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

#### Compliance Costs:

The cost to obtain the FBI criminal history check is currently \$24 per check, and employer administrative costs associated with obtaining the fingerprint cards and such required information for the FBI search are approximately \$13 per check.

The \$24 fee and facility/agency administration costs shall not be included as an allowable cost on any cost report or rate appeal filed by the operator, and the operator shall separately identify all such costs on any report of costs submitted to the Department for the purpose of determining the facility's rate of reimbursement. Operators also may not seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this section.

#### Economic and Technical Feasibility Assessment:

The proposed regulation would impose no compliance requirements which would raise technological or feasibility issues.

#### Minimizing Adverse Impact:

The proposed regulations attempt to minimize the adverse economic impact on all providers. Exemption of small businesses and local governments from the proposed regulations would not serve the purpose of assuring quality care and services to all nursing home residents and those who receive home care. The Department considered the approaches suggested in Section 202-b(1) of the State Administrative Procedure Act and found them inapplicable, and determined that all nursing homes and home care agencies should comply with these new requirements in order to protect all of the people served by such providers.

#### Small Business and Local Government Input:

Over the past few years, the Department has had numerous discussions with the healthcare industry, local government and other interested stakeholders regarding the issues involved in requiring criminal history record checks of healthcare workers. Small businesses and local governments are represented in these groups.

### **Rural Area Flexibility Analysis**

#### Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

As part of an application for employment or use agreement, this regulation requires nursing home and home care operators to obtain all information necessary for the purpose of initiating a criminal history record check, including a fingerprint card. The operator shall submit the fingerprint card, the fee for such record check, and all other required information to the Department, which shall then submit the information to the U.S. Attorney General's Office for its full search of the records of the FBI.

After receiving the criminal history record check from the Attorney General, the Department is directed promptly to forward the information to the operator.

Operators must inform any prospective employee of the criminal history record check process required by this regulation, and that a prospective employee may withdraw his/her application for employment at any time, without prejudice, prior to the operator's decision on employment. The operator is prohibited from hiring any individual whose history check reveals a disqualifying offense as defined in the proposal, and must provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check.

**Professional Services:**

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

**Compliance Costs:**

The cost to obtain the FBI criminal history check is currently \$24 per check, and employer administrative costs associated with obtaining the fingerprint cards and such required information for the FBI search are approximately \$13 per check.

The \$24 fee and facility/agency administrative costs shall not be included as an allowable cost on any cost report or rate appeal filed by the operator, and the operator shall separately identify all such costs on any report of costs submitted to the Department for the purpose of determining the facility's rate of reimbursement. Operators also may not seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this section.

**Minimizing Adverse Impact:**

The proposed regulations attempt to minimize the adverse economic impact on all providers. Exemption of rural area providers from the proposed regulations would not serve the purpose of assuring quality care and services to all nursing home residents and those who receive home care. The Department considered the approaches suggested in Section 202-bb(2) of the State Administrative Procedure Act and found them inapplicable, and determined that all nursing homes and home care agencies should comply with these new requirements in order to protect all of the people served by such providers.

**Opportunity for Rural Area Participation:**

Over the past few years, the Department has had numerous discussions with the healthcare industry, local government and other interested stakeholders regarding the issues involved in requiring criminal history record checks of healthcare workers. These groups have member from rural areas.

**Job Impact Statement**

No Job Impact Statement is needed. The proposal will not have a substantial adverse impact on jobs and employment opportunities.

This regulation will not impact the existing employed direct care workforce in nursing homes and home care services agencies, as it applies only to future prospective employees. It is anticipated the number of all future prospective non-licensed staff of such nursing homes and home care services agencies who are to provide direct care or supervision to residents/clients will be reduced to the degree that the criminal history check reveals a criminal record barring employment.

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## Department of Law

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

**Senior Residential Communities**

**I.D. No.** LAW-07-04-00012-P

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

**Proposed action:** Amendment of Part 25 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(6)(a) and (b)

**Subject:** Senior residential communities.

**Purpose:** To insure that prospective residents in senior residential communities receive material disclosures regarding all significant aspects of such residences.

**Substance of proposed rule (Full text is posted at the following State website: [www.oag.state.ny.us](http://www.oag.state.ny.us)):** The proposed regulations will govern mandatory disclosures in offerings of occupancy in Senior Residential Communities "Residences"). These Residences are generally characterized by (1) restrictions limiting occupancy to senior citizens in good health, (2) payment of a substantial entrance fee as a prerequisite for admission in the Residence, and (3) execution of a residency agreement which enumerates the terms and conditions of occupancy in the Residence. Residents generally do not acquire an ownership interest in the Residence despite the payment of the entrance fee, making this type of residential organization significantly different from cooperative, condominium or homeowners association organization. Where ownership is not offered, residents' interest in the Residence most closely resembles a leasehold interest, although a significant distinguishing factor is that residents often may select an entrance fee option that offers a substantial percentage refund of the entrance fee upon termination of occupancy. Residents are generally required to pay a monthly service fee in addition to the entrance fee.

Typically, Residences provide some health-related services, but are not licensed to provide the level of care provided at nursing homes or assisted living communities. Thus, residents are generally required to pass an entrance physical examination or otherwise satisfy management that they are able to provide for their own health care needs on a day-to-day basis. In many instances, a residency agreement may be terminated by the Residence if a resident's physical or mental health requires a higher level of care.

The regulation will be enacted to insure that prospective residents of Senior Residential Communities receive material disclosures prior to executing residency agreements, making deposits or paying entrance fees, or taking occupancy. The disclosures must be presented in the form of an Offering Prospectus, which must conform to format and content requirements set forth in the regulation, and must be submitted according to the procedure described in the regulation. The structure of the regulation follows those regulations governing condominiums, cooperatives, and homeowners associations, and has analogous requirements for the submission of amendments, certifications, and descriptions of property specifications and/or building condition. However, if the Residence is organized as a coop, condominium, or home owners association, it must comply with all of the applicable requirements in Parts 20, 21, or 22, respectively, as well as the applicable requirements of Part 25. Additionally, the regulation defines specific terms such as "Senior Residential Community", "entrance fee", and "residency agreement."

Sponsors of Senior Residential Communities must disclose, among other things, the following:

- the amount of entrance fees, the amount of deposits, monthly fees, and various entrance fee options, including refund options.
- annual budgets for the operation, annual certified financial statements, a statement of the tax implications of living in a Residence.
- the procedure to reserve units and establish residency, including the proper procedure for maintaining deposits in escrow as well as all alternatives to the use of escrow accounts (e.g., surety bonds or letters of credit).
- the specific residential services and amenities provided, including food service and meal plans, housekeeping and laundry services, etc. The disclosure must indicate which services are included in the price of the entrance or monthly service fees, and which are available at extra cost.
- the specific health-related services provided, including whether a health care facility is available on premises, whether assistance with the administration of medication is provided, whether assistance with activities of daily living is provided, etc.
- a description of all staffing information.
- the procedure for termination of residency and all restrictions, requirements, circumstances of default, etc.
- all relevant rights and obligations of both residents and Sponsor.

In addition, all pertinent documents must be included with the offering prospectus, including copies of the residency agreement, the confidential data statement, floor plans, asbestos reports, "house rules", and sponsor's engineering or architectural reports.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kenneth E. Demario, Department of Law, Investment Protection Bureau, 120 Broadway, 23rd Fl., New York, NY 10271, (212) 416-8134, e-mail: Kenneth.Demario@oag.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. General Business Law Section 352-e(6) authorizes the Attorney General to promulgate rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law.

2. Legislative Objectives. General Business Law Section 352-e requires offerors of cooperative interests in realty to provide the investing public with a prospectus or offering plan which contains the full and fair disclosure required for such investors to make an informed decision. The proposed rules will help ensure that these disclosures are full and fair.

3. Needs and Benefits. The organizational structure of senior residential communities differs from that of coops, condominiums, and homeowner associations because the interest conveyed to residents is neither an ownership interest nor a leasehold interest. Instead, residents pay a substantial entrance fee and monthly service fees for an indefinite period of occupancy. Residents must make a significant financial commitment in an unfamiliar style of transaction, which necessitates proper disclosure. As a result of this organizational structure, senior residential communities are not explicitly subject to existing regulations, although they involve the acquisition of an interest which may fluctuate in value. Offers of residence in these communities involve risks which affect the likelihood of residents receiving partial or full return of entrance fees, and the likelihood of the residence coming into existence and operating successfully, which must be disclosed under GBL § 352-e.

Typically, occupancy in senior residential communities is restricted to persons of a specified age or older. Such residents may have special needs that necessitate regulation, including health care requirements. Residents therefore must be informed as to the services provided by the sponsor, and the sponsor's licences for such services.

In the past, offering plans for senior residences submitted for filing to the Attorney General have included, on an ad hoc basis, various aspects of the existing regulations for coops and condominiums, without specifying what must be disclosed by law. This proposed Part 25 of 13 NYCRR will specify the requirements for these unique entities.

4. Costs. Since the proposed rule simply elaborates on existing requirements for the filing of offering plans, it is anticipated that there will be no additional costs to either the regulated parties or local and state governments.

5. Local Government Mandates. The proposed rule does not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of this amendment.

7. Duplication. The proposed rules will not duplicate any existing state or federal rule.

8. Alternatives. No significant alternatives were considered because there were no regulations in place for senior residential communities requiring prospective residents to pay substantial entrance fees.

9. Federal Standards. This rule does not exceed any minimum standards of the federal government for the same or similar subject.

10. Compliance Schedule. The rule will go into effect upon the filing of a Notice of Adoption in the *New York State Register*.

#### **Regulatory Flexibility Analysis**

1. Effect of rule. Small sponsoring entities will be affected by the proposed rule. It is impossible to predict how many sponsors will take part in a public offering of real estate securities, at any given time. Currently, the total number of sponsors taking part in public offerings of real estate may be as high as 16,000. In any given year, however, only a small number of these submit new plans to the Department of Law's Investment Protection Bureau. In 2002, for example, there were approximately 300 new plans submitted. For the years 2001 and 2002, there were five plans submitted for senior residences.

2. Compliance requirements. The proposed rules elaborate on the disclosure requirements set forth in General Business Law Section 352-e. The proposed regulations require no new obligations in terms of recordkeeping.

3. Professional services. When submitting offering plans, most sponsors (small businesses) retain an attorney to prepare the required disclosure. The proposed regulations require no additional professional.

4. Compliance costs. Since the proposed rules only elaborate on existing filing requirements to ensure compliance, there should be no additional cost incurred by a local government or regulated business in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. These costs will not vary based on the size or type of business.

5. Economic and technical feasibility. It should be economically and technologically feasible for small businesses and local governments to comply with the proposed regulation. The proposed rules contain no technological requirements and impose no new costs on either regulated businesses, including small businesses, or any local government.

6. Minimizing adverse impact. The proposed rules will not create an adverse impact on local government. The proposed rules will not have an adverse impact on small businesses since (a) the real estate securities offerors, including small businesses, will not face additional costs when complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

7. Small business and local government participation. In order to ensure that small businesses and local government have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

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

1. Types and estimated numbers of rural areas. The proposed rules apply uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 rural areas. However, the vast majority of the approximately 300 new offering plans submitted in 2002 came from New York City and its suburbs.

2. Reporting, recordkeeping, and other compliance requirements. The proposed rules elaborate on the disclosure requirements already set forth in General Business Law Section 352-e. There are no new reporting or recordkeeping requirements for the proposed rules. The proposed rules do not require that a small business or local government hire a professional. However, it is likely that a small business will retain an attorney to ensure compliance with the proposed rules as they already do when submitting offering plans to the Department of Law's Investment Protection Bureau.

3. Costs. Since the proposed rules only elaborate on already existing filing requirements, there will be no additional costs incurred by a regulated party in the initial compliance with the proposed rules or in the continued compliance with the proposed rules. There will be no variation in costs for entities in rural areas.

4. Minimizing adverse impact. The proposed rule will not have an adverse impact on rural areas since (a) the real estate security offerors, including those located in rural areas, will not face additional costs when

complying with the proposed rules and (b) the proposed rules only elaborate on existing filing requirements.

5. Rural area participation. To ensure that entities in rural areas have an opportunity to participate in the rule making process, a copy of the proposed rules will be sent to members of the Bar who represent sponsors of condominiums, cooperatives, home owner associations and senior residences for review and comment. A copy of the proposed rules will be posted on the website of the Attorney General of the State of New York.

## Office of Mental Retardation and Developmental Disabilities

### NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

#### Rate/Fee Setting

**I.D. No.** MRD-03-04-00002-ERP

**Filing No.** 140

**Filing date:** Jan. 30, 2004

**Effective date:** Feb. 1, 2004

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

**Emergency action taken:** Amendment of sections 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09, and 43.02

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

**Specific reasons underlying the finding of necessity:** Fiscal uncertainties precluded OMRDD from securing necessary control agency approvals to allow for timely proposal and promulgation of these amendments within the regular SAPA procedural time frames. The emergency amendments revise the rates/fees of reimbursement of the referenced facilities and services. If OMRDD did not file this emergency adoption and establish the regulatory authority to pay the revised rates and fees effective January 1, 2004 and February 1, 2004, the loss of revenues could have a deleterious effect on the fiscal viability of some providers, especially those which have smaller operations. This potential negative effect could translate into compromised services for citizens with developmental disabilities who need such services.

**Subject:** Rate/fee setting in voluntary agency operated individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services; HCBS waiver community residential habilitation services; specialty hospitals; intermediate care facilities for persons with developmental disabilities; and day treatment facilities serving persons with developmental disabilities.

**Purpose:** To revise the methodologies used to calculate rates/fees of the referenced facilities or programs for the periods of Jan. 1, 2004 to Dec. 31, 2004 and July 1, 2004 to June 30, 2005; establish trend factors to be applied within the context of the referenced reimbursement methodologies, effective Jan. 1, 2004 and Feb. 1, 2004 and add supplemental trend factor provisions governing individualized residential alternative (IRA) facilities and home and community-based (HCBS) waiver services; and ICF/DD facilities.

**Text of emergency/revised rule:** ° Paragraph 635-10.5(i)(1) - Add new subparagraphs (xix) and (xx):

(xix) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xviii) of this paragraph for the fee period July 1, 2003 to June 30, 2004 were increased in the amount of 3.12 percent. The trend factor in effect for the fee period ending June 30, 2004 shall be deemed to be increased in the amount of 3.12 percent. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section.

(xx) 3.20 percent to trend 2003-2004 costs to 2004-2005. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section. For agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

Note: Rest of paragraph is renumbered accordingly.

° Paragraph 635-10.5(i)(2) - Add new subparagraphs (xix) and (xx):

(xix) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xviii) of this paragraph for calendar year 2003 were increased in the amount of 3.12 percent. The trend factor in effect for the fee period ending December 31, 2003 shall be deemed to be increased in the amount of 3.12 percent. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section.

(xx) 3.20 percent to trend calendar 2003 costs to calendar year 2004. The application of these trend factors shall include services provided in accordance with paragraph (c)(2) of this section. For agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

Note: Rest of paragraph is renumbered accordingly.

° Clause 671.7(a)(1)(vi)(a) - Add new subclause (12):

(12) For calendar year 2004:

NYC and Nassau, Rockland, Suffolk, and Westchester Counties	\$ 29.07 per day
Rest of State	\$ 28.07 per day

Note: Rest of clause remains unchanged.

° Clause 671.7(a)(1)(xvi)(a) - Add new subclause (10):

(10) 0.00 percent from January 1, 2004 through December

31, 2004.

° Clause 671.7(a)(1)(xvi)(b) - Add new subclause (10):

(10) 0.00 percent from July 1, 2004 through June 30, 2005.

° Paragraph 680.12(d)(3) - Add new subparagraph (xvii):

(xvii) 3.02 percent for 2004.

° Subparagraphs 681.14(g)(1)(x)-(xiii) are amended as follows:

(x) Effective February 1, 2003, facilities will receive an amount that they would have received if the trend factor in subparagraph (ix) of this paragraph for the rate period of July 1, 2002 to June 30, 2003 were increased in the amount of 3.0 percent. The trend factor in effect for the rate period ending June 30, 2003 shall be deemed to be increased in the amount of 3.0 percent; [and]

(xi) 3.43 percent for 2002-2003 to 2003-2004 [.] ;

(xii) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xi) of this paragraph for the rate period of July 1, 2003 to June 30, 2004 were increased in the amount of 3.12 percent. The trend factor in effect for the rate period ending June 30, 2004 shall be deemed to be increased in the amount of 3.12 percent; and

(xiii) 3.20 percent for 2003-2004 to 2004-2005.

° Subparagraphs 681.14(g)(2)(x)-(xiii) are amended as follows:

(x) Effective February 1, 2003, facilities will receive an amount that they would have received if the trend factor in subparagraph (ix) of this paragraph for calendar year 2002 were increased in the amount of 3.0 percent. The trend factor for the rate year ending December 31, 2002 shall be deemed to be increased in the amount of 3.0 percent; [and]

(xi) 3.43 percent for 2002 to 2003 [.] ;

(xii) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xi) of this paragraph for calendar year 2003 were increased in the amount of 3.12 percent. The trend factor for the rate year ending December 31, 2003 shall be deemed to be increased in the amount of 3.12 percent; and

(xiii) 3.20 percent for 2003 to 2004.

° Subparagraphs 681.14(g)(3)(xviii)-(xxi) are amended as follows:

(xviii) Effective February 1, 2003, facilities will receive an amount that they would have received if the trend factor in subparagraph (xvii) of this paragraph for the rate period of July 1, 2002 to June 30, 2003 were increased in the amount of 3.0 percent. The trend factor in effect for the rate period ending June 30, 2003 shall be deemed to be increased in the amount of 3.0 percent; [and]

(xix) 3.43 percent for 2002-2003 to 2003-2004 [.] ;

(xx) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xix) of this paragraph for the rate period of July 1, 2003 to June 30, 2004 were increased in the amount of 3.12 percent. The trend factor in effect for the rate period ending June 30, 2004 shall be deemed to be increased in the amount of 3.12 percent; and

(xxi) 3.20 percent for 2003-2004 to 2004-2005.

- Subparagraphs 681.14(g)(4)(xviii)-(xxi) are amended as follows:

(xviii) Effective February 1, 2003, facilities will receive an amount that they would have received if the trend factor in subparagraph (xvii) of this paragraph for calendar year 2002 were increased in the amount of 3.0 percent. The trend factor for the rate year ending December 31, 2002 shall be deemed to be increased in the amount of 3.0 percent; [and]

(xix) 3.43 percent for 2002 to 2003 [.] ;

(xx) Effective February 1, 2004, facilities will receive an amount that they would have received if the trend factor in subparagraph (xix) of this paragraph for calendar year 2003 were increased in the amount of 3.12 percent. The trend factor for the rate year ending December 31, 2003 shall be deemed to be increased in the amount of 3.12 percent; and

(xxi) 3.20 percent for 2003 to 2004.

- Subparagraph 690.7(d)(6)(i) - Add new clause (p):

(p) 0.00 percent for 2003-2004 to 2004-2005, including those facilities in Regions II and III designated or elected to a Region I reporting year-end and fiscal cycle and excluding those facilities in Region I designated or elected to a Region II or III reporting year-end and fiscal cycle in accordance with subparagraph (b)(1)(iv) of this section.

- Subparagraph 690.7(d)(6)(ii) - Add new clause (p):

(p) 0.00 percent for 2003 to 2004, including those facilities in Region I designated or elected to Region II or III and excluding those facilities in Region II or III designated or elected to Region I in accordance with subparagraph (b)(1)(iv) of this section.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of emergency/proposed rule making was published in the *State Register* on January 21, 2004, I.D. No. MRD-03-04-00002-EP. The emergency rule will expire March 29, 2004.

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 635-10.5(i)(1), (2) and 681.11(g)(1)-(4).

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Acting Director, Regulatory Affairs Unit, Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Albany, NY 12229, (518) 474-1830; e-mail: barbara.brundage@omr.state.ny.us

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

**Public comment will be received until:** 30 days after publication of this notice.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an environmental impact statement will not be prepared.

#### Revised Regulatory Impact Statement

##### 1. Statutory Authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09.

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OMRDD.

2. Legislative Objectives: These emergency/revised amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law. The enactment of these emergency/revised amendments will ensure the funding to voluntary agency providers of the following services:

a. Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5).

b. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

c. Specialty Hospitals (amendments to section 680.12).

d. Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) (amendments to section 681.14).

e. Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7).

This funding is necessary in order to enable voluntary agencies that operate the above facilities to maintain services in the areas of care, treatment, rehabilitation, and training of persons with mental retardation and developmental disabilities.

3. Needs and Benefits: From the time of their inception and implementation in New York State, OMRDD has provided funding for the above referenced facilities and services. Such funding is necessary to assure the continued delivery of services to persons with developmental disabilities. The emergency/revised amendments are primarily concerned with identifying the respective trend factors applicable to these facilities and services, effective January 1, 2004 and February 1, 2004.

Fiscal uncertainties precluded OMRDD from securing necessary control agency approval to allow for previous proposal and timely promulgation of these amendments within the regular SAPA procedural time frames. The loss of revenues, if OMRDD did not file these emergency/revised amendments and establish the regulatory authority to reimburse providers of the above referenced facilities and services at revised rates/fees for the periods beginning January 1, 2004, and July 1, 2004, could have a negative effect on the fiscal viability of some providers, especially those which have smaller operations. Revenues would also be lost if the emergency/revised amendments were not adopted, effective February 1, 2003, to provide a supplemental trend factor of 3.12 percent for Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services and for Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD). This potentially negative effect could translate into compromised services for citizens with developmental disabilities.

##### 4. Costs:

a. Costs to the Agency and to the State and its local governments:

◦ For Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite, and prevocational services for the approximately 57,400 persons receiving such services as of December 2003.

The original emergency/proposed amendments implement a trend factor of 3.20 percent. The estimated cost for implementation the trend factor contained in the emergency/proposed amendments on an annual aggregate basis is approximately \$44.0 million for the fee periods beginning January 1, 2004 and July 1, 2004. This represents approximately \$21.7 million in State share and \$20.4 million in federal funds. The estimated cost of the 3.20 percent trend factor to local governments is approximately \$1.9 million on an annual aggregate basis and divided among the counties.

The amendments contained in this emergency/revised rule making add new subparagraphs 635-10.5(i)(1)(xix) and (i)(2)(xix) to establish a supplemental trend factor of 3.12 percent for the immediately preceding fee periods. Effective February 1, 2004, providers of these services will receive an amount that they would have received if the trend factor in effect for the fee periods ending December 31, 2003 and June 30, 2004 were increased by 3.12 percent. The estimated cost for implementation of this supplemental trend factor contained in the emergency/revised amendments on an annual aggregate basis is approximately \$40.0 million. This represents approximately \$19.7 million in State share and \$18.5 million in federal funds. The estimated cost of the 3.12 percent supplemental trend factor to local governments is approximately \$1.8 million on an annual aggregate basis and divided among the counties.

◦ For Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which are providing services to approximately 1,900 persons as of December 2003. The amendments implement a trend factor of zero percent. There are therefore no costs attributable to this amendment, either to the State or to local governments.

The amendments to section 671.7 also update the SSI per diem allowances consistent with levels determined by the Federal Social Security Administration. There are no additional costs attributable to this conforming amendment, either to the State or to local governments.

◦ For Specialty Hospitals (amendments to section 680.12). New York State funds the one such facility currently in operation. The original emergency/proposed amendments implement a trend factor of 3.02 percent. The estimated total cost for implementation of this trend factor on an aggregate annualized basis is approximately \$437,000 for the period beginning January 1, 2004. This represents approximately \$218,500 in State share and

\$218,500 in federal funds. There are no costs to local governments as a result of the amendments.

◦ For Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2003, there were 623 voluntary-operated sites certified by OMRDD to provide ICF/DD services in New York State. The original emergency/proposed amendments implement a trend factor of 3.20 percent. The estimated cost for implementation of the trend factor contained in the amendments on an annual aggregate basis is approximately \$22.8 million for the rate periods beginning January 1, 2004 and July 1, 2004. This represents approximately \$11.4 million in State share and \$11.4 million in federal funds.

The amendments contained in this emergency/revised rule making add new subparagraphs 681.14(g)(1)(xii); (g)(2)(xii); (g)(3)(xx) and (g)(4)(xx) to establish a supplemental trend factor of 3.12 percent for the immediately preceding rate periods. Effective February 1, 2004, ICF/DD facilities will receive an amount that they would have received if the trend factor in effect for the rate periods ending December 31, 2003 and June 30, 2004 were increased by 3.12 percent. The estimated cost for implementation of this supplemental trend factor contained in the emergency/revised amendments on an annual aggregate basis is approximately \$20.4 million. This represents approximately \$10.2 million in State share and \$10.2 million in federal funds.

There are no costs to local governments resulting from emergency/proposed amendments to section 681.14.

◦ For Day Treatment facilities serving persons with developmental disabilities (amendments to section 690.7). As of December 2003, there were 206 sites certified by OMRDD to provide day treatment services statewide. The amendments implement a trend factor of zero percent for the periods beginning January 1, 2004 and July 1, 2004. There is therefore no fiscal impact, State or federal, associated with the amendments. There are also no costs to local governments resulting from these amendments.

Pursuant to the Social Services Law, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. As previously discussed on a facility/service specific basis, an unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver services (section 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law.

In all instances, these estimated cost impacts have been derived by applying the trend factor provisions of the amendments within the context of the respective reimbursement methodologies to the providers of services certified or authorized as of December, 2003.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The emergency amendments are necessary to maintain funding of the above cited facilities at revised levels of reimbursement in effect as of January 1, 2004 and February 1, 2004. To the extent that the amendments provide trend factor increases to the providers of the various facilities and services, the amendments will result in increased funding to provider agencies.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: No additional paperwork will be required by the amendments.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives: The current course of action as embodied in these amendments reflects what OMRDD believes to be a fiscally prudent, cost-effective reimbursement of the facilities and developmental disabilities services in question. No alternatives to these trend factors were considered. There is no alternative to emergency adoption that would allow for prompt, timely implementation of the trend factor provisions contained in the original emergency/proposed and the emergency/revised amendments.

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

10. Compliance schedule: The original emergency/proposed rule was effective January 1, 2004. The emergency/revised amendments are adopted effective February 1, 2004. OMRDD had concurrently filed the rule as a Notice of Proposed Rule Making, and it intends to finalize the emergency/revised rule as soon as possible within the time frames man-

dated by the State Administrative Procedure Act. The amendments are primarily concerned with revising the various reimbursement methodologies to implement trend factor adjustments for facilities and providers of services to persons with developmental disabilities. These amendments do not impose any new requirements with which regulated parties are expected to comply.

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

1. Effect on small business: These emergency/revised regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

◦ Individualized Residential Alternative (IRA) facilities, and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite and prevocational services for the approximately 57,400 persons receiving such services as of December 2003.

◦ Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). Currently, OMRDD funds voluntary operated community residence facilities which serve approximately 1,900 persons.

◦ Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2003, there were 623 voluntary-operated sites certified by OMRDD to provide ICF/DD services in New York State.

◦ Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7). As of December 2003, there were 206 voluntary-operated sites certified by OMRDD to provide day treatment services statewide.

The OMRDD has determined, through a review of the certified cost reports, that the organizations which operate the above referenced facilities or provide the developmental disabilities services employ fewer than 100 employees at the discrete certified or authorized sites and would, therefore, be classified as small businesses.

There is only one Specialty Hospital (amendments to section 680.12) certified to operate in New York State. It employs more than 100 persons and would therefore not be considered a small business as contemplated under the State Administrative Procedure Act (SAPA).

The emergency/revised amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will continue to provide appropriate funding for small business providers of developmental disabilities services. Further, OMRDD expects that the amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements. In fact, the provisions contained in the amendments will either have no fiscal impact, or they will provide for increased reimbursements to small business providers of services, due to the application of the trend factors established by the amendments. Specific impacts of the increased funding are set forth in the accompanying Regulatory Impact Statement as costs to State and Federal government.

Pursuant to the Social Services Law, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. As discussed on a facility/service specific basis in the Regulatory Impact Statement, an unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver services (section 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law. For these people receiving HCBS waiver services, the implementation of the 3.20 percent trend factor contained in the original emergency/proposed amendments will result in a county share of approximately \$1.9 million in the aggregate. The emergency/revised amendments establish a supplemental trend factor of 3.12 percent which will result in a county share of approximately \$1.8 million in the aggregate. These aggregate cost impacts are divided among all the counties.

2. Compliance requirements: There are no additional compliance requirements for small businesses or local governments resulting from the implementation of these amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The amendments do not alter this requirement. Therefore, no additional professional services are required as a result of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these amendments.

5. Economic and Technological Feasibility: The original emergency/proposed and the emergency/revised amendments are concerned with rate/fee setting in the affected facilities or services, and only revise the reimbursement methodologies which describe the ways in which OMRDD calculates the appropriate reimbursement of such facilities and services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The purpose of these amendments is to allow OMRDD to reimburse providers of the referenced services at revised levels in effect as of January 1, 2004 and February 1, 2004. Specifically, these amendments establish trend factor adjustments for the regulations governing the reimbursement of the referenced facilities/services for the rate/fee periods beginning January 1, 2004 and July 1, 2004. The trend factor provisions will either have no impact on funding of small business providers of services, or will have positive impacts resulting from increased reimbursements to the providers.

As previously stated, the amendments will only have a relatively minimal fiscal impact on local governments due to the implementation of the 3.20 percent trend factor and the 3.12 percent supplemental trend factor contained in the amendments for reimbursements to HCBS waiver services.

These amendments impose no adverse economic impact on regulated parties, and no compliance response. The local government share of Medicaid funded programs is established by State law. Therefore, the approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small Business and Local Government Participation: To the extent that information regarding provider reimbursement has been available, OMRDD has shared and discussed such information with provider representatives.

Further, OMRDD has complied with relevant Federal notice requirements concerning changes in certain Medicaid funded facilities and services. Thus, known information concerning regulatory amendments involving changes to the reimbursement methodology of Day Treatment facilities was published in a Public Notice that appeared in the State Register prior to the emergency adoption of these amendments.

In addition, OMRDD is required to hold public hearings only on those amendments to section 671.7 as they may affect reimbursement of the room and board components of the community residence fees. However, it has been OMRDD's longstanding practice to enlarge the scope of these scheduled public hearings so as to include all of the amendments contained in this rule making, as well as to provide an opportunity to comment on any aspect of the various rate and fee setting methodologies. These hearings were previously scheduled to be held on March 8, 2004 (Buffalo), March 10, 2004 (Albany), and March 12, 2004 (NYC).

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

A Revised Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The amendments are primarily concerned with providing necessary revisions to the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

#### **Job Impact Statement**

A Revised Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with providing revisions to the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments establish trend factors to be applied within the context of reimbursement methodologies for the various facility/program types. These trend

factor increases are not expected to result in changes in reimbursements significant enough to affect staffing patterns within the regulated facilities or programs. They will, however, not have any adverse impacts on jobs or employment opportunities in New York State.

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

The agency received no public comment.

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## Division of Parole

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

#### **Parole Revocation Process**

**I.D. No.** PAR-07-04-00003-P

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

**Proposed action:** Amendment of sections 8002.6(a), (c) and (d); 8004.3(a), (c), (d), (e), (g) and (h); 8005.20(c)(1)-(4) and (6); and 8005.20(g) and (h) of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 259(2) and 259-c(11)

**Subject:** Redefining a time assessment; the process for declaring and canceling the delinquency of parole violators; final parole revocation determinations; and the process for re-releasing adjudicated parole violators.

**Purpose:** To make the process by which parole, conditional release and post-release supervision is revoked more expedient and efficient. In addition, the proposed rule changes will enhance the process by which adjudicated parole violators are re-released to supervision after completing the time assessments imposed by administrative law judges after the completion of final revocation hearings.

**Substance of proposed rule (Full text is posted at the following State website: [www.parole.state.ny.us](http://www.parole.state.ny.us)):** On January 23, 2003, the New York State Board of Parole promulgated new rules governing the parole revocation process and the process utilized to effect the re-release of individuals whose release status was revoked after a final revocation hearing conducted pursuant to section 259-i(3) of the Executive Law. Set forth below is a summary of the rules that have been adopted by the Board of Parole and the manner in which these rules will affect the practices of the Board. Through this rule making, the Board of Parole will:

1) amend 9 NYCRR § 8004.3(a) so as to confer upon the Division's Area Supervisors the authority to declare an alleged violator delinquent;

2) amend 9 NYCRR § 8004.3(e) to confer upon the Division's Administrative Law Judges the authority to cancel a declaration of delinquency prior to taking testimony at a final revocation hearing. This authority may be exercised in all cases except for those cases where the alleged violator is under supervision for an Article 125 offense (homicide), a sex offense (Article 130 offenses, Penal Law § 255.25 & Article 263 offenses), an Article 135 offense (kidnapping and related offenses);

3) amend 9 NYCRR § 8005.20(c) to confer upon the Division's Administrative Law Judges the authority to render final decisions in all revocation cases except for those cases where the adjudicated violator is under supervision for an Article 125 offense (homicide), a sex offense (Article 130 offenses, Penal Law § 255.25 & Article 263 offenses), an Article 135 offense (kidnapping and related offenses);

4) amend 9 NYCRR § 8002.6 to change the parole violator re-release procedure. By this proposal, adjudicated violators will be re-released upon expiration of the time assessment unless significant information related to the violator's incarceration authorizes the Board to conduct a parole violator reappearance interview. This proposal applies to violators whose time assessments expire in either State or local custody;

5) amend 9 NYCRR § 8005.20(c)(2) so as to allow for a revoke & restore disposition to the Willard Drug Treatment Campus when misdemeanor charges are pending against the adjudicated violator. This proposal will make the Willard program available to violators who are currently ineligible for this type of disposition only by reason of a pending misdemeanor charge.

**Text of proposed rule and any required statements and analyses may be obtained from:** Terrence X. Tracy, Counsel, Division of Parole, 97

Central Ave., Albany, NY 12206, (518) 473-5671, e-mail: tracy@ parole.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 259(2) of the New York Executive Law authorizes the Chairman of the New York State Board of Parole to promulgate regulations as are necessary and proper for the efficient operation of the Division of Parole. In addition, Executive Law § 259-c(11) empowers the Board of Parole to make rules governing the conduct of its work. Finally, pursuant to sections 259-c(6) and 259-i(3) of the Executive Law, the Legislature has conferred upon the Board of Parole the exclusive authority to revoke the parole, conditional release or post-release supervision status of any person, as well as their re-release to supervision.

2. **Legislative Objectives:** Executive Law § 259-i(3) sets forth time frames for completing the parole revocation process, as well as a mechanism for restoring adjudicated violators to supervision upon satisfaction of the penalty imposed after completion of the final revocation hearing. The legislative construct established by sections 259(2), 259-c(6), (11) and 259-i(3) of the Executive Law, provides a framework within which the Board of Parole can revoke an individual's release status, while affording the Board sufficient flexibility by way of its rule making powers to effect procedural changes deemed necessary to promote an efficient revocation process, including a violator's re-release to supervision. The proposed rule changes, as enacted by the Board of Parole, are consistent with the governing legislative scheme as they provide for enhanced efficiencies in the process utilized for revoking an individual's release status and re-releasing the violator to supervision.

Executive Law § 259-i(3)(f)(x) provides that the Board may waive the requirement that an adjudicated violator make a personal appearance before the Board when it determines the violator's suitability for re-release. In practice, the re-release of most violators occurs after expiration of the delinquent time assessment without the Board having required a personal appearance. In enacting Executive Law § 259-i(3)(f)(x), the Legislature allowed for the re-release of violators to supervision as soon as they are legally eligible for such re-release. By abolishing the current language of 9 N.Y.C.R.R. § 8002.6(c) and (d) and promulgating entirely new language, this proposed rule change will enhance the Board's ability to ensure that appropriate violators are re-released to supervision in a manner consonant with Executive Law § 259-i(3)(f)(x).

3. **Needs and Benefits:** The proposed rule changes are necessary to expedite the parole violation process and to ensure the timely re-release of appropriate parole violators from custody after they have completed the delinquent time assessment imposed by the Board of Parole. In accordance with Executive Law § 259-i(3)(b), parole violators are incarcerated in the county or city in which their arrest on the alleged violation occurred. This results in the violator being lodged in a local correctional facility pending the completion of the final parole revocation hearing. If after a preliminary hearing it is determined that there is probable cause to believe the alleged violator has violated one or more of the conditions of his or her release in an important respect, Executive Law § 259-i(3)(d) requires that the Board's rules provide for: (1) declaring such person to be delinquent as soon as practicable, 2) requiring reasonable and appropriate action to make a final determination with respect to the alleged violation, or 3) ordering such person to be restored to supervision under such circumstances as it may deem appropriate. The rule changes proposed with respect to 9 N.Y.C.R.R. § 8004.3(a), (c), (d), (e) and (f) will provide for an expeditious declaration of delinquency and enhance the Division's ability to complete final revocation hearings without the unnecessary delay occasioned by requiring the Board's involvement at this stage of the revocation process.

With respect to the rule changes proposed by the Board relative to 9 N.Y.C.R.R. § 8005.20, the current provisions of this regulation limit the ability of the administrative law judge who presides over the final revocation hearing to impose a final disposition. Therefore, for certain types of violators, the presiding administrative law judge can only submit a recommended penalty to the Board of Parole. The current practice under 9 N.Y.C.R.R. § 8005.20 fails to infuse a desired element of finality to the revocation process upon completion of the final hearing. Moreover, under

the current language of the subject regulation, the Board is required to expend needless time reviewing the recommendation and attendant record before determining the appropriate penalty.

The proposed changes 9 N.Y.C.R.R. § 8005.20 will reduce the amount of time that parole violators spend serving their time assessments in local jails while their cases are pending before the Board of Parole for a final determination as to the appropriate penalty. In addition, by infusing an element of finality to the disposition at the conclusion of the final revocation hearing, the adjudicated violator, the victim of the violative behavior, if any, and the New York State Department of Correctional Services will know the precise amount of time for which the violator is being returned to state custody. The Board has determined that only those violators serving sentences for felony offenses under articles 125, 130, 135 or 263 of the Penal Law or section 255.25 thereof warrant review by the Board after a final revocation hearing for the purpose of determining the appropriate penalty.

As for the rule changes proposed to 9 N.Y.C.R.R. § 8002.6, Executive Law § 259-i(3)(f)(x) provides that the Board may waive the requirement that a violator make a personal appearance before the Board at the time it the violator's suitability for re-release. In practice, the re-release of most violators occurs after expiration of the delinquent time assessment without the Board having required a personal appearance. In enacting Executive Law § 259-i(3)(f)(x), the Legislature allowed for the re-release of violators to supervision as soon as they are legally eligible for such re-release. By redefining what constitutes a "time assessment" and replacing the current language of 9 N.Y.C.R.R. § 8002.6(c) and (d) with entirely new language, this proposed rule change will enhance the Board's ability to ensure that appropriate violators are re-released to supervision in a manner consonant with Executive Law § 259-i(3)(f)(x).

Overall, the proposed rule changes will foster the swift initiation and completion of revocation hearings, reduce the time it takes to return adjudicated parole violators to state custody and institute a more expeditious process for re-releasing parole violators to supervision when appropriate, irrespective of their place of confinement, *i.e.*, local custody or state prison.

4. **Costs:** These proposed regulatory changes will not impose any costs beyond those already experienced.

5. **Paperwork:** These regulatory changes do not impose any new or additional paperwork requirements on regulated parties.

6. **Local Government Mandate:** These regulatory changes do not impose any obligations on local governments.

7. **Duplication:** These new regulations will not duplicate any existing state or federal rule.

8. **Viable Alternatives:** The Division and the Board have already taken all measures short of regulatory changes to improve the efficiency of the parole violation process and to lessen the burdens on localities associated with the housing parole violators in local jails. There are no alternative means by which the Division and Board of Parole can achieve the results identified in paragraph 3, *supra*.

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

10. **Compliance Schedule:** The Division intends to implement these rules within thirty days from the publication of its notice of adoption.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the rule changes will have no adverse impact upon small businesses and local governments, nor do the rule changes impose any reporting, recordkeeping or other compliance requirements upon small businesses and local governments.

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

A Rural Area Flexibility Analysis is not being submitted with this notice, for the rule changes will have no adverse impact upon rural areas, nor do the rule changes impose any reporting, recordkeeping or other compliance requirements upon rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not being submitted with this notice, for the rule changes will have no adverse impact upon jobs or employment opportunities, nor do the rule changes impose any reporting, recordkeeping or other compliance requirements upon employers.

## Public Service Commission

### NOTICE OF ADOPTION

#### Deferral Accounting by Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-09-03-00015-A  
**Filing date:** Jan. 30, 2004  
**Effective date:** Jan. 30, 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 01-M-1958 approving Consolidated Edison Company of New York, Inc.'s request for deferral authorization of certain interference costs.

**Statutory authority:** Public Service Law, sections 5(b), (c), 65(1), 66 and 80

**Subject:** Request for deferral accounting.

**Purpose:** To defer certain expenses associated with interference work.

**Substance of final rule:** The Commission authorized Consolidated Edison Company of New York, Inc. to defer \$32.9 million of non-World Trade Center-related electrical interference costs for the period September 12, 2001 through December 31, 2002 and to defer \$11.4 million of non-World Trade Center-related electrical interference costs for 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. (01-M-1958SA4)

### NOTICE OF ADOPTION

#### Calculation of Franchise Fees by Cablevision of Rockland/Ramapo Inc. and the Village of Montebello

**I.D. No.** PSC-18-03-00007-A  
**Filing date:** Jan. 30, 2004  
**Effective date:** Jan. 30, 2004

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

**Action taken:** The commission, on Dec. 17, 2003, adopted an order in Case 99-V-0578 granting Cablevision of Rockland/Ramapo, Inc. a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

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

**Subject:** Waiver of 9 NYCRR section 595.1(o)(2).

**Purpose:** To allow Cablevision of Rockland/Ramapo, Inc. and the Village of Montebello to exclude the amount of franchise fees collected from subscribers from inclusion in the company's calculation of gross receipts.

**Substance of final rule:** The Commission approved a request by Cablevision of Rockland/Ramapo, Inc. for a waiver of Section 595.1(o)(2) pertaining to the calculation of franchise fees in the Village of Montebello, Rockland County, 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. (99-V-0578SA1)

### NOTICE OF ADOPTION

#### Lease of Real Property by The Brooklyn Union Gas Company and Consolidated Edison Company of New York, Inc.

**I.D. No.** PSC-26-03-00021-A  
**Filing date:** Jan. 28, 2004  
**Effective date:** Jan. 28, 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-0865, allowing The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KeySpan) to extend its lease agreement with Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, sections 5(b), (c), 65(1), 66(1), (2), (5), (8), (9), (10), (11), (12) and 70

**Subject:** Leasing of real property.

**Purpose:** To renew a lease and approve the accounting and rate treatment for the transaction.

**Substance of final rule:** The Commission approved a sublease and lease renewal for a portion of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's Customer Office, located at 89-67 162nd Street, Jamaica, to Consolidated Edison Company of New York, Inc. and approved the accounting and rate treatment associated with the transaction.

**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-0865SA1)

### NOTICE OF ADOPTION

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

**I.D. No.** PSC-39-03-00018-A  
**Filing date:** Jan. 30, 2004  
**Effective date:** Jan. 30, 2004

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

**Action taken:** The commission, on Dec. 17, 2003, adopted an order in Case 02-V-0058 granting Cablevision of Wappingers Falls, Inc. a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the calculation of franchise fees.

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

**Subject:** Waiver of 9 NYCRR section 595.1(o)(2).

**Purpose:** To permit Cablevision of Wappingers Falls, Inc. to exclude the amount of franchise fees collected in the Town of Haverstraw.

**Substance of final rule:** The Commission approved a request by Cablevision of Wappingers Falls, Inc. for a waiver of Commission rules to permit exclusion of franchise fee collections from calculation of gross receipts for the purpose of determining the franchise fee to be paid to the Town of Haverstraw, 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-V-0058SA1)

### NOTICE OF ADOPTION

#### Property Transfer by Niagara Mohawk Power Corporation

**I.D. No.** PSC-42-03-00011-A

**Filing date:** Jan. 29, 2004

**Effective date:** Jan. 29, 2004

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

**Action taken:** The commission, on Dec. 17, 2003, adopted an order in Case 03-M-1374 approving with conditions Niagara Mohawk Power Corporation's (Niagara Mohawk) request to transfer the James A. O'Neill Office Building and underlying realty to 1304 Buckley Road Associates.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of property.

**Purpose:** To allow Niagara Mohawk to transfer property.

**Substance of final rule:** The Commission authorized Niagara Mohawk Power Corporation to transfer certain land, improvements and personal property to 1304 Buckley Road Associates, and determined that ratepayers and shareholders shall share the resulting loss based on a 50/50 ratio, 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-1374SA1)

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

#### Intercarrier Agreement between Verizon New York Inc. and MCImetro Access Transmission Services, LLC

**I.D. No.** PSC-07-04-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and MCImetro Access Transmission Services, LLC to revise the interconnection agreement effective on March 31, 2002.

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

**Subject:** Intercarrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and MCImetro Access Transmission Services, LLC in March 2002. The companies subsequently have jointly filed amendments to clarify the provisions regarding reciprocal compensation rates. The Commission is considering these changes.

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

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

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

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

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

(96-C-0787SA6)

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

#### Intercarrier Agreement between Verizon New York Inc. and Intermedia Communications, Inc.

**I.D. No.** PSC-07-04-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Intermedia Communications, Inc. to revise the interconnection agreement effective on Oct. 18, 2003.

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

**Subject:** Intercarrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Intermedia Communications, Inc. in October 2003. The companies subsequently have jointly filed amendments to clarify the provisions regarding a unitary intercarrier compensation rate. The Commission is considering these changes.

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

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

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

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

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

(97-C-0111SA4)

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

#### Intercarrier Agreement between Verizon New York Inc. and Brooks Fiber Communications of New York, Inc.

**I.D. No.** PSC-07-04-00015-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and Brooks Fiber Communications of New York, Inc. to revise the interconnection agreement effective on Oct. 18, 2003.

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

**Subject:** Intercarrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and Brooks Fiber Communications of New York, Inc. in October 2003. The companies subsequently have jointly filed amendments to clarify the provisions regarding a unitary intercarrier compensation rate. The Commission is considering these changes.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(99-C-1568SA4)

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

**Intercarrier Agreement between Verizon New York Inc. and MCI WorldCom Communications, Inc.**

**I.D. No.** PSC-07-04-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and MCI WorldCom Communications, Inc. to revise the interconnection agreement effective on Oct. 18, 2003.

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

**Subject:** Intercarrier agreement to interconnect telephone networks for the provisioning of local exchange service.

**Purpose:** To amend the agreement.

**Substance of proposed rule:** The Commission approved an Interconnection Agreement between Verizon New York Inc. and MCI WorldCom Communications in October 2003. The companies subsequently have jointly file amendments to clarify the provisions regarding a unitary inter-carrier compensation rate. The Commission is considering these changes.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(99-C-1569SA3)

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

**Interconnection of Networks between Verizon New York Inc. and MCI WorldCom Communications, Inc.**

**I.D. No.** PSC-07-04-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Verizon New York Inc. and MCI WorldCom Communications, Inc. (as Successor to Rhythms Links Inc.) for approval of an interconnection agreement executed on Dec. 12, 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:** Verizon New York Inc. and MCI WorldCom Communications, Inc. (as Successor to Rhythms Links Inc.) have reached a negotiated agreement whereby Verizon New York Inc. and MCI WorldCom Communications, Inc. (as Successor to Rhythms Links Inc.) will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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

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

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

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

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

(04-C-0066SA1)

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

**Low-Income Energy Affordability Program by the New York State Energy Research and Development Authority (NYSERDA)**

**I.D. No.** PSC-07-04-00018-P

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

**Proposed action:** The commission is considering a proposal by the New York State Energy Research and Development Authority (NYSERDA), submitted Feb. 2, 2004, pursuant to an order issued May 30, 2003 in this proceeding, for the transfer of responsibility for delivery of certain low-income utility program services that are supported by system benefits charge (SBC) funding from the Niagara Mohawk Power Corporation (Niagara Mohawk) and the New York State Electric and Gas Corporation (NYSEG) to NYSEERDA.

**Statutory authority:** Public Service Law, sections 5(2) and 66(1)

**Subject:** Low-Income Energy Affordability Program (LEAP).

**Purpose:** To transfer certain low income program services and associated SBC funding from Niagara Mohawk and NYSEG to NYSEERDA.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept or to reject, in whole or in part, or modify a proposal by the New York State Energy Research and Development Authority (NYSERDA) to transfer responsibility for certain low-income program services that are supported by Systems Benefits Charge funding from the Niagara Mohawk Power Corporation and the New York State Electric & Gas Corporation to NYSEERDA.

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

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

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

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

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

(94-E-0952SA34)

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

**Transfer of a Nuclear Generating Facility by Rochester Gas and Electric Corporation, et al.**

**I.D. No.** PSC-07-04-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a joint petition filed by Rochester Gas and Electric Corporation (RG&E), Constellation Generation Group, LLC and R.E. Ginna Nuclear Power Plant, LLC for authority under section 70 of the Public Service Law to transfer ownership of the Robert E. Ginna Nuclear Generating Station and related assets and for related relief, including, but not limited, recovery of expenses and costs associated with the proposed transaction.

**Statutory authority:** Public Service Law, sections 5(b), 65(1), 66(1), (2), (5), (8), (9), (10), (11), (12) and 70

**Subject:** Transfer of a nuclear generating facility and related assets, and related contract, accounting and other matters.

**Purpose:** To consider granting approval for the transfer of nuclear generating facilities to a new owner and approval of related contract, accounting, rate treatment and other matters.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the transfer of the Robert E. Ginna Nuclear Generating Station and related assets, owned by Rochester Gas and Electric Corporation (RG&E), to Constellation Generation Group, LLC and R.E. Ginna Nuclear Power Plant, LLC. The Commission is also considering approval of various contracts related to the proposed transfer, authorization of recovery of the costs and expenses associated with the proposed transaction, finding that sale satisfies horizontal and vertical market power guidelines, granting other regulatory authorizations and making other related findings, and other matters related to the proposed sale.

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

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

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

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

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

(03-E-1231SA1)

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

**Refund of Transmission Service Overcharges by the Village of Rouses Point**

**I.D. No.** PSC-07-04-00020-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by the Village of Rouses Point to use a refund related to transmission service overcharges by the New York State Electric and Gas Corporation for imminent extraordinary capital projects.

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

**Subject:** Refund of transmission service overcharges.

**Purpose:** To allow the Village of Rouses Point to use a refund for various capital projects.

**Substance of proposed rule:** The Village of Rouses Point is proposing to use proceeds from a refund related to transmission overcharges by the New York State Electric and Gas Corporation for an imminent extraordinary capital project.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, 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-0060SA1)

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

**Refund of Transmission Service Overcharges by the Village of Greene**

**I.D. No.** PSC-07-04-00021-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by the Village of Greene to devote a portion of a refund related to transmission service overcharges by the New York State Electric and Gas Corporation to an imminent extraordinary capital project.

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

**Subject:** Refund of transmission service overcharges.

**Purpose:** To allow the Village of Greene to use a portion of a refund for various capital projects.

**Substance of proposed rule:** The Village of Greene is proposing to devote approximately \$65,000 of a refund related to transmission overcharges by the New York State Electric and Gas Corporation to an imminent extraordinary capital project. The Village will return the remainder of the refund proceeds to ratepayers through a credit to the Purchased Power Adjustment Clause.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, 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-0061SA1)

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

**Approval of New Types of Electricity Meters, Transformers, and Auxiliary Devices by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-07-04-00022-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, an application by Niagara Mohawk Power Corporation for the approval of the Ritz instrument transformer types GIFU 15.10 - GIF 72.5, VEF 15-10 - 72.5, VZF 15-10 36-10, OSKF 72.5-765, OTEF 72.5-765, KOTEF 72.5-765, and KSKEF 362-500 SF-6.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters, transformers, auxiliary devices.

**Purpose:** To permit electric utilities and other entities in New York State to use the Ritz instrument transformers.

**Substance of proposed rule:** The Commission will consider the request from Niagara Mohawk Power Corporation for approval and use of the Ritz Instrument Transformers for revenue billing in New York State. Niagara Mohawk Power Corporation requests the approval and use of the Ritz Instrument Transformer Types GIFU 15.10 - GIF 72.5, VEF 15-10 - 72.5, VZF 15-10 36-10, OSKF 72.5-765 OTEF 72.5-765, KOTEF 72.5-765, and KSKEF 362-500 SF-6. This line of instrument transformers is intended to be used in electric service applications of 15kV through 765kV. The instrument transformer line is capable of providing ANSI revenue metering class accuracy and has been tested to exceed the accuracy requirements of ANSI C12.11.

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

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

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

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

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

(04-E-0088SA1)

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

**Refund of Transmission Service Overcharges by the Village of Castile**

**I.D. No.** PSC-07-04-00023-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by the Village of Castile to devote a portion of a refund related to transmission service overcharges by the New York State Electric and Gas Corporation to an imminent extraordinary capital project.

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

**Subject:** Transmission service overcharges refund.

**Purpose:** To allow the Village of Castile to use a portion of a refund for various capital projects.

**Substance of proposed rule:** The Village of Castile is proposing to devote approximately \$58,000 of a refund related to transmission overcharges by the New York State Electric and Gas Corporation to an imminent extraordinary capital project.

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

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

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

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

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

(04-E-0093SA1)

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

**Gas Reliability by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-07-04-00024-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 Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 4.

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

**Subject:** Gas reliability.

**Purpose:** To provide the company with the right to use or acquire firm, non-recallable, primary delivery point capacity obtained by marketers from third parties in a manner than would enable the company to rely on such capacity for reliability purposes.

**Substance of proposed rule:** Orange and Rockland Utilities, Inc. proposes to revise its S.C. No. 11—Continuous Receipt of Customer-Owner Gas in its gas tariff schedule, P.S.C. No. 4. The tariff revisions would provide the company with the right to use or acquire firm, non-recallable primary delivery point capacity obtained by Marketers from third parties in

a manner that would enable the company to rely on such capacity for reliability purposes.

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

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

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

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

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

(02-G-1553SA2)

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

**New Cashout Option by Orange and Rockland Utilities, Inc.**

**I.D. No.** PSC-07-04-00025-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 Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service, P.S.C. No. 4.

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

**Subject:** New cashout option for Service Classification No. 11 customers.

**Purpose:** To implement a new cashout option for marketers serving firm transportation customers.

**Substance of proposed rule:** Orange and Rockland Utilities, Inc. proposes to revise its S.C. No. 11—Continuous Receipt of Customer-Owned Gas in its gas tariff schedule, P.S.C. No. 4, to include a cashout option for marketers serving firm transportation customers. The proposed tariff revisions would provide sellers taking service under S.C. No. 11 and who elect either the Balancing Service Option or the Functional Storage Service Option the option of choosing to participate in either the current rollover program or a new cashout option. Such sellers will not be allowed to participate in both programs.

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

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

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

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

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

(02-G-1553SA3)

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

**Attachment of AT&T Wireless Facilities by Niagara Mohawk Power Corporation and National Grid Communications, Inc.**

**I.D. No.** PSC-07-04-00026-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 of Niagara Mohawk Power Corporation (Niagara Mohawk) and National Grid Communications, Inc. (GridCom) for approval of the attachment of wireless facilities of AT&T Wireless PCS, LLC (AT&T Wireless) to the transmission facilities of Niagara Mohawk in the Town of Schodack.

**Statutory authority:** Public Service Law, section 70

**Subject:** Attachment of AT&T Wireless facilities to Niagara Mohawk's transmission facilities.

**Purpose:** To consider proposed wireless attachment to Niagara Mohawk's transmission facilities.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, the petition of Niagara Mohawk Power Corporation (Niagara Mohawk) and National Grid Communications, Inc. (GridCom) for approval of the attachment of wireless facilities of AT&T Wireless PCS, LLC (AT&T Wireless) to the transmission facilities of Niagara Mohawk in the Town of Schodack.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-M-0101SA1)

## Racing and Wagering Board

### EMERGENCY RULE MAKING

#### Drug Testing of Horses

**I.D. No.** RWB-07-04-00010-E

**Filing No.** 141

**Filing date:** Jan. 30, 2004

**Effective date:** Jan. 30, 2004

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

**Action taken:** Amendment of sections 4038.18, 4109.7 and 4113.3; and addition of sections 4043.6, 4043.7, 4120.10 and 4120.11 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 301 and 902

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

**Specific reasons underlying the finding of necessity:** These rule amendments will provide an effective mechanism to deter the use in the racing horse of the potent tranquilizers reserpine and fluphenazine. Both drugs are being abused in an effort to gain an improper advantage in pari-mutuel racing; however the existing time-based structure of the equine drug rule does not provide effectively for the sanction of abusers and deterrence. These rule amendments will provide an effective mechanism to deter the use of erythropoietin and darbepoietin in the racing horse. These substances are being abused in an effort to gain an improper advantage in pari-mutuel racing; however the existing equine drug rule does not provide an effective means for the sanction of abusers and deterrence. The continued abuse of these drugs and substances, which have no legitimate use in pari-mutuel racing, undermines public confidence in the integrity of racing with resultant loss of willing participants and bettors. This would result in the loss of significant revenues to the State, municipalities, breeders and the industry. In addition, the continued undeterred use of these drugs and substances poses a threat to the safety of both the equine and human racing participants. An emergency rule making is necessary because the Board has determined that emergency adoption is necessary for the preservation of the general welfare and public safety and that standard rule making procedures would be contrary to the public interest.

**Subject:** Testing of horses for the drugs reserpine and fluphenazine and for the antibodies of erythropoietin and darbepoietin, as well as the consequences of positive tests.

**Purpose:** To provide for effective testing for the drugs reserpine and fluphenazine and for the antibodies of erythropoietin and darbepoietin and the consequences of positive tests, in order to deter their use in horses that compete in pari-mutuel racing; provide for the exclusion from racing of those horses that are the subject of a positive test until there is a subsequent negative test; and provide claimants of horses with the option of voiding any claim based upon the report of a positive test.

**Text of emergency rule:** THOROUGHBRED

AMEND Part 4043 (Drugs Prohibited and Other Prohibitions) to add new Rules 4043.6 and 4043.7:

**4043.6 Erythropoietin and Darbepoietin**

(a) A finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from a horse shall establish that the horse is unfit to race in any subsequent race, subject to the provisions of paragraph b.

(b) Any horse that has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse shall not be entered or allowed to race in any subsequent race until the horse has tested negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory.

(c) Notwithstanding any inconsistent provision of this Part, a horse shall not be subject to disqualification from the race and from any share of the purse in the race, and the trainer of the horse shall not be subject to application of trainer's responsibility based upon the finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse.

**4043.7 Reserpine and Fluphenazine**

(a) Notwithstanding any inconsistent provision of this Part, a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from a horse shall result in the disqualification of the horse from the race and from any share of the purse in the race.

(b) The trainer of a horse which has been the subject of a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse shall not be subject to application of trainer's responsibility based solely upon the finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample.

AMEND Rule 4038.18 (Certain Voidable Claims) to add new paragraphs b and c and reletter existing paragraphs b and c to be d and e respectively:

(a) Post-race positive. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a post-race positive test, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

(b) Erythropoietin and darbepoietin. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

(c) Reserpine and fluphenazine. Notwithstanding any inconsistent provision of Part 4043, should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the stewards and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the stewards by the claimant or his trainer.

[(b)] (d) Upper neurectomy or unreported lower neurectomy. Where an upper neurectomy as defined in subdivision (a) of section 4025.31 of this Subchapter or a lower neurectomy which has not been reported as required in subdivision (b) of section 4025.31 has been performed on a horse prior to the race in which it is claimed, the claimant shall have the option to void said claim upon written notice to the stewards from the claimant or his trainer given within 10 days following the date of the claim.

[(c)] (e) Undeclared pregnant mare. Where a pregnant mare has been claimed which pregnancy has not been disclosed as required in section 4038.17 of this Part, the claimant shall have the option to void the claim

upon written notice to the stewards from the claimant or his trainer within 10 days following the date of the claim.

#### HARNESSES

AMEND Part 4120 (Drugs Prohibited and Other Prohibitions) by adding new Rules 4120.10 and 4120.11:

##### 4120.10 Erythropoietin and Darbepoietin

(a) A finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from a horse shall establish that the horse is unfit to race in any subsequent race, subject to the provisions of paragraph b. Such horse shall be placed on the stewards' list.

(b) Any horse that has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse shall not be entered or allowed to race in any subsequent race until the horse has tested negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory.

(c) Notwithstanding any inconsistent provision of this Part, a horse shall not be subject to disqualification from the race and from any share of the purse in the race and the trainer of the horse shall not be subject to application of trainer's responsibility based upon the finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse.

##### 4120.11 Reserpine and Fluphenazine

(a) Notwithstanding any inconsistent provision of this Part, a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from a horse shall result in the disqualification of the horse from the race and from any share of the purse in the race.

(b) The trainer of a horse which has been the subject of a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse shall not be subject to application of trainer's responsibility based solely upon the finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample.

AMEND Rule 4109.7 (Certain Voidable Claims) to add new paragraphs b and c and reletter paragraphs b and c to be d and e respectively:

(a) Post-race positive. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a post-race positive test, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

(b) Erythropoietin and darbepoietin. Should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

(c) Reserpine and fluphenazine. Notwithstanding any inconsistent provision of Part 4120, should the analysis of a post-race blood or urine sample taken from a claimed horse result in a finding by the laboratory that the drug reserpine or the drug fluphenazine was present in the sample taken from that horse, the claimant's trainer shall be promptly notified in writing by the judges and the claimant shall have the option to void said claim within five days of receipt of such notice by his trainer. An election to void a claim shall be submitted in writing to the judges by the claimant or his trainer.

[(b)] (d) Upper neurectomy or unreported lower neurectomy. Where an upper neurectomy as defined in subdivision (a) of section 4025.31 of this Subchapter or a lower neurectomy which has not been reported as required in subdivision (b) of section 4025.31 has been performed on a horse prior to the race in which it is claimed, the claimant shall have the option to void said claim upon written notice to the judges from the claimant or his trainer given within 10 days following the date of the claim.

[(c)] (e) Undeclared pregnant mare. Where a pregnant mare has been claimed which pregnancy has not been disclosed as required in section 4038.17 of this Part, the claimant shall have the option to void the claim upon written notice to the judges from the claimant or his trainer within 10 days following the date of the claim.

AMEND Rule 4113.3 to add a new paragraph i:

4113.3. Reasons for placing a horse on the steward's list. A horse shall be placed on the steward's list at each track for the following reasons:

(a) it has a tube in its throat;

(b) it is dangerous or unmanageable. Such horse must work out before the judges on the main track, secure permission of the judges to qualify and then qualify in two consecutive qualifying races before release from the steward's list;

(c) it is sick, lame or unfit to race. Such horse must perform before the State veterinarian and be certified fit to race by the State veterinarian before release from the steward's list;

(d) it is unable to start satisfactorily behind the starting gate. Such horse must work out behind the starting gate, be approved by the starter and then qualify once before release from the steward's list;

(e) it has been high nerved;

(f) it has performed poorly. Such horse shall qualify once before release from the steward's list.

(g) it has tested positively for a drug. Such horse shall qualify in a workout and thereafter test negative for drugs before release from the steward's list.

(i) it has been the subject of a finding by the laboratory that the antibody of erythropoietin or darbepoietin was present in the sample taken from the horse. Such horse shall test negative for the antibodies of erythropoietin or darbepoietin in a test conducted by the laboratory before release from the steward's list.

**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 28, 2004.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert A. Feuerstein, Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206-1668, (518) 453-8460, e-mail: info@racing.state.ny.us

#### Regulatory Impact Statement

Statutory Authority: The Board is authorized to promulgate these rules pursuant to Racing, Pari-Mutuel Wagering and Breeding Law Sections 101, 301, and 902. The Board has general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. The Board is authorized to promulgate rules necessary to prevent the administration of drugs or other improper acts to racehorses prior to a race. The Legislature has directed that the Board promulgate any rules necessary to implement equine drug testing so that the public's confidence and the high degree of integrity in racing are assured.

Legislative Objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing.

Needs and Benefits: These rule amendments are necessary to provide an effective mechanism to address and deter the use in the racing horse of the tranquilizers reserpine and fluphenazine, as well as the substances erythropoietin and darbepoietin. Both drugs are being abused in an effort to gain an improper advantage in pari-mutuel racing. The substances erythropoietin and darbepoietin, which stimulate red cell production, are similarly being abused. This information is derived from tests on samples from horses in competition and research conducted by the Board's Equine Drug Testing and Research Program at Cornell University. The Board's existing time-based equine drug rules do not provide effectively for the determination of use or sanctions. The continued and undeterred use of these drugs and substances undermines public confidence in the integrity of racing with corresponding loss of wagering handle. Wagering handle generates significant revenues for the State, municipalities, breeders and tracks. In addition, the continued abuse of the regulated drugs and substances poses a threat to the health of the horse and the safety of both the equine and human participants.

Costs: These rules will impose no new costs for State or local governments. The rule will not impose any new costs on the Racing and Wagering Board for the implementation and continued administration of the rule. The costs of manpower, testing and incidental expenses will be accomplished within existing budget limitations. These rules will impose no costs upon regulated parties in order to comply with limitations concerning the use of the regulated drugs and substances. The only costs are those associated with the sanctions in the event of non-compliance.

Paperwork: There is no additional paperwork required by or associated with these rule amendments.

Local Government Mandates: This rule would impose no local government mandates.

Duplication: There are no other State or Federal requirements similar to the provisions contained in the rule amendment.

Alternative Approaches: There are no other significant alternatives to this rule, which was drafted to accomplish the stated benefits with the least negative impact upon the pari-mutuel racing industry. No action would fail

to address the existing problems associated with continued abuse of the drugs and substances that are the subject of these rules.

**Federal Standards:** The rule does not exceed any minimum standards of the Federal government because there are no applicable Federal rules.

**Compliance Schedule:** Compliance can be accomplished immediately.

#### **Regulatory Flexibility Analysis**

1. **Effect of Rule:** The rules do not apply to and thus will not adversely affect local government. The rules will impact all licensed owners and trainers of racehorses that seek to compete in pari-mutuel racing. There are thousands of such licensed owners and/or trainers. The number of horses owned or trained by such licensees may range from one to hundreds. These individuals operate businesses that generally employ less than one hundred persons.

2. **Compliance Requirements:** There are no required reporting or recordkeeping requirements for small businesses.

3. **Professional Services:** There are no professional services that are likely to be needed to comply with these rules.

4. **Economic and Technological Feasibility:** The rules do not impose any technological requirements on the industry. The compliance component of the rules, *i.e.*, the exclusion of a horse from pari-mutuel racing competition, is a consequence of the report of a positive test. In that situation, the horse may not participate again until the horse has been retested without a positive result.

5. **Compliance Costs:** There are few anticipated compliance costs. The licensees should already be monitoring use of drugs and other substances to assure conformity with Board rules. There will be a potential loss of purse monies associated with the exclusion of horses until a clearance test. This cost cannot be estimated due to the competitive nature of horse racing. During this time there might be lower costs associated with the care of the horse if the horse is not maintained in active training status. The cost of the necessary retest will be borne by the Board.

6. **Minimizing Adverse Impact:** The Board attempted to minimize adverse impact, consistent with the need to assure public safety and general welfare, by excluding a horse from competition only for the limited period necessary for a negative retest and by providing for limitation of disciplinary sanctions from the otherwise general application of the trainer's responsibility rule.

7. **Small Business and Local Government Participation:** The Board provided notice of the concepts and general requirements of these rules to various segments of the regulated racing industry. Among those segments were the representative horsemen's associations. These associations (one per track) include most if not all of the small business industry participants (owners and trainers) as members.

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

The rules will impact all licensed owners and trainers of racehorses that seek to compete in pari-mutuel racing. Many of the licensees affected by these rules are located within "rural areas" as that term is defined in New York State Executive Law Section 481(7). The impact of compliance of those entities located in rural areas should be substantially the same as, if not identical to that in other than rural areas.

There are no required reporting or recordkeeping requirements for small businesses. There are no professional services that are likely to be needed to comply with these rules. The rules do not impose any technological requirements. The compliance component of the rules, *i.e.* the exclusion of a horse from pari-mutuel racing competition, is a consequence of the report of a positive test. In that situation, the horse may not participate again until the horse has been retested without a positive result.

There are few anticipated compliance costs. The licensees should already be monitoring use of drugs and other substances to assure conformity with Board rules. There will be a potential loss of purse monies associated with the exclusion of horses until a clearance test. This cost cannot be estimated due to the competitive nature of horse racing. During this time there might be lower costs associated with the care of the horse if the horse is not maintained in active training status. The cost of the necessary retest will be borne by the Board.

The Board provided notice of the concepts and general requirements of these rules to various segments of the regulated racing industry. Among those segments were the representative horsemen's associations. These associations (one per track) include most if not all of the rural area small business industry participants (owners and trainers) as members.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because the New York State Racing & Wagering Board has determined that these rules will not have a substantial adverse impact on jobs and employment opportunities. The area of potential impact is that which will result from the

exclusion of a horse from pari-mutuel competition until such time as the horse tests negative for the drug or substance that resulted in the ineligibility to participate. For the drugs reserpine and fluphenazine, it is estimated that the period of exclusion following the reported result of a positive test would be very short. Based upon the facts that these drugs may not be lawfully administered to the horse within one week before the start of the racing program and the typical ten-day period between the collection of a sample and report of a positive test, there should be a relatively short period of exclusion provided the horse is subject to a prompt retest. Although reserpine and fluphenazine are detectable beyond the one-week period, this situation differs little from the existing situations involving other drugs. Based upon experience, there will be relatively few positive tests and no substantial adverse impact on jobs for industry participants such as trainers and groomers.

For the substances erythropoietin and darbepoietin, it is estimated that the period of exclusion following the reported result of a positive test would range from several weeks to a period in excess of 120 days. However, based upon the results of preliminary testing, which involved approximately 37,000 horses, it is estimated that less than one percent of horses actually tested will test positive. All horses are not subject to post-race testing. Although a single horse may be excluded potentially for a period of several months, most owners and trainers do not race only one horse. Thus there should be no likelihood of substantial adverse impact on jobs due to the temporary exclusion of these horses from racing. Furthermore, these horses will still require care even if not actively training or racing.

The New York State Racing and Wagering Board has made this determination based upon the above information and its knowledge and familiarity with the conduct of pari-mutuel wagering throughout New York State.

## **EMERGENCY RULE MAKING**

### **Trifecta Wagering**

**I.D. No.** RWB-07-04-00011-E

**Filing No.** 142

**Filing date:** Jan. 30, 2004

**Effective date:** Jan. 30, 2004

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

**Action taken:** Amendment of section 4011.22(i) of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1) and 227

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

**Specific reasons underlying the finding of necessity:** Authorization for the conduct of trifecta wagering on thoroughbred stakes races, handicap races or allowance races in the event there are five betting entries in the race, rather than the mandatory minimum of six as prescribed by the current rule. Vast amounts of wagers would be subject to loss in the event trifecta wagering was cancelled due to the reduction in available betting entries from six to five. This would result in the loss of significant revenues to the State, breeders and the industry. An emergency rulemaking is necessary because the board has determined that emergency adoption is necessary for the preservation of the general welfare and that standard rulemaking procedures would be contrary to the public interest.

**Subject:** Trifecta wagering.

**Purpose:** To authorize the conduct of trifecta wagering in thoroughbred stakes races, handicap races or allowance races in those situations where there are five betting entries at the discretion of the board steward.

**Text of emergency rule:** Paragraph (i) of 9 NYCRR Section 4011.22 Trifecta is hereby amended to read:

(i) No trifecta wagering shall be conducted on any race having fewer than six betting entries, *provided however, that in a stakes race, handicap race or allowance race no trifecta wagering shall be conducted on any race having fewer than five betting entries.* If fewer than six betting entries start in other than a stakes race, handicap race or allowance race, the trifecta shall be declared off and the gross pool refunded. *If fewer than five betting entries start in a stakes race, handicap race or allowance race, the trifecta shall be declared off and the gross pool refunded. The board's steward may, in the exercise of discretion to protect the wagering public, require that there be at least six betting entries for the conduct of trifecta wagering.* If a trifecta pool is cancelled and if time permits, with the

approval of the board's steward, a track may schedule exacta wagering in place of trifecta wagering.

**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 28, 2004.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert A. Feuerstein, Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206-1668, (518) 453-8460, e-mail: info@racing.state.ny.us

#### **Regulatory Impact Statement**

**Statutory Authority:** Section 101(1) of the Racing, Pari-Mutuel Wagering and Breeding Law vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 227 of the Racing, Pari-Mutuel Wagering and Breeding Law provides that the Board shall make rules regulating the conduct of pari-mutuel betting.

**Legislative Objectives:** This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

**Needs and Benefits:** This rule amendment is necessary to address those situations where, in Graded Stakes, handicap and allowance races, the trifecta wagering opportunity would be eliminated or cancelled because there are not six betting interests, as required by the existing Rule 4011.22(i). The benefit of the rule amendment would be the retention of the wagering opportunities with the corresponding preservation of revenues to the State, localities, and the racing and breeding industries.

It will prevent the loss of trifecta wagering to out-of-state horseracing events. When a trifecta is lost because of an inadequate field size, the bettor immediately looks to another track (most likely out-of-state) for another trifecta betting opportunity. Some do switch from the cancelled trifecta bet to an exacta on the same race but many do not. At off track sites, many in-state and out-of-state simulcast signals are accepted simultaneously. Multiple types of bets (like exactas) and exotic types of bets (like trifectas) are the most popular forms of pari-mutuel wagering. In these simulcast venues, the loss of in-state trifecta pools will result in the loss of wagering on New York State racing to trifecta wagering on out-of-state racing.

The rule applies to graded stakes, handicap and allowance races because these races are highly competitive. These higher class races find the horses competing more consistently and truer to bettor's expectations. The lower class races may lack this consistency. The horses competing in a lower class race may have infirmities or lack inherent racehorse ability that hinders their individual production of consistent performance.

The role of the Board steward will be to ensure that the integrity of the race is safeguarded at all times for the betting public. The Board steward is uniquely qualified by his knowledge of the horses, track conditions, jockeys, wagering situations, and the interrelationships among them all. With this knowledge, the Board steward has the ability to identify situations where collusion or mischief may occur, and prevent a trifecta pool from continuing in light of a questionable scratch. The steward will scrutinize the health of the horse, track conditions, and wagering schemes to ensure that the decision to scratch the sixth horse in a trifecta opportunity is based on a bona fide racing decision rather than a decision intended to exploit a trifecta wagering opportunity. In fact, these expert qualities are the basis for a steward's current authority in making discretionary determinations and rulings. The Board steward is the only public official of the three track stewards who has an express duty to protect the betting public. Therefore, it is only logical that the Board steward be allowed to make such expert determinations.

**Costs:** This rule amendment affects only the required minimum number of betting interests in thoroughbred trifecta Graded Stakes, handicap and allowance races. The rule will impose no new costs for state or local governments. The rule will impose no costs upon regulated parties. The rule will not impose any new costs on the Racing & Wagering Board for the implementation and continued administration of the rule.

Betting pools are weakened when a trifecta wagering pool is lost because of field size. Situations that cause a field to drop from 6 to 5 range from weather conditions to track conditions to injury or illness to a horse. The amounts wagered into trifecta pools vary widely depending on the time of the year. A recent NYRA day and their slowest day of the year (Dec. 11th) found one of the trifecta pools over \$200,000 with many others over \$150,000. On Travers Day in August at Saratoga or Belmont Day in June at Belmont Park, the trifecta pools are in the range of \$2-\$3 million dollars per race.

The cost of not implementing this rule can best be gauged in part by looking at the impact on State taxes on exotic wagering. For every dollar bet on a NYRA race, nearly 86 cents of that dollar is wagered off-track. The State tax on an exotic bet like a trifecta is 1.6% when this bet is made on-track. It is the same as the 1.6% tax on an on-track exacta. At the 250 New York off-track betting branches however, the State tax on a trifecta is 1.5% while on an exacta it is only 0.5%. At the OTB teletheaters the State tax on a trifecta is 3.0% while the State tax on an exacta is 1.5%. Therefore, State tax proceeds are adversely impacted when an exacta replaces a cancelled trifecta.

**Paperwork:** There is no additional paperwork required by or associated with this rule amendment.

**Local Government Mandates:** This rule would impose no local government mandates.

**Duplication:** There are no other state or federal requirements similar to the provisions contained in the rule amendment.

**Alternative Approaches:** There are no other significant alternatives to this rule, which was narrowly drafted to accomplish the stated benefits in thoroughbred races of significant merit and interest.

One alternative that was considered was a proposal to limit the rule to Grade I stakes, such as the Travers Stakes or the Belmont Stakes. It was determined that the competitive nature of handicap and allowance races is such that the rule could be applied to these races without impairing the integrity of the race. If the Board did not adopt this rule, the state would lose tax revenue from trifecta wagering at simulcast venues and racing associations would suffer wagering pool losses, most likely to other racing associations located out of state.

**Federal Standards:** The rule does not exceed any minimum standards of the federal government because there are no applicable federal rules.

**Compliance Schedule:** This emergency rule amendment is effective upon filing. Compliance can be accomplished immediately without need for modification of existing procedures.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because the rule will not impose any adverse economic impact or reporting, record-keeping or other compliance requirements on small businesses or local governments. The rule will apply only to associations and corporations that conduct pari-mutuel thoroughbred racing and those facilities that accept wagers on races conducted at those facilities. Those associations, corporations and entities do not qualify as a small business or local government.

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

A rural area flexibility analysis is not submitted with this notice because the rule amendment will not impose any adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas.

The Racing & Wagering Board has made this determination based upon the nature of the rule amendment, which merely changes the number of required betting interests for trifecta wagering on certain thoroughbred races. Trifecta wagering is an existing form of approved wagering. Further, the Racing & Wagering Board has made these determinations based upon its knowledge and familiarity with the various pari-mutuel wagering operations throughout New York State.

#### **Job Impact Statement**

A job impact statement is not submitted with this notice because the New York State Racing & Wagering Board has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. This is evident from the nature of the rule, which preserves wagering opportunities and associated revenues. The New York State Racing and Wagering Board has made this determination based upon its knowledge and familiarity with pari-mutuel wagering operations throughout New York State.

## **NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED**

### **Submission of Veterinarian Treatment Records**

**I.D. No.** RWB-34-03-00004-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. RWB-34-03-00004-P was published in the *State Register* on August 27, 2003.

**Subject:** Submission, format and content of veterinarian treatment records as they pertain to treatment of thoroughbred and harness horses.

**Purpose:** To amend the requirements governing the submission of veterinarian treatment records of thoroughbred and harness race horses making submission mandatory and the amendment of the rules to delineate the time period of required submission; amend the requirements regarding the content and form of those records as they pertain to thoroughbred and harness race horses; and amend the content and format of the furosemide administration information presently required to be submitted.

**Substance of rule:** The amendment to Title 9E N.Y.C.R.R. § 4120.9 and § 4043.9 and the addition of § 4120.10 and § 4043.10 will require the mandatory submission of veterinarian treatment records pertaining to race horses within 24 hours after treatment, or, within one hour of post time if it is within 24 hours of post time. Veterinarian records for horses treated by non New York State Racing and Wagering Board licensed veterinarians must be submitted prior to race time. Presently, the veterinarians are required to maintain these records and submit them upon the request of the Board. The existing rule does not work well with enforcement of the board's substantive equine drug rules. The records maintained are often submitted late, are inadequate in detail and are sometimes the subject of question concerning when they were created. The submission of contemporaneous type records will facilitate the prompt and proper investigations concerning the use of equine drugs on racehorses. Comparison of these records to reported drug testing findings and the details of the training and veterinarian care will be valuable in proving and disproving facts and circumstances concerning treatment. The submission of records of treatment by non New York State Racing and Wagering Board licensed veterinarians will serve the above objectives. Currently, there is no practicable way to obtain these records because the veterinarians are not licensed by the Board. This requirement will make all relevant treatment records available without imposing the requirement only for treatment by Board licensed veterinarians. The proposed rule also amends the content to be included on records pertaining to furosemide administration. This proposed change would substitute the name of the horse for the description and tattoo number of the horse. The race number would be added as a requirement. The purpose of these changes with respect to furosemide is to facilitate a reasonable assurance of identity of the horse in conjunction with the race number. The race number is significant in relation to the permissible time for furosemide administration prior to the start of the race.

**Changes to rule:** No substantive changes.

**Expiration date:** August 26, 2004.

**Text of proposed rule and changes, if any, may be obtained from:** Jennifer A. Whalen, Assistant Counsel, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206, (518) 453-8460, e-mail: jwhalen@racing.state.ny.us

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

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## State University of New York

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

#### Traffic and Parking Regulations and Signage of the State University of New York at Stony Brook

**I.D. No.** SUN-07-04-00001-P

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

**Proposed action:** Amendment of section 584.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Traffic and parking regulations and signage of the State University of New York at Stony Brook.

**Purpose:** To redesignate street signage of existing streets on the campus.

**Text of proposed rule:** § 54.5 is amended to read as follows:

§ 584.5 Traffic control.

(a) Speed control. The maximum speed at which vehicles may proceed on or along all roadways on the grounds of the State University of New York at Stony Brook, Town of Brookhaven, Suffolk County, is established at 30 MPH, except for [Center] *John S. Toll Drive*, between Fine Arts

Drive and [North Loop] *Circle Road*. The maximum speed at which vehicles may proceed on or along [Center] *John S. Toll Drive* between Fine Arts Drive and [North Loop] *Circle Road* is established at 20 MPH. The parking of vehicles is prohibited on or along both sides of all roadways on the grounds of the State University of New York at Stony Brook, Town of Brookhaven, Suffolk County.

(b) Intersectional control — top intersections. The following intersections on the grounds of the State University of New York at Stony Brook are designated as “Stop” intersections:

(1) The intersection of South Drive with the following roads and parking lot access roads:

(i) All exits of South P Lot—entrance from the south.

(ii) [Forest] *Marburger Drive*—entrance from the north.

(iii) Access road to the Dental School—entrance from the north.

(2) The intersection of [Forest] *Marburger Drive* with the following road:

(i) Access road to South Campus—entrance from the east.

(3) The intersection of [South Loop] *Circle Road* with the following roads and parking lot access roads:

(i) All exits from Roth Quad parking lot—entrance from the north.

(ii) Lake Drive—entrance from the north.

(iii) [Health and Science] *Life Sciences Service Road*—entrance from the east.

(iv) All exits from Social and Behavioral Science Building—entrance from the west.

(v) All exits from Humanities Building—entrance from the west.

(vi) Fine Arts Loop—entrance from the east.

(vii) Fine Arts Drive—entrance from the east.

(4) The intersection of [Center] *John S. Toll Drive* with the following roads and access roads:

(i) All exits from Math Tower lot entrance from the east.

(ii) Access road to Service Complex entrance from the west.

(iii) All access roads serving main campus—entrance from the south.

(iv) All access roads serving the Student Union—entrance from the north.

(5) The intersection of [North Loop] *Circle Road* with the following roads and access roads:

(i) [South Loop] *Circle Road*—entrance from the east.

(ii) Tabler [Service Road] *Drive*—entrance from the south.

(iii) Engineering Drive—entrance from the north.

(iv) All exits from Roosevelt [Quad] *Drive* entrance from the south.

(v) [Center] *John S. Toll Drive*—entrance from the north.

(vi) All exits from Kelly [Paved lot] *Drive* entrance from the west.

(vii) Service Road (to Service Complex)—entrance from the east.

(viii) Gymnasium Road—entrance from the east.

(ix) All exits from North P lot—entrance from the west.

(x) Environmental Conservation Road entrance from the south.

(xi) [Infirmery] *Stadium Road*—entrance from the west.

(xii) All exits from H lot—entrance from the west.

(xiii) All exits from G lot—entrance from the west.

(xiv) All exits from overflow lot—entrance from the east.

(6) At the intersection of Fine Arts Drive with the following roads and access roads:

(i) Entrance Drive—Entrance from the south.

(ii) [South Loop] *Circle Road*—entrance from the south.

(iii) [North Loop] *Circle Road*—entrance from the north.

(iv) [Center] *John S. Toll Drive*—entrance from the north.

(7) The intersection of North Entrance Road with the following roads:

(i) [North Loop] *Circle Road*—entrance from the north and south.

(8) The intersection of [Infirmery] *Stadium Road* with the following roads and access roads:

(i) All exits from Langmuir parking lot—entrance from the west.

(ii) All exits from the [Infirmery] *Stadium* parking lot—entrance from the west.

(9) The intersection of Gymnasium Road with the following roads and access roads:

(i) All exits from Service Complex entrance from the west and south.

(ii) All exits from the Field House parking lot—entrance from east.

(10) The intersection of Roosevelt [Quad service roads] *Drive* with the following parking lot access roads:

(i) All exits from Roosevelt Quad parking lots—Entrance from the north and south.

(11) The intersection of Tabler [Service Road] *Drive*— with the following parking lot access roads:

(i) All exits from Tabler parking lots—entrances from the east and west.

(12) The intersection of Lake Drive with the following parking lot access road:

(i) All exits from Roth Quad parking lots—entrance from the west.

(13) The intersection of Engineering Drive with the following parking lot access roads:

(i) All exits from Roth Quad parking lots—entrance from the east.

(ii) All exits from heavy engineering lots.

(14) The intersection of [East Loop Road] *Health Sciences Drive* with the following roads and access roads:

(i) Chapin Apts. Service Road—entrance from the east.

(ii) Power Plant Service Road—entrance from the west.

(iii) Main Entrance University Hospital—entrance from the west.

(iv) Health and Science Service Road entrance from the west.

(v) Parking Garage Service Road—entrance from the west.

(vi) The entrance of Veterans Home from the south.

(15) The intersection of the Health and Sciences Service Road with the following roads and pedestrian walkways:

(i) Three Tier Surface Lot Service Road—entrance from the south.

(ii) Pedestrian crosswalk—entrance from the east and west.

(16) The intersection of the Main Entrance to University Hospital with the following roads and access roads:

(i) All exits from parking lots and hospital service roads—entrance from the west.

(17) The intersection of Chapin Apts. Service Road with the following roads:

(i) The south leg of Chapin Apts. Service Road—entrance from the south.

(ii) [East Loop Road] *Health Sciences Drive*.

(c) Intersectional control—yield intersections. The following intersections on the grounds of the State University of New York at Stony Brook are designated as yield intersections:

(1) The channelized right turn lane from westbound [South Loop] *Circle Road* to northbound [North Loop] *Circle Road*—entrance from the east.

(2) The channelized right turn lane from northbound Nichols Road to eastbound [East Loop Road] *Health Sciences Drive*—entrance from the southwest.

(3) The channelized right turn lane from northbound Nichols Road to eastbound Daniel Webster Drive—entrance from the southwest.

(d) One-way roads. The following roads are for one-way traffic:

(1) Fine Arts Loop for traffic proceeding in a counterclockwise direction only.

(2) Kelly Quad access road from [North Loop] *Circle Road* to Roosevelt Quad for traffic proceeding in a counterclockwise direction only.

(3) Chapin Apts. access road for traffic in a clockwise direction only.

(4) The channelized right-turn lane from [Forest] *Marburger Drive* to [South Loop] *Circle Road*.

(e) Turn prohibitions. The turning of vehicles at intersections or other designated locations is prohibited as follows:

(1) Left turns by traffic from the east on Fine Arts Drive at its intersection with the roadway to the parking garage.

**Text of proposed rule and any required statements and analyses may be obtained from:** Lynette M. Phillips, SUNY Stony Brook, Office of the University Counsel, 328 Administration Bldg., Stony Brook, NY 11794-1212, (631) 632-6110, e-mail: LPhillips@notes.sunysb.edu

**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: Education Law § 360(1)

2. Legislative Objectives: To provide for safety and convenience of students, faculty, employees and visitors within and upon the property, roads, streets and highways under the supervision and control of the State

University through the regulation of vehicular and pedestrian traffic, parking and signage.

3. Needs and Benefits: Changes in the signage on the State University campus are descriptive in nature, designed to enable the campus community and visitors to better orient themselves and more easily locate the stadium, academic facilities and the hospital. Additionally, two streets have been renamed in honor of former leaders who have helped build Stony Brook into a leading research university.

4. Costs: None.

5. Local Government Mandates: None.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: None.

9. Federal Standards: There are no related Federal standards.

10. Compliance Schedule: The campus will notify those affected as soon as the rule is effective. Compliance should be immediate.

#### **Regulatory Flexibility Analysis**

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments. The proposal addresses road signage on the campus of the State University of New York at Stony Brook.

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

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural area. The proposal addresses road signage and traffic regulations on the campus of the State University of New York at Stony Brook.

#### **Job Impact Statement**

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses internal street name changes on the campus of the State University of New York at Stony Brook.