

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.

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Pine Shoot Beetle Quarantine

I.D. No. AAM-20-04-00009-E

Filing No. 517

Filing date: May 3, 2004

Effective date: May 3, 2004

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

Action taken: Amendment of section 131.1 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: This rule amends the pine shoot beetle quarantine in section 131.1 of 1 NYCRR by extending that quarantine to the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates. This rule also incorpo-

rates by reference, the most recent revisions to federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 1, 2004, which set forth requirements and restrictions for the movement of host materials. Finally, this rule deletes spruce, larch and fir from the list of regulated host materials subject to regulation under the quarantine, since the United States Department of Agriculture (USDA) has tested and determined that these materials are not a host to the pine shoot beetle.

The pine shoot beetle, *Tomicus piniperda*, an insect non-indigenous to the United States, is a destructive wood-boring insect native to Europe. The beetle attacks pine trees by nesting under the bark and feeding on new shoots. The resulting damage by the beetle causes shoot and branch mortality which affects the growth and appearance of the tree and may eventually lead to the death of the tree. Although it is a slow-moving pest, the pine shoot beetle is easily spread through the movement of Christmas trees, nursery stock and pine logs and lumber. The pine shoot beetle was first detected in a Christmas tree farm near Cleveland, Ohio in July of 1992 and subsequently spread to other parts of Ohio as well as to sections of Michigan, Indiana, Illinois, Pennsylvania and New York. On November 19, 1992, the USDA adopted regulations establishing a pine shoot beetle quarantine to help prevent the spread of this pest. On November 25, 1992, the Department, as an emergency measure, adopted section 131.1 of 1 NYCRR, which incorporated by reference that federal quarantine. This emergency measure was ultimately adopted as a permanent rule on March 17, 1993.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately incorporate by reference the federal regulations which set forth requirements for the movement of host materials and to extend the quarantine could result in the spread of this pest. The beetle has already been detected in the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Cortland, Delaware, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Wayne and Yates. Failure to immediately extend the quarantine to these counties could result in the spread of the pest beyond those areas. Although the beetle has not as yet been detected in the Counties of Clinton, Essex, Warren, Washington and Columbia, extension of the quarantine into these counties would establish a buffer between infested and uninfested counties, thereby helping to control the further spread of this pest. These counties are not the only counties adjacent to counties in which the beetle has been detected, since the Counties of Ulster and Orange are also adjacent to the quarantined area. However, since the Counties of Clinton, Essex, Warren, Washington and Columbia contain 173 saw mills which process pine logs shipped from counties where the beetle has been detected, there is a greater likelihood that infested materials will be transported to these five counties. Failure to establish such a buffer by immediately extending the quarantine to these counties could result in the spread of the pest through transportation of susceptible materials into Vermont and Massachusetts as well as those uninfested counties in New York which lie south of the Counties of Sullivan, Delaware, Greene and Columbia. The failure to immediately extend the quarantine will promote the spread of the beetle which can be easily transported on nursery stock, pine logs and lumber with bark attached from infested areas to uninfested areas. This would not only result in damage to the natural resources of the State, but could also result in a

federal quarantine or quarantines by other states which would cause economic hardship to the Christmas tree, nursery and forest products industries throughout New York State. The consequent loss of business would harm industries which are important to New York State's economy and as such, would harm the general welfare. Given the potential for the spread of the pine shoot beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Pine shoot beetle quarantine.

Purpose: To prevent the spread of the beetle in the Counties of Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Otsego, Rensselaer, Saratoga, Schoenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates; incorporate by reference, Federal regulations at 7 CFR sections 301.50 through 301.50-10, revised as of January 2004, which set forth requirements for the movement of host materials; and delete spruce, larch and fir from the list of regulated host materials subject to regulation under the pine shoot beetle quarantine.

Text of emergency rule: Section 131.1 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

Pine Christmas trees, pine nursery stock and pine [, spruce, larch and fir] logs and lumber, with bark attached, shall not be shipped, transported or otherwise moved from any point within Albany, Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Oswego, Ontario, Orleans, Otsego, Rensselaer, Saratoga, Schoenectady, Schoharie, St. Lawrence, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne, [and] Wyoming and Yates Counties to any point outside of said counties, except in accordance with 7 CFR sections 301.50 through 301.50-10 [(pages 27 - 34) (revised as of January 1, 1995)] (pages 33 - 41) (revised as of January 1, 2004) which is incorporated by reference herein. Copies of the Code of Federal Regulations may be obtained from the U.S. Government Printing Office, Washington, DC 20402 and the material incorporated by reference herein is available for public inspection and copying at the offices of the Department of Agriculture and Markets, Division of Plant Industry, [Capital Plaza, One Winners Circle] 10B Airline Drive, Albany, NY 12235.

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 July 31, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Robert Mungari, Director, Division of Plant Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087

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

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00004-A

Filing No. 506

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Public Service.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00004-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00005-A

Filing No. 509

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: 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 State University of New York.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00005-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00006-A

Filing No. 504

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the exempt class in the Department of Audit and Control.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00006-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00007-A

Filing No. 501

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: 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 and classify a position in the exempt class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00007-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00008-A

Filing No. 500

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Department of Agriculture and Markets.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00008-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00009-A

Filing No. 502

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00009-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00010-A

Filing No. 503

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00010-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00012-A

Filing No. 508

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00012-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00013-A

Filing No. 510

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the non-competitive class in the State University of New York.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00013-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00014-A

Filing No. 511

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: 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 was published in the notice of proposed rule making, I.D. No. CVS-52-03-00014-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00015-A

Filing No. 505

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete positions from and classify positions in the non-competitive class in the Executive Department.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00015-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-52-03-00016-A

Filing No. 507

Filing date: April 30, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Appendix(es) 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify a position in the exempt class and delete a position from the non-competitive class in the Department of Public Service.

Text was published in the notice of proposed rule making, I.D. No. CVS-52-03-00016-P, Issue of December 31, 2003.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Shirley LaPlante, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6210, e-mail: sjl@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Library Services in Protective Custody

I.D. No. COR-20-04-00001-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 330.4(f)(1) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Library services in protective custody.

Purpose: To correct limits for library books possessed by protective custody inmates.

Text of proposed rule: Paragraph (1) of subdivision (f) of section 330.4 is amended as follows:

(1) Inmates may request and maintain *these general library* [in their cells reading material as follows:] books, magazines or newspapers *in their cells* [(not to exceed an aggregate total of 10, excluding legal materials)] for a period of at least one week.

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.

Regulatory Impact Statement

Statutory Authority:

Section 112 of the Correction Law grants to the commissioner of correction the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein. This section also assigns to the commissioner of correction the power to make rules and regulations for the officers and other employees of the department and the duties to be performed by them.

Legislative Objective:

By vesting the department and the commissioner with this rulemaking authority, the legislature intended the department to control library resources and manage allocation of library materials to inmates in protective custody.

Needs and Benefits:

Subdivision (f) is entitled General Library Services and is intended only to address that topic. It prescribes for a minimum stock equal to two books and one periodical for each inmate in protective custody. The proposed correction to paragraph (1) is necessary because the current wording "books, magazines or newspapers (not to exceed an aggregate total of 10, excluding legal materials)" refers to an allowance of personal property, not library materials, and was mistakenly transcribed from the text limiting the total amount of such personal property items allowed to be kept in the cell by inmates confined for disciplinary reasons in post-adjustment status, at section 303.2(c). The only statement in Part 330 properly relating to the allowance of personal property items, which would include personal books and magazines, appears in subdivision (n) which says "Inmates will be issued their personal property when assigned to protective custody status, subject to safety and security considerations." Paragraph (1) was only intended to specify how long (at least one week) inmates could keep their share of the library materials.

Costs:

a. To State government: None

b. To local governments: None. The proposed amendment does not apply to local governments.

c. Costs to private regulated parties: None. The proposed amendment does not apply to private regulated parties.

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

(i) Initial expenses: None.

(ii) Annual cost: None.

Paperwork:

a. New reporting or application forms: None.

b. Additions to existing reporting or application forms: None.

c. New or addition record keeping that will be required of the regulated party to comply with the rule or prove compliance with the rule: None.

Local Government Mandates:

There are no new mandates imposed upon local governments by this proposal. The proposed amendment does not apply to local governments.

Duplication:

This proposed amendment does not duplicate any existing State or Federal requirement.

Alternatives:

No alternatives are considered feasible. This correction is necessary to obviate the misconception that an inmate can request and maintain up to ten items from the library.

Federal Standards:

There are no minimum standards of the Federal government for this or a similar subject area.

Compliance Schedule:

The Department of Correctional Services will achieve compliance with the proposed rule immediately.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely corrects limits for library books possessed by protective custody inmates.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on rural areas. This proposal merely corrects limits for library books possessed by protective custody inmates.

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 merely corrects limits for library books possessed by protective custody inmates.

catch limits, possession and sale restrictions and manner of taking for summer flounder, scup and black sea bass.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manage marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies and interstate FMPs.

3. Needs and benefits:

Pursuant to § 13-0371 of the ECL, New York State participates in the Atlantic States Marine Fisheries Compact administered through the Atlantic States Marine Fisheries Commission (ASMFC) to promote cooperative utilization of marine fish species. The principal mechanism for implementation of cooperative management of migratory fish are the ASMFC's Interstate Fisheries Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers. Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have timely implemented provisions of FMPs with which they are required to comply. If ASMFC determines a state to be in non-compliance with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

ECL Sections 13-0340-b, 13-0340-e and 13-040-f, which authorize the adoption of regulations for the management of summer flounder, scup, and black sea bass, provide that such regulations must be consistent with the FMPs for these species adopted by the Atlantic States Marine Fisheries Commission. ASMFC recently amended the FMPs for summer flounder, scup, and black sea bass by adopting annual quota changes and recreational harvest projections. In order to maintain compliance with the FMPs and ACFCMA, states are required to immediately implement these changes by amending their recreational fishing regulations for each of these species.

Under the FMP for summer flounder and scup, ASMFC assigns each state an annual harvest target or quota. In addition, a projection is made for each state as to its expected harvest, assuming its regulations are unchanged and that harvest patterns and rates remain the same as the previous year. If the projected harvest for a state exceeds that state's assigned quota, the state is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the state from exceeding of its assigned quota. ASMFC reviews each state's regulations and must determine that they are compliant with the FMP. Accordingly, failure to timely adopt revised 2004 regulations may result in a non-compliance determination by ASMFC and the Secretary of Commerce, and the imposition of a total closure of fishing for summer flounder, scup and/or black sea bass in New York State, with significant adverse impacts to the state's economy.

New York's projected harvests for summer flounder and scup in 2004 exceed the state's assigned quotas by 48.5% and 58%, respectively. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC, to achieve a 58% reduction for scup. The regulatory changes in the emergency rule are calculated to achieve a 20% reduction for summer flounder. The Department is proposing to ASMFC that the New York 2004 recreational harvest projection for summer flounder be based on an average of the estimated harvest for 2001-2003, rather than on 2003 alone. New York's summer flounder regulations were essentially unchanged over this three year period, and the recreational harvest estimate, which is derived from a federal survey that is not statistically reliable at the individual state level, has fluctuated significantly over the period. For this reason, the Department has chosen to comply with the FMP by basing its harvest projection on a more reliable and stable three year average of harvest estimates, resulting in a 20% reduction requirement for 2004.

The FMP for black sea bass calls for annual adjustments to common coastwide regulations that are calculated to hold coastwide harvest within the allowed annual quota. For 2004, a two-week closure between September 1 and October 31 is required, with a recommended closure of September 6 through September 21. The emergency rule changes New York's closure period from September 1 through September 16 to September 23 through October 7. This change is required to minimize the economic impact that would otherwise occur due to concurrent summer flounder and black sea bass closures on and immediately following September 6.

The promulgation of this regulation on an emergency basis is necessary in order for the Department to maintain compliance with the FMPs for

Department of Environmental Conservation

REGULATORY IMPACT STATEMENT, REGULATORY FLEXIBILITY ANALYSIS, RURAL AREA FLEXIBILITY ANALYSIS AND/OR JOB IMPACT STATEMENT

Recreational Harvest and Possession of Marine Fish Species

I.D. No. ENV-19-04-00003-EP

This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement pertain(s) to a notice of emergency/proposed rule making, I.D. No. ENV-19-04-00003-EP, printed in the *State Register* on May 12, 2004.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) Sections 13-0340-b, 13-0340-e and 13-0340-f authorize the Department of Environmental Conservation (DEC or Department) to establish by regulation, open season, size,

summer flounder, scup, and black sea bass and to avoid closure of these fisheries and the economic hardship that would be associated with such closure. Specific major changes to the regulations include the following items:

Summer Flounder

Implement an open season of May 15 to September 6 for the summer flounder recreational fishery. The current fishing season for summer flounder is open year-round. Lower the recreational possession limit from 7 fish per person per trip to 3 fish per person per trip.

Scup

Implement an open season from June 16 through October 17 and November 1 through November 30 for the scup recreational fishery. The current fishing season for scup in New York is open year round. Lower the recreational possession limit from 50 fish per person per trip to 20 fish per person per trip. Increase the recreational minimum size limit from the current 10 inches to 11 inches total length.

Black sea bass

Implement an open season for black sea bass from October 8 to September 23 for the recreational black sea bass fishery. The current fishing season for black sea bass is open January 1 to September 1 and September 16 to November 30.

4. Costs:

(a) Cost to State government:

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

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

Certain regulated parties (Party/charter vessels, Bait and tackle shops) may experience some adverse economic effects through lost economic opportunities.

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

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules. The implementation costs will be associated with the public notification and final adoption of these regulations, and costs relating to the expense of updating informational materials and notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

There will also be additional costs associated with enforcement of these new regulations.

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

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

8. Alternatives:

The following significant alternatives, listed by species, have been considered by the Department and rejected for the reasons set forth below:

Summer flounder alternatives:

(1) Implement a 48.5% reduction as calculated by ASMFC, projecting New York's 2004 harvest based on the 2003 landings alone:

The Department considered the following approaches for meeting a 48.5% reduction.

(a) One option would be to achieve a 48.5% reduction without increasing the size limit, *i.e.*, with a season closure and reduced possession limit only. Under this approach, New York would meet the reduction by reducing effort, which is the most effective way to avert continuing overages in subsequent years. This approach would keep the size limit at 17", which prevents further displacement of opportunity for participation in harvest from west to east and inshore to ocean. Also, maintaining the existing size limit increases the probability that New York will be able to return to a size limit of 16", a size range preferred by all in industry.

However, this option would have a significant negative economic impact on the recreational fishery. Even after lowering the possession limit from 7 (current) to only 2, a very abbreviated (approximately 2½ month) open season would be necessary.

(b) As an alternative, New York could achieve a 48.5% reduction while increasing the minimum size limit to 17.5" or 18". Many, though not all, industry members have suggested that, if the Department adopts a 48.5% reduction strategy, it do so by implementing an 18" minimum size limit with a 3 fish possession limit and a May 1 - September 15 open season. The

longer open season (approximately 4½ months) may mitigate the adverse impact of the higher size limit and lower possession limit.

Raising the size limit, however, fails to accrue the benefits associated with maintaining a 17" minimum, as noted in 1(a) above. There will likely be a significant increased impact resulting from the combination of raising the size limit and reducing the possession limit to 3. The longer open season may not sufficiently constrain the harvest to keep New York within its allowable harvest limit.

(2) Implement a 20% reduction in harvest while increasing size limit to 17.5" or 18". This option would allow for a longer open season and/or a higher possession limit than the proposed rule and the 48.5% reduction options. Accordingly, it would reduce the economic impacts associated with a 48.5% reduction. Increasing the minimum size limit allows for a longer open season, which may mitigate the adverse impact of the higher size limit. Raising the size limit, however, fails to accrue the benefits associated with maintaining a 17" minimum, as noted in 1(a) above. There will likely be an increased impact resulting from raising the size limit. The longer open season may not sufficiently constrain the harvest to keep New York within its allowable harvest limit.

The basis of a 20% reduction (as opposed to 48.5%) is that the MRFSS does not produce statistically valid estimates of catch and effort when estimates are disaggregated by state. Consequently, for this approach, New York would use the average annual fluke harvest over the past three years (during which our regulations were essentially unchanged), rather than New York's landings from only 2003, as the basis of projecting 2004 landings.

(3) No Action (no amendment to regulations).

The "no action" alternative would prevent any short term adverse impacts to the fishery from regulations. This option would likely result in a non-compliance determination by ASMFC and NMFS, which would bring about a federal closure of all fishing for summer flounder in New York under ACFCMA.

Scup alternatives:

(1) Achieve the 58% reduction called for by ASMFC without increasing size limit, *i.e.*, with season closure and reduced possession limit only. This alternative complies with ASMFC requirements. It meets the reduction by reducing effort, which is the most effective way to avert continuing overages. It keeps the size limit at 10", which prevents further displacement of opportunity for participation in harvest from shore to private boat modes.

This option would likely have a significant adverse economic impact on the fishery. At this size limit, lowering the creel limit from 50 to 20 would reduce the open season from year round (current) to August 16 - December 31 or require a closure from June 1 to Labor Day.

(2) Achieve a 58% reduction while increasing size limit to 10.5" or 11.25". These options all comply with the ASMFC requirements. Many in the recreational fishing industry suggest an 11¼" minimum size. An 11¼" minimum size limit would allow New York to maintain a longer open season, which would mitigate adverse economic impacts associated with very large required harvest reduction. A 10.5" minimum would be consistent with other nearby states' proposed minimum size limits which would allow for a uniform minimum size limit throughout the southern New England region. The 10.5" minimum would minimize the further displacement of opportunity for participation in shore based scup fisheries, which tend to have access to smaller size fishes. Also, minimal changes in the size limit increases the probability that New York will be able to manage our recreational fishery at a smaller size limit in future years.

The impact on the fishery will still be severe. Increasing the size limit to only 10.5" would require a substantially reduced fishing season, and while increasing the minimum to 11¼" would minimize the length of the required season closure, the large increase in the minimum size limit (from the current 10 to 11¼") would likely result in a significant loss of opportunity for participation in harvest for shore-based fishermen. In addition, the extended open season that would be allowed under the 11¼" minimum size limit may not sufficiently constrain the harvest to keep New York within its allowable harvest limit.

(3) No Action (status quo regulations).

This alternative would retain the strong economic viability of the recreational scup fishery. This approach would fail to achieve the 58% reduction required by ASMFC and would likely result in a non-compliance determination by ASMFC and NMFS, and a federal closure this summer. Since New York's estimated 2003 scup landings were 5,030,575 fish as compared to an assigned quota of only 1,900,000 fish, a significant harvest reduction is clearly required.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs for scup and black sea bass. The Department has chosen to comply with the FMP for summer flounder by basing its harvest projection on a more reliable and stable three year average of harvest estimates, resulting in a 20% reduction requirement for 2004.

10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via the Department's website of the changes to the regulations. The regulations will take effect upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of the regulations:

There were 496 licensed party/charter vessels operating in New York during 2003 and an unknown number of retail and wholesale marine bait and tackle shop businesses operating in New York in 2003. Many currently licensed party and charter boat owners and operators, as well as bait and tackle shops, will be affected by these regulations. The regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. This may result in a lower number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season. However, over the long term, these short term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected under these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

The annual cost of continuing compliance may take the form of lost income if the sales of marine bait fish or tackle declines or if fewer fishermen take trips aboard marine party and charter vessels. Some of the proposed regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. It is not known if fishermen will take fewer trips or if they will purchase less bait and tackle as a result of the shorter seasons, higher size limits or lower possession limits, or if they will instead re-direct their fishing effort towards other species.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question including party and charter vessels, as well as wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. These regulations are designed to protect stocks from continued over harvest and to rebuild them for future utilization. Failing to take these appropriate actions to protect our natural resources could cause the complete collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

5. Minimizing adverse impact:

The purpose to these regulations is to constrain the recreational harvest of these species by reducing the length of the fishing season, increasing minimum size limits and lowering possession limits for recreational fishermen. The impact of these regulations will be minimized by adjusting and coordinating fishing seasons to maintain recreational fishing opportunities for some species when others are closed, and by implementing season closure and size and possession limit options throughout the marine district that will not unduly affect some fishing modes and geographic areas more than others.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail outlets and other support industries for recreational fisheries. The purpose of the rule is to constrain harvest of these species to allow the stocks to rebuild to higher sustainable levels. There is no means to eliminate the potential for short term economic losses while attempting to rebuild over harvested stocks of fish. Failing to take these appropriate actions to protect our natural resources could cause the complete collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. Regulations are proposed which provide the appropriate level of protection and allow

for harvest consistent with the capacity of the resource to sustain such effort.

6. Small business and local government participation:

The development of this proposal has drawn upon input from recreational fishermen, recreational fishing industry representatives and the Marine Resources Advisory Council, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon consultation with and recommendations received from other interested and affected parties, including recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners and state law enforcement personnel. There was no special effort to contact local governments because the rule does not affect them.

7. Economic and technological feasibility:

The changes required by this action have been determined to be economically feasible for the majority of the affected parties. For those proposals which are required under federal and interstate fishery management plans, the Department does not have any discretion regarding this economic impact. New York must comply with the provisions of the FMPs or face Federal sanctions.

There is no additional technology required for small businesses, and this action does not apply to local governments, so there are no economic or technological impacts for any such bodies.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder, scup and black sea bass fisheries directly affected by the emergency rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the emergency rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the emergency amendments of Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

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

There were 496 licensed party/charter vessels operating in New York during 2003 and an unknown number of retail and wholesale marine bait and tackle shop businesses operating in New York in 2003. Many currently licensed party and charter boat owners and operators, as well as bait and tackle shops, will be affected by these regulations. The regulations will likely result in a short term reduction in allowable catch or availability of marine fisheries resources for the affected parties. This may result in a lower number of fishing trips and/or lower bait and tackle sales during the upcoming fishing season.

The purpose of these regulations is to constrain the harvest of certain marine fish species to reduce fishing mortality and rebuild stock biomass. The potential short term impact of these regulations may be that some recreational party and charter boat owners experience short term reductions in customers. It is possible that some jobs and employment opportunities associated with party and charter boat operations could be lost as a result of the restrictions imposed by the proposed regulations. However, based on outreach with members of the recreational fluke and scup fisheries, the Department does not anticipate that there will be any substantial loss of jobs as a result of the proposed changes. Moreover, in the long term, the effect of this proposed rule on jobs and employment opportunities will be positive. Protection of the fluke and scup fisheries is essential to the survival of the party and charter boat operations that participate in these fisheries.

The maintenance of long term sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Over the long term, these short term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect stocks from continued over-harvest and to rebuild them for future utilization. Failing to take these appropriate actions to protect our natural resources could cause the complete collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

Based on the above and Department staff's knowledge and past experience with the adoption of finfish rules similar to those contained in this proposal, the Department has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of these amendments.

Department of Health

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Treatment of Opiate Addiction

I.D. No. HLT-37-03-00001-RP

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

Revised action: Addition of section 80.84 and amendment of section 80.86 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 3308(2), 3551 and 3352

Subject: Treatment of opiate dependence in an outpatient setting.

Purpose: To allow the treatment of opiate addiction in an office-based setting while curtailing controlled substance diversion.

Text of revised rule: Section 80.84 is added to read as follows:

80.84 Physicians and pharmacies; prescribing, administering and dispensing for the treatment of narcotic addiction.

Pursuant to the provisions of the federal Drug Addiction Treatment Act of 2000 (106 P.L. 310, Div. B, Title XXXV, Section 3502(a)), an authorized physician may prescribe, administer or dispense an approved controlled substance, and a licensed registered pharmacist may dispense an approved controlled substance, to a patient participating in an authorized controlled substance maintenance program approved pursuant to Article 32 of the Mental Hygiene Law for the treatment of narcotic addiction.

(a) An approved controlled substance shall mean the following controlled substance which has been approved by the Food and Drug Administration (FDA) and the New York State Department of Health for the treatment of narcotic addiction:

(1) buprenorphine

(b) An authorized physician is a physician registered with the department to prescribe, administer or dispense an approved controlled substance for the treatment of narcotic addiction pursuant to this section and specifically registered with the Drug Enforcement Administration to prescribe, administer or dispense an approved controlled substance for the treatment of narcotic addiction, and approved for such purpose pursuant to the provisions of Article 32 of the Mental Hygiene Law.

(1) The total number of such patients of an authorized physician or group practice at any one time shall not exceed 30.

(2) A physician must register with the department every two years to provide such treatment. Such registration will be provided at no cost.

(3) An authorized physician prescribing an approved controlled substance for the treatment of narcotic addiction, in addition to preparing and signing a prescription in accordance with Section 3335 of the Public Health Law, shall also write his/her unique DEA identification number on the prescription.

(c) An authorized pharmacy is a pharmacy registered with the department to dispense an approved controlled substance for the treatment of narcotic addiction.

(1) A pharmacy must register with the department every two years to provide such treatment. Such registration will be provided at no cost.

(2) A pharmacist may dispense an approved controlled substance for the treatment of narcotic addiction pursuant to a prescription issued by an authorized physician. Such dispensing shall be in accordance with Section 3336 of the Public Health Law.

(3) A pharmacist dispensing such a prescription shall file the prescription information with the department either electronically in accordance with Section 80.73(c)(2) of this Part, or manually on an approved departmental form. The pharmacist shall report the practitioner's narcotic addiction treatment registration number in lieu of the practitioner's Drug Enforcement Administration registration number.

(d) Each incident or alleged incident involving the theft, loss or possible diversion of controlled substances shall also be reported to the department immediately.

Section 80.86 is amended to read as follows:

80.86 Records and reports of treatment programs. (a) All persons approved pursuant to article [23] 32 of the Mental Hygiene Law to operate a [substance abuse] *chemical dependence* program, *other than authorized physicians and pharmacists as defined in Section 80.84 of this Part who are registered with the department to prescribe, administer or dispense approved controlled substances for the treatment of narcotic addiction*, and who possess a Federal registration by the Drug Enforcement Administration, United States Department of Justice to purchase, possess and use controlled substances shall keep the following records:

(1) records of controlled substances received by approved persons including date of receipt, name and address of distributor, type and quantity of such drugs received and the signature of the individual receiving the controlled substance. A duplicate invoice or separate itemized list furnished by the distributor will be sufficient to satisfy this record requirement provided it includes all required information and is maintained in a separate file. In addition, duplicate copies of Federal order forms for schedule II controlled substances must be retained; and

(2) records of controlled substances administered or dispensed including date of administration or dispensing, name of patient, signature of person administering or dispensing, type and quantity of drug and such other information as may be required by this Part.

(b) By the 10th day of each month, a person *other than an authorized physician as defined in Section 80.84(b) of this Part*, approved to conduct a maintenance program pursuant to article [23] 32 of the Mental Hygiene Law, shall file with the department a report summarizing its controlled substances activity in the preceding month. Such a report shall be on forms provided by the department and shall include:

(1) an inventory of the quantity of controlled substances on hand at the commencement and at the conclusion of such month's activity;

(2) the date of the inventory;

(3) the signature of the persons performing the inventory;

(4) the total quantity of controlled substances received, the distributor from whom each order was received, and the form and dosage unit in which such substance was received;

(5) a separate list of the total quantity of controlled substances prescribed, dispensed and administered during such month;

(6) total quantity of methadone surrendered to the department for destruction;

(7) total number of patients treated during the month; and

(8) each incident or alleged incident involving the theft, loss or possible diversion of controlled substances.

(c) Each incident or alleged incident involving the theft, loss or possible diversion of controlled substances shall also be reported to the department immediately.

Revised rule compared with proposed rule: Substantial revisions were made in section 80.84(b)(4).

Text of revised 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: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Statutory Authority:

United States Public Law 106-310, the Children's Health Act of 2000 was enacted on October 17, 2000. Title XXXV of this law, Waiver Authority for Physicians Who Dispense or Prescribe Certain Narcotic Drugs for Maintenance Treatment or Detoxification Treatment, is better known by the short title Drug Addiction Treatment Act of 2000 (DATA).

DATA allows physicians to prescribe and dispense narcotics in Schedules III, IV, and V of the Controlled Substances Act (CSA) that have been specifically approved by the Food and Drug Administration (FDA) for the purpose of maintenance or detoxification of opiate addiction.

The federal buprenorphine was just approved by FDA for this purpose. The federal law supersedes any existing state law that prohibits such treatment.

New York State Public Health Law, Article 33, Section 3308 states that the Commissioner is authorized and empowered to make any regulations necessary to supplement the purpose of Article 33. Section 3351 states that

the Commissioner shall designate in regulation the name of all controlled substances appropriate for use in the treatment of opiate addiction. Section 3352 states that persons certified to operate treatment programs should follow certain recordkeeping requirements, as the Commissioner shall require by regulation.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted to govern and control the possession, prescribing, manufacturing, dispensing, administering, and distribution of licit controlled substances within New York State. In the year 2000 a legislative purpose was added to the law to clarify that its purpose is to allow for the legitimate use of controlled substances, while curtailing their illicit use.

Needs and Benefits:

Prior to the adoption of DATA, the treatment of opiate addiction was limited to authorized methadone clinics and licensed substance abuse programs. According to the National Institute of Drug Abuse (NIDA), the regulatory burden involved in delivering methadone to opioid-dependent individuals has been so heavy that it has prevented expansion of the system.

The result has been a "treatment gap," which NIDA defines as the difference between the total number of opioid-dependent persons and those in treatment. In an effort to close the treatment gap, NIDA explored other strategies and studied the use of other drugs to treat opioid addiction. Restrictions were intended to decrease abuse and diversion while permitting legitimate treatment. However a treatment gap continues to exist.

There are approximately 125 MMTPs in New York State with a license capacity to treat 46,000, or 23%, of the estimated 200,000 opiate dependent patients in New York State. Also, over three-quarters of the MMTPs are located in the New York City area, therefore addicts living in rural areas may not have access to an MMTP. It is also believed that many middle and upper class addicts do not seek enrollment in MMTPs due to the stigma associated with MMTPs.

The DATA expands availability of treatment of opiate dependent patients allowing physicians to prescribe narcotic drugs for opiate addiction, requiring only self-certification, and moves the treatment of addiction from the clinic to the private physician's office and the patient's own pharmacy. The law allows qualified physicians to prescribe and dispense Schedule III, IV, and V narcotics that have been approved by FDA for use in maintenance or detoxification treatment. Currently the only such drug approved for such use is buprenorphine.

Buprenorphine is a partial opioid agonist with a significant potential for abuse. To meet the legislative purpose of Article 33 and the intent of the DATA, additional regulations are necessary to ensure buprenorphine is not diverted into illegal channels, while ensuring access to care.

These regulations require that the physician register with the Department of Health, as well as the Office of Alcohol and Substance Abuse Services (OASAS), to provide such treatment. This will ensure that the physician possesses the addiction treatment qualifications required by DATA and is in good standing with respect to adherence to controlled substance laws. Pharmacies that wish to dispense buprenorphine will also be required to register with the department. Registered pharmacies will be required to file buprenorphine prescription data with the department in the same manner they currently follow for Schedule II controlled substances and benzodiazepines. The department will have the capability of monitoring the utilization of buprenorphine by the analysis of this data in the same manner currently utilized for controlled substances with significant abuse potential.

DOH/OASAS Task Force:

In the fall of 2000, the Department of Health (DOH) partnered with the Office of Alcoholism and Substance Abuse Services (OASAS) to begin planning for the implementation of DATA. The agencies established a joint task force charged with establishing complementary regulations, as well as a joint application process by which New York State physicians could register to provide this new treatment modality.

The task force met routinely for over two years. The result was a streamlined application process by which physicians could register with New York State to provide such treatment, as well as streamlined regulations.

The agencies sent a joint mailing to physicians detailing the regulatory requirements and registration process. The agencies established a joint registration application by which qualified physicians simply complete the joint application and send it to OASAS. Once OASAS reviews and approves the application, the approved application is sent to DOH for their

approval. Due to the joint application process, the agencies work closely together through the registration process.

Both agencies also adopted emergency regulations in the fall of 2002. The task force ensured the adoption of emergency regulations that meet the needs and responsibilities of both agencies, while ensuring accessibility of this new treatment to the citizens of New York State.

Outreach:

DOH met with the pharmaceutical Society of the State of New York (PSSNY), as well as the Medical Society of the State of New York (MSSNY), during the drafting of this regulation. PSSNY did not have present any concerns with the regulations. MSSNY was opposed to the concept of a patient registry. The original regulations contained a requirement for physicians to maintain a registry of the patients whom they were treating, and to share such registry with the DOH. MSSNY stated that the registry requirement might deter patients from seeking such treatment. Due to such concerns, DOH decided to remove the patient registry requirement from the regulations.

Costs:

This proposal does not pose any cost to the physician, pharmacy, or the department. The registration of physicians and pharmacies will be provided free of charge. 93% of all pharmacies in the state are already set up to transmit data to the department electronically in the required format, therefore only minimal software modification will be necessary. The remaining 7% submit the data manually on a departmental form.

Local Government Mandates:

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

Paperwork:

The Department of Health anticipates a simple registration form for physicians and pharmacies that wish to register for this program. Participation in this program is entirely voluntary. The Department of Health has partnered with OASAS to streamline the registration process for physicians.

Ninety-three percent of all New York State pharmacies currently have the capacity to send the department prescription data electronically. The department can't predict how many pharmacies will participate in this program. Approximately 60% of the pharmacies in the State have registered thus far to participate in the Expanded Syringe Access Program (ESAP), and it is anticipated that participation in this new incentive will be similar. Those choosing manual submission may simply complete a manual submission form in the same manner they currently utilize for Schedule II controlled substances and benzodiazepines.

Physicians who prescribe buprenorphine will be required to keep the same records they currently maintain for all controlled substances. Physicians choosing to dispense buprenorphine will be required to submit a manual submission form or submit the data electronically, in the same manner as required for pharmacies.

Methadone clinics are currently required to submit dispensing reports to the department; therefore the collection of dispensing data for drugs that treat addiction is not a new concept.

Duplication:

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

Alternatives:

The proposed regulation is designed to curtail the potential diversion and abuse of buprenorphine in this new treatment modality. Buprenorphine is a narcotic with significant abuse potential and will be utilized in a population of patients who have a prior history of controlled substance abuse. The federal law sets basic parameters for such treatment but leaves specific oversight up to the individual states. The department believes it is in the best interest of public health to monitor the prescribing and dispensing of this drug for this new treatment modality.

There are no alternatives that would ensure accessibility to treatment while curtailing the potential for abuse and diversion.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government. This amendment does not prohibit the provisions of the federal DATA, it simply achieves consistency with existing New York State standards aimed at curtailing the diversion of medication with a high potential for diversion.

Compliance Schedule:

Physicians and pharmacies may begin to register with the department immediately. Once a physician has registered with the department for this program, and has received his/her unique identification registration num-

ber from the Drug Enforcement Administration (DEA), he/she may begin to prescribe and/or dispense buprenorphine for the treatment of opiate addiction. Once a pharmacy has registered with the department for this program, they may begin to dispense buprenorphine for this treatment.

Revised Regulatory Flexibility Analysis

Effect of Rule:

Physician and pharmacy participation in this program is voluntary. There are currently 72,920 physicians licensed to practice medicine in New York State. According to the New York State Board of Pharmacy, as of September 2002, there were a total of 4,434 pharmacies in New York State. Of these, 62 were sole proprietorship, 274 were partnerships, 72 are small chains (fewer than 3 pharmacies per chain) and the rest were large chains or other corporations (some of which may be small businesses) or located in public institutions.

Compliance Requirements:

Pharmacies that choose to register for this program will be required to submit the buprenorphine prescription information in the same manner that they currently utilize for CII and benzodiazepine prescriptions; either electronically or manually. Physicians who choose to dispense will also be required to submit buprenorphine prescription information either electronically or manually, in the same format they currently utilize when dispensing CII and benzodiazepines. The recordkeeping requirements for physicians and pharmacies will be consistent with existing requirements.

Professional Services:

Registered pharmacies that choose to submit the required prescription data electronically may need to make a minor change to their current software. Because almost all New York State pharmacies already have a program in place to submit this data, the department does not anticipate that they will be charged for adding buprenorphine data to the current data they submit to the department. The department does not expect a large number of physicians to dispense buprenorphine. Of those that do, the department does not expect them to submit the required data electronically; therefore there no professional services will be required.

Compliance Costs:

The department anticipates that there will be no compliance costs associated with this regulation.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Small businesses may choose not to submit electronically, in which case no new, or additional, equipment would be required. Those businesses that do opt to submit data electronically will require only a standard personal computer and software already utilized by the pharmacy community.

Minimize Adverse Impact:

The proposed rule was designed to minimize the impact on small businesses by allowing the dispenser to have the choice of submitting specified data electronically or manually. The rule does not require non-computerized pharmacies or physicians to become computerized. The department has worked with the pharmacy societies and software vendors to adopt transmission standards already utilized by the pharmacy community. Also, at the request of the pharmacy societies, the department is allowing dispensers to submit electronic information in batch format, as opposed to a more costly point-of-sale transmission.

Small Business and Local Government Participation:

To ensure that small businesses were given the opportunity to participate in this rule making, the department met with the pharmacy societies representing independent pharmacies. Local governments are not affected.

Revised Rural Area Flexibility Analysis

Finding:

Pursuant to 202-bb of the State Administrative Procedure Act, a Rural Area Flexibility Analysis is not required.

The proposed amendment does not impose any adverse impact on rural areas. The proposed amendment makes the treatment of addiction in rural settings more feasible, as addicts will no longer have to travel to a methadone clinic to obtain their medication. Many rural areas do not have a methadone clinic in close proximity.

Measures Taken to A Certain Finding:

Approximately 93% of the pharmacies in the State currently transmit controlled substance prescription data to the department in the format allowed by this proposal. The remaining 7%, many of which may be in rural areas, do not use computers and will not be forced to computerize. They, as well as physicians, will be allowed to transmit their data manually on a departmental form.

Revised Job Impact Statement

Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. This proposal expands the treatment options for physicians and pharmacies and is not expected to have impact on increasing or decreasing jobs overall.

Categories and Numbers Affected:

This rule affects the 4,423 pharmacies in New York State. Approximately 93% of the pharmacies are currently submitting controlled substance prescription data to the department electronically.

It is anticipated that a small percentage of the 72,920 physicians in the State will register to participate in this program. Of that number, it is expected that most of the physicians will only perform the prescribing of buprenorphine. It is expected that a very small percentage of physicians will actually dispense buprenorphine. Most patients will be receiving their buprenorphine from a registered pharmacy.

Regions and Adverse Impact:

There are no regions of the State where this rule would have a disproportionate adverse impact on jobs or employment opportunities.

Minimizing Adverse Impact:

There are no unnecessary adverse impacts on existing jobs pursuant to this rule; therefore no measures to minimize such impacts were necessary. Promotions of the development of new employment opportunities are not affected by this rule.

Self-Employment Opportunities:

This proposal does not have any measurable impact on opportunities for self-employment.

Assessment of Public Comment

One public comment on the proposed rule was received.

The City of New York, Human Resources Administration (HRA), is in full support of the proposed regulations. In its comment, HRA also expressed the importance of exploring how to prevent client and pharmacy fraud, as patients will not be going to a clinic and taking their medication under supervision.

Insurance Department

EMERGENCY RULE MAKING

Claim Submission Guidelines

I.D. No. INS-20-04-00004-E

Filing No. 499

Filing date: April 30, 2004

Effective date: April 30, 2004

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

Action taken: Addition of Part 217 (Regulation 178) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 2403, 3224 and 3224-a

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

Specific reasons underlying the finding of necessity: Prior to the enactment of Chapters 637 and 666 of the Laws of 1997 (the "Prompt Pay Law"), establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs and PHSPs to pay claims or bills for healthcare services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The lack of specific statutory time frames for payment encouraged delayed payment of claims.

Chapter 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to settlement of claims for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42, or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers.

Since the effective date of the prompt payment statute, the Insurance Department has received over 88,000 complaints against insurers, HMO and PHSPs concerning late payment of claims. The Department also levied

periodic monetary penalties against insurers, HMOs and PHSPs for untimely payment and untimely denial of health care claims.

While insurers, HMOs and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs and PHSPs regarding when a claim should be considered clean and therefore ready for payment.

The Insurance Department convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. Regulation 178 is the result of several meetings, discussions and agreement, and represents a consensus of the Healthcare Roundtable. The Department believes that the clean claim provision in this regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient.

The Insurance Department and the Healthcare Roundtable continue to meet to discuss additional changes that might be necessary to further the prompt pay requirements. This regulation must be promulgated as an emergency measure so that, as discussions continue, the clean claim parameters can be put in place and assessed to determine what other claim payment guidelines are needed. Insurers, HMOs and PHSPs are ready to accept the guidelines, as they will improve insurers', HMOs', and PHSPs' relationships with the provider community, which is essential for the viability of health insurance in New York State.

Consequently, it is critical for this regulation to be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

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

Purpose: To create claim payment guidelines on what is needed in order to determine when a health care insurance claim is considered complete and ready for payment.

Text of emergency rule: A new Part 217 of Chapter IX of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation 178), entitled "Prompt Payment Of Health Insurance Claims", is adopted to read as follows:

Section 217.1 Definitions and applicability.

(a) For the purposes of this Part:

(1) "Payer" shall mean an insurer authorized to write accident and health insurance or that is licensed pursuant to Article 43 of the New York Insurance Law, or an entity certified pursuant to Article 44 of the Public Health Law.

(2) "Submitted on paper" shall include claims submitted on paper or by facsimile.

(b) This Part shall apply to all health care claims submitted under contracts or agreements issued or entered into pursuant to Articles 32, 42 or 43 of the Insurance Law or Article 44 of the Public Health Law.

Section 217.2 Health Insurance claim submission guidelines.

(a) A claim for payment of medical or hospital services submitted on paper shall be deemed complete if it contains the minimum data elements set forth in this Part. If the minimum data elements set forth are not present or accurate, the payer may, but need not, adjudicate the claim if the payer can determine, based on the information submitted, whether such claim should be paid or denied. Even if the claim is deemed complete, a payer may, pursuant to the provision of Section 3224-a(b) of the New York Insurance Law, request specific additional information, distinct from information on the claim form, necessary to make a determination as to its obligation to pay such claim.

(b)(1) In the case of a medical claim submitted on the national standard form known as a CMS 1500 (previously known as HCFA 1500 (New York State)), attached as an appendix (Appendix 26), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

- 1a. Insured's I.D. Number
2. Patient's Name
3. Patient's Date of Birth and Gender
4. Insured's Name (Last Name, First Name)
5. Patient's Address
9. Other Insured's Name (if appropriate)
- 9a. Other Insured's Policy or Group Number (if appropriate)
- 9b. Other Insured's Date of Birth and Gender (if appropriate)
- 9c. Employer's Name or School Name (if appropriate)
- 9d. Insurance Plan Name or Program Name (if appropriate)

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

(2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(c)(1) In the case of a hospital claim submitted on the national standard form HCFA 1450 (also known as UB-92), attached as an appendix (Appendix 27), the claim shall contain at least the items in the following fields of the claim form, except as provided in paragraph (2) of this subdivision:

1. Provider Name and Address
3. Patient Control Number
4. Type of Bill
5. Federal Tax Number
6. Statement Covers Period
7. Covered Days (if appropriate) (interim bill, etc.)
8. Non-Covered Days (if appropriate)
9. Coinsurance Days (if appropriate)
10. Lifetime Reserve Days (if appropriate)
11. Newborn Birthweight (if appropriate)
12. Patient Name
13. Patient Address
14. Patient Birthdate
15. Patient Sex
17. Admission Date
18. Admission Hour
19. Type of Admission
22. Discharge Status Code
42. Revenue Codes
43. Revenue Description
44. CPCS/CPT4 Codes
45. Service Date
46. Service Units
47. Total Charges (by revenue code)
48. Non-Covered Charges
50. Payer Name
51. Provider ID
54. Other Insurance Payment (if appropriate)
55. Estimated Amount Due (if appropriate)
58. Insured's Name
59. Patient Relationship
60. Patient's Cert. SSN - HIC - ID No.
62. Insurance Group Number (if on card) (where appropriate)
67. Principal Diagnosis Code

- 68. Code
- 69. Code
- 70. Code
- 71. Code
- 72. Code
- 73. Code
- 74. Code
- 75. Code
- 76. Admitting Diagnosis Code
- 77. E-Code
- 78. DRG #
- 79. P.C.
- 80. Principal Procedure Code and Date
- 81. Other Procedures Code and Date
- 82. Attending Physician's ID Number

(2) For items listed in paragraph (1) of this subdivision with the notation "(if appropriate)", the generic nature of the standard claim form produces some instances when the information is not relevant in a particular instance. In those cases, the payer shall not insist upon completion of that item if the information is not relevant to the situation of that particular practitioner or patient or the information will not be used by the payer. If an item is not applicable at all, it should be left blank rather than inserting a notation that it is not applicable.

(d) Nothing in this Part shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

A new Appendix 26 of Title 11 is adopted to read as follows:

See Appendix in the back of this issue.

A new Appendix 27 of Title 11 is adopted to read as follows:

See Appendix in the back of this issue.

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 July 28, 2004.

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

Regulatory Impact Statement

1. **Statutory Authority:** The Superintendent's authority for the adoption of Part 217 of Title 11 (Regulation 178) is derived from Sections 201, 301, 1109, 2403, 3224, 3224-a of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the Superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law. Section 2403 prohibits any person from engaging in any trade practice constituting a "defined violation", which pursuant to the provisions of Section 2402(b) includes a violation of Section 3224-a. Section 3224-a sets forth the timeframes for timely payment of undisputed claims for health care services under contracts issued by insurers pursuant to Articles 32, 42 and 43 of the Insurance Law and by health maintenance organizations (HMOs) or Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. Section 3224 gives the Superintendent the authority to establish a standard claim form for physicians or other health care providers to be used for accident and health insurance claims and by Article 43 corporations.

2. **Legislative Objectives:** Prior to the enactment of Chapters 637 and 666 of the Laws of 1997, establishing prompt payment requirements for health care claims, existing law did not require insurers under contracts issued by insurers pursuant to Articles 32, 42 or 43, HMOs or PHSPs to pay claims or bills for health care services within any specific timeframe. Neither did existing law require interest on unpaid claims or bills for health care services. The statement in support of the prompt payment legislation stated that HMOs and insurers did not pay claims and bills in a timely fashion, to the detriment of providers and patients alike. The lack of specific statutory provisions encouraged payers to delay payments to take advantage of interest, which can be earned on the moneys being withheld from payment. The intent of the prompt payment law was to provide protection to both patients and health care providers relative to the timely payment of health service claims by insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs.

Prior to the legislation, there were generally no repercussions for the late payment of claims. Healthcare providers complained that there were

no incentives for paying claims promptly or penalties for late payments. Consequently, hospitals were accumulating large receivables because of these late payments.

Chapters 637 and 666 of the Laws of 1997, which took effect on January 22, 1998, amended the Insurance Law relating to the settlement of claims for health care and payment for health care services. The law was intended to set timeframes within which insurers under contracts issued pursuant to Articles 32, 42 or 43, HMOs and PHSPs must pay undisputed claims for health care services submitted by subscribers and health care providers. New Section 3224-a prescribed penalties in the form of interest payable on claims paid later than 45 days. The law also amended Section 2402, to include a violation of Section 3224-a as a defined violation, and amended Section 2406 to specifically provide for the Superintendent to levy daily monetary penalties against such insurers, HMOs and PHSPs for their failure to pay undisputed health claims within 45 days of receipt, untimely denials of claims, or requesting additional information needed to process the claim beyond 30 days of receipt of the claim. The Insurance Department established mechanisms for accepting complaints from health care providers and created procedures for levying monetary penalties against insurers, HMOs and PHSPs for violation of the prompt payment statute.

Since January 1998, the Department has received over 88,000 complaints from health care providers against insurers, HMOs and PHSPs regarding the timely payment of health care claims. The Department has collected monetary penalties of approximately 5 million dollars from insurers, HMOs and PHSPs for violations of Section 3224-a.

The powers granted to the Superintendent of Insurance to investigate and enforce compliance with the prompt payment requirements established by the law as well as the new interest and penalty sanctions, help ensure that payments are made in a timely manner. The purpose of this regulation is to facilitate the legislative intent of the Prompt Pay Law by establishing minimum requirements when claims are submitted on paper as to what constitutes a clean or undisputed claim, thereby resulting in more timely payment of claims by insurers, HMOs and PHSPs.

3. **Needs and Benefits:** While insurers, HMOs, and PHSPs have altered their procedures to comply with the timeframes of the Prompt Pay Law, there remained disagreement among the various associations that represent health care providers, insurers, HMOs, and PHSPs regarding when a claim should be considered to be clean and therefore ready for payment.

The Superintendent of Insurance convened the Healthcare Roundtable to encourage dialogue among the various associations representing health care providers, insurers, HMOs, and PHSPs in order to reach agreement as to when a claim should be considered to be clean or undisputed. The group agreed that the guidelines established by the State of Connecticut in the form of a regulation, which sets forth elements of a clean claim, would be a good starting point in determining what information must be included on a claim form in order for the claim to be considered complete.

Regulation 178 is the result of several meetings, discussions and agreements, and represents a consensus of the Healthcare Roundtable. Members of the Roundtable include the Medical Society of the State of New York, The Healthcare Association of New York, The Greater New York Hospital Association, The Conference of Blue Cross Blue Shield Plans, the Health Plan Association, the American College of Obstetricians and Gynecologists, and various provider representatives.

This regulation is similar to Connecticut's regulation in that the parameters are clear and consistent with the health care claims process for provider claims submitted on paper. The regulation provides clear standards with which insurers, HMOs, and PHSPs need to comply in processing health care claims submitted on paper. In this way, providers will know what information will be needed when submitting such claims to ensure prompt payment of the claims.

4. **Cost:** Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs, and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

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

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

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

8. Alternatives: Interest groups representing providers and payers met on numerous occasions to develop the parameters for determining what constitutes a substantially complete claim. Various alternatives were considered but all affected parties agreed that the regulation represents the best solution to resolve the question about what constitutes a clean claim.

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

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

Regulatory Flexibility Analysis

1. Effect of the rule: The regulation will affect insurers paying claims under contracts written pursuant to Articles 32, 42, and 43 of the Insurance Law and health maintenance organizations (HMOs) and Prepaid Health Service Plans (PHSPs) pursuant to Article 44 of the Public Health Law. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of insurers authorized to do business in New York and has concluded that insurers and HMOs do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedures Act, because there are none which are both independently owned and have under 100 employees.

There are under 20 PHSPs in New York, some of which are small businesses. PHSPs are entities certified pursuant to Article 44 of the Public Health Law that provide Medicaid services in a managed care environment. However, they will not be negatively impacted by this regulation. The regulation establishes minimum requirements for the submission of claims on forms that the plans currently use. The establishment of these minimum requirements will assist the plans by reducing the administrative burden of requesting additional information on incomplete claims.

The regulation will also affect health care providers, many of which are small businesses, submitting claims on paper for payment for health care services submitted on the CMS 1500 claim form and the CMS 1450 form. It sets forth guidelines for determining when a claim that is submitted on paper is considered complete and ready for processing. This regulation is the result of meetings with representatives of health care providers, insurers, HMOs and PHSPs, and represents a consensus between the Department and the various interested parties as to what information is necessary for a claim to be considered substantially complete. The regulation does not apply to or affect local governments.

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

3. Professional services: Insurers, HMOs, and PHSPs are not required and should not need to obtain professional services to comply with this regulation. Health care providers do not need to obtain additional professional services as a result of this regulation.

4. Compliance costs: The relevant statutes, as amended by Chapters 637 and 666 of the Laws of 1997, require that insurers, HMOs, and PSHPs pay undisputed claims within 45 days of receipt, or deny the claim, or request additional information within 30 days of receipt. Insurers, HMO, and PSHPs are already responding to the mandates of the prompt payment statute. This regulation had been requested by interested parties in order to establish the framework for what is considered a substantially complete

claim that is ready for processing. The regulation does not impose any additional cost to insurers, HMOs, and PSHPs. As a result of this regulation, insurers, HMOs, and PSHPs should not need to request additional information as frequently, thereby reducing their costs of processing claims.

5. Economic and technological feasibility: Compliance with the regulation should be economically and technologically feasible for small businesses since no new procedures or requirements are added and the regulation merely establishes the minimum items needed to have a clean claim when using the standard form and adherence on the part of the health care provider will speed the processing of health care claims and curtail the various requests from insurers and HMOs for additional information.

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

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

Rural Area Flexibility Analysis

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

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

3. Costs: Any cost associated with implementing the claims payment guidelines was established by statute and has already been incurred by insurers, HMOs and PHSPs who readied their claims processing functions in early 1998, when Section 3224-a became effective, in order to process claims within the requisite timeframes. The regulation does not require insurers, HMOs, or PHSPs to provide additional or new claim forms but simply establishes which elements on existing claim forms need to be completed. In fact, insurers, HMOs and PHSPs have already established procedures to handle the increased number of complaints filed by health care providers. Insurers, HMOs and PHSPs believe that the clean claim provisions in this proposed regulation will prevent providers from submitting unnecessary complaints to the Insurance Department regarding claims that are deficient. The prevention of such a practice could also serve to reduce costs to regulated parties and the Department.

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

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

Job Impact Statement

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

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

EMERGENCY RULE MAKING

Physicians and Surgeons Professional Insurance Merit Rating Plans

I.D. No. INS-20-04-00008-E

Filing No. 516

Filing date: May 3, 2004

Effective date: May 3, 2004

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

Action taken: Amendment of Part 152 (Regulation 124) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 2342(d) and (e); and L. 2002, ch. 1, part A, section 42 as amd. by L. 2002, ch. 82, part J, section 16

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

Specific reasons underlying the finding of necessity: Section 42 of Part A of Chapter 1 of the Laws of 2002, requires that any physician, surgeon or dentist who wants to participate in the excess medical malpractice insurance program established by the Legislature in 1986 must participate in a proactive risk management course. Section 42 authorized the Superintendent to promulgate regulations that provide for the establishment and administration of such plans. Section 42, as originally enacted on January 25, 2002, established an effective date of July 1, 2003 for participation in these courses. However, on May 29, 2002, Section 16 of Part J of Chapter 82 of the Laws of 2002 was enacted and the effective date was amended to July 1, 2002.

It is essential that this amendment be promulgated on an emergency basis so that insurers are made aware of the requirements for proactive risk management courses and have the courses in place as soon as possible. Insureds must be able to avail themselves of these courses as soon as possible so that they may participate in the excess medical malpractice insurance program. This is especially important for those insureds who are presently insured in the excess medical malpractice insurance program. It is vital that their insurance be maintained on a continuous basis not only for their financial protection but also to preserve the rights of claimants who suffer injury as a result of medical malpractice.

For the reasons cited above, this amendment is being promulgated on an emergency basis for the preservation of the general welfare.

Subject: Physicians and surgeons professional insurance merit rating plans.

Purpose: To establish guidelines and requirements for medical malpractice merit rating plans and risk management plans.

Substance of emergency rule: Section 152.1 is amended by adding paragraph (e) which details the statutory authority for proactive risk management programs.

Section 152.2 is amended by adding definitions for the terms physician, excess medical malpractice program and insurer.

Section 152.6 contains the standards for risk management programs in which insureds participate in order to receive premium credits. This section is amended to provide that these courses may be offered in an internet-based format.

Section 152.7 is amended by specifying how risk management programs, provided in an internet-based format, may be implemented.

Section 152.8 is renumbered to be Section 152.11 and a new Section 152.8 is added to provide the standards for proactive risk management programs which are provided for insureds who wish to qualify for the excess medical malpractice insurance programs established by the Legislature.

A new Section 152.9 is added to provide coordination of the excess medical malpractice risk management courses with risk management courses that are offered for the purpose of providing premium credits.

A new Section 152.10 is added to provide guidelines for insurers in implementing risk management programs administered for insureds who wish to qualify for participation in the excess medical malpractice insurance program established by the Legislature.

Section 152.11 is amended to provide requirements for insurers conducting audits of insureds or for insureds to conduct self-review surveys. A new provision is added requiring insurers to report, by territory and medical specialty, the number of insureds participating in risk management programs who qualify for the excess medical malpractice insurance program.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire July 31, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Theresa Marchon, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: tmarchon@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2343(d) provides that the Superintendent shall, by regulation, establish a merit rating plan for physicians professional liability insurance. Section 2343(e) provides that the Superintendent may approve malpractice insurance premium reductions for insured physicians who successfully complete an approved risk management course, subject to standards prescribed by the Superintendent by regulation. Section 42 of Part A of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002, requires that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature in 1986 participate in a proactive risk management program. Section 42 authorizes the Superintendent to promulgate regulations which provide for the establishment and administration of these risk management courses.

2. Legislative objectives: The objective of Section 2343(d) was the establishment, by the Superintendent, by regulation, of a merit rating plan for physicians professional liability insurance that was reasonable and not unfairly discriminatory, inequitable, violative of public policy or contrary to the best interests of the people of New York. The regulation was to include reasonable standards to be applied to merit rating plans submitted by insurers for approval by the Superintendent. Those standards are to be used to arrive at premium rates, surcharges and discounts based on an evaluation of the insured, geographical areas, specialties of practice, past and prospective loss and expense experience for medical malpractice insurance and any other factors deemed relevant in a system of merit rating.

The objective of Section 2343(e) was to permit insurers to provide premium credits for successful completion of risk management programs approved by the Superintendent.

The objective of Section 42 of Part A of the Laws of 2002 was to require that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature participate in a proactive risk management program.

An effective risk management program would provide insureds with an overview of the causes of malpractice claims, emphasize communication skills and improved patient rapport skills, and focus on improving procedures. This should reduce the frequency and severity of medical malpractice claims. The intent of this amendment is to effectuate that objective.

3. Needs and benefits: The first amendment to Part 152 established standards under which risk management programs may be approved by the Superintendent. Successful completion of approved risk management programs permitted credits to be applied to physicians professional liability programs.

At the time that amendment was promulgated, all risk management courses were conducted in a classroom setting in a lecture format. Since that time, advances in technology have made Internet-based home study courses available in an array of disciplines. Insurers have requested that they be permitted to take advantage of this technology and offer Internet-based risk management courses to their medical malpractice insureds. Offering Internet-based risk management courses will allow insureds increased flexibility in participating in these courses. This may result in more insureds completing the courses, which should ultimately translate into

better patient care and reductions in the incidence and cost of medical malpractice claims.

The recently enacted Section 42 of Part A of Chapter 1 of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 requires that, as of July 1, 2002, physicians, surgeons and dentists participate in a proactive risk management program in order to be eligible to participate in the excess medical malpractice insurance program established by the Legislature.

4. Costs: This rule imposes no compliance costs upon state or local governments.

There are no additional costs imposed upon regulated parties by the provisions of this amendment since, for the purposes of obtaining a premium credit, insurers are not required to offer risk management courses to their insureds, and those that offer risk management courses will not be required to include an Internet-based version. However, if they do offer these courses, these provisions offer regulated parties another option in offering risk management courses to their insureds. It is likely that it is more cost effective to offer Internet-based risk management courses to insureds in addition to, or in place of risk management courses in the lecture format. Courses conducted in a lecture format entail costs of hiring instructors, printing course materials and renting physical settings that can accommodate, and are convenient to, as many insureds that are eligible to attend.

In addition, insured physicians taking the Internet-based courses would not incur any transportation expenses that are associated with attending lecture format risk management courses. Furthermore, physicians would not have to schedule time away from their practice since these courses could be taken on line at virtually any time.

While insurers will incur additional costs when offering proactive risk management programs for the purpose of insurer eligibility in the excess medical malpractice insurance program, the statute provides that these costs will be reimbursed from funds available pursuant to Section 51 of Part A of Chapter 1 of the Laws of 2002. Reimbursement will be made according to procedures to be established by the Superintendent.

Although insurers have offered risk management programs, for the purpose of obtaining premium credits, for almost ten years, there are additional requirements specified in Section 42 of Chapter 1 of the Laws of 2002 for proactive risk management courses.

The follow-up course component of the proactive risk management course must be offered annually rather than every other year.

In order to satisfy the statutory requirement that these courses be proactive, insurers will also be required to conduct risk management audits annually, either by the insurer or by a self-review survey completed by the insured. There will be costs associated with developing the audit procedure, training people to conduct the audits, visiting insureds' practice settings to do the audit and implementing any necessary follow-up procedures after the results of the audit are analyzed.

These new requirements must be incorporated into the course and the course must be submitted to the superintendent for approval.

In addition, Section 42 requires that, in order for a dentist to participate in the excess medical malpractice program, he or she must participate in a proactive risk management program. Dental malpractice insurance carriers will incur costs necessary to set up proactive risk management courses, since up to this point the requirements of this Part with respect to risk management courses set up for purposes of premium credits did not apply to them.

Although the statute does not permit insurers to assess any fees against insureds for participating in these courses, insureds may have to schedule time away from their practice to participate in these risk management courses. However, it should be noted that participation in a proactive risk management course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, it is anticipated that completion of the excess medical malpractice risk management program will allow an insured physician to receive credit for Category 1 continuing medical education.

5. Local government mandates: This rule does not impose any mandates on local government.

6. Paperwork: There are paperwork requirements imposed by the provisions of the amendment on insurers with respect to offering an internet based risk management course. An insurer that decides to offer an Internet-based risk management course will have to follow existing procedures for

obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an Internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a location where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to provide the follow-up course on an annual basis rather than every other year which will entail making more frequent arrangements concerning location, notification and presentation of the course if it is offered in a lecture format. They will also have to develop new procedures for the purposes of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork burden should be minimal since insurers are already required to submit similar statistics regarding other risk management courses.

7. Duplication: This amendment will not duplicate any existing federal or state law.

8. Alternatives: The alternative of not permitting Internet-based risk management courses to be offered by insurers is not a viable alternative. The Department is of the opinion that technological advances in this area should be made available to insurers and insureds. By permitting the availability of these types of courses, it is expected that more insured physicians will be able to take these courses and the benefits of risk management will improve the quality of care provided to their patients.

Consideration was given to permitting insurers to provide non-Internet-based home study courses to their insureds. However, the Department is of the opinion that such home study courses do not afford insurers the ability to properly monitor the effectiveness of the course and to verify that the insured physician is actually taking the course as do other formats. Currently, when offering a risk management course in the lecture format, attendance must be taken of participants both before and after the lecture and admittance to the course is closed at a certain time after the start of the course. With Internet-based risk management courses, the insured physician will be required to affirm that they have read the content of the course, taken any quizzes and completed the required project. In addition, insureds will be given an individual password to use and the length of time spent on the Internet taking the course can be tracked by the insurer.

Since the proactive risk management course is required by statute, the Department could not consider the alternative of not implementing it. Although an internet based format is not directly addressed in the mandatory statute, the rule provides for this option in order to provide flexibility to both insurers and physicians, surgeons and dentists who must take such courses to qualify for the excess medical malpractice insurance coverage and to maintain consistency between the risk management credit course which is voluntary, and the course that must be taken by all insureds wishing to qualify for the excess medical malpractice insurance program.

9. Federal standards: There are no minimum standards of the federal government for the same or similar areas.

10. Compliance schedule: The provisions of this amendment will apply immediately. As required by statute, insurers must have a proactive risk management course available for their insureds in order for insureds to participate in the excess medical malpractice insurance program. It is expected that insurers will be able to comply with the new provisions in a relatively short period of time since most medical malpractice insurers already have had other risk management programs approved by the superintendent. In order to facilitate compliance with this statute, extensive discussions have been held by the Department with the major medical malpractice insurers in this state and the Medical Society of the State of New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

Since the offering of risk management courses for the purpose of premium credits is optional for insurers, there is no compliance schedule with respect to the offering of these courses in an internet-based format. An insurer may offer an internet-based risk management course to its insureds as soon as the Department determines that the course is in compliance with the provisions of this Part.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. The basis for this finding is that this rule is directed to property/casualty insurance companies licensed to do business in New York State and self-insurers, none of which fall within the definition of "small business".

The Insurance Department has reviewed filed Reports on Examination an Annual Statements of authorized property/casualty insurers and determined that none of them would fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees. Self-insurers typically have to be large enough to have the financial ability to self insure losses and the Department has never been provided information to indicate that any of the self-insurers are small businesses.

This rule will also have no adverse economic impact on local governments and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Although they are not regulated parties, this part affects physicians, surgeons and dentists, some of whom may be considered small businesses as they are required to attend proactive risk management courses if they wish to be eligible to participate in the excess medical malpractice insurance program. This may entail scheduling time away from their medical practice in order to participate in these courses. However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

In addition, by providing insurers with the option of offering risk management programs in an internet-based format, physicians should be able to save time and money by taking these courses in their home or office at a time convenient to them as opposed to attending these courses when conducted in a lecture format.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers and self-insurers covered by this regulation do business in every county in this state, including rural areas as defined under Section 102(1) of the State Administrative Procedure Act. Other affected parties, such as physicians, surgeons and dentists, conduct their practices throughout the state.

2. Reporting, recordkeeping and other compliance requirements: There are paperwork requirements imposed by the provisions of this amendment on insurers with respect to offering an internet-based risk management course. An insurer that decides to offer an internet-based risk management course will have to follow existing procedures for obtaining the Superintendent's approval of that course and submit required data on the number of insureds receiving the risk management credit.

Although they are not regulated parties, an insured physician might be subject to minimal paperwork requirements. If an insured physician takes an internet-based risk management course, he or she must affirm that they were the person who actually took the course and that they are aware that any premium credit granted by the insurer is based on this affirmation. Any additional costs associated with the completion of this affirmation will be offset by the fact that the insured does not have to travel to and from a setting where any risk management course is offered in the lecture format. It should also be noted that it is a voluntary decision by the insured to participate in any risk management course.

With respect to the proactive risk management course, insurers will have to provide the follow-up course on an annual basis rather than every other year which will entail making more frequent arrangements concerning location, notification and presentation of the course if it is offered in a lecture format. They will also have to develop new procedures for the purpose of conducting audits and/or self-audits by insureds.

Insurers will also be required to submit to the Department, on an annual basis, the number of insureds participating in proactive risk management courses. However, this paperwork should have a minimal impact since insurers are already required to submit similar statistics regarding other risk management courses.

3. Costs: This rule imposes no compliance costs upon state or local governments. It is not expected that insurers would incur undue expenses in offering internet-based risk management courses to their insureds for the purpose of obtaining premium credits. In fact, it is likely that it is more cost effective to offer internet-based risk management courses to insureds in

addition to, or in place of, risk management courses in the lecture format. Insureds would not be unduly affected by participating in internet-based risk management courses and would probably incur time and financial savings since they would be able to take these courses in their home or office at a time convenient to them.

Insurers will incur additional costs when offering proactive risk management programs to insureds for the purpose of eligibility in the excess medical malpractice insurance program. However, the statute provides that their costs will be reimbursed from statutory funds according to procedures to be established by the Superintendent. Insurers must offer these courses on an annual basis and will be conducting risk management audits or have insureds conduct self-audits. These new requirements are statutorily mandated, but should not impose any undue hardships for insurers.

However, it should be noted that participation in this course permits an insured to be issued one million dollars of excess medical malpractice insurance at no charge to himself/herself. It should also be noted that the aim of participation in risk management courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

It should also be noted that portions of the excess medical malpractice risk management programs will be reviewed by the Medical Society of the State of New York for qualification as Category 1 of continuing medical education credit. Therefore, an insured who successfully completes this course will qualify both for continuing medical education and for participation in the excess medical malpractice insurance program.

4. Minimizing adverse impact: The regulation applies to regulated parties that do business throughout New York State and does not impose any adverse impact on rural areas. Permitting insurers to offer risk management courses in an internet-based format should benefit insureds in rural areas through savings of time and money. Instead of traveling to central locations throughout the state to attend these courses in a lecture format, they can take the courses on computers in their home or office at a time convenient to them.

5. Rural area participation: The Department met extensively with the major medical malpractice insurers in New York State to solicit their opinions on the subject of proactive risk management programs. The Department also solicited input from the Medical Society of the State of New York in order that these courses would qualify for continuing medical education credit. Their comments were taken into account in developing the provisions of this Part.

Job Impact Statement

This rule should not have any adverse impact on jobs and employment opportunities in this State since it merely sets forth guidelines that medical malpractice insurers must follow when developing statutorily prescribed proactive risk management programs that must be submitted to the Superintendent for approval. It also permits insurers to offer risk management courses in an internet-based format.

NOTICE OF ADOPTION**Financial Statement Filings and Accounting Practices and Procedures**

I.D. No. INS-03-04-00004-A

Filing No. 515

Filing date: May 3, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201 and 301

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To delete obsolete references to certain web sites.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-03-04-00004-P, Issue of January 21, 2004.

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

Text of rule and any required statements and analyses may be obtained from: John Gemma, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5276, e-mail: jgemma@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Comprehensive Motor Vehicle Insurance Repairs Act

I.D. No. INS-08-04-00006-A

Filing No. 514

Filing date: May 3, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of Part 65 (Regulation 68-C) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and art. 51

Subject: Comprehensive Motor Vehicle Insurance Repairs Act.

Purpose: To conform the fraud warning statement contained in no-fault claim forms with the statutory language as contained in Regulation 95; amend any incorrect references and typographical errors; and present the forms in a more easily readable format.

Text or summary was published in the notice of proposed rule making, I.D. No. INS-08-04-00006-P, Issue of February 25, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Theresa Marchon, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: tmarchon@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

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

Unfair Claims Settlement Practices and Claim Cost Control Measures

I.D. No. INS-20-04-00007-P

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

Proposed action: This is a consensus rule making to amend section 216.8 (Regulation 64) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601 and 3412

Subject: Unfair claims settlement practices and claim cost control measures.

Purpose: To replace the reference to the National Insurance Crime Bureau ("NICBC) with an unspecified "central organization" designated by the superintendent, which will receive and investigate automobile total losses. The central organization may also contract with another reporting entity acceptable to the superintendent to assist it in executing its responsibilities pursuant to this Part.

Text of proposed rule: Section 216.8 is hereby amended to read as follows:

§ 216.8 Verification and reporting requirements applicable to losses arising under automobile physical damage policies and reporting of third-party property damage losses.

(a) Preamble. The purpose of this section is to implement the provisions of section 3412 of the Insurance Law, which provides for measures to be applied by insurers and a central organization engaged in loss prevention in order to prevent payment of fraudulent claims arising under automobile physical damage policies. Such measures shall include: reporting of data on private passenger automobiles involved in total losses to a central organization engaged in loss prevention, as designated by the superintendent; verification procedures to be applied by insurers prior to the payment of total theft losses; restrictions on the insured's retention of salvage; restrictions and procedures for insurer's disposition of salvage; the insurer's right to retrieve located stolen or abandoned vehicles; and notification by insurers to law enforcement agencies, when the insurer or the central organization suspects improper or fraudulent action on the part of the insured, or others involved in the loss settlement process.

(b) Applicability. This section shall apply to all losses involving private passenger automobiles of the current model year and the preceding six model years and older private passenger automobiles with an actual cash value of \$5,000 or more, prior to the loss. A private passenger automobile shall mean a four-wheel private passenger vehicle, station wagon, van, jeep-type vehicle, *sport utility vehicle*, or pickup truck.

(c) Central organization. The central organization [is hereby] shall be designated [to be the National Insurance Crime Bureau, hereinafter re-

ferred to as NICB.] by the superintendent. For purposes of this Part, "central organization" shall also include any entity that is acceptable to the superintendent with which the central organization contracts to assist in executing its responsibilities pursuant to this Part. All insurers licensed to write automobile physical damage insurance in this State are hereby required to become members of the [NICB] central organization, for the purpose of compliance with this section.

(d) Reporting and follow-up requirements. Insurers shall report all private passenger automobiles involved in losses to the [NICB] central organization, as follows:

(1) All total theft losses shall be reported immediately, but no more than two business days following notice of claim, as defined in section 216.1(d) of this Part. If the insurer has not received any acknowledgment or communication from the [NICB] central organization within 10 calendar days following its submission of the total theft report to the [NICB] central organization, the insurer shall immediately communicate with the [NICB] central organization to determine the status of its report.

(2) All other first- and third-party losses, however sustained, where damage to the claimant's vehicle exceeds \$ 2,500 shall be reported to the [NICB] central organization no later than five calendar days after the sale of salvage, or, if the insured or claimant is permitted to retain the vehicle, no later than five calendar days after the date of loss payment.

(3) The [NICB] central organization shall be responsible for recording any special vehicle identification number (VIN) issued by the Commissioner of Motor Vehicles, which data will be forwarded to the [NICB] central organization pursuant to section 431(2) of the Vehicle and Traffic Law.

(e) Verification procedures required prior to paying a total theft loss. Notwithstanding the provisions of section 216.7(b) and (c) of this Part, an insurer shall comply with [NICB] central organization verification procedures prior to its payment of a total theft loss, subject to the rules provided for in this section.

(1) The insurer shall defer the payment of a claim for five calendar days following receipt of the acknowledgment from the [NICB] central organization of the insurer's total theft report. If no further communication is received from the [NICB] central organization during this five-day period indicating unresolved questionable circumstances, the insurer shall continue with the processing of the claim in accordance with the provisions of this Part.

(2) If the [NICB] central organization verification procedure indicates insurance coverage by more than one insurer or a previously unrecovered theft loss, the insurers shall promptly investigate and resolve such discrepancy.

(3) If the [NICB] central organization verification procedure reveals an erroneous vehicle identification number (VIN) and the [NICB] central organization is unable to clear up such discrepancy internally, a questionnaire will be sent to the insurer by the [NICB] central organization. This questionnaire shall be returned to the [NICB] central organization within five business days of receipt by the insurer. Should [NICB] central organization and insurer efforts, after due diligence, be unsuccessful in resolving the VIN error after a 30-day period from date of report of loss to the insurer on a vehicle that has been inspected pursuant to Part 67 of this Title, the insurer shall proceed with the processing of the loss in accordance with the provisions of this Part.

(4) Subject to the provisions of subdivision (h) of this section, if the [NICB] central organization certification procedure indicates that the theft loss may be fraudulent, the insurer shall suspend processing of the loss. The [NICB] central organization shall then cooperate [in promptly investigating the matter] with any investigation.

(f) Salvage. Insurers shall, except where the insured is permitted to retain the automobile as part of the claim settlement, take possession of the certificate of title, properly endorsed to them, and take possession of the salvage, if any, whenever a loss is determined by the insurer to be a total loss or a constructive total loss. Insurers, in disposing of the salvage, shall fully comply with the requirements of section 429 of the Vehicle and Traffic Law.

(1) An insured shall not be permitted to retain the insured vehicle if the salvage value of the vehicle after the loss aggregates 10 percent or less of the actual cash value of the vehicle prior to the loss, unless the insurer is satisfied that the insured intends to retain the automobile for the insured's own use.

(2) Unless the conditions set forth in section 430.2 of the Vehicle and Traffic Law are met, insurers shall not, directly or indirectly, transfer within or without this State any vehicle for salvage, except to an automobile dealer, a vehicle dismantler, or a scrap processor licensed, registered

or certified in accordance with the provisions of the Vehicle and Traffic Law, or such person meeting licensing, registration or certification requirements of the state in which such person does business. An insurer or its agents shall not purchase salvage vehicles or used major component parts of motor vehicles except from a registered vehicle dismantler or a licensed automobile dealer.

(g) [NICB] *Central organization* recording and reporting recovery of stolen or abandoned vehicles. The [NICB] *central organization* shall be responsible for receiving and recording reports received from police and other law enforcement agencies of located stolen or abandoned vehicles pursuant to section 3412(f) of the Insurance Law. The [NICB] *central organization* shall promptly transmit such information to the insurer providing automobile physical damage coverage, if any, on the located vehicle. The insurer shall immediately notify the insured of the location where the vehicle has been stored for safekeeping.

(h) Reporting requirement and cooperation with law enforcement agencies. (1) The [NICB] central organization and each insurer authorized to issue automobile comprehensive insurance policies covering losses incurred to private passenger vehicles shall, upon the request of any appropriate law enforcement agency or insurance organization engaged in automobile loss prevention, release information in its possession resulting from an investigation conducted by it pertaining to such comprehensive loss, including information as such agency or organization deems related to its investigation. Should the [NICB] *central organization* or the insurer be of the opinion that the loss was caused by any criminal or fraudulent act of any person or organization, or that an improper action occurred in the disposition of an automobile subject to the provisions of this section, the [NICB] *central organization* or the insurer shall notify the Insurance Department's Frauds Bureau and any other appropriate law enforcement agency or insurance organization engaged in automobile loss prevention of that opinion, and shall notify the Insurance Department or Department of Motor Vehicles of any improper action of their respective licensees or registrants.

(2) In the absence of fraud or bad faith, there shall be no liability on the part of, and no cause of action of any nature shall arise against, the [NICB] *central organization*, or the insurer, or any person acting on their behalf:

- (i) for any such information it furnished;
- (ii) for its assistance in any such investigation; or
- (iii) for any report or notification made pursuant to the provisions of this section.

(3) Any information or evidence furnished pursuant to this subdivision shall be held in confidence by the appropriate agency or insurance organization engaged in automobile loss prevention, until such information is required to be released pursuant to a criminal proceeding, or if such agency or organization shall be served a summons or subpoena to testify as to any information or evidence in its possession regarding such automobile comprehensive loss in any civil action where an insured or other person is seeking recovery under a policy against an insurer for such automobile comprehensive loss.

(i) Required amendatory endorsement. For all policies providing automobile physical damage coverage issued or renewed to be effective on and after October 1, 1979, insurers shall adopt one of the following procedures:

(1) amend the policy by adding thereto the endorsement as set out in this subdivision, which is hereby deemed approved upon filing with the Insurance Department;

(2) submit for Insurance Department approval the insurer's own substantially similar endorsement; or

(3) submit for Insurance Department approval the insurer's basic policy form incorporating the substance of the endorsement set out in this subdivision.

An insurer which adopts one of the procedures set forth in this subdivision may subsequently submit filings under either of the other procedures.

**MANDATORY PHYSICAL DAMAGE
COVERAGE ENDORSEMENT
(NEW YORK)**

Notwithstanding any conflicting provisions applicable to the physical damage coverages of this policy, it is agreed that the following condition is added:

Recovery of Stolen or Abandoned Automobiles

In the event an automobile to which the physical damage coverages of this policy apply is stolen or abandoned, the company or its authorized representative(s) shall, when notified of the location of the automobile, have the right to take custody of the automobile for safekeeping.

Instruction

This endorsement must be attached to, incorporated in or overprinted upon all policies covering private passenger automobiles issued or delivered in New York.

(j) Existing policies. All policies in force on and after the effective date of this Part providing automobile physical damage coverage shall be deemed to include the provisions of the endorsement set forth in subdivision (i) of this section.

Text of proposed rule and any required statements and analyses may be obtained from: Anna Lemecha, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5128, e-mail: alemecha@ins.state.ny.us

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

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

Consensus Rule Making Determination

The agency has determined that no person is likely to object to the rule as written. The rule currently calls for the National Insurance Crime Bureau ("NICB") to receive and investigate automobile total losses. The NICB transferred its claims database and related software in 1998 to the Insurance Services Office, Inc. ("ISO") which has been collecting the required data and making the necessary reports since such time. As such, the amendment merely replaces the reference to the NICB with a "central organization" designated by the Superintendent. The central organization may also contract with another reporting entity acceptable to the Superintendent to assist it in executing its responsibilities pursuant to this Part. Under the amendment, the central organization will not be specified. This provides the Superintendent greater flexibility to name a new central organization when necessary, as, for example, in the present case, where the NICB transferred certain of its responsibilities and duties to ISO.

Job Impact Statement

The proposed rule change will have no impact on jobs and employment opportunities in New York State. The amendment merely replaces the reference to the National Insurance Crime Bureau with an unspecified "central organization" designated by the Superintendent. The central organization may also contract with another reporting entity acceptable to the Superintendent to assist it in executing its responsibilities and duties pursuant to this Part. This provides the Superintendent greater flexibility to name a new central organization whenever necessary without having to go through the regulatory process as, for example, in the present case, where the National Insurance Crime Bureau transferred certain of its responsibilities and duties to the Insurance Services Office, Inc. in 1998.

Department of Motor Vehicles

NOTICE OF ADOPTION

Westchester County Motor Vehicle Use Tax

I.D. No. MTV-11-04-00029-A

Filing No. 519

Filing date: May 4, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of section 29.12(a) of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Westchester County motor vehicle use tax.

Purpose: To increase the tax.

Text or summary was published in the notice of proposed rule making, I.D. No. MTV-11-04-00029-P, Issue of March 17, 2004.

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

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

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Gas Pipeline Tariff No. 219 by Niagara Mohawk Power Corporation

I.D. No. PSC-03-04-00012-A

Filing date: April 28, 2004

Effective date: April 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 April 8, 2004, adopted an order in Case 03-G-1674 approving Niagara Mohawk Power Corporation's (Niagara Mohawk) request for a waiver of certain tariff provisions contained in its Service Classification 14.

Statutory authority: Public Service Law, section 66

Subject: Tariff provisions.

Purpose: To remove from tariff language an optional one percent loss factor term.

Substance of final rule: The Commission denied Niagara Mohawk Power Corporation's (Niagara Mohawk) request for a declaratory ruling regarding certain tariff provisions and granted Niagara Mohawk a waiver of the 1% loss factor provisions required by its Service Classification 14 of its Gas Pipeline Tariff No. 219, 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-G-1674SA1)

NOTICE OF ADOPTION

Sale-Leaseback Transaction by KeySpan-Ravenswood, LLC

I.D. No. PSC-10-04-00018-A

Filing date: May 3, 2004

Effective date: May 3, 2004

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

Action taken: The commission, on May 3, 2004, adopted an order in Case 04-E-1095 granting KeySpan-Ravenswood, LLC's (Ravenswood) request for a sale-leaseback financing transaction of an electric generation facility and related real property.

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

Subject: Transfer of lightly regulated electric generation assets.

Purpose: To allow the owner/participants to obtain tax advantages while Ravenswood receives lower-cost financing.

Substance of final rule: The Commission approved KeySpan-Ravenswood, LLC's (Ravenswood) petition for the sale and simultaneous leaseback of Ravenswood Unit 40, a dual-fueled, combined-cycle electric generation facility and allowed Ravenswood to continue to be lightly regulated as an electric corporation. The Commission also granted Ravenswood a waiver of certain filing requirements, 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. (04-E-0195SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition of Rehearing by Tenant Research Team

I.D. No. PSC-20-04-00011-P

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

Proposed action: The Public Service Commission is considering a request filed by Tenant Research Team for a rehearing of the commission's Sept. 26, 2003 order approving a request by KSLM Columbus Apartments to submeter electricity at 120 W. 97th St., 160 W. 97th St., and 135 96th St., New York, NY.

Statutory authority: Public Service Law, sections 22 and 65(1)

Subject: Rehearing of the commission's order issued on Sept. 26, 2003.

Purpose: To reconsider the commission's decision regarding the submetering proposal submitted by KSLM Columbus Apartments.

Substance of proposed rule: The Commission issued an order on September 26, 2003 approving a proposal by KSLM Columbus Apartments to submeter electricity at 120 West 97th Street, 160 West 97th Street, and 135 West 96th Street, New York, NY.

By letter dated October 10, 2003, the Tenant Research Team filed a petition of rehearing for the Commission to reconsider its decision on the submetering proposal submitted by KSLM Columbus Apartments. The petition presents the reason for the rehearing based on its position that the tenants did not receive notification of KSLM Columbus Apartments intent to petition the Commission to submeter electricity prior to Commission approval.

The Commission may accept, deny or modify, in whole or in part, the petition for rehearing on the proposal to submeter electricity at 120 West 97th Street, 160 West 97th Street, and 135 West 96th Street, New York, NY.

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

Data, views or arguments may be submitted to: Jaclyn A. 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-0598SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Net Metering Special Provisions by Central Hudson Gas & Electric Corporation

I.D. No. PSC-20-04-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a proposal filed by Central Hudson Gas & Electric Corporation to make various changes to its rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 15—Electricity, to become effective Aug. 1, 2004.

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

Subject: Net metering special provisions.

Purpose: To modify certain terms of service for residential customers taking service under the net metering special provisions within Service Classification Nos. 1 and 6.

Substance of proposed rule: Central Hudson Gas and Electric Corporation (Central Hudson or the company) proposes to clarify and revise certain terms of service for customers taking service under the net metering

special provisions within Service Classification Nos. 1 and 6 contained in P.S.C. No. 15—Electricity that pertain to residential photovoltaic and farm waste generators, respectively, that meet the requirements of Public Service Law Section 66-j. Central Hudson proposes to clarify the metering options available to customers taking service under the net metering special provisions within Service Classification No. 1. The company also proposes to revise the procedure for allocating photovoltaic output, as measured by a non-time-differentiated meter, and to offer additional metering options to customers taking service under the net metering special provisions within Service Classification No. 6.

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-0546SA1)

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

Long Term Indebtedness by Chautauqua Utilities, Inc.

I.D. No. PSC-20-04-00013-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, or modify, in whole or in part, a petition filed by Chautauqua Utilities, Inc. for authority to incur indebtedness not to exceed \$1,700,000.

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

Subject: Long term indebtedness.

Purpose: To authorize long term indebtedness for the construction of a natural gas pipeline in Chautauqua County, NY.

Substance of proposed rule: By Petition filed May 3, 2004, Chautauqua Utilities, Inc. seeks approval to incur indebtedness totaling \$1.7 million by executing: (1) a 4% per annum promissory note in the amount of \$680,000, payable to the Chautauqua County Industrial Development Authority or its designated agency, with a term of 15 years and payments to be made monthly; (2) a promissory note in the amount of \$850,000, payable to M&T Bank at prime plus 1%, with a term of 10 years and payments to be made monthly; and (3) a 6% per annum promissory note in the amount of \$170,000, payable to Chautauqua Utilities, Inc.'s affiliate, Chautauqua Energy Management, with no fixed payment schedule. The purpose of such indebtedness is to construct, complete and commence operation of gas plant in the Town of North Harmony, Chautauqua County.

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-G-0576SA1)

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

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

I.D. No. PSC-20-04-00014-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 petition by Cablevision of Wappingers Falls, Inc. for a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the manner of calculation of franchise fees.

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

Subject: Calculation of franchise fees.

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

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Town of Phillipstown (South) (Putnam County). Section 595.1(o)(2) requires franchise contract language to express franchise fees as a percentage of gross revenues derived from the operation of the cable system. Gross revenues are defined in the referenced section as "all revenues required to be reported to the commission . . . pursuant to 9 NYCRR Part 595." Section 595.1(o)(2) permits exclusions from that revenue base, but requires that such base include all "revenues received directly from subscribers for any cable services purchased by subscribers on a regular, recurring monthly basis." Franchise fee collections fall within these definitions of gross revenues. Therefore, a waiver of rule is required to permit exclusion of franchise fee collections from calculation of gross revenues.

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

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

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

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

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

(04-V-0436SA1)

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

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

I.D. No. PSC-20-04-00015-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 petition by Cablevision of Wappingers Falls, Inc. for a waiver of 9 NYCRR section 595.1(o)(2) pertaining to the manner of calculation of franchise fees.

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

Subject: Calculation of franchise fees.

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

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Cablevision of Wappingers Falls, Inc. for a waiver of section 595.1(o)(2) pertaining to the manner of calculation of franchise fees in the Town of Phillipstown (North) (Putnam County). Section 595.1(o)(2) requires

franchise contract language to express franchise fees as a percentage of gross revenues derived from the operation of the cable system. Gross revenues are defined in the referenced section as "all revenues required to be reported to the commission . . . pursuant to 9 NYCRR Part 595." Section 595.1(o)(2) permits exclusions from that revenue base, but requires that such base include all "revenues received directly from subscribers for any cable services purchased by subscribers on a regular, recurring monthly basis." Franchise fee collections fall within these definitions of gross revenues. Therefore, a waiver of rules is required to permit exclusion of franchise fee collections from calculation of gross revenues.

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

Data, views or arguments may be submitted to: Jaclyn A. 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-V-0437SA1)

Racing and Wagering Board

EMERGENCY RULE MAKING

Trifecta Wagering

I.D. No. RWB-20-04-00005-E

Filing No. 512

Filing date: April 30, 2004

Effective date: April 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: This rule amendment provides 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 rule making is necessary because the Board has determined that emergency adoption is necessary for the preservation of the general welfare and that standard rule making procedures would be contrary to the public interest.

Subject: Trifecta wagering in thoroughbred stakes, handicap or allowance races in those situations where there are five betting entries. Such authorization would allow trifecta wagering on a five-entry field at the discretion of the Racing and Wagering Board's steward.

Purpose: To authorize the conduct of trifecta wagering in thoroughbred stakes, handicap or allowance races in those situations where there are five betting entries at the discretion of the Board steward. This would avoid the mandatory cancellation of the trifecta betting pool, thereby preserving the wagering opportunities and corresponding revenues associated with this type of wager.

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 July 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 rules 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 and 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 and 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 and 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 and 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.

EMERGENCY RULE MAKING

Drug Testing of Horses

I.D. No. RWB-20-04-00006-E

Filing No. 513

Filing date: April 30, 2004

Effective date: April 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 4043.6, 4043.7, 4038.18, 4120.10, 4120.11, 4109.7 and 4113.3 of 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 rulemaking 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 rulemaking procedures would be contrary to the public interest.

Subject: The 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. These rules will provide for the exclusion from racing of those horses that are the subject of a positive test until there is a subsequent negative test. Claimants of horses will have the option of voiding any claim based upon the report of a positive test.

Text of emergency rule: 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.

AMEND Part 4043 (Drugs Prohibited and Other Prohibitions) to add a new Rule 4043.6:

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.

THOROUGHBRED:

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 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.

HARNESS

AMEND Part 4120 (Drugs Prohibited and Other Prohibitions) by adding a new Rule 4120.10:

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 steward's 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.

HARNESS:

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.

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 July 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 Section 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 au-

thorized 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. There are no professional services that are likely to be needed to comply with these rules. 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.

3. **Professional Services.** There are no professional services required to comply with the proposed rules.

4. **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.

5. **Economic and Technological Feasibility.** There are no technological requirements associated with compliance. There should be no costs associ-

ated with compliance. Erythropoietin and darbepoietin have no legitimate use in the racing horse and therefore no affirmative compliance requirement exists. The drugs reserpine and fluphenazine are tranquilizers for which alternatives exist. Horsemen may comply with the prohibitions of the rule by use of alternative drugs at an equal or lesser cost.

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

1. **Types and estimated numbers of rural areas.**

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.

2. **Reporting, recordkeeping and other compliance requirements.**

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.

3. **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.

4. **Minimizing adverse impact.**

As a consequence of the location of horsemen in rural areas, these rules have similar impact on rural areas as on non-rural areas of the State. The geographic location of the horses and horsemen is incidental to the substance of the rule. Consequently, there is no way to design the rule to minimize impact on rural areas.

5. **Rural area 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 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 grooms.

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.

State University of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Student Activity Fees

I.D. No. SUN-20-04-00010-P

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

Proposed action: Amendment of section 302.14 of Title 8 NYCRR

Statutory authority: Education Law, section 355(2)(b) and (h)

Subject: Student activity fees at State-operated units of the State University of New York.

Purpose: To amend regulations governing the collection, use and disbursement of student activity fees at State-operated campuses of the State University of New York.

Text of proposed rule: 302.14 Student Activity Fees

(a) Referendum. Prior to the close of the academic year [1976-77 with sufficient time provided for the orderly budget planning of student activity programs,] 2004-2005 and every [four] two years thereafter, the student body (or such components thereof as may be designated by the chief administrative officer, or [his] designee) at each State-operated campus shall determine by referendum whether student activity programs shall be supported by either voluntary or mandatory student fees. [The implementation of the 1976-77 referendum determination shall become effective in relation to the appropriation, collection and disbursement of such fees for the 1977-78 academic year.] *Such referendum shall be held on the same day as the annual elections for officers of the representative student organization or organizations (hereinafter referred to as "student government").* The determination resulting from each referendum shall remain in force for a period of [four] two academic years, except that at any time and from time to time within such [four] two year period a subsequent referendum held in accordance with the constitution and by-laws of the [representative student organization or organizations] *student government* may affect a change in this determination with respect to the following academic year [and to continue for the remaining portion of the four year period].

(b) Voluntary fees. Where students at a State-operated campus have determined to make the payment of student activity fees voluntary, the [representative student organization] *student government* shall be responsible for the collection, appropriation and disbursement of such fees *subject to the permitted uses authorized in paragraph (c)(3) of the Board of Trustees' Policy.* With the approval of the chief administrative officer, or [his] designee, personnel or facilities of the campus, or both, may be used in connection with the collection of such fees on behalf of the [representative student organization] *student government* provided that the collection of voluntary student activity fees is clearly distinguished from the collection of required university fees.

(c) Mandatory fees. Where students at a State-operated campus have determined to make the payment of student activity fees mandatory, the appropriation, collection and disbursement of such fees, whensoever collected, shall be governed by the following regulations:

(1)(a) Preparation and certification of the budget. The [representative student organization] *student government* shall prepare and approve a budget governing expenditures from student activity fees in accordance

with the constitution and by-laws of the [student organization] *student government*, and consistent with the principles of equal opportunity and viewpoint neutrality, prior to registration for each [term] *academic year.* *The constitution and by-laws of such student government shall specify the criteria governing eligibility for funding of and allocations to student organizations from student activity fees. The student government may provide for use of advisory referenda of the student body with respect to particular funding decisions but may not agree to be bound by such referenda.* Allocations included in the budget shall fall within programs defined in paragraph (3) of this subdivision. The approved budget shall thereafter be presented to the chief administrative officer prior to the registration for each [term] *academic year* for [his] review and certification that the allocations *from the fee and any proposed sources of revenue* are in compliance with the provisions of paragraph (3) of this subdivision. [In the event that the chief administrative officer, or his designee, concludes that a particular proposed allocation may not be in compliance with the provisions of this Part, he shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the representative student organization and four appointed by the chief administrative officer, or his designee. The campus review board shall study the proposed allocation and make a recommendation with respect to it. The chief administrative officer, or his designee, shall thereafter make the final decision. Any proposed allocation which is determined not to be in compliance with the provisions of these regulations shall be excluded from the budget.] Upon determination by the chief administrative officer, or [his] designee, that the approved budget is in compliance with these regulations, he *or she* shall so certify, and such certification shall authorize the collection of the fee at registration.

(1)(b) Appeals - *In the event that the chief administrative officer, or designee, concludes that a particular proposed allocation included in the budget may not be in compliance with the provisions of this Part, he or she shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the student government and four appointed by the chief administrative officer, or designee. The campus review board shall study the proposed allocation and make a recommendation to support or not to support it. The chief administrative officer, or designee, shall thereafter make the final decision. Any proposed allocation which is determined not to be in compliance with the provisions of these regulations shall be excluded from the budget.*

(2) Collection at registration. *The total amount of the fee for one academic year, as fixed and assessed by the student government, shall not exceed an amount to be determined by the chancellor in consultation with the student assembly.* Upon registration, every student shall be required to pay [a] one half of the total fee, or proportionate part thereof, *if registered for less than full-time,* for [the] each term for which he *or she* registers. [, as may have been fixed and assessed by the representative student organization to the extent that such fee does not exceed an amount to be determined by the chancellor in consultation with the student assembly.] Failure to pay the required fee may result in denial of registration. The fiscal officer of each State-operated campus shall collect the prescribed fee at the time of registration and shall pay over the amounts so collected to [a custodial and disbursing] *an independent fiscal agent* designated by the [representative student organization] *student government* and approved by the chief administrative officer, or [his] designee. If there is reasonable evidence in an individual case, as determined by the chief administrative officer, or [his] designee, that payment of the fee may cause undue hardship, such student may nevertheless be allowed to register and [his] *the* obligation to pay such fee shall thereafter be subject to administrative review and action by the chief administrative officer, or [his] designee, after consultation with the [representative student organization] *student government.* In a case in which a student has been allowed to register without payment of the student activity fee, the chief administrative officer [of the campus concerned] may withhold grades or transcripts of credits until payment has been waived by such administrative action or the obligation has been met. In addition, the [representative student organization] *student government* may determine to deny participation in student activities in the case of any student who has not fulfilled his *or her* obligation with respect to payment of the mandatory student activity fee. Student imposed fees in excess of the mandated fee shall be considered voluntary within the provisions of subdivision (b) of this section. Policies governing refunds to students who cancel their registration or withdraw from the university shall be established by the [representative student organization] *student government.* *For those periods outside the academic year (i.e. summer session) a mandatory fee also may be collected, provided the amount of the fee is consistent with the level of programming provided during that period and*

is used in accordance with the Board of Trustees' Policy. The amount of this fee shall be determined by the student government in consultation with the chief administrative officer of the campus, or designee, and shall not be included within the cap applicable to the amount charged for the academic year.

(3) Use of funds. Funds which are collected under provisions of this section which require every student to pay the prescribed mandatory fee and all revenues generated from use of the fee shall be used only for support of the following programs for the benefit of the campus community:

- (i) programs of cultural and educational enrichment;
- (ii) recreational and social activities;
- (iii) tutorial programs;
- (iv) athletic programs, both intramural and intercollegiate;
- (v) student publications and other media;
- (vi) assistance to recognized student organizations *including religious student organizations*, [provided that] for the purposes and activities of the organization that are of an educational, cultural, recreational or social nature[;], and provided further that the criteria for recognition of student organizations, the criteria governing eligibility for funding of and allocations to such student organizations from student activity fees and the advisory nature of any referenda held by the student government to aid in particular funding decisions shall be specified in the constitution and by-laws of the student government;
- (vii) insurance related to conduct of these programs;
- (viii) administration of these programs;
- (ix) transportation in support of these programs;
- (x) student services to supplement or add to those provided by the university; [and]
- (xi) remuneration and reimbursement of reasonable and necessary travel expenses in accordance with state guidelines to students [of-ficers] for service to student government[.];
- (xii) campus-based scholarships, fellowships and grant programs, provided the funds are administered by the campus or a campus affiliated organization;
- (xiii) payments for contractual services provided by a nonprofit organization to the extent that such services are in aid of an approved student activity during the budget year and which activity serves the purposes set forth above and provided further that such payments may not be exclusively for the general corporate purposes of such organization;
- (xiv) salaries for professional non-student employees of the student government to the extent that they are consistent with hiring practices and compensation rates of other campus-affiliated organizations; and
- (xv) charitable donations to a nonprofit organization; provided, however, that such donations may be funded only from the proceeds of a fundraiser held by a recognized student organization.

(4) Disbursement of funds. Proceeds of the student activity fee shall be disbursed by the [representative student organization] *student government*, through the designated [custodial and disbursing] *independent fiscal agent*, provided that the *proposed* fiscal commitment for each expenditure shall have been approved by the chief administrative officer or [his] designee. In the event that the chief administrative officer, or [his] designee, concludes that a particular *proposed* fiscal commitment may not be in compliance with an approved budgetary allocation and the provisions of this section, he or she shall refer such proposed fiscal commitment to the campus review board for review and recommendation. Final determination for approval of the compliance with this section of any *proposed* fiscal commitment shall rest with the chief administrative officer or [his] designee. Fiscal and accounting procedures prescribed by the chancellor, or [his] designee, shall be adopted and observed by the [representative student organization] *student government*. These procedures shall include, among other things, provisions for an annual *independent audit*[.] *including the communication to student government management by the independent auditor of any internal control matter(s) noted during the conduct of the audit; and for public dissemination of information regarding the budgeting process including a list of funded activities, current allocations and expenditures.*

(5) Changes to approved budget. Changes to the approved budget after certification, either prior to or subsequent to the collection of mandatory fees, shall be subject to administrative review and certification by the chief administrative officer, or [his] designee, in the same manner as was applicable to the original budget.

(d) Use of college facilities. The provisions of this section shall not be interpreted to authorize the use of college facilities for student activities and programs without appropriate administrative approval. *Appropriate*

payments shall be made by student organizations for the use of college facilities where there are extraordinary costs to the college associated with such events.

Text of proposed rule and any required statements and analyses may be obtained from: Edward Engelbride, Assistant Vice Chancellor for University Life, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5116, e-mail: engelbed@sysadm.suny.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, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each state-operated institution of the University.

2. Legislative Objectives: The present measure makes revisions in the policy governing the collection, use and disbursement of student activity fees for state-operated campuses of the State University of New York. These fees are a source of financial support for activities that enhance student life at these campuses, in furtherance of the statutorily-defined mission of the State University of New York under Article 8 of the Education Law.

3. Needs and Benefits: The present measure is needed to provide consistent, appropriate, legally sufficient and financially responsible guidance to the student governments and students at the state-operated campuses of the State University of New York relating to the periodic referendum on the mandatory student activity fee and to the collection, use and disbursement of these fees. The amendments bring the student activity fee policy into compliance with recent federal court decisions, particularly, the U.S. Supreme Court case, Board of Regents of the *University of Wisconsin System v. Southworth*, 120 S. Ct. 1346 (2000). In the *Southworth* case, the Supreme Court ruled that public institutions of higher education may, constitutionally, charge students an activity fee to fund student programs that involve speech if the activity fee program is "viewpoint neutral," meaning that the allocation of funds to student groups must be based on criteria unrelated to the views of the student group. The proposed amendments also enhance the participation of students in the process of setting these fees and the communication regarding the activities supported by the fee. While greater flexibility is provided in the permissible uses of the fees, measures also are taken to ensure fiscal accountability for these funds by the elected student governments. Overall, the amendments recognize the important role of student activity fees in providing financial support for activities at institutions within the State University that enhance the college experience for students.

4. Costs: There will be no additional costs to students due to the amendments. The present measure does not change the amount of the student activity fee or the mechanism for establishing the fee ceiling. It does ensure, however, that students will have more information about the activities supported by the fee and more input into the establishment of the mandatory fee in the first instance. The student governments at the campuses of the State University of New York may incur minimal, additional costs in complying with the increased oversight and fiscal accountability requirements.

5. Local Government Mandates: There are no local government mandates.

6. Paperwork: Representative student organizations at state-operated units of the State University of New York will be required to adopt measures to ensure fiscal accountability for the student activity fee funds and to ensure broader dissemination of information to the student body at each campus about the uses of these funds.

7. Duplication: None.

8. Alternatives: While there is an alternative of keeping the fee policy unchanged, it is not acceptable since a number of the amendments are required by federal court decisions and are necessary to ensure financial integrity and accountability for the activity fee. The present measure also received significant student support within the State University. The amendments implement a range of recommendations made by the University-wide Task Force on the Student Activity Fee which was appointed by the Chancellor in June 2001. The Task Force was composed of a number of constituencies within the University, including students and campus business and student affairs professionals. Additionally, the amendments were

endorsed by the University-wide student governance organization, the Student Assembly of State University of New York.

9. Federal Standards: None.

10. Compliance Schedule: It is intended that the amendments will be effective for the Spring 2003 semester.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule 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.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on rural areas. The rule will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping, professional services or other compliance requirements on rural areas.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs student activity fees at the State University of New York and will not have any adverse impact on the number of jobs or employment.

Department of Taxation and Finance

NOTICE OF ADOPTION

Fuel Use Tax

I.D. No. TAF-10-04-00024-A

Filing No. 497

Filing date: April 29, 2004

Effective date: April 29, 2004

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

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

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

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

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning April 1, 2004, and ending June 30, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-10-04-00024-P, Issue of March 10, 2004.

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

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

Assessment of Public Comment:

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.

NOTICE OF ADOPTION

Farming and Commercial Horse Boarding Operations

I.D. No. TAF-10-04-00025-A

Filing No. 498

Filing date: April 29, 2004

Effective date: May 19, 2004

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

Action taken: Amendment of sections 528.7 and 528.22 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 1101(b)(19) and (20); 1105(c)(3)(vi) and (5)(iii); 1115(a)(6), (15) and (16) and (c)(2); 1142(1) and (8); and 1250 (not subdivided)

Subject: Farming and commercial horse boarding operations.

Purpose: To correct dated sections of the sales and use tax regulations to reflect current Tax Law as it pertains to farming and commercial horse boarding operations.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-10-04-00025-P, Issue of March 10, 2004.

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

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

Assessment of Public Comment

The New York Farm Bureau submitted comments to voice their appreciation for the Department of Taxation and Finance's work in updating the regulations regarding the sales and compensating use tax exemptions applicable to farming and commercial horse boarding operations: "This program helps maintain the viability of New York agriculture and in so doing promotes the benefits that farms and commercial horse boarding operations provide to our local communities. In reviewing the proposed regulations, the Department has done a commendable job in matching the proposed regulations with the legislative intent of this program." No other comments were received by the Department on the proposed rule.

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

Fuel Use Tax

I.D. No. TAF-20-04-00003-P

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

Proposed action: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

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

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

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning July 1, 2004, and ending Sept. 30, 2004, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (xxxv) to read as follows:

Sales Tax Component	Motor Fuel Composite Rate	Aggregate Rate	Sales Tax Component	Diesel Motor Fuel Composite Rate	Aggregate Rate
(xxxiv) April - June 2004					
10.5	18.5	33.1	11.0	19.0	31.85
(xxxv) July - September 2004					
11.4	19.4	34.0	11.1	19.1	31.95

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

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

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

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

Statements and analyses are 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.

Workers' Compensation Board

EMERGENCY RULE MAKING

Waiver Agreements

I.D. No. WCB-20-04-00002-E

Filing No. 496

Filing date: April 29, 2004

Effective date: April 29, 2004

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

Action taken: Amendment of section 300.36 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 141 and 32

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

Specific reasons underlying the finding of necessity: WCL § 32, as amended Chapter 635 of the Laws of 1996, permits the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents, subject to approval by the Board. At first, few waiver agreements were submitted to the Board, and a meeting was held before a Board Commissioner in all cases to question the parties about the agreement. However, in the late 1990's, the number of waiver agreement submitted to the Board increased so dramatically that it was not feasible to hold a meeting in every case in which an agreement was filed. Moreover, most agreements submitted to the Board were routine. Beginning in 2000, Board Commissioners began reviewing routine agreements administratively, without holding a meeting to discuss the agreement with the parties. The majority of settlement agreements are reviewed and approved by the Board without the need for a meeting with the parties. On April 22, 2004, the Appellate Division, Third Department rendered a Memorandum and Order in Matter of *Hart v. Pageprint/Dekalb*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3rd Dept., Slip Op. No. 94339, 2004), finding that the administrative review of waiver agreements was invalid insofar as it conflicted with the terms of 12 NYCRR 300.36. The purpose of this amendment is to amend 12 NYCRR 300.36, consistent with WCL § 32, to permit the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting with the parties, which benefits everyone. Requiring meetings for all waiver agreements would greatly increase the time it takes for such an agreement to be approved as the Board has limited calendar time. Additionally, the Board has numerous agreements which have been processed administratively and are ready for approval, but cannot be approved due to the above referenced decision. If the Board is to continue to efficiently and timely review and issue decisions regarding waiver agreements, it must process the routine agreements administratively.

Subject: Waiver agreements pursuant to section 32.

Purpose: To provide for the administrative review of waiver agreements.

Text of emergency rule: Subdivision (b) of section 300.36 of Title 12 NYCRR is amended to read as follows:

(b) Any agreement submitted to the board for approval shall be on a form prescribed by the chair or, alternatively, contain the information prescribed by the chair. [For the purposes of section 32 of the Workers' Compensation Law and this section, an agreement shall be deemed submitted when it is received by the board at the time a hearing is conducted to

question the parties about the agreement. No agreement shall be approved for a period of 10 calendar days after submission to the board.]

Subdivisions (e), (f), (g), (h) and (i) of section 300.36 of Title 12 NYCRR are renumbered (f), (g), (h), (i) and (j) and a new subdivision (e) is added to read as follows:

(e) *After at least 10 calendar days have passed since the submission of the agreement to the Board, the agreement shall be reviewed by the chair, a designee of the chair, a member of the board, or a Workers' Compensation Law Judge, who will make a determination whether to approve or disapprove the agreement. The chair, designee of the chair, member of the board, or Workers' Compensation Law Judge reviewing the agreement may approve or disapprove the agreement administratively, based on a review of the record before the board, or may chose to schedule a meeting to question the parties about the agreement. If the agreement is reviewed administratively, the Board shall advise the parties in writing of the date the agreement shall be deemed submitted for the purposes of Section 32 of the Workers' Compensation Law and this section. If a meeting is scheduled to question the parties about the agreement, the agreement will be deemed submitted for the purposes of Section 32 of the Workers' Compensation Law and this section at such meeting.*

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 July 27, 2004.

Text of emergency rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 473-8626, e-mail: Office-ofGeneralCounsel@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.36. Workers' Compensation Law Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law.

Section 141 of the Workers' Compensation Law provides that the Chair shall be the administrative head of the Board and authorizes the Chair, in the name of the Board, to enforce all the provisions of the WCL and to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports.

Section 32 of the Workers' Compensation Law provides that whenever a claim for workers' compensation has been filed, the claimant or the deceased claimant's dependents and the employer or its insurance carrier may enter into a written agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents. Such agreement shall not be binding unless approved by the Board. Once approved by the Board, the agreement shall be final and conclusive upon the parties. An agreement may be modified at any time by written agreement of all the interested parties provided it is approved by the Board.

2. Legislative objectives:

Section 73 of Chapter 635 of the Laws of 1996 amended Section 32 of the Workers' Compensation Law to permit the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents. This rule would amend the regulations adopted in 1997 implementing Section 73 of Chapter 635 of the Laws of 1996 to provide for the administrative review of waiver agreements.

3. Needs and benefits:

Prior to the enactment of Section 73 of Chapter 635 of the Laws of 1996, a workers' compensation claimant was not permitted to permanently waive his or her right to benefits under the Workers' Compensation Law (hereinafter "WCL"). The 1996 amendment to WCL § 32 permits the parties to a workers' compensation claim to enter into an agreement settling upon and determining the compensation and other benefits due to the claimant or the claimant's dependents, subject to approval by the Board. At first, few waiver agreements were submitted to the Board, and a meeting was held before a Board Commissioner in all cases to question the parties about the agreement. However, in the late 1990's, the number of waiver agreement submitted to the Board increased so dramatically that it was not feasible to hold a meeting in every case in which an agreement was filed. Moreover, most agreements submitted to the Board were routine. Beginning in 2000, Board Commissioners began reviewing routine agreements administratively, without holding a meeting to discuss the agreement with the parties. The majority of settlement agreements are reviewed

and approved by the Board without the need for a meeting with the parties. On April 22, 2004, the Appellate Division, Third Department rendered a Memorandum and Order in *Matter of Hart v. Pageprint/Dekalb*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3rd Dept., Slip Op. No. 94339, 2004), finding that the administrative review of waiver agreements was invalid insofar as it conflicted with the terms of 12 NYCRR 300.36. The purpose of this amendment is to amend 12 NYCRR 300.36, consistent with WCL § 32, to permit the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting with the parties.

Permitting the Board to review and approve or disapprove routine waiver agreements administratively, without the need for a meeting benefits all participants to the workers' compensation system. The Board receives approximately 1,000 new waiver agreements each month. Requiring meetings for all waiver agreements would greatly increase the length of time it would take to review each agreement, as the Board has limited calendar time and only a small number of Board Commissioners. Additionally, claimants would be required to take time during the work day to appear at a Board district office for the meeting. The waiver agreements that are reviewed administratively are routine and the claimants represented. The Board is working to ensure that the parties who have entered into a routine waiver agreement have that agreement reviewed and a decision issued without delay. By redirecting the simple or routine cases from the meeting calendar and processing them administratively, the complex cases that remain on the meeting calendar will progress more quickly.

4. Costs:

The proposed amendment will not result in any new or additional costs to private regulated parties, State, local governments or the Workers' Compensation Board. This proposal merely adds a second process for the review and approval or disapproval of waiver agreements, which does not require personal appearances before the Board by the parties.

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants in the workers' compensation system, this proposal merely adds a second process for the review and approval or disapproval of waiver agreements, which does not require personal appearances before the Board by the parties.

6. Paperwork:

The proposed amendment does not add any reporting requirements.

7. Duplication:

This amendment will not duplicate any existing Federal or State requirements.

8. Alternatives:

One alternative discussed was to hold a meeting in every case to question the parties about the agreement submitted. However, in most instances, waiver agreements submitted to the Board are routine, questioning of the parties concerning the agreement is not necessary, and a meeting would result in a delay in the processing of such agreements. Pursuant to the proposed amendment, the Board could schedule a meeting to discuss the agreement with the parties when circumstances so warrant.

9. Federal standards:

There are no federal standards applicable to this proposed amendment.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2,511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage.

Small businesses that are self-insured will also be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage.

Small businesses which are self-insured employers and self-insured local governments may voluntarily enter into waiver agreements settling upon and determining claims for compensation. This amendment will speed the processing and approval of such agreements.

2. Compliance requirements:

The amendment will not require any additional reporting or record-keeping by small businesses or local governments.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to WCL § 32.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed amendment. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed amendment to comply.

6. Minimizing adverse impact:

This proposed amendment is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business participation and local government participation:

Because this proposed amendment was necessitated by a Memorandum and Order of the Appellate Division, Third Department issued April 22, 2004 in *Matter of Hart v. Pageprint/Dekalb*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3rd Dept., Slip Op. No. 94339, 2004), there has been insufficient time for the Board to seek the input of small businesses and local government. However, the Board has been processing waiver agreements administratively since 2000, and small businesses and local governments have been parties to such agreements.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule applies to all claimants, insurance carriers and self-insured employers in all rural areas of the state which are subject to the provisions of the Workers' Compensation Law.

2. Reporting, recordkeeping and other compliance requirements:

The amendment will not impose any additional reporting, recordkeeping or compliance requirements on regulated parties in rural areas.

3. Costs:

This proposal will not impose any compliance costs on rural areas. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to WCL § 32.

4. Minimizing adverse impact:

This proposed amendment is designed to minimize adverse impact for regulated parties in rural areas. This proposed amendment provides only a benefit to regulated parties in rural areas.

5. Rural area participation:

Because this emergency amendment was necessitated by a Memorandum and Order of the Appellate Division, Third Department issued April 22, 2004 in *Matter of Hart v. Pageprint/Dekalb*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3rd Dept., Slip Op. No. 94339, 2004), there has been insufficient time for the Board to seek the input of regulated parties in rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended simply to speed the processing and approval of waiver agreements submitted pursuant to WCL § 32 and will therefore ultimately benefit the participants to the workers' compensation system.

