

# RULE MAKING ACTIVITIES

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Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

- AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice  
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing; or C for first Continuation.)

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Captive Cervids

**I.D. No.** AAM-43-04-00002-E  
**Filing No.** 1149  
**Filing date:** Oct. 8, 2004  
**Effective date:** Oct. 8, 2004

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

**Action taken:** Repeal of section 62.8 and addition of Part 68 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6), 72 and 74

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

**Specific reasons underlying the finding of necessity:** The proposed repeal of section 62.8 of 1 NYCRR and the adoption of 1 NYCRR Part 68 will help to prevent the introduction of chronic wasting disease (CWD) into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State. CWD is an infectious and communicable disease of deer belonging to the Genus *Cervus* (including elk, red deer and sika deer) and the Genus *Odocoileus* (including

white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico and Illinois. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and the Canadian provinces of Saskatchewan and Alberta.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. On December 24, 2003, the USDA proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that it determines are equivalent to the proposed Federal program. The Department believes that the State CWD herd certification program established by this rule is equivalent to the proposed Federal program.

New York State has 564 entities engaged in raising approximately 9,944 deer and elk in captivity with a value of several million dollars, and many of these entities have imported captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. The rule repeals a prohibition on the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless a permit authorizing such movement has been obtained from the Department prior to such importation or movement. Except for cervids moving directly to slaughter, permits shall be issued only for captive cervids that meet the health requirements established by the rule.

The rule establishes general health requirements for captive cervids, special provisions for captive cervids susceptible to CWD, requirements for CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

The promulgation of this regulation on an emergency basis is necessary because the introduction and spread of CWD into and within New York State would be devastating from both an animal health and economic standpoint given the threat the disease poses to the approximately 9,944 captive deer in the State and the 564 entities which raise them.

**Subject:** Captive cervids.

**Purpose:** To prevent the introduction and spread of chronic wasting disease into and within the State.

**Substance of emergency rule:** Section 62.8 of 1 NYCRR is repealed.

Section 68.1 of 1 NYCRR sets forth definitions for "CWD susceptible cervid," "CWD exposed cervid," "CWD positive cervid," "CWD negative cervid," "CWD suspect cervid," "CWD infected zone," "captive," "CWD Certified Herd Program," "Cervid," "Chronic Wasting Disease," "Commingling," "Department," "Enrollment Date," "Herd," "Herd Inventory,"

"CWD Herd Plan," "CWD Herd Status," "CWD positive herd," "CWD Suspect herd," "Special purpose herd," "CWD Exposed herd," "CWD certified herd," "Official identification," "CWD Monitored herd," "Owner," "Premises," "CWD Premises plan," "Quarantine," "State animal health official," "Status date," "Official test," and "USDA/APHIS."

Section 68.2 of 1 NYCRR establishes general health requirements for captive cervids including requirements relating to mandatory reporting, the movement of captive cervids, enforcement, facilities, fencing, herd integrity, sample collection and premises location.

Section 68.3 of 1 NYCRR establishes special provisions for captive cervids susceptible to chronic wasting disease including requirements relating to importation, enrollment in the CWD Herd Certification program, Monitored herd program, licenses and permits issued by the Department of Environmental Conservation, fencing, premises inspection and record keeping.

Section 68.4 of 1 NYCRR establishes requirements for the CWD Certified Herd program including requirements for captive susceptible cervid operations engaged in breeding and/or the sale or removal of live cervids from the premises for any purposes, the establishment of a CWD herd status, sampling and testing, animal identification, annual physical herd inventory and additions to CWD Certified Herd program herds.

Section 68.5 of 1 NYCRR establishes requirements for CWD Monitored Herds including requirements for special purpose herds consisting of one or more susceptible cervids, sampling and testing, additions to CWD monitored herds, and animal identification.

Section 68.6 of 1 NYCRR establishes requirements for approved susceptible cervid slaughter facilities, including requirements for holding pens, sample retention and holding facilities, susceptible cervid offal disposal plans and inspection.

Section 68.7 of 1 NYCRR establishes requirements for the importation of captive susceptible cervids for immediate slaughter including requirements for source herds, permits, direct movement, samples, waste and slaughter.

Section 68.8 of 1 NYCRR establishes requirements for the management of CWD positive, exposed or suspect herds including premises quarantine, establishment of a herd plan, depopulation, cleaning and disinfection, future land use restrictions, restocking constraints and timeframes, fencing requirements, risk analysis, official herd quarantines, elimination of high-risk cervids within the herd, special fencing requirements and the disposal of carcasses.

**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 January 5, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** John Huntley, DVM, State Veterinarian, Director, Division of Animal Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-3502

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

Section 18(6) of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State. Subdivision (10) of said Section provides that "feral animal" means an undomesticated or wild animal.

2. Legislative Objectives: The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State. The Department's proposed repeal of 1 NYCRR section 62.8 and adoption of 1 NYCRR Part 68 will further this goal by preventing the importation of deer which may be infected with chronic wasting disease (CWD), and permitting CWD to be detected and controlled if it were to arise within the captive cervid population of the State.

##### 3. Needs and Benefits:

CWD is an infectious and communicable disease of deer belonging to the Genus *Cervus* (including elk, red deer and sika deer) and the Genus *Odocoileus* (including white tailed deer and mule deer). It has been detected in Colorado, Wyoming, Nebraska, Montana, Oklahoma, South Dakota, Wisconsin and, most recently, New Mexico. Initially, it was found to be present in captive herds of elk and white-tailed and mule deer. It has now been confirmed in free-ranging white-tailed deer, elk and mule deer in Colorado, Nebraska, Wisconsin, Saskatchewan and New Mexico.

The origin of CWD is unknown. The mode of transmission is suspected to be from animal to animal. The disease is progressive and always fatal. There is no live animal test for CWD, so it is impossible to determine whether a live animal is positive, nor is there a vaccine to prevent the disease. The incubation period is lengthy and 3 to 5 years of continued surveillance is needed with no new infection found before a herd can be declared free of CWD through quarantine. The United States Secretary of Agriculture has declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program.

New York State has 564 entities engaged in raising approximately 9,944 deer and elk in captivity with a value of several million dollars, and many of these entities import captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. This rule repeals a rule that had prohibited, with certain exceptions, the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless they are accompanied by a valid certificate of veterinary inspection and a permit authorizing such importation or movement has been obtained from the Department, in consultation with the New York State Department of Environmental Conservation. The rule establishes general health requirements for captive cervids, special requirements for captive cervids susceptible to CWD, requirements for a CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State, and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

##### 4. Costs:

###### (a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk range from \$500 to \$2,000 per animal. The value of deer range from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, the prior prohibition on the importation of captive cervids susceptible to CWD prevented the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. It is not known how many captive cervids will meet the health requirements of 1 NYCRR Part 68 or otherwise qualify for importation or movement within the State of New York. The number and value of the captive cervids that will continue to be prohibited from importation will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer in the State that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences, that they have an average of 20 adult cervids and a 160-acre square enclosure, it would require two miles of fence extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape at a cost of \$1.00 a foot, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560.

The rule also requires that captive cervid operations, with the exception of special purpose herds, have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. The owners

of those farms will have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five to ten percent death loss when handled for purposes such as testing. The majority (1,975 out of 2,950) of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other whitetailed deer can be expected to produce a total death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming the deer each have a value of \$1,500.

The labor costs associated with the handling of captive cervids required by this Part will average three person days, or \$250.00 per year. It is estimated that the recordkeeping associated with this rule will require less than one hour annually on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

(b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 annually to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

5. Local Government Mandates:

The proposed amendments would not impose any program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least sixty months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that will be implemented within sixty days of a diagnosis of CWD.

7. Duplication:

None.

8. Alternatives:

Various alternatives, from the imposition of a total prohibition against the importation of all cervids, to no restriction on their importation were considered.

Due to the spread of CWD in other states and the threat that this disease poses to the State's captive deer population, the proposed rule was determined to be the best method of preventing the introduction of this disease into New York State and permitting it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of captive cervids susceptible to CWD was not necessary if health standards and a permit system were established. It was also concluded that a failure to regulate the importation of cervids was an alternative that posed an unacceptable risk of introducing CWD to the State's herds of captive cervids.

9. Federal Standards:

The federal government currently has no standards restricting the interstate movement of cervids due to CWD, but has proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that are determined to be equivalent to the proposed Federal program. The Department believes that the State CWD program established by this rule is equivalent to the proposed Federal program.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

### **Regulatory Flexibility Analysis**

1. Effect of Rule:

There are approximately 564 small businesses raising a total of approximately 9,944 captive cervidae (the family that includes deer and elk) in New York State. The rule would have no impact on local governments.

2. Compliance Requirements:

Regulated parties are prohibited from importing captive cervids, other than those moving directly to slaughter, without a valid certificate of veterinary inspection. In addition, regulated parties importing or moving captive cervids into the State or within the State for any purpose must first obtain a permit from the Department, in consultation with the New York State Department of Environmental Conservation, authorizing such movement.

Captive cervid operations, with the exception of special purpose herds, must have proper restraining facilities to capture and restrain cervids for testing, as well as storage facilities for samples.

Captive cervid operations must have a continuous barrier fence and maintain herd integrity.

Regulated parties will be able to import CWD susceptible cervids only if they are moved from a herd which has achieved CWD certified herd status and the state of origin has adopted mandatory reporting and quarantine requirements equivalent to those set forth in 1 NYCRR Part 68. Regulated parties may not hold CWD susceptible cervids in captivity in New York State unless they are enrolled in the CWD Certified Herd Program or the CWD Monitored Herd Program or have a license or permit issued by DEC pursuant to ECL section 11-0515. Application for enrollment of existing herds in the CWD Certified Herd Program and CWD Monitored Herd Program must take place within thirty days of the effective date of 1 NYCRR Part 68.

Regulated parties with herds containing at least one CWD susceptible cervid must have a perimeter fence that is at least eight feet high. Captive CWD susceptible cervid facilities and perimeter facilities must be inspected and approved by a state or federal regulatory representative. Captive CWD susceptible cervid herds established prior to the effective date of 1 NYCRR Part 68 must meet the facility standards within six months of said date.

Regulated parties must keep accurate records documenting purchases, sales, interstate shipments, escaped cervids and deaths, including harvested cervids, and maintain them for at least sixty months for all captive CWD susceptible cervid operations. The owners of all CWD susceptible cervid herds enrolled in the CWD Certified Herd Program shall establish and maintain accurate records that document the results of the annual herd inventory.

All captive CWD susceptible cervid herds that are not special purpose herds or held at an approved CWD susceptible cervid slaughter facility must participate in the CWD Certified Herd program. Samples must be submitted for testing as required by the Program. As of the first annual inventory after the effective date of 1 NYCRR Part 68, each herd member and herd addition shall have a minimum of two official/approved unique identifiers. At least one of these identification systems shall include visible identification. A physical herd inventory shall be conducted between ninety days prior to and ninety days following the annual anniversary date established based upon the CWD Certified Herd Program enrollment date. Cervids that were killed or died during the course of the year must be tested. A state or federal animal health official must validate the annual inventory. A report of the validated annual inventory containing all man-made identification of each animal must be submitted to the Department.

All special purpose herds consisting of one or more CWD susceptible cervid shall participate in the CWD Certified Herd Program. Samples shall be submitted for testing as required by the Program. Each herd addition must have a minimum of two official/approved unique identifiers affixed to the animal. Carcass and sample identification tags must be affixed to unidentified harvested captive cervids, natural deaths, and clinical suspects.

Approved CWD susceptible slaughter facilities must have holding pens constructed to prevent contact with captive or free-ranging cervid populations. Sample retention and holding facilities must be adequate to preserve and store diagnostic tissues for seventy-two hours after slaughter. A CWD susceptible cervid offal disposal plan must be developed, implemented and approved by the Department in consultation with the Department of Environmental Conservation.

Herd owners, in conjunction with the Department and USDA/APHIS, must develop CWD herd plans for any CWD positive, exposed or suspect

herd. Perimeter fencing adequate to prevent fence line contact with captive and free-ranging cervids must be established for all CWD positive herds and positive premises. The carcasses of CWD positive cervids that are depopulated shall be disposed of in accordance with disposal plans approved by the Department and USDA/APHIS.

The rule would have no impact on local governments.

### 3. Professional Services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

### 4. Compliance Costs:

#### (a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms with 1,646 deer that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive whitetailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming a \$1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or \$250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

#### (b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 to carry out necessary inspections and to collect and process samples.

#### (c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

### 5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation of the importation of captive deer into New York State will have an economic impact on the entities that imported a total of 360 captive deer into New York State in 2002, the economic consequences of the infection or exposure to CWD of the approximately

9,944 captive cervids already in the State would be far greater. The rule is technologically feasible. Captive deer imported into the State are already required to be accompanied by a health certificate. Endorsement of that certificate with the number of the permit issued by the Department presents no technological problem. The structural, recordkeeping and testing requirements of the rule involve existing technologies that are already in use.

### 6. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certified Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

The rule would have no impact on local governments.

### 7. Small Business and Local Government Participation:

In developing this rule, the Department has consulted with representatives of the approximately 400 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

### Rural Area Flexibility Analysis

#### 1. Types and Estimated Numbers of Rural Areas:

The approximately 400 entities raising captive deer in New York State are located throughout the rural areas of New York.

#### 2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

The rule requires that captive cervids being imported or moved into or within New York State be accompanied by a permit. Such permits will be issued by the Department in consultation with the New York State Department of Environmental Conservation after a determination that the deer in question qualify for importation. A valid certificate of veterinary inspection must also accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. Accurate records documenting purchases, sales, interstate shipments, intrastate shipments, escaped cervids and deaths (including divested cervids) will have to be established by herd owners and maintained for at least sixty months for all captive susceptible cervids. A report of the required annual inventory of CWD certified herds must be made and submitted to the Department. For each natural death, clinical suspect and cervid harvested from a CWD Monitored Herd, tag numbers must be entered into the CWD Monitored Herd record along with the corresponding information that identifies the disposition of the carcass. A CWD herd plan must be developed by each herd owner, in conjunction with the Department and USDA/APHIS officials containing the procedures to be followed for positive or trace herds that would be implemented within sixty days of a diagnosis of CWD. It is not anticipated that regulated parties in rural areas will have to secure any professional services in order to comply with the rule.

#### 3. Costs:

##### (a) Costs to regulated parties:

There are approximately 564 entities raising a total of approximately 9,944 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not

have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming that the farms will use post extensions and wire or tape, since at that height, only a visual barrier is needed, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot.

The rule also requires that captive cervid operations, with the exception of special purpose herds have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inventory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. Since the Department currently owns three portable deer chutes, the owners of those farms will only have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

Whitetailed deer experience a five percent to ten percent death loss when handled for purposes such as testing. The majority, 1,975 out of 2,950, of captive whitetailed deer in the State are in quarantined premises and will not have to be handled. Handling the other captive whitetailed deer in the State can be expected to produce a death loss of 49 to 98 deer on 43 farms for a loss of \$1,700 to \$3,400 per farm per year, assuming a \$1,500 value per deer.

The labor costs associated with the handling of captive cervids required by this Part will average three person days or \$250.00 per year per farm. It is estimated that the recordkeeping associated with this rule will require less than one hour each year on the average farm.

The 102 herds designated as special purpose herds will require an area in which to keep, for testing purposes, the heads of captive cervids that have died. It is estimated that this will result in a one-time cost of \$400 to \$500 per farm.

(b) Costs to the agency, state and local governments:

There will be no cost to local government or the State, other than the cost to the Department. The cost to the Department will be between \$500 and \$1,000 per farm annually, or between \$121,500 and \$243,000 to carry out necessary inspections and to collect and process samples.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry.

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certification Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

5. Rural Area Participation:

In developing this rule, the Department has consulted with representatives of the approximately 400 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

**Job Impact Statement**

1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 564 entities engaged in raising captive deer in New York State is not known.

3. Regions of Adverse Impact:

The 564 entities in New York State engaged in raising captive deer are located throughout the rural areas of the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,944 captive deer currently raised by approximately 564 New York entities from the introduction of

CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

**Department of Audit and Control**

**NOTICE OF ADOPTION**

**Reporting and Payment of Abandoned Property by Reporting Organizations**

**I.D. No.** AAC-29-04-00001-A

**Filing No.** 1152

**Filing date:** Oct. 12, 2004

**Effective date:** Oct. 27, 2004

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

**Action taken:** Amendment of Part 123 of Title 2 NYCRR.

**Statutory authority:** Abandoned Property Law, section 1414

**Subject:** Reporting and payment of abandoned property by reporting organizations.

**Purpose:** To make various technical changes to reporting requirements in general.

**Text or summary was published** in the notice of proposed rule making, I.D. No. AAC-29-04-00001-P, Issue of July 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:** Robert Harder, Department of Audit and Control, 110 State St., 14th Fl., Albany, NY 12236, (518) 474-4021, e-mail: rharder@osc.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**Division of Criminal Justice Services**

**NOTICE OF ADOPTION**

**Forensic Laboratory Accreditation**

**I.D. No.** CJS-32-04-00005-A

**Filing No.** 1148

**Filing date:** Oct. 7, 2004

**Effective date:** Oct. 27, 2004

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

**Action taken:** Amendment of section 6190.1(a)(8) of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 837(13) and 995-b(1)

**Subject:** Forensic laboratory accreditation.

**Purpose:** To update citations to ASCLD/LAB accreditation standards.

**Text or summary was published** in the notice of proposed rule making, I.D. No. CJS-32-04-00005-P, Issue of August 11, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Mark Bonacquist, Division of Criminal Justice Services, Four Tower Place, Albany, NY 12203, (518) 457-8420

**Assessment of Public Comment**

The agency received no public comment.

## Education Department

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

#### Period of Validity of the Initial Teaching Certificate and Flexibility in the Staffing of Teacher Preparation Programs

I.D. No. EDU-43-04-00005-P

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

**Proposed action:** Amendment of sections 80-3.3(a)(1) and 52.21(b)(2)(i)(h) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2), and (7), 3001(2), 3004(1) and 3006(1)

**Subject:** Period of validity of the initial teaching certificate and flexibility in the staffing of teacher preparation programs.

**Purpose:** To increase the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provide teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing on those programs.

**Text of proposed rule:** 1. Paragraph (1) of subdivision (a) of section 80-3.3 of the Regulations of the Commissioner of Education is amended, effective February 3, 2005, as follows:

(1) Duration. The initial certificate shall be valid for [three] *five* years from its effective date. [A candidate may be granted an extension of the time validity of the initial certificate for a period not to exceed one additional year for the purpose of completing a master's or higher degree program needed to fulfill the education requirement for a professional certificate, pursuant to section 80-3.4 of this Subpart, provided that the candidate completes at least 24 semester hours of such study by the end of the three-year period of the initial certificate. The application for the one-year extension of the validity of the initial certificate shall be accompanied by documentation satisfactory to the commissioner demonstrating the candidate's progress to date in the graduate program and the compelling need for additional time to complete such program. At the expiration of the additional one-year period, the time validity of an initial certificate shall not be extended again for the same purpose.]

2. Clause (h) of subparagraph (i) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective February 3, 2005, as follows:

*(h) Faculty.*

(1) Institutions shall provide sufficient numbers of qualified, full-time faculty in order to [:] foster and maintain continuity and stability in teacher education programs and policies [; ensure that the majority of credit-bearing courses in the program are offered by full-time teaching faculty:] and ensure the proper discharge of *instructional and* all other faculty responsibilities. *Institutions shall meet the requirements for faculty set forth in section 52.2 of this Part.*

*(2) Staffing requirements.*

(i) *Except as provided in item (ii) of this subclause, institutions shall meet the following staffing requirements: Institutions shall ensure that the majority of credit-bearing courses in the program are offered by full-time teaching faculty.* Faculty teaching assignments shall not exceed 12 semester hours per semester for undergraduate courses, or 9 semester hours per semester for graduate courses, or 21 semester hours per academic year for faculty who teach a combination of graduate and undergraduate courses, while still providing sufficient course offerings to allow students to complete their programs in the minimum time required for earning the degree. Individual faculty members shall not supervise more than 18 student teachers per semester. Supervision of field experiences, practica, and student teaching shall be considered by the institution in determining faculty load, and institutions shall demonstrate how such supervision is considered in determining faculty load.

*(ii) Waiver and exception.*

(a) *Waiver.* The commissioner may grant a waiver from one or more requirements of [this clause] *item (i) of this subclause* upon a showing of good cause satisfactory to the commissioner, including but not limited to a showing that the institution cannot meet the requirement

because of the nature of the program, which otherwise meets the requirements of this Part.

*(b) Exception.* *Institutions that meet the standard for student performance on the New York State teacher certification examinations set forth in section 52.21(b)(2)(iv)(b) of this Part and are accredited in accordance with section 52.21 (b)(2)(iv)(c) of this Part shall not be required to meet the staffing requirements prescribed in item (i) of this subclause.*

*(iii) For institutions subject to registration review for failing to meet the standard for student performance on the New York State teacher certification examinations set forth in section 52.21(b)(2)(iv)(b) of this Part, the department may impose a time frame for the institution to conform to the staffing requirements set forth in item (i) of this subclause as part of the institution's corrective action plan.*

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

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education, Education Department, Rm. 979, Education Bldg. Annex, 879 Washington Ave., Albany, NY 12234, (518) 474-5851, e-mail: hedepcom@mail.nysed.gov

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 210 of the Education Law grants to the Board of Regents authority to register domestic and foreign institutions in terms of New York standards.

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the educational supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and the Board of Regents and authorizes the Commissioner to enforce the laws relating to the education system and to execute education policies determined by the Board of Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (7) of section 305 of the Education Law authorizes the Commissioner of Education to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education, subject to the approval of the Board of Regents, to establish regulations governing the examination and certification of teachers employed in the public schools.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the legislative objectives of the above referenced statutes by establishing requirements for a teaching certificate and standards for the registration of teacher preparation programs.

##### 3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to increase the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provide teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs.

Currently, the duration of an initial certificate for classroom teaching, the first level certificate held by teachers authorizing instruction in the State's public schools, is three years or four years with an extension. To obtain the extension a teacher must show completion of 24 semester hours in the master's degree program required for the professional certificate (formerly known as the permanent certificate) and a compelling need for the additional time to complete that program. This is a recent change

resulting from implementation of the new certification requirements for classroom teachers. Before February 2, 2004, the provisional certificate was the first level certificate authorizing teachers to provide instruction in the State's public schools. Provisional certificate holders were required to complete a master's degree program within five years to qualify for a permanent certificate. The proposed amendment would return to the previous standard, permitting teachers holding the initial certificate five years to complete the master's degree.

Increasing the duration of the initial certificate to five years has strong support in the field. In a survey the presidents of all colleges and universities with teacher preparation programs, conducted by the Office of Higher Education, 83 percent of the responding presidents indicated the need to extend the duration of the initial certificate to five years. (The survey, entitled "President's Survey: Elements of the Regents Teaching Policy," was produced by Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education and Office of the Professions, State Education Department, 2M West Wing, Education Building, 89 Washington Ave., Albany, N.Y. 12234).

Many teaching candidates, teacher preparation programs and school districts from around the State have reported to the State Education Department that the duration of the initial certificate is currently too short to provide new teachers with sufficient time to complete the master's degree program required for a professional certificate. Typically these teachers are working full-time and pursuing the master's degree on a part-time basis during evenings and on summer breaks. Many members of the higher education community have indicated that the first few years as a new teacher are challenging enough without having to simultaneously complete all requirements for a master's degree in three years. Students have, likewise, expressed concerns about the financial strains and other challenges of completing a master's degree in three years, while simultaneously maintaining work, family, and other responsibilities. Also, educators have advised the Department that new teachers often benefit from teaching in the classroom for a period of time before progressing too far into the master's degree program. With this teaching experience, they are better able to integrate pedagogical theory and practice. Finally, the Department is concerned that the short duration of the initial certificate will exacerbate the teacher shortage problem by discouraging individuals from entering the teaching field and in some cases causing teachers to lose certification simply because the time validity of their certificate has expired. For these reasons, the Department proposes extending the duration of the initial certificate to five years.

This proposal would also amend the provisions of section 52.21(b)(2)(i)(h) of the Commissioner's regulations to provide teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs. Under the current regulation, institutions of higher education with registered teacher preparation programs must provide sufficient numbers of qualified full-time faculty to ensure that the majority of credit-bearing courses in the program are offered by full-time faculty. Furthermore, the regulation specifies fixed faculty workload requirements for teacher preparation programs: faculty teaching assignments may not exceed 12 semester hours per semester for undergraduate courses, or 9 semester hours for graduate courses, or 21 semester hours per academic year for faculty who teach a combination of graduate and undergraduate courses. The regulation also specifies that individual faculty may not supervise more than 18 student teachers per semester.

The Office of Higher Education's survey of college presidents revealed that the vast majority of respondents believed that having full-time faculty teach a majority of credit-bearing courses in their teacher preparation programs and faculty workload limitations are important to program quality. However, 61 percent believed that they needed more flexibility than permitted by the full-time faculty regulation at issue and over half believed that they need more flexibility than permitted by the faculty workload regulation at issue. The Department's research has found that the regulations for collegiate programs preparing other professionals do not prescribe a minimum percentage of full-time faculty or fixed faculty workload requirements. Also, the standards of private accrediting bodies for teacher preparation programs do not identify a minimum percentage of full-time faculty or fixed faculty workload requirements.

As a result of this information, the Department is proposing to move toward a performance based system that continues to emphasize high standards of quality while giving college and university leadership with a record of achievement more discretion and flexibility to develop staffing plans that are consistent with the design of their teacher preparation programs. The Department believes that teacher preparation programs demon-

strate quality, at least in part, by maintaining accreditation and having students who consistently perform well on the teacher certification examinations. This position is supported by the survey of college presidents that revealed that nearly three-quarters of the responding presidents (73 percent) believed that accreditation and institutional pass rates on certification examinations were strong indicators of program quality. Therefore, the proposed amendment eliminates the percentage requirement for full-time faculty and the fixed workload requirements for those teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations. The regulations will continue to require all institutions that offer teacher preparation programs to provide sufficient numbers of qualified, full-time faculty to foster and maintain continuity and stability in these programs and ensure the proper discharge of instructional and all other faculty responsibilities. The regulations will also continue to require all teacher preparation programs to meet the requirements for faculty that are applicable to all registered college programs.

#### 4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local government: The proposed amendment will not impose any additional costs upon local government, including school districts and BOCES.

(c) Costs to private regulated parties: The proposed amendment will not impose any new costs on regulated parties. In fact, the amendment could result in cost savings to institutions of higher education that meet articulated standards of institutional accountability in their teacher education programs. These institutions would be permitted greater flexibility in the staffing of those programs, which could result in cost savings.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State government," the amendment will not impose any additional costs on State government, including the State Education Department. The changes will not result in additional costs for administering the certification of classroom teachers or the registering of college programs in teacher preparation.

#### 5. PAPERWORK:

The proposed amendment will not impose any reporting or recordkeeping requirements. The amendment does not change application procedures for applying for a teaching certificate or registering teacher preparation programs.

#### 6. LOCAL GOVERNMENT MANDATES:

The amendment concerns the duration of a teaching certificate held by an individual and the registration requirements for teacher preparation programs at colleges. The proposed amendment does not impose any program, service, duty or responsibility upon local governments.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered.

#### 9. FEDERAL STANDARDS:

There are no applicable standards of the Federal government for the subject area of the proposed amendment.

#### 10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date. The amendment is in the nature of mandate relief. It extends the duration of a teaching certificate and provides for greater flexibility in staffing for teacher preparation program that meet articulated standards of institutional accountability. Because of the nature of the proposed amendment, no additional period of time is needed to enable regulated parties to comply.

#### **Regulatory Flexibility Analysis**

The proposed amendment increases the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provides teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs. It concerns the duration of a teaching certificate held by an individual and registration requirements for teacher preparation programs at colleges. The amendment does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the amendment that it does not affect small businesses or local govern-

ments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

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

##### **1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment will affect holders of the initial teaching certification in all parts of the State and those college teacher preparation programs that meet articulated standards of institutional accountability in all parts of the State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

##### **2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:**

The purpose of the proposed amendment is to increase the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provide teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs.

Currently, the duration of an initial certificate for classroom teaching, the first level certificate held by teachers authorizing instruction in the State's public schools, is three years or four years with an extension. This is a recent change resulting from implementation of the new certification requirements for classroom teachers. Before February 2, 2004, the provisional certificate was the first level certificate authorizing teachers to provide instruction in the State's public schools. Provisional certificate holders were required to complete a master's degree program within five years to qualify for a permanent certificate. The proposed amendment would return to the previous standard, permitting teachers holding the initial certificate five years to complete the master's degree.

The amendment would also provide teacher preparation programs that meet articulated standards of institutional accountability, including those located in rural areas of the State, greater flexibility in the staffing of those programs. Under the current regulation, institutions of higher education with registered teacher preparation programs must provide sufficient numbers of qualified full-time faculty to ensure that the majority of credit-bearing courses in the program are offered by full-time faculty. Furthermore, the regulation specifies fixed faculty workload requirements for teacher preparation programs, and requires that individual faculty may not supervise more than 18 student teachers per semester. The proposed amendment eliminates the percentage requirement for full-time faculty and the fixed faculty workload requirements for those teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations.

The proposed amendment will not establish additional reporting or recordkeeping requirements. The proposed amendment will not require regulated parties, including those located in rural areas, to hire professional services in order to comply.

##### **3. COSTS:**

The amendment will not impose additional costs on regulated parties, including those located in rural areas of New York State.

##### **4. MINIMIZING ADVERSE IMPACT:**

The amendment constitutes a mandate relief measure. It increases the duration of the initial certificate for classroom teaching from three, or four years with extension, to five years and provides teacher preparation programs that meet articulated standards of institutional accountability greater flexibility in the staffing of those programs. Because of the nature of the proposed amendment, the State Education Department does not believe it to be warranted to establish different requirements for holders of the initial teaching certificate or colleges located in rural areas.

##### **5. RURAL AREA PARTICIPATION:**

The proposed amendment was discussed with the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives who live and/or work in rural areas, including individuals who are employed as educators in rural school districts and BOCES. The same discussion occurred with the State's District Superintendents, representing BOCES and school districts across the State and with postsecondary institutions in the State that offer teacher education programs, including institutions located in rural areas of the State.

#### **Job Impact Statement**

##### **1. NATURE OF IMPACT:**

The proposed amendment is in the nature of mandate relief. It extends the duration of a teaching certificate and provides for greater flexibility in staffing for teacher preparation program that meet articulated standards of institutional accountability. The amendment extends the duration of the initial teaching certificate from three years, or four years with an extension, to five years. This will help new teachers to remain employed in the State's public schools under an initial teaching certificate, while completing the master's degree program required for the professional teaching certificate.

The proposed amendment also eliminates the percentage requirement for full-time faculty and the fixed workload requirements for those college teacher preparation programs that demonstrate program quality by being accredited by the Regents or an acceptable professional education accrediting association and that meet or exceed the established institutional pass rate of 80 percent on teacher certification examinations. The regulations will continue to require all institutions that offer teacher preparation programs to provide sufficient numbers of qualified, full-time faculty to foster and maintain continuity and stability in these programs and ensure the proper discharge of instructional and all other faculty responsibilities.

##### **2. CATEGORIES AND NUMBERS AFFECTED:**

The amendment will affect individuals who obtain the initial teaching certificate, approximately 25,000 individuals each year. It will also affect 113 institutions of higher education that have teacher preparation programs and meet the articulated standards of institutional quality. While it is possible that the proposed amendment may result in an alteration of staffing patterns at these institutions, the Department anticipates that any negative impact will be de minimus, if any. If, for example, an institution avails itself of the opportunity to reduce the number of full-time faculty in a teacher preparation program, the reduction of such positions is likely to be offset by the simultaneous hiring of additional adjunct faculty and greater efficiencies in the functioning of the program.

##### **3. REGIONS OF ADVERSE IMPACT:**

The proposed amendment is not expected to have an adverse impact on any region of the State.

##### **4. MINIMIZING ADVERSE IMPACT:**

Many teaching candidates, teacher preparation programs, and school districts in the State have reported to the State Education Department that the duration of the initial certificate is currently too short to provide new teachers with sufficient time to complete the master's degree program required for a professional certificate. Extending the duration of the initial teaching certificate to five years will assist new teacher to remain employed in the State's public schools.

The amendment will permit institutions of higher education that meet articulated institutional quality standards greater flexibility in the allocation of faculty. The State Education Department surveyed presidents of all colleges in the State that offer teacher education programs. Sixty-one percent of the responding college presidents believed that they needed more flexibility than permitted by the current full-time faculty regulation at issue and over half believed that they need more flexibility than permitted by the current faculty workload regulation at issue. The Department expects that any adverse impact on jobs resulting from providing these colleges greater flexibility in the allocation of faculty will be minor, if any.

##### **5. SELF-EMPLOYMENT OPPORTUNITIES:**

The amendment is not expected to have a measurable impact on opportunities for self-employment.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### **Recreational Harvest and Possession of Marine Fish Species**

**I.D. No.** ENV-19-04-00003-A

**Filing No.** 1153

**Filing date:** Oct. 12, 2004

**Effective date:** Oct. 27, 2004

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

**Action taken:** Amendment of Part 40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0340-b, 13-0340-e and 13-0340-f

**Subject:** Regulation of the recreational harvest and possession of marine fish species in New York's marine district.

**Purpose:** To control the recreational harvest and possession of marine species (summer flounder, scup, and black sea bass) consistent with conservation requirements identified in regional FMPs.

**Text or summary was published** in the notice of emergency/proposed rule making, I.D. No. ENV-19-04-00003-EP, Issue of May 12, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Alice Weber, Department of Environmental Conservation, 205 N. Belle Mead Rd., Suite 1, Setauket, NY 11733, (631) 444-0435, e-mail: amweber@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to the requirements of art. 8 of the Environmental Conservation Law, a negative declaration has been prepared and is on file with the department.

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

A proposal to revise Part 40 of 6 NYCRR, New York's marine recreational finfish regulations, was published in the New York *State Register* on August 18, 2004. The proposal included an increase in the recreational minimum size limit for summer flounder and a change to the recreational fishing season for black sea bass. A press release describing the changes was mailed to sport fishing organizations, media contacts, and other interested parties.

During the public comment period, 14 written comments were received concerning the Department's proposal to amend Part 40 of 6 NYCRR. All comments are addressed in the summary below.

Comments: The Department received fourteen written comments that addressed the proposed change to the recreational summer flounder regulations.

One person forwarded a copy of an editorial from a local recreational fishing magazine, which indicated its opposition to the rule change because of concern that the recreational fishing data upon which the changes were based were inaccurate. All of the remaining letters were written in opposition to the proposed change for summer flounder, specifically objecting to the proposed increase in minimum size limit. Several of the commenters reported that the proposed regulation would have significant economic effects on their own business, or on other marine related industries. These letters indicated that the economic effect would include a loss of income associated with fewer customers for party and charter boat fisheries; loss of sales revenue for wholesale and retail bait and tackle businesses; loss of motel bookings, restaurant and retail business income, marina and ramp boat fees, and tourist dollars; and an accompanying loss of jobs.

Department Response: As described in Environmental Conservation Law Section 13-0340-b, the Department is required to adopt regulations which are consistent with the compliance requirements of the interstate fishery management plan (FMP) for summer flounder. The FMP is designed to promote the long term health of this 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), the Atlantic States Marine Fisheries Commission (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 Section 13-0340-b, which authorizes the adoption of regulations for the management of summer flounder, provides that such regulations must be consistent with the FMP for this species adopted by the ASMFC. ASMFC recently amended the FMP for summer flounder by adopting annual quota changes and recreational harvest projections. In order to maintain compliance with the FMP and ACFCMA, states are required to immediately implement these changes by amending their recreational fishing regulations for each of this species.

Under the FMP for summer flounder, 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 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 in New York State, with significant adverse impacts to the state's economy. New York's projected harvests for summer flounder in 2004 exceeded the state's assigned quotas by 48.5 per cent. The regulatory changes in this emergency rule are calculated to bring New York into compliance.

On April 23, 2004 the Department adopted emergency regulations intended to comply with the ASMFC 2004 requirements for summer flounder, scup and black sea bass. The ASMFC approved the regulations for scup.

However, on June 17, 2004, the ASMFC determined that New York's emergency regulations for summer flounder were not in compliance with the requirements to achieve a 48.5% reduction. On July 19, 2004 the U.S. Secretary of Commerce determined that the summer flounder regulations did not comply with the ASMFC requirements. Accordingly the Secretary of Commerce sent a letter to Governor George Pataki notifying him of that decision and establishing a date certain when a moratorium would be placed on commercial and recreational summer flounder fishing in New York. In order to achieve compliance and to prevent a federal closure of the commercial and recreational summer fishery in New York, the Department adopted emergency regulations which established an open season for fluke from May 15 to September 6, a daily limit of three (3) summer flounder, and an increase in the minimum length for summer flounder from 17 inches to 18 inches. Simultaneously, the Department revised the proposed rule to include these same provisions. The revised proposed rule appeared in the August 18, 2004 issue of the *State Register*.

The permanent adoption of this regulation is necessary in order for the Department to maintain compliance with the FMPs for summer flounder and black sea bass and to avoid closure of these fisheries and the economic hardship that would be associated with such closure. For this reason, the Department has determined that the proposed amendments to 6 NYCRR Part 40 should be adopted.

## NOTICE OF ADOPTION

### Managed Harvest of Beaver and River Otter

**I.D. No.** ENV-34-04-00007-A

**Filing No.** 1154

**Filing date:** Oct. 12, 2004

**Effective date:** Oct. 27, 2004

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

**Action taken:** Amendment of section 6.1 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

**Subject:** Managed harvest of beaver and river otter.

**Purpose:** To establish beaver and river otter trapping seasons for the 2004-2005 license year.

**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-34-04-00007-P, Issue of August 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:** Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, e-mail: grbatche@gw.dec.state.ny.us

**Additional matter required by statute:** State Environmental Quality Review Act (SEQR; ECL art. 8). Establishment of trapping regulations are covered by a final programmatic impact statement (FPIS) on wildlife game species management (DEC 1980) and supplemental findings (DEC 1994). The proposed action does not involve significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "type II" action under DEC's SEQR regulations (6 NYCRR § 618.2[d][5]).

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

Comments: The Department received written comments from persons opposed to the Department's proposal to lengthen the beaver trapping season by one month. The Department's proposal would amend 6 NYCRR Section 6.1 to lengthen the trapping season in four areas of the state: the Hudson Valley, the Southern Taconic Highlands, the Neversink-Mongaup Hills, and the eastern Catskill region. The comments stated that: (1) There is no reason to extend the season when other solutions exist; (2) The

number of beaver complaints has remained stable; and (3) There are more humane solutions [than trapping beaver]. The comments also stated that beaver provide important wetland habitat that would be lost with more trapping, and that the Department should provide more information on other methods of managing beaver.

Department response: In managing beaver, the Department strives to balance the benefits provided by beaver (e.g., enhancement of wetland habitat) with the problems they cause (e.g., flooding of public and private property). The managed harvest of beaver, through annually adjusted beaver trapping seasons is the primary mechanism for achieving this balance. The Department annually receives about 2,000 public complaints of beaver damage, and annually established trapping seasons are essential to avoid unacceptable increases in beaver complaints. Moreover, the Department considers beaver trapping in and of itself to be a legitimate outdoor activity highly valued by beaver trappers and persons who experience damage from beaver. Beaver trapping and beaver trappers are a vital component of the Department's beaver management system, and the annual adjustment of beaver seasons is needed to balance beaver populations and control the problems they cause.

With the limited applicability and high cost of current beaver damage control technology, the use of non-lethal management techniques (e.g., installation of water level control devices) alone is not enough to resolve the majority of beaver damage problems. It is therefore important to take a more comprehensive approach to resolving beaver damage complaints. By integrating current beaver damage control technology with the managed harvest of beaver through trapping, issuance of special permits to control specific problem beaver, standardized operation procedures and sound technical advice, the Department has established an efficient management system which best meets the needs of persons directly effected by beaver.

In the four areas where a one month lengthening of the beaver trapping season was proposed, beaver populations are higher than the Department's population or nuisance beaver objectives. An additional month of trapping opportunity is expected to lower the population and reduce the problems associated with beaver. Therefore, having considered the comments submitted, the Department has determined that the proposed amendments to Section 6.1 should be adopted.

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## Department of Health

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

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

I.D. No. HLT-07-04-00027-RP

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

**Revised action:** Amendment of sections 763.13 and 766.11, and addition of section 400.23 to Title 10 NYCRR and amendment of section 505.14 of Title 18 NYCRR.

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

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

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

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

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

(a) (1) *The operator of a residential health care facility, licensed home care services agency, certified home health agency, long term home health care program, personal care services agency or AIDS home care program ("the operator") shall obtain a criminal history record check from the United States Attorney General ("the Attorney General") to the extent provided for under section 124 of Public Law 105-277 for any prospective employee prior to any employment and a signed sworn state-*

*ment from the applicant disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction.*

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

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

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

*Authorization for Search and Exchange of Information*

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

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

Name: \_\_\_\_\_

(print)

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

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

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

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

(2) *Notwithstanding any inconsistent rule or regulation in this Title, neither the costs associated with obtaining the fingerprint card, nor any administrative services costs incurred in implementing the criminal history record check shall be deemed an allowable cost for Medicaid rate-setting purposes and all such costs shall be separately identified on any report of costs submitted to the department for the purpose of determining the facility's rate of Medicaid reimbursement, provided, however, that in the event funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement, then for the purposes of determining rates of payment for such fiscal year, pursuant to this title and Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), the amount of the fee and the cost of obtaining the fingerprint card shall be a reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs.*

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

(e) (1) *Operators may employ applicants on a provisional basis for a single period of time not to exceed 60 calendar days from the date the operator requests a criminal history record check through the Department, if all of the following conditions are met:*

(i) *Operators shall have submitted a request for a criminal history record check pursuant to this section and maintain a copy of the completed request forms.*

(ii) The operator shall have no knowledge about the applicant that would disqualify the applicant from employment under this section.

(iii) The applicant has, in accordance with the provisions of this section, submitted a signed sworn statement disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction.

(iv) A residential health care facility operator shall provide direct supervision of the applicant while the applicant is in the facility or with residents. The results of the observations shall be documented in the employee personnel file.

(v) The operator of a licensed home care services agency, certified home health agency, long term home health care program, personal care services agency or AIDS home care program ("home care agency") shall supervise the applicant through random, direct observation and evaluation of the applicant and care recipient by an employee who has been employed by the home care agency for at least one year. The results of the observations shall be documented in the employee personnel file.

(vi) A home care agency which has been in business for less than one year shall supervise the applicant through random, direct observation and evaluation of the applicant and care recipient by an employee with prior employment experience of at least one year with one or more home care agencies. The results of the observations shall be documented in the employee personnel file.

(2) If the information relating to the criminal history record check is received at any time during the provisional employment and reveals that the applicant is disqualified from employment in accordance with this section, the applicant shall be dismissed immediately.

(3) The operator shall on the 60th day of provisional employment determine whether or not the applicant's criminal history record check has been received by the operator.

(4) Except as provided in paragraph (5) of this subdivision, if the applicant's criminal history record check has not been received by the operator by the 60th day of provisional employment, the applicant's provisional employment shall expire.

(5) If the criminal history record check for any applicant has not been provided within 60 days due to the documented inability of the Department or the Attorney General to provide such record checks in a timely manner, the period of provisional employment may be extended at the option of the operator for no more than an additional 60 days or until the facility receives the required check, whichever occurs first. During the extended provisional employment period, the supervision and documentation requirements of this subdivision shall be continued.

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

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

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

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

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

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

(e) any comparable offense in any other jurisdiction.

(ii) Where the criminal history record check reveals a conviction for any other criminal offense not listed in subparagraph (i) of this paragraph, other than a traffic infraction, the operator in determining the suitability of the prospective employee in such employment position, shall make such decision in accordance with article 23-A of the State Correction Law to include consideration of any information produced by the prospective employee on his or her behalf as identified in Correction Law, Section 753(1)(g).

(2) In making a determination with regard to applicants for employment pursuant to this section, the operator shall give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the prospective employee. In such cases where such certificates are produced, the operator, in determining the suitability of the prospective employee in such employment position, shall make such decision in accordance with article 23-A of the State Correction Law to include considera-

tion of any information produced by the prospective employee or on his or her behalf as identified in Correction Law section 753(1)(g).

(3) An operator who, in denying employment for an applicant, reasonably relies upon information provided by the Attorney General pursuant to this section shall not be liable, pursuant to federal law, in any action brought by the applicant based on the employment determination resulting from the incompleteness or inaccuracy of the information.

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

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

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

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

(l) This section is deemed to supercede and apply in lieu of any local laws or laws of any political subdivision of the state requiring a criminal history record check for applicants for employment in health care facilities and programs listed in this Section.

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

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

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

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

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

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

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

(d) Providers of personal care services.

\* \* \*

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

\* \* \*

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

**Revised rule compared with proposed rule:** Substantial revisions were made in section 400.23(a)(1), (d)(2), (e)(1), (2), (3), (4), (5), (g)(1)(i)(e), (ii), (2), (3), (h) and (l).

**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:

These proposed regulations are promulgated under the authority of Sections 201, 2800, 2803, 2812, 3600, and 3612 of the Public Health Law (PHL) and Section 363-a of the Social Services Law (SSL). PHL Section 201(1)(v) authorizes the Department to act as the single state agency for Medical Assistance (MA) pursuant to Section 363-a of the Social Services

Law, with responsibility to supervise the plan for MA as required by Title XIX of the federal Social Security Act, and to adopt regulations as may be necessary to implement this plan. This section of law further requires the Department to make such regulations, not inconsistent with law, as may be necessary to implement these provisions.

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

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

Sections 2800, 2812, and 3600 of the State Public Health Law and Section 363-a of the State Social Services Law provide the authority for this proposed regulation to supercede and apply in lieu of any local laws or laws of any political subdivision of this State requiring a criminal history record check for applicants for employment in healthcare facilities and programs listed in the proposal.

Section 124 of federal Public Law (PL) 105-277, enacted in 1998, enables nursing facilities (NFs) and home health care agencies (HHAs) to request from the FBI fingerprint-based national criminal history checks for employees or job applicants for positions involving direct patient care. Section 751 of the State Corrections Law provides the authority for the Department to enact regulations which provide a mandatory bar to employment in health facilities or programs for persons convicted of certain criminal offenses.

#### Legislative Objectives:

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

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

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

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

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

#### Needs and Benefits:

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

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

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

These regulations would require the operator of a nursing home, licensed home care services agency, certified home health agency, long-term home health care program, personal care services agency or AIDS home care program to obtain a criminal history record check from the U.S. Attorney General for any prospective employee prior to employment or use of the individual. For these regulations, "employee" is defined to mean all prospective employees, including those persons employed by a temporary employment agency, not licensed by the State Education Department or the Department of Health under Article 28-D, providing direct care or supervision to residents or patients in nursing homes or through a home care service agency. If the criminal history record check reveals that the prospective employee was convicted of one of a number of criminal offenses, the nursing home/home care operator will be prohibited from hiring or using that individual. Those offenses are:

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

The proposed regulation permits operators to employ applicants on a provisional basis for 60 calendar days from the date the criminal history record check is requested through the Department, subject to certain conditions:

(i) Operators must have submitted the request for a criminal history record check and possess a copy of the completed request forms.

(ii) The operator must have no knowledge about the applicant that would disqualify him/her from employment.

(iii) The applicant must have submitted a signed sworn statement disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction.

(iv) Nursing homes must provide direct supervision of the applicant while the applicant is in the facility or with residents.

(v) Home care agencies must supervise the applicant through random, direct observation and evaluation of the applicant and care recipient by an employee who has been employed by the home care agency for at least one year. For agencies which have been in business for less than one year, such supervision must be performed by an employee with prior employment experience of at least one year with one or more home care agencies.

If the information relating to the criminal history record check is received at any time during the provisional employment and reveals that the applicant is disqualified from employment in accordance with this regulation, the applicant shall be dismissed immediately. The operator shall on the 60th day of provisional employment determine whether or not the applicant's criminal history record check has been received by the operator. If the record check has not been provided to the employer, the

applicant's provisional employment shall expire. However, if the record check has not been provided due to the documented inability of the Department or the U.S. Attorney General to provide it timely, the period of provisional employment may be extended for an additional 60 days or until the facility receives the required record check, whichever occurs first.

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

#### Costs

##### Costs to Regulated Parties:

The proposed regulations would require nursing home and home care operators to obtain all information from a prospective employee necessary for the purpose of initiating a criminal history record check, including, at a minimum, a fingerprint card of the prospective employee. As part of such application for employment, the operator must also obtain from the prospective employee an "Authorization for Search and Exchange of Information" and a signed sworn statement disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction.

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

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

- The number of new caregivers entering the field each year is approximately 17,500 certified nursing home nurse aides, 50,000 home health aides and personal care aides, and 5,000 other non-State Education Department or Public Health Law Article 28-D licensed direct caregivers.
- The average annual "turnover" rates are estimated at 40% for CNAs in nursing homes, and 40% for HHAs and 50% for PCAs in home care settings. This would result in an estimated additional 105,500 employees (30,000 CNAs, 67,500 HHAs, PCAs and 8,000 "other" non-licensed) required to be checked each year when caregivers change employers.

The cost to obtain the FBI criminal history check is currently \$24 per check, as of November 2003, and employer administrative costs associated with obtaining the fingerprint cards and such required information for the FBI search are estimated at approximately \$13 per check. Utilizing these estimates and assumptions, costs to operators for implementing the proposed regulation are approximately \$7.2 million annually for non-licensed direct caregivers.

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

The \$24 fee for the criminal background check and the estimated facility/agency associated administrative costs shall not be included as an allowable cost on any cost report or rate appeal filed by the operator, and the operator shall separately identify all such costs on any report of costs submitted to the Department for the purpose of determining the facility's rate of reimbursement unless funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement. If funds are appropriated in any given fiscal year, then for the purposes of determining an operator's rate of payment for such fiscal year, the amount of the fee and the cost of obtaining the fingerprint card shall be a reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs. Operators shall not seek to obtain from a prospective employee, directly or indirectly,

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

##### Costs to State and Local Government:

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

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

##### Costs to the Department of Health:

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

##### Local Government Mandates:

Local governments may operate as regulated parties – see "Costs to State and Local Government". Several counties have recently enacted their own requirements for the performance of criminal background histories for health care workers. This state regulation will supercede and apply in lieu of the local requirements.

##### Paperwork:

As part of an application for employment or use agreement, this regulation would require nursing home and home care operators to obtain all information necessary for the purpose of initiating a criminal history record check, including a fingerprint card. This information shall include an "Authorization for Search and Exchange of Information" and a signed sworn statement disclosing any finding of patient or resident abuse or a conviction for a crime or violation other than a traffic infraction.

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

If hiring an applicant for a provisional period, pending results of the criminal history record check, the operator is also required to document the supervision of the individual during such period.

##### Duplication:

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

##### Alternative Approaches:

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

##### Federal Standards:

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

##### Compliance Schedule:

The proposed regulations will be effective April 1, 2005, contingent upon publication of a Notice of Adoption of the proposed regulations in the *State Register*.

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

Effect on Small Business and Local Governments:

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

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

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

**Compliance Requirements:**

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

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

Operators must inform any prospective employee of the criminal history record check process required by this regulation, and that a prospective employee may withdraw his/her application for employment at any time, without prejudice, prior to the operator's decision on employment. The operator is prohibited from hiring any individual whose history check reveals a mandatory disqualifying offense as defined within the proposal. Where applicable as noted in the proposed regulations, the operator must provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check. However, the operator is permitted to provisionally hire an applicant for 60 days pending the return of the record check, provided documented supervisory requirements are met.

**Professional Services:**

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

**Compliance Costs:**

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

The \$24 fee for the criminal background check and the estimated facility/agency associated administrative costs shall not be included as an allowable cost on any cost report or rate appeal filed by the operator, and the operator shall separately identify all such costs on any report of costs submitted to the Department for the purpose of determining the facility's rate of reimbursement unless funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement. If funds are appropriated in any given fiscal year, then for the purposes of determining an operator's rate of payment for such fiscal year, the amount of the fee and the cost of obtaining the fingerprint card shall be a reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs. Operators shall not seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this section.

**Economic and Technical Feasibility Assessment:**

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

**Minimizing Adverse Impact:**

The proposed regulations attempt to minimize the adverse economic impact on all providers. Exemption of small businesses and local governments from the proposed regulations would not serve the purpose of assuring quality care and services to all nursing home residents and those who receive home care. The Department considered the approaches sug-

gested in Section 202-b(1) of the State Administrative Procedure Act and found them inapplicable, and determined that all nursing homes and home care agencies should comply with these new requirements in order to protect all of the people served by such providers.

**Small Business and Local Government Input:**

Over the past few years, the Department has had numerous discussions with the healthcare industry, local government and other interested stakeholders regarding the issues involved in requiring criminal history record checks of healthcare workers. Small businesses and local governments are represented in these groups. The proposed regulations have also been on the agenda of the Code Committee of the State Hospital Review and Planning Council for information.

**Revised Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

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

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

Operators must inform any prospective employee of the criminal history record check process required by this regulation, and that a prospective employee may withdraw his/her application for employment at any time, without prejudice, prior to the operator's decision on employment. The operator is prohibited from hiring any individual whose history check reveals a mandatory disqualifying offense as defined in the proposal. Where applicable as noted in the proposed regulations, the operator must provide the prospective employee with an opportunity to explain any criminal history record information contained in the record check. However, the operator is permitted to provisionally hire an applicant for 60 days pending the return of the record check, provided documented supervisory requirements are met.

**Professional Services:**

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

**Compliance Costs:**

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

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

rate of reimbursement unless funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement. If funds are appropriated in any given fiscal year, then for the purposes of determining an operator's rate of payment for such fiscal year, the amount of the fee and the cost of obtaining the fingerprint card shall be a reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs. Operators shall not seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this section.

**Minimizing Adverse Impact:**

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

**Opportunity for Rural Area Participation:**

Over the past few years, the Department has had numerous discussions with the healthcare industry, local government and other interested stakeholders regarding the issues involved in requiring criminal history record checks of healthcare workers. These groups have member from rural areas. The proposed regulations have also been on the agenda of the Code Committee of the State Hospital Review and Planning Council for information.

**Job Impact Statement**

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

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

**Assessment of Public Comment**

Public comments were received from 94 individuals and organizations regarding the proposed regulations requiring federal criminal background checks of unlicensed direct caregivers working in nursing homes and home care agencies. The majority of the commentors raised similar concerns. The comments are summarized below:

**COMMENT:**

Language should be added to require a prospective employee to disclose any findings of patient abuse or resident abuse or conviction for a crime or violation other than a traffic infraction. Employers should be able to review prior disciplinary findings that may have resulted in harm to the resident/patient.

**RESPONSE:**

The Department agrees with the comment and language has been added to the regulation. The new language is in proposed section 400.23(a)(1).

**COMMENT:**

The proposed regulations treat nursing home and home care unlicensed staff unfairly. The regulations create incentives to work in non-covered settings and will worsen the staffing shortages in long term care settings. The proposed regulations should be expanded to require criminal background checks for all health care provider types (hospitals, adult homes, assisted living facilities, etc.) and/or additional employees (all caregivers, all employees) to fully protect vulnerable people receiving care in the full range of health care settings.

**RESPONSE:**

The provisions of the enabling federal law (PL 105-277) specifically limit the ability to request and obtain FBI criminal background history information to direct caregivers of nursing homes and home care agencies.

**COMMENT:**

Temporary staffing agencies should be able to obtain criminal history record checks and provide this information to the facilities or agencies using their staff. It is unfair to require nursing homes or home care agencies to seek and obtain this information for temporary staff.

**RESPONSE:**

The provisions of the enabling federal law (PL 105-277) specifically limit the ability to request and obtain FBI criminal background history information to direct caregivers of nursing homes and home care agencies.

**COMMENT:**

Employers should be able to share this information or the Department should be able to retain the information in a database for a couple of years so that an immediate screen could eliminate some individuals from having repeat FBI checks every time they change employers.

**RESPONSE:**

The provisions of the enabling federal law (PL 105-277) specifically preclude the retaining of any FBI criminal history information by the Department or the sharing of this information between employers.

**COMMENT:**

The provisions of the regulations will create an unfair financial burden on providers. The financial circumstances of nursing homes and home care agencies will worsen with an additional unfunded mandate. The costs associated with these regulations must be reimbursable.

**RESPONSE:**

The Department believes the costs associated with the criminal background check are a cost of doing business which will have a minimal impact on expenditures for the facilities/program; however, if funds are specifically appropriated in any given fiscal year for such Medicaid reimbursement, then for the purposes of determining an operator's rate of payment for such fiscal year, the amount of the fee and the cost of obtaining the fingerprint card shall be reimbursable cost to be reflected in such rates as timely as practical based on budgeted costs and subsequently prospectively adjusted to reflect actual costs.

**COMMENT:**

There are no assurances that the regulatory agency administering the program can handle the process in a timely manner. Potential delay in processing would diminish competitive opportunity to seek, recruit and hire qualified individuals in an already depleted workforce. Any time lag between the time an individual is seeking employment and the date the individual is permitted to work will exacerbate the workforce shortage and adversely affect access to services.

**RESPONSE:**

The Department has added language to the proposed regulations [400.23(e)(1), (5)] establishing a period of provisional employment of up to 60 days, with the possibility of an extension for another 60 days when specific conditions are met, while the Department is processing the provider's request for the criminal background history.

**COMMENT:**

Providers should be given immunity from liability for decisions made in good faith application of the provisions of these regulations including the application of Correction Law, Article 23-A standards.

**RESPONSE:**

The Department has no authority to provide such immunity. The Department has added language [400.23(g)(3)] which repeats the language in federal PL 105-277, which states that an operator who, in denying employment, reasonably relies upon information provided by the U.S. Attorney General pursuant to PL 105-277, shall not be liable in any action brought by the applicant based on an employment determination resulting from the incompleteness or inaccuracy of the information.

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## Insurance Department

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### NOTICE OF ADOPTION

**Minimum Standards of Policies and Contracts**

**I.D. No.** INS-32-04-00006-A  
**Filing No.** 1150  
**Filing date:** Oct. 7, 2004  
**Effective date:** Oct. 27, 2004

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

**Action taken:** Amendment of Part 52 (Regulation 62) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3217, 3221 and 4303; and L. 2002, ch. 82

**Subject:** Minimum standards for the form, content and sale of policies and contracts.

**Purpose:** To adopt revised minimum standards for the form, content and sale of policies and contracts as a result of changes to the Insurance Law enacted by L. 2002, ch. 82.

**Text or summary was published** in the notice of proposed rule making, I.D. No. INS-32-04-00006-P, Issue of August 11, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Mike Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5262, e-mail: emangan@ins.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**Text of rule and any required statements and analyses may be obtained from:** Richard M. Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Uniondale, NY 11553, (516) 222-7700

**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.

**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.

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## Long Island Power Authority

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### NOTICE OF ADOPTION

**Electric Service Tariff**

**I.D. No.** LPA-25-04-00005-A

**Filing date:** Oct. 6, 2004

**Effective date:** Oct. 6, 2004

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

**Action taken:** The Long Island Power Authority (authority) approved revisions to the authority's tariff for electric service concerning miscellaneous service charges.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Tariff for electric services.

**Purpose:** To adopt certain revisions for electric service.

**Text or summary was published** in the notice of proposed rule making, I.D. No. LPA-25-04-00005-P, Issue of June 23, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Richard M. Kessel, Long Island Power Authority, 333 Earle Ovington Blvd., Uniondale, NY 11553, (516) 222-7700

**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.

**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

**Electric Service Tariff**

**I.D. No.** LPA-25-04-00006-A

**Filing date:** Oct. 6, 2004

**Effective date:** Oct. 6, 2004

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

**Action taken:** The Long Island Power Authority (authority) approved a proposal to extend and improve LIPA's existing business development and business retention programs.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Tariff for electric services.

**Purpose:** To adopt certain revisions to the tariff for electric service to extend and improve LIPA's existing business retention programs.

**Text or summary was published** in the notice of proposed rule making, I.D. No. LPA-25-04-00006-P, Issue of June 23, 2004.

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

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## Division of the Lottery

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### EMERGENCY RULE MAKING

**Video Lottery Gaming**

**I.D. No.** LTR-43-04-00001-E

**Filing No.** 1146

**Filing date:** Oct. 7, 2004

**Effective date:** Oct. 7, 2004

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

**Action taken:** Addition of Part 2836 to Title 21 NYCRR.

**Statutory authority:** Tax Law, section 1617-a

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

**Specific reasons underlying the finding of necessity:** (1) The nature and location of the general welfare need:

The New York Lottery operates lottery games to fund education in New York State. The current financial situation in New York State is such that funds are urgently needed to meet revenue shortfalls, particularly after the September 11th disaster and the general economic downturn that followed. It is projected that the operation of video lottery gaming in New York State may generate over \$1 billion for education annually when fully implemented. Any game delay that jeopardizes start up of video lottery gaming this fiscal year could result in a loss of approximately \$1 to 4 million weekly in aid to education.

Since passage of the legislation in October 2001 authorizing the Division to license the operation of video lottery gaming at racetracks around New York State, the Division has worked diligently with contractors and racetrack owners to develop the game and the gaming facilities. With commencement of gaming anticipated sometime around the end of this year, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been drafted, leaving inadequate time prior to the anticipated start date to comply with the normal rule making procedure set forth in the State Administrative Procedure Act Section 202(1).

(2) Description of the cause, consequences, and expected duration of the need to file emergency rules:

The cause of the need is set forth in paragraph #1 above. The consequence of filing this emergency rule making is that the Division will begin to generate needed aid to education through the operation of video lottery gaming. In July 2003, the first draft of these regulations was published. The Division received a number of comments during the public comment period. Revisions to the proposed regulations based on comments received from the public and arising from internal product development are included in these emergency regulations. The Division intends to file shortly a Notice of Revised Rule Making pursuant the State Administrative Procedure Act Section 202(4-a) to continue the normal rule making procedures relative to these regulations.

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation of the game and deprive the state of needed

revenue to education. The approximately \$1 to 4 million in weekly aid to education lost this fiscal year by this delay would need to be taken from other revenue sources.

(4) Circumstances necessitate that the public and interested parties be given less than the minimum period of 30 days for notice and comment because any game delay would result in a loss of approximately \$1 to 4 million weekly this fiscal year in aid to education. As mentioned above, the Division continues to finalize the gaming product and to work with the racetracks to design their business operations. These regulations are a result of that product development, and have only now been completed. Consequently, this is the earliest the regulations could have been finalized, leaving inadequate time prior to the anticipated start date to comply with the normal rule making procedure set forth in the State Administrative Procedure Act Section 202(1). Delaying the commencement of gaming for the time needed to utilize the normal rule making process would mean a loss in aid to education of approximately \$1 to 4 million per week which would have to be made up from other state revenues.

**Subject:** Video lottery gaming.

**Purpose:** To allow for the licensed operation of video lottery gaming.

**Substance of emergency rule:** Chapter 383 of the Laws of 2001 as amended by Chapter 85 of the Laws of 2002, as amended by Chapter 62 of the Laws of 2003, codified as § 1617-a of the New York State Tax Law, authorized the Division of the Lottery to license the operation of video lottery gaming at eligible racetracks around New York State. That legislation directed the Division to promulgate rules and regulations for the licensing and operation of those games.

The regulations begin by setting forth the general provisions, construction, and application of the rules. This section contains the definitions for key terms that are used throughout the body of the document.

Many of the regulations set forth the licensing procedures for the various participants needed to bring video lottery gaming into operation. Licensees include the racetracks that are eligible under the enabling legislation to operate video lottery gaming, and their employees, as well as gaming and non-gaming vendors that will supply goods and services to both the Division and the racetracks. Licensing procedures include financial disclosure and, in some instances, background investigations for principles and key employees. Non-gaming vendors supplying goods and services below a certain threshold will not be required to undergo the licensing process, but will have to register as suppliers.

The racetracks, referred to in the regulations as video lottery gaming agents, will be required to submit business plans for approval by the Division prior to licensing, and to establish a set of internal control procedures pursuant to guidelines provided by the Division. The agents will be required to submit periodic financial reports and undertake other financial controls. The regulations set forth the continuing obligations of video lottery gaming agents following licensure, and identify penalties that may be imposed on licensees for violation of the regulations.

The regulations establish rules for the conduct and operation of video lottery gaming. Movement of the terminals is closely regulated, and surveillance and security systems are established at each facility.

**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 January 4, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. McLaughlin, General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301, e-mail: [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us)

#### **Regulatory Impact Statement**

1. Statutory Authority: On October 31, 2001, Governor Pataki signed into law Part C of Chapter 383 of the Laws of 2001, as amended by Chapter 85 of the laws of 2002, as amended by Chapters 62 and 63 of the Laws of 2003, codified as 1617-a and 1612 of the New York State Tax Law, which authorizes the New York State Division of the Lottery ("Division") to license the operation of video lottery gaming at racetrack locations around the state. That legislation directs the Division to promulgate regulations allowing for the licensed operation of video lottery gaming. These regulations fulfill that mandate, enabling the licensing and operation of video lottery gaming at authorized racetracks.

2. Legislative Objectives: These proposed regulations advance the legislative objective of raising additional revenue for education by establishing video lottery gaming.

3. Needs and Benefits: The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum

of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

The regulations set forth the manner in which the regulated community will be licensed to conduct video lottery gaming. Additionally, they describe the game operation, financial operations, terminal design, the manner in which the security systems must operate, and certain requirements for the physical layout of the gaming facilities. These regulations provide the regulated community with the details and guidance to effectively implement video lottery gaming in New York State.

While the Division considers video lottery gaming to be very similar to other lottery games that the Division has successfully conducted for over twenty-five years, some components set it apart from those more traditional games. For example, most of the Division's current licensed agents are food and beverage retailers. Video lottery gaming will require the Division to license racetrack venues as video lottery gaming agents, in addition to licensing video lottery gaming and non-gaming suppliers, as well as principals, key employees, and employees.

In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled after those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

A Notice of Proposed Rule Making was published in July 2003. Since that time, the game design has continued to develop during the start up phase of the project. Because of this, and based on comments received during the public comment period, it was necessary to revise the proposed regulations. These emergency regulations include the revisions. By way of example, sections were added authorizing the issuance of badges for temporary employees, expressly setting forth a procedure to request exemption from the regulations, and authorizing the video lottery gaming agents to use Division logos and other copyrighted material to advertise and promote video lottery gaming at the licensed facilities.

In response to comments received from prospective licensees, the video lottery gaming agents were given increased latitude in managing their business operations. For example, rather than adhering to internal controls procedures prescribed by the Division, each agent will design their own in compliance with guidelines established by the Division. License applications with minor deficiencies can be resubmitted without the need to wait a lengthy resubmission time. If temporary employees are needed intermittently, they may utilize a badging system instead of undergoing a lengthy licensing process. Gaming agents will be able to utilize a Division logo in their advertising program, and will be able to sell all lottery products. Grammatical and formatting changes were made for clarity and ease of use.

These regulations will assist the regulated parties to fully understand and comply with all the requirements of the operation of video lottery gaming, while generating sales and revenue to aid education in the State of New York.

4. Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$450 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million dollars. The regulations require video lottery gaming agents housing over 2500 terminals to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

The racetracks will incur certain labor costs associated with operating video lottery gaming. The gaming facilities throughout the state are expected to employ upwards of a total estimated 4,000 people. Individual gaming agents will be employing approximately 200 to 1,200 people. The average number of employees at each facility is estimated to be over 500. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries ranging from \$22,000 to \$250,000. Total annual payroll for each racetrack could range from \$3.0 million to over \$15 million.

There are other incidental costs that will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Division guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. It is anticipated that most of these controls will be established through sufficient experienced racetrack personnel. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

Total costs for the State, the tracks and vendors for start up and a full year of operations are estimated to be approximately \$500 million, with total revenue for the project for that time period estimated to be over \$1.2 billion.

5. Local Government Mandates: No local mandates are imposed by rule upon any county, city, village, etc. The legislation permits local communities which have racetracks not expressly identified in the legislation to pass local laws authorizing video lottery gaming at racetracks in their communities, if they so choose.

6. Paperwork: The regulations require that the regulated entities complete a licensing application, including fingerprints, and to update and renew the application periodically. The application will follow a standard multi-state format used by other states that license similar gaming activities. Completion of these applications will be a new responsibility for the video lottery gaming agents, their principals, and key employees. Agents, their principals and key employees will be required to provide more detailed disclosure than they have previously been required to provide for licensure. This level of disclosure is common in other gaming states. Provisional licenses will be granted under certain circumstances, so that the licensing review process is not expected to pose a barrier to immediate entry into the business.

The regulated vendors should be familiar with these licensing forms and reporting requirements as they are similar to those required in other states where these vendors currently do business. In fact, gaming vendors routinely have regulatory compliance departments to assist in fulfillment of these requirements.

Vendors supplying goods or services not directly related to gaming must register to do business with the video lottery gaming agents. However, if their contracts exceed certain thresholds outlined in the regulations, they will be required to undergo a full licensing procedure. In particular, non-gaming vendors will be required to submit license applications if any of the following conditions exist:

- (a) the non-gaming vendor has a contract with a video lottery gaming agent that exceeds \$100,000.00 in any twelve (12) month period;
- (b) the non-gaming vendor has contracts with more than one video lottery gaming agent that combined exceed \$150,000.00 in any twelve (12) month period;
- (c) the non-gaming vendor has contract(s) for a portion of a video lottery gaming facility construction project that exceeds \$500,000.00 in any twelve (12) month period;
- (d) the non-gaming vendor has combined contracts for a portion of more than one video lottery gaming facility construction project exceeding \$1,000,000.00 within any twelve (12) month period.

Agents will be required to submit business plans that will include floor plans of the gaming areas, staffing plans, internal control procedures, marketing plans, and security plans. These will need to be updated periodically.

In order to ensure the financial integrity and security of video lottery gaming, the video lottery gaming agents will be required to develop internal control procedures, to undergo an auditing process and to submit financial reports. These financial reports are produced during the regular course of business, and their submission should not prove burdensome. These will need to be updated periodically.

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

8. Alternatives: In furtherance of its statutory mandate to design a game that is comparable to others in the industry, the Division has spent a considerable amount of time since the legislation was signed studying video lottery gaming venues in other states, namely, Delaware, Rhode Island, and West Virginia. In some respects, the video lottery gaming design in these regulations is modeled on those states; however, there are significant differences. For example, the video lottery games and the video lottery terminals are designed to meet specific legal requirements unique in this state.

Prior to publication of the first proposed regulations, members of the regulated community were contacted and comments to the proposed draft regulations solicited. In response, the Division received hundreds of comments that were carefully and thoroughly examined. These comments fell broadly into the following general categories:

- (a) That the requirements to become licensed and operate video lottery gaming appeared oftentimes unclear or vague;
- (b) That many of the requirements established in the proposed draft regulations were overly burdensome;
- (c) That the licensing authority of the Division was questionable;
- (d) That the regulations imposed excessive costs to satisfy unnecessary regulatory requirements; and
- (e) That the regulations contained definitions that were inconsistent, inaccurate or ambiguous.

As a result of this outreach effort, a number of revisions were made and included in the first proposed regulations published in July 2003. The public comment period which followed elicited a number of comments primarily from prospective licensees. Many of those comments proved valuable in drafting these emergency regulations which both meet the needs of the regulated community while maintaining the high standards established by the Division to operate and regulate its games. All comments received are available for public review by contacting Robert J. McLaughlin, Esq., General Counsel, New York State Division of the Lottery at One Broadway Center, P.O. Box 7500, Schenectady, New York 12301 or by calling 518-388-3408 or e-mailing to [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us).

While the majority of requests for revision were accommodated whenever feasible, the Division did not accept any requests for change that in its estimation would undermine the security and integrity of the game. For example, when asked to make changes which would reduce the costs of developing or operating their businesses, the Division generally accommodated those requests when possible. Conversely, though comments were received that the stringent licensing application process was overly burdensome, the Division did not lessen these requirements.

As another alternative, the Division entered into a Memorandum of Understanding with the Racing and Wagering Board to avoid potential duplicative licensing requirements for the racetrack employees.

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

10. Compliance Schedule: The licenses must be issued prior to commencement of video lottery gaming. In many instances, the license applicants will be issued provisional licenses immediately upon filing their application. All requirements concerning the conduct and operation of video lottery gaming must be complied with prior to actual commencement of the games and maintained on-going throughout the operation of the games.

#### **Regulatory Flexibility Analysis**

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

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

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central com-

puter system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain leaders. It is anticipated that once video lottery gaming has commenced, these companies will recoup any costs associated with licensing and start-up;

(c) Non-gaming vendors: Most vendors supplying goods and services not directly related to gaming will be required to complete a registration process. However, if their contract exceeds a certain value, they will be required to comply with licensing provisions. While it is difficult to estimate all costs associated with doing business with a video lottery gaming agent, the costs of registration will be minimal. The costs of licensing, should that be necessary, will conform to the costs of licensing discussed in paragraph (c) below. However, non-gaming vendors who must undergo a licensing process will not be required to pay a licensing fee other than the costs of fingerprinting.

Participation in video lottery gaming by any of these entities is voluntary and it is expected they will use good business judgment when deciding whether or not to participate in these games. It is expected there will be no adverse economic impact on any of these regulated businesses.

2. Compliance Requirements: These rules will not require small businesses to complete burdensome forms or reports. To the extent that any small business becomes a non-gaming vendor to a video lottery agent, a contract value threshold of \$100,000 applies before licensing is necessary. Completion of the licensing application will be required. Certain small vendors may not even be required to register.

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

4. Compliance Costs: This is a voluntary program. Members of the regulated community need only apply for licenses if they choose to enter into video lottery gaming. It is expected that the decision to apply for a license will result from the exercise of sound business judgment.

The regulations, as well as the legislation, require facilities be in conformance with state and local building codes. These requirements, in addition to the necessary changes to facilities to accommodate video lottery terminals and related peripheral equipment, will result in each video lottery gaming agent incurring construction costs.

Based on forecasted estimates provided by the racetracks themselves, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$240 million if all eligible venues participate. Each facility's proposed project differs. The cost for each facility ranges from \$4 million to over \$100 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional \$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ upwards of a total estimated 1900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

There are other incidental costs which will be incurred by the video lottery gaming agents. These include costs relative to providing sufficient internal controls to satisfy Lottery guidelines as well as auditing, both expected to exceed what is currently in place at the racing facilities. The majority of these controls are put in place through adequate experienced personnel and the personnel costs are set forth above. Additional external auditing costs are expected to average approximately \$65,000 annually.

Members of the regulated community will be required to expend money for licensing costs. Gaming vendors will be required to pay a \$10,000 licensing fee to cover costs related to conducting background investigations of their principals and key employees. Principals and employees will be required to pay approximately \$100 to cover the cost of fingerprints.

5. Economic and Technological Feasibility: The economic and technological impact of these rules on local government is minimal.

There are no expected adverse economic or technological impact on small businesses in complying with these regulations.

6. Minimizing Adverse Impact: In the case of smaller, non-gaming vendor contracts, these vendors will not be required to comply with licensing and background checks. Small businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$25,000 annually will be exempt from any registration or licensing requirements, and businesses supplying non-gaming goods and services pursuant to contracts valued at less than \$100,000 will only need to complete a registration process.

7. Small Business and Local Government Participation: During the pre-proposal stage of the regulatory process, members of the regulated community were contacted and given the opportunity to participate in the formation of these regulations. The New York Lottery received numerous comments from members of the community, many of which were incorporated during the final drafting of the proposed regulations. After publication of the Notice of Proposed Rule Making on July 16, 2003, the Lottery received numerous comments mostly from prospective licensees, during the public comment period. These emergency regulations include revisions made to the regulations as a result of that comment period.

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

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

However, the Division has determined that these regulations will impose no adverse impact on these rural areas. The rule places no additional requirements on racetracks, other businesses or communities located within the rural areas than it does on racetracks, businesses or communities located outside rural areas.

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

#### **Job Impact Statement**

The Division has determined that the rule will not have a substantial adverse impact on jobs and employment opportunities. To the contrary, the agency has determined the rule will have a positive impact on jobs and employment opportunities.

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

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

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## **Office of Mental Retardation and Developmental Disabilities**

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

#### **Responsibility for Home Health Aide and Personal Care Services in Certain Residential Facilities and Day Care Programs**

**I.D. No.** MRD-43-04-00004-P

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

**Proposed action:** Amendment of sections 635-9.1, 635-9.2, 635-10.4, 635-10.5, 671.5, 686.13 and 690.7 of Title 14 NYCRR.

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

**Subject:** Responsibility for home health aide and personal care services in certain residential facilities and day programs.

**Purpose:** To require that certain residential facilities and day programs be responsible for Medicaid-reimbursable home health aide and personal care services provided to participants in those settings.

**Text of proposed rule:** Add new subparagraph 635-9.1(a)(1)(xxii) to read as follows:

(xxii) *Supervised community residences and supervised individualized residential alternative (IRA) facilities shall assume the cost of services which:*

(a) *are necessary to meet the needs of consumers while in residence, and*

(b) *prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Add new subparagraph 635-9.2(a)(1)(x) to read as follows:

(x) *Nonresidential facilities providing day treatment and day habilitation services shall assume the cost of services which:*

(a) *are necessary to meet the needs of consumers while attending their programs and*

(b) *prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Add new subparagraph 635-10.4(b)(1)(xii) to read as follows:

(xii) *Residential habilitation services in a supervised IRA shall include services which:*

(a) *are necessary to meet the needs of consumers while in residence, and*

(b) *prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Add new subparagraph 635-10.4(b)(2)(xi) to read as follows:

(xi) *Day habilitation services shall include services which:*

(a) *are necessary to meet the needs of consumers while receiving day habilitation services, and*

(b) *prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Paragraph 635-10.5(c)(3) is amended to read as follows:

(3) The fee determined through the application of this subdivision may [not] be appealed. *In order to appeal the fee, the facility must send to OMRDD a fee adjustment application within one year of the close of the fee period in question. Such appeal shall be pursuant to section 686.13(i) of this Title, except that the determination following such first level appeal process shall be the commissioner's final decision.* [However] *In addition, arithmetic or calculation errors identified within 90 days of the fee notification by either OMRDD or the service provider, will be adjusted accordingly.*

Renumber subparagraph 671.5(a)(4)(xi) as paragraph (a)(5) and add a new paragraph (6) to read as follows:

(6) *The provider of community residential habilitation services in a supervised community residence shall be responsible for the cost of services which:*

(i) *are necessary to meet the needs of consumers while in residence, and*

(ii) *which prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Delete current subclause 686.13(b)(2)(vi) and replace with new subclause (vi) to read as follows:

(vi) *Supervised community residences shall be responsible for the cost of services which:*

(a) *are necessary to meet the needs of consumers while in residence, and*

(b) *prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

Add new subparagraph 690.7(d)(5)(viii) to read as follows:

(viii) *The day treatment facility shall be responsible for the cost of services which:*

(a) *are necessary to meet the needs of consumers while attending the program, and*

(b) *which prior to August 1, 2004 could have been met by home health aide or personal care services separately billed to Medicaid.*

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

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

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

##### 2. Legislative Objectives:

These amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law. The enactment of these amendments will promote efficient operation and appropriate reimbursement of certain services provided under the Medicaid program. Affected programs and services are:

a. Supervised community residences and supervised Individualized Residential Alternative (IRA) facilities (amendments to sections 635-10.4, 635-10.5, 671.5 and 686.13).

b. HCBS waiver day habilitation programs (amendments to sections 635-10.4 and 635-10.5).

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

d. The amendments also contain conforming changes to sections 635-9.1 and 635-9.2.

##### 3. Needs and Benefits:

The amendments are concerned with promoting greater efficiency and improving coordination of services among various Medicaid services that may be provided to persons with developmental disabilities.

New York State policy changed with regard to some Medicaid services for persons residing in supervised community residences and Individualized Residential Alternatives (IRAs) and for persons attending day treatment and day habilitation programs. Home health aide and personal care services can no longer be separately billed to Medicaid for these persons. Now, the IRA, community residence, day treatment or day habilitation provider must either purchase those home health aide or personal care services necessary to meet consumers' needs directly from a home health agency or personal care services provider, or provide these services (again, if necessary to meet consumers' needs) with its own staff. The New York State Department of Health announced this change in the June 2004 Medicaid Update.

These regulations are to conform OMRDD's rules to this new policy. The proposed amendments state: (1) that supervised community residences, IRAs, day treatment programs and day habilitation programs cannot charge consumers for costs of home health aide or personal care services, (635-9.1 and 635-9.2); (2) that services necessary to meet consumers' needs and previously separately billed to Medicaid as home health aide or personal care services are now part of day treatment, residential habilitation or day habilitation and are, therefore, the responsibility of the supervised community residence, supervised IRA, day treatment program, or day habilitation program to provide (635-10.4(b)(1) and (2)); (3) that the reimbursement established by OMRDD and paid to the supervised community residence, supervised IRA, day treatment program or day habilitation program now includes the cost of these services previously separately billed to Medicaid (635-10.4; 635-10.5; 671.5; 686.13; and 690.7), and (4) that a day habilitation program can request adjustments to (*i.e.* appeal) its fee (635-10.5(c)). Current OMRDD regulations already allow fee and price adjustments for IRAs and community residences.

The amendments are a part of a State effort to reform and improve the administration of the Medicaid program in New York State.

##### 4. Costs:

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

As stated, the ultimate purpose of the amendments is to promote greater efficiency and improve coordination of services among various Medicaid providers that may be serving persons with developmental disabilities. OMRDD believes that some of its regulated providers (supervised IRAs, supervised community residences, day treatment programs and day habilitation programs) have sufficient funds to provide the equivalent of home health care and personal care services. These OMRDD regulated providers can either purchase home health aide and personal care services directly from home health agencies and personal care providers, or can provide the equivalent of these services with their own staff. To the extent that these services will now be paid for with funds the OMRDD regulated providers already have, there will be savings to the State Medicaid program. Some affected OMRDD regulated providers may not have sufficient funds to either purchase the home health aide or personal care services directly, or to hire the staff needed to provide the equivalent of these services. These providers may receive additional funding from OMRDD for these purposes. To the extent that OMRDD grants providers additional funding, there will be no cost savings to the State or to OMRDD. At this time, OMRDD does not know how many providers will receive funding adjustments, so that it cannot quantify costs to the State and OMRDD.

Pursuant to sections 365 and 368-a of the Social Services Law, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. An unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver day habilitation services (amendments to sections 635-10.4 and 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law. To the extent that the amendments will result in improved coordination of Medicaid services between the affected day programs and services provided to consumers at home, it is expected that some, relatively negligible savings to local governments could result.

b. Costs to private regulated parties: There are no initial capital investment costs. There may be some small non-capital expenses. As stated above, supervised IRAs, supervised community residences, day treatment and day habilitation providers must either purchase those home health aide or personal care services necessary to meet consumers' needs directly from a home health agency or personal care services provider, or provide these services with their own staff. Providers may incur costs in either purchasing or directly providing these services, but current funding levels may be sufficient to cover these costs. Moreover, in a case where a provider does not have sufficient funds, the provider can request that OMRDD adjust its reimbursement. Therefore, the amendments are not expected to have any significant fiscal impact on regulated providers.

5. Local Government Mandates:

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

6. Paperwork:

No additional paperwork will be required by the amendments.

7. Duplication:

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

8. Alternatives:

The alternative to these proposed regulations was to implement these changes without regulations. However, since regulations have the force and effect of law, OMRDD has decided that regulations are needed to establish the following legal rights and obligations. First, where a consumer has a need for home health aide or personal care type services, the regulations ensure the right to have these needs met by the residential or day program provider while the person is participating in the program. Second, the regulations establish that it is the legal obligation of the supervised IRA, supervised CR, day treatment, or day habilitation program to meet the consumer's need for home health aide or personal care type services while the consumer is participating in the program. Third, the regulations require the residential or day program provider to use OMRDD funding to meet any consumer need for home health aide or personal care type services. Fourth, the regulations prohibit the residential or day program provider from charging a consumer or representative for these services. Fifth, the regulations establish that a day habilitation provider can now appeal its fee.

9. Federal Standards:

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

10. Compliance Schedule:

Regulated providers of the affected services were notified of the changes well in advance. OMRDD intends to finalize the proposed amendments within the time frames provided for by the State Administrative Procedure Act (SAPA).

**Regulatory Flexibility Analysis**

1. Effect on small business: These regulatory amendments will apply to agencies that operate:

Supervised community residences and supervised Individualized Residential Alternative (IRA) facilities (amendments to sections 635-10.4, 635-10.5, 671.5 and 686.13). New York State currently funds 2,354 such supervised sites.

HCBS waiver day habilitation programs (amendments to sections 635-10.4 and 635-10.5). New York State currently funds 1,663 such programs.

Day Treatment Facilities for Persons with Developmental Disabilities (amendments to section 690.7). There are currently 197 sites certified by OMRDD to provide day treatment services statewide.

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

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements. There should be no significant fiscal impacts on the affected small business providers of services as a result of these amendments.

The June 2004 Medicaid Update stated that home health aide and personal care services provided to residents or participants of the affected programs or facilities during program participation or while in residence will not be allowed to be separately billed to the Medicaid program. This is not expected to significantly impact providers of services because the regulated facilities and programs have always been expected to meet the needs of the consumers they serve during regular hours. Therefore, OMRDD would expect that any separate Medicaid billings for home health aide or personal care services provided to persons while in residence or in the day program would be exceptional. If there are persons in the affected residential or day programs who need services of the kind provided by home health aides or personal care providers, they can receive such services or similar services from residence or day program staff, or through the residence or day program's direct purchase of such services from qualified providers. Any necessary adjustments to rates or fees of reimbursement can be addressed by the provisions of the relevant OMRDD rate or fee setting methodology.

Pursuant to sections 365 and 368-a of the Social Services Law, local governments incur no costs for most of the above referenced facilities or services, or the State reimburses local governments for their share of the cost of Medicaid funded programs and services. An unreimbursed local government share is involved for only a portion of the consumers receiving HCBS waiver day habilitation services (amendments to sections 635-10.4 and 635-10.5). These are consumers who live with their families or on their own and who do not qualify for local share relief under State law. To the extent that the amendments will result in improved coordination of Medicaid services between the affected day programs and services provided to consumers at home, it is expected that some, relatively negligible savings to local governments could result also.

2. Compliance requirements: As stated above, supervised IRAs, supervised community residences, day treatment and day habilitation providers must either purchase those home health aide or personal care services necessary to meet consumers' needs directly from a home health agency or personal care services provider, or provide these services with their own staff. Providers may incur costs in either purchasing or directly providing these services. Current funds should be sufficient to cover these costs in most cases. Moreover, in a case where a provider does not have sufficient funds for the services, the provider can request that OMRDD adjust its reimbursement. Therefore, the amendments are not expected to have any significant fiscal impact on regulated providers.

3. Professional services: No additional professional services are required as a result of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: As stated above, supervised IRAs, supervised community residences, day treatment and day habilitation providers must either purchase those home health aide or personal care services necessary

to meet consumers' needs directly from a home health agency or personal care services provider, or provide these services with their own staff. Providers may incur costs in either purchasing or directly providing these services. Current funds should be sufficient to cover these costs in most cases. Moreover, in a case where a provider does not have sufficient funds for the services, the provider can request that OMRDD adjust its reimbursement. Therefore, the amendments are not expected to have any significant fiscal impact on regulated providers.

5. Economic and technological feasibility: The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: These amendments impose no adverse economic impact on regulated parties or local governments. Therefore, the approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small business and local government participation: Regulated providers of the affected services were notified of the changes well in advance. The topic was discussed at OMRDD's Provider Council which has extensive representation of OMRDD's regulated provider community. In addition, all residential and day providers that OMRDD funds were alerted to the new provisions so as to provide ample time to adjust their operations accordingly. Also, those providers that OMRDD knows were serving persons who were also receiving separately billed home health aide and personal care services were sent, on June 4, 2004, notice of the new provisions with rosters of consumers affected by the change.

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

A rural area flexibility analysis for these amendments is not being submitted because the amendments will not impose any adverse economic impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This is because the proposed amendments will promote greater efficiency and improve coordination of services among various Medicaid funded services that may be provided to persons with developmental disabilities.

#### **Job Impact Statement**

A job impact statement for these proposed amendments is not being submitted because it is apparent from the nature and purposes of the rule that it will, in and of itself, not have a substantial adverse impact on jobs and/or employment opportunities. Setting aside any possible effects on home health aide and personal care aide providers attributable to the DOH Medicaid policy change and alluded to in the Regulatory Impact Statement, the proposed amendments may have a minor positive effect on employment opportunities within the OMRDD regulated provider community. This is because in some cases, additional day treatment, residential habilitation or day habilitation staff may be necessary to provide services to meet consumer needs that were formerly met by home health aide or personal care services. Decisions about meeting the needs of consumers will be made on a case-by-case basis, so any impacts would be difficult to quantify.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Electric Service Standards**

**I.D. No.** PSC-10-04-00016-A

**Filing date:** Oct. 12, 2004

**Effective date:** Oct. 12, 2004

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

**Action taken:** The commission, on July 28, 2004, adopted an order, in Case 02-E-1240 approving New York State Department of Public Service staff's revisions to standards on reliability of electric service for large New York State electric utilities.

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

**Subject:** Electric service standards.

**Purpose:** To ensure that the electric reliability and quality of electric service in an electric utility's operating area is adequate.

**Substance of final rule:** The Commission adopted the New York State Department of Public Service Staff's modification to the electric service standards used to measure reliability and quality of electric service for each of the large New York State electric utilities, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (02-E-1240SA1)

### NOTICE OF ADOPTION

#### **Adoption of Billing and Crediting Procedures**

**I.D. No.** PSC-14-04-00010-A

**Filing date:** Oct. 8, 2004

**Effective date:** Oct. 8, 2004

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

**Action taken:** The commission, on Sept. 22, 2004, adopted an order in Case 04-M-0324 requiring electric, gas and steam utilities to establish procedures relating to billing and debiting of shared meter charges under Public Service Law, section 52.

**Statutory authority:** Public Service Law, section 52

**Subject:** Utility shared meter procedures.

**Purpose:** To implement certain procedures in connection with the imposition of shared meter charges on building owners and provision of corresponding refunds or credits to tenants.

**Substance of final rule:** The Commission directed electric, gas and steam metering utilities to establish certain procedures relating to billing and debiting of shared meter charges under Public Service Law § 52 and directed the utilities to adopt the procedures, 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-M-0324SA1)

### NOTICE OF ADOPTION

#### **Deferral and Allocation of Property Tax Refund by United Water New York, Inc.**

**I.D. No.** PSC-21-04-00017-A

**Filing date:** Oct. 8, 2004

**Effective date:** Oct. 8, 2004

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

**Action taken:** The commission, on Sept. 22, 2004, approved in Case 03-W-1170 a request by United Water New York, Inc. (United Water) to defer \$63,367.35 of property tax refunds to ratepayers and retain \$21,123.45 of the refund.

**Statutory authority:** Public Service Law, sections 89-c(3) and 113(2)

**Subject:** Allocation of property tax refunds.

**Purpose:** To retain a portion and defer a portion of a property tax refund received from Ramapo School District.

**Substance of final rule:** The Commission authorized United Water New York, Inc. (United Water) to pass \$63,367.35 (75%) of property tax re-

funds to ratepayers during the first quarter after United Water receives approval to implement a revenue reconciliation surcharge or surcredit and to retain \$21,123.45 (25%) of the remaining refund for the benefit of shareholders, subject to the terms and conditions set forth in the Order.

**Final rule compared with proposed rule:** No changes.

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(03-W-1170SA2)

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Water Rates and Charges by New York Water Service Corporation**

**I.D. No.** PSC-43-04-00023-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, or reject, in whole or in part, or modify, a request filed by New York Water Service Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 12—Water.

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

**Subject:** Water rates and charges.

**Purpose:** To increase New York Water Service Corporation's annual revenues by \$3,130,000 or 14.6 percent.

**Public hearing(s) will be held at:** 1:00 p.m. and 7:00 p.m. on Dec. 9, 2004 at Hempstead Town Hall Pavilion, One Washington St., Hempstead, NY.

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

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

**Substance of proposed rule:** On June 4, 2004, New York Water Service Corporation (the company) filed a request for approval to increase the company's annual revenues by about \$3,130,000 or 14.6%. The company states that the principal reasons for the rate request are increased costs associated with wages and salaries, employee benefits, local property and school taxes, state and federal incomes taxes, insurance, and to provide a level of return to its investors which is consistent with current costs of capital. On June 23, 2004, the Commission initially suspended the effective date of the filing to November 2, 2004. The company provides water service to approximately 44,400 customers in the Town of Hempstead, Nassau County. Negotiation among the parties in this rate proceeding could lead to a proposal that the Commission consider a multi-year rate plan. The Commission may approve or reject, in whole or in part, or modify the company's request.

**Text of proposed rule may be obtained from:** Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-3204

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

**Public comment will be received until:** five days after the last scheduled public hearing.

**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-W-0665SA1)

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

**Fixed Price Rates by New York State Electric & Gas Corporation**

**I.D. No.** PSC-43-04-00006-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, modify, or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedules, P.S.C. Nos. 120 and 121—Electricity to become effective Jan. 1, 2005.

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

**Subject:** Fixed price rates.

**Purpose:** To establish the bundled rate option or fixed price rates.

**Substance of proposed rule:** On October 7, 2004, New York State Electric & Gas Corporation (NYSEG) filed proposed tariff revisions in compliance with Commission Order Adopting Provisions of the Joint Proposal with Modifications, issued February 27, 2002. NYSEG proposes to establish the Bundled Rate Option or NYSEG's Fixed Price Rates to become effective January 1, 2005. NYSEG also proposes forecasted commodity rates and fixed non-bypassable wires charges (transition charges). The Commission may approve, reject or modify, in whole or in part, NYSEG's proposed tariff revisions.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(01-E-0359SA16)

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

**Economic Development Rate Incentives by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00007-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, to modify, or reject, in whole or in part, a joint proposal filed in Case Nos. 02-E-0198, 02-G-0199, *et al.*, by Rochester Gas and Electric Corporation (RG&E), dated Sept. 15, 2004. This Sept. 2004 joint proposal presents electric and natural gas economic development rate incentives, and non-rate incentives for natural gas service.

**Statutory authority:** Public Service Law, sections 5(2) and 66(12)

**Subject:** Proposed economic development rate incentives for electric and natural gas service, and further non-rate incentives for natural gas service.

**Purpose:** To approve the joint proposal.

**Substance of proposed rule:** On September 15, 2004, a Joint Proposal, signed by Rochester Gas and Electric Corporation, the New York State Department of Public Service, Multiple Intervenors, and Energetix, Inc., was filed with the New York State Public Service Commission (PSC) as the September 15, 2004 Joint Proposal on Electric and Natural Gas Economic Development Incentive Programs ("Joint Proposal"), as required by the PSC's June 2, 2004 Order in Case Nos. 02-E-0198, 02-G-0199, *et al.* The Joint Proposal addresses RG&E's economic development incentive rates for electric and natural gas service, and the development of non-rate incentives for natural gas service.

The PSC is considering whether to approve, to modify, or to reject the Joint Proposal, in whole or in part, making such changes to it as may be deemed necessary.

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

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

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

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

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

(02-E-0198SA7)

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

**Economic Development Incentive Programs by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00008-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 19—Electricity to become effective Jan. 1, 2005.

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

**Subject:** Economic development incentive programs.

**Purpose:** To revise the empire zone programs and add a new Incremental Load Rate Program.

**Substance of proposed rule:** On October 5, 2004, Rochester Gas and Electric Corporation (RG&E) filed proposed tariff revisions to Schedule P.S.C. No. 19—Electricity to become effective January 1, 2005. Pursuant with the Joint Proposal on Electric and Natural Gas Economic Development Incentive Programs dated October 4, 2004, RG&E proposes to revise its Empire Zone Programs and to add a new Incremental Load Rate Program. These services are offered to electric non-residential customers served under P.S.C. No. 19. The proposed filing also includes a method for transitioning existing Incremental Manufacturing Load Rider customers to the new Incremental Load Rate Program. The Commission may approve, reject or modify, in whole or in part, RG&E's proposed tariff revisions.

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

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

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

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

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

(02-E-0198SA8)

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

**Unbundling and Accounts Receivable by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00009-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedules, P.S.C. Nos. 18 and 19—Electricity to become effective Jan. 1, 2005.

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

**Subject:** Unbundling and accounts receivable.

**Purpose:** To include in its tariff provisions for the purchase of ESCO accounts receivable and the unbundling of electric rates.

**Substance of proposed rule:** On October 6, 2004, Rochester Gas and Electric Corporation (RG&E) filed proposed tariff revisions to Schedules P.S.C. Nos. 18 and 19 — Electricity to become effective January 1, 2005. Pursuant with the Joint Proposal on Purchase of Accounts Receivable dated August 20, 2004 RG&E proposes, for P.S.C. No. 19, to purchase accounts receivable at a discount and without recourse for commodity sales by ESCO's that provide commodity service in RG&E's territory. RG&E also proposes, for P.S.C. No. 19, appropriate rate and electricity supply pricing options for S.C. Nos. 8, 12 and 14, along with interval meter data capabilities for ESCO and RG&E customers with interval meters. Revisions to update the descriptions of various provisions were also made to Rule 12 — the Enrollments Section. RG&E proposes the unbundling of electric rates pursuant to the March 9, 2004 Electric Rate Joint Proposal, for both P.S.C. Nos. 18 and 19, along with providing, to eligible customers, for electricity supply pricing options for each commodity rate period. The Commission may approve, reject or modify, in whole or in part, RG&E's proposed tariff revisions.

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

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

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

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

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

(03-E-0765SA5)

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

**Submetering of Electricity by Dara Gardens Residents' Association**

**I.D. No.** PSC-43-04-00010-P

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition for rehearing by the Dara Gardens Residents' Association (DGRA) seeking reversal of the commission's order issued Sept. 1, 2004 (order) allowing the submetering of electricity at Dara Gardens, 150-29 72nd Rd., Kew Garden Hills, NY (Dara Gardens). The DGRA also proposes that the commission modify its order to allow for a submetering program that would provide for one of the Dara Gardens buildings to be submetered for one year to test the feasibility of the submetering proposal.

**Statutory authority:** Public Service Law, section(s) 2, 4(1), 5, 22, 53, 65, 65(1), 66, 66(1), (2), (3), (4), (5), (12) and (14)

**Subject:** Submetering of electricity.

**Purpose:** To reverse the commission's Sept. 1, 2004 order.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition for rehearing by the Dara Gardens Residents' Association (DGRA) seeking reversal of the Commission's order issued September 1, 2004 (Order) allowing the submetering of electricity at Dara Gardens, 150-29 72nd Road, Kew Garden Hills, New York. The DGRA also proposes that the Commission modify its Order to allow for a submetering program that would provide for one of the Dara Gardens buildings to be submetered for one year to test the feasibility of the submetering proposal.

**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-0104SA2)

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

**New Types of Electricity Meters, Transformers and Auxiliary Devices by Ritz Instrument Transformers Inc.**

**I.D. No.** PSC-43-04-00011-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Ritz Instrument Transformers Inc. for the approval of six families of electrical transformers.

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

**Subject:** New types of electricity meters, transformers and auxiliary devices.

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

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, a petition filed September 23, 2004 by Ritz Instrument Transformers Inc. for the approval of six families of electrical transformers. According to the petition, Niagara Mohawk Power Corporation has submitted a letter of intent to use the Ritz Instrument transformer line in its customer billing metering applications.

**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-1159SA1)

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

**Submetering of Electricity by American Metering & Planning Services, Inc.**

**I.D. No.** PSC-43-04-00012-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 grant, deny, or modify, in whole or in part, the petition filed by American Metering & Planning Services, Inc., on behalf of 125 Court Street, LLC to submeter electricity at 125 Court St., Brooklyn, NY (125 Court St.).

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 125 Court St., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by American Metering & Planning Services, Inc., on behalf of 125 Court Street, LLC to submeter electricity at 125 Court Street, Brooklyn, New York (125 Court Street).

**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-1172SA1)

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

**Interruptible Service by New York State Electric & Gas Corporation**

**I.D. No.** PSC-43-04-00013-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, modify, or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 120—Electricity to become effective Dec. 22, 2004.

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

**Subject:** Interruptible service.

**Purpose:** To eliminate interruptible rate, special provision (c) of Service Classification No. 7.

**Substance of proposed rule:** On October 6, 2004, New York State Electric & Gas Corporation (NYSEG) filed proposed tariff revisions to eliminate its electric Interruptible Rate applicable to the Large General Service Customers with Time-of-Use Metering, to become effective December 22, 2004. The proposed revisions are being made since customers are now eligible to participate in the Demand Response Programs of the New York Independent System Operator. The Commission may approve, reject or modify, in whole or in part, NYSEG's proposed tariff revisions.

**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-1230SA1)

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

**Economic Development Incentive Programs by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00014-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, modify, or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 16—Gas to become effective Jan. 1, 2005.

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

**Subject:** Economic development incentive programs.

**Purpose:** To revise the empire zone programs and add a new Incremental Load Rate Program.

**Substance of proposed rule:** On October 5, 2004, Rochester Gas and Electric Corporation (RG&E) filed proposed tariff revisions to Schedule P.S.C. No. 16 — Gas to become effective January 1, 2005. Pursuant with the Joint Proposal on Electric and Natural Gas Economic Development Incentive Programs dated October 4, 2004, RG&E proposes to revise its Empire Zone Programs and to add a new Incremental Load Rate Program. These services are offered to gas non-residential customers served under P.S.C. No. 16. The proposed filing also includes a method for transitioning existing Incremental Manufacturing Load Rider customers to the new Incremental Load Rate Program. The Commission may approve, reject or modify, in whole or in part, RG&E's proposed tariff revisions.

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

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

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

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

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

(02-G-0199SA5)

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

**Economic Development Rate Incentives by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00015-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, modify, or reject, in whole or in part, a joint proposal filed in Case Nos. 02-E-0198, 02-G-0199, *et al.*, by Rochester Gas and Electric Corporation (RG&E), dated Sept. 15, 2004. This Sept. 2004 joint proposal presents electric and natural gas economic development rate incentives, and non-rate incentives for natural gas service.

**Statutory authority:** Public Service Law, sections 5(2) and 66(12)

**Subject:** Proposed economic development rate incentives for electric and natural gas services, and further non-rate incentives for natural gas service.

**Purpose:** To approve the joint proposal.

**Substance of proposed rule:** On September 15, 2004, a Joint Proposal, signed by Rochester Gas and Electric Corporation, the New York State Department of Public Service, Multiple Intervenors, and Energetix, Inc., was filed with the New York State Public Service Commission (PSC) as the September 15, 2004 Joint Proposal on Electric and Natural Gas Economic Development Incentive Programs ("Joint Proposal"), as required by the PSC's June 2, 2004 Order in Case Nos. 02-E-0198, 02-G-0199, *et al.* The Joint Proposal addresses RG&E's economic development incentive rates for electric and natural gas service, and the development of non-rate incentives for natural gas service.

The PSC is considering whether to approve, to modify, or to reject the Joint Proposal, in whole or in part, making such changes to it as may be deemed necessary.

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

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

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

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

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

(02-G-0199SA6)

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

**Accounts Receivable by Rochester Gas and Electric Corporation**

**I.D. No.** PSC-43-04-00016-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 16 — Gas to become effective Jan. 1, 2005.

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

**Subject:** Accounts receivable.

**Purpose:** To include in its tariff provisions for the purchase of ESCO accounts receivable.

**Substance of proposed rule:** On October 6, 2004, Rochester Gas and Electric Corporation (RG&E) filed proposed tariff revisions to Schedule P.S.C. No. 16 — Gas to become effective January 1, 2005. Pursuant with the Joint Proposal on Purchase of Accounts Receivable dated August 20, 2004, RG&E proposes to purchase accounts receivable at a discount and without recourse for commodity sales by ESCO's that provide commodity service in RG&E's territory. RG&E also proposes to update its Residential Service Application, General Service Application and Deferred Payment Agreements for Non-Residential and Residential and to delete, from its tariff, Forms E and G because the service classification and provision which the forms addressed are no longer in effect. The Commission may approve, reject or modify, in whole or in part, RG&E's proposed tariff revisions.

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

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

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

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

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

(03-G-0766SA6)

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

**Submetering of Natural Gas to a Commercial Customer by Syska Hennessy Group**

**I.D. No.** PSC-43-04-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, reject or modify, in whole or in part, a petition filed Sept. 21, 2004 by Syska Hennessy Group, on behalf of NOKIA, for permission to submeter gas service to a commercial tenant located at 102 Corporate Park Dr., Harrison, NY.

**Statutory authority:** Public Service Law, section 65(1), (2), (3), (4), (5), (8), (9), (10), (12) and (14)

**Subject:** Submetering of natural gas service to a commercial customer.

**Purpose:** To submeter natural gas to a commercial customer.

**Substance of proposed rule:** On September 21, 2004, Syska Hennessy Group has filed a petition, on behalf of NOKIA, to submeter gas service to a commercial tenant located at 102 Corporate Park Drive, Harrison, New York. The Commission may approve, reject, or modify, in whole or in part, this request.

**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-G-1139SA1)

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

**Service Quality Assurance Program by Niagara Mohawk Power Corporation**

**I.D. No.** PSC-43-04-00018-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, an Oct. 8, 2004 revised proposal of Niagara Mohawk Power Corporation, for modifications to its Service Quality Assurance Program as contemplated in attachment 9 of the joint proposal that was approved by the commission in Opinion No. 01-6, issued Dec. 3, 2001.

**Statutory authority:** Public Service Law, section 66

**Subject:** Niagara Mohawk's Service Quality Assurance Program.

**Purpose:** To modify certain performance indicators and targets.

**Substance of proposed rule:** The New York State Public Service Commission is considering whether to accept, reject or modify, in whole or in part, an October 8, 2004 revised proposal by the Niagara Mohawk Power Corporation to modify certain components of the utility's Service Quality Assurance Program as contemplated in Attachment 9 of the Joint Proposal approved by the Commission in Opinion No. 01-6, issued December 3, 2001.

**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.

(01-M-0075SA24)

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

**Standard Agreement for Attachments to Utility Poles by Central Hudson Gas & Electric Corporation, et al.**

**I.D. No.** PSC-43-04-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a Standard Form Pole Attachment Agreement filed on Oct. 6, 2004, by Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Frontier, Citizens Communications Company and its New York State subsidiaries, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange & Rockland Utilities, Inc., Rochester Gas & Electric Corporation, Verizon New York Inc. and the New York State Telecommunications Association (collectively pole owners).

**Statutory authority:** Public Service Law, sections 66(1), 94(2) and 119-a

**Subject:** Standard agreement for attachments to utility poles.

**Purpose:** To consider approval of a standard form pole attachment agreement.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, a Standard Form Pole Attachment Agreement filed on October 6, 2004, by Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Frontier, Citizens Communications Company and its New York State subsidiaries, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange & Rockland Utilities, Inc., Rochester Gas & Electric Corporation, Verizon New York Inc. and the New York State Telecommunications Association (collectively Pole Owners).

**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-M-0432SA4)

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

**Transfer of Certain Cable System Facilities in the City of New York by Time Warner Entertainment Company, L.P.**

**I.D. No.** PSC-43-04-00020-P

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

**Proposed action:** The commission is considering a petition by Time Warner Entertainment Company, L.P. for approval of the transfer of its franchise from Staten Island Cable, LLC to Time Warner Entertainment Company, L.P.

**Statutory authority:** Public Service Law, section 222

**Subject:** Transfer of certain cable system facilities in the City of New York.

**Purpose:** To allow Time Warner Entertainment Company, L.P. to acquire certain cable system franchise from Staten Island Cable, LLC.

**Substance of proposed rule:** The Public Service Commission is considering a petition by Time Warner Entertainment Company, L.P. for approval of the transfer of its franchise from Staten Island Cable, LLC to Time Warner Entertainment Company, L.P.

**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-0858SA2)

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

**Transfer of Certain Cable System Facilities in the City of New York by Time Warner Entertainment Company, L.P.**

**I.D. No.** PSC-43-04-00021-P

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

**Proposed action:** The commission is considering a petition by Time Warner Entertainment Company, L.P. for approval of the transfer of its franchise from Queens Inner Unity Cable System to Time Warner Entertainment Company, L.P.

**Statutory authority:** Public Service Law, section 222

**Subject:** Transfer of certain cable system facilities in the City of New York.

**Purpose:** To allow Time Warner Entertainment Company, L.P. to acquire certain cable system franchise from Queens Inner Unity Cable System.

**Substance of proposed rule:** The Public Service Commission is considering a petition by Time Warner Entertainment Company, L.P. for approval of the transfer of its franchise from Queens Inner Unity Cable System to Time Warner Entertainment Company, L.P.

**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. Brillong, 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-0859SA2)

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

**Transfer of Certain Cable System Facilities in and Around Watertown, NY by Time Warner Entertainment Advance/Newhouse Partnership (TWEAN)**

**I.D. No.** PSC-43-04-00022-P

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

**Proposed action:** The commission is considering a petition by Time Warner Entertainment Advance/Newhouse Partnership (TWEAN) to acquire franchise titles and ownership interests held by its subsidiary CAT Holdings, LLC in its system serving 10 Watertown, NY area municipalities.

**Statutory authority:** Public Service Law, section 222

**Subject:** Transfer of certain cable system facilities in and around Watertown, NY.

**Purpose:** To allow Time Warner Entertainment-Advance/Newhouse Partnership to acquire certain cable system facilities from CAT Holdings, LLC.

**Substance of proposed rule:** The Public Service Commission is considering a petition by Time Warner Entertainment Advance/Newhouse Partnership (TWEAN) to acquire franchise titles and ownership interests held by its subsidiary CAT Holdings, LLC in its system serving ten Watertown, NY area municipalities.

**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. Brillong, 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-0860SA2)

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

**Water Rates, Charges and Water Service by National Aqueous Corporation**

**I.D. No.** PSC-43-04-00024-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition filed by customers of National Aqueous Corporation to investigate the company's water service and National Aqueous Corporation's May 25, 2004 application for an increase in rates.

**Statutory authority:** Public Service Law, section 89-i

**Subject:** Water rates, charges and water service.

**Purpose:** To investigate the corporation's water service and the company's May 25, 2004 application for an increase in revenues.

**Substance of proposed rule:** On October 4, 2004, the residents of Melody Lake subdivision in the Town of Thompson, Sullivan County, who are customers of the National Aqueous Corporation (NAC or the company), filed a petition requesting that the New York State Public Service Commission investigate water service provided by NAC and the company's May 25, 2004 request for an increase in rates. The company currently provides water service to 62 customers and is located in the Town of Thompson, Sullivan County. The Commission may approve or reject, in whole or in part, or modify the customers' petition.

**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. Brillong, 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-W-1200SA1)

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

**Water Rates and Charges by United Water New Rochelle Inc.**

**I.D. No.** PSC-43-04-00025-P

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

**Proposed action:** The Public Service Commission is considering a petition filed by United Water New Rochelle Inc. concerning its Revenue Reconciliation and Purchased Water Reconciliation for the year ended July 11, 2003.

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

**Subject:** Water rates and charges.

**Purpose:** To reconcile both revenue and purchased water.

**Substance of proposed rule:** On August 11, 2004, United Water New Rochelle Inc. (UWNR or the company) filed its Revenue Reconciliation and Purchased Water Reconciliation filings for the year ended July 11, 2003 in Case 99-W-0948. In the Revenue Reconciliation filing, the company states an under-recovery of \$1,058,269 in revenue. The company proposes to collect \$352,756 or one-third of this under-recovery by means of a surcharge in the months of January-March in each of the next three years (2005-2007).

In the Purchased Water Reconciliation filing, the company reports an under-recovery of \$138,854 in purchased water expense. The company proposes that the \$138,854, plus interest, be increased by \$14,149 and that \$153,003 be recovered by means of a surcharge over a 12-month period. The company states that the additional amount of \$14,149 represents the projected unrecovered Purchased Water Reconciliation balance from the second rate year ended July 11, 2002. The Commission may approve or reject, in whole or in part, or modify the company's petition.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-W-1210SA1)

## Racing and Wagering Board

### NOTICE OF ADOPTION

**Trifecta Wagering**

**I.D. No.** RWB-33-04-00006-A

**Filing No.** 1147

**Filing date:** Oct. 7, 2004

**Effective date:** Oct. 27, 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

**Subject:** Trifecta wagering in thoroughbred stakes races, handicap races or allowance races in those situations where there are five betting entries.

**Purpose:** To authorize the conduct of trifecta wagering in thoroughbred stakes races handicap races or allowable 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 or summary was published** in the notice of emergency/proposed rule making, I.D. No. RWB-33-04-00006-EP, Issue of August 18, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** Jennifer A. Whalen, Division of Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206-1668, (518) 453-8460, e-mail: jwhalen@racing.state.ny.us

**Assessment of Public Comment**

No public comments were received.

## Workers' Compensation Board

### EMERGENCY RULE MAKING

**Written Reports of Independent Medical Examinations**

**I.D. No.** WCB-43-04-00003-E

**Filing No.** 1151

**Filing date:** Oct. 12, 2004

**Effective date:** Oct. 12, 2004

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 137

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

**Specific reasons underlying the finding of necessity:** Recent decisions issued by Board Panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent decisions have greatly, negatively impact the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Filing written reports of independent medical examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 business days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 business days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**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 January 9, 2005.

**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: officeofgeneralcounsel@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 300.2(d)(11). Workers' Compensation Law (WCL) 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 authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in

2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

### 5. Local government mandates:

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. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

### 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 local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

### 2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

### 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. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

### 5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

This proposed rule 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 and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.