RULE MAKING ACTIVITIES

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

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

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

Banking Department

EMERGENCY RULE MAKING

Budget Planning Activities

I.D. No. BNK-39-04-00001-E
Filing No. 1010
Filing date: Sept. 9, 2004
Effective date: Sept. 13, 2004

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

Action taken: Addition of Part 404 to Title 3 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Chapter 629 of the laws of 2002, which became effective on April 7, 2003, made substantial changes to the conduct of the business of budget planning in this state. Amendments made to Article 12-C of the New York Banking Law and Article 28-B of the New York General Business Law necessitated the emergency adoption of Part 402 of the Superintendent's Regulations on that date.

It has come to the attention of the Banking Department that many licensed budget planners utilize third party entities to assist them in distributing the monies of debtors to their creditors. Likewise, many applicants for a budget planning license have indicated in their application that they intend to conduct their budget planning activities in a similar fashion. This type of "outsourcing", in which an entity other than the licensee which has a contract for budget planning services with a debtor has access to or controls the monies of debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature. The rule is necessary in order to provide protection to debtors when a third party "outsourcer" is used in the process of paying debtor funds to creditors of the debtors. Specifically, if the third party "outsourcer" is another budget planner licensed under Article 12-C of the New York Banking Law, the amount of that licensee's bond or assets placed on deposit, as the case may be, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly distributed to their creditors, must be increased to reflect the additional amount of debtors' funds that it has access to or controls as a result of its "outsourcing" activities. However, if the licensed budget planner which utilizes another licensed budget planner as an "outsourcer" places assets on deposit pursuant to Section 580(4) of the Banking Law in an amount sufficient to cover the debtors' funds that the licensed "outsourcer" has access to or controls, then the licensed "outsourcer" would not be required to obtain a surety bond in a greater amount, or place additional assets on deposit to cover the additional amount of debtors' funds that it has access to or controls, as a result of its outsourcing activities. In such case, the monies of debtors would be fully protected by the original licensee's asset deposit.

If the third party "outsourcer" is not a licensed budget planner in New York State, the issue of the safety of the monies of the debtors becomes more paramount as an entity unregulated by and probably unknown to the Banking Department will have access to or control of the monies of debtors. In such case, unless the licensed budget planner places assets on deposit sufficient to cover the debtors' funds that the non-licensed "outsourcer" has access to or controls, the non-licensed "outsourcer" would be required to place assets on deposit sufficient to protect the monies of the debtors that it has access to or controls as a result of its "outsourcing" activities.

The rule also contains provisions relating to the contractual relationship between the licensed budget planner and the service provider, which give protection to debtors who may be adversely affected if the contract between the licensee and the service provider is terminated.

The primary legislative objective of Chapter 629 is to provide greater consumer protection to New York residents who contract with licensed budget planners for budget planning services. Accordingly, considering the foregoing, emergency adoption of this rule is necessary and appropriate.

Subject: Budget planning activities.

Purpose: To set forth the regulatory requirements and standards of operation for entities licensed under art. 12-C of the Banking Law to conduct the business of budget planning when the licensees use the services of third party entities in making payments of debtor funds to creditors of the debtors.

Text of emergency rule: *PART 404*

BUDGET PLANNERS/DELEGATION OF CERTAIN ACTIVITIES
(Statutory authority: Banking Law, § 587)

§ 404.1 Definitions.

For purposes of this Part: (a) The term "debtor" shall mean an individual who enters into a contract with a licensee and is at that time a New York resident.

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

(c) The term "licensee service provider" shall mean an entity licensed pursuant to Article 12-C of the New York Banking Law that holds, or has access to, or can effectuate possession of, by any means, the monies of another licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(d) The term "non-licensee service provider" shall mean an entity that holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's debtors, or distributes, or is in the chain of distribution of such monies, to the creditors of such debtors, pursuant to an agreement or contract with the licensee. This term shall not include entities that solely provide the electronic routing and settlement of financial transactions and their sponsoring banks.

(e) The term "control party" shall mean with respect to a licensee, any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a licensee. With respect to a non-licensee service provider it shall mean any individual or entity that has a 10% or more ownership interest in the non-licensee service provider and/or any individual or entity that possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of a non-licensee service provider.

§ 404.2 Explanatory note.

Section 580.4 of Article 12-C of the New York Banking Law requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed by the licensee to the creditors of the debtors. In circumstances in which a licensee uses a licensee service provider or a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of a licensee's debtors, the services of such service providers shall be subject to the terms and conditions set forth in sections 404.3, 404.4, 404.5 and 404.6 of this Part, in order to provide the consumer protections afforded to licensees' debtors as mandated under Article 12-C of the New York Banking Law.

In complying with these terms and conditions, a licensee that obtains a surety bond pursuant to Section 580.4 of the Banking Law and uses the services of a licensee service provider as described, is required to use a licensee service provider that either obtains a surety bond or maintains assets on deposit, in accordance with the provisions of Banking Law Section 580.4. Similarly, if the licensee obtains a surety bond and uses the services of a non-licensee service provider as described, the licensee is required to use a non-licensee service provider that maintains assets on deposit, in accordance with the provisions of Section 404.4(c)(2) of this Part.

If, however, a licensee elects to maintain assets on deposit pursuant to Banking Law Section 580.4 and uses the services of a licensee service provider or a non-licensee service provider as described, there is no requirement that the licensee service provider or the non-licensee service provider obtain a surety bond or maintain assets on deposit. The licensee service provider would, of course, be required to obtain a surety bond or maintain assets on deposit with respect to its own contracts with debtors for budget planning services, pursuant to Banking Law Section 580.4.

§ 404.3 Servicing By a Licensee Service Provider.

(a) If a licensee seeks to utilize a licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of another licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies to creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the licensee service provider.

(2) A description of the services to be provided by the licensee service provider.

(3) A copy of the agreement or contract between the licensee and the licensee service provider with respect to the provision of any or all of the services described in section 404.3(a) of this Part.

(4) The highest daily amount of debtor funds of the licensee to be held by the licensee service provider, or to which access is given to the licensee service provider, or to which possession can be effectuated, by any means, by the licensee service provider, or which are distributed by the licensee service provider, or are in the chain of distribution, to the creditors of the licensee's debtors.

(c) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the Superintendent, in his/her discretion, may require the licensee service provider to obtain a larger surety bond or maintain a greater amount of assets on deposit for the protection of debtors in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.5, 402.6 and 402.7 in connection with the services being provided by the licensee service provider to the licensee as described in section 404.3(a) of this Part.

(d) A licensee shall not use a licensee service provider until the licensee receives written notice from the Superintendent confirming that the Superintendent has received a copy of the licensee service provider's bond or asset deposit agreement, if required under Section 404.3(c) of this Part.

(e) Notwithstanding the provisions of Section 404.3(c) of this Part, if a licensee maintains a surety bond and seeks to utilize a licensee service provider, as defined in section 404.1(c) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(f) If the use of an alternate mechanism pursuant to Section 404.3(e) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(g) If a licensee proposes the use of an alternate mechanism to a licensee service provider obtaining a larger surety bond or maintaining a greater amount of assets on deposit, pursuant to Section 404(3)(e) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

§ 404.4 Servicing By A Non-Licensee Service Provider.

(a) If a licensee seeks to utilize a non-licensee service provider to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or to be in the chain of distribution of such monies, to the creditors of the licensee's debtors, the licensee shall give the Superintendent ten days written notice of its intention to do so.

(b) Notice to the Superintendent shall contain the following information:

(1) Name and address of the non-licensee service provider.

(2) Name, address, social security number and resume of the officers and directors of the non-licensee service provider, any other individual(s) who supervises the daily operations of the non-licensee service provider and any persons having a 10% or more ownership interest, directly or indirectly, in the non-licensee service provider. If an individual(s) has a 10% or more ownership interest in the non-licensee service provider and such individual is not a control party of the licensee with whom the non-licensee service provider is in contract to provide the services described in section 404.4(a) of this Part, such individual shall provide an affidavit attesting to that fact.

(3) A description of the services to be provided to the licensee by the non-licensee service provider.

(4) A copy of the agreement or contract between the licensee and the non-licensee service provider with respect to the provision of any or all of the services described in section 404.4(a) of this Part.

(5) The highest daily amount of debtor funds to be held by the non-licensee service provider, or to which access is given to the non-licensee service provider, or to which possession can be effectuated, by any means, by the non-licensee service provider, or which are distributed by the non-licensee service provider, or are in the chain of distribution, to the creditors of the debtors.

(c) A licensee shall not use a non-licensee service provider for the services described in section 404.4(a) of this Part until:

(1) The non-licensee service provider gives the Superintendent or his/her authorized representative written authorization to examine all books, records, documents and materials, including those maintained in electronic form, as they relate to the debtors monies held by, or distributed by the non-licensee service provider to the creditors of the debtors, as the superintendent in his/her discretion deems necessary to protect the interests of the debtors. The cost of such examination shall be borne by the licensee in contract with the non-licensee service provider; and

(2) Unless the licensee maintains assets on deposit in lieu of a surety bond, pursuant to Banking Law Section 580.4, the non-licensee service

provider shall maintain assets on deposit for the protection of the debtors whose monies it holds, or has access to, or can effectuate possession of, by any means, or which are distributed, or are in the chain of distribution, by the non-licensee service provider, to the creditors of the debtors. The maintenance of such assets shall be in accordance with the terms and conditions as set forth in Superintendent's Regulation Parts 402.6 and 402.7; and

(3) All information required in subdivision (b) of this section and a copy of the non-licensee service provider's asset deposit agreement, if required under Section 404.4(c)(2) of this Part, have been provided to the Superintendent, and the licensee receives written notice from the Superintendent confirming that the Superintendent has received all such information.

(d) Notwithstanding the provisions of Section 404.4(c)(2) of this Part, if a licensee maintains a surety bond and seeks to utilize a non-licensee service provider, as defined in Section 404.1(d) of this Part, the Superintendent, in his/her sole discretion, may permit the use of an alternate mechanism to the non-licensee service provider maintaining assets on deposit, consistent with the purposes of Section 580.4 of Article 12-C of New York's Banking Law and the requirements of this Part.

(e) If the use of an alternate mechanism pursuant to Section 404.4(d) of this Part is proposed by a licensee, the licensee must provide a description of the alternate mechanism and a copy of all applicable documents and records, as well as any other information requested by the Superintendent, in connection with obtaining and/or using the alternate mechanism, including all contracts/agreements pertaining or related thereto.

(f) If a licensee proposes the use of an alternate mechanism to a non-licensee service provider maintaining assets on deposit pursuant to Section 404.4(d) of this Part, use of the alternate mechanism shall not be permitted until the licensee receives written notice from the Superintendent that he/she has no objection to such alternate mechanism.

§ 404.5 Termination of Agreements or Contracts.

(a) Every agreement or contract between a licensee and a licensee service provider, or a non-licensee service provider, to hold, or have access to, or to effectuate possession of, by any means, the monies of the licensee's debtors in contract with the licensee for budget planning services, or to distribute, or be in the chain of distribution of such monies, to creditors of such debtors, shall provide that the agreement or contract shall not be terminated without at least 30 days written notice to the party against whom termination is being sought.

(b) A licensee shall immediately notify the Superintendent, in writing, of such termination, upon the sending of by the licensee, or upon the receipt by the licensee, of the notice of termination.

§ 404.6 Compliance.

Compliance with this Part shall be required on or before May 18, 2004.

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 December 7, 2004.

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

Regulatory Impact Statement

1. Statutory Authority:

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

2. Legislative Objective:

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

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

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

The Legislature in amending various sections of Article 12-C of the New York Banking Law, which provides for the licensing and regulation of entities engaged in the business of budget planning, did so generally to establish a more rigorous regulatory environment within which entities licensed under New York law may engage in the business of budget planning. The Legislature addressed, among other things, the inherent risks associated with the payment of Debtor funds to creditors when Debtors choose to have such payments made via the services of a licensed budget planner instead of paying their creditors directly. Specifically, as one way of increasing consumer protections for the Debtors who contract with licensed budget planners in order to pay the debts they owe to creditors, Article 12-C was amended to require licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not properly been paid to their creditors.

In addition to the amendments to Article 12-C of the New York Banking Law, amendments were also made to Article 28-B of the New York General Business Law in connection with the business of budget planning. Specifically, Section 455 of Article 28-B of the New York General Business Law requires a person or entity, wherever located, that enters into a contract for budget planning with an individual then resident in New York State, to first obtain a license from the Superintendent of Banks to conduct the business of budget planning. Such a license is obtained pursuant to Article 12-C of the New York Banking Law. Because of the requirement that out-of-state entities that contract with New York residents for budget planning services be licensed under the Banking Law, New York residents who partake of the budget planning services offered by the out-of-state entities will also be afforded the consumer protections that have been put in place under Article 12-C of the Banking Law.

The proposed New Part 404 sets forth a framework for the regulation of entities licensed under Article 12-C of the New York Banking to conduct the business of budget planning, when such licensees use third party entities in distributing the monies of Debtors to creditors. New Part 404 was drafted in furtherance of the public policy objectives that the Legislature sought to advance in enacting the amendments to Article 12-C of the New York Banking Law, in particular, Section 580(4), by providing protection when third party entities are used in distributing Debtor monies to creditors.

3. Needs and Benefits:

Proposed New Part 404 is needed to enable the Banking Department to carry out its existing supervisory and regulatory responsibilities with respect to entities licensed under Article 12-C of New York's Banking Law to conduct the business of budget planning. Specifically, when Banking Law Section 580(4) was recently enacted, it placed the requirement upon licensed budget planners to obtain a surety bond or place assets on deposit, the proceeds of which constitute a trust fund to reimburse payments made by Debtors that have not been properly paid to their creditors. Since the enactment of the legislation, members of the Banking Department staff have received numerous applications from prospective licensees. Extensive discussions were had at meetings and in telephone conversations with a number of the prospective licensees, as well as with current licensees, regarding the operations of their budget planning businesses. This was done in order to assess whether the business practices of the budget planning industry conformed to the consumer protections standards set

forth in the new laws. The Department learned from many of the prospective and current licensees that with respect to the Debtors that they are in contract with for budget planning services, it is their practice to use third party entities in distributing the Debtors' monies to creditors. The third party entities that they contract with for such services are generally for-profit entities that are not, themselves, licensed to conduct the business of budget planning. However, one current licensee indicated that it uses the services of another New York State licensed budget planner in order to distribute Debtors' monies to creditors. The current and prospective licensees explained that it is necessary for them to use the services of third party entities in this way primarily because they do not have the computerized technology, staffing, and budgetary resources to provide the critical services performed by the third party entities.

Nevertheless, this type of "outsourcing" to a third party entity, in which an entity other than the licensee which has a contract for budget planning services with a Debtor, holds, or has access to, or can effectuate possession of, by any means, the monies of a licensee's Debtors, or distribute, or is in the chain of distribution of such monies, to the creditors of such Debtors, raises the possibility that those monies will not be sufficiently protected, as intended by the Legislature when it put into law the bond/asset deposit requirement as set forth in Section 580(4) of New York's Banking Law.

The rule is proposed in order to accommodate the budget planning industry's operational need to use the third party entities in distributing Debtor funds to creditors. At the same time, the rule provides the consumer protections afforded by the recently enacted budget planning legislation as set forth in Baking Law Section 580(4). In particular, if the licensee uses a third party entity in distributing Debtor funds to creditors, and the licensee elects to place assets on deposit, which assets constitute a trust fund to reimburse payments made by Debtors if not properly paid to their creditors, the rule allows for the use of such a third party entity and places no additional bond/asset deposit requirements on the third party entity. If, on the other hand, the licensee elects to obtain a surety bond rather than place assets on deposit, the licensee may only use a third party entity in distributing Debtor funds if the third party entity places assets on deposit or obtains a surety bond, as the case may be.

Budget Planning is a regulated financial service in New York State. Therefore, it is the obligation of the Superintendent of Banks, as the State financial regulator, to establish a rule as proposed in accordance with the legislative intent to protect vulnerable consumers from entities that may operate without the necessary business standards required to appropriately provide budget planning services. It is the Banking Department's belief that the rule as proposed is necessary. It provides the mechanism by which the budget planning entities that are currently licensed, as well as those seeking to obtain such a license, can continue to operate using the services of third party entities in distributing Debtor funds to creditors. At the same time, the rule satisfies the legislative requirement as set forth in Banking Law Section 580(4) to provide certain protection to Debtors in contract with licensees, in cases where third party entities are used by the licensees in distributing Debtor funds to creditors.

4. Costs:

(a) Costs to State Government: None.

Any and all additional examination costs that may be incurred by the Banking Department, as a result of the requirements of the rule imposed on the licensees that use third party entities in the distributing Debtor funds to creditors, will be borne by the licensees.

(b) Costs to Local Government: None.

(c) Costs to Regulated Entities:

The proposed rule allows licensees to use third party entities in distributing Debtor funds to creditors. In summary, Part 404 provides the following. If a licensee elects to maintain assets on deposit and utilizes the services of a third party entity in distributing Debtor funds to creditors, (whether or not the third party entity is, or is not, another budget planner licensed in New York) there is no requirement that the third party entity obtain a surety bond or place assets on deposit with respect to the business of the licensee that it is servicing. If a licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is also a licensed budget planner in New York, the third party entity must either obtain a surety bond or maintain assets on deposit with respect to the business of the licensee that it is servicing. If the licensee elects to obtain a surety bond and utilizes the services of a third party entity in distributing Debtor funds, which entity is not a New York licensed budget planner, the third party entity must maintain assets on deposit with respect to the business of the licensee that it is servicing.

A licensee is likely to incur no costs if it uses a third party entity in distributing Debtor funds and elects to maintain assets on deposit, rather than a surety bond. The reason being, that a licensee has to purchase a surety bond, whereas, by placing assets on deposit, the licensee does not have to make such a purchase. Moreover, when assets are placed on deposit, the licensee has the ability to earn interest on the deposited funds.

It is possible, however, that in circumstances where a licensee may not have all, or part of, the necessary funds to place on deposit, that it could incur some costs in connection with borrowing funds for its required deposit. The Banking Department is unable to determine what the costs to the licensees would be under those circumstances since the cost of borrowing funds is typically dependent upon factors such as, the amount of the borrowing and the financial condition of the entity doing the borrowing. Therefore, it is not possible to estimate, even in a general way, such borrowing costs. However, should costs be incurred to make the asset deposit, those costs will not outweigh the benefits derived by maintaining the assets on deposit should Debtor funds not be properly paid to creditors.

(d) Costs to the Banking Department for Implementation and Continued Administration of the Rule: The rule requires Banking Department staff to review contracts or agreements that licensees have entered into, or plan to enter into, regarding the licensees use of third party entities in distributing Debtor funds to creditors. This review is done in order to assess compliance with rule to ensure, that where third party entities are involved, the Debtors in contract with the licensees are afforded the consumer protections provided by the bond/asset deposit requirements of Section 580(4) of the New York Banking Law. The Banking Department expects that its costs to implement and administer the rule will be minimal.

5. Local Government Mandates:

The proposed rule imposes no burdens on local governments.

6. Paperwork:

The reporting requirements as set forth in the rule will enable the Banking Department to provide the necessary supervisory oversight of the licensees, in furtherance of the legislative objective to provide more consumer protections for debtors in contract with licensees for budget planning services.

Under the proposed rule, licensed budget planners will have to provide the Banking Department with the following information: a) the name and address of the third party entity used in distributing debtor funds to creditors, b) a description of the services being provided by the third party entity, c) a copy of the agreement or contract entered into with the third party entity, d) information regarding the highest daily amount of Debtor funds that the third party entity will be providing services for under the contract or agreement, and e) information with respect to the termination of any such agreement or contract. All of this information is of the type that licensees using third party entities in distributing Debtor funds will have readily available to provide to the Banking Department.

7. Duplication:

None.

8. Alternatives:

(a) Proposal – As is previously discussed in the Legislative Objective Section contained herein, the recent amendments to Article 12-C, Section 580(4) of New York's Banking Law include the requirement that New York State licensed budget planners obtain a surety bond, or in lieu of such bond, place certain assets on deposit to be used to reimburse payments made by Debtors that have not been properly distributed to creditors.

Since the enactment of the legislation, Banking Department staff met with current and prospective licensees and learned that these businesses require the use of the services provided by third party entities in distributing Debtor funds. The rule was proposed keeping in mind both the legislative intent in enacting the bond/asset deposit requirements to provide increased consumer protection to New York residents in contract with licensees should their payments not be properly distributed to creditors, and the need that current and prospective licensees have in using the services of third party entities in distributing such payments. The rule allows licensees to use the services of third party entities in this way, and also provides the Debtors in contract with the licensee the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature.

(b) Do not propose the rule.

If this alternative were considered, the Banking Department would have to require that licensees not use the services of third party entities in distributing Debtor funds to creditors, in order to provide Debtors the consumer protections afforded under Section 580(4) of the Banking Law. This alternative is not feasible because, as many current and prospective licensees explained to the Banking Department, they need to use the services of the third party providers in distributing Debtor funds. The need results primarily because they do not have the computerized technology,

staffing and budgetary resources to provide the critical services that they perform.

Under these circumstances, the Banking Department believes that if the rule was not proposed, licensed budget planners would have to be prohibited from using third party entities in distributing Debtor funds. This could be severely harmful to the budget planning industry, particularly since, the inability to use the third party entities may prevent the licensees from continuing to operate their businesses. Moreover, the inability to use the third party entities may prevent many prospective licensees from seeking a budget planning license in New York because they may not be able to operate without the services of the third party entities. Accordingly, the proposed rule is needed not only to provide consumer protection to Debtors as mandated by Section 580(4) of the Banking Law, but also to prevent putting certain current licensees out of business, and to enable certain prospective licensees the opportunity to conduct the business of budget planning in New York.

9. Federal Standards:

None.

10. Compliance Schedule:

Compliance with the rule is required on or before September 13, 2004.

Regulatory Flexibility Analysis

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

No local governments are licensed to conduct the business of budget planning, and all of the budget planners currently licensed under Article 12-C of the New York Banking Law have less than 100 employees.

When the Legislature enacted the recent amendments to Article 12-C of the New York Banking Law, it established a more rigorous regulatory environment within which entities licensed under New York Law were to engage in the business of budget planning. This was done in order to provide increased consumer protection to New York residents that contract for budget planning services with licensees.

The recent amendments to Article 12-C of the New York Banking Law include the bonding/asset deposit requirements set forth under Section 580(4) of Article 12-C. In particular, Section 580(4) requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, maintain certain assets on deposit, the proceeds of which constitute a trust fund to the used to reimburse payments made by debtors that have not been properly distributed to creditors.

In response to the legislation, members of the Banking Department staff met with and/or had conversations with current and prospective licensees. As is more fully described in the Regulatory Impact Statement, the Banking Department learned that many of the current and prospective licensees require the services of certain third party entities in distributing debtor funds to creditors. Accordingly, the rule was proposed in response to the industry need to use third party entities in this way. The rule is flexible in that it allows licensees to use the services of third party entities, who may be small business, in distributing debtor funds to creditors. At the same time, it provides the consumer protections afforded under Section 580(4) of the Banking Law, as mandated by the Legislature, to the debtors in contract with the licensees for budget planning services. The rule ensures that debtors' funds will be protected, as mandated by the statute, irrespective of which entity has control over and/or access to the funds.

Specifically, due to the servicing relationship between the licensee and the third party entities, when a licensee elects to use a third party entity in distributing debtors funds to creditors, under the proposed rule, the licensee can choose to either place assets on deposit, or obtain a surety bond. If the licensee places assets on deposit, there are no bond/asset deposit requirements placed on the third party entity. If the licensee elects to obtain a bond, the third party entity can either place assets on deposit or obtain a surety bond, as the case may be, with respect to the budget planning business of the licensee that it services.

Based on the dialogue that the Banking Department had with current and prospective licensees regarding their need to use third party entities in distributing debtor funds to creditors, it is not apparent, thus far, that the rule will impose any appreciable or substantial adverse impact on entities licensed under New York Law to conduct the business of budget planning.

Rural Area Flexibility Analysis

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. The legislature mandated under Section 580(4) of the New York Banking Law, that licensees obtain a surety bond or place certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly paid to creditors. In order to provide debtors with the consumer protections afforded under Section 580(4), the proposed rule allows licensees that use third party entities in distributing debtor funds to creditors to either place assets on deposit or obtain a surety bond. If the licensee elects to obtain the surety bond, it must only use the services of a third party entity that also places assets on deposit or obtains a surety bond, as the case may be, in connection with the licensees business that it is servicing. If the licensee elects to place assets on deposit, no bond/asset deposit requirements are placed on the third party entity.

There is nothing about the character and nature of the rules requirements that would make it difficult for, or prevent, licensed budget planners from complying with the rule based on a particular office location. Accordingly, it is unlikely that the rule would cause regulated parties to seek flexibility with respect to any part, or parts thereof, even if the regulated parties were located in a designated rural area as defined in New York State Executive Law Section 481(7).

To the extent that the rule, if adopted, may have any impact on rural areas, it has the ability to provide increased consumer protection to debtors residing in rural areas who enter into contracts with licensees for budget planning services, when such licensees use the services of third party entities in distributing debtors funds to creditors.

Job Impact Statement

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

In particular, Section 580(4) of Article 12-C of the New York Banking Law was recently amended in connection with budget planning in New York State. It requires licensees to obtain a surety bond, or in lieu of obtaining such a bond, to maintain certain assets on deposit, the proceeds of which constitute a trust fund to be used to reimburse payments made by debtors that have not been properly distributed to creditors.

As is explained in the Regulatory Impact Statement, it has come to the attention of the Banking Department that both current and prospective licensees require the services of third party entities in distributing debtors to creditors. The rule has been proposed in order to allow the licensees to continue using such third party entities in the operations of their businesses. At the same time, the rule provides the consumer protections afforded under Section 580(4) to debtors that contract with licensees for budget planning services when the licensees use third party entities in distributing the funds of the debtors to creditors.

Under the rule, if a licensee elects to use a third party entity in distributing debtor funds to creditors, a licensee can choose to either place certain assets on deposit or obtain a surety bond, the proceeds of which constitute a trust fund to reimburse payments made by debtors that have not been properly paid to creditors. If a licensee places assets on deposit, there is no bond/asset deposit requirement placed on the third party entity. If a licensee, instead, chooses to obtain a surety bond, the rule requires that the third party entity place certain assets on deposit, or obtain a surety bond, as the case may be, with respect to licensees business that it services.

Accordingly, based on the rule's requirements, it will have no impact on jobs in New York State.

NOTICE OF ADOPTION

Personnel Interlocks between a Banking Organization and a Firm Primarily Engaged in Securities Underwriting Activities

I.D. No. BNK-22-04-00006-A
Filing No. 1013
Filing date: Sept. 13, 2004
Effective date: Sept. 29, 2004

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

Action taken: Repeal of Part 17 and Supervisory Procedure 114 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 14 and 14-e

Subject: Personnel interlocks between a banking organization and a firm primarily engaged in securities underwriting activities.

Purpose: To conform the General Regulations of the Banking Board and Supervisory Procedures of the Banking Department to the repeal of Banking Law, sections 130(4) and 143(1).

Text or summary was published in the notice of proposed rule making, I.D. No. BNK-22-04-00006-P, Issue of June 2, 2004.

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

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

Assessment of Public Comment

The one comment received by the Department regarding the proposed repeal of Part 17 of the General Regulations of the Banking Board and Supervisory Procedure CB 114 was from a law firm which represents New York state-licensed banking organizations. The comment supported the proposal, noting that it would avoid potential confusion concerning the continuing applicability of the regulations and this reduce regulatory burden.

Delaware River Basin Commission

INFORMATION NOTICE
DELAWARE RIVER BASIN COMMISSION
NOTICE OF PROPOSED RULEMAKING AND PUBLIC HEARING

The Delaware River Basin Commission (Commission) is a federal-state regional agency charged with managing the water resources of the basin without regard to political boundaries. Its members are the governors of the four Basin states - New York, New Jersey, Pennsylvania and Delaware - and a federal representative appointed by the President of the United States. The Commission is exempt from the requirements of the New York State Administrative Procedure Act. This notice is published by the Commission for informational purposes.

Proposed Amendment to the Water Quality Regulations, Water Code and Comprehensive Plan to Establish Pollutant Minimization Plan Requirements for Point and Non-Point Source Discharges of Toxic Pollutants Following Issuance of a TMDL by either the U. S. Environmental Protection Agency or a Member State, or an Assimilative Capacity Determination by the Delaware River Basin Commission.

Summary: The Delaware River Basin Commission ("Commission" or "DRBC") will hold a public hearing to receive comments on a proposed amendment to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to establish pollutant minimization plan requirements for point and non-point source discharges of toxic pollutants following issuance of a total maximum daily load (TMDL) under Section 303(d) of the Clean Water Act (CWA) by either a member state or the U.S. Environmental Protection Agency (EPA), or issuance of an assimilative capacity determination by the Commission.

A TMDL establishes the maximum loading of a pollutant that a water body can receive without causing an impairment of the water quality standard, which includes designated uses, water quality criteria calculated to protect those uses and antidegradation requirements. When water quality standards are not attained, despite the technology-based control of industrial and municipal wastewater (point sources), the CWA requires that the impaired waters be identified on the state's Section 303(d) list and that a TMDL be developed for the pollutant or pollutants causing the impairment. A determination of the assimilative capacity of a water body for a given pollutant under Section 4.30.7 of the Commission's Water Quality Regulations is similar to the establishment of maximum total loading for a water body in a TMDL. The Commission may issue an assimilative capacity determination whenever a stream quality objective (the Commission's term for a numeric water quality criterion) is not being attained.

A TMDL or assimilative capacity determination does not in and of itself result in any improvement in water quality. Rather, the total loading or assimilative capacity must be allocated among the various sources contributing to the water quality impairment, and each discharger must reduce its discharge to achieve its allocated load. For point source discharges, the individual load allocation typically is converted to an effluent limitation in a National Pollutant Discharge Elimination System (NPDES) permit issued under Section 402 of the Clean Water Act. For non-point sources, the load allocation typically is achieved through Best Management Practices (BMPs).

For certain toxic pollutants in water bodies within the Delaware River Basin, ambient and/or effluent monitoring shows that loadings are many times higher than the levels required to ensure that water quality standards are met. Substantial reductions in loadings of such pollutants from all point and non-point sources are needed to protect the designated uses. However, the process of developing and allocating a total load or determining the assimilative capacity of the water body for the pollutant may take the regulatory agencies many years. As has become apparent in the case of the TMDL for polychlorinated biphenyls (PCBs) in the Delaware Estuary, issued by EPA on December 15, 2003 on behalf of the states of Delaware, New Jersey and Pennsylvania, it may be many more years before the states are able to incorporate implementing provisions into NPDES permits for point sources and require implementing BMPs for non-point sources. For PCBs, and possibly for other persistent bioaccumulative toxic chemicals, still more time - in some cases decades - will be needed before dischargers achieve sufficient load reductions to achieve the water quality standards. The proposed rule is intended to accelerate real improvements in water quality by authorizing the Commission to require point and non-point source dischargers to initiate load reduction efforts sooner. No numeric targets are proposed. Rather, the rule is based on concepts of pollution prevention and sustainability and the recognition that dischargers that are familiar with their own operations may be best situated to identify opportunities for achieving prompt loading reductions in a cost-effective manner. To comply with the rule, dischargers must plan and implement measures for achieving the maximum practicable reduction of pollutant discharges to the air, soil and water.

The proposed rule is primarily a gap-filling measure. For point sources, it will cease to apply to any discharge upon the next issuance by the state or EPA of a NPDES permit or permit renewal with respect to that discharge. For non-point discharges, the Commission's intention is to apply the rule only where existing state and federal programs will not ensure implementation of the TMDL or assimilative capacity determination.

The rule has four principal parts. Section A addresses the scope of the rule - both the pollutants and the entities intended to be regulated. Section B sets forth procedures for submission, review, implementation and continuation of Pollutant Minimization Plans ("PMPs" or "plans") required under the rule, including the relationship of the rule to the NPDES permit program. Section C lists the elements required to be included in a PMP, and Section D sets forth the requirement that dischargers submit a report annually, quantifying changes in pollutant loadings since initiation of the PMP and describing measures under way or completed to reduce loadings. Additional sections include a waiver provision and a provision for the development of guidance to assist dischargers in developing PMPs under the rule.

Scope of the Proposed Rule. The scope of the proposed rule is limited to toxic chemicals listed in Section A.I of the rule. The proposed rule lists one pollutant - PCBs - for which the EPA issued a TMDL for the Delaware Estuary on December 15, 2003. Additional pollutants may be added to the rule only through notice and comment rulemaking.

Classes of dischargers or individual dischargers proposed to be subject to the rule may be added by amendment or by a directive of the Commission's Executive Director, upon approval by the Commission. Two classes of PCB dischargers are initially proposed to be included: those listed in Group 1 of Tables 3-2 through 3-5 of Appendix 3 of the document, *U.S. Environmental Protection Agency Regions II and III, Total Maximum Daily Loads for Polychlorinated Biphenyls (PCBs) for Zones 2-5 of the Tidal Delaware River* (December 15, 2003); and those listed in Group 2 of the same tables in the event that the presence of PCB congeners is confirmed through monitoring in accordance with the requirements set forth in Appendix 3 of the same document.

Procedures for Submission, Review, Implementation and Continuation of PMPs. The proposed rule requires dischargers to submit a PMP to the Commission and the permitting agency, if any, within three months of publication of a final rule or issuance of a directive by the Executive Director. The Commission staff, in consultation with the permitting agency staff (if applicable), will review each PMP for completeness, and the Executive Director will issue a completeness determination, either confirming that a PMP contains all components required by the rule, or identifying deficiencies in the PMP. Where a deficiency is identified, a discharger has 30 days to submit a revised PMP reflecting a good faith effort to cure the deficiency. The rule sets forth procedures for subsequent revisions if necessary, and allows the Executive Director to seek penalties against a discharger for repeated failure to comply, or grant a waiver from a requirement of the rule for good cause shown. The discharger must commence implementation of its plan as submitted within 60 days of receipt of a determination of completeness.

Upon issuance of a final new or renewed NPDES permit by EPA or a member state after the imposition of a PMP requirement under the proposed rule, the permit supersedes any provisions of the PMP that relate to the NPDES-permitted discharge.

PMPs for point source discharges will receive a thorough substantive review at the time of NPDES permit issuance or reissuance. Due to limited agency resources, earlier substantive review of PMPs by the Commission or the member states is authorized but not required. The rule provides that if the Commission determines at any time that a PMP is not likely to achieve the maximum practicable reduction of pollutant discharges to the air, soil or water, it may require the discharger to submit a revised PMP to more aggressively reduce pollutant loading.

The initial term of the PMLP is to be five years. The term of any PMP that is not superseded by a NPDES permit within five years may be extended by the Executive Director, following a review by the Commission Staff in consultation with the staff of the appropriate state environmental agency.

Plan Elements. Interested parties are referred to the text of the rule for the required elements of a PMP. Notably, these elements include strategies for tracking down unknown sources of the pollutant, as well as for minimizing releases of the pollutant where sources are found. Plans also must include a description of the procedures to be used to measure, demonstrate and report progress in reducing potential and actual discharges of the pollutant, including annual sampling and analysis of discharges using a prescribed analytical method if one is listed in the rule. In the case of PCBs, dischargers are required to measure loadings annually using EPA Method 1668, Revision A. Dischargers are encouraged to use less complex and expensive analytical methods where possible for purposes of screening or identifying pollutant sources.

Annual Report. Annual sampling and reporting using a uniform method are required in order for dischargers and regulators to determine the effectiveness of a PMP in reducing pollutant loadings to a waterway.

Dates: The public hearing will be held on October 27, 2004 at 11:00 A.M. as part of the Commission's regularly scheduled business meeting. The hearing will end 60 to 90 minutes later, at the discretion of the Commission chair, If necessary, the hearing will be continued at a date and location announced by the Commission chair, until all those who wish to testify are afforded an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance with the Commission Secretary by phoning 609-883-9500, extension 224. Written comments will be accepted through Friday, November 19, 2004.

Addresses: The full text of the proposed rule will be posted no later than October 1, 2004 on the Commission's web site, http://www.drbc.net. The public hearing will be held in the Kirby Auditorium at the National Constitution Center, 525 Arch Street, Independence Mall, Philadelphia. Written comments should be addressed to the Commission Secretary as follows: by e-mail to paula.schmitt@drbc.state.nj.us; by fax to 609-883-9522; by U.S. Mail to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; or by overnight mail to Commission Secretary, DRBC, 25 State Police Drive. West Trenton, NJ 08628-0360.

Further Information, Contact: Please contact Commission Secretary Pamela Bush, 609-883-9500 ext. 203, with questions about the proposed rule or the rulemaking process.

Education Department

EMERGENCY RULE MAKING

Nonpublic School Bus Drivers

I.D. No. EDU-24-04-00003-E
Filing No. 1021
Filing date: Sept. 14, 2004
Effective date: Sept. 14, 2004

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

Action taken: Amendment of section 156.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 305(34) and 3624 (not subdivided); and L. 2003, ch. 270

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

Specific reasons underlying the finding of necessity: The proposed amendment is needed to conform the Commissioner's Regulations to the provisions of Education Law section 305(34), as added by Chapter 270 of the Laws of 2003. Education Law section 305(34) requires the Commissioner of Education to promulgate regulations which apply school bus driver safety training instruction and testing requirements, prescribed by Education Law section 3624, to drivers who operate pupil transportation which is owned, leased or contracted for by private and parochial schools to the same degree as such requirements apply to drivers who operate pupil transportation which is owned, leased or contracted for by public school districts. Consistent with the statute, section 156.3 has been revised to apply the training and testing requirements currently in place for school bus drivers employed by or for public schools to those school bus drivers employed by private and parochial schools. Chapter 270 of the Laws of 2003 becomes effective on July 1, 2004.

The proposed rule was adopted at the June 21-22, 2004 Regents meeting, as an emergency measure, effective July 1, 2004, for the preservation of the general welfare in order to conform section 156.3 of the Commissioner's Regulations to the provisions of Education Law section 305(34), as added by Chapter 270 of the Laws of 2003, so that individuals hired by private and parochial schools as school bus drivers may obtain the required instruction, training and certification in a timely manner consistent with statutory requirements.

The proposed rule is being presented to the Board of Regents for adoption as a permanent rule at their September 9-10, 2004 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act. Pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the State Register on September 29, 2004. However, the June emergency adoption will expire on September 22, 2004, 90 days after its filing with the Department of State on June 25, 2004. A second emergency adoption is therefore necessary to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Nonpublic school bus drivers.

Purpose: To apply the school bus safety practices instruction and retraining requirements for public school bus drivers to nonpublic school bus drivers.

Text of emergency rule: Section 156.3 of the Regulations of the Commissioner of Education is amended, effective September 14, 2004, as follows:

156.3 Safety regulations for school bus drivers, monitors, attendants and pupils.

(a) Definitions. For purposes of this section:

(1) A school bus driver shall mean any person who drives a school bus which is owned, leased or contracted for by a public school district [or a], board of cooperative educational services *or nonpublic school* for the purpose of transporting pupils. However, for the purposes of this section, the following shall not be considered to be school bus drivers:

(i) . . .

(ii) a driver of a suburban intercity coach or transit type bus, transporting pupils on trips other than between home and school, such as field trips, athletic trips, and other special transportation services; [and]

(iii) a parent who transports exclusively his or her own children; *and*

(iv) a volunteer driver for a nonpublic school who transports pupils on other than a regularly established route on an occasional basis.

(2) A school bus shall mean every vehicle owned, *leased* or contracted for by *a public* school, [or] board of cooperative educational services *or nonpublic school* and operated for the transportation of pupils, children of pupils, teachers and other persons acting in a supervisory capacity to or from school or school activities.

(3) . . .

(4) . . .

(5) A nonpublic school shall mean a private or parochial school offering instruction in any or all grades, pre-kindergarten through twelve.

(b) School bus driver and instructor qualifications. (1) . . .

(2) . . .

(3) Physical fitness. (i) . . .

(ii) Each regular or substitute driver of a school bus owned, leased or contracted for by a school district, [or a] board of cooperative educational services *or a nonpublic school* shall be examined by a physician or nurse practitioner to the extent authorized by law and consistent with the written practice agreement pursuant to Education Law, section 6902(3), in accordance with the provisions of this subdivision. The physical examination shall be reported immediately on forms prescribed by the commissioner to the chief school officer of the district. The physical examination shall include, as a minimum, those requirements specified on the prescribed physical examination report. The examining physician or nurse practitioner shall require the school bus driver to undergo any diagnostic tests that are necessary to determine whether the driver has the physical and mental ability to operate safely a school transportation conveyance. Each school bus driver shall receive an annual physical examination, and each driver who is to be initially employed shall be examined within four weeks prior to the beginning of service. In no case shall the interval between physical examinations exceed a 13-month period.

(iii) Each regular or substitute driver of a school bus owned, leased or contracted for by a school district, *board of cooperative educational services or nonpublic school* shall pass a physical performance test approved by the commissioner, upon recommendation of an advisory group of certified school bus driver instructors, at least once every two years. Additionally, the test shall be administered to any driver following an absence from service of 60 or more consecutive days from his or her scheduled work duties. In no case shall the interval between physical performance tests exceed 24 months.

(a) . . .

(b) . . .

(c) *(1)* A school bus driver who is employed by a school district, board of cooperative [education] *educational* services, or contractor as of September 1, 1997 shall have until July 1, 2000 to take and pass the driver physical performance test. All drivers hired by school districts, boards of cooperative [education] *educational* services, or contractors after September 1, 1997 shall be required to pass the driver physical performance test before they may transport pupils.

(2) A school bus driver who is employed by a nonpublic school as of January 1, 2005 shall have until January 1, 2008 to take and pass the driver physical performance test. All drivers hired by nonpublic schools after January 1, 2005 shall be required to pass the driver physical performance test before they may transport pupils.

(d) School districts, boards of cooperative educational services, *nonpublic schools* or transportation contractors may apply to the commissioner for a temporary waiver to permit Department of Motor Vehicles (DMV) certified 19A examiners, employed by that carrier, to administer the physical performance test to school bus drivers employed by that carrier. Such waiver may be granted where it is established that there are insufficient certified school bus driver instructors on staff to administer the test in a timely manner. Upon the issuance of such waiver, a certified school bus driver instructor's physical presence shall not be required during the administration of the test, provided that such testing is conducted under the general supervision of a certified school bus driver instructor who is employed by such board of education, board of cooperative educational services, *nonpublic school* or transportation contractor. Such certified school bus driver instructor shall instruct the DMV certified 19A examiner in the proper administration of the physical performance test and shall review and approve the test results of all physical performance tests administered by the examiner.

(4) . . .

(5) Pre-service, safety training, and refresher training for school bus drivers.

(i) Pre-service. Each school bus driver initially employed by a board of education or transportation contractor subsequent to July 1, 1973, *or initially employed by a nonpublic school on or after July 1, 2004,* shall have received at least two hours of instruction on school bus safety practices. Each driver of a vehicle transporting pupils with disabilities exclusively who is initially employed subsequent to January 1, 1976, *or initially employed on or after July 1, 2004 for nonpublic school bus drivers,* shall have received an additional hour of instruction concerning the special needs of a pupil with a disability.

(ii) *(a)* During the first year of employment, each driver *initially employed by a board of education, board of cooperative educational services or transportation contractor subsequent to July 1, 1973* shall complete a basic course of instruction in school bus safety practices approved by the commissioner, which shall include two hours of instruction concerning the special needs of a pupil with a disability.

(b) During the first year of employment, each school bus driver initially employed by a nonpublic school on or after July 1, 2005 shall complete a basic course of instruction in school bus safety practices approved by the commissioner, which shall include two hours of instruction concerning the special needs of a pupil with a disability. Each school bus driver initially employed by a nonpublic school on or after July 1, 2004 and on or before June 30, 2005, shall complete such course within the first two years of such employment.

(iii) . . .

(iv) . . .

(v) Except as otherwise provided in clauses (a) and (b) of this subparagraph, all training required in this subdivision shall be provided by, or under the direct supervision of a school bus driver instructor certified by the commissioner. To qualify for certification as a school bus driver instructor (SBDI), individuals shall successfully complete a school bus driver instructor training and evaluation course taught by a certified master instructor. The course shall be approved by the commissioner upon the recommendation of the commissioner's school bus driver instructor advisory committee, an advisory group consisting of at least seven certified school bus driver instructors appointed annually for such purpose by the commissioner. Each person who applies for admission to this course shall be currently employed by a public school district, board of cooperative educational services, *nonpublic school* or private contractor who is currently providing pupil transportation services for a public school district, *nonpublic school* or board of cooperative educational services. The SBDI course shall include but shall not be limited to the following content areas: planning and making presentations including lesson plans and objectives, school bus accident statistics and interpretation, effective communications, and evaluation. Each such person shall possess a high school diploma or equivalent diploma and shall have completed the basic course of instruction in school bus safety practices. In addition, each such person shall have completed the Advanced New York State School Bus Driver Training Course or a Department of Motor Vehicles approved Point/Insurance Reduction Program. To maintain certification, school bus driver instructors shall be required to attend the annual professional development seminar (PDS) approved by the commissioner upon the recommendation of the SBDI advisory committee, and taught by a certified master instructor. The PDS shall provide refresher training for all SBDIs in presentation skills, lesson planning, school bus safety techniques, requirements and statistics. The PDS shall provide SBDIs with training materials for the upcoming school year safety training campaign, including information which shall be conveyed to all school bus drivers in the next two driver refreshers.

(a) . . .

[(b) Upon application by a board of education, a variance may be granted from the requirements of this paragraph for the 1990-91 school year only, upon a finding by the commissioner that the services of an approved school bus driver instructor are not available to provide the required training.]

(vi) . . .

(6) Character requirement. The driver of a vehicle for the transportation of school children shall be of good moral character and thoroughly reliable. At the time of initial application and at such other times as the superintendent of schools, [or] district superintendent of schools, *or nonpublic school chief administrator* may determine, each applicant for approval for employment as a school bus driver shall furnish to the superintendent *or administrator* at least three statements from three different persons who are not related either by blood or marriage to the applicant pertaining to the moral character and to the reliability of the applicant.

(c) School bus monitor and attendant qualifications. (1) . . .

(2) . . .

(3) Physical fitness. (i) . . .

(ii) . . .

(iii) Each school bus monitor or attendant of a school bus owned, leased or contracted for by a school district or board of cooperative educational services shall pass a physical performance test approved by the commissioner *at least once every two years. Additionally, the test shall be administered to any monitor or attendant following an absence from service of 60 or more consecutive days from his or her scheduled work duties. In no case shall the interval between physical performance tests exceed 24 months*. Individuals employed by a school district, board of cooperative educational services or contractor as a monitor or attendant on July 1, 2003 shall have until July 1, 2004 to take and pass a physical performance test. Individuals hired as a monitor or attendant after July 1, 2003, must take and pass a physical performance test before they may assume their duties.

(a) . . .

(b) . . .

(c) . . .

(4) . . .

(5) . . .

(d) . . .

(e) . . .

(f) . . .

(g) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-24-04-00003-P, Issue of June 16, 2004. The emergency rule will expire November 12, 2004.

Text of emergency 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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 305(34), as added by Chapter 270 of the Laws of 2003, authorizes and directs the Commissioner of Education to promulgate regulations which apply school bus safety practices instruction and retraining requirements prescribed pursuant to section 3624 of Education Law, to drivers who operate pupil transportation which is owned, leased or contracted for by private and parochial schools to the same degree as such requirements apply to drivers who operate pupil transportation which is owned, leased or contracted for by public school districts.

Education Law section 3624 empowers the Commissioner to determine and define the qualifications of school bus drivers and to develop the training and testing such drivers shall receive.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to conform the Commissioner's Regulations to the provisions of Education Law section 305(34), as added by Chapter 270 of the Laws of 2003.

NEEDS AND BENEFITS:

The proposed amendment is needed to implement the statutory requirements of Chapter 270 of the Laws of 2003. The proposed amendment will help to insure the safety of the 2.3 million students transported on school buses each day in New York State by applying, as required by Chapter 270 of the Laws of 2003, school bus safety practices instruction and retraining requirements prescribed pursuant to Education Law section 3624 to drivers who operate transportation which is owned, leased or contracted for by private and parochial schools to the same extent as such requirements apply to drivers who operate transportation which is owned, leased or contracted for by public school districts.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: The proposed amendment is necessary to implement Education Law section 305(34), as added by Chapter 270 of the Laws of 2003, and does not impose any additional costs beyond those inherent in the statute. There will be an incremental additional cost to private and parochial schools that employ their own school bus drivers. Costs will vary for each nonpublic school based upon their individual past practices in training school bus drivers, and the availability of school bus driver instructors (SBDI) on staff or nearby.

The proposed amendment phases in the testing and training requirements for nonpublic school bus drivers to the same degree that the requirements were phased in for public school bus drivers. It is difficult to accurately estimate the anticipated cost of the proposed amendment because we have no data on the number of school bus drivers employed by private and parochial schools. For the purpose of estimating the cost of implementing the proposed amendment the following rates can be used: Physical Performance Test (every 2 years) - $35, Basic Course of Instruction (once) - $65, Pre-Service Training Course (once) - $30, two 2-hour refresher training sessions (annually) - $40, Medical Exam (annually) - $30.

An individual employed as a school bus driver for the first time and by a nonpublic school would cost the school approximately $95 in one-time only training the first year, an additional $40 annually for refresher training, and $65 in medical and physical performance testing every 2 years. Assuming an estimated 2,500 school bus drivers employed by nonpublic schools with 5% being new drivers each year, the total statewide cost would be $195,125 ($11,875 + 100,000 + 81,250 = $195,125) or $77.25 per year per school bus driver.

(d) Costs to the regulating agency for implementation and continued administration of the rule: None.

LOCAL GOVERNMENT MANDATES:

None. The proposed amendment is not applicable to local governments.

PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to Education Law section 305, subdivision 34 as added by Chapter 270 of the Laws of 2003, and does not impose any new reporting or recordkeeping requirements beyond those imposed by the statutes.

The same reporting and data collection system that is in place for public school bus drivers will be utilized for nonpublic school bus drivers, including forms for the Physical Performance Test, medical exam, and training course completion certificates.

DUPLICATION:

The proposed amendment is necessary to implement Education Law section 305, subdivision 34 as amended by Chapter 270 of the Laws of 2003, and will not duplicate any other requirement in State or federal law.

ALTERNATIVES:

The proposed amendment conforms the Commissioner's Regulations to Education Law section 305, subdivision 34, as amended by Chapter 270 of the Laws of 2003. There are no significant alternatives for meeting the statutory requirements and none were considered.

FEDERAL STANDARDS:

The proposed amendment relates to State standards for school bus drivers employed by private and parochial schools and does not exceed any minimal Federal standards.

COMPLIANCE SCHEDULE:

As required by the statute the training and testing requirements contained in the proposed amendment mirror the existing training and testing requirements for public school bus drivers. The primary impact will be limited to nonpublic schools, excluding daycares, camps and proprietary schools, offering instruction in any or all grades including pre-kindergarten through twelve.

The Department has consulted with the public school community including the Commissioner's School Bus Driver Instructor Advisory Committee to obtain their suggestions and assistance for an efficient and cost effective implementation of the requirements. In addition, the Department has consulted with the New York Association for Pupil Transportation, and the New York School Bus Contractor's Association to obtain their views. Nonpublic school groups and associations have been given the opportunity to review the proposed amendment and raise questions concerning its implementation. The Department has consulted with the public school community including the Commissioner's School Bus Driver Instructor Advisory Committee to obtain their suggestions for an efficient and cost effective implementation of the requirements by nonpublic schools. In addition, the department has consulted with the New York Association for Pupil Transportation, and the New York School Bus Contractor's Association to obtain their suggestions. Nonpublic school groups and associations have been given the opportunity to provide suggestions and raise issues concerning the statutes and the proposed regulations. The Department has in place a 1,000 plus member training corps of school bus

driver instructors who are prepared to conduct pre-service training, administer the driver physical performance test, and teach the Basic Course of Instruction to nonpublic school bus drivers. Some have offered to provide initial low cost or no cost training for non-public schools in order to get their bus drivers into compliance as quickly as possible.

Therefore, it is anticipated that regulated parties can achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

EFFECT OF RULE:

The proposed amendment applies to all private and parochial schools offering instruction in any or all grades pre-kindergarten through twelve, which employ school bus drivers, including those schools that are operated as for-profit business corporations employing less than 100 employees.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to 305(34), as added by Chapter 270 of the Laws of 2003.

All drivers who operate transportation which is owned, leased or contracted for by a nonpublic school shall comply with the school bus safety practices instruction and retraining prescribed pursuant to Education Law section 3624 to the same extent as such requirements shall apply to drivers who operate transportation which is owned, leased or contracted for by public school districts.

Any person employed by a private or parochial school as a school bus driver on July 1, 2004 or later, shall be at least 21 years of age, be approved for hire by the schools chief administrative office, and pass an annual medical exam prior to transporting pupils.

All school bus drivers employed by private and parochial schools as of January 1, 2005 shall have until January 1, 2008 to take and pass the driver physical performance test. All drivers hired by private and parochial schools after January 1, 2005 shall be required to pass the driver physical performance test before they may transport pupils. Once passed, all school bus drivers must complete and pass the driver physical performance test at least once every two years.

All school bus drivers employed by a private or parochial school subsequent to July 1, 2004 shall receive at least 2 hours of pre-service instruction or 3 hours of instruction if they exclusively transport pupils with disabilities. During the first year of employment, each school bus driver initially employed by a nonpublic school on or after July 1, 2005 shall complete a basic course of instruction in school bus safety practices approved by the Commissioner, which shall include 2 hours of instruction concerning the special needs of a pupil with a disability. Each school bus driver initially employed by a nonpublic school on or after July 1, 2004 and on or before June 30, 2005, shall complete such course within the first two years of such employment.

The chief school officer of private and parochial schools shall approve in writing the hiring of each school bus driver and shall ensure that they receive all required training and testing.

PROFESSIONAL SERVICES:

The proposed amendment proposes no additional professional services requirements on local governments, other than those already required by law.

Small businesses may incur expenses to hire the services of a certified School Bus Driver Instructor (SBDI) to teach the Basic Course of Instruction and administer the Physical Performance Test to school bus drivers. A waiver request may be submitted to permit a DMV certified 19A Examiner to administer the Physical Performance Test.

COMPLIANCE COSTS:

The proposed amendment is necessary to implement Chapters 270 of the Laws of 2003 and does not impose any additional costs beyond those inherent in the statute.

The addition of qualifications and standards for school bus drivers employed by a private or parochial school will result in additional incremental cost. Costs will vary for each private or parochial school based upon their individual past practices in training school bus drivers, and the availability of School Bus Driver Instructors on staff or nearby.

The proposed amendment phases in the testing and training requirements for nonpublic school bus drivers to the same degree that the requirements were phased in for public school bus drivers. It is difficult to accurately estimate the anticipated cost of the proposed amendment because we have no data on the number of school bus drivers employed by private and parochial schools. For purposes of estimating the cost of implementing the proposed amendment the following rates can be used: Physical Performance Test (every 2 years) - $35, Basic Course of Instruction (once) - $65, Pre-Service Training Course (once) - $30, and two 2-hour refresher sessions (annually) - $40, Medical Exam (annually) - $30.

An individual employed as a school bus driver for the first time and by a private or parochial school would cost the school approximately $95 in one-time only training the first year, an additional $40 annually for refresher training, and $65 in medical (every year instead of every 2 years) and physical performance testing every 2 years. Assuming an estimated 2,500 school bus drivers employed by private and parochial schools with 5% being new drivers each year, the total statewide cost would be $195,125 ($11,875 + 100,000 + 81,250 = $195,124) or $77.25 per year per school bus driver.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on small businesses. Economic feasibility is addressed above under Compliance Costs.

MINIMIZING ADVERSE ECONOMIC IMPACT:

The proposed amendment phases in the testing and training requirements for school bus drivers employed by private and parochial schools to the same degree that the requirements were phased in for public school bus drivers. Also, the training and testing requirements contained in the proposed amendment mirror the existing training and testing requirements for school bus drivers. Nothing additional was proposed in the proposed amendment that was not already required of public school bus drivers.

SMALL BUSINESS PARTICIPATION:

Staff from the State Education Department have consulted with the public school community, including the Commissioner's School Bus Driver Instructor Advisory Committee and the New York Association for Pupil Transportation to obtain their suggestions and assistance for an efficient and cost effective implementation of the requirements. In addition, the Department has consulted with members of the Commissioner's Advisory Council of Nonpublic Schools in order to provide small businesses with an opportunity to participate in the rule making process. The associations have made suggestions and raised important issues concerning the testing and training requirements for private and parochial school bus drivers. Their suggestions and concerns have been taken into account and incorporated into the final proposal. State Education Department staff also met with members of the Commissioner's School Bus Driver Instructor Advisory Committee, and members of the New York Association for Pupil Transportation. The advisory committee and the associations have made suggestions and raised important issues concerning the testing and training requirements for private and parochial school bus drivers. Their suggestions and concerns have been taken into account and incorporated into the final proposal.

Local Governments:

The proposed amendment is applicable to drivers who operate transportation which is owned, leased or contracted for by nonpublic schools, and does not impose any reporting, record keeping or other compliance requirements on school districts, boards of cooperative educational services or other local governments. Because it is evident from the nature of the proposed amendment that it does not affect local governments, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all private and parochial schools offering instruction in any or all grades pre-kindergarten through twelve, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment is necessary to conform the Commissioner's Regulations to 305(34), as added by Chapter 270 of the Laws of 2003.

All drivers who operate transportation which is owned, leased or contracted for by a nonpublic school shall comply with the school bus safety practices instruction and retraining prescribed pursuant to Education Law section 3624 to the same extent as such requirements shall apply to drivers who operate transportation which is owned, leased or contracted for by public school districts.

Any person employed by a private or parochial school as a school bus driver on July 1, 2004 or later, shall be at least 21 years of age, be approved for hire by the schools chief administrative office, and pass an annual medical exam prior to transporting pupils.

All school bus drivers employed by private and parochial schools as of January 1, 2005 shall have until January 1, 2008 to take and pass the driver physical performance test. All drivers hired by private and parochial schools after January 1, 2005 shall be required to pass the driver physical performance test before they may transport pupils. Once passed, all school bus drivers must complete and pass the driver physical performance test at least once every two years.

All school bus drivers employed by a private or parochial school subsequent to July 1, 2004 shall receive at least 2 hours of pre-service instruction or 3 hours of instruction if they exclusively transport pupils with disabilities. During the first year of employment, each school bus driver initially employed by a nonpublic school on or after July 1, 2005 shall complete a basic course of instruction in school bus safety practices approved by the Commissioner, which shall include 2 hours of instruction concerning the special needs of a pupil with a disability. Each school bus driver initially employed by a nonpublic school on or after July 1, 2004 and on or before June 30, 2005, shall complete such course within the first two years of such employment.

The chief school officer of private and parochial schools shall approve in writing the hiring of each school bus driver and shall ensure that they receive all required training and testing. The proposed amendment proposes no additional professional services requirements on local governments, other than those already required by law.

Small businesses may incur expenses to hire the services of a certified School Bus Driver Instructor (SBDI) to teach the Basic Course of Instruction and administer the Physical Performance Test to school bus drivers. A waiver request may be submitted to permit a DMV certified 19A Examiner to administer the Physical Performance Test.

COSTS:

The proposed amendment is necessary to implement Chapters 270 of the Laws of 2003 and does not impose any additional costs beyond those inherent in the statute.

There should be no additional costs to rural school districts as a result of the proposed changes. The addition of qualifications and standards for nonpublic school bus drivers will not result in any increase in State Aid for pupil transportation. The amendment applies only to school bus drivers employed by private and parochial schools. Costs will vary for each nonpublic school based upon their individual past practices in training school bus drivers, and the availability of school bus driver instructors (SBDI) on staff or nearby.

The proposed amendment phases in the testing and training requirements for nonpublic school bus drivers to the same degree that the requirements were phased in for public school bus drivers. It is difficult to accurately estimate the anticipated cost of the proposed amendment because no true data is available on the number of school bus drivers employed by private and parochial schools. For purposes of estimating the cost of implementing the proposed amendment the following rates can be used: physical performance test (every 2 years) - $35, Basic Course of Instruction (once) - $65, Pre-Service Training Course (once) - $30, and two 2-hour refresher training sessions (annually) - $40, Medical Exam (annually) - $30. Thus an individual employed as a school bus driver for the first time and by a nonpublic school would cost the school $95 in one-time only training the first year, an additional $40 annually for refresher training, and $65 in medical and physical performance testing every 2 years. Assuming an estimated 2,500 school bus drivers employed by nonpublic schools with 5% of new drivers each year the total statewide cost would be $195,125 ($11,875 + 100,000 + 81,250 = $195,125) or $77.25 per school bus driver.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of Education Law section 305(34), as added by Chapter 270 of the Laws of 2003, and does not have any impact on school districts, boards of cooperative education services (BOCES) or private pupil transportation contractors. The statute authorizes and directs the Commissioner of Education to promulgate regulations which apply school bus safety practices instruction and retraining requirements prescribed pursuant to section 3624 of Education Law, to drivers who operate pupil transportation which is owned, leased or contracted for by private and parochial schools to the same degree as such requirements apply to drivers who operate pupil transportation which is owned, leased or contracted for by public school districts. Since the statue requires uniform standards applicable to all nonpublic schools in the State, it was not possible to prescribe a lesser standard or exempt nonpublic schools located in rural areas.

The training and testing requirements contained in the proposed amendment mirror the existing training and testing requirements for public school bus drivers. The primary impact will be to nonpublic schools offering instruction in any or all grades pre-kindergarten through twelve.

RURAL AREA PARTICIPATION:

Copies of the proposed amendment were provided for review and comment to the Department's Rural Advisory Committee, whose memberships include schools located in rural areas. In addition, the Department has consulted with the public school community including the Commissioner's School Bus Driver Instructor Advisory Committee to obtain their suggestions for an efficient and cost effective implementation of the requirements by nonpublic schools. The Department has also consulted with the New York Association for Pupil Transportation, and the New York School Bus Contractor's Association to obtain their suggestions. Nonpublic school groups and associations have been given the opportunity to provide suggestions and raise issues concerning the statutes and the proposed regulations. The Department has in place a 1,000 plus member training corps of school bus driver instructors who are prepared to conduct pre-service training, administer the driver physical performance test, and teach the Basic Course of Instruction to nonpublic school bus drivers. Some have offered to provide initial low cost or no cost training for nonpublic schools in order to get their bus drivers into compliance as quickly as possible.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 270 of the Laws of 2003, relating to the qualifications, testing and training requirements for nonpublic school bus drivers. The proposed amendment prescribes requirements for those individuals who are already employed, or who seek to become employed by a nonpublic school as a school bus driver; but it will not affect the number of jobs or employment opportunities available in this occupation. Because it is evident from the nature of the rule that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 16, 2004 the following comments have been received:

1. COMMENT:

The comment was made that Chapter 270 of the Laws of 2003 refers to "private and parochial schools" and not "nonpublic schools" as is used in the proposed regulatory amendment. The concern is that use of the term "nonpublic schools" in the proposed regulations may actually bring more schools under the umbrella of the regulations than were intended by the legislature.

DEPARTMENT RESPONSE:

The proposed regulations do not exceed the authority of the statute. Consistent with Chapter 270 of the Laws of 2003, paragraph (a)(5) of 156.3 specifically defines "nonpublic school" as a private or parochial school offering instruction in any or all grades pre-kindergarten through twelve.

2. COMMENT:

The comment was made that the proposed regulations provide for a three-year waiting period for implementing physical performance testing for incumbent school bus drivers. A concern was raised that the statute did not give the department the authority to delay implementation of testing.

DEPARTMENT RESPONSE:

Chapter 270 of the Laws of 2003 requires the Commissioner to promulgate rules and regulations, which include instruction in school bus safety practices and testing requirements, to the same extent that such requirements shall apply to school bus drivers employed by public schools.

Physical performance test requirements for public school bus drivers were phased in over a multi-year period. Part 156.3 of the Commissioner's Regulations was first revised in 1996 to provide for an optional physical performance test. It also required the formation of a special committee to assist the Department in the review and development of a testing instrument.

On July 18, 1997 the Board of Regents approved an amendment to the regulations concerning qualifications of school bus drivers. The regulation required all school bus drivers employed by public schools to take and pass a physical performance test once every two years. It specifically provided for a three-year phase-in of the testing requirements for individuals employed as school bus drivers prior to September 1, 1997.

This was done to minimize the impact of the requirement on the upcoming school year by only requiring those individuals hired as school

bus drivers on or after September 1, 1997 to take and pass the test before they could transport pupils. The requirements were also phased in to give the 50,000 individuals employed as school bus drivers time to be tested, to get physically fit, and to seek any medical assistance or accommodation necessary and available under the law.

The Department believes that the proposed amendment is consistent with Chapter 270 of the Laws of 2003 since the amendment's provisions apply the same training and testing requirements to school bus drivers employed by nonpublic schools, including phased-in timing, as was required of public school bus drivers.

3. COMMENT:

A concern was raised that the proposed regulations do not apply to "voluntary drivers" employed by nonpublic schools. Most of the student school bus fatalities during the past 5 - 10 years have occurred when voluntary drivers have been behind the wheel of the school bus. The proposed regulations do not apply any of the testing and training requirements for public school bus drivers to voluntary drivers used by nonpublic schools.

DEPARTMENT RESPONSE:

Chapter 270 of the Laws of 2003 specifically exempts voluntary drivers who transport pupils on other than a regularly established route on an occasional basis from the requirements of the statute and any resulting regulations.

4. COMMENT:

The comment was made that the proposed regulations have not been developed in a timely manner, which will result in insufficient time for implementation, thus resulting in a delay of full implementation of the statutory requirements.

DEPARTMENT RESPONSE:

While the Department has utilized the full amount of time available for the enactment of regulations, this will not result in a delay of full implementation. The phase-in of the physical performance test requirement for veteran drivers, and the phase-in of the Basic Course requirement for new drivers hired in the 2004-2005 school year are comparable to the phase-in timetable that was used for testing and training requirements of public school bus drivers.

EMERGENCY RULE MAKING

Impartial Hearing Officer Determinations Regarding Services for Students with Disabilities

I.D. No. EDU-28-04-00003-E
Filing No. 1025
Filing date: Sept. 14, 2004
Effective date: Sept. 14, 2004

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

Action taken: Amendment of section 279.12 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 311 (not subdivided), 4403(1) and (3), 4404(2) and 4410(13)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511.

The proposed rule was adopted at the June 21-22, 2004 Regents meeting, as an emergency measure, effective June 25, 2004, for the preservation of the general welfare to immediately conform the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR 300.511, and thereby ensure compliance with Federal requirements for receipt of funds under the IDEA.

The proposed rule is being presented to the Board of Regents for adoption as a permanent rule at their September 9-10, 2004 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act. Pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the State Register on September 29, 2004. However, the June emergency adoption will expire on September 22, 2004, 90 days after its filing with the Department of State on June 25, 2004. A second emergency adoption is therefore necessary to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby ensure compliance with Federal requirements for receipt of funds under the IDEA.

Subject: Procedures for State level review of Impartial Hearing Officer determinations regarding services for students with disabilities.

Purpose: To delete a provision authorizing the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal.

Text of emergency rule: Section 279.12 of the Regulations of the Commissioner of Education is amended, effective September 14, 2004, as follows:

§ 279.12 Decision of State Review Officer.

(a) . . .

(b) [The timelines in which the State Review Officer must issue a decision may be extended once for a period not to exceed 60 days from the date upon which the decision was originally due to be issued upon request by the Office of State Review and upon consent of both petitioner and respondent for the purpose of allowing a State Review Officer sufficient time to review an extensive record on appeal. For purposes of this subdivision, an extensive record on appeal is a record that contains more than 1,000 pages of transcript. The timeline for issuing a decision may also be extended by the Office of State Review: (i) for a period of time equal to the additional time that the Office of State Review has granted respondent and petitioner for the filing of an answer and reply, and/or (ii) in appeals in which the petitioner is the board of education, for the period of time during which the hearing record on appeal filed pursuant to section 279.9 of this Part is not complete.

(c)] The decision of the State Review Officer shall be mailed by the Office of State Review to counsel for petitioner and respondent, parties appearing pro se, and the superintendent of the school district involved as a party in the appeal or the superintendent's designee. The superintendent, or the superintendent's designee, shall forward a copy of the decision as soon as practicable to the principal and chairperson of the committee on special education of the school involved in developing the most recent individualized education program (IEP) that was in contention in the appeal.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-28-04-00003-EP, Issue of July 14, 2004. The emergency rule will expire November 12, 2004.

Text of emergency 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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 provides the Regents with authority to establish the educational policies of the State and to adopt rules to carry into effect such policies and the powers and duties of the Department under the laws relating to education.

Education Law section 311 authorizes the Commissioner to regulate the practice of appeals from actions of local school officials brought pursuant to Education Law section 310.

Education Law section 4403(1) and (3) provide the Department with general authority to adopt regulations concerning the provision of a free appropriate public education to students with disabilities.

Education Law section 4404(2) provides for the review of determinations of impartial hearing officers regarding services for students with disabilities by a State Review Officer (SRO), and directs the Commissioner to adopt regulations governing the practice and procedures to be followed in proceedings before such Officer.

Education Law section 4410(13) authorizes the Commissioner to adopt regulations to implement the provisions of that statute, concerning special education services to preschool students with disabilities.

LEGISLATIVE OBJECTIVES:

The proposed amendment modifies the procedures concerning appeals of impartial hearing officers to a State Review Officer, pursuant to the

authority conferred on the Commissioner by the aforementioned statutes to regulate the practice and procedures to be followed in proceedings before SROs, and is necessary to conform to Federal law.

NEEDS AND BENEFITS:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511.

COSTS:

Costs to State government: None.

Costs to local governments: None.

Costs to private regulated parties: None.

Costs to the regulating agency for implementation and continued administration of the rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to Federal requirements and thereby ensure continued State funding under the IDEA.

LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any program, service, duty, or responsibility upon local governments.

PAPERWORK:

The proposed amendment imposes no additional reporting requirements, forms or other paperwork.

DUPLICATION:

The proposed amendment does not duplicate existing State or Federal requirements, and is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511.

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511.

COMPLIANCE SCHEDULE:

It is anticipated that regulated persons will be able to comply with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts. The rule does not apply to small businesses since they are not parties to such hearings. The amendment will not impose additional reporting, recordkeeping or other compliance requirements on small businesses, nor will it have any adverse economic impact on small businesses. Because it is evident from the nature of the rule that it does not apply to small businesses, no further steps were needed to ascertain that fact and none were taken. Therefore, a regulatory flexibility analysis for small businesses is not required, and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment is applicable to all public school districts in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511. The proposed amendment does not impose any compliance requirements on school districts.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any professional service requirements.

COMPLIANCE COSTS:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to Federal requirements and thereby ensure continued State funding under the IDEA, and does not impose any compliance costs on school districts.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements or costs on local governments.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511. The proposed amendment does not impose any compliance requirements or costs on school districts.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment is applicable to all public school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511. The proposed amendment does not impose any compliance requirements or professional service requirements on school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to Federal requirements and thereby ensure continued State funding under the IDEA, and does not impose any compliance costs on school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform section 279.12 of the Commissioner's Regulations to the Federal Individuals with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by deleting a provision that authorizes the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal. The U.S. Department of Education has notified the State Education Department that this provision is out of compliance with CFR section 300.511. The proposed amendment does not impose any compliance requirements or costs on school districts.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment relates to appeal procedures for State-level review of determinations of impartial hearing officers in hearings relating to the provision of special education to students with disabilities by school districts and will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

NOTICE OF ADOPTION

Requirements for Conferral of a College Degree and Home Instruction

I.D. No. EDU-09-04-00007-A
Filing No. 1019
Filing date: Sept. 14, 2004
Effective date: Sept. 30, 2004

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

Action taken: Repeal of section 3.47(a) and (b); addition of new section 3.47(a) and (b); and amendment of section 100.10(d) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 218(1), 224(4), 3204(2), 3205(1), (2) and (3), 3210(2)(d), 3212(2)(d) and 3234(1)

Subject: Requirements for the conferral of a college degree and the home instruction of students of compulsory attendance age and college study.

Purpose: To establish alternatives to the requirement that a candidate for a college degree hold a high school diploma, repeal the requirement that a student must have completed at least a four-year high school course or its equivalent before beginning degree study, require students who seek to meet compulsory educational requirements through full-time college study to obtain the approval of the school district, and establish requirements relating to the home instruction of students of compulsory attendance age and college study.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-09-04-00007-P, Issue of March 3, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Nonpublic School Bus Drivers

I.D. No. EDU-24-04-00003-A
Filing No. 1023
Filing date: Sept. 14, 2004
Effective date: Sept. 30, 2004

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

Action taken: Amendment of section 156.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 305(34) and 3624 (not subdivided); and L. 2003, ch. 270

Subject: Nonpublic school bus drivers.

Purpose: To apply the school bus safety practices instruction and retraining requirements for public school bus drivers to nonpublic school bus drivers.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-24-04-00003-P, Issue of June 16, 2004.

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

Text of 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

Assessment of Public Comment

Since publication of the Notice of Proposed Rule Making in the State Register on June 16, 2004 the following comments have been received:

1. COMMENT:

The comment was made that Chapter 270 of the Laws of 2003 refers to "private and parochial schools" and not "nonpublic schools" as is used in the proposed regulatory amendment. The concern is that use of the term "nonpublic schools" in the proposed regulations may actually bring more schools under the umbrella of the regulations than were intended by the legislature.

DEPARTMENT RESPONSE:

The proposed regulations do not exceed the authority of the statute. Consistent with Chapter 270 of the Laws of 2003, paragraph (a)(5) of 156.3 specifically defines "nonpublic school" as a private or parochial school offering instruction in any or all grades pre-kindergarten through twelve.

2. COMMENT:

The comment was made that the proposed regulations provide for a three-year waiting period for implementing physical performance testing for incumbent school bus drivers. A concern was raised that the statute did not give the department the authority to delay implementation of testing.

DEPARTMENT RESPONSE:

Chapter 270 of the Laws of 2003 requires the Commissioner to promulgate rules and regulations, which include instruction in school bus safety practices and testing requirements, to the same extent that such requirements shall apply to school bus drivers employed by public schools.

Physical performance test requirements for public school bus drivers were phased in over a multi-year period. Part 156.3 of the Commissioner' Regulations was first revised in 1996 to provide for an optional physical performance test. It also required the formation of a special committee to assist the Department in the review and development of a testing instrument.

On July 18, 1997 the Board of Regents approved an amendment to the regulations concerning qualifications of school bus drivers. The regulation required all school bus drivers employed by public schools to take and pass a physical performance test once every two years. It specifically provided for a three-year phase-in of the testing requirements for individuals employed as school bus drivers prior to September 1, 1997.

This was done to minimize the impact of the requirement on the upcoming school year by only requiring those individuals hired as school bus drivers on or after September 1, 1997 to take and pass the test before they could transport pupils. The requirements were also phased in to give the 50,000 individuals employed as school bus drivers time to be tested, to get physically fit, and to seek any medical assistance or accommodation necessary and available under the law.

The Department believes that the proposed amendment is consistent with Chapter 270 of the Laws of 2003 since the amendment's provisions apply the same training and testing requirements to school bus drivers employed by nonpublic schools, including phased-in timing, as was required of public school bus drivers.

3. COMMENT:

A concern was raised that the proposed regulations do not apply to "voluntary drivers" employed by nonpublic schools. Most of the student school bus fatalities during the past 5 - 10 years have occurred when voluntary drivers have been behind the wheel of the school bus. The proposed regulations do not apply any of the testing and training requirements for public school bus drivers to voluntary drivers used by nonpublic schools.

DEPARTMENT RESPONSE:

Chapter 270 of the Laws of 2003 specifically exempts voluntary drivers who transport pupils on other than a regularly established route on an occasional basis from the requirements of the statute and any resulting regulations.

4. COMMENT:

The comment was made that the proposed regulations have not been developed in a timely manner, which will result in insufficient time for implementation, thus resulting in a delay of full implementation of the statutory requirements.

DEPARTMENT RESPONSE:

While the Department has utilized the full amount of time available for the enactment of regulations, this will not result in a delay of full implementation. The phase-in of the physical performance test requirement for veteran drivers, and the phase-in of the Basic Course requirement for new drivers hired in the 2004-2005 school year are comparable to the phase-in timetable that was used for testing and training requirements of public school bus drivers.

NOTICE OF ADOPTION

Operation of Radiographic Equipment by an Unlicensed Person in a Podiatrist's Office

I.D. No. EDU-24-04-00004-A
Filing No. 1020
Filing date: Sept. 14, 2004
Effective date: Sept. 30, 2004

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

Action taken: Addition of sections 65.6 and 65.7 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a), 7001(1) and (2), and 7006(4); and Public Health Law, section 3515(4)(d)

Subject: Operation of radiographic equipment by an unlicensed person under the direct supervision of a licensed podiatrist.

Purpose: To implement section 7006(4) of the Education Law, which permits an unlicensed assistant providing supportive services to a licensed podiatrist to X-ray a patient's foot, while under the direct supervision of the licensed podiatrist, provided that the unlicensed assistant has completed an acceptable course of study.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-24-04-00004-P, Issue of June 16, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Impartial Hearing Officer Determinations Regarding Services for Students with Disabilities

I.D. No. EDU-28-04-00003-A
Filing No. 1024
Filing date: Sept. 14, 2004
Effective date: Sept. 30, 2004

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

Action taken: Amendment of section 279.12 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 311 (not subdivided), 4403(1) and (3), 4404(2) and 4410(13)

Subject: Procedures for State level review of Impartial Hearing Officer determinations regarding services for students with disabilities.

Purpose: To delete a provision authorizing the State Review Officer to extend the timelines for issuing a decision to allow additional time to review an extensive record on appeal.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. EDU-28-04-00003-EP, Issue of July 14, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Regents Examinations

I.D. No. EDU-28-04-00005-A
Filing No. 1022
Filing date: Sept. 14, 2004
Effective date: Sept. 30, 2004

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

Action taken: Amendment of sections 8.2, 8.3 and 100.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305 (not subdivided), 308 (not subdivided), 309 (not subdivided) and 3204 (not subdivided)

Subject: Admission to and passing mark on Regents examinations and college credits to meet high school equivalency diploma requirements.

Purpose: To require principals of public schools to admit to Regents examinations a candidate who is a school district resident and who seeks to take such examinations for the purpose of meeting the requirements for an earned degree pursuant to Regents Rule section 3.47(a)(2); clarify where there is an exception to the 65 passing mark on Regents examinations; and change the subject distribution of 24 college semester hours required for a pathway to earn a high school equivalency diploma.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-28-04-00005-P, Issue of July 14, 2004.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Education Department publishes a new notice of proposed rule making in the NYS *Register*.

Requirements for Educational Leadership Programs

I.D. No.	Proposed	Expiration Date
EDU-10-04-00003-P	March 10, 2004	September 6, 2004

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Qualifications for Teachers and Paraprofessionals

I.D. No. EDU-39-04-00004-P

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

Proposed action: Addition of section 120.6 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1) and (2), and 3713(1) and (2)

Subject: Qualifications for teachers and paraprofessionals under the No Child Left Behind Act of 2001.

Purpose: To incorporate by reference requirements of the No Child Left Behind Act of 2001 relating to qualifications of teachers and paraprofessionals in order to ensure that local educational agencies are in compliance with this Federal law.

Text of proposed rule: Section 120.6 of the Regulations of the Commissioner of Education is added, effective January 6, 2005, as follows:

120.6 Qualifications of teachers and paraprofessionals.

(a) For the purpose of compliance with the NCLB, a local educational agency shall ensure that its teachers of core academic subjects are highly qualified in accordance with the requirements and definitions prescribed in 34 CFR 200.55 and 200.56 (Code of Federal Regulations, Revised as of July 1, 2003, Title 34, Volume 1, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001, 2003; available at the NYS Education Department, Office of Higher Education, 2M West Wing, Education Building, 89 Washington Avenue, Albany, NY 12234). A local educational agency shall provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the high objective uniform State standard of evaluation (HOUSSE). The HOUSSE shall be an evaluation, prescribed by the department and conducted locally either during a pre-employment review or at the time of an annual professional performance review prescribed in section 100.2(o) of this Title, that enables a teacher who is beyond the first year of the effective date of the teacher's first teaching certificate to demonstrate subject matter competency in all core academic subjects that the teacher teaches. The evaluation shall be based upon objective, coherent information as prescribed by the department, and shall include, but not be limited to, information on the teacher's education, credentials, professional experience, and professional development.

(b) For the purpose of compliance with the NCLB, a local educational agency shall ensure that a paraprofessional who is hired by the LEA and works in a program supported with funds under Title I meets qualifications in accordance with the requirements of 34 CFR 200.58 (Code of Federal Regulations, Revised as of July 1, 2003, Title 34, Volume 1, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001, 2003; available at the New York State Education Department, Office of Higher Education, 2M West Wing, Education Building, 89 Washington Avenue, Albany, NY 12234).

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, 2M West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: hedepcom@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 101 of the Education Law charges the Education Department with the general management and supervision of all the educational work of the State and establishes the Regents of the University of the State of New York as the head of the Department.

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

Section 215 of the Education Law authorizes the Commissioner of Education to examine and inspect schools under the educational supervision of the State and require reports from them.

Subdivision (1) of section 305 of the Education Law authorizes the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents.

Subdivision (2) of section 305 of the Education Law provides that the Commissioner of Education shall have general supervision over all schools and shall advise and guide the school officers of all districts in relation to their duties and the general management of schools under their control.

Subdivisions (1) and (2) of section 3713 of the Education Law authorize the State of New York to accept the provisions of any law of the United States making appropriations for the purpose of defraying the cost of providing public education, and designates the Commissioner of Education as the State Educational Agency authorized to cooperate with agencies to carry out the provisions of such Federal law.

2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of the above-referenced statutes by establishing requirements that local educational agencies must meet to be in compliance with Federal law relating to the qualifications of teachers and paraprofessionals.

3. NEEDS AND BENEFITS:

The purpose of the proposed regulation is to incorporate by reference requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals in order to ensure that local educational agencies are in compliance with this Federal law. The regulation will provide an underlying legal basis in State regulation for the State Education Department's guidance to local educational agencies (school districts, boards of cooperative educational services, county vocational education and extension boards, and charter schools) on the NCLB requirements. The State Education Department has issued guidance documents to local educational agencies on this topic, and plans to continue to provide guidance on how local educational agencies may meet the requirements of the NCLB.

The NCLB requires teachers of core academic subjects to be "highly qualified." The NCLB defines what this means, and provides that a teacher of core academic subjects who is not new to the profession may meet the requirement to be highly qualified, in part, through passing a high objective uniform State standard of evaluation (HOUSSE). The State Education Department has prescribed a HOUSSE for New York teachers of core academics who are not new to the profession. The HOUSSE is to be conducted by the local educational agency either during a pre- employment review or at the time of a teacher's annual review. The proposed regulation is needed to require a local educational agency to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE. Without the HOUSSE, New York State could have difficulty complying with NCLB's teacher quality requirements. This regulation will ensure that local educational agencies use the HOUSSE when needed so that New York State will be in compliance with this Federal law.

4. COSTS:

(a) Costs to State government: The regulation incorporates by reference Federal requirements of the NCLB relating to qualifications for teachers and paraprofessionals. The regulation does not impose any additional costs on the State Education Department or any other State agency beyond the administrative costs imposed by the NCLB.

(b) Costs to local government: The regulation will require local educational agencies to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE. The State Education Department estimates that the cost to local educational agencies for administering this assessment will be minimal. The regulation will not impose any other additional costs on local educational agencies beyond the costs imposed by the NCLB.

(c) Costs to private regulated parties: The proposed regulation will not impose any additional costs on teachers or paraprofessionals working for local educational agencies beyond the costs imposed by the NCLB.

(d) Cost to the regulatory agency: As stated above in "Costs to State Government," the proposed regulation will not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed regulation incorporates by reference regulations of the U.S. Department of Education relating to qualifications of teachers and paraprofessionals at local educational agencies (school districts, boards of cooperative educational services, county vocational education and extension boards, and charter schools). The Federal regulations that are incorporated by reference require local educational agencies to ensure that all new teachers who will teach core academic subjects in Title I programs are highly qualified, as defined in the Federal regulations, when they are hired. They also require a local educational agency to ensure that by the end of the 2005-2006 school year all its elementary, middle, and secondary teachers who teach core academic subjects are highly qualified as defined in the Federal regulations.

The NCLB defines what it means for a teacher of core academic subjects to be "highly qualified." In this definition, it provides that a teacher of core academic subjects who is not new to the profession may meet the requirement to be highly qualified, in part, through passing a high objective uniform State standard of evaluation (HOUSSE). The State Education Department has prescribed the HOUSSE for New York teachers of core academics who are not new to the profession. The HOUSSE is to be conducted by the local educational agency either during a pre-employment review or at the time of a teacher's annual review. The proposed regulation requires a local educational agency to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE.

The Federal regulations further require local educational agencies to ensure that each paraprofessional working in a program supported with funds under Title I meets prescribed qualifications. The Federal regulations require all such paraprofessionals to have earned a secondary school diploma or its recognized equivalent. In addition, such paraprofessionals hired after January 8, 2002, and all such paraprofessionals by January 8, 2006, must have completed at least two years of study at an institution of higher education, obtained an associate or higher degree, or passed a State or local assessment that demonstrates knowledge of and ability to assist in instructing prescribed subjects.

Except for the requirement to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE, the regulation does not impose additional requirements on local governments beyond those imposed by the NCLB.

6. PAPERWORK:

The regulation does not impose any additional reporting or recordkeeping requirements on regulated parties beyond those imposed by the NCLB.

7. DUPLICATION:

The proposed regulation does not duplicate other existing State requirements. The regulation incorporates by reference regulatory requirements of the U.S. Department of Education.

8. ALTERNATIVES:

Because of the nature of the proposed regulation, which incorporates by reference the Federal requirements of the NCLB, there are no viable alternatives to the proposed regulation, and none were considered.

9. FEDERAL STANDARDS:

The proposed regulation incorporates by reference Federal requirements of the NCLB relating to qualifications of teachers and paraprofessionals.

10. COMPLIANCE SCHEDULE:

The proposed regulation is effective on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed regulation incorporates by reference Federal regulations implementing the No Child Left Behind Act of 2001 (NCLB) that are applicable to school districts, BOCES, county vocational education and extension boards, and charter schools relating to qualifications of teachers and paraprofessionals. The regulation does not impose any reporting, recordkeeping, or compliance requirements and will not have an adverse economic impact on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken.

(b) Local Governments:

1. Effect of the rule:

The proposed regulation affects all local educational agencies in the State, including those that are considered local governments (school districts, BOCES, and county vocational education and extension boards), as well as charter schools.

2. Compliance requirements:

The purpose of the proposed regulation is to incorporate by reference requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals in order to ensure that local educational agencies are in compliance with this Federal law. The Federal regulations that are incorporated by reference require local educational agencies to ensure that all new teachers who will teach core academic subjects in Title I programs are highly qualified as defined in the Federal regulations, when they are hired. They also require a local educational agency to ensure that by the end of the 2005-2006 school year, all its elementary, middle, and secondary teachers who teach core academic subjects are highly qualified as defined in the Federal regulations.

The NCLB defines what it means for a teacher of core academic subjects to be "highly qualified." In this definition, it provides that a teacher of core academic subjects who is not new to the profession may meet the requirement to be highly qualified, in part, through passing a high objective uniform State standard of evaluation (HOUSSE). The State Education Department has prescribed the HOUSSE for New York teachers of core academics who are not new to the profession. The HOUSSE is to be conducted by the local educational agency either during a pre-employment review or at the time of a teacher's annual review. The proposed regulation requires a local educational agency to provide a teacher of core academic subjects who is not new to the profession, the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE.

The Federal regulations further require local educational agencies to ensure that each paraprofessional working in a program supported with funds under Title I meets prescribed qualifications. The Federal regulations require all such paraprofessionals to have earned a secondary school diploma or its recognized equivalent. In addition, such paraprofessionals hired after January 8, 2002, and all such paraprofessionals by January 8, 2006, must have completed at least two years of study at an institution of higher education, obtained an associate or higher degree, or passed a State or local assessment that demonstrates knowledge of and ability to assist in instructing prescribed subjects.

Except for the requirement to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE, the regulation does not impose additional requirements on local governments beyond those imposed by the NCLB.

3. Professional services:

The proposed amendment does not mandate local educational agencies to contract for additional professional services to comply.

4. Compliance costs:

The regulation will require local educational agencies to provide a teacher of core academic subjects who is not new to the profession, the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE. The State Education Department estimates that the cost to local educational agencies for administering this assessment will be minimal. The regulation will not impose any other additional costs on local educational agencies beyond the costs imposed by the NCLB.

5. Economic and technological feasibility:

Meeting the requirements of the proposed amendment is economically and technologically feasible. As stated above in compliance costs, the regulation imposes only minimal costs on local educational agencies beyond those imposed by Federal law.

6. Minimizing adverse impact:

The proposed regulation incorporates by reference Federal regulations implementing the requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals. The NCLB requirements are applicable uniformly to all local educational agencies, whether they are local government entities or not. Therefore, it is not feasible to establish different requirements for local educational agencies that are local government entities.

7. Local government participation:

The State Education Department shared drafts of the proposed regulation with its NCLB Committee of Practitioners, a group responsible for advising the State Education Department on implementing the NCLB in New York State. This Committee includes representatives from local governments that are local educational agencies.

Rural Area Flexibility Analysis

1. Types and estimate of number of rural areas:

The proposed regulation applies to school districts, boards of cooperative educational services (BOCES), county vocational education and extension boards, and charter schools in all parts of the State, including those located in 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 regulation is to incorporate by reference requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals in order to ensure that local educational agencies are in compliance with this Federal law. The Federal regulations that are incorporated by reference require local educational agencies, including those located in rural areas of the State, to ensure that all new teachers who will teach core academic subjects in Title I programs are highly qualified as defined in the Federal regulations, when they are hired. They also require a local educational agency to ensure that by the end of the 2005-2006 school year, all its elementary, middle, and secondary teachers who teach core academic subjects are highly qualified as defined in the Federal regulations.

The NCLB defines what it means for a teacher of core academic subjects to be "highly qualified." In this definition, it provides that a teacher of core academic subjects who is not new to the profession may meet the requirement to be highly qualified, in part, through passing a high objective uniform State standard of evaluation (HOUSSE). The State Education Department has prescribed the HOUSSE for New York teachers of core academics who are not new to the profession. The HOUSSE is to be conducted by the local educational agency either during a pre-employment review or at the time of a teacher's annual review. The proposed regulation requires a local educational agency to provide a teacher of core academic subjects who is not new to the profession, the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE.

The Federal regulations further require local educational agencies, including those located in rural areas of the State, to ensure that each paraprofessional working in a program supported with funds under Title I meets prescribed qualifications. The Federal regulations require all such paraprofessionals to have earned a secondary school diploma or its recognized equivalent. In addition, such paraprofessionals hired after January 8, 2002, and all such paraprofessionals by January 8, 2006, must have completed at least two years of study at an institution of higher education, obtained an associate or higher degree, or passed a State or local assessment that demonstrates knowledge of and ability to assist in instructing prescribed subjects.

The proposed regulation does not impose any additional reporting or recordkeeping requirements beyond those imposed by the NCLB, and does not require regulated parties to hire professional services in order to comply. Except for the requirement to provide a teacher of core academic subjects who is not new to the profession the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE, the regulation does not impose additional requirements on local educational agencies, beyond those imposed by the NCLB.

3. Costs:

The regulation will require local educational agencies to provide a teacher of core academic subjects who is not new to the profession, the opportunity to meet the NCLB requirement to be highly qualified, in part, through passing the HOUSSE. The State Education Department estimates that the cost to local educational agencies for administering this assessment will be minimal. The regulation will not impose any other additional

costs on local educational agencies beyond the costs imposed by the NCLB.

4. Minimizing adverse impact:

The proposed regulation incorporates by reference Federal regulations implementing the requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals. The proposed regulation applies uniformly to all local educational agencies. However, in guidance, the U.S. Secretary of Education established extended deadlines for meeting NCLB teacher quality requirements for local educational agencies in rural areas, and the State Education Department is implementing the extended deadlines.

5. Rural area participation:

Comments on the proposed regulation were solicited from the Department's Rural Advisory Committee whose membership includes school districts located in rural areas. In addition, the Department shared drafts of the proposed regulation with the Department's NCLB Committee of Practitioners, a group responsible for advising the State Education Department on the implementation of the NCLB in New York State. This Committee includes representatives of local educational agencies, teachers, principals, pupil services personnel, administrators, other school-based staff, and parents. The membership includes individuals who represent entities located in rural areas of the State.

Job Impact Statement

The purpose of the proposed regulation is to incorporate by reference requirements of the No Child Left Behind Act of 2001 (NCLB) relating to qualifications of teachers and paraprofessionals in order to ensure that local educational agencies are in compliance with this Federal law. The regulation is needed to provide an underlying legal basis in State regulation for the State Education Department's guidance to local educational agencies on the NCLB requirements.

The Federal regulations implementing the NCLB, incorporated by reference, concern qualifications that teachers and paraprofessionals must meet. These requirements will not affect demand for teachers and paraprofessionals in New York State, or the number of teaching or paraprofessional positions in the State. Because it is evident from the nature of the rule that it will have no impact on the number of jobs or the number of employment opportunities in teaching or any other field, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Department of Environmental Conservation

ERRATUM

The Summary of Express Terms published in the *State Register* for I.D. Nos. ENV-35-04-00024-E and ENV-35-04-00024-P pertaining to 6 NYCRR Part 237, "Acid Deposition Reduction No_x Budget Trading Program," 6 NYCRR Part 238, "Acid Deposition Reduction SO_2 Budget Trading Program," and 6 NYCRR Part 200, "General Provisions" contained a typographical error involving the submission date for the compliance certification report under Part 237 and the date the initial allocations will be performed under Part 238. This error was only in the Summary of Express Terms, and not in the full text of the regulation, as filed with the Department of State. A corrected Summary follows.

Information regarding this correction may be obtained from Michael P. Sheehan, P.E., Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, e-mail: mpsheeha@gw.dec.state.ny.us

Summary of Express Terms

6 NYCRR Part 237, Acid Deposition Reduction NO_x Budget Trading Program

6 NYCRR Part 238, Acid Deposition Reduction SO_2 Budget Trading Program

6 NYCRR Part 200, General Provisions

Part 237 establishes the Acid Deposition Reduction (ADR) NO_x Budget Trading Program and Part 238 establishes the ADR SO_2 Budget Trading Program. These programs are designed to reduce acid deposition in New York State by limiting emissions of NO_x during the non-ozone season and SO_2 year-round from fossil-fuel fired electricity generating units.

Parts 237 and 238 establish emission budgets for NO_x and SO_2, respectively. Parts 237 and 238 establish trading programs by creating and allocating allowances that are limited authorizations to emit up to one ton of NO_x or SO_2 in the respective control periods or any control period thereafter. Affected units are required to hold for compliance deduction, at the respective allowance transfer deadlines, the tonnage equivalent to the emissions at the unit for the control period immediately preceding such deadline.

For Part 237, the first control period commences on October 1, 2004 and concludes on April 30, 2005. Subsequent control periods begin on October 1 and conclude on April 30 the next calendar year. Part 237 applies to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sells any amount of electricity. The control period for Part 238 runs from January 1 to December 31 starting in 2005. Part 238 applies to units that are defined as affected units under the SO_2 portion of Title IV of the Clean Air Act, the federal acid rain program.

Part 237 includes limited exemption provisions that allow units otherwise affected by the regulation to be exempt from nearly all of the reporting, permitting and allowance compliance requirements. All units at a single source may apply for a limited exemption of Part 237 if they accept an emission limitation restricting NO_x emissions from the source during a control period to 25 tons or less. A limited exemption is also available to units that restrict the supply of the unit's electrical output to the grid during a control period to less than 10 percent of the gross generation of the unit. Units that shutdown will no longer be considered NO_x or SO_2 budget units and shall no longer be subject to Parts 237 and 238.

Part 237 requires each NO_x budget unit to have a NO_x authorized account representative (AAR) who shall be responsible for, among other things, complying with the NO_x budget permit requirements, the monitoring requirements, the allowance provisions, and the recordkeeping and reporting requirements. Similarly for Part 238, each SO_2 budget unit needs to have an SO_2 AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate NO_x or SO_2 AAR to perform the above duties.

The NO_x AAR shall submit a complete NO_x budget permit application to the Department by the later of October 1, 2004 or 12 months before the date on which the NO_x budget unit commences operation. The NO_x AAR shall submit to the Department a compliance certification report for each control period by September 30 immediately following the relevant control period. The SO_2 AAR shall submit a complete SO_2 budget application by the later of October 1, 2004 or 12 months before the date on which the SO_2 budget unit commences operation and a compliance certification report for each control period by March 1 immediately following the relevant control period.

The Statewide ADR NO_x Trading Program Budget is 39,908 tons for each control period. By September 1, 2004, the Department will make the NO_x allowance allocations for the 2004-05, 2005-06, 2006-07 and 2007-08 control periods. By September 1 of each subsequent year, the Department will make the NO_x allowance allocations for the control period that commences in the year three years after the deadline for submission.

The Department will determine the number of NO_x allowances to be allocated to each NO_x budget unit by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three most recent control periods, for which data is available by 0.15 pounds per million Btu (first round calculation); (2) determining the allocation factor by dividing 92 percent of the Statewide NO_x budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 92 percent portion of the Statewide NO_x budget.

The Statewide SO_2 trading program budget is 197,046 tons for the 2005 through 2007 control periods and 131,364 tons for each control period starting in 2008. By October 1, 2004, the Department will make the SO_2 allowance allocations for the 2005, 2006 and 2007 control periods. By

January 1 of each year thereafter, the Department will make the SO_2 allocations for the control period in the year that is three years after the year of submission.

The Department will determine the number of SO_2 allowances to be allocated to each SO_2 budget unit in 2005, 2006, and 2007 by: (1) multiplying the greatest heat input experienced by the unit for any single control period among the three preceding control periods by the lesser of either 0.9 pounds per million Btu for coal units or 0.45 pounds per million Btu for non-coal units and the highest actual annual average emission rate from 1998 to 2001 (first round calculation); (2) determining the allocation factor by dividing 94 percent of the Statewide SO_2 budget by the sum of all the above first round calculations (second round calculation); (3) multiplying the allocation factor by each unit's first round calculation result (third round calculation); and, (4) allocating the lesser of the unit's control period potential to emit or the third round calculation plus the unit's proportional share of any additional allowances remaining in the 94 percent portion of the Statewide SO_2 budget. For the 2008 and beyond control periods, SO_2 allocations will be made in the same manner as above except the first round calculation will be made using 0.6 pounds per million Btu for coal and 0.3 pounds per million Btu for fuels other than coal.

For both Parts 237 and 238, new units will be allocated from set-aside accounts which consist of five percent of the Statewide NO_x budget and three percent of Statewide SO_2 budget. The NO_x AAR and SO_2 AAR of the new unit may submit a written request to the Department to reserve for the new unit allowances in an amount no greater than the unit's control period potential to emit. For Part 237, the request must be made prior to October 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For Part 238, the request must be made prior to January 1 of the control period for which the request is being made or prior to the date the unit commences operation, whichever is later. For both Parts 237 and 238, the unit must have all of its required permits for the Department to consider these requests.

The Department will set-aside three percent of both the Statewide NO_x and SO_2 budgets for energy efficiency and renewable energy projects. The Department will award allowances to projects that reduce Statewide NO_x and SO_2 emissions through end-use efficiency measures, renewable energy generation, in-plant efficiency measures or that generate electricity more efficiently than the average heat rate in the State. End-use efficiency and renewable energy projects have priority in reserving award of these allowances.

For both the new unit and energy efficiency and renewable energy set-asides, if more than one project requests allowances from the set-aside and the number requested exceeds the number in the set-aside account, the Department will reserve allowances in the order in which approvable requests were submitted. Requests will be considered to be simultaneous if received in the same calendar quarter. Should approvable requests in excess of the set-aside be submitted in the same quarter, the Department will reserve allowances to each project in an amount proportional to the allowances requested. Unused set-aside allowances will flowback to the NO_x and SO_2 budget units in proportion to their original allocation.

The Department may award supplemental allowances to specific NO_x or SO_2 budget units for NO_x or SO_2 reductions achieved at an upwind source. The NO_x budget unit has until December 31 each year to submit its application for the immediately prior control period. The SO_2 budget unit has until July 1 each year to submit its application for the immediately prior control period. The upwind source must be located in a State that the Administrator has approved revisions to that State's implementation plan (SIP) mandated by the EPA NO_x SIP Call. The Department will award one supplemental allowance for every three tons of emission reductions at the upwind unit. The number of supplemental allowances that may be awarded for each control period is limited to a set percentage of either the Statewide NO_x or SO_2 budgets. The percentage starts at 10 percent for the first control period, then decreases to 8 percent for the second control period, 6 percent for the third control period, 5 percent for the fourth control period and 4 percent for each subsequent control period. Supplemental allowances will be awarded in the order in which complete and approvable applications are submitted. Supplemental allowances must be used for compliance within two control periods after award.

The Department will award early reduction allowances to NO_x and SO_2 budget units that achieve reductions beyond a specified emission rate (0.15 pounds NO_x per million Btu, 0.9 pounds SO_2 per million for coal units and 0.45 pounds SO_2 per million Btu for non-coal units), permitted allowable emissions and the actual average emission rate for the 1999-2000 and 2000-01 control periods for NO_x and the 2000 and 2001 control periods for SO_2. NO_x budget units may apply for early reduction allowances for reductions achieved during the 2001-02, 2002-03 and 2003-04 control periods. SO_2 budget units may apply for early reduction allowances for reductions achieved during the 2002, 2003 and 2004 control periods. NO_x budget units must apply for early reductions allowances by September 1, 2004 and SO_2 budget units must apply by May 1, 2005. Early reduction allowances may only be used for the first two control periods for both the NO_x and SO_2 ADR Programs.

The Department will establish one NO_x and one SO_2 compliance account for each NO_x and SO_2 budget unit and one NO_x and one SO_2 overdraft account for each source with two or more NO_x or SO_2 budget units. Allocations will made into compliance accounts and deductions of allowances for compliance purposes will be made from compliance account and overdraft accounts. Allowances may be held without discount until deducted for compliance, except those created as supplemental or early reduction allowances. The NO_x or SO_2 AAR may specify the allowances by serial number to be deducted for compliance purposes in the compliance certification report or utilize the first in, first out protocols in the regulation. In order to meet the unit's budget emissions limitation for the control period immediately preceding, NO_x allowances must be submitted for recordation in a unit's compliance account or the source's overdraft account by midnight of September 30 and SO_2 allowances must be submitted for recordation by midnight of March 1. After making the deductions for compliance, if a unit has excess emissions the Department will deduct from the unit's compliance account or the source's overdraft account, allocated for a subsequent control period, allowances equal to three times the unit's excess emissions.

In the case of electric grid reliability emergency, NO_x or SO_2 budget units may use for compliance purposes allowances allocated for future control periods. The Department must receive by the allowance transfer deadline a certification from the New York State Department of Public Service that the unit is located in an area that experienced one or more electric system reliability emergencies during the control period stating the starting and ending times of each emergency. The Department must receive from the NO_x or the SO_2 AAR a statement of intent to use future control period allowances and a report detailing the number of NO_x or SO_2 tons emitted during each electric grid reliability emergency. The number of future year allowances is limited to the number of tons emitted during certified emergencies. The Department will deduct allowances pursuant to the first in, first out protocols in the regulations.

Parts 237 and 238 both rely on the provisions of Part 75 for emissions monitoring and reporting. Units that are in compliance with Title IV of the Clean Air Act and 6 NYCRR Part 204 provisions for emissions monitoring and reporting should be in compliance with Parts 237 and 238.

Units that are not NO_x budget units may qualify to become a NO_x budget opt-in unit. A unit may become a NO_x budget opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a NO_x budget unit. Opt-in units receive NO_x allowance allocations by May 31 for each control period based on the lesser of its baseline heat input or heat input for the previous control period multiplied by the lesser of its baseline NO_x emission rate or the most stringent applicable NO_x emission limitation. Opt-in units may withdraw from the program.

Part 200 cites the portions of federal statute and regulations that are incorporated by reference into Parts 237 and 238.

NOTICE OF ADOPTION

Pelt-Sealing and Reporting Requirements for Coyote and Marten

I.D. No. ENV-30-04-00002-A
Filing No. 1015
Filing date: Sept. 14, 2004
Effective date: Sept. 29, 2004

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

Action taken: Amendment of sections 2.20, 6.3 and 180.10 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0917 and 11-1103

Subject: Pelt-sealing and reporting requirements for coyote and marten.

Purpose: To make it easier for hunters and trappers to report a harvested coyote, and enable the collection of biological data on harvested pine marten.

Text or summary was published in the notice of proposed rule making, I.D. No. ENV-30-04-00002-P, Issue of July 28, 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 regulations pertaining to the possession and transportation of game species 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 any significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "type II" action pursuant to the department's SEQR regulations (6 NYCRR § 618.2[d][5]).

Assessment of Public Comment

The Department received one comment concerning the proposed amendments to the requirements for pelt sealing marten.

Comment: An individual expressed concern that he would no longer be allowed to sell marten for taxidermy.

Department response: 6 NYCRR Section 6.3, subdivision (c), currently allows for a "temporary exemption" from the requirement to submit the lower jaw of a marten prior to pelt sealing. The proposed amendment of subdivision (c) extends this exemption to the entire carcass. Therefore, persons who harvest a marten will be allowed to sell a marten for taxidermy under the existing "temporary exemption" provision.

Department of Health

NOTICE OF ADOPTION

Children's Camps

I.D. No. HLT-19-04-00004-A
Filing No. 1018
Filing date: Sept. 14, 2004
Effective date: Sept. 29, 2004

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

Action taken: Amendment of Subpart 7-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 1394(1)

Subject: Children's camps.

Purpose: To add standards for camp trips, swimming, incidental water immersion, on-site activities, and bunk bed guardrails; and clarify potable water standards, update and clarify obsolete wording and standards.

Substance of final rule: The proposed code amendment contains the following provisions:

The existing code sections for on-site and off-site swimming are consolidated into the same subdivision.

Outdated terminology and standards have been updated and clarified.

New standards for camp trip swimming, wilderness swimming and incidental water immersion (non-swimming entry of water) are established.

A definition for "camp trip" is added and frequencies for reviewing trip procedures are specified. Camp trip leader qualifications are amended.

A new staff position of activity leader is established and additional staff requirements for remote on-site activities are specified.

Current code standards and language is made consistent with the New York State Penal and Vehicle and Traffic laws for riflery and horseback riding activities, respectively.

Potable water supply sampling requirements and maximum contaminant levels have been clarified and references to specific sections in the Public Water Supply regulations (Part 5 New York State Sanitary Code) have been updated. Waivers from disinfection are no longer allowed and annual start up procedures are established. A bacteriological sample analysis of each on-site water supply is now required prior to operation each season and each month of operation thereafter.

Camper immunization records requirements are updated and made consistent with the New York State Department of Health Immunization Program recommendations.

Epinephrine administration and potential rabies exposure have been added as required reportable incidents.

Additional prohibitions against transporting passengers in portions of a vehicle that are not designed for passenger occupancy are included.

Specific requirements for food preparation are removed and replaced with a general requirement to comply with Subpart 14-1 (Food Service Code) of the State Sanitary Code.

Bunk beds must have adequate guardrails.

The requirement for camp operators to obtain the permit-issuing official's approval of plans prior to modifying camp facilities is clarified.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 7-2.10(c).

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

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

Although the regulation has been changed since it was published in the *State Register* on May 12, 2004, the changes do not necessitate any changes to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

In response to the May 12, 2004 notice in the *State Register*, a total of 5 written comments were received during the comment period. Written comments were received from: two children's camp operators, two members of the New York State Assembly (one letter), a representative of New York State Department of Environmental Conservation (DEC) and the Essex County Board of Supervisors.

Two letters addressed the cost of bunk bed guardrail installation. One expressed concern that guardrail installation would be cost prohibitive for large not-for-profit camps. The other letter suggested that the Department of Health's Regulatory Impact Statement (RIS) underestimated the cost associated with the requirement.

The letter from the two State Assembly members requested continuation and modification of code language requiring camp vehicles to bear valid inspection stickers.

One letter objected to language that was added to clarify the type of athletic events that are excluded from regulation as a children's camp.

In addition to commenting on the cost of installing bunk bed guardrails, the letter from the DEC representative: (1) expressed concern for increasing the time period prior to camp operation that the permit application must be submitted; (2) supported the water supply requirements but indicated that the costs associated with the changes were underestimated; (3) commented on the need for the DOH to approve construction at DEC camp properties. The letter also commented on other aspects of camp regulations not part of the amendments, including a request for clarification of certain staff certification requirements, recommending a reduction in the minimum age of camp lifeguards and posed questions on enforcement procedures.

The following reflects the major concerns expressed by those who commented and the Department's response:

Bunk Bed Guardrail Cost:

Commenters indicated that: 1) the cost of installation was underestimated in the RIS and that; 2) installation of guardrails is too costly for large not-for-profit camps. One commenter requested that the Department allow camps six years to install guardrails and to exempt bunk beds that are used by children over 12 years old.

Response:

No changes are proposed. The Department's cost estimates for guardrail installation are based on information from camp operators who installed guardrails and on manufacturer's listed retail costs of guardrails. DEC's costs are based on a complete replacement of bunk beds and mattresses, which is not necessary to comply with the regulation.

The Department considered limiting the requirement for bunk beds guardrails to beds used by younger campers; however, analysis of fall injuries from bunk beds showed that falls from beds occurred in all age groups at rates proportional to the camper population.

Although the regulation states that camps have until May 15, 2005 to install guardrails as noted in the RIS, the Department's intent is to allow camps one year from the effective date of the regulation's adoption to comply. If additional time is needed, a camp can request a reasonable extension to comply by applying to the local health department for a variance.

Yearly Permit Application:

A commenter opposed changing the requirement for permit application submission from 30 to 60 days prior to camp operation because not all staff will be hired within the 60 day period.

Response:

No changes are proposed. The additional time from 30 to 60 days is to allow local health departments adequate time to process applications, and issue permits. As part of the application review process the Department must comply with Section 424(a) of the Social Service Law which requires the Department to screen all camp directors through the State Central Registry Database Check to determine if the applicant has been or is currently the subject of a report for child abuse or maltreatment. This process routinely takes in excess of 30 days and must be completed prior to permit issuance. Staff information that is not available at the time the camp's application is due can be submitted at a later date.

Camp Vehicle Inspection:

Commenters state that camper safety will be weakened by discontinuing the existing requirement for camp transportation vehicles to have a current motor vehicle inspection.

Response:

The Department agrees to continue to require vehicles that are used to transport campers and staff to have required registration and inspection stickers. Additionally, the Department is simplifying the language to only refer to required inspection and registration stickers.

Athletic Event Exclusion Clarification:

The commenter objected to the amendment that clarifies types of athletic events that are excluded from regulation as children's camps. The commenter's objection is based on the premise that the amended language will be used to exclude the commenter's camp from regulation and therefore reduce camper safety. The commenter states that if deregulation of his camp is not the intended consequence then his comment is to serve to alert others of his concerns.

Response:

No changes are proposed. The exemption of athletic events from regulation as children's camps is a long standing provision of the State Sanitary code which has been misinterpreted by local health departments and athletic event operators. The exclusion does not pertain to children's athletic camps which conduct tournaments and assume supervisory oversight of participants.

Additional Staff Requirements:

One commenter opposed the regulations because it was believed that the regulation required day camps to hire a "full-time professional nurse" and an activity leader.

Response:

No changes are proposed. The commenter erroneously believed that the changes require day camps to hire a nurse. No changes were made to camp Health Director requirements.

The activity leader requirement will ensure camper safety by requiring staff, who supervise activities with a higher risk of injury, to be a minimum of 18 years old and by requiring the activity leader to be competent in the activity that he or she is supervising. Existing staff may be used to fulfill this requirement.

Water Supply:

A commenter agrees with the requirements for potable water supply disinfection, start-up procedures and sampling, however, believes that the department has underestimated the cost associated with these changes.

Response:

No changes are proposed. The Department's cost estimates are based on actual cost of disinfection equipment installation and estimated operating cost. Cost information was provided by camp operators and the Department's Bureau of Water Supply Protection. Cost estimates for additional potable water testing were obtained from laboratories that conduct the testing.

DOH Approval of Construction:

The DEC letter commented that it seemed redundant for the DOH to review and approve construction at or conversion of DEC owned camps because DEC staff enforce the building code requirements at DEC owned properties.

Response:

No change is proposed. DOH construction and conversion approval applies to many portions of the camp such as the water supply, sewage disposal system and food service which the DOH has sole oversight responsibility. Additionally, the DOH children's camp regulations contain several specific building requirements.

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Resuscitation Equipment in Public Places

I.D. No. HLT-14-04-00013-C

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

The notice of proposed rule making, I.D. No. HLT-14-04-00013-P was published in the *State Register* on April 7, 2004.

Subject: Resuscitation equipment in public places.

Purpose: To provide for the availability of resuscitation equipment in certain public places.

Substance of rule: Public Health Law Section 3000-d requires restaurants, bars, theatres and health clubs to make available resuscitation equipment in quantities deemed adequate by the Department of Health and provides that a notice of the availability and location of such resuscitation equipment shall be given at such public places by means of signs, printed material or other written communication as determined by the Commissioner of Health. These rules and regulations pertain to the quantity and equipment, information to be provided with the equipment, and the type, size, style, location and wording of the required written notice to patrons.

Changes to rule: No substantive changes.

Expiration date: April 7, 2005.

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

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

Insurance Department

EMERGENCY
RULE MAKING

Healthy New York Program

I.D. No. INS-39-04-00002-E
Filing No. 1011
Filing date: Sept. 8, 2004
Effective date: Sept. 8, 2004

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

Action taken: Addition of section 362-2.7 and amendment of sections 362-2.5, 362-3.2, 362-4.1, 362-4.2, 362-4.3, 362-5.1, 362-5.2, 362-5.3 and 362-5.5 of Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: It is estimated that approximately 3 million New York citizens currently do not have health insurance coverage. Access to employer based insurance coverage is heavily impacted by changes in the economy. Many small businesses do not offer health insurance to their employees due to its cost. A significant percentage of the uninsured in this State and Nationwide are employed by small businesses which do not offer health insurance coverage. Chapter 1 of the Laws of 1999 authorized the development of the Healthy New York program for the purpose of bringing affordable health insurance coverage to currently uninsured working people. The program targets uninsured small businesses with a significant percentage of low-wage workers and

uninsured individuals at lower income levels. Since the program's commencement in 2001, over 27,000 uninsured workers have already benefitted from Healthy New York. After several years of operation, we have determined that certain changes allowing for choice in health insurance benefit packages, improved and simplified eligibility and recertification requirements, and an increased reduction in premiums will encourage even more uninsured small businesses and uninsured low income individuals to purchase health insurance coverage.

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

Subject: Healthy New York Program.

Purpose: To reduce costs, lessen complexity, and add a second benefit package.

Text of emergency rule: Section 362-2.5 shall be revised to read as follows:

§ 362-2.5 Annual recertification of eligibility.

(a) Health maintenance organizations and participating insurers shall [annually provide qualifying small employers and qualifying individuals with at least 30 days advance notice of their obligation, pursuant to section 4326(i) of the Insurance Law, to submit a recertification of continued eligibility], at least 90 days prior to the annual renewal date[.], [In conjunction with such notice, health maintenance organizations and participating insurers shall] provide any forms necessary for recertification.

(b) Health maintenance organizations and participating insurers shall annually collect certifications of continued eligibility for the Healthy New York Program [and necessary supporting documentation] and shall be responsible for examination of such certifications [and supporting documentation] to verify that small employers and individuals participating in the program continue to meet eligibility requirements and continue to comply with the terms of the program. Health maintenance organizations and participating insurers shall determine whether the small employer and individual participants continue to meet the requirements for participation in the Healthy New York Program and shall provide written notice of such determination within two weeks of receipt of the annual recertification.

(c) The failure of an employer or individual to provide written certification demonstrating continued eligibility and continued compliance with the terms of the Healthy New York Program shall be a basis for nonrenewal of a qualifying health insurance contract.

(d) [If a given small employer or individual participant fails to provide a recertification 90 days in advance of the annual renewal date, the health maintenance organization or participating insurer shall immediately provide such participant with a written reminder of the obligation to recertify. Such reminder notice shall notify the participant that coverage will be nonrenewed if the participant fails to provide a recertification at least 60 days in advance of the annual renewal date.

(e)]Health maintenance organizations and participating insurers shall provide no less than 45 days written notice to the contract holder and any covered employees of a nonrenewal[pursuant to subdivision (d) of this section]. Such notice of nonrenewal or termination shall set forth the basis for the nonrenewal and include a description of any applicable conversion rights. Such notice shall also include a description of other coverage options available for purchase from the health maintenance organization or participating insurer.

([f]*e*) Healthy New York Program enrollees who have transferred into the program from other public programs pursuant to section 4326(p) of the Insurance Law shall not be required to demonstrate satisfaction of the eligibility requirements set forth in section 4326(c) of the Insurance Law at the time of annual recertification.

A new Section 362-2.7 is added to read as follows:

§ 362-2.7 Healthy New York benefit adjustments.

(a) Beginning June 1, 2003, there shall be no copayment applied to preventive and primary health care services for routine well child visits and necessary immunizations.

(b) Beginning June 1, 2003, health plans shall offer an additional Healthy New York benefit package at a reduced premium rate. Such additional benefit package shall contain all of the benefits set forth in section 4326(d)(1) through (13) of the Insurance Law. The prescription drug benefit set forth in Section 4326(d)(14) shall not be included in the additional benefit package. Qualifying small employers and qualifying individuals shall have the option of choosing among the benefit packages. Qualifying small employers must elect to provide the same benefit package to all of their employees participating in Healthy New York. Once enrolled in the program, any change in the selection of benefit package may occur at the time of annual recertification [only] *or at anytime the premium rate changes. Notice of this option shall be included with any notice of rate change.*

(c) Individuals who are eligible for a federal tax credit under the federal Trade Adjustment Act of 2002, who have 3 months or more of creditable coverage shall be deemed to have sufficient creditable coverage to satisfy the 12-month pre-existing condition waiting period in full.

Section 362-3.2 shall be revised to read as follows:

§ 362-3.2 Small employer participation (other than individual proprietors).

(a) Qualifying small employers must have fifty or fewer eligible employees.

(b) Qualifying small employers must offer coverage to all employees, as defined in this part, who are earning annual wages of $30,000 or less (adjusted annually as per section 4326(c)(1)(F) of the Insurance Law).

(c) Qualifying small employers must offer coverage to all persons who are considered to be eligible employees for the purpose of determining the employer's eligibility to purchase a qualifying group health insurance contract.

(d) Qualifying small employers may, but shall not be required to, offer coverage to part-time workers who work less than the required number of work hours to qualify as employees. However, if part-time workers are included as eligible employees for the purpose of meeting the eligibility requirements set forth in section 4326(c)(1)(B)(iii) of the Insurance Law, then the coverage must be offered to part-time workers.

(e) At least thirty percent of eligible employees must earn annual wages of $30,000 or less (adjusted annually as per section 4326(c)(1)(F) of the Insurance Law).

(f) At least fifty percent of eligible employees must participate in group health insurance coverage through the Healthy New York Program.

(g) At least one eligible employee earning annual wages of $30,000 or less (adjusted annually as per section 4326(c)(1)(F) of the Insurance Law) must participate in group health insurance coverage through the Healthy New York Program.

(h) On behalf of participating employees, qualifying small employers must contribute at least fifty percent of the premium for the qualifying group health insurance contract. *Qualifying small employers choosing to offer coverage to part-time workers may choose the level of premium contribution on behalf of part-time workers.*

(i) An employer's place of business must be located within New York State in order to be eligible to purchase a qualifying group health insurance contract.

(j) Qualifying small employers shall in no case include employers who have provided group health insurance covering their employees during the 12-month period preceding the date of application. Small employer applicants shall be considered to have provided group health insurance if they have arranged for group health insurance coverage (insured or self-insured) on behalf of their employees and contributed *more than a de-minimus amount* towards the cost of coverage on behalf of their employees. *De-minimus contributions are those that do not exceed an average of $50 per employee per month, and shall not prevent small employers from qualifying to purchase health insurance coverage through the Healthy NY program.*

(k) Mid-year fluctuations in group size, wage levels and employee participation shall not serve as a basis for termination of a qualifying group health insurance contract.

(l) Qualifying group health insurance contracts shall be subject to all applicable continuation and conversion rights including those described in sections 3216(c)(5), 3221(m), 4304(e), 4304(h), 4305(d)and 4305(e) of the Insurance Law. A member covered under a qualifying group health insurance contract who elects to exercise a statutory conversion right shall be provided with the option of converting directly to a qualifying individual health insurance contract if such member satisfies the eligibility criteria set forth in section 4326(c)(3)(A)(ii)-(iv) of the Insurance Law.

(m) Upon initial application [and at the time of annual re-certification], health maintenance organizations and participating insurers shall collect and examine certifications of eligibility and any supporting documentation to determine eligibility for a qualifying group health insurance contract and compliance with the terms of the Healthy New York Program.

(n) Qualifying group health insurance contracts shall include a provision providing for a 30 day grace period for payment of premiums.

(o) Qualifying small employers may, in their discretion, impose waiting periods which newly hired workers must satisfy in advance of obtaining coverage under the small employer's qualifying group health insur-

ance contract. However, the waiting period shall not exceed 45 days from the date of hire and it must be the same for all newly hired workers.

Section 362-4.1 shall be revised to read as follows:

§ 362-4.1 Definitions applicable to working uninsured individuals and individual proprietors.

(a) Employed person shall mean, for purposes of determining eligibility for qualifying individual health insurance contracts, any person [currently]employed [(]on a full-time or part-time basis[)] *either currently or within the past 12 months for which monetary compensation was received*[and currently receiving monetary compensation and any person engaged in episodic employment].

(b) [Episodic employment shall mean employment for some portion of at least 20 of the 52 weeks immediately preceding the date of application or recertification.

(c)]Individual proprietor shall mean an individual proprietor who is the sole owner and employee of a business and shall include, but not be limited to, independent contractors and other self-employed persons.

Section 362-4.2 shall be revised to read as follows:

§ 362-4.2 Working uninsured individuals and individual proprietor participation.

(a) Qualifying individuals shall in no case include individuals who have health insurance in force or who would be eligible to obtain health insurance under an employer provided group health benefits plan. Qualifying small employers shall in no case include individual proprietors who have health insurance in force or who would be eligible to obtain health insurance under an employer provided group health benefits plan.

(b) An applicant would be considered eligible for an employer provided group health benefits plan if they are eligible to participate in an employer sponsored health benefit plan (insured or self-insured) and the employer contributes toward the cost of the plan or the payment of the premium.

(c) A working uninsured individual or individual proprietor applicant shall not be denied eligibility for the Healthy New York Program on the basis that their employer provides coverage if the applicant is precluded from participation in the employer sponsored health benefits plan due to conditions of eligibility which are based upon conditions pertaining to employment, as defined in section 52.18(f) of this Title.

(d) A working uninsured individual or an individual proprietor shall be eligible for the Healthy New York Program without regard to the existence of health insurance coverage during the 12-month period preceding application if such health insurance coverage terminated due to one of the events listed in section 4326(c)(3)(C) of the Insurance Law, provided that the applicant has not obtained other health insurance coverage subsequent to such termination.

(e) A working uninsured individual or an individual proprietor shall be eligible for the Healthy New York Program without regard to the existence of health insurance coverage during the 12-month period preceding application if such health insurance coverage terminated due to reaching the age of dependency under such prior coverage, provided that the applicant has not obtained other health insurance coverage subsequent to such termination.

(f) Mid-year fluctuations in household income or employment status shall not serve as a basis for termination of a qualifying health insurance contract.

(g) Working uninsured individuals and individual proprietors must be residents of New York State in order to qualify to purchase a qualifying health insurance contract. Documentation of New York State residency must be provided at initial application [and in conjunction with annual recertification].

(h) Qualifying health insurance contracts shall be subject to all applicable conversion rights including those described in sections 3216(c)(5), 3221(m), 4304(e) and 4305(d) of the Insurance Law. A member covered under a qualifying health insurance contract who elects to exercise a statutory conversion right shall be provided with the option of converting directly to a qualifying individual health insurance contract if such member satisfies the eligibility criteria set forth in section 4326(c)(3)(ii)-(iv) of the Insurance Law.

(i) Upon initial application, [and at the time of annual recertification,] health maintenance organizations and participating insurers shall collect and examine documentation sufficient to demonstrate eligibility for a qualifying health insurance contract and compliance with the terms of the Healthy New York Program. Appropriate forms of documentation shall, at a minimum, include:

(1) proof of residency;

(2) proof of employment status; and

(3) proof of income.

(j) Qualifying health insurance contracts shall include a provision providing for a 30 day grace period for payment of premiums.

(k) In order to purchase a qualifying individual health insurance contract, applicants must be employed persons. Applicants for qualifying individual health insurance contracts may also meet this employment requirement by demonstrating that their spouse (residing in their household) is an employed person.

Section 362-4.3 is hereby amended to read as follows:

§ 362-4.3 Verification of net household income.

(a) To qualify for coverage under the Healthy New York Program, individual proprietors and working uninsured individuals must satisfy the household income criteria set forth in sections 4326(c)(1)(A)(ii) and (3)(A)(iii) of the Insurance Law. For the purpose of determining household income eligibility, household members shall include the applicant, the applicant's legal spouse if residing in the household and any children eligible for coverage under the policy. Income received by the applicant and the applicant's legal spouse residing in the household shall be counted.

(b) Income shall include, but shall not be limited to, the following:

(1) monetary compensation for services including wages, salary, commissions, overtime compensation, fees or tips;

(2) net income from farm and nonfarm self-employment;

(3) social security payments or benefits;

(4) dividends, interest on savings or bonds, regular income from estates or trusts, or net rental income;

(5) unemployment compensation;

(6) government, civilian employee or military retirement or pension or veteran's payments;

(7) private pension or annuity;

(8) alimony[or child support payments received];

(9) regular contributions from persons not living in the household;

(10) net royalties; and

(11) such other income as determined by the superintendent.

(c) Income shall not include public assistance; SSI; foster care payments; capital gains; any assets drawn down as withdrawals from a bank; receipts from the sale of property; or payments for compensation for injury. Also excluded are noncash benefits, such as employee fringe benefits, food or housing received in lieu of wages, and receipts from Federal noncash benefit programs.

(d) Health maintenance organizations and participating insurers shall collect such documentation as is necessary and sufficient to initially[, and annually thereafter,] verify that the household income requirements of the Healthy New York Program have been satisfied. Such documentation may include, but not be limited to one or more of the following:

(1) [annual] income tax returns and, if not prohibited by Federal law for purposes of income verification, the social security account number;

(2) paycheck stubs;

(3) written documentation of income from all employers; or

(4) other documentation of income (earned or unearned) as determined by the superintendent to be acceptable, provided however, such documentation shall set forth the source of such income.

Section 362-5.1 is hereby amended to read as follows:

§ 362-5.1 Definitions applicable to the Direct Payment Market Stop Loss Relief program and state funded stop loss relief for the Healthy New York Program.

(a) Capitation payments means contractually based prepayments made to a health care provider, on a per member per month or a percentage of premium basis, in exchange for health care services to be rendered, referred or otherwise arranged by such provider.

(b) Claims corridor means:

(1) for the direct payment stop loss fund and the direct payment out-of-plan stop loss fund, claims paid on behalf of a covered member in a given calendar year in excess of $20,000 and less than $100,000;

(2) *for calendar years 2001 and 2002,* for the small employer stop loss fund and the qualifying individual stop loss fund, claims paid on behalf of a covered member in a given calendar year in excess of $30,000 and less than $100,000[.]*;*

(3) beginning in calendar year 2003, for the small employer stop loss fund and the qualifying individual stop loss fund, claims paid on behalf of a covered member in excess of $5,000 and less than $75,000.

(c) Claims paid means claims paid by a health maintenance organization on behalf of a covered member pursuant to an individual enrollee direct payment contract issued pursuant to section 4321 of the Insurance Law or an individual enrollee out-of-plan direct payment contract issued pursuant to section 4322 of the Insurance Law. Claims paid shall also mean

those claims paid by a health maintenance organization or participating insurer pursuant to a qualifying health insurance contract issued pursuant to section 4326 of the Insurance Law. Claims paid shall be determined by the date of payment rather than the date of service or date the claim was incurred.

(d) Claims threshold means the aggregate amount that a health maintenance organization or participating insurer must pay out as claims paid before reaching the applicable claims corridor and before becoming eligible for reimbursement on behalf of a covered member in a given calendar year. [For the direct payment stop loss fund and the direct payment out-of-plan stop loss fund, the claims threshold is $20,000. For the small employer stop loss fund and the qualifying individual stop loss fund, the claims threshold is $30,000.]

(e) Direct payment out-of-plan stop loss fund means the fund established pursuant to section 4322-a(a) of the Insurance Law which is available to reimburse health maintenance organizations for certain claims paid during a calendar year on behalf of members covered under individual enrollee out-of-plan direct payment contracts issued pursuant to section 4322 of the Insurance Law.

(f) Direct payment stop loss fund means the fund established pursuant to section 4321-a(a) of the Insurance Law which is available to reimburse health maintenance organizations for certain claims paid during a calendar year on behalf of members covered under individual enrollee direct payment contracts issued pursuant to section 4321 of the Insurance Law.

(g) Health maintenance organization shall mean an organization (or line of business of an article 43 corporation) which has received a certificate of authority to operate as a health maintenance organization from the Commissioner of Health pursuant to article 44 of the Public Health Law, or, an article 43 corporation which is qualified within the meaning of section 1310 (c) of title XIII of the Public Health Service Act.

(h) Individual enrollee direct payment contract means a contract written pursuant to section 4321 of the Insurance Law.

(i) Individual enrollee out-of-plan direct payment contract means a contract written pursuant to section 4322 of the Insurance Law.

(j) Qualifying individual stop loss fund means the fund established pursuant to section 4327(a) of the Insurance Law which is available to reimburse health maintenance organizations and participating insurers for certain claims paid during a calendar year on behalf of members covered under a qualifying individual health insurance contract issued pursuant to section 4326 of the Insurance Law.

(k) Small employer stop loss fund means the fund established pursuant to section 4327(a) of the Insurance Law which is available to reimburse health maintenance organizations for certain claims paid during a calendar year on behalf of members covered under a qualifying group health insurance contract issued pursuant to section 4326 of the Insurance Law.

Section 362-5.2 is hereby amended to read as follows:

§ 362-5.2 Eligibility of claims paid for reimbursement from the stop loss funds.

(a) For each contract eligible for reimbursement from a given stop loss fund, health maintenance organizations and participating insurers shall record and aggregate claims paid on a per member basis. Reimbursement from the applicable stop loss fund shall be calculated based on such per member aggregates.

(b) Health maintenance organizations and participating insurers shall be eligible for reimbursement of 90 percent of claims paid within the applicable claims corridor on behalf of each member covered under an individual enrollee direct payment contract, an individual enrollee out-of-plan direct payment contract, a qualifying group health insurance contract and a qualifying individual health insurance contract.

(c) Health maintenance organizations and participating insurers shall not be entitled to any reimbursement on behalf of a covered member if the claims paid on behalf of that member in a given calendar year do not, in the aggregate, reach the applicable claims threshold. Additionally, claims paid on behalf of a covered member which exceed [$100,000] *the claims corridor* in a given calendar year shall not be eligible for reimbursement from the stop loss funds.

(d) Claims paid within a calendar year shall be determined by the date of payment rather than the date of service or date the claim was incurred. No health maintenance organization or participating insurer shall delay or defer payment of a claim solely for the purpose of causing the date of payment to fall into a subsequent calendar year.

(e) Claims paid shall not include interest paid out by a health maintenance organization or participating insurer pursuant to subsection (c) of section 3224-a(c) of the Insurance Law.

(f) Claims paid which are not submitted for reimbursement prior to April first of the calendar year following the year in which they are paid shall not be eligible for reimbursement from the stop loss funds and shall not be credited as paid claims in any year for the purpose of determining whether the claims threshold has been reached. If the superintendent determines that the claims data submitted in conjunction with a reimbursement request is insufficient to make a reimbursement determination, the superintendent or *the* stop loss fund administrator shall make a request for clarification of the data or for the submission of additional data. Health maintenance organizations and participating insurers shall comply with all such requests within 15 business days. If a health maintenance organization or participating insurer fails to comply with such a request from the superintendent or *the* stop loss fund administrator within 15 business days, the superintendent may in his discretion deem any affected claims ineligible for reimbursement.

(g) For individual enrollee direct payment contracts and individual enrollee out-of-plan direct payment contracts, claims paid shall not include claims paid prior to January 1, 2000. For qualifying group health insurance contracts and qualifying individual health insurance contracts, claims paid shall not include claims paid prior to January 1, 2001.

(h) Claims paid shall include capitation payments which can be directly attributed to securing the services of a given provider or provider group on behalf of a member covered under an individual enrollee direct payment contract or an individual enrollee out-of-plan direct payment contract.

(i) Claims paid may include regional covered lives assessments paid pursuant to section 2807-t of the Public Health Law or percentage surcharges paid pursuant to section 2807-j or section 2807-s of the Public Health Law, but shall not include amounts paid in satisfaction of 24 percent surcharge requirement set forth in section 2807-j 2(b)(i)(B) of the Public Health Law. Health maintenance organizations and participating insurers which include the covered lives assessments shall convert the family covered lives assessment into a per member assessment component in order to be included with claims expenses attributable to any one member.

(j) If a health maintenance organization writes the out-of-network portion of their individual enrollee out-of-plan direct payment contract through an affiliate insurer, then the claims paid by that insurer may be credited in determining whether the health maintenance organization is eligible for reimbursement from the stop loss fund on behalf of the covered member.

Section 362-5.3 is hereby amended to read as follows:

§ 362-5.3 Rating of products eligible for claims reimbursements.

(a) The premium rates established for individual enrollee direct payment contracts, individual enrollee out-of-plan direct payment contracts, qualifying group health insurance contracts and qualifying individual health insurance contracts must recognize the availability of reimbursement from the applicable stop loss fund.

(b) Reimbursement from the applicable stop loss fund shall reduce claims expenses for the purposes of calculating loss ratios, premium rates and premium rate adjustments and for the purposes of determining compliance with section 4308 of the Insurance Law and sections 52.40 through 52.45 of this Title.

(c) Initial rate submissions and rate adjustment applications submitted for individual enrollee direct payment contracts, individual enrollee out-of-plan direct payment contracts, qualifying group health insurance contracts and qualifying individual health insurance contracts shall contain such information as may be needed in order to assist the superintendent in determining the anticipated premium rate impact of the availability of reimbursement from the stop loss funds.

(d) Estimates of anticipated receipts from the stop loss funds may be calculated based upon available enrollment data and such other data as may be deemed appropriate by the superintendent.

(e) Healthy New York qualifying group health insurance contracts and qualifying individual health insurance contracts shall be treated as [small group] individual products for the purpose of applying loss ratio standards.

(f) Health maintenance organizations and participating insurers may reinsure their Healthy New York business in whole or in part if they determine it would favorably impact premium rates. The impact of any such reinsurance shall be factored into the premium rates for affected qualifying group health insurance premiums and individual health insurance premiums.

(g) No later than 30 days from the effective date of this regulation, health maintenance organizations and participating insurers shall submit the policy form amendments and premium rate adjustments necessitated by these amendments.

Section 362-5.5 is hereby amended to read as follows:

§ 362-5.5 Data filing requirements.

(a) The superintendent shall require the submission of necessary claims data in connection with each health maintenance organization's and participating insurer's annual submission of requests for reimbursement from the stop loss funds. Each health maintenance organization and participating insurer shall also provide the superintendent with such additional data, as he deems necessary, to oversee the operation of the stop loss funds and the Healthy New York program. *Reports pertaining to stop loss reimbursement or loss ratio shall be certified by an officer of the company that such report is accurate and complete.* Data to be submitted may include, but shall not be limited to, the following:

(1) the total number of contracts issued within the reporting period and the total number of contracts in force which are covered by the stop loss fund;

(2) the number of qualifying individual health insurance contracts issued which do not provide coverage for dependents;

(3) the number of qualifying small employer health insurance contracts where the employer elects not to make dependent coverage available to employees;

(4) the total number of primary insureds, the total number of dependents covered, and the total number of child dependents covered (a breakdown of these totals by geographic region may be required);

(5) total premium earned and per member per month premium earned for all contracts covered by the stop loss fund for the reporting period;

(6) claims payment data, reported individually for each covered member and/or for each covered member for whom the health maintenance organization or participating insurer has paid claims eligible for reimbursement;

(7) total claims eligible for reimbursement year to date; and

(8) paid claims continuance tables containing the number of claimants and the total number of claims paid by claimant dollar intervals. The superintendent shall provide a written and electronic spreadsheet with specific claimant dollar intervals and any partitions of paid claims other than by stop loss fund.

(b) Data must be reported separately for each stop loss fund. Data reporting periods may be other than a calendar year and reporting frequency for some data could be as often as monthly. Claims payment data shall clearly set forth both the date the claim was incurred and the date the claim was paid. Claims payment data may also be requested on a cumulative basis or in the form of aggregates, categoricals, and averages.

(c) A health maintenance organization or participating insurer shall use a coding system to ensure the privacy of insured individuals. Personally identifying information shall not be submitted with claims data.

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 December 6, 2004.

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

Regulatory Impact Statement

1. Statutory authority: The authority for the amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4318, 4326 and 4327 of the Insurance Law. Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization and its subscribers. Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state. Section 3216 sets forth the standard provisions to be included in individual accident and health insurance policies written by commercial insurers. Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Section 4303 sets forth benefits that must be covered under accident and health insurance contracts. Section 4304 includes requirements for individual health insurance contracts written by non-profit corporations. Section 4305 includes requirements for group health insurance contracts written by not-for-profit corporations. Section 4318 sets forth requirements for accident and health insurance contracts that include a pre-existing condition provision. Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002. Section 4327 creates two stop-loss funds and requires the superintendent to promulgate regulations setting forth the procedures for the operation of the stop loss funds and distribution of monies therefrom. Section 4327(b) sets the stop loss corridors for calendar year 2001. Section 4327(d) provides that, except as specified in subsection (b) with respect to calendar year 2001, the level of stop loss coverage need not be the same. Section 2807-v(1)(h) & (i) of the Public Health Law directs the distribution of funds for purposes of services and expenses related to the Healthy New York program.

2. Legislative objectives: A significant number of New York residents are currently uninsured. A large portion of New York State's uninsured population is made up of individuals employed in small businesses. Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. Additionally, the problem of the uninsured has been exacerbated by national events impacting the labor market and access to employer based health insurance coverage. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program; an initiative designed to encourage small employers to offer health insurance to their employees and to encourage uninsured individuals to purchase health insurance coverage.

3. Needs and benefits: This amendment to Part 362 of 11 NYCRR is necessary to introduce a second Healthy New York benefit package at a reduced premium rate. The second benefit package provides for a lower cost alternative and gives individuals and small businesses choice of a benefit package that meets their needs. Any change in benefit package selection may occur at the time of annual recertification or when the premium rate changes. Any notice of rate change must include notice of this option to change benefit packages. The amendment deletes the well child copayment applicable to Healthy New York in order to enhance access to preventive and primary care for children. The amendment permits Healthy New York to be considered qualifying health insurance under the federal Trade Act of 2002 to allow those qualifying for a federal tax credit to benefit from that credit. The amendment revises the eligibility requirements relating to employment in order to lessen complexity and enhance access. The amendment provides that child support payments shall not be treated as income of the parents for the purpose of determining household income eligibility equitably. The amendment deletes the applicability of certain documentation requirements in connection with the re-certification process and facilitates re-certification closer to annual renewal date. This will allow for simplification of the re-certification process to assist in ensuring continuity of coverage for low income individuals. The amendment clarifies that qualifying small employers choosing to offer coverage to part-time workers may choose the level of premium contribution on behalf these workers to encourage employers to extend coverage to part-time workers. The amendment provides that employers making a de-minimus contribution to employee premiums shall not be crowded out of the Healthy New York Program for this reason. De-minimus contributions are those that do not exceed an average of $50 per employee per month. This de-minimus amendment will avoid penalizing vulnerable employers for such premium contributions and will encourage these employers to purchase Healthy New York subject to a 50% premium contribution requirement. The amendment clarifies that health maintenance organizations and participating insurers may reinsure their Healthy New York business if it achieves a favorable premium impact. The amendment also adjusts the stop loss corridors for the program in order to effectuate a level of premium reduction sufficient to encourage more currently uninsured businesses and individuals to purchase comprehensive health insurance coverage. These revisions should provide low-income individuals and vulnerable small businesses with enhanced access to Healthy New York. This amendment changes the loss ratio standard for Healthy New York contracts from small group to individual and requires that insurer's reports pertaining to stop loss reimbursement or loss ratio be certified.

4. Costs: The Health Care Reform Act allocated a fixed amount to the Healthy New York program to encourage uninsured businesses and indi-

viduals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment will increase the per head cost to the State to be distributed from the overall allocation for the program for workers enrolled in Healthy New York. The amount of this increase will depend on the actual claims experience of the Healthy New York insured population. Because the amendment enhances access to Healthy New York, we would also expect that the amendment will cause the program to operate at enrollment levels which are consistent with the program's full funding capacity. At the same time, by bringing affordable insurance protections to the currently uninsured population, this amendment will avert costs to the State resulting from uninsured individuals accessing necessary and emergency health care services. Enhanced access to market based coverage will result in an introduction of private dollars into the New York's healthcare system along with a savings to heavily subsidized State programs. Further, enhanced access to preventive and primary care services should result in cost savings related to improved children's health.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: This amendment will not impose any new reporting requirements. This amendment simplifies the recertification process reducing the administrative burden and paperwork requirements for health plans and enrollees. This amendment requires that insurers certify all reports pertaining to stop loss reimbursement and loss ratio but does not require any additional reports.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: Throughout the initial implementation of Healthy New York, input has been obtained from interested parties including consumer groups; health plans; health plan associations; business groups; association groups; local chambers of commerce and academics. In addition, independent reports have been prepared examining the impact of the program on the uninsured population. In developing the reports, the contractor interviewed health plans, brokers, businesses and enrollees. Claims data submitted by the participating health plans has also been analyzed. The alternative to introducing a lower cost benefit package would be continuing the current structure of offering a single benefit package option. This alternative was rejected in order to provide businesses and individuals with choice of the benefit package which best meets their needs and to provide for a lower cost alternative. With respect to the amendment to delete the well child copayment, the alternative would be to retain a copayment on these services. This alternative was rejected because it discourages access to preventive and primary care for children. This change was requested by health plans, providers and consumers. The alternative to changing the pre-existing condition exclusion for those eligible to receive a federal tax credit would leave those covered by Healthy NY unable to benefit from the credit. The alternative to addressing employment standards would be to retain the existing fragmented definition of employment within the eligibility criteria. The amended employment standard will lessen complexity, facilitate the application process, and enhance access to the Healthy New York program. The alternative to providing that child support shall not be counted as the income of the parents in determining household income eligibility would be continuing to count such payments as parental income. Consistent with requests of consumers and health plans, this revision will enhance access to the program while ensuring more equitable consideration of parental income. The alternative to simplifying the re-certification process would be continuing with the current requirements on re-certification. The Department believes the revision will assist in ensuring continuity of coverage for low-income individuals. No alternative was considered on providing clarification of employer's ability to choose the appropriate level of premium contribution on behalf of part-time workers. The program was already administered to allow employers choosing to cover part-time workers to choose the premium contribution on their behalf. With respect to the provision providing a de minimus exception to the program's crowd out requirement for employers which are contributing minimally toward payment of employee premiums, the alternative would be continuing to bar employers contributing minimally to premiums from participation in Healthy New York. We have received feedback from employers, brokers, and health plans that providing for an exception would be most equitable. This amendment will permit such employers to purchase Healthy New York subject to a program requirement that they contribute a full 50% of the Healthy New York premium. Concerning the provision addressing reinsurance, the alternative would be an absence of clarification or guidance on the use of reinsurance mechanisms. The Department wishes to clearly advise of the availability of private reinsurance mechanisms to favorably impact Healthy NY premiums. The alternative to changing the stop loss reimbursement levels would be to continue with the current reimbursement levels. Based upon a review of the program's claims data by the Department, health plans and an independent contractor, we have determined that the adjusted stop loss corridors are the most appropriate for the program. We have received feedback from health plans, chambers of commerce, business groups, academics, consumer groups and consumers that the Healthy New York small business program would be improved by enhanced price separation between Healthy New York and other small group products. We have also received feedback that the individual program would be improved if the Healthy New York premium constituted a smaller percentage of the member's household income. Adjustment of the stop loss corridors will achieve enhanced price separation in the small group market while reducing the percentage of income Healthy New York subscribers will need to commit to payment of premium. Increase of the loss ratio standard for Healthy New York contracts will increase the percentage of premium dollar that is received in claims by members. After two complete year's experience, the Department believes that the amendments set forth above will best serve the needs of the program.

9. Federal standards: The Federal Trade Adjustment Act of 2002 extends a federal tax credit to certain individuals to be applied towards the purchase of health insurance. This amendment adjusts the pre-existing condition exclusion period within the Healthy NY to bring it into compliance with the requirements of the Trade Adjustment Act in order to enable eligible individuals to obtain the benefit of this credit.

10. Compliance schedule: This rulemaking will be effective upon adoption. HMOs and providers achieved the June 1, 2003 compliance date without problems because this regulation was previously filed on an emergency basis in March, June, September and December, 2003 and March and June, 2004.

Regulatory Flexibility Analysis

1. Effect of rule: The amendment will affect qualifying small employers, including individual proprietors, by providing them with even greater access to affordable options for comprehensive health insurance. Employers will be provided with choice in the health insurance benefit option that meets their needs, enhanced and simplified eligibility, and improved Healthy New York premium rates. These modifications should encourage the purchase of health insurance coverage through the Healthy New York program. In turn, this will diminish the number of uninsured in New York State. The amendment will not affect local governments. The amendment will affect health maintenance organizations and licensed insurers in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Procedure Act.

2. Compliance requirements: Qualifying small employers and individual proprietors must provide health maintenance organizations and insurers with a certification of eligibility on an annual basis for continued participation in the Healthy New York program. There are no compliance requirements for local governments. This amendment eases existing compliance requirements.

3. Professional services: The qualifying small employer and individual proprietor should not require professional services to comply with the amendment.

4. Compliance costs: The implementing legislation requires that small businesses wishing to participate in the Healthy New York program complete an initial form certifying as to their eligibility to participate in the program. There should be no costs associated with completing this form since the information requested in support of an applicant's eligibility certification is readily available to the small employer. This regulatory amendment does not impose any additional costs. The amendment should reduce insurance costs for small businesses. The amendment imposes no costs to local governments.

5. Economic and technological feasibility: The Healthy New York program is designed to make health insurance premiums more affordable to small businesses. Compliance with the amendment should be economically and technologically feasible for small businesses since it requires no action on their part.

6. Minimizing adverse impact: The amendment minimizes the adverse impact on small employers by lowering premium rates and increases access to affordable health coverage.

7. Small business and local government participation: Adjustment of the stop-loss corridors resulting in premium reduction is based on the Department's discussions with Chambers of Commerce, small businesses and providers. Other changes to the program result from concerns ex-

pressed to the Department by providers, Chambers of Commerce, business councils, and small businesses. This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with an additional opportunity to participate in the rule-making process.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Health maintenance organizations and insurers to which this regulation is applicable do business in every county of the state, including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Small businesses and working uninsured individuals meeting the eligibility criteria for participation in the Healthy New York program and individuals in need of health insurance coverage are located in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires health maintenance organizations to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department by the health maintenance organizations. This revision will not add any new reporting requirements. This amendment does require that a notice of rate change include a notice of the right to change benefit packages. Nothing in this revision distinguishes between rural and non-rural areas.

3. Costs: The Healthy New York program is funded from state monies as part of the Health Care Reform Act of 2000. There are no costs to local governments. Qualifying small businesses and individuals will benefit from the revisions to Part 362 due to the resulting reduced premium rates for Healthy New York insurance. This will benefit those businesses and individuals in both rural and non-rural areas of the State. Additionally, this amendment should facilitate the program's goals of encouraging individuals to purchase insurance on their own behalf and encouraging businesses to purchase insurance on behalf of their employees. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will impact all affected entities the same. Furthermore, the result of the amendment should ultimately be a favorable one since it decreases premium rates and reduces some program complexity.

5. Rural area participation: Adjustment of the stop-loss corridors resulting in premium reduction is based on the Department's discussions with health plans, Chambers of Commerce, small businesses and consumers. Other changes to the program result from concerns expressed to the Department by providers, HMOs, Chambers of Commerce, business councils, small businesses, and consumers. This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with further opportunity to participate in the rulemaking process.

Job Impact Statement

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for individuals, the working uninsured and small employers. This amendment reduces the cost of Healthy New York health insurance, a program for the uninsured, by creating choice in benefit structure, easing confusion regarding eligibility terms, and generally improving access to Healthy New York insurance.

Office of Mental Health

NOTICE OF ADOPTION

Attendance Rules for Teachers

I.D. No. OMH-14-04-00004-A
Filing No. 1017
Filing date: Sept. 14, 2004
Effective date: Sept. 29, 2004

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

Action taken: Amendment of sections 250.1, 250.6 and 251.6 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09(b) and 31.04(a); and Civil Service Law, section 136

Subject: Attendance rules for teachers.

Purpose: To conform overtime eligibility rules to labor management agreements.

Text or summary was published in the notice of proposed rule making, I.D. No. OMH-14-04-00004-P, Issue of April 7, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Dan Odell, Bureau of Policy, Legislation and Regulation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 473-6945, e-mail: dodell@omh.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reimbursement of HCBS Waiver Services

I.D. No. MRD-39-04-00005-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 635-10.4 and 635-10.5 of Title 14 NYCRR.

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

Subject: Reimbursement of HCBS waiver services.

Purpose: To establish an hourly unit of service for HCBS waiver respite services.

Text of proposed rule: ° Subdivision 635-10.4(g) is amended as follows:

(g) Respite services are broadly defined as the provision of intermittent, temporary substitute care of a person on behalf of a primary caregiver who is either a family member, a legal guardian, an advocate, a family care provider or community residence (including IRA) live-in staff. It is a means of providing relief from the responsibilities of daily caregiving.

[(1)] [There shall be two categories of respite care:]

[(i)] [Residential respite includes an overnight stay in an OMRDD operated, certified or approved setting that is not a private residence. This service is limited to recipients living at home, in family care, or in community residences with live-in staff. Locations where the service may be provided would include, but not be limited to, ICF/DDs, family care homes, and community residences.]

[(ii)] [Hourly respite is limited to recipients living at home, in family care, or in community residences with live-in staff. It may be delivered in a person's home, or in ICF/DDs, family care homes, or community residences. When delivered in the person's home, it may be provided for as many as 24 hours in one day.]

(1) Respite is limited to persons living at home, in family care, or in community residences (including IRAs) with live-in staff.

(2) Respite may be provided in any setting that is operated, certified, or approved by OMRDD, including a private residence.

(3) Respite may be provided for as many as 24 hours in one day.

[(2)]*(4)* Respite care services in the person's home shall be delivered by parties who are qualified to provide the level of care specified in the person's individualized service plan.

[(3)]*(5)* Respite care provided in a [supervised community residence] *certified residential setting* shall comply with [Part 686 of this Title] *all regulations applicable to that residential setting*.

Note: Rest of subdivision (g) is renumbered accordingly.

° Subdivision 635-10.5(h) is amended as follows:

(h) Respite services.

[(1)] [Notwithstanding any other provision of regulation, hourly respite may be delivered in a free-standing respite center.]

[(2)]*(1)* Respite service costs are those costs related to the aggregate of all respite services selected and identified in the individualized service plan (ISP) for each person receiving respite services from an approved provider. Total allowable respite service costs shall be determined in accordance with the provisions of section 635-10.4 (g) of this Subpart and Subpart 635-6 of this Part.

[(3)]*(2)* For the purposes of this subdivision, the term approved provider shall mean any party which has entered into a provider agreement with the Department of Health pursuant to OMRDD approval for the reimbursement of costs incurred in delivering allowable respite services as set forth in section 635-10.4(g) of this Subpart.

[(4)]*(3)* Prices for the reimbursement of waiver [residential] respite services shall be determined through a budget review.

(i) In such budget review, OMRDD shall consider the following limitations: provider historical costs for salaries, fringe and administration for such services. If service specific costs are not available, OMRDD shall consider regional salary, fringe and administration costs and the provider's historical costs for salaries, fringe and administration in other comparable OMRDD programs. In addition, OMRDD will consider specific service requirements documented in the ISPs of persons to be served, approved fringe benefit appeals in other OMRDD programs, levels of staff treatment responsibility, the impact of provider agency expansion on agency administration costs, and the allocation of clinical titles required for the service.

(ii) The unit of service for [residential] respite *other than that for determining the unit capital price for a non-State operated free-standing respite center* shall be *one hour equaling 60 minutes and may be claimed in 15 minute increments* [on a per diem basis for a person requiring an overnight stay for a maximum of 24 hours in an approved respite setting in accordance with section 635-10.4(g)(1)(i) of this Subpart. After a 24-hour period, reimbursement shall accrue at the rate of 1/24th the per diem fee for each subsequent full hour of care, unless the person remains overnight, wherein another per diem's reimbursement may be claimed].

(iii) The unit price for [overnight] respite *other than that delivered at a non-State operated free-standing respite center* shall be determined by dividing the OMRDD approved *total annual* budgeted costs by the *corresponding* projected [days] *hours* of utilization.

[(5)] [Prices for the reimbursement of waiver hourly respite shall be determined through a budget review process.]

[(i)] [Prices for hourly respite other than that delivered at a free-standing respite center shall be categorized as basic hourly respite and/or skilled hourly respite.]

[(a)] [Basic hourly respite refers to services by anyone other than a registered nurse or licensed practical nurse.]

[(b)] [Skilled hourly respite refers to services needed because of the person's medical or health care condition, and which are provided by parties holding either a registered nurse or licensed practical nurse credential.]

[(ii)] [In such budget review, OMRDD shall consider the following limitations: provider historical costs for salaries, fringe and administration for such services. If service specific costs are not available, OMRDD shall consider regional salary, fringe and administration costs and the provider's historical costs for salaries, fringe and administration in other comparable OMRDD programs. In addition, OMRDD will consider specific service requirements documented in the ISPs of persons to be served, approved fringe benefit appeals in other OMRDD programs, levels of staff treatment responsibility, the impact of provider agency expansion on agency administration costs, and the allocation of clinical titles required for the service.]

[(iii)] [The unit of service for hourly respite other than that for a free-standing respite center shall be one hour equaling at least 30 minutes but less than 90 minutes of service.]

[(iv)] [The unit of service for hourly respite for a free-standing respite center, other than that for determining the unit capital price for a non-State operated free-standing respite center, shall be one hour equaling 60 minutes and may be claimed in 15 minute increments.]

[(v)] [The unit price for hourly respite other than that delivered at a non-State operated free-standing respite center shall be determined by dividing the approved budgeted costs by the corresponding projected hours of utilization.]

[(vi)] (3)*(iv)* The unit [operating] price for [hourly] respite delivered at a non-State operated free-standing respite center shall [be determined by dividing the approved budgeted operating costs by the corresponding projected hours of utilization] *consist of an operating price and a capital price.*

(a) The unit operating price for a non-State operated free-standing respite center shall be determined by dividing the approved annual budgeted operating costs by the corresponding projected hours of utilization.

[(vii)] *(b)* The unit capital price for a non-State operated free-standing respite center shall be determined by dividing the approved annual budgeted capital costs by 12 and shall be paid monthly. *Capital costs for a non-State operated free-standing respite center shall be determined in accordance with Subpart 635-6 of this Title, except that the provider may be reimbursed for debt service in lieu of depreciation and interest, in which case only OMRDD approval is required.*

Note: Rest of subdivision (h) is renumbered accordingly.

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

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

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

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 and fees for services in facilities licensed or operated by OMRDD.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law by making necessary revisions to the fee-setting methodology for Home and Community-based (HCBS) Waiver services. Specifically, the proposed amendments will ensure the continuation of appropriate funding, under the HCBS waiver, to providers of respite services.

3. Needs and Benefits: Currently, respite services are delivered as HCBS waiver residential respite or hourly respite, and as a family support service under separate contracts with agencies. This regulatory proposal will streamline and simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. The change would not operationally affect the services. This regulation would complete the second phase in simplifying respite price setting, which began with changing the unit of service for free-standing respite centers to an hourly unit of service in October, 2003.

In addition to consolidating and simplifying the price setting and billing, this regulatory change will also enable OMRDD to convert the funding of services now delivered as State-funded family support services to Medicaid-funded HCBS waiver services. Medicaid funding would then be available to pay for respite services delivered to those individuals that are eligible for enrollment (or already enrolled) in the HCBS waiver. This conversion will result in cost savings to the State.

4. Costs:

a. Costs to the Agency and to the State and its local governments: The conversion of respite funded as a family support service to an HCBS waiver service will make Medicaid funding available for services delivered to individuals who are HCBS-waiver eligible. Individuals who are not HCBS-waiver eligible will continue to receive State-funded services as before. Currently, 8800 individuals receive respite funded by family support services at a cost of approximately $14.4 million to the State annually. OMRDD estimates that after conversion, the necessary funds will be provided by a Federal share of approximately $2.9 million, a State share of approximately $10.1 million and a local government share of $1.4 million. The local government share will be divided among the counties.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the

amendments. The change will not have fiscal impacts for providers of services because the revisions will not affect respite service utilization nor change overall amounts of reimbursement to authorized providers of respite services.

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 proposed amendments. The changes to the reimbursement provisions for the hourly unit of service for respite services will only change the unit of service for which the provider submits claims and the source of funding. In fact, the change implementing the hourly unit of service for respite should reduce the paperwork and associated administrative costs by simplifying and streamlining agency billing.

7. Duplication: The proposed 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 proposed rule making contains what OMRDD believes to be necessary amendments to reconfigure existing respite services as HCBS waiver services with an hourly unit of service. If OMRDD did not revise the current regulations, it would not be able to access federal financial participation for respite services provided to all persons enrolled in the HCBS waiver who receive such services. Also, without the conversion of all programs to the hourly unit of service, there would be possible confusion and administrative inefficiencies associated with managing a multiplicity of prices for respite services and different billing and reimbursement provisions.

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

10. Compliance Schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act.

Regulatory Flexibility Analysis

1. Effect on small business: These proposed regulatory amendments will apply to agencies which provide respite services to persons with developmental disabilities. The OMRDD has determined, through a review of the providers' contracts or certified cost reports, that the organizations which provide respite services employ fewer than 100 employees at the discrete certified or authorized sites and would therefore be classified as small businesses.

The proposed 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 have any negative effects on these small business respite service providers, and that they will continue to provide appropriate funding for respite services.

Currently, respite services are delivered as HCBS waiver residential respite or hourly respite, and as a family support service under separate contracts with agencies. This regulatory proposal will streamline and simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. The change would not operationally affect the services delivered. This regulation would complete the second phase in simplifying respite price setting, which began with changing the unit of service for free-standing respite centers to an hourly unit of service in October, 2003.

In addition to consolidating and simplifying price setting and billing, this regulatory change will also enable OMRDD to convert the funding of services now delivered as State-funded family support services to Medicaid-funded HCBS waiver services. Medicaid funding would then be available to pay for respite services delivered to those individuals that are eligible for enrollment (or already enrolled) in the HCBS waiver. This conversion will result in cost savings to the State.

Since the amendments will not affect respite service utilization or the overall levels of funding for these services, there will be no adverse fiscal impacts on current providers of respite services as a result of the proposed amendments. Further, the proposed amendments will not impose any additional or increased compliance requirements. In fact, the change implementing the hourly unit of service for respite should reduce the paperwork and associated administrative costs by simplifying and streamlining agency billing.

An unreimbursed local government share is involved for some consumers receiving HCBS waiver services. OMRDD estimates that the provision of HCBS respite services under the proposed amendments will result in a local government share of approximately $1.4 million on an annualized aggregate basis. This cost impact will be divided among the counties.

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

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

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

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: With the exception of the local government cost share addressed above, the amendments will have no adverse economic impacts.

OMRDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. However, since these amendments require no compliance response of regulated parties or local governments, the approaches outlined cannot be effectively applied.

7. Small business and local government participation: OMRDD consulted extensively with representative providers of respite and members of provider organizations regarding the development of these amendments. In particular, the Implementation Task Force of the Commissioner's Statewide Family Support Services Advisory Committee participated in the process of consolidating respite services to the hourly unit of service.

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. The amendments only provide necessary revisions to the reimbursement methodology for HCBS waiver services. Specifically, this regulatory proposal will streamline and simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. The amendments will not have adverse effects on regulated parties because they will not affect respite service utilization or the overall levels of funding for these services. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodology is primarily based upon budgeted costs of such HCBS waiver services, or of similar services operated by the provider or similar providers in the same area. Thus, the reimbursement methodology has been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an impact on jobs and/or employment opportunities. This finding is based on the fact that the proposed rule making revises the reimbursement methodology for HCBS waiver respite services to simplify price setting and agency billing by establishing the same mechanism for price setting for all types of respite, with a unit of service equivalent to one hour. Because the amendments will not affect respite service utilization or the overall levels of funding for these services, it is reasonable to expect that the rule will not have an adverse impact on jobs and employment opportunities.

Division of Probation and Correctional Alternatives

EMERGENCY RULE MAKING

Interstate/Intrastate Transfer and Related Supervision Rule

I.D. No. PRO-39-04-00003-E
Filing No. 1012
Filing date: Sept. 9, 2004
Effective date: Sept. 9, 2004

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

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

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

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

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

Subject: Interstate/intrastate transfer and related supervision rule.

Purpose: To regulate interstate and intrastate transfers.

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

Amend paragraph (a) to read as follows:

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

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

(2) DNA testing, where applicable; and

(3) Sex Offender Registration, where applicable.

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

Section 349.4 Requirement for the intrastate transfers of supervision.

Amend paragraph (a) to read as follows:

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

Amend paragraph (b) to read as follows:

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

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

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

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

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

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

(i) subject's current address and prospective address if different;

(ii) subject's current home and business telephone number;

(iii) *the order and conditions of probation*;

(iv) *a copy of any existing order of protection;*

(v) a brief description of the underlying offense or act;

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

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

Amend paragraph (e) to read as follows:

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

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

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

(3) periodic supervision reports;

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

(5) any records regarding outstanding financial obligations;

(6) a photograph if available;

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

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

(9) any other information authorized by law;

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

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

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

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

[A completed form DPCA-200 for registering probationers shall be promptly forwarded to the Division of Probation and Correctional Alternatives and the Division of Criminal Justice Services] *Where any convicted adult, youthful offender, juvenile offender/youthful offender, or juvenile delinquent adjudicated of a fingerprintable offense, is under probation supervision, a copy of the DPCA-200 or through an equivalent process*

which indicates the sending probation department's ORI number and the probationer's registration number associated with the underlying offense for which such individual is under supervision shall be transmitted to the DPCA via DCJS with a copy to the receiving probation department.

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

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

A new paragraph (g) shall read as follows:

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

Section 351.6. Reporting Requirements.

Amend Section 351.6 to read as follows:

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

This notice is intended to serve 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 December 7, 2004.

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

Regulatory Impact Statement

1. Statutory Authority:

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

2. Legislative Objectives:

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

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

3. Needs and Benefits:

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

The Division of Probation and Correctional Alternatives is aware of several problems that have arisen in the area of interstate and intrastate transfer that can be remedied by establishing restrictions and conditions that must be met before transfers are initiated and completed. A recent incident involved an upstate sex offender with other pending sex crimes being judicially transferred and allowed to relocate to another jurisdiction. The transfer occurred before the receiving probation agency could verify residency or conduct a criminal history check. Public safety was compromised as the offender was subsequently arrested for another sex offense in the receiving jurisdiction while the transfer was pending. The proposed rule amendment will ensure that this situation does not happen again by establishing stronger measures that clearly delineate responsibilities of sending and receiving jurisdictions that will both guarantee offender accountability and compliance and protect public and victim safety.

Examples of new key regulatory provisions are highlighted below:

- Since transfer of probation is a privilege not a right, an intrastate probationer will be required to agree in writing to comply with any and all conditions set forth by the receiving court and to be subject to any other fees and/or surcharges. This is consistent with current law in the area of interstate transfer which recognizes that a probationer must agree to abide by any conditions set by a supervising agency, compact administrator or designee.
- It is reasonable and sound that no intrastate transfer shall be initiated by a sending probation department when there exists a pending violation of probation in its jurisdiction unless the receiving department consents and that sending department take all necessary steps to ensure fingerprinting, DNA testing and Sex Offender Registration are completed prior to transfer and that orders of protection are provided with application papers in a timely manner.
- Several provisions will establish better intrastate transfer procedures by prohibiting transfers whenever there exists pending criminal charge(s) in the sending jurisdiction except under certain enumerated circumstances, and disallowing transfers involving sex offenders and domestic violence where a probationer is not a resident of the receiving jurisdiction at the time of sentencing or disposition until the receiving jurisdiction has had sufficient opportunity to investigate the prospective transfer and verify actual residence prior to the probationer's movement to the receiving jurisdiction.
- Fingerprinting provisions will help ensure that all enumerated cases, subject to fingerprinting laws are indeed fingerprinted prior to leaving the original jurisdiction. Fingerprinting guarantees notification to the probation department of record of any new arrest. Further, it is important to law enforcement that criminal history records are accurate.
- DNA collection is recognized as a vital law enforcement investigatory and prosecutorial tool as technology provides for positive identification of offenders. It has proven instrumental in solving previously unsolved crimes and in assisting defense in their efforts to prove their client's innocence.

- Sex Offender registration helps ensure that offenders are registered in a timely fashion and that risk assessments are conducted, and that appropriate law enforcement agencies are notified. Through registration and risk assessment, the public and/or entities with vulnerable populations may have access to certain information that is timely and accurate.
- New language which will require affording the receiving department the opportunity to investigate enumerated sex offenses and those involving domestic violence of nonresidents will promote victim safety, enhance supervision and as a result foster community safety.
- The change in our supervision rule as to reporting requirements merely clarifies a previous written communication on this subject to guarantee that the Division of Probation and Correctional Alternatives has a more comprehensive database of individuals under probation supervision.

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

4. Costs:

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

5. Local Government Mandates:

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

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

6. Paperwork:

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

7. Duplication:

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

8. Alternatives:

In view of the need to ensure uniformity in transfer procedures, establish stronger minimum standards to promote offender accountability and protect public and victim safety, regulation in this area is critical and no other alternatives were determined appropriate.

9. Federal Standards:

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

10. Compliance Schedule:

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

Regulatory Flexibility Analysis

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

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

DPCA has discussed the proposed rule changes with the Executive Committee of the Council of Probation Administrators, which include a cross-section of urban, rural, and suburban jurisdictions, and we have circulated and submitted comments on a prior draft of this regulatory reform to all probation directors and the State Probation Commission. The current emergency regulatory amendments incorporate numerous verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experience in the area of interstate and intrastate transfers and supervision

reporting and to clarify certain procedural provisions. Details of many of these changes are highlighted in the regulatory impact statement. Moreover, DPCA did not find differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

Job Impact Statement

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

Public Service Commission

NOTICE OF ADOPTION

Transfer of Certain Biomass Processing by Niagara Mohawk Power Corporation

I.D. No. PSC-15-04-00030-A
Filing date: Sept. 14, 2004
Effective date: Sept. 14, 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 03-M-1767 authorizing the transfer of Niagara Mohawk Power Corporation's (Niagara Mohawk) biomass facility to Dunkirk Power LLC.

Statutory authority: Public Service Law, section 70

Subject: Transfer of certain biomass processing technology.

Purpose: To approve an asset purchase agreement between Dunkirk Power LLC and Niagara Mohawk.

Substance of final rule: The Commission approved a joint petition by Niagara Mohawk Power Corporation and Dunkirk Power LLC for the transfer of the biomass processing system from Niagara Mohawk to Dunkirk Power LLC for the price of $1.00.

Final rule compared with proposed rule: No changes.

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(03-M-1767SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Incentive Mechanism by Verizon New York Inc.

I.D. No. PSC-39-04-00006-P

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

Proposed action: The commission is considering incentive mechanisms that will be applied to the metrics and standards for certain types of hot cuts.

Statutory authority: Public Service Law, section 94.2

Subject: Incentive mechanisms pursuant to the Performance Assurance Plan (PAP).

Purpose: To establish incentive mechanisms for Verizon New York Inc.'s basic, project and batch hot cuts under the PAP; and other related matters.

Substance of proposed rule: Pursuant to case 02-C-1425, a process has been ordered to develop metrics and performance standards for Verizon's basic, project and batch hot cuts. Following the establishment of such metrics and standards, incentive mechanisms need to be adopted, in accordance with case 99-C-0949 for Verizon's basic, project and batch hot cut processes; as well as other related matters.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(99-C-0949SA12)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Tariffing Certain Intrastate Telecommunications Services by Verizon New York Inc.

I.D. No. PSC-39-04-00007-P

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

Proposed action: The commission is considering whether to require Verizon New York Inc. to tariff certain intrastate telecommunications services, specifically: (1) any enterprise UNE-P arrangement not disconnected or migrated after Aug. 22, 2004; and, (2) any four line or more UNE-P arrangement not disconnected or migrated after Aug. 22, 2004.

Statutory authority: Public Service Law, section 92

Subject: Tariffing certain intrastate telecommunication services.

Purpose: To consider whether to tariff certain intrastate telecommunications services.

Substance of proposed rule: The Commission is considering whether to require Verizon New York Inc. to tariff certain intrastate telecommunications services, specifically: (1) any enterprise UNE-P arrangement not disconnected or migrated after August 22, 2004; and, (2) any four line or more UNE-P arrangement not disconnected or migrated after August 22, 2004.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(04-C-0861SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

License Agreement of Real Property by the Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and M&M Parking Systems

I.D. No. PSC-39-04-00008-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 or reject, in whole or in part, a petition filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KeySpan) and M&M Parking Systems (M&M) for: (1) approval under section 70 of the Public Service Law for a license agreement of a part of KeyS-

pan's Coney Island Service Station property to M&M; (2) approval of the proposed accounting and rate treatment for the transaction; and (3) related relief.

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

Subject: Consideration of the license agreement of real property, the accounting and rate treatment for the transaction, and related matters.

Purpose: To consider the license agreement of a part of property, the proposed accounting and rate treatment (associated with the transaction), and related matters.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, the License Agreement of a part of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (KeySpan) Coney Island Service Station property, located at 817 Neptune Avenue, Brooklyn, New York to M&M Parking Systems (M&M). Under this License Agreement, M&M proposes to use this property for the purpose of daily and monthly parking of vehicles. By this petition, the parties seek approval of this License Agreement. The Commission is also considering KeySpan's proposed accounting and rate treatment for the transaction, including its proposal to use the revenues generated from this transaction to defray operation and maintenance expenses, and other related issues.

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

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

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

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

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

(04-G-1029SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Regulation of Utility Operations by Eastman Kodak Company

I.D. No. PSC-39-04-00009-P

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

Proposed action: The commission is considering a petition from Eastman Kodak Company regarding regulation of its water service business under Public Service Law, art. 6 and other matters related to lightened and incidental regulation of its utility businesses, and the application of the Public Service Law to its unregulated businesses. The commission may adopt, modify or reject, in whole or in part, the relief requested.

Statutory authority: Public Service Law, sections 66(13), 80(11), 89-c(11), 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Regulation of the electric, gas, steam, and water utility operations of Eastman Kodak Company.

Purpose: To apply regulations to the electric, gas, steam, and water utility operations of Eastman Kodak Company.

Substance of proposed rule: The Commission is considering a petition from Eastmam Kodak Company regarding regulation of its water service business under Public Service Law Article 6 and other matters related to lightened and incidental regulation of its utility businesses, and the application of the Public Service Law to its unregulated businesses. The Commission may adopt, modify or reject, in whole or in part, the relief requested.

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

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

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

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

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

(04-M-0388SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Utility Franchise by Niagara Mohawk Power Corporation and National Grid Communications, Inc.

I.D. No. PSC-39-04-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a joint petition filed by Niagara Mohawk Power Corporation (Niagara Mohawk) and National Grid Communications, Inc. (Gridcom) for approval of a master license agreement authorizing the installation of wireless facilities on Niagara Mohawk property.

Statutory authority: Public Service Law, sections 70 and 110

Subject: Transfer of utility franchise and control of transactions between utilities and affiliated interests.

Purpose: To require utilities to request approval of transfers of franchises and transactions with affiliated interests.

Substance of proposed rule: Niagara Mohawk and Gridcom have filed a joint petition requesting approval of a master license agreement authorizing the installation of wireless facilities on Niagara Mohawk property.

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

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

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

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

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

(04-M-1078SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Loan Agreement between Fishers Island Water Works Corp. and Citizens Bank of Connecticut

I.D. No. PSC-39-04-00011-P

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

Proposed action: The commission is considering the petition of Fishers Island Water Works Corp. for approval to enter into a loan agreement with Citizens Bank of Connecticut for an amount of $530,000.

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

Subject: Issues of stock, bonds and other forms of indebtedness.

Purpose: To allow Fishers Island Water Works Corp. to enter into a loan agreement.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify the petition of Fishers Island Water Works Corp. for approval to enter into a loan agreement with Citizens Bank of Connecticut for an amount of $530,000. The loan would repay a loan owed to Fishers Island Telephone Corp. and refinance present debt.

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

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

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

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

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

(04-W-1073SA1)

State University of New York

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Tuition and Fees Schedule

I.D. No. SUN-39-04-00012-EP
Filing No. 1027
Filing date: Sept. 14, 2004
Effective date: Sept. 14, 2004

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

Action taken: Amendment of section 302.1(b)-(i) of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Amendment of these regulations needs to proceed on an emergency basis because increases in tuition must be effective for the Fall 2004 semester. Earlier proposed rule making related to this matter was not possible because the Education Law precludes the University from adopting tuition changes until after the State Budget is enacted, and this did not occur until August 11, 2004.

Subject: State University of New York Tuition and Fees Schedule.

Purpose: To increase tuition for nonresident students enrolled in associates, bachelors and graduate degree programs and for resident and nonresident students in the professional programs of pharmacy, law, medicine, dentistry, physical therapy and optometry.

Text of emergency/proposed rule: (b)(1) Students enrolled in degree-granting undergraduate programs leading to an associate degree and nondegree granting programs of at least one regular academic term in duration which have been approved as eligible for tuition assistance programs awards.

Tuition

(i) Students, New York State residents: $2,175 per semester or $1,450 per quarter.

(ii) Students, out-of-state residents: [$5,150] *$5,305* per semester or [$3,433] *$3,537* per quarter.

(iii) Special students, New York State residents: $181 per semester credit hour or $121 per quarter credit hour.

(iv) Special students, out-of-state residents: [$429] *$442* per semester credit hour or [$286] *$295* per quarter credit hour.

(v) The president of a college of technology or a college of agriculture and technology may establish differing rates of tuition for the college for students enrolled in degree-granting programs leading to an associate degree and nondegree granting programs, with the approval of the chancellor or designee, based on considerations which may include but are not limited to time, location, cost, services provided, enrollment management and access, so long as such tuition rates do not exceed the tuition rates specified in this subdivision.

(2) Students enrolled in degree-granting undergraduate programs leading to a baccalaureate degree and nondegree granting programs of at least one regular academic term in duration which have been approved as eligible for tuition assistance programs awards.

Tuition

(i) Students, New York State residents: $2,175 per semester or $1,450 per quarter.

(ii) Student, out-of-state residents: [$5,150] *$5,305* per semester or [$3,433] *$3,537* per quarter.

(iii) Special students, New York State residents: $181 per semester credit hour or $121 per quarter credit hour.

(iv) Special students, out-of-state residents: [$429] *$442* per semester credit hour or [$286] *$295* per quarter credit hour except that for non-matriculated students (as defined in section 145-2.4 of this Title), the president of a State-operated institution may establish a differing tuition rate(s), with the approval of the chancellor or designee, in accordance with guidelines to be issued by the chancellor, provided that such tuition rate(s) does not exceed the rate specified in this paragraph and is not lower than 15 percent above the rate in subparagraph (iii) of this paragraph. Tuition and fees charged to such non-matriculated students shall be set to cover total direct instructional costs for such students.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(c) (1) Students enrolled in graduate programs leading to a master's, doctor's or equivalent degree with the exception of those degrees set forth in (c)(2).

Tuition

(i) Students, New York State residents: $3,450 per semester or $2,300 per quarter.

(ii) Students, out-of-state residents: [$5,250] *$5,460* per semester or [$3,500] *$3,640* per quarter.

(iii) Special Students, New York State residents: $288 per semester credit hour or $192 per quarter credit hour.

(iv) Special students, out-of-state residents: [$438] *$455* per semester credit hour or [$292] *$303* per quarter credit hour.

(2) Students enrolled in graduate programs leading to a master of business administration degree (M.B.A.).

Tuition

(i) Students, New York State residents: $3,550 per semester or $2,367 per quarter.

(ii) Students, out-of-state residents: [$5,400] *$5,670* per semester or [$3,600] *$3,780* per quarter.

(iii) Special Students, New York State residents: $296 per semester credit hour or $197 per quarter credit hour.

(iv) Special students, out-of-state residents: [$450] *$473* per semester credit hour or [$300] *$315* per quarter credit hour.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(d) Students enrolled in the professional program of pharmacy.

Tuition

(1) Students, New York State residents: [$6,050] *$6,290* per semester or [$4,033] *$4,193* per quarter.

(2) Students, out-of-state residents: [$10,350] *$10,870* per semester or [$6,900] *$7,247* per quarter.

(3) Special students, New York State residents: [$504] *$524* per semester credit hour or [$336] *$349* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [$863] *$906* per semester credit hour or [$575] *$604* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(e) Students enrolled in the professional program of law (J.D. and LL.M).

Tuition

(1) Students, New York State residents: [$5,850] *$6,085* per semester or [$3,900] *$4,057* per quarter.

(2) Students, out-of-state residents: [$8,700] *$9,135* per semester or [$5,800] *$6,090* per quarter.

(3) Special students, New York State residents: [$488] *$507* per semester credit hour or [$325] *$338* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [$725] *$761* per semester credit hour or [$483] *$508* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(f) Students enrolled in medicine programs.

Tuition

(1) Students, New York State residents: [$8,400] *$9,400* per semester or [$5,600] *$6,267* per quarter.

(2) Students, out-of-state residents: [$14,950] *$16,750* per semester or [$9,967] *$11,167* per quarter.

(3) Special students, New York State residents: [$700] *$783* per semester credit hour or [$467] *$522* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [$1,246] *$1,396* per semester credit hour or [$831] *$931* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(g) Students enrolled in dentistry programs.

Tuition

(1) Students, New York State residents: [$6,650] *$7,400* per semester or [$4,433] *$4,933* per quarter.

(2) Students, out-of-state residents: [$13,100] *$14,800* per semester or [$8,733] *$9,867* per quarter.

(3) Special students, New York State residents: [$554] *$617* per semester credit hour or [$369] *$411* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [$1,092] *$1,233* per semester credit hour or [$728] *$822* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(h) Students enrolled in the professional program of physical therapy.

Tuition

(1) Students, New York State residents: [$5,250] *$5,460* per semester or [$3,500] *$3,640* per quarter.

(2) Students, out-of-state residents: [$8,350] *$8,770* per semester or [$5,567] *$5,847* per quarter.

(3) Special students, New York State residents: [$438] *$455* per semester credit hour or [$292] *$303* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: [$696] *$731* per semester credit hour or [$464] *$487* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(i) Students enrolled in optometry programs.

Tuition [and Fees]

(1) Students, New York State residents: [$6,550] *$6,810* per semester or [$4,367] *$4,540* per quarter.

(2) Students, out-of-state residents: [$12,450] *$13,075* per semester or [$8,300] *$8,717* per quarter.

(3) Special students, New York State residents: [$546] *$568* per semester credit hour or [$364] *$378* per quarter credit hour or equivalent.

(4) Special students, out-of-state residents:[$1,038] *$1,090* per semester credit hour or [$692] *$726* per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 12, 2004.

Text of rule and any required statements and analyses may be obtained from: Brian Stenson, Vice Chancellor for Finance and Business, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5175, e-mail: stensonb@sysadm.suny.edu

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

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

Regulatory Impact Statement

1. Statutory Authority: Education Law, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each State-operated institution of the University. In accordance with Section 355(2)(h)(4) of the Education Law, no change in tuition can be made effective prior to enactment of the annual budget for the State University of New York.

2. Legislative Objectives: The present measure will provide essential financial support for the operations of the State University of New York, in furtherance of its statutorily defined mission as set forth in Article 8 of the Education Law.

3. Needs and Benefits: The present measure establishes a series of tuition increases in the degree programs of the State University of New York as necessitated by the 2004-2005 State Budget.

The tuition changes authorized by this measure affect associate, baccalaureate and graduate programs at the State-operated campuses of the State University of New York and the professional schools within the State University of New York including the School of Law and Pharmacy at the State University of New York at Buffalo, the four medical schools of the State University, the Schools of Dental Medicine, the Professional Program in Physical Therapy at State University of New York at Buffalo and Stony Brook and the College of Optometry.

This measure is needed in order to provide essential financial support for the State-operated campuses of the State University of New York for the 2004-2005 fiscal year. The State University's cost for graduate, professional and medical programs exceeds the funding provided by tuition and State support. Currently, support cannot be shifted from undergraduate programs to graduate, professional and medical programs. It should be noted that even with the recommended increases, the tuition charged at the State-operated campuses of the State University of New York is still competitive when compared to peer institutions at other university systems.

The present amendment will increase annual tuition for nonresident students enrolled in associates degree programs to $10,610; for baccalaureate degree students to $10,610; for masters and doctoral degree students to $10,920; and for students enrolled in master of business administration degree programs to $11,340.

This amendment mostly affects the medical and professional schools within the State University of New York. Tuition for New York State residents at the School of Law will increase to $12,170 per year ($18,270 non-residents), and at the Pharmacy School to $12,580 per year ($21,740 non-residents).

The measure also increases tuition by $2,000 per year for New York State residents and by $3,600 for nonresidents enrolled in the four medical schools of the State University of New York.

The amendment also increases tuition for students in the professional dental program (D.D.S.) at the Universities at Buffalo and Stony Brook. Under this measure, tuition will increase $1,500 per year for New York State residents and $3,400 per year for nonresidents. Increases for students enrolled in the Professional Program of Optometry at the College of Optometry are increased by $520 for residents and $1,250 for nonresidents.

Finally, the amendment increases tuition for students pursuing the terminal Professional Degree in Physical Therapy. The new annual rate is $10,920 for New York State residents and $17,540 for nonresidents.

4. Costs: Students enrolled in these programs of the State University of New York will be required to pay additional tuition ranging from $210 per year for associate's degrees to $3,600 for the Schools of Medicine.

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

6. Paperwork: No parties will experience any new reporting responsibilities. State University of New York publications and documents containing notices regarding costs of attendance will need to be revised to reflect these changes.

7. Duplication: None.

8. Alternatives: There is no acceptable alternative to these increases given the significant changes in the core budget of the University under the 2004-2005 State Budget, specifically the reductions in State tax-appropriated funding and the requirement for increased funding from student tuition revenues.

9. Federal Standards: None.

10. Compliance Schedule: Not applicable.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

NOTICE OF ADOPTION

Student Activity Fees

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

Filing No. 1026

Filing date: Sept. 14, 2004

Effective date: Sept. 14, 2004

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

Action taken: Amendment of section 302.14 of Title 8 NYCRR.

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

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

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

Text or summary was published in the notice of proposed rule making, I.D. No. SUN-20-04-00010-P, Issue of May 19, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Edward Engelbride, Assistant Vice Chancellor for University Life, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5116, e-mail: engelbed@sysadm.suny.edu

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Terms and Conditions of Employment

I.D. No. SUN-28-04-00012-A

Filing No. 1028

Filing date: Sept. 14, 2004

Effective date: Sept. 29, 2004

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

Action taken: Amendment of sections 335.5(b) and 335.15 and Appendices B-1 and B-2 and addition of new Appendix B-3 to Title 8 NYCRR.

Statutory authority: Education Law, sections 355(2)(b) and 355-a

Subject: Terms and conditions of employment of certain employees of the State University of New York.

Purpose: To remove certain professional titles of State University of New York employees involved in fundraising from eligibility for permanent appointment and provide eligibility for term appointments for such professional titles.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. SUN-28-04-00012-EP, Issue of July 14, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Michael D. Morgan, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5886, email: morganmi@sysadm.suny.edu

Assessment of Public Comment

The agency received no public comment.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Case Management Subsystem

I.D. No. TDA-13-04-00002-A
Filing No. 1016
Filing date: Sept. 14, 2004
Effective date: Sept. 1, 2005

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

Action taken: Amendment of section 600.6 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 21, 21(2), 34(3)(f) and 82

Subject: Use of the case management subsystem of the welfare management system.

Purpose: To require social services districts to use the case management subsystem of the welfare management system for purposes of maintaining appropriate documentation to support their recovery and recoupment claims against public assistance recipients and record of all repayment of public assistance.

Text or summary was published in the notice of proposed rule making, I.D. No. TDA-13-04-00002-P, Issue of March 31, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

Assessment of Public Comment

During the public comment period for the regulation concerning the statewide implementation of the Cash Management System (CAMS), the Office of Temporary and Disability Assistance (OTDA) received comments from two social services districts and one State agency. No changes have been made to the proposed regulations as a result of the comments.

Comment: One social services district requested a delay in implementation until anticipated implementation costs could be added to future budgets.

Response: The proposed regulation is estimated to create a savings over costs of implementation, and any additional administrative costs may be submitted as part of a district's annual administrative cap waiver plan. The implementation is not expected to create financial hardships for the districts. In addition, adequate notice for budgeting implementation exists because implementation is scheduled for September 2005.

Comment: One social services district requested a delay in implementation until interfacing between the State's and the district's systems has been updated. The district also requested that the State fully fund the implementation.

Response: OTDA will continue to work with the district regarding the requirements for implementation and to improve systems interfacing. Implementation is scheduled for September 2005. The proposed regulation is estimated to create a savings over costs of implementation and any additional administrative costs may be submitted as part of a district's annual administrative cap waiver plan.

Comment: The State agency requested that information recorded on the CAMS system be made available to them after the implementation has been complete.

Response: OTDA will work with the State agency to provide the requested information.

NOTICE OF ADOPTION

Exemption of Earned Income

I.D. No. TDA-17-04-00016-A
Filing No. 1014
Filing date: Sept. 13, 2004
Effective date: Sept. 29, 2004

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

Action taken: Amendment of section 352.20(a) and (b) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 131-a(8), 158, 349 and 355(3)

Subject: Exemption of earned income.

Purpose: To implement L. 2002, ch. 246, concerning the exemption of the earned income of full-time and part-time students when determining eligibility for public assistance.

Text of final rule: Subdivisions (a) and (b) of section 352.20 are amended to read as follows:

(a) All of the earned income of a dependent child in receipt of Family Assistance (FA) or Safety Net Assistance (SNA), who is a full-time *or part-time* student [or part-time student not employed full time], is exempt and must be disregarded as income or resources in determining eligibility or degree of need. For the purpose of this subdivision:

(1) [school attendance] *full-time student* means attending a school, college or university or a course of vocational or technical training designed to fit a person for gainful employment or participation in the Jobs Corps under the Job Training Partnership Act; *and*

(2) part-time [school attendance] *student* means *attending* a school, *college or university or a course of vocational or technical training designed to fit a person for gainful employment or participation in the Jobs Corps under the Job Training Partnership Act* [schedule] equal to at least one half of a full-time curriculum as determined by the educational authority [; and] .

[(3) full-time employment shall not include any work that is not considered to be full-time employment by industry-wide standards or any work between school semesters, including during summer vacation.]

(b) All of the earned income of an FA or SNA dependent child who is a full-time *or part-time* student shall be exempt and disregarded for purposes of the gross income test(s) contained in section 352.18 of this Part and in determining eligibility and degree of need. [This exemption shall be limited to six months in a calendar year.]

Final rule as compared with last published rule: Nonsubstantive changes were made in section 352.20(b).

Text of rule and any required statements and analyses may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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

Although changes were made to the proposed amendments, the changes do not require that the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement be revised.

Assessment of Public Comment

During the public comment period for the amendments that would implement Chapter 246 of the Laws of 2002 concerning the exemption of earned income of students, this Office received one comment from the Assembly. The comment recommended that the published amendments be revised to refer to part-time students in the section that requires the exemption and disregard of earned income of students for purposes of the gross income test and in determining eligibility and degree of need for assistance. The recommended change has been made.

NOTICE OF CONTINUATION
NO HEARING(S) SCHEDULED

Temporary Absences

I.D. No. TDA-17-04-00001-C

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

The notice of proposed rule making, I.D. No. TDA-17-04-00001-P was published in the *State Register* on April 28, 2004.

Subject: Temporary absences.

Purpose: To make it easier for social services districts to determine which public assistance recipients, who are temporarily absent from the district of residence, continue to be eligible for assistance.

Substance of rule: The proposed amendments will make it easier for social services districts to determine which public assistance recipients, who are temporarily absent from the public assistance household, continue to be eligible for assistance.

Currently, section 349.4 of 18 NYCRR establishes criteria for determining whether a person who is in receipt of federally-aided assistance, such as Family Assistance, is temporarily absent from the public assistance household but remains eligible to continue to receive such assistance. Section 352.30(a) of 18 NYCRR provides that public assistance can be provided to a household that includes persons who are temporarily absent from the household and the amount of such assistance provided to the household is not reduced as a result of the absent members. This provision is not limited to public assistance that is federally aided but includes all public assistance, regardless of the source of funds. The deletion of the reference to "federally-aided assistance" in section 349.4 of 18 NYCRR will make it clear to social services districts that individuals who are temporarily absent from the public assistance household are eligible to receive such assistance, regardless of the source of the assistance.

Section 352.3(c) of 18 NYCRR contains provisions concerning the length of time an allowance for household expenses can be provided when the recipient of such assistance is temporarily out of their home because they are receiving care in a medical institution. This section only authorizes the payment of shelter expenses and no other assistance and applies to recipients who are temporarily absent from their home. This section and the provisions of 18 NYCRR 349.4 and 352.30(a) have caused confusion in the social services districts when deciding which section should be applied when determining whether a public assistance recipient should continue to receive assistance while temporarily absent from their home and the amount of assistance. The repeal of 18 NYCRR 352.3(c), along with the amendments to 18 NYCRR 349.4, will eliminate this confusion and allow all public assistance recipients who are temporarily absent from their homes to be treated the same.

Changes to rule: No substantive changes.

Expiration date: April 28, 2005.

Text of proposed rule and changes, if any, may be obtained from: Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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