

# RULE MAKING ACTIVITIES

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

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

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

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## Banking Department

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

#### Mortgage Fraud Reporting

I.D. No. BNK-15-05-00006-P

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

**Proposed action:** Addition of Part 414 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-d and section 37(3)

**Subject:** Mortgage fraud reporting.

**Purpose:** To require reporting of fraud or larceny committed in connection with a mortgage loan application.

**Text of proposed rule:** A new Part 414 is added to read as follows:

#### MORTGAGE FRAUD REPORTING

(Statutory authority: Section 37(3) of the Banking Law, Article 12-D of the Banking Law)

##### § 414.1 Purpose.

The Legislature has enacted Article 12-D of the Banking Law to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operated fairly, honestly and efficiently, free from deceptive and anti-competitive practices. Prompt reporting of instances of mortgage fraud provides the Superintendent with timely, valuable information that may be used to address and eliminate fraud within the New York residential mortgage lending industry and to

protect consumers, thereby allowing mortgage lending to be conducted in accordance with the intent of the Legislature. The reporting requirements of this Part are in addition to the reporting requirements of Part 300 of the Superintendent's Regulations.

##### § 414.2 Definitions.

For the purposes of this Part:

(a) The term fraud shall mean an intentional misrepresentation of any material fact or conduct that is intended to prevent the discovery of a material fact with respect to the documentation submitted in connection with an application for a mortgage or conduct that is intended to deceive, injure or defraud any person or entity involved in the processing of a mortgage loan, from the submission of an application for such loan to the closing of such loan. Without limitation, examples of "fraud" include, whether or not a criminal offense, forgery, dishonesty, making of false entries, omission of true entries and any misrepresentation of a material fact.

(b) The term larceny shall have the meaning set forth in Section 155.05(1) of the Penal Law, which states, "A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."

(c) The term material fact shall mean any fact necessary for a lender to make a credit decision regarding the mortgage loan application. Material facts include, but are not limited to, the name, social security number and address of the applicant, the employment and salary history of the applicant, information related to the credit history of the applicant, information regarding the encumbrances against the property to be purchased and the validity of the appraisal of said property.

(d) The term mortgage loan shall mean a loan made to one or more individuals primarily for personal, family or household use primarily secured by a first or junior mortgage on one to four family residential real property located in this State or by certificates of stock or other evidence of ownership interests in, and proprietary from, corporations, partnerships formed for the purpose of cooperative ownership of real estate in this State. Such term shall not include residential loan products exempt pursuant to section 39.5 of Part 39 of the General Regulations of the Banking Board.

##### § 414.4 Report.

Each mortgage broker, mortgage banker and exempt organization shall submit a report to the Superintendent within ten (10) days after the discovery of any fraud or larceny committed by any party in connection with the submission and processing of an application for a mortgage loan. Such report shall be submitted to the New York City office of the New York State Banking Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR.

##### § 414.5 Contents of Report.

Each report submitted to the Superintendent pursuant to this section shall utilize the form prescribed by the Department, which is available from the New York City office of the Department located at the address stated in Supervisory Policy G 1 of Title 3 of the NYCRR. Such form is also available on the website of the Department, which is located at <http://www.banking.state.ny.us>.

If it is determined subsequent to the submission of a report that material information contained therein is false or otherwise inaccurate, the submitting entity shall be deemed to be in compliance with the reporting requirements of this section if the submitting entity reasonably believed that the information was true and accurate at the time the report was

submitted and the submitting entity took reasonable steps to verify its truth and accuracy.

§ 414.6 Subsequent reports.

In addition to the report required by section 414.5 of this Part, such mortgage broker, mortgage banker or exempt organization shall promptly submit to the Superintendent reports, in the form of a letter, of any additional material developments relating to the reportable events, and each such report shall contain a statement of the actions taken or proposed to be taken with respect to such developments.

§ 414.7 Confidentiality.

Reports submitted pursuant to this Part 414 shall be treated as confidential pursuant to Supervisory Procedure G 106.6.

§ 414.8 Effective Date.

The filing of reports hereunder shall be required commencing sixty (60) days after the effective date of this Part 414.

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

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

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

**Regulatory Impact Statement**

1. Statutory authority:

Section 37(3) of the Banking Law states that the Superintendent may require a mortgage banker to make special reports to the Superintendent at such times as prescribed by the Superintendent. Further, Banking Law § 597 states that in addition to the annual reports, the Superintendent may require mortgage brokers, mortgage bankers and exempt organizations to file additional regular or special reports as he deems necessary to effectuate their proper supervision.

2. Legislative objective:

The Legislature enacted Article 12-D of the Banking Law to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operated fairly, honestly and efficiently, free from deceptive and anti-competitive practices. Mandating the prompt reporting of instances of mortgage fraud by members of the residential mortgage lending industry will provide the Superintendent with timely, valuable information that will assist in addressing and eliminating fraud within the industry and protect consumers in accordance with the intent of the Legislature.

3. Needs and benefits:

Since the formation of the Department's predatory lending task force in 2000, the Department's Criminal Investigation Bureau ("CIB") and Mortgage Banking Division ("MBD") have conducted a number of investigations and examinations that have uncovered instances of fraudulent and larcenous behavior by the principals and employees of registrants and licensees that resulted in significant financial harm to New York consumers. During discussions with individuals who were involved in the tainted transactions but who did not themselves commit any improper activity, the Department learned that the members of the mortgage lending industry are unwilling to report such events to the Department for fear of being ostracized by their industry peers. It is the contention of the industry that even registered mortgage brokers that operate in accordance with applicable laws and regulations would be reluctant to bring business to a lender that previously referred a matter to the Department.

Since registrants and licensees are not currently required to report instances of mortgage lending fraud or larceny, and they are reluctant to do so voluntarily, New York consumers suffer monetary losses as a result. Therefore, since the mortgage lending industry has been unable to properly monitor itself in this area, the Department believes that it is necessary to implement this proposed regulation. By requiring licensees and registrants to provide this information to Department within ten days after discovery, the number and magnitude of these incidents will likely be reduced or limited.

Representatives of the Department discussed this regulatory proposal with representatives of the mortgage lending industry. While the industry is generally supportive of the proposal, there was some concern regarding

enforcement by the Department of the filing obligation and the potential penalty for failing to file a required report.

4. Costs:

While the proposal will impose some costs on mortgage brokers, mortgage bankers and exempt organizations for completing and submitting the required reports on instances of mortgage fraud or larceny, and will impose some costs on the Department in processing such reports, these costs are expected to be modest.

5. Local government mandates:

The proposal imposes no burdens on local governments.

6. Paperwork:

The proposed regulations would require mortgage brokers, mortgage bankers and exempt organizations to complete and file a new type of report with the Banking Department. However, to the extent that imposition of the reporting requirement has the effect of reducing mortgage fraud or larceny, there will be fewer reportable events.

7. Duplication:

None.

8. Alternatives:

While the Department considered not imposing a reporting requirement in connection with mortgage fraud or larceny, it believes that the proposed requirements are necessary in order for the Department to properly regulate the mortgage lending industry in New York. The Department met with members of an industry trade group regarding the contemplated regulation. The industry raised concerns as to when reports would be required under the regulation, particularly as regards the definitions of reportable fraud or larceny. In response to these concerns, the proposed regulation describes what is a material fact and includes an intent requirement in the definition of fraud.

9. Federal standards:

There are no comparable Federal regulations.

10. Compliance schedules:

In order to ensure that affected parties have adequate time to familiarize themselves with the new reporting requirement and integrate this requirement into their compliance processes, it is proposed that the requirement to file reports become operative 60 days after the effective date of the regulation.

**Regulatory Flexibility Analysis**

Proposed new Part 414 of the Superintendent's Regulations will not impose any appreciable or substantial technological impact, or reporting, recordkeeping or other compliance requirements on local governments. The residential mortgage lending in New York has evolved into a sophisticated marketplace that emphasizes the use of the latest technology, by entities of all sizes, to analyze and retain information regarding consumers seeking to obtain a mortgage loan. These entities are not part of any local governmental unit. While mortgage brokers, mortgage bankers and exempt organizations may incur some minimal additional administrative costs associated with the additional reporting requirements, the Department believes that the requirements of the proposed rule are essential for the proper regulation of the mortgage lending industry in New York State and the protection of New York consumers.

**Rural Area Flexibility Analysis**

While mortgage brokers, mortgage bankers and exempt organizations may incur some additional administrative costs associated with the additional reporting requirements, the Department believes that the reports required by the amendments are essential for the proper regulation of the mortgage lending industry in New York State. In addition, the new reporting requirements will reduce costs to New York consumers by reducing fraud in the mortgage lending business.

**Job Impact Statement**

A Job Impact Statement is not submitted since the proposed rule has no effect on the creation or elimination of jobs. The new reporting requirements contained in the proposed rule may result in the imposition of some additional administrative costs on mortgage brokers, mortgage bankers and exempt organizations. However, it is believed that these costs, at best, would be negligible. However, the Department also believes that these amendments are necessary to properly monitor and regulate the mortgage lending industry in New York.

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-15-05-00008-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Temporary State Commission of Investigation.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Temporary State Commission of Investigation, by increasing the number of positions of Assistant Counsel from 4 to 5.

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-15-05-00009-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and classify a position in the exempt class in the Department of Labor.

**Text of proposed rule:** Amend Appendix(es) 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading "Administration - General," by decreasing the number of positions of Investigator from 2 to 1 and by increasing the number of positions of Secretary from 6 to 7.

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-15-05-00010-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by adding thereto the position of Metropolitan Regional Real Estate Coordinator (1).

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-15-05-00011-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Parole," by increasing the number of positions of Assistant Regional Director of Parole Operations from 4 to 5.

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

#### Jurisdictional Classification

**I.D. No.** CVS-15-05-00012-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the non-competitive class in the Department of Health.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Health, by deleting therefrom the subheading "Roswell Park Cancer Institute" and the positions of φAffirmative Action Administrator 2 (1), φAssistant Director of Cancer Institute (3), φAssociate Chief Cancer Research Clinician, Cancer Research Clinician 1, Cancer Research Clinician 2, Cancer Research Prosthodontist (1), Cancer Research Scientist 1, Cancer Research Scientist 2, Cancer Research Scientist 3, Cancer Research Scientist 4, Cancer Research Scientist 5, Cancer Research Scientist 6, φCancer Research Scientist 7, Cashier (part-time), φChief Cancer Research Clinician, φChief Cancer Research Maxillofacial Prosthodontist (1), Dental Technician (1), φDeputy Director of Cancer Institute (1), φDirector of Cancer Institute (1), φDirector of Cancer Institute Planning (1), φInstitute Marketing Program Coordinator (1), Medical Dosimetrist (1), Pharmacist (half-time) (1), Pre-Doctoral Fellow (8), Resident Dentist (1), Senior Cancer Dental Surgeon, Senior Cancer Research Clinician (various specialties) and Supervising Facial Restoration Technician (1).

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-15-05-00013-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Education Department, by deleting therefrom the position of φCoordinator of Doctoral Program Review (1) and by adding thereto the position of φState Education Psychometrician (1).

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-15-05-00014-P

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

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

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

**Subject:** Jurisdictional classification.

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

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by deleting therefrom the positions of Senior Youth Division Counselor (6), Senior Youth Division Counselor (1) (Until first vacated after September 13, 1988), φSupervising Youth Division Counselor (1) and Youth Division Counselor (20) and by adding thereto the positions of Youth Counselor 1 (20), Youth Counselor 2 (6) and φYouth Counselor 3 (1).

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-15-05-00015-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from and classify positions in the non-competitive class in the Insurance Department.

**Text of proposed rule:** Amend Appendix(es) 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Insurance Department, by deleting therefrom the positions of Associate Insurance Frauds Investigator (10), φChief Insurance Frauds Investigator (1), Insurance Frauds Investigator (22), Principal Insurance Frauds Investigator (2) and Senior Insurance Frauds Investigator (20) and by adding thereto the positions of Insurance Frauds Investigator 1 (22), Insurance Frauds Investigator 2 (20), Insurance Frauds Investigator 3 (10), Insurance Frauds Investigator 4 (2) and φInsurance Frauds Investigator 5 (1).

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

**Data, views or arguments may be submitted to:** John F. Barr, Executive Deputy Commissioner, Department of Civil Service, State Campus, Albany, NY 12239, (518) 457-6212, e-mail: jxb25@cs.state.ny.us

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 19, 2005 under the notice of proposed rule making I.D. No. CVS-03-05-00009-P.

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## Department of Correctional Services

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

#### Employee Records

**I.D. No.** COR-15-05-00001-P

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

**Proposed action:** This is a consensus rule making to amend section 5.30(b) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112; and Public Officer's Law, section 87

**Subject:** Employee records.

**Purpose:** To set the fee for copies of employee records.

**Text of proposed rule:** Subdivision (b) of section 5.30 of Title 7 NYCRR is hereby amended as follows:

(b) Former employees may request to have copies of records sent to them. The custodian of the record of a former employee shall respond to a request from a former employee in accordance with section 5.35 of this Part. Present employees may be charged for copies according to section 5.36[5.40] of this Part, unless otherwise provided by collective bargaining agreement.

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

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

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

#### Consensus Rule Making Determination

The Department of Correctional Services has determined that no person is likely to object to the proposed rule as written because it merely corrects a typographic error. The amended text of section 5.30(b) changes the citation in the last sentence from the non-existing section 5.40 to the correct section 5.36.

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely corrects a typographic error regarding fees for copying employee records.

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## Education Department

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

#### No Child Left Behind Act of 2001—School/District Accountability

**I.D. No.** EDU-15-05-00007-P

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

**Proposed action:** Amendment of section 100.2(p) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

**Subject:** No Child Left Behind Act of 2001 (Pub. L. 107-110) - school/district accountability.

**Purpose:** To establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the Federal No

Child Left Behind Act of 2001 relating to academic standards and school/district accountability.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.emsc.nysed.gov/irts/accountability/>):** The State Education Department proposes to amend subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, effective July 14, 2005. The following is a summary of the provisions of the proposed rule.

In general, subdivision (p) of section 100.2 is amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the federal No Child Left Behind Act of 2001 (NCLB), Public Law 107-110, relating to academic standards and school and school district accountability. The substantive amendments are as follows:

Section 100.2(p)(1) is amended to replace references to the New York State Alternate Assessment (NYSAA) with "State alternate assessment"; to specify that performance levels shall include scores reported for students with disabilities who participate in the local assessment option for the 2004-2005 and prior school years; to define "significant medical emergency"; and to define participation rates with respect to the scoring of state assessments.

Section 100.2(p)(2) is amended to establish criteria for determining the accountability status of newly registered and merged schools.

Section 100.2(p)(5) is amended to clarify citation references and to establish criteria for determining adequate yearly progress in districts with 40 or more students based on the amended definition of participation rates, and to include clarifying language on data collection and evaluation of participation rates.

Section 100.2(p)(6) is amended to specify that a public school that fails to make adequate yearly progress for two consecutive years in the same accountability performance criterion in section 100.2(p)(14) or the same accountability indicator in section 100.2(p)(15) shall be designated in the next school year as a "School Requiring Academic Progress: Year 1."

Section 100.2(p)(7) is amended to provide that commencing with 2003-2004 school year results, a district that failed to make adequate yearly progress on all criteria in section 100.2(p)(14) in a subject area, or all indicators in section 100.2(p)(15)(i) and (ii), or the indicator in section 100.2(p)(15)(iii), for two consecutive years shall be designated as a "district requiring academic progress". The amendment further provides that commencing with 2003-2004 school year results: (a) a district identified as requiring academic progress for failing to make adequate yearly progress on all criterion in section 100.2(p)(14) in a subject area shall be removed from such status if it makes adequate yearly progress for two consecutive years on any criterion in the subject area for which it is identified, (b) a district which fails to make adequate yearly progress on both indicators set forth at sections 100.2(p)(15)(i) and (ii) shall be removed from such status if it makes adequate yearly progress for two consecutive years on either of such indicators, and (c) a district which fails to make adequate yearly progress on the indicator set forth in section 100.2(p)(15)(iii) shall be removed from such status if it makes adequate yearly progress for two consecutive years on such indicator; provided that for a district requiring academic progress that is removed from such status based on 2002-2003 and 2003-2004 results, such district shall have made adequate yearly progress in 2002-2003 on each criterion or indicator for which it was identified.

The first sentence of section 100.2(p)(14)(vii) is amended to replace "indicator" with "criterion."

Section 100.2(p)(15) is amended to specify the elementary science indicator and the middle-level science indicator as: (a) an index of 100 that may be incremented annually, as the commissioner deems appropriate, or progress in relation to performance in the previous school year; and (b) beginning in 2004-2005, 80 percent of student enrolled on all days of the test administration, who did not have a significant medical emergency, received valid scores.

Section 100.2(p)(16) is amended to clarify existing language and citation references and to establish criteria for inclusion of transferring students in the high school cohort.

**Text of proposed rule and any required statements and analyses may be obtained from:** Ann Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** James A. Kadamus, Deputy Commissioner, Education Department, Rm. 875, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915, e-mail: jkadamus@mail.nysed.gov

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

**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 Board of Regents to appoint the Commissioner of Education as the Chief Administrative Officer of the Department, which is charged with the general management and supervision of all public schools and the educational work of the State.

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

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 provides the Commissioner with the authority to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or any statute relating to education, and shall be responsible for executing all educational policies determined by the Regents. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with federal agencies to implement such law.

**LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the federal No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110, relating to academic standards and school/district accountability.

**NEEDS AND BENEFITS:**

Commissioner's Regulations section 100.2(p) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic standards and school and school district accountability. The State and local educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure that all LEAs, public elementary schools and public high schools make adequate yearly progress (AYP). Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards. The proposed amendment is in response to recent guidance provided by the U.S. Department of Education and is necessary to ensure consistency with NCLB accountability requirements and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446).

The proposed amendment defines "alternate assessment" as a State alternate assessment recommended by the committee on special education, for use by students with disabilities as defined in section 100.1(t)(2)(iv) in lieu of a required State assessment. The purpose is to allow the State greater flexibility in exceeding the one percent cap on Proficient scores from students with significant cognitive disabilities in determining adequate yearly progress.

The proposed amendment defines "significant medical emergencies" and "participation rates" for purposes of determining the performance of

schools and districts on State assessments and for purposes of determining adequate yearly progress.

The proposed amendment establishes criteria for determining the accountability status of newly registered schools, merged schools and schools transferring responsibilities for one or more grades to another entity. The proposed amendment establishes the factors to be considered by the Commissioner. The list includes, but is not limited to, school mission, school administration and staff, grade configurations and groupings of students, zoning patterns, curricula and instruction and facilities.

The proposed amendment establishes criteria for determining adequate yearly progress in districts with 40 or more students based on the amended definition of participation rates.

The proposed amendment establishes criteria and procedures to designate school districts that fail to make adequate yearly progress and establishes a timeline, in compliance with the federal No Child Left Behind legislation of 2001, indicating the effective date when each district and school accountability groups will be subject to the performance criteria specified in subparagraph (14)(v)(a) and (b) of section 100.2(p).

The proposed amendment also clarifies provisions governing the inclusion of transferring students in the high school cohort.

**COSTS:**

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None. The rule does not impose any additional costs on private parties.

Cost to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed amendment will not impose any costs on the State, the Education Department or LEAs beyond those imposed by State and federal statutes.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes. The proposed amendment is in response to recent guidance provided by the U.S. Department of Education and is necessary to ensure consistency with NCLB accountability requirements and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446).

**PAPERWORK:**

The proposed amendment will not impose any additional reporting or other paperwork requirements.

**DUPLICATION:**

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements, and is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability.

**ALTERNATIVES:**

There were no significant alternatives to the proposed rule and none were considered. The proposed rule is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The proposed rule has been carefully drafted to meet these specific federal and State requirements.

**FEDERAL STANDARDS:**

The proposed rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the NCLB, relating to academic standards and school and school district accountability. The proposed amendment is in response to recent guidance provided by the U.S. Department of Education and is necessary to ensure consistency with NCLB accountability requirements and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446).

**COMPLIANCE SCHEDULE:**

The proposed rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The State and LEAs are

required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended.

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State plan filed with the federal government, that the state has developed and is implementing a single, statewide accountability system to ensure that all local educational agencies (LEAs), public elementary schools and public high schools make AYP. Each state must implement a set of high-quality, yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards. Each state must establish a timeline for AYP to ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described in NCLB section 1111(b)(2)(C)(v) will meet or exceed the state's proficient level of academic achievement on such academic assessments.

It is anticipated that regulated parties may achieve compliance with the proposed rule by its effective date.

#### **Regulatory Flexibility Analysis**

##### **Small Businesses:**

The rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### **Local Government:**

##### **EFFECT OF RULE:**

The proposed rule generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965, as amended.

##### **COMPLIANCE REQUIREMENTS:**

The proposed rule is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any additional compliance requirements beyond those imposed by State and federal statutes.

The proposed amendment defines "alternate assessment" as a State alternate assessment recommended by the committee on special education, for use by students with disabilities as defined in section 100.1(t)(2)(iv) in lieu of a required State assessment. The purpose is to allow the State greater flexibility in exceeding the one percent cap on Proficient scores from students with significant cognitive disabilities in determining adequate yearly progress.

The proposed amendment defines "significant medical emergencies" and "participation rates" for purposes of determining the performance of schools and districts on State assessments and for purposes of determining adequate yearly progress.

The proposed amendment establishes criteria for determining the accountability status of newly registered schools, merged schools and schools transferring responsibilities for one or more grades to another entity. The proposed amendment establishes the factors to be considered by the Commissioner. The list includes, but is not limited to, school mission, school administration and staff, grade configurations and groupings of students, zoning patterns, curricula and instruction and facilities.

The proposed amendment establishes criteria for determining adequate yearly progress in districts with 40 or more students based on the amended definition of participation rates.

The proposed rule establishes criteria and procedures to designate school districts that fail to make adequate yearly progress and establishes a timeline, in compliance with the federal No Child Left Behind legislation of 2001, indicating the effective date when each district and school ac-

countability groups will be subject to the performance criteria specified in subparagraph (14)(v)(a) and (b) of section 100.2(p).

The proposed rule also clarifies provisions governing the inclusion of transferring students in the high school cohort.

##### **PROFESSIONAL SERVICES:**

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

##### **COMPLIANCE COSTS:**

The rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any costs on LEAs beyond those imposed by State and federal statutes.

##### **ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

##### **MINIMIZING ADVERSE IMPACT:**

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations to the requirements of the NCLB relating to school and school district accountability and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446). LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed rule has been carefully drafted to meet these specific federal and State requirements.

##### **LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed rule will be provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

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

##### **TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended, 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 rule is necessary to establish criteria and procedures, relating to academic standards and school and school district accountability, to conform the Commissioner's Regulations to the NCLB. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The proposed rule will not impose any additional compliance requirements beyond those imposed by State and federal statutes.

The proposed amendment defines "alternate assessment" as a State alternate assessment recommended by the committee on special education, for use by students with disabilities as defined in section 100.1(t)(2)(iv) in lieu of a required State assessment. The purpose is to allow the State greater flexibility in exceeding the one percent cap on Proficient scores from students with significant cognitive disabilities in determining adequate yearly progress.

The proposed amendment defines "significant medical emergencies" and "participation rates" for purposes of determining the performance of schools and districts on State assessments and for purposes of determining adequate yearly progress.

The proposed amendment establishes criteria for determining the accountability status of newly registered schools, merged schools and schools transferring responsibilities for one or more grades to another entity. The proposed amendment establishes the factors to be considered by the Commissioner. The list includes, but is not limited to, school mission, school administration and staff, grade configurations and groupings of students, zoning patterns, curricula and instruction and facilities.

The proposed amendment establishes criteria for determining adequate yearly progress in districts with 40 or more students based on the amended definition of participation rates.

The proposed rule establishes criteria and procedures to designate school districts that fail to make adequate yearly progress and establishes a timeline, in compliance with the federal No Child Left Behind legislation of 2001, indicating the effective date when each district and school accountability groups will be subject to the performance criteria specified in subparagraph (14)(v)(a) and (b) of section 100.2(p). The proposed rule also clarifies provisions governing the inclusion of transferring students in the high school cohort.

#### COSTS:

The rule is necessary to conform the Commissioner's Regulations to the requirements of the NCLB, relating to academic standards and school and school district accountability. The State and LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any costs on LEAs beyond those imposed by State and federal statutes.

#### MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations to the requirements of the NCLB relating to school and school district accountability and the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108-446). LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule does not impose any additional costs or compliance requirements upon school districts, BOCES or charter schools beyond those imposed by federal and State statutes. The proposed rule has been carefully drafted to meet these specific federal and State requirements. Because these Federal and State requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

#### RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

#### Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to the requirements of the No Child Left Behind Act of 2001 (NCLB), relating to academic standards and school and school district accountability. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or 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.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### Acid Deposition Reduction Budget Trading Programs for NO<sub>x</sub> and SO<sub>2</sub>

**I.D. No.** ENV-35-04-00024-A

**Filing No.** 300

**Filing date:** March 28, 2005

**Effective date:** 30 days after filing

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

**Action taken:** Amendment of section 200.9 and addition of Parts 237 and 238 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, and 19-0311; and Energy Law, sections 3-101 and 3-103

**Subject:** Acid deposition reduction budget trading programs for NO<sub>x</sub> and SO<sub>2</sub>.

**Purpose:** To reduce emissions of NO<sub>x</sub> and SO<sub>2</sub> from fossil fuel-fired electric generating sources statewide to protect the sensitive ecosystems in the Northeast from the damaging effects of acid deposition.

**Substance of final rule:** 6 NYCRR Part 237, Acid Deposition Reduction NO<sub>x</sub> Budget Trading Program

6 NYCRR Part 238, Acid Deposition Reduction SO<sub>2</sub> Budget Trading Program

6 NYCRR Part 200, General Provisions

Part 237 establishes the Acid Deposition Reduction (ADR) NO<sub>x</sub> Budget Trading Program and Part 238 establishes the ADR SO<sub>2</sub> Budget Trading Program. These programs are designed to reduce acid deposition in New York State by limiting emissions of NO<sub>x</sub> during the non-ozone season and SO<sub>2</sub> year-round from fossil-fuel fired electricity generating units.

Parts 237 and 238 establish emission budgets for NO<sub>x</sub> and SO<sub>2</sub>, 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<sub>x</sub> or SO<sub>2</sub> 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<sub>2</sub> 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<sub>x</sub> 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<sub>x</sub> or SO<sub>2</sub> budget units and shall no longer be subject to Parts 237 and 238.

Part 237 requires each NO<sub>x</sub> budget unit to have a NO<sub>x</sub> authorized account representative (AAR) who shall be responsible for, among other things, complying with the NO<sub>x</sub> budget permit requirements, the monitor-

ing requirements, the allowance provisions, and the recordkeeping and reporting requirements. Similarly for Part 238, each SO<sub>2</sub> budget unit needs to have an SO<sub>2</sub> AAR designated to perform these duties. The owner and/or operator of the unit may also designate an alternate NO<sub>x</sub> or SO<sub>2</sub> AAR to perform the above duties.

The NO<sub>x</sub> AAR shall submit a complete NO<sub>x</sub> budget permit application to the Department by the later of October 1, 2004 or 12 months before the date on which the NO<sub>x</sub> budget unit commences operation. The NO<sub>x</sub> 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<sub>2</sub> AAR shall submit a complete SO<sub>2</sub> budget application by the later of October 1, 2004 or 12 months before the date on which the SO<sub>2</sub> 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<sub>x</sub> Trading Program Budget is 39,908 tons for each control period. By September 1, 2004, the Department will make the NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> allowances to be allocated to each NO<sub>x</sub> 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<sub>x</sub> 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<sub>x</sub> budget.

The Statewide SO<sub>2</sub> 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<sub>2</sub> allowance allocations for the 2005, 2006 and 2007 control periods. By January 1 of each year thereafter, the Department will make the SO<sub>2</sub> 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<sub>2</sub> allowances to be allocated to each SO<sub>2</sub> 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<sub>2</sub> 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<sub>2</sub> budget. For the 2008 and beyond control periods, SO<sub>2</sub> 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<sub>x</sub> budget and three percent of Statewide SO<sub>2</sub> budget. The NO<sub>x</sub> AAR and SO<sub>2</sub> 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<sub>x</sub> and SO<sub>2</sub> budgets for energy efficiency and renewable energy projects. The Department will award allowances to projects that reduce Statewide NO<sub>x</sub> and SO<sub>2</sub> 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<sub>x</sub> and SO<sub>2</sub> budget units in proportion to their original allocation.

The Department may award supplemental allowances to specific NO<sub>x</sub> or SO<sub>2</sub> budget units for NO<sub>x</sub> or SO<sub>2</sub> reductions achieved at an upwind source. The NO<sub>x</sub> budget unit has until December 31 each year to submit its application for the immediately prior control period. The SO<sub>2</sub> 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<sub>x</sub> 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<sub>x</sub> or SO<sub>2</sub> 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<sub>x</sub> and SO<sub>2</sub> budget units that achieve reductions beyond a specified emission rate (0.15 pounds NO<sub>x</sub> per million Btu, 0.9 pounds SO<sub>2</sub> per million for coal units and 0.45 pounds SO<sub>2</sub> 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<sub>x</sub> and the 2000 and 2001 control periods for SO<sub>2</sub>. NO<sub>x</sub> budget units may apply for early reduction allowances for reductions achieved during the 2001-02, 2002-03 and 2003-04 control periods. SO<sub>2</sub> budget units may apply for early reduction allowances for reductions achieved during the 2002, 2003 and 2004 control periods. NO<sub>x</sub> budget units must apply for early reductions allowances by September 1, 2004 and SO<sub>2</sub> 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<sub>x</sub> and SO<sub>2</sub> ADR Programs.

The Department will establish one NO<sub>x</sub> and one SO<sub>2</sub> compliance account for each NO<sub>x</sub> and SO<sub>2</sub> budget unit and one NO<sub>x</sub> and one SO<sub>2</sub> overdraft account for each source with two or more NO<sub>x</sub> or SO<sub>2</sub> budget units. Allocations will be 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<sub>x</sub> or SO<sub>2</sub> 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<sub>x</sub> 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<sub>2</sub> 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<sub>x</sub> or SO<sub>2</sub> 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<sub>x</sub> or the SO<sub>2</sub> AAR a statement of intent to use future control period allowances and a report detailing the number of NO<sub>x</sub> or SO<sub>2</sub> 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<sub>x</sub> budget units may qualify to become a NO<sub>x</sub> budget opt-in unit. A unit may become a NO<sub>x</sub> budget opt-in unit if it conforms to all of the permitting, monitoring, recordkeeping and reporting requirements of a NO<sub>x</sub> budget unit. Opt-in units receive NO<sub>x</sub> 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<sub>x</sub> emission rate or the most stringent applicable NO<sub>x</sub> 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.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 237-1.6(a)(1)(i), 237-4.1(c)(4), 237-4.2(b), 237-5.2(b), 237-5.3(a), (d)(7), (e)(2)(i), 237-6.4(a), 237-6.5(d)(3), (d)(3)(i), 237-8.2, 238-3.2, 238-5.2(a), (b), 238-5.3(a), (b), (e)(8), 238-6.4(a), 238-6.5(d)(3), (d)(3)(i) and Subpart 238-2 (title).

**Text of rule and any required statements and analyses may be obtained from:** Michael P. Sheehan, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8396, e-mail: mpsheeha@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to art. 8 of the (State Environmental Quality Review Act), a short environmental assessment form, a negative declaration and a coastal assessment form have been prepared and are on file. This rule was approved by the Environmental Board.

#### Regulatory Impact Statement

There were no changes to the previously published Regulatory Impact Statement. The effect of the regulations remains the same.

#### Regulatory Flexibility Analysis

There were no changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments. The effect of the regulations on small businesses and local governments remains the same.

#### Rural Area Flexibility Analysis

There were no changes to the previously published Rural Area Flexibility Analysis. The effect of the regulations on rural areas remains the same.

#### Job Impact Statement

There were no changes to the previously published Job Impact Statement. The effect of the regulations remains the same.

#### Assessment of Public Comment

The agency received no public comment.

of Food Stamp benefits. The match will enable an automated increase in Food Stamp benefits for those EPIC participants enrolled in the Medicare prescription drug discount program who are also Food Stamp beneficiaries. In order to obtain a deduction for medical expenses that will result in this increased benefit for calendar year 2004, the exchange of data must take place before the end of the calendar year. There is not enough time to canvas all EPIC participants for their consent to release of data. An emergency regulation mandating the sharing of data is the only way to ensure that those EPIC participants enrolled in the Medicare prescription drug program who are Food Stamp eligible will have the opportunity to get their medical deduction before the end of this calendar year and that the sharing of the data does not violate the confidentiality requirements of HIPAA. For these reasons, the Department finds that the immediate adoption of the regulation is necessary for the preservation of the public health, safety and general welfare and that compliance with the procedural requirements of the State Administrative Procedure Act (SAPA) 202(1) would be contrary to the public interest.

**Subject:** Provision of information by the EPIC program.

**Purpose:** To enable the provision of information to OTDA by EPIC regarding participants who are enrolled in the Medicare Prescription Drug Card Program, thereby assisting these participants to receive an enhanced medical deduction in the calculation of food stamp benefits.

**Text of emergency rule:** A new subdivision (c) is added to Section 9600.4 of Title 9 NYCRR to read as follows:

(c) For the purpose of assisting participants to receive an appropriate amount of federal Food Stamp benefits, the Program for Elderly Pharmaceutical Insurance Coverage (EPIC) shall provide to the Office of Temporary and Disability Assistance (OTDA) information identifying EPIC participants who are also enrolled in the Medicare prescription drug discount card program authorized by Title XVIII of the Social Security Act. Information provided shall be limited to eligibility and enrollment data available to EPIC and sufficient to enable OTDA to identify those participants who are also Food Stamp recipients. OTDA's use of this information shall be limited to the purpose of identifying EPIC participants who are also Food Stamp recipients and are eligible for additional Food Stamp benefits by virtue of their enrollment in the Medicare prescription drug discount card program.

**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 June 25, 2005.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the amendment of this regulation is contained sections 244(5)(a), 245(2) and 246(4) of the Elder Law.

Legislative Objectives:

Section 244(5)(a) of the Elder Law requires the Elderly Pharmaceutical Insurance Coverage (EPIC) panel, consisting of the Commissioners of the Departments of Education and Health, the Superintendent of Insurance, and the Directors of the State Office for the Aging and the Division of the Budget to promulgate regulations pursuant to Section 246(4) of the Elder Law, subject to the approval of the Director of the Budget. The Director of the Budget approved the promulgation of these regulations. Section 245(2) of the Elder Law requires the Executive Director of EPIC to appoint staff and request the assistance of any department or other agency of the State in performing such functions as may be necessary to carry out the provisions of the EPIC law and to perform such other functions as may be specifically required by the law, assigned by the EPIC panel, or necessary to ensure the efficient operation of the program. Section 246(4) of the Elder Law defines the scope of EPIC regulations as including procedures to ensure that all information obtained on persons applying for EPIC benefits remains confidential and is not disclosed to persons or agencies other than those entitled to such information because such disclosure is necessary for the proper administration of the EPIC program.

Needs and Benefits:

The EPIC program provides coverage of certain drugs for residents of the State of New York who are at least 65 years of age, who have incomes within the limitations prescribed by law, who are not in receipt of Medical Assistance and who do not have equivalent or better drug coverage from any other public or private third party payment source or insurance plan.

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## Department of Health

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### EMERGENCY RULE MAKING

#### Medicare Prescription Drug Card Program

I.D. No. HLT-15-05-00004-E

Filing No. 302

Filing date: March 28, 2005

Effective date: March 28, 2005

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

**Action taken:** Amendment of section 9600.4(c) of Title 9 NYCRR.

**Statutory authority:** Elder Law, sections 244, 245 and 246

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

**Specific reasons underlying the finding of necessity:** The specific reason underlying the finding of necessity to adopt as an emergency rule: The proposed regulation will require EPIC to share data with OTDA so that OTDA can match the data against its files of individuals who are in receipt

The program provides an essential benefit for elderly New York residents who need financial assistance in order to obtain medications but who do not have other insurance benefits and are not in receipt of Medical Assistance coverage of their drug expenses. Chapter 49 of the Laws of 2004 authorizes the EPIC program to apply for transitional assistance under the Medicare prescription drug discount card program with a specific drug discount card under Title XVIII of the federal Social Security Act. EPIC automatically enrolled eligible participants in the Medicare prescription drug discount card program.

Section 1860D-31(g)(6) of the Social Security Act, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 42 USC 1395w-141(g)(6), states that the availability of negotiated prices or transitional assistance received through the Medicare prescription drug card “shall not be treated as benefits or otherwise taken into account in determining an individual’s eligibility for, or the amount of benefits under, any other Federal program.” The Secretary of the United States Department of Agriculture, through its Northeast Regional office, has interpreted this statute as requiring that the discounts and subsidy a household receives through the Medicare prescription drug discount card be treated as standard medical expenses to be used in determining the household’s medical expenses deduction for Food Stamp eligibility purposes.

EPIC seeks to assist its participants who are enrolled in the Medicare prescription drug discount program who are applying for or in receipt of Food Stamp benefits to receive the appropriate amount of Food Stamp benefits. Providing information to the Office of Temporary and Disability Assistance (OTDA) about its participants who are also enrolled in the Medicare Prescription Drug card program will assist these participants to receive an enhanced medical deduction in the calculation of Food Stamp benefits. Improved health outcomes for these participants as a result of increased Food Stamp benefits and the resultant potential for decreased prescription drug needs for these participants has a direct impact on the EPIC program and justifies the sharing of this information with OTDA.

**Costs:**

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

There are no costs to regulated entities as a result of this proposed regulation which requires EPIC to share data with OTDA.

**Costs to State and Local Governments:**

There are no costs to State and local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

The Department of Health will incur minimal costs in producing and transmitting the data required by this proposed regulation.

**Local Government Mandates:**

The proposed regulatory amendment does not impose any new mandates on local governments.

**Paperwork:**

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment.

**Duplication:**

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

**Alternatives:**

The alternative considered to the proposed regulatory amendment was to obtain individual consents for release of information from all EPIC participants who were enrolled in the Medicare prescription drug card program. The length of time required to obtain this consent would have meant that many elderly participants would lose the medical deduction to which they are entitled for the current year. Release of the information pursuant to regulation is a permissible release of protected health information under regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) pursuant to 45 CFR 164.512(k)(6)(i).

**Federal Standards:**

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

**Compliance Schedule:**

The EPIC program will transfer data as required by this regulation as of the effective date of the regulation’s filing.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

**Job Impact Statement**

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

**EMERGENCY  
RULE MAKING**

**Cytotechnologists Work Standard**

**I.D. No.** HLT-15-05-00005-E

**Filing No.** 303

**Filing date:** March 28, 2005

**Effective date:** March 28, 2005

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

**Action taken:** Amendment of section 58-1.12(b)(7) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 576-a

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

**Specific reasons underlying the finding of necessity:** New York Public Health Law Section 576-a establishes work standards for cytotechnologists who examine cytology slides at clinical laboratories. After initial enactment of Section 576-a, the Department adopted the first regulations in the United States establishing cytotechnologist workload limits, a registration process for cytotechnologists, quality standards for cytology slides, as well as operational standards for clinical laboratories performing cytopathology testing. Since that time, the Department has worked closely with 285 clinical laboratories holding permits in the category of cytology (and which employ approximately 1,100 registered cytotechnologists full-time and part-time). The Department has gained significant experience in applying workload standards at these clinical laboratories.

Public Health Law Section 576-a also authorizes the Department to promulgate regulations to increase the maximum number of cytology slides that may be examined in a workday by cytotechnologists who use cytology slide examination or preparation technologies approved by the federal Food and Drug Administration (FDA). The Department has become aware of recent advances in cytology slide preparation and examination technology, which, according to recent studies conducted with the involvement of device manufacturers, improve detection of serious diseases (*i.e.*, cervical cancers). These new technologies also vastly increase the rate at which cytotechnologists can effectively examine slides. The Department has examined claims made by developers of these new technologies and has considered the potential impact that they could have on public health and welfare.

The vast majority of New York permitted clinical laboratories are not acquiring and using these costly new slide examination technologies. Use of these technologies by cytotechnologists at workload levels currently authorized by New York law is not cost effective. Increased workload standards are essential to ensure that clinical laboratories can afford, and immediately acquire and use these important, potentially life saving technologies. Therefore, the Department must immediately authorize, pursuant to this proposed emergency rulemaking, clinical laboratories to increase the workload limits for its cytotechnologists who use this new technology. This proposed rule making allows needed flexibility in increasing workload limits for cytotechnologists using FDA approved slide preparation and/or examination devices, as soon as they become commercially available for use by clinical laboratories.

The Department is committed to ensuring that New York residents and laboratories promptly benefit from new technologies with potential to improve gynecological cytology test methods without adding significantly to health care costs. This proposed rule making, once adopted, would promote use of new technologies that hold promise for more accurate, efficient and effective cervical cancer diagnosis, without compromising accuracy and reliability.

For the foregoing reasons, the Department finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) for this rulemaking would be contrary to the public interest and welfare. The alternative — to promulgate this proposed rulemaking pursuant to SAPA section 202(1) would unreasonably delay and hinder the Department's ability encourage appropriate use of new, and perhaps better, technology. To avoid unnecessary and potentially detrimental delay in the Department's implementation of appropriate work standards for cytotechnologists using new technologies for cervical cancer detection and diagnosis, the amendment to 10 NYCRR Section 58-1.12(b) is hereby proposed for adoption by emergency promulgation.

**Subject:** Cytotechnologists work standard.

**Purpose:** To provide flexibility to the department in establishing work standards that consider new technologies for pap smear screening.

**Text of emergency rule:** Paragraph (7) of subdivision (b) of Section 58-1.12 is amended to read as follows:

(7) Exceptions. (i) Each laboratory [must] *shall* evaluate the performance of each cytotechnologist *in its employ*, and establish an appropriate examination volume limitation based on *the cytotechnologist's* experience, documented accuracy[,] and performance in proficiency testing, or [for] on other reasons, *including false-negative or false-positive interpretations* [reports]. Under no circumstances [should] *shall* this volume be exceeded, even if it is [less] *lower* than the maximum work standard.

(ii) A cytotechnologist may exceed the work standard by [10] *twenty (20)* percent, with the written approval of the department. The laboratory director may request such approval based on each cytotechnologist's experience, documented accuracy, including false-negative or false-positive [reports] *interpretations*, and a performance score in proficiency testing of not more than two (2) errors. Documentation of [this] *department* approval [must] *shall* be available in the laboratory, and may be revoked by the department with prior notice to the laboratory, based on a cytotechnologist's performance in proficiency testing or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. The laboratory director [must] *shall* monitor the performance of each cytotechnologist and advise the department [when the] *whenever the* approval is to be revoked based on on-the-job performance.

(iii) Cytotechnologists who qualify as supervisors under section 58-1.4 of this Subpart may re-examine up to [20] *twenty (20)* slides per day [separate from] *in addition to* the workload standard, *provided the combined total number of slides does not exceed one-hundred (100)*, as part of the [quality control-]quality assurance program of the laboratory, with the prior approval of the department, based on documented accuracy, including [false negative or positive reports] *false-negative and false-positive interpretations*, and performance in proficiency testing. Such approval may be revoked, with prior notice to the laboratory, based on proficiency testing performance or other evidence that the cytotechnologist's accuracy is [less] *other* than acceptable. Records [must] *shall* be maintained to document the *examination* volume and hours worked by *each cytotechnologist*.

(iv) *The department may increase the cytotechnologist work standard beyond the level already authorized elsewhere in this section for cytotechnologists using a federal Food and Drug Administration (FDA)-approved device in the preparation or examination of cytology slides:*

*(a) in determining whether to increase the cytotechnologist work standard with respect to a particular device, the department shall consider the following: the FDA's approved use of the device; studies of the accuracy, reliability and appropriate use of the device; input from clinical laboratories using the device; recommendations of experts in the field of cytology and/or cytotechnology; and other relevant information as appropriate;*

*(b)(1) the department may require a clinical laboratory wishing to exceed the cytotechnologist work standard set forth elsewhere in this section to request in writing the department's approval. The department may also require the applicant laboratory to provide, in a form acceptable to the department, some or all of the following information regarding the device in use at the laboratory: the device manufacturer's recommendations, if any, regarding the quantity (i.e., slide volume), speed or manner of slide examination, and the basis for such recommendations; documentation of training for each cytotechnologist using the device; each cytotechnologist's experience using the device, including false-negative and false-positive interpretations, workload, and number of hours spent examining slides; each cytotechnologist's performance on proficiency*

*testing; as well as any other information as determined appropriate by the department to assess device capacity and user capability; and*

*(2) the department shall provide written notice of the authorized work standard established pursuant to this subparagraph. The department may set a work standard in writing that applies to one or more cytotechnologists.*

*(c) laboratories shall maintain documentation of approval pursuant to this subparagraph for a minimum of two (2) years after use of the device is discontinued;*

*(d) if the department determines that a cytotechnologist work standard authorized pursuant to this subparagraph increases the rate of errors or compromises the reliability of results, the department shall adjust the standard as it deems appropriate and shall notify the affected clinical laboratories in writing of such change. Clinical laboratories that find the adjustment unacceptable may request only in writing that the department reconsider its determination; and*

*(e) notwithstanding the foregoing, any cytotechnologist work standard authorized by the department pursuant to this subparagraph shall be at least as stringent as the federal standards promulgated under the federal clinical laboratory improvement amendments of nineteen hundred and eighty-eight (1988) and/or other applicable law(s).*

**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 June 25, 2005.

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

#### **Regulatory Impact Statement**

Statutory Authority:

Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The statute established standards for cytotechnologists' workload, a registration requirement for individuals engaged in initial examination of slides, and quality standards for preparing and examining the slides. Regulations adopted as 10 N.Y.C.R.R. Sections 58-1.12 and 58-1.13 pursuant to that legislation have been in effect since 1989. Public Health Law, Article 5, Title V was amended by Chapter 436 of the Laws of 1993. Section 576-a of that legislation modified the state's cytotechnologist work standard, (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist may examine during a work day) to effect parity with federal standards in the Clinical Laboratory Improvement Amendments of 1988 (CLIA '88). Section 576-a also includes a provision authorizing the Department to increase the cytotechnologist work standard in response to technological advances in instrumentation and devices for assisted examination of cytology slides.

Legislative Objectives:

In 1988, media reports made the public aware of problems associated with inordinate cytotechnologist workloads in clinical laboratories examining gynecologic slides (Pap smears) for evidence of cervical cancer. At that time, New York was the only state with a comprehensive program of oversight of these laboratories, including review of cytotechnologist qualifications, and on-site assessment of laboratory operations and proficiency testing. While excessive testing volumes had not been reported in New York State, the Legislature determined that additional steps were required to protect women residents of the State, and Public Health Law Section 576-a was enacted as Chapter 539 of the Laws of 1988. The legislation established a work standard for initial examination of cytologic specimens (i.e., a numeric limitation on the cytology slides, including Pap smears, that a cytotechnologist or pathologist may examine during a work day), a registration requirement for individuals engaged in slide examination, and quality standards for the slides. Chapter 436 of the Laws of 1993 modified the State's cytotechnologist work standard for parity with federal standards in CLIA '88; specifically, the Legislature enacted an increase of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day, from the previous limit of 10 percent above the 80-slide limit, or 88 slides.

Needs and Benefits:

After initial enactment of Section 576-a, the Department adopted the first regulations in the country establishing cytotechnologist workload standards, a registration process for cytotechnologists, requirements for the quality of slides, as well as general standards for operation of cytopathology laboratories. The Department has not revised these regulations since their promulgation in 1990. During that time, the Department has gained significant experience in applying workload standards for 285

clinical laboratories with a permit in the cytology testing category that employ more than 1,200 registered cytotechnologists full-time and part-time.

The Food and Drug Administration (FDA) has approved for marketing a cytology slide screening device that increases the number of slides a cytotechnologist can accurately and reliably examine per day. The Department needs to consider, on a case by case basis and in the most expeditious manner possible, establishment of a cytotechnologist workload limit other than that set earlier to promote accurate and reliable slide examination by the conventional (manual) method. The Department must now ensure that New York residents and laboratories benefit from new technologies with the potential to improve gynecological cytology test methods without adding significantly to health care costs. To this end, it is proposed to amend existing regulations, and allow needed flexibility for increasing the workload limit for cytotechnologists using automated slide preparation and/or examination methods as new methods are approved by the FDA and become available for use by clinical laboratories.

Technological advances have permitted automation to make inroads in the discipline of cytology, a field of laboratory medicine that historically has relied solely on the joint expertise of cytotechnologists and pathologists for accurate and reliable diagnosis of cancers and other abnormalities detectable at the cellular level. Slides for cervical cancer screening, once prepared in the physician's office, can now be produced in the laboratory as a clean preparation of target cells, free of any obscuring blood or inflammation debris, deposited on a glass slide in a single layer, well-separated and with little or no overlap of cells to interfere with a cytotechnologist's ability to locate and identify aberrant cell types indicative of cervical cancer and other abnormalities. The FDA's approval of several automated systems for cytology slide preparation (*i.e.*, fix-and-stain material on microscopic slides) as in-vitro diagnostic devices, and overwhelming acceptance of the devices by the clinical laboratory industry and women's health practitioners and advocates have opened the door to further advances in the science of cytology, specifically, development of computerized algorithms for detection of cells not meeting criteria as normal. The purported advantage of this new technology is that it allows cytotechnologists to focus on accurate interpretation, resulting not only in increased productivity but, more importantly, the potential to improve diagnostic performance.

During conventional (manual) slide examination, the cytotechnologist must use locator skills to detect cells that are abnormal according to pre-established criteria for nuclear density and other factors, such as the relative size of the cell nucleus compared to the rest of the cell. Several device manufacturers have programmed a computer with an algorithm similar to that used by cytotechnologists to identify abnormal cells, thereby allowing a computer to take over the tiresome task of scanning numerous slides to look for the usually rare abnormal cell. The algorithms are sophisticated, but, as yet, are not capable of definitively classifying cells as pre-cancerous or indicative of malignancy. Devices that locate and mark suspect cells, guiding the cytotechnologist to them for interpretation, have already received FDA approval. Another device approved by the FDA classifies as within normal limits slides with no to very low probability of an abnormal finding, allowing up to 25 percent of gynecologic specimens to be reported as within normal limits without human review.

New slide preparation and screening technologies are changing the way laboratories diagnose cervical cancer and other malignant diseases detectable at the cellular level. Clinical trial data and preliminary data from laboratories using location guidance devices for detection of cancerous cells may increase by 50 percent or more the number of slides a cytotechnologist may reliably examine during a given time period. More importantly, evidence is emerging that this technology can increase the probability that no truly abnormal cell, however rare, would be missed due to human factors, such as fatigue and momentary lapses in vigilance, which have been widely recognized as capable of compromising result reliability. Manufacturers' claims that this technology can better locate cells typical of low- and high-grade squamous intraepithelial lesions (LSIL and HSIL, respectively), the most clinically important findings other than squamous cell carcinoma, are of particular interest to the Department in fulfilling its mandate to promote and protect the public health, because such claims, if proved correct, signal the potential to reduce morbidity in women who are routinely screened for cervical cancer.

Moreover, the Department has been informed that laboratories are reluctant to purchase automated devices for cytology examinations if the instrumentation cannot be utilized to near-full potential or in an otherwise cost-effective manner. This proposed rulemaking to increase the workload limit would better enable laboratories to acquire new technologies that

hold promise for more efficient and effective cervical cancer diagnosis without compromising safety, accuracy and reliability.

In addition to allowing flexibility to change cytology workload standards without repetitive rulemaking, the proposed regulation would also provide affected parties with Department criteria for setting such standards, and make clear that, at the Department's discretion, laboratories may be required to request and be granted device-specific approval to examine Pap smears applying a workload standard other than that in place for conventional (manual) examination methods. Moreover, the proposed amendment establishes the Department's authority to make an immediate adjustment to any work standard pursuant to the rule upon a determination that error rates have increased or the reliability of results has been compromised following approval of an increased work standard.

The proposed amendment would also make the regulation consistent with its authorizing statute as modified by Chapter 436 of the Laws of 1993, which provided for an increase in the work standard of 20 percent above the limit of 80 gynecologic slides, or 96 slides per work day. Existing regulation must be changed, as it set the previous restriction as 10 percent above the 80-slide limit, or 88 slides, and, as such, does not accurately reflect the Department's practice of authorizing up to 96 slides to be examined per work day.

Several housekeeping modifications were also proposed to facilitate compliance. The Department has received numerous inquiries related to the allowance for cytotechnologists' qualified supervisors to examine up to 20 slides beyond the work standard, and finds it necessary to clarify that the combined total number of slides may not exceed 100. In three instances, the term "reports" has been changed to "interpretations" to make clear that the Department considers all errors as relevant to approval (*i.e.*, false-negatives and false-positives), including errors in the cytotechnologist's interpretation, regardless whether corrected during re-examination or slide review by a pathologist prior to reporting - and not only erroneous results (typically false-negatives) reported to medical practitioners and discovered through retrospective review following a finding of HSIL or an equivalent, or malignancy.

#### Costs:

##### Costs to private regulated parties:

Since the proposed rulemaking does not require purchase or use of any devices for preparation and/or examination of cytology slides, this proposed rulemaking does not require private affect parties to incur costs. To the contrary, several clinical laboratories operating in New York State and using or considering use of new technology for examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that specimen throughput may be increased, which, in turn, would allow for increased reimbursement for cytopathology services and potentially increased profits.

##### Costs for implementation and administration of the rule:

##### Costs to State government:

State government is not expected to incur costs attributable to this proposed amendment.

##### Costs to the Department:

The Department is not expected to incur costs attributable to this proposed amendment. A system is already in place for review of laboratories' requests for qualified cytotechnologists to exceed the existing workload limit by 20 percent, and it is expected that the few additional requests submitted as a direct result of this amendment would be able to be processed under the same system and using the same personnel.

##### Costs to local government:

Local government-operated clinical laboratories would have the opportunity to increase reimbursement and profits by increasing throughput of cytology examination specimens under the provisions of this proposal, as described for private regulated parties.

##### Paperwork:

The Department may experience a minimal increase in paperwork from the intermittent need to communicate new standards to affected laboratories in writing. The Department already has an established system for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and expects few additional requests as a direct result of this amendment.

##### Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

##### Duplication:

These rules do not duplicate any other law, rule or regulation.

##### Alternative Approaches:

In drafting this proposed rule, the Department has considered the diversity of technological approaches to automating Pap smear examinations already in place and those known to be in development. The only consistent feature of these devices appears to be generalized use of a computerized algorithm to simulate human decision-making. The Department believes it is not feasible to arrive at a single, universally applicable work standard that could be set forth in regulation for all existing and future Pap examination technologies. The alternative — promulgation of revised regulations to establish workload limits each time a device is granted FDA approval — would be unacceptably burdensome to the Department, and would possibly delay the use of technology in New York that could more effectively identify cancerous and precancerous cells.

#### Federal Standards:

Federal workload standards for cytotechnologists performing conventional (manual) examination of cytology slides have been promulgated under CLIA 88. Both the FDA and U.S. Centers for Medicaid and Medicare Services (CMS) have declined to set in federal regulation standards specific to any current commercial automated slide examination device. This proposed amendment contains a provision that any cytotechnologist work standard authorized by the Department pursuant to the amendment must be at least as stringent as the respective federal standards.

#### Compliance Schedule:

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, efficient and effective tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester-Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using automated devices, and there appears to be no potential for organized opposition. Regulated parties should be able to comply with these amendments as of their effective date, upon filing with the Secretary of State.

#### Regulatory Flexibility Analysis

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

This proposed amendment to allow needed flexibility to increase workload limits for cytotechnologists using automated slide preparation and/or examination methods would affect clinical laboratories operated as small businesses or by local government, provided such facilities hold or are seeking a permit in the category of cytology, and opt to use U.S. Food and Drug Administration (FDA)-approved devices for automated slide preparation and/or examination. Of the 253 clinical laboratories holding a Department permit in cytology, 44 have declared themselves to be small businesses in permit applications submitted to the Department, and local governments, including the City of New York, operate seven such laboratories.

##### Compliance Requirements:

The Department expects that affected clinical laboratories operated as small businesses or by local governments would experience minimal impact from this proposal's adoption. Most of these facilities engaged in the examination of cytologic material, including Pap smears, do not process the high number or type of specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased automated devices for preparation and/or examination of cytology slides would benefit from the flexibility this amendment would afford.

The Department has a system already established for review of laboratories' requests for qualified cytotechnologists to exceed the workload limit by 20 percent, and anticipates few, if any, additional requests as a direct result of this amendment from laboratories operated as small businesses or by a local government. Therefore, the Department expects that this small segment of the affected regulated parties would be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

##### Professional Services:

No need for additional professional services is anticipated.

##### Compliance Costs:

This rulemaking does not impose any additional costs on clinical laboratories operating as small businesses or by a local government since it does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State, and using or considering use of such devices have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing for increased reimbursement for cytopathology services and potentially increased profits. This potential benefit may also apply to any small business or local government laboratory operator opting to use automated devices for cytologic material examination.

##### Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that operate clinical laboratories affected by this amendment. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, automated devices for cytologic material examination.

##### Minimizing Adverse Impact:

These amendments will not have an adverse impact on the ability of regulated parties that are small businesses or operated by local governments to comply with Department requirements for cytotechnologist work standards.

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

This amendment is being proposed as an emergency rule. Notifying small businesses or local government affected parties about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would incur unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those operated as small businesses or by local government, are being notified of the provisions of this amendment, and, following its adoption, will be invited to provide comments and otherwise participate in the development of standards for workload limits.

##### Compliance Schedule:

The director of the Department's Wadsworth Center and his staff, including the director for Regulatory Affairs, held discussions with representatives of the Governor's Office, the Commissioner of Health's Office, firms that manufacture and/or distribute automated devices for cytological examinations, and regulated parties (*i.e.*, clinical laboratories) currently using such devices. Various Department groups, including the Office of Medicaid Management and the Office of Managed Care, have been working together in an ongoing effort to ensure adequate reimbursement for cytological examinations, including Pap smears, using FDA-approved cytological screening devices.

This amendment does not impose any new or more stringent requirements on regulated clinical laboratories; rather, it affords flexibility to laboratories that handle medium- to high-volumes of cytology specimens, and wish to use automated devices to examine increased numbers of slides without compromising testing accuracy and reliability. Strong support for the amendment is expected from clinical laboratories holding or seeking a permit in the category of cytology, and patient advocacy organizations, especially those focused on women's health; indications of support have been expressed by the medical community at large, which has just begun to become educated in the availability and reliability of the new technologies for cytological examination. The Department will continue to work with interested and affected parties in carrying out this amendment's provisions, and will notify laboratories in an unequivocal and timely manner of any changes affecting the cytotechnologists' workload standard or exceptions to that standard following adoption of this proposal.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technologies, and no potential of organized opposition is apparent. Consequently, regulated parties, including those operated as a small business or by local government, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

#### Rural Area Flexibility Analysis

##### Effect of Rule:

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. Of

the 253 clinical laboratories holding a permit in the category of cytology, 88, many of which are hospital-based, are located in rural areas.

**Compliance Requirements:**

The Department expects that affected clinical laboratories located in and serving rural areas will experience minimal impact by anticipated adoption of this proposal. With the possible exception of one or two large rural hospital pathology departments, most laboratories operated in rural areas and engaged in examination of cytologic material, including Pap smears, do not process the high volume and type of cytologic specimens that would make purchase and use of an automated device for slide examination a financially prudent decision. However, any laboratory that has purchased such automated devices will be able to take advantage of the flexibility this amendment would afford. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with this amendment as of its effective date, upon filing with the Secretary of State.

**Professional Services:**

No need for additional professional services is anticipated.

**Compliance Costs:**

Clinical laboratories operating in rural areas are not required to incur additional costs as a result of this proposed amendment, since this rulemaking does not require purchase or use of automated devices for preparation and/or examination of cytology slides. To the contrary, several clinical laboratories operating in New York State and using or considering use of devices for the examination of slides, have conveyed to the Department their desire to have cytotechnologist work standards specific to such devices in place as soon as practicable so that they may increase specimen throughput, in turn allowing increased reimbursement for cytopathology services and potentially increased profits. This benefit may also apply to laboratories located in rural areas, especially larger hospital-based pathology laboratories opting to use automated devices for cytologic material examination.

**Economic and Technological Feasibility:**

The proposed regulation would present no economic or technological difficulties to facilities located in rural areas. This proposal does not impose a requirement for purchase or use of new technologies, *i.e.*, devices for cytologic material examination.

**Minimizing Adverse Impact:**

These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for cytotechnologist work standards.

**Participation by Parties in Rural Areas:**

This amendment is being proposed as an emergency rule. Notifying affected parties in rural areas about its provisions and requirements in accordance with the State Administrative Procedures Act (SAPA) process would cause unnecessary and potentially detrimental delay in establishing new and expanded work standards for cytotechnologists using automated devices for slide preparation and/or examination. All laboratories holding a permit in the category of cytology, including those located in rural areas, are being notified of this amendment's provisions, and, following its adoption, will be invited to provide comments and otherwise participate in development of standards for workload limits.

**Compliance Schedule:**

The Department has been engaged in ongoing communication with several device manufacturers, and has responded to many letters from women's health organizations and laboratories stating its intent to ensure that safe, effective, and efficient tests for cervical cancer are available to New York's women. These interested parties include: National Association of Nurse Practitioners in Women's Health; National Black Women's Health Imperative; Center for Women Policy Studies; National Partnership for Women and Families; National Family Planning & Reproductive Health Association; Memorial Hospital for Cancer & Allied Diseases, Department of Pathology; Memorial Sloan-Kettering Cancer Center; Albany Cytopath Labs, Inc.; Centrex Clinical Laboratories, Inc.; ACM Medical Laboratory, Inc.; ClearPath Diagnostics; University of Rochester—Strong Memorial Hospital Clinical Laboratories; and Sunrise Medical Laboratories, Inc.

The Department is not aware of any opposition to increasing workload limits for cytotechnologists using new technology, and no potential for organized opposition is apparent. Regulated parties, including those operating in rural areas, should be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

**Job Impact Statement**

**Nature of Impact:**

This proposed rulemaking would have an impact on the productivity of cytotechnologists who use the new cytology slide preparation and examination technology. The proposed rule would authorize cytotechnologists using such technologies to increase, with Department approval, the number of slides that can be effectively reviewed in a given time period.

In addition, the proposed rulemaking would make it more financially attractive for clinical laboratories to acquire new cytology slide preparation and examination technology. Therefore, more cytotechnologists will use such technology. Experienced cytotechnologists will have to receive on the job training to use some of the new technologies, while persons studying to become cytotechnologists will learn to use the new technology as part of their course work. However, given workforce shortage of cytotechnologists nationally and in New York, the Department does not expect that the use of the new technologies will have an adverse impact on employment opportunities for cytotechnologists.

**Category and Numbers Affected:**

Cytotechnologists working in New York licensed clinical laboratories may be affected by this rule. There are approximately 1,100 registered cytotechnologists working (on a part time or full time basis) in New York licensed clinical laboratories. However, many of these cytotechnologists work in clinical laboratories that are not located in New York State. It is unclear how many cytotechnologists will use new technologies pursuant to this proposed rulemaking to review more slides than is currently permissible.

**Regions of Impact:**

Cytotechnologists work in laboratories throughout New York State. However, as described below, the Department of Health does not believe that this proposed rulemaking would have a significant adverse impact on employment opportunities for cytotechnologists.

**Likelihood of Adverse Impact:**

The Department expects that the proposed rulemaking, if implemented, will increase cytotechnologists' productivity, and it will not adversely affect job opportunities for cytotechnologists. There is currently a significant workforce shortage of cytotechnologists in the United States, including New York. This workforce shortage is expected to worsen in coming years as large numbers of cytotechnologists retire and relatively few are being trained to replace them. The federal Clinical Laboratory Advisory Committee, the US Department of Labor and several health care professional organizations have acknowledged this workforce shortage problem. Some clinical laboratories have urged the Department to promulgate this regulation to alleviate cytotechnologist-staffing shortages.

**NOTICE OF ADOPTION**

**New York City Watershed Rules and Regulations**

**I.D. No.** HLT-32-04-00003-A

**Filing No.** 301

**Filing date:** March 28, 2005

**Effective date:** April 13, 2005

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

**Action taken:** Amendment of sections 128-1.6(a) and 128-3.8(b)(2) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(l) and 1100

**Subject:** New York City watershed rules and regulations.

**Purpose:** To make the State-adopted New York City watershed regulations consistent with the revised New York City regulations.

**Text or summary was published** in the notice of proposed rule making, I.D. No. HLT-32-04-00003-P, Issue of August 11, 2004.

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

**Text of rule and any required statements and analyses may be obtained from:** 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: regsna@health.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Valuation of Life Insurance Reserves

**I.D. No.** INS-15-05-00002-E

**Filing No.** 298

**Filing date:** March 25, 2005

**Effective date:** March 25, 2005

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

**Action taken:** Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

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

**Specific reasons underlying the finding of necessity:** During 2004, the Department became aware that some insurers have designed certain life insurance products with the clear intent of circumventing the existing reserve standards. The Department is concerned with the solvency of those insurers who fail to set aside sufficient funds to pay claims as they pose a serious threat to consumers who rely on insurers to honor their commitment both now and in the future. In addition, insurers who have elected to circumvent the law place themselves at a competitive advantage over those insurers who follow the rules and establish the appropriate level of reserves. On a daily basis, those insurers who abide by the law suffer substantial losses in terms of market share, as they cannot effectively compete against insurers that do not set aside adequate reserves. Action must be taken now to end this practice of under reserving by insurers that have decided market share is more important than the safety and soundness of policyholder funds.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the March 31, 2005 quarterly statement is May 15, 2005. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this first amendment to Regulation No. 147 is necessary for the general welfare.

**Subject:** Rules governing valuation of life insurance reserves.

**Purpose:** To prescribe rules and guidelines for valuing individual life insurance policies and certain group life insurance certificates, with primary emphasis on valuation of non-level premium and/or non-level benefit life insurance policies, indeterminate premium life insurance policies, universal life insurance policies, variable life insurance policies, and credit life insurance policies in accordance with statutory reserve formulas.

**Substance of emergency rule:** The First Amendment to Regulation No. 147 provides new mortality and reserve standards for credit life insurance policies. It also provides new reserve standards for certain other specified life insurance policies. The following is a summary of the amendments to Regulation No. 147:

Section 98.1(a) was amended to include credit life insurance policies and to mention clarification of principles.

Section 98.2(b) was amended to ensure consistency in applicability wording within the regulation.

Section 98.2(i) was amended to state that unless notification was previously provided to the superintendent to adopt lower reserves based on the requirements of this Part, insurers may not adopt such lower reserves without the prior approval of the superintendent.

A new subdivision (j) was added to section 98.2 regarding the use of the minimum mortality standards defined in Part 100 of this Title.

A new subdivision (k) was added to section 98.2 regarding the applicability of this regulation to certain specified life insurance policies.

A new subdivision (l) was added to section 98.2 regarding the applicability of this regulation to credit life insurance.

Subdivision (d)(2) of section 98.4 was amended to change an incorrect reference.

The last sentence of section 98.4(s) was amended to change a reference from 1% to one percent, in order to be consistent with similar references in other sections of the regulation.

Section 98.4(u) was amended to reference the examples and reserve methodologies described in section 98.9 of this Part.

The third sentence of paragraph (2) of section 98.6(a) was amended to change an incorrect reference to the Contract Segmentation Method to the mortality and interest rates used in calculating basic unitary reserves.

Section 98.7(b)(1)(i) was amended to reference section 98.9 of this Part.

Section 98.7(b)(1)(ii) was amended to have the definition of secondary guarantee period extended to this whole Part rather than just paragraph (1) of section 98.7.

Section 98.7(b)(1)(iii) was amended to reference section 98.9 of this Part and provides clarification of an example supplied in this section.

Section 98.7(c) was amended to change the reference from age 100 to the age at the end of the applicable valuation mortality table, since the 2001 CSO Mortality Tables go out to ages greater than 100.

Section 98.8(b) was amended to reference section 98.9 of this Part.

A new section 98.9 was added for certain specified life insurance policies. This section provides examples of policy designs which constitute guarantees and describes the reserve methodologies to be used in valuing such policies.

A new section 98.10 was added for credit life insurance. This section provides minimum mortality standards and minimum reserve standards for such policies.

Section 98.9 was renumbered to section 98.11. This is the severability provision.

**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 June 22, 2005.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

The superintendent's authority for the First Amendment of Regulation No. 147 (11 NYCRR 98) is derived from sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this paragraph.

Section 4217(c)(6)(D) permits the superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies and contracts, as the superintendent deems appropriate.

Section 4217(c)(9) requires that reserves for any plan of life insurance which provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or which is of such a nature that the minimum reserves cannot be determined by the methods prescribed in sections 4217 and 4218, must be computed by a method consistent with the principles of sections 4217 and 4218 as determined by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net

premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract.

Section 4240(d)(7) states that the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

For fraternal benefit societies, section 4517(b)(2) provides that reserves according to the commissioner's reserve valuation method for life insurance certificates providing for a varying amount of benefits or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of this subsection (b).

#### 2. Legislative objectives:

One major area of focus of the Insurance Law is solvency of insurers doing business in New York. One way the Insurance Law seeks to ensure solvency is through requiring all insurers authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders.

#### 3. Needs and benefits:

The regulation is necessary to help ensure the solvency of life insurers doing business in New York. After the adoption of the current version of Regulation No. 147 and the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), some companies developed life insurance products that resulted in reserves being held that were lower than the reserves defined in section 4217 of the Insurance Law and the current version of Regulation No. 147, even though these products had similar death benefit and premium guarantees. To clarify the intent of the NAIC model regulation, NAIC Actuarial Guideline 38 was developed in 2002. The Guideline stated that new policy designs which are created to simply exploit a perceived loophole must be reserved in a manner similar to more typical designs with similar guarantees. Section 98.4(u) of the current version of Regulation No. 147 also contains wording to address consistent reserving principles. In the past year the Department became aware that, in spite of such wording, some companies were creating new products to exploit a perceived loophole in the reserve methodologies described in Actuarial Guideline 38. The new reserve methodologies in this amendment address this problem. Not adopting this amendment could result in inadequate reserves for some insurers, which would jeopardize the security of policyholder funds.

The regulation will also set standards for determining policy reserves for credit life insurance.

#### 4. Costs:

Costs to most insurers authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most companies would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with the modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements.

Costs to the Insurance Department will be minimal. There are no costs to other government agencies or local governments.

#### 5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

#### 6. Paperwork:

The regulation imposes no new reporting requirements.

#### 7. Duplication:

The regulation does not duplicate any existing law or regulation.

#### 8. Alternatives:

One significant alternative considered was to keep the current version of Regulation No. 147, in combination with the formulas in the current version of Actuarial Guideline 38, which would result in some companies holding reserves lower than those intended by section 4217 of the Insurance Law and Regulation No. 147. Over the course of several months, the

Department discussed this matter as part of the NAIC Life and Health Actuarial Task Force forums and in several conference calls and meetings with impacted insurers. During this period, revised wording to NAIC Actuarial Guideline 38 was exposed. In response to the exposed wording, a group of impacted insurers submitted a letter stating that they believed the wording in NAIC Actuarial Guideline 38 should not be changed. The Department reviewed the insurers' concerns related to the exposed wording, but determined that such wording was needed because the Department believes the reserves that would be held by these insurers would be lower than those intended by section 4217 of the Insurance Law, Regulation No. 147, and NAIC Actuarial Guideline 38.

The wording in the NAIC's December 2004 draft exposure of revised Actuarial Guideline 38 is the basis for the wording in section 98.9(c)(7)(i) of this amendment to Regulation No. 147 and sets reserves at intended levels for policies issued on or after January 1, 2000 through December 31, 2005. The wording in a widely distributed September 2004 draft of revised Actuarial Guideline 38 is the basis for the wording in section 98.9(c)(7)(ii) of this amendment to Regulation No. 147, and applies to policies issued on or after January 1, 2006. This provision is intended to discourage new policy designs created to exploit any perceived loopholes found in the future.

Another alternative was to not include the methodology stated in Section 98.9(c)(8)(ii), which states the standards for certain universal life insurance policies issued on or after January 1, 2006, and instead rely on the methodology stated in section 98.9(c)(8)(i). This could result in companies being able to design policies that would result in reserves being held that are lower than those intended by section 4217 of the Insurance Law and Regulation No. 147.

Another alternative was to keep the current minimum standard for credit life insurance, but this would result in a mortality standard that is inconsistent with that stated in a recently adopted NAIC model regulation.

#### 9. Federal standards:

There are no federal standards in this subject area.

#### 10. Compliance schedule:

This regulation applies to financial statements filed on or after December 31, 2004. The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place in the course of attempting to develop a national standard through the National Association of Insurance Commissioners. Since this regulation has been adopted on an emergency basis since December 29, 2004, insurers have had ample time to achieve full compliance.

#### **Regulatory Flexibility Analysis**

##### 1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers authorized to do business 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. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

##### 2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

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

Insurance companies covered by the regulation do business in every county in this state, including rural areas as defined under SAPA 102(10).

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

The amendment to this regulation establishes reserve requirements for certain types of life insurance, including universal life insurance with secondary guarantees, and for credit life insurance.

##### 3. Costs:

Costs to most insurers authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in this regulation have been in effect since the original adoption of this regulation in March of 2003, most insurers would only need to update their current computer programs to implement the new reserve methodologies for policies with secondary guarantees and credit

life insurance policies. An insurer that needs to modify its current system could produce the modifications internally or if the system was purchased from a consultant, have their consultant produce the modifications. The cost associated with these modifications is estimated to be \$50,000 - \$100,000. The cost would include the actual modifications as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred due to those requirements.

4. Minimizing adverse impact:

The regulation does not impose any adverse impact on rural areas.

5. Rural area participation:

The Department's concern about very low reserves being held for certain product designs is well known in the insurance industry. Numerous discussions with impacted insurers have taken place in the course of attempting to develop a national standard through the National Association of Insurance Commissioners. Insurers that may be impacted by this standard are aware of the issues and should have already formed an estimate of the impact. In addition, a discussion of the proposed rule making was included in the Insurance Department's regulatory agenda which was published in the January 5, 2005 issue of the *State Register*.

**Job Impact Statement**

Nature of Impact:

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This regulation sets standards for setting life insurance reserves for insurers. The regulation is unlikely to impact jobs and employment opportunities.

Categories and number affected:

No categories of jobs or number of jobs will be affected.

Regions of adverse impact:

This rule applies to all insurers authorized to do business in New York State. There would be no region in New York which would experience an adverse impact on jobs and employment opportunities.

Minimizing adverse impact:

No measures would need to be taken by the Department to minimize adverse impacts.

Self-employment opportunities:

This rule would not have a measurable impact on self-employment opportunities.

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

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

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

(3) Compliance with the requirements of § 202(1) of the State Administrative Procedure Act would be contrary to the public interest because it would delay implementation of the game and deprive the state of needed revenue to education. The approximately \$1 to 4 million in weekly aid to education lost this fiscal year by this delay would need to be taken from other revenue sources.

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

**Subject:** Video lottery gaming.

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

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

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

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

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

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## Division of the Lottery

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### EMERGENCY RULE MAKING

#### Video Lottery Gaming

**I.D. No.** LTR-15-05-00003-E

**Filing No.** 299

**Filing date:** March 25, 2005

**Effective date:** March 25, 2005

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

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

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

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

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

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

Since passage of the legislation in October 2001 authorizing the Division to license the operation of video lottery gaming at racetracks around

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 22, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Robert J. McLaughlin, General Counsel, Division of the Lottery, One Broadway Center, P.O. Box 7500, Schenectady, NY 12301, (518) 388-3408, e-mail: [rmclaughlin@lottery.state.ny.us](mailto:rmclaughlin@lottery.state.ny.us)

#### **Regulatory Impact Statement**

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

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

3. **Needs and Benefits:** The regulations satisfy a legislative mandate directing the Division to promulgate regulations for the design, licensing and implementation of video lottery gaming. Pursuant to a Memorandum of Understanding between the Division and the Racing and Wagering Board, potential duplicative licensing requirements for the racetrack employees have been eliminated.

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

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

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

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

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

lottery products. Grammatical and formatting changes were made for clarity and ease of use.

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

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

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

According to data provided by the racetracks, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will approximate \$450 million if all eligible venues participate. Each racetrack's proposed project differs. The cost for each facility ranges from \$4 million to \$250 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this could cost those agents an additional \$250-\$300 per video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electrical and communication upgrades.

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

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

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

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

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

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

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

routinely have regulatory compliance departments to assist in fulfillment of these requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Regulatory Flexibility Analysis**

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

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

(b) Gaming vendors: Vendors wishing to supply gaming products and services must be licensed. These include the supplier of the central computer system that will support the video lottery games, the companies supplying the games and terminals, management companies and certain leaders. It is anticipated that once video lottery gaming has commenced, these companies will recoup any costs associated with licensing and start-up;

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

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

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

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

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

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

Based on forecasted estimates provided by the racetracks themselves, total costs for new construction, rehabilitation of facilities and readying facilities for the installation of the video lottery terminals will exceed \$240 million if all eligible venues participate. Each facility's proposed project differs. The cost for each facility ranges is from \$4 million to over \$100 million dollars. The regulations require video lottery gaming agents housing over 2,500 terminals to equip the facility with an alternate emergency power source. It is estimated that this will cost those agents an additional

\$250-\$300 per installed video lottery terminal. The individual facilities will also be incurring closing costs and interest expenses on any funds borrowed to pay project costs. Each track's expenditures in readying the facility for compliance with the regulations include adequate heating, venting, air conditioning, cashier's cages, electric and communication upgrades.

The gaming facilities throughout the state are expected to employ upwards of a total estimated 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each facility is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual hourly salaries between \$22,000 to \$250,000. Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

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

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

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

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

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

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

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

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

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

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

#### **Job Impact Statement**

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

According to estimates provided by the racetracks, it is anticipated that racetracks, or gaming agents, throughout the state are expected to employ upwards of 1,900 people. Individual gaming agents will be employing between approximately 70 to 700 people. The average number of employees at each gaming facility (incremental over current operations) is estimated to be over 240. Hourly wages are expected to range from minimum wage to \$65 per hour, with annual salaries between \$22,000 to \$250,000.

Total annual payroll for each racetrack will range from \$1.8 million to over \$10.8 million, with an average payroll of over \$6.6 million.

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

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## Office of Mental Health

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### EMERGENCY RULE MAKING

#### **Residential Treatment Facilities for Children and Youth**

**I.D. No.** OMH-12-05-00002-E

**Filing No.** 304

**Filing date:** March 29, 2005

**Effective date:** March 29, 2005

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

**Action taken:** Amendment of section 584.5(e) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

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

**Specific reasons underlying the finding of necessity:** To address the immediate needs of children being served in Residential Treatment Facilities for Children and Youth (RTF) it is necessary to continue to temporarily expand the capacity of certain RTF's.

**Subject:** Operation of residential treatment facilities for children and youth.

**Purpose:** To continue the temporary increase in the capacity of certain RTF's to serve the needs of emotionally disturbed children and youth.

**Text of emergency rule:** Subdivision 584.5(e) of Part 584 of 14 NYCRR is amended to read as follows:

(e) An operating certificate shall be issued for a residential treatment facility for a resident capacity of no less than 14 and no more than 56; provided, however, that for the period commencing April 1, 2000 through [September 30, 2004,] *September 30, 2007*, bed capacity for facilities primarily serving New York City residents may be temporarily increased up to an additional ten beds over the maximum certified capacity with the prior approval of the Commissioner. In order to receive such approval, the residential treatment facility must demonstrate that the additional capacity will be used to serve those children and youth deemed most in need of RTF services by the New York City Preadmission Certification Committee as set forth in Section 583.8.

**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. OMH-12-05-00002-P, Issue of March 23, 2005. The emergency rule will expire May 27, 2005.

**Text of emergency 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

#### **Regulatory Impact Statement**

1. Statutory Authority: §§ 7.09(b), 31.04(a)(2) and 31.26(b) of the Mental Hygiene Law grant the Commissioner the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction, to set standards of quality and adequacy of facilities, and to adopt regulations governing Residential Treatment Facilities for Children and Youth, respectively.

2. Legislative Objectives: NYCRR Part 584 sets forth standards for the operation of Residential Treatment Facilities for Children and Youth. This amendment to Part 584 allows for the temporary increase of capacity of certain facilities to allow additional children and youth to be served in the program.

3. Needs and Benefits: The Office of Mental Health has determined that it is necessary to continue the existing capacity of these Residential Treatment Facilities for Children and Youth (RTFs) which serve seriously emotionally disturbed children and youth who are residents of New York City. Under the existing regulation, (14 NYCRR Section 584.5(e)), RTF bed capacity serving primarily New York City residents may be temporarily increased until September 30, 2004 by up to 10 additional beds over the permitted maximum of 56 per facility. This amendment would extend the referenced expiration date, to September 30, 2007.

There are a number of initiatives underway that focus on improving the use of the current RTF resources by decreasing the length of stay. These initiatives include focused development of supervised community residences, family based treatment programs, case management and family support to assist the youth discharged from an RTF to successfully reintegrate into the community.

To expand capacity in 2000, a total of 21 temporary beds were added to 5 existing RTF facilities serving New York City residents. These beds were added on a voluntary basis with the cooperation of the facilities and the support of the New York City Department of Mental Health. Three of the facilities that were not at the 56 bed maximum had their capacity increased administratively by a total of 13, without going over the maximum. One of the facilities, St. Christopher Otilie, was at 56 beds and another, Linden Hill, was at 55 beds. St. Christopher Otilie added 5 beds. Linden Hill added 3 beds. Therefore, 7 beds are permitted to be added under 14 NYCRR Section 584.5(e). That permission expired on September 30, 2004. Although significant improvements in development of residential alternatives, such as the supervised community residences and the family based treatment beds, have been made in the last four years. However, these additional beds are still needed.

#### 4. Costs:

(1) Costs to private regulated parties: There will be no mandated costs to the regulated parties associated with allowing an increase in capacity to the RTF program.

(2) Cost to state and local government: The annual state cost for the 7 beds is estimated as follows: 4/1/05 to 3/31/06 - \$486,000, 4/1/06 to 3/31/07 - \$502,000 and 4/1/07 to 3/31/08 - \$519,000. These additional funds will be covered by the State share of Medicaid appropriation. There is no local share for the RTF program. Funding for these beds was included in the enacted budget for State Fiscal Year 2004-2005 and is included in the Executive Budget proposed for State Fiscal Year 2005-2006.

(3) The cost projection was calculated by applying the per bed projected Medicaid rate to the 7 additional beds.

5. Local Government Mandates: There will be no additional mandates to local government.

6. Paperwork: There are no new paperwork requirements associated with this amendment.

7. Duplication: There are no duplicate, overlapping or conflicting mandates which may effect this rule.

8. Alternatives: The only alternative would be to allow the temporary additional capacity authority to expire, which is not acceptable given the critical need for these services.

9. Federal Standards: The rule does not exceed any Federal standards.

10. Compliance Schedule: Providers will be able to comply with this rule immediately.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, or local governments.

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

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules impact only Residential Treatment Facilities for Children and Youth serving children who are New York City residents.

#### **Job Impact Statement**

Because this amendment will impact only 2 providers of Residential Treatment Facilities for Children and Youth, and only permits these 2 providers to continue the temporary operation of a total of 7 beds until September 30, 2007, it will not have any impact on jobs and employment activities.

## Public Service Commission

### NOTICE OF ADOPTION

#### **Disposition of Federal Tax Refunds by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-42-04-00020-A

**Filing date:** March 24, 2005

**Effective date:** March 24, 2005

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

**Action taken:** The commission, on March 16, 2005, adopted an order in Case 03-M-1148 that determined the disposition of a Federal tax refund of Consolidated Edison Company of New York, Inc.

**Statutory authority:** Public Service Law, sections 65, 66 and 113(2)

**Subject:** Disposition of a Federal income tax refund.

**Purpose:** To determine the disposition.

**Substance of final rule:** The Commission determined the disposition of a federal tax refund of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-M-0026SA1)

### NOTICE OF ADOPTION

#### **Major Electric Rate Increase by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-51-04-00011-A

**Filing date:** March 24, 2005

**Effective date:** March 24, 2005

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

**Action taken:** The commission, on March 16, 2005, in Case 04-E-0572, approved revisions to Consolidated Edison Company of New York Inc.'s (Con Edison) tariff schedule, P.S.C. No. 9—Electricity, No. 2—Retail Access, PASNY No. 4 and Economic Development Delivery Service No. 2.

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

**Subject:** Major rate increase.

**Purpose:** To adopt a three-year electric rate plan for Con Edison.

**Substance of final rule:** The Commission adopted the terms and conditions set forth in the December 2, 2004 Joint Proposal establishing a three-year electric rate plan for Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the Order.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-0572SA1)

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

**Performance Assurance Plan by Verizon New York Inc.**

**I.D. No.** PSC-15-05-00016-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 approve or reject, in whole or in part, modifications to Verizon New York Inc.'s (Verizon) performance assurance plan (PAP), which provides for an annual review by Department of Public Service staff and Verizon to determine whether any modifications or additions should be made. All aspects of the plan are subject to review. Pursuant to the order in Case 99-C-0949, issued Jan. 24, 2003, interested parties are invited to propose modifications or additions to the PAP, which will be considered in the annual review discussions.

**Statutory authority:** Public Service Law, section 91(1)

**Subject:** Annual review of the performance assurance plan (PAP).

**Purpose:** To consider modifications to the PAP and comments from the telecommunications industry and other related entities on the PAP in an effort to recommend changes to the PAP pursuant to the annual review and related issues.

**Substance of proposed rule:** The Commission is considering whether to approve or reject, in whole or in part, modifications to Verizon New York Inc.'s (Verizon) Performance Assurance Plan (PAP), which provides for an annual review by Department of Public Service Staff and Verizon to determine whether any modifications or additions should be made. All aspects of the plan are subject to review. Pursuant to the order in case 99-C-0949, issued January 24, 2003, interested parties are invited to propose modifications or additions to the PAP, which will be considered in the annual review discussions.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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-0949SA13)

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

**Pole Attachment Rates by Bath Electric, Gas and Water Systems**

**I.D. No.** PSC-15-05-00017-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part or modify, a petition filed by Bath Electric, Gas and Water Systems for rehearing of the commission's order issued Feb. 9, 2005 regarding pole attachment rates.

**Statutory authority:** Public Service Law, section 89-c(1)

**Subject:** Request for rehearing of the commission's Feb. 9, 2005 order.

**Purpose:** To consider a request for rehearing of the commission approved pole attachment rates for Bath Electric, Gas and Water Systems.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole, in part or modify, a petition filed by Bath Electric, Gas and Water Systems for rehearing of the Commission's order issued on February 9, 2005 regarding pole attachment rates.

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

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

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

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

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

(04-E-1471SA2)

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

**Submetering of Electricity by Strivers Gardens Realty, LLC**

**I.D. No.** PSC-15-05-00018-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by Strivers Gardens Realty, LLC to submeter electricity at 300 W. 135th St., New York, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 300 W. 135th St., New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by Strivers Gardens Realty, LLC to submeter electricity at 300 West 135th Street, New York, New York 10030.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-E-0095SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E. for Trump Village Section One**

**I.D. No.** PSC-15-05-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section One, to submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section One, to submeter electricity at 2940 Ocean Parkway, Brooklyn, New York.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-E-0205SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E. for Trump Village Section Two**

**I.D. No.** PSC-15-05-00020-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section Two, to submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section Two, to submeter electricity at 2940 Ocean Parkway, Brooklyn, New York.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-E-0206SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E. for Greenpark Essex**

**I.D. No.** PSC-15-05-00021-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Greenpark Essex, to submeter electricity at 143-09, 143-11, 143-23 and 143-29 Barclay Ave., Flushing, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 143-09, 143-11, 143-23 and 143-29 Barclay Ave., Flushing, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Greenpark Essex, to submeter electricity at 143-09, 143-11, 143-23 and 143-29 Barclay Avenue, Flushing, New York.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-E-0251SA1)

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

**Submetering of Electricity by Herbert E. Hirschfeld, P.E. for Greenpark Sussex**

**I.D. No.** PSC-15-05-00022-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Greenpark Sussex, to submeter electricity at 143-06 and 143-16 Barclay Ave., Flushing, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 143-06 and 143-16 Barclay Ave., Flushing, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Herbert E. Hirschfeld, P.E., on behalf of Greenpark Sussex, to submeter electricity at 143-06 and 143-16 Barclay Avenue, Flushing, New York.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, 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.

(05-E-0252SA1)

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

**Submetering of Electricity by ConServe Corporation for 2400 Johnson Avenue Owners**

**I.D. No.** PSC-15-05-00023-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by ConServe Corporation, on behalf of 2400 Johnson Avenue Owners, to submeter electricity at 2400 Johnson Ave., Riverdale, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 2400 Johnson Ave., Riverdale, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by ConServe Corporation, on behalf of 2400 Johnson Avenue Owners, to submeter electricity at 2400 Johnson Avenue, Riverdale, New York.

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

**Data, views or arguments may be submitted to:** Jaelyn A. Brillling, 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. (05-E-0273SA1)

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

**Data, views or arguments may be submitted to:** Jaelyn A. Brillling, 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. (05-E-0276SA1)

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

**Submetering of Electricity by ConServe Corporation for Len Ru Apartment Corporation**

**I.D. No.** PSC-15-05-00024-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by ConServe Corporation, on behalf of Len Ru Apartment Corporation, to submeter electricity at 3400 Wayne Ave., Riverdale, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 3400 Wayne Ave., Riverdale, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by ConServe Corporation, on behalf of Len Ru Apartment Corporation, to submeter electricity at 3400 Wayne Avenue, Riverdale, New York.

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

**Data, views or arguments may be submitted to:** Jaelyn A. Brillling, 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. (05-E-0275SA1)

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

**Submetering of Electricity by ConServe Corporation for Fairfield Views, Inc.**

**I.D. No.** PSC-15-05-00025-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, the petition filed by ConServe Corporation, on behalf of Fairfield Views, Inc., to submeter electricity at 3103 Fairfield Ave., Riverdale, NY.

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

**Subject:** Submetering of electricity.

**Purpose:** To submeter electricity at 3103 Fairfield Ave., Riverdale, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by ConServe Corporation, on behalf of Fairfield Views, Inc., to submeter electricity at 3103 Fairfield Avenue, Riverdale, New York.