

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Implementation of the Kosher Law Protection Act of 2004

I.D. No. AAM-04-05-00001-E
Filing No. 24
Filing date: Jan. 5, 2005
Effective date: Jan. 5, 2005

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

Action taken: Addition of Part 254 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, subd. 6 and 201-c, subds. 1 and 2

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

Specific reasons underlying the finding of necessity: The regulations are legislatively directed to be adopted on an emergency basis.

Subject: Implementation of the Kosher Law Protection Act of 2004.

Purpose: To provide kosher certification.

Text of emergency rule: A new Part 254 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is adopted to read as follows:

PART 254

PERSONS CERTIFYING FOOD AS KOSHER

254.1 Statement of Qualifications of Persons Certifying Food as Kosher. Every person (including an individual, partnership, corporation, and association) who certifies non-prepackaged food as kosher or kosher-for-Passover shall file with the Department of Agriculture and Markets a statement, upon a form provided by the Department, of that person's qualifications to certify food as kosher. Such statement may include the certifier's background, training, education, experience and any other information that shows the certifier's qualifications. The form may be filed electronically on the Department's website at <http://www.agmkt.state.ny.us/> or by mail or fax to the New York State Department of Agriculture and Markets, Division of Kosher Law Enforcement, 55 Hanson Place, Brooklyn, New York 11217.

254.2 Registration of Persons Certifying Non-Prepackaged Food as Kosher. Every person (including an individual, partnership, corporation and association) who manufactures, produces, processes, packs or sells non-prepackaged food represented or branded as kosher shall file with the Department of Agriculture and Markets, upon a form provided by the Department, the name, address and telephone number of the person certifying the food as kosher. The form may be filed electronically on the Department's website at <http://www.agmkt.state.ny.us/> or by mail or fax to the New York State Department of Agriculture and Markets, Division of Kosher Law Enforcement, 55 Hanson Place, Brooklyn, New York 11217.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 4, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Michael McCormick, Counsel's Office, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2449

Regulatory Impact Statement

1. Statutory Authority:

The Kosher Law Protection Act of 2004, effective July 13, 2004, directs the Commissioner of Agriculture and Markets to adopt a regulation implementing that Act's requirement that persons certifying food as kosher file with the Commissioner a statement of their qualifications to provide that certification and that persons who manufacture, produce, process, pack and sell food represented as kosher file with the Department the name, address and phone number of the person certifying the food as kosher.

2. Legislative Objectives:

The Legislature directed that the proposed regulations be adopted to provide consumers with information about kosher certifiers.

3. Needs and Benefits:

The proposed rule implements the legislative directive that persons certifying food as kosher file with the Department a statement of their qualifications to provide that certification and that persons who manufacture, produce, process, pack and sell food represented as kosher file with the Department the name, address and phone number of the person certifying the food as kosher. The filed information will be available for public inspection so consumers of food certified as kosher will have the ability to examine the qualifications of persons certifying food as kosher.

4. Costs:

The filing cost to persons certifying food as kosher will be minimal; filing can be done electronically or by mailing or faxing a written statement of qualifications to the Department. The Department will incur an

estimated cost of between \$50,000 and \$150,000 to facilitate electronic filing. There is no cost to local governments.

5. Local Government Mandates:

There are no local government mandates involved with the proposed rule.

6. Paperwork:

Filers may use the electronic forms on the Department's website or submit the information in writing on those forms which will be electronically filed.

7. Duplication:

None.

8. Alternatives:

None. The Legislature directed, in the Kosher Law Protection Act of 2004, that the proposed regulation be adopted.

9. Federal Standards:

None.

10. Compliance Schedule:

180 days after the Act's effective date.

Regulatory Flexibility Analysis

1. Effect of Rule:

Persons certifying food as kosher must file a statement with the Department of their qualifications to provide such certification as required by the Kosher Law Protection Act of 2004, effective July 13, 2004. Persons manufacturing, producing, processing, packing or selling food represented as kosher will file with the Department the name, address and phone number of the person certifying the food as kosher. The number of person affected is not known.

2. Compliance Requirements:

Persons certifying food as kosher will file with the Department a statement of their qualifications to provide such certification. Persons manufacturing, producing, processing, packing or selling food represented as kosher will file with the Department the name, address and phone number of the person certifying the food as kosher. Local governments are not affected by the proposed rule.

3. Professional Services:

None.

4. Compliance Costs:

Filing costs will be minimal. Filing may be done electronically or by mailing or faxing a written statement of qualifications to the Department. There are no costs to local governments.

5. Economic and Technological Feasibility:

See 4 above.

6. Minimizing Adverse Impact:

The filing is statutorily required by the Kosher Law Protection Act of 2004.

7. Small Business and Local Government Participation:

None. The filing is legislatively directed.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The proposed rule has uniform statewide impact.

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

All persons certifying food as kosher must file with the Department of Agriculture and Markets a statement of their qualifications to provide kosher certification. Persons who manufacture, produce, process, pack and sell food represented as kosher file with the Department the name, address and phone number of the person certifying the food as kosher. No professional services are required to meet the filing requirement.

3. Costs:

No capital costs or annual costs arise from the proposed rule.

4. Minimizing Adverse Impact:

There is no identifiable adverse impact.

5. Rural Area Participation:

The proposed rule has uniform statewide impact and implements a legislative directive with no identifiable impact on any specific area of New York State.

Job Impact Statement

1. Nature of Impact:

The proposed rule will not adversely impact any existing or prospective employment opportunity because the rule only requires the filing with the Department of Agriculture and Markets of qualifications of persons certifying food as kosher and the identification of persons certifying food as kosher. The rule does not establish minimum standards, nor require specific qualifications.

2. Categories and Numbers Affected:

Persons providing kosher certification of food and persons manufacturing, producing, processing, packing and selling food represented as kosher will be affected. The number is unknown.

3. Regions of Adverse Impact:

The proposed rule has uniform statewide impact.

4. Minimizing Adverse Impact:

There is no identifiable adverse impact.

**EMERGENCY
RULE MAKING**

Captive Cervids

I.D. No. AAM-04-05-00002-E

Filing No. 26

Filing date: Jan. 6, 2005

Effective date: Jan. 6, 2005

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

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

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

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

Specific reasons underlying the finding of necessity: The proposed repeal of section 62.8 of 1 NYCRR and the adoption of 1 NYCRR Part 68 will help to prevent the introduction of chronic wasting disease (CWD) into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State. CWD is an infectious and communicable disease of deer belonging to the Genus Cervus (including elk, red deer and sika deer) and the Genus Odocoileus (including white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico and Illinois. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and the Canadian provinces of Saskatchewan and Alberta.

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

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

The rule establishes general health requirements for captive cervids, special provisions for captive cervids susceptible to CWD, requirements for CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD

into New York State and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

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

Subject: Captive cervids.

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

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

Section 68.1 of 1 NYCRR sets forth definitions for "CWD susceptible cervid," "CWD exposed cervid," "CWD positive cervid," "CWD negative cervid," "CWD suspect cervid," "CWD infected zone," "captive," "CWD Certified Herd Program," "Cervid," "Chronic Wasting Disease," "Commingling," "Department," "Enrollment Date," "Herd," "Herd Inventory," "CWD Herd Plan," "CWD Herd Status," "CWD positive herd," "CWD Suspect herd," "Special purpose herd," "CWD Exposed herd," "CWD Certified herd," "Official identification," "CWD Monitored herd," "Owner," "Premises," "CWD Premises plan," "Quarantine," "State animal health official," "Status date," "Official test," and "USDA/APHIS."

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 5, 2005.

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

Regulatory Impact Statement

1. Statutory Authority:

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

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

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

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

2. Legislative Objectives:

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

3. Needs and Benefits:

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

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

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

4. Costs:

(a) Costs to regulated parties:

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

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

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

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

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

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

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

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

(c) Source:

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

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

Due to the spread of CWD in other states and the threat that this disease poses to the State's captive deer population, the proposed rule was deter-

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

9. Federal Standards:

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

10. Compliance Schedule:

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

Regulatory Flexibility Analysis

1. Effect of Rule:

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

2. Compliance Requirements:

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

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

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

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

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

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

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

inventory. A report of the validated annual inventory containing all man-made identification of each animal must be submitted to the Department.

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

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

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

The rule would have no impact on local governments.

3. Professional Services:

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

4. Compliance Costs:

(a) Costs to regulated parties:

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

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

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

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

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

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

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

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

(c) Source:

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

5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation of the importation of captive deer into New York State will have an economic impact on the entities that imported a total of 360 captive deer into New York State in 2002, the economic consequences of the infection or exposure to CWD of the approximately 9,944 captive cervids already in the State would be far greater. The rule is technologically feasible. Captive deer imported into the State are already required to be accompanied by a health certificate. Endorsement of that certificate with the number of the permit issued by the Department presents no technological problem. The structural, recordkeeping and testing requirements of the rule involve existing technologies that are already in use.

6. Minimizing Adverse Impact:

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

The rule would have no impact on local governments.

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

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

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

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

3. Costs:

(a) Costs to regulated parties:

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

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

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

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

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

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

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

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

(c) Source:

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

4. Minimizing Adverse Impact:

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

5. Rural Area Participation:

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

Job Impact Statement

1. Nature of Impact:

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

2. Categories and Numbers Affected:

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

3. Regions of Adverse Impact:

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

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,944 captive deer currently raised by approximately 564 New York entities from the introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

Banking Department

EMERGENCY RULE MAKING

Licensed Cashers of Checks

I.D. No. BNK-04-05-00005-E

Filing No. 30

Filing date: Jan. 10, 2005

Effective date: Jan. 12, 2005

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

Action taken: Amendment of Part 400 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 37(3), 369, 371 and 372

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

Specific reasons underlying the finding of necessity: L. 2004, ch. 432 amended Art. 9-A of the Banking Law to provide an appropriate regulatory regime for entities engaged in cashing commercial checks. The amendments to Part 400 are necessary to conform the regulations governing check cashers to the changes in the law, which were approved on Sept. 14, 2004 and were effective immediately.

Subject: Licensed cashers of checks.

Purpose: To regulate commercial check cashing.

Text of emergency rule: The title of Part 400 is amended to read as follows:

Part 400

LICENSED CASHERS OF CHECKS

(Statutory authority: Banking Law, §§ 37[3], 367, 369, 371, 372)

Paragraphs (a) and (b) of Section 400.1 of the Superintendent's Regulations shall be amended to read as follows:

(a) Application [form]. *No person shall engage in the business of cashing checks, drafts or money orders, as principal, broker, agent or otherwise, for a consideration, without first obtaining a license from the superintendent. This licensing requirement applies whether such activities are conducted for customers who are natural persons or for any business, corporation, partnership, limited liability company or partnership, association, or sole proprietorship, or any other entity.* Application for a new license or for a change of control of a licensee shall be made upon forms issued by the superintendent. These forms may be obtained at Banking Department offices [located at Two Rector Street, 21st Fl., New York, NY 10006 and 194 Washington Ave., Albany, NY 12210.] *at the locations specified in Supervisory Policy G-1.* For purposes of this Part, the term person shall include a[n individual.] *natural person or a partnership, corporation, association or any other entity.* The term control shall mean having the power directly or indirectly to direct or cause the direction of the management and policies of a licensee, whether through the ownership

of voting stock of a licensee, the ownership of voting stock of any corporation which possesses such power or otherwise and shall be presumed to exist if any person, directly or indirectly, owns, controls, or holds with power to vote 10 percent or more of the voting stock of any licensee or any person owning, controlling or holding with power to vote 10 percent or more of the voting stock of any licensee.

(b) Application procedure. Completed applications should be delivered to the Licensed Financial Services Division of the Banking Department [Two Rector Street, 21st Fl., New York, NY 10006.] *at the New York City office location specified in Supervisory Policy G-1.* An application for a new license for a fixed location or for a mobile unit must be accompanied by a check for the investigation and license fees specified in Banking Law, section 367. An application by a licensee to operate a limited station must be accompanied by a check for the license and investigation fees required by Banking Law, section 370. An application for change of control of a licensee must be accompanied by a check for the investigation fee specified in Banking Law, section 370-a. In each case, the check must be made payable to the order of "Superintendent of Banks of the State of New York". Applicants for a new license seeking to conduct business under a trade name must file a certificate in the office of the county clerk as required by General Business Law, section 130. A certificate of the county clerk stating that such a document has been filed must be submitted with an application for a new license.

A new Subsection (g) shall be added to Section 400.1 of the Superintendent's Regulations as follows:

(g) *The license of a restricted location authorized pursuant to subdivision 1 of the Banking Law shall not be affected by a change of control, pursuant to Section 370-a of the Banking Law, pertaining solely to such restricted location of such licensee, provided that the licensee continues thereafter to engage at that location in the cashing of checks, drafts or money orders only for payees that are other than natural persons and provided further that such license shall bear a legend stating that such location is restricted to the cashing of checks, drafts or money orders only for payees that are other than natural persons.*

Paragraph (1) of Subsection (a) of Section 400.6 of the Superintendent's Regulation shall be amended to read as follows:

(a) Every licensee shall:

(1) Post and display at all times in a conspicuous place on the premises the license. [and also] *Every licensee that cashes one or more checks, drafts or money orders for any payees that are natural persons must post the schedule of rates to be charged with respect to such transactions involving payees that are natural persons.* The schedule shall be made of [plastic or metal] *durable material*, be no less than 30 inches wide and 36 inches high with letters at least > inch in size and indicate the fee applicable to the full amount of the check to be cashed that corresponds to the amount of the check. *The schedule shall indicate the fee that corresponds to the amount of the check. The amount of the check shall be set forth on the schedule in increments of \$25.00 ranging from \$25.00 to \$2,000. The schedule shall also indicate the percentage charge imposed on all checks and the minimum charge of \$1.00 per check.* The schedule shall be in English and in Spanish and posted in the customer's area.

Section 400.12 of the Superintendent's Regulations shall be amended to read as follows:

[The] *Except with respect to the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons, [licensee] a licensee shall be permitted to charge or collect a fee for cashing a check, draft or money order not to exceed (a) 1.5 percent of the amount of the check, draft or money order, or (b) \$1, whichever is greater. Effective January 1, 2005, and annually thereafter, the maximum percentum fee specified in clause (a) of this section, shall be increased by a percentum amount, based upon an increase in the annual consumer price index for the New York—Northern N.J.—Long Island, NY—NJ—CT—PA area for all urban consumers (annual CPI-U), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor for the calendar year preceding the year in which such increase is made compared to such annual CPI-U for the year prior to such preceding year. The maximum percentum fee that may be charged or collected for cashing a check, draft or money order pursuant to this section in effect at such time shall be multiplied by such computed percentum amount and the result added to such maximum percentum fee. The resulting sum shall be the revised maximum percentum fee, which shall be posted upon the internet site of the Banking Department (www.banking.state.ny.us) by the Superintendent not later than forty-five days following the public release of such annual index by the U.S. Department of Labor. Such revised maximum percentum fee shall be calculated and posted to the nearest one-hundredth*

of a percentum. Such revised maximum percentum fee shall be effective not later than forty-five days after the Superintendent shall have notified the Majority Leader of the Senate, the Speaker of the Assembly, and the Chairperson of both the Senate and Assembly Committees on Banks of his/her intention to change the maximum percentum fee pursuant to the provisions of Section 372.3 of the Banking Law and shall continue in effect until revised and increased in the next succeeding year based upon an increase in such annual index. If such annual CPI-U does not increase in any one year, the maximum percentum fee in effect during the year in which the index does not increase shall remain unchanged in the next succeeding year. Nothing herein shall be deemed to prohibit the Superintendent from setting, by regulation, a different maximum percentum fee at any time where the Superintendent shall find that such a fee is necessary and appropriate to protect the public interest and to promote the stability of the check cashing industry for the purpose of meeting the needs of the communities that are served by check cashers. *No maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons.*

Paragraph (3) of Subsection (h) of Section 400.13 of the Superintendent's Regulations shall be amended to read as follows:

(3) that the check casher is licensed and regulated by the New York State Banking Department located at [Two Rector Street, New York, NY 10006] *the New York City office location specified in Supervisory Policy G-1;* and

Section 400.15 of the Superintendent's Regulations shall be amended to read as follows:

Background. Chapter 546 of the Laws of 1994 altered the licensing criteria applicable to check cashers by substantially amending section 369 of the Banking Law to require, among other things, that the superintendent determine whether there is a community need for a new licensee in the proposed area to be served and to prohibit entirely the granting of a license at a location which is less than three-tenths of a mile from an existing licensee. In so acting, the Legislature adopted a specific statutory finding of legislative intent, to wit, "The legislature hereby finds and declares that check cashers provide important and vital services to New York citizens; that the business of check cashers shall be supervised and regulated through the Banking Department in such a manner as to maintain consumer confidence in such business and protect the public interest; that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers." However, the legislation left unamended Banking Law, section 370 which permits a licensee to apply to the superintendent for leave to change its place of business to any other location and which does not make explicit the standards to be applied by the superintendent in granting permission to relocate. A licensee must obtain a new license to conduct business at another location. In order to [preserve the bar against issuance of new licenses within three-tenths of a mile of existing licensees] *promote and maintain the stability of the check cashing business* while accommodating the reasonable needs of current licensees to relocate, [and to prevent evasions of the legislative intent behind chapter 546 of the Laws of 1994,] the following standards shall be applied by the superintendent in determining whether to approve applications for relocation to any site which is within three-tenths of a mile of another licensed location:

Paragraph (a) of Section 400.15 of the Superintendent's Regulations shall be amended to read as follows:

(a) No relocation shall be permitted to a site within three-tenths of a mile of another *existing licensee location* from a location greater than three-tenths of a mile from such *existing licensee location* [.], *unless such other existing licensee engages in the cashing of checks, drafts or money orders only for payees of such checks, drafts or money orders that are other than natural persons at a restricted location authorized pursuant to subdivision 1 of Section 369 of the Banking Law or at any other licensed location whereat the licensee engages solely in the cashing of checks, drafts or money orders only for payees that are other than natural persons.*

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire April 9, 2005.

Text of emergency 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

Regulatory Impact Statement

1. Statutory authority:

Banking Law Section 37[3] authorizes the Superintendent to require any licensed casher of checks to make such special reports to her at such times as she may prescribe. Section 369 describes the circumstances under which the Superintendent shall issue a license to permit the cashing of checks, drafts and money orders at a specified location or in a specified area. Section 371 authorizes the Superintendent to make such rules and regulations, and such specific rulings, demands and findings, not inconsistent with Article 9-A of the Banking Law, as she may deem necessary for the proper conduct of the business authorized and licensed under, and for the enforcement of, that Article. Section 372 authorizes the Superintendent to establish by regulation the maximum fees which may be charged by a licensed check casher for cashing a check, draft or money order.

2. Legislative objectives:

As more fully described in response to Item 3, "Needs and benefits" below, the amendments to Part 400 of the Superintendent's Regulations implement, or conform to the regulations of the Banking Department to, recently enacted legislation amending the provisions of the Banking Law governing check cashers. The objective of this legislation was to provide for the regulation of the business of check cashing regardless of whether such check cashing was performed for customers that are natural persons or business or other entities. The amendments to Part 400.6 regarding signage requirements for retail check cashing carry out the legislative objective of consumer protection embodied in the provisions of Section 372 of the Banking Law that require a schedule of the fees and charges permitted under that section to be conspicuously and continuously posted in every licensed location.

3. Needs and benefits:

While the Banking Department has had the authority to regulate check cashers under Article 9-A of the Banking Law, an interpretive policy dating back to the initial regulation of check cashers in 1944 applied such regulation only to the cashing of checks for payees that are natural persons (that is, retail or consumer check cashing). However, the Attorney General recently issued a formal opinion (#2004-F5) that commercial check cashers are subject to licensing and regulation under Article 9-A of the Banking Law. At about the same time, a grand jury impaneled by the New York County Supreme Court issued a report calling on the Legislature to ensure that commercial check cashers are subject to licensing and regulation.

In response to these developments, Chapter 432 of the Laws of 2004, which was approved on September 14, 2004, amended the Banking Law in relation to the cashing of checks for payees who are other than natural persons. The new legislation provides for the regulation of the business of check cashing by the Banking Department, whether performed for customers who are natural persons or business entities.

The changes to Part 400 all implement, or conform to the regulations of the Banking Department to, specific changes made by the Legislature in Chapter 432, except for certain of the amendments to Part 400.6, which incorporate the provisions of an existing emergency regulation amending the signage requirements of Part 400.6 (BNK-38-04-00001-E). Specifically:

Amendments to Section 400.1(a) make it clear that the requirement that any person engaging in the business of check cashing must first obtain a license from the Superintendent applies whether such activities are conducted for customers who are natural persons or for any business or entity.

New Section 400.1(g) relates to the requirement in Banking Law Section 369 that no license shall be issued for a location which is closer than three tenths of a mile from an existing licensee. Chapter 432 amended Section 369 to make it clear that the Superintendent may permit a location to be licensed which is closer than three tenths of a mile from an existing licensee, so long as the newly licensed location is a "restricted location" as described in subsection 1 of Section 369 of the Banking Law—that is, a location which is restricted to the cashing of checks, drafts or money orders only for payees that are other than natural persons.

New Section 400.1(g) makes it clear that this exemption will not be affected by a change of control of such restricted location, provided that the licensee continues to engage only in commercial check cashing.

Amendments to Section 400.6(a)(1) deal with the requirement that licensees post a schedule of rates. These amendments make it clear that the signage requirement applies only to retail check cashers, and that the posted rate schedule need only cover transactions involving payees that are natural persons.

The amendments to Part 400.6 also incorporate the provisions of a current emergency regulation amending that section. Previously adopted amendments to Part 400.12 of the Superintendent's Regulations increased

the maximum fee that licensed check cashers may charge and provide for an annual fee adjustment thereafter based on the increase in the consumer price index for the New York metropolitan area, if any. As a result of the amendments to Part 400.12, licensed check cashers need to revise their posted schedules of fees and charges.

In addition to amending the disclosure of the amount of the check cashing fee, the amendment changes the structure of the disclosure to provide more useful information. Previously under Part 400.6, the signage was required to disclose the fee charged in five cent increments. As a result, the corresponding check amounts were often atypical amounts. Under the amendment to Part 400.6, the disclosure will be governed by the amount of the check and the corresponding check cashing fee set forth on the signage according to the amount of the check in increments of \$25.00 ranging from \$25.00 to \$2,000. The schedule will also indicate the percentage charge imposed on all checks and the \$1.00 minimum.

Moreover, since the fee may change in the future due to increases in the Consumer Price Index, the amendment allows signs to be made of durable material instead of specifying that the signs must be made of plastic or metal.

Chapter 432 amended Section 372(1) of the Banking Law to make it clear that while the Superintendent shall establish the maximum fees which may be charged by licensees for cashing checks, such maximum fees shall not apply to the cashing of checks for payees that are other than natural persons. The amendments to Part 400.12 provide for a comparable exception in the relevant regulation.

In addition to the foregoing, the amendments revise Part 400.1(a) and (b) and Part 400.15 to update references to the location of the New York City office of the Department.

4. Costs:

Except as noted below, the amendments to Part 400 of the Superintendent's Regulations are not projected to impose any costs on regulated persons or the state government.

As noted in "Needs and Benefits" above, licensed check cashers will be required periodically to revise their posted schedule of fees and charges as a consequence of previously adopted amendments to Part 400.12. No additional costs will be incurred in complying with the requirement that the new signs reflect the new disclosure structure. Indeed, the new regulations may reduce the costs of compliance by specifying only that the signs be made of a durable material, rather than requiring that they be made of plastic or metal.

5. Local government mandates:

The rule making will not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

Under Chapter 432 of the Laws of 2004, the existing licensing and regulatory requirements in Article 9-A apply to commercial check cashers, except insofar as they are specifically exempted. These requirements include certain reporting and examination requirements applicable to all check cashers. In addition, Chapter 432 added a new subsection (7) to Section 372 of the Banking Law, requiring a licensee to submit to the Superintendent a copy of any suspicious activity reports or currency transactions reports as are required to be submitted to the federal authorities.

7. Duplication:

The rule making will not result in duplication, overlap or conflict with any rules or other legal requirements of the state and federal governments. While Chapter 432 of the Laws of 2004 added a new subsection (7) to Section 372 of the Banking Law, requiring a licensee to submit to the Superintendent a copy of any suspicious activity report or currency transactions report that is required to be submitted to the federal authorities, a licensee may submit a copy of the report filed with the federal authorities in satisfaction of this requirement.

8. Alternative approaches:

Except as noted with respect to certain of the changes in Part 400.6, the changes in Part 400 are necessary to conform the regulations to the changes in the Banking Law effected by Chapter 432 of the Laws of 2004. One alternative would be to take no action; however not conforming the regulation to the statute was not considered to be a viable alternative. The Banking Department did communicate with the commercial check cashing industry during the process of making recommendations during the legislative process leading to the adoption of Chapter 432.

Consideration was given to leaving the retail check cashing signage provisions Part 400.6 unchanged. However, as the schedule of permissible fees has changed, failing to require changes in the signage would result in inaccurate fee disclosure. Moreover, as noted in "Needs and Benefits"

above, it was determined that the need for licensed check cashers to make signage changes to reflect the new fee schedule imposed by the previously adopted amendments to Part 400.12 meant that simultaneously promulgating the changes in the signage requirements contained in the proposed amendments to Part 400.6 would provide an opportunity to improve the quality of disclosure to customers and provide greater flexibility in signage materials without imposing additional costs on licensed entities.

9. Federal standards:

No minimum standards of the federal government for the same or similar subject areas will be exceeded by the amendments to Part 400 of the Superintendent's Regulations. The federal government does not license or regulate check cashers.

10. Compliance schedule:

The amendments to Part 400 reflect changes to the Banking Law effected by Chapter 432 of the Laws of 2004. Section 6 of that Chapter contains certain transitional provisions for the licensing of commercial check cashers. Except as therein provided, check cashers are currently required to comply with the statutory changes, which have already come into effect.

Regulatory Flexibility Analysis

1. Effect of Rule

The amendments to Part 400 all implement the legislative determination, embodied in Chapter 432 of the Laws of 2004, that commercial check cashers, as well as retail check cashers, shall be subject to licensing and regulation.

The amendments make it clear that the existing regulatory requirements applicable to retail check cashers are generally also applicable to commercial check cashers. The amendments also reflect the statutory intent to modify the regulatory scheme applicable to retail check cashers to accommodate certain unique aspects of commercial check cashing.

Commercial check cashers service small business entities and are themselves small businesses. Customers of commercial check cashers typically are such small business entities as construction sub contractors, food and sundry suppliers, and garment industry vendors that receive payment in check for goods and services. These businesses many times operate on a cash basis, and the commercial check cashers facilitate the conduct of these businesses. This service enables owners of such businesses to forego the use of fixed banking facilities, which may be far removed from their place of business and operations, in order to convert payment checks to cash. There is no basis upon which to make a meaningful estimate of the number of small business entities serviced by commercial check cashers.

With respect to the commercial check cashing entities themselves, there exists no definitive list of such entities, essentially because such businesses have not heretofore been regulated. The most comprehensive list is provided by the Financial Crimes Enforcement Network (FinCEN), a federal regulatory entity within the Department of Treasury dedicated particularly to enforcement of federal anti-money laundering and related criminal statutes. Under the US PATRIOT Act requirements, money service businesses, such as check cashers, whether or not regulated by any federal or state government, must register with FinCEN. A list provided to the Department's Criminal Investigation Bureau shows 245 entities. This number includes numerous markets, pharmacies, and educational facilities in addition to a few entities already licensing as retail check cashers. The commercial and educational entities would not be subject to licensing and regulation under Part 400 if they cash checks incidental to their businesses and for a fee not exceeding \$1 per check. (It is noted, however, that if such retail vendors are engaging in commercial check cashers with supplier vendors that service these industries, and the activity is more than incidental and the fees charged in excess of the exempted maximum fee of \$1, these retail entities may be potentially subject to licensing by the Department.) Removing these entities from the FINCEN list leaves approximately 120 entities that indicate either by name they are engaged in check cashing or for which no description of the business activity is provided. (In certain instances, these entities may be payment agents for billers and would be exempt from the licensing requirements pursuant to Article 9-A.)

Based upon Department's experience from licensing retail check cashers, it may be assumed these commercial check cashing entities are virtually all small businesses, constituted as sole proprietorships, partnerships, Chapter S corporations or limited liability companies or partnerships. The Department does not believe any of these entities are publicly traded corporations.

In addition to this relatively identifiable universe, it is noted that historically in many instances commercial check cashers have not dealt directly with commercial customers, but rather operated through "agents"

or series of agents. These agents engage in "intermediate" check cashing, taking checks from commercial entities in exchange for the face amounts minus a fee, subsequently aggregating the checks, and ultimately cashing the checks with a commercial check casher that deposits the checks in a bank account. At that moment, the checks first enter the formal bank payment and clearance process. How many of these "agents" exist is unknown and cannot be meaningfully estimated at this time. However, the Department assumes all such agents would be small businesses. Under the statutory requirements, these agents would either need to be licensed as check cashers or be employed by a licensed check casher.

The regulatory scheme set forth in the amendments to Part 400 will impose a burden upon commercial check cashers, since these entities have heretofore not been subject to licensing and regulation. However, these amendments all implement, or conform the regulations to, specific changes made by the Legislature in Chapter 432. Retail check cashers already operate under this same basic regulatory scheme, and the statutory amendments made by Chapter 432 included provisions intended to accommodate unique aspects of commercial check cashing.

Certain of the amendments to Part 400 also apply to retail check cashers, including the signage amendments in Part 400.6. However, these amendments will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on such entities. Indeed, by improving the structure of the required disclosures and providing additional flexibility regarding signage materials, these amendments provide an economic benefit and reduce regulatory burden.

The amendments to Part 400 will not impose any adverse economic impact, or reporting, recordkeeping or other compliance requirements on local governments.

2. Compliance Requirements

As noted above, under the amendments to Part 400, commercial check cashers will be subject to the same licensing and regulation as retail check cashers, except insofar as modifications in the regulatory scheme set forth in Chapter 432 are reflected in the Part 400 amendments. The compliance requirements thus imposed on commercial check cashers are entirely new.

3. Professional Services

Part 400 imposes extensive reporting and record keeping requirements upon check cashers. Commercial check cashers may need to obtain increased services from accountants, attorneys and data processing entities in order to meet these requirements.

4. Compliance Costs

Since the compliance requirements imposed on commercial check cashers are entirely new, such commercial check cashers will experience increased compliance costs. The amount of such costs will depend on the ease with which the existing business operations and record keeping systems of each entity can be adapted to meeting the operational, recordkeeping and reporting requirements imposed by Article 9-A and Part 400. The amount of such costs cannot be estimated per entity or in the aggregate.

5. Economic and Technological Feasibility

Commercial check cashers presumably have in place a business operational infrastructure that includes an electronic data processing and record keeping capability sufficient to meet federal and state tax reporting requirements as well as US PATRIOT Act requirements. Thus, while compliance with the Part 400 regulatory scheme may require some modification of existing programs in order to meet the reporting and recordkeeping requirements, compliance is expected to be technologically and economically feasible.

6. Minimizing Adverse Impact

To the extent the amendments to Part 400 modify the current regulatory scheme, these modifications are made in recognition of certain peculiar operational characteristics of commercial checking that are not pertinent to retail check cashing or, in the case of the signage amendments to Part 400.6, do address regulatory standards whose modification is of interest to the retail check cashers.

The amendments affecting commercial check cashers conform Part 400 to the statutory modifications to Article 9-A contained in Chapter 432. The statutory amendments accomplish the following: (i) permits both existing and new commercial check cashing locations that are within 3/10s of a mile of an existing licensed check casher, provided such locations engage only in commercial check cashing; (ii) removes the maximum fee per check limitation upon the cashing of commercial checks, whether the cashing is performed by retail or commercial check cashers; (iii) removes the cap on the amount of a check that may be cashed with respect to commercial checks and increases the cap amount for retail checks from \$6,000 to \$15,000; and (iv) authorizes a temporary license for commercial check cashers upon initial application to permit such cashers to continue to

operate as their applications are processed and prior to the issuance of a permanent license. Finally, since Chapter 432 excludes commercial checks from the maximum fee per check limitation, Part 400 is amended to limit the signage requirements relating to fees charged by licensed check cashers only to retail checks.

7. Small Business and Local Government Participation

The Department had numerous discussions with the Financial Service Centers of New York, Inc., the state check casher trade association, which primarily represents retail but also a certain number of commercial check cashers, during the development of the legislative proposal which became Chapter 432. There is no trade association which represents the commercial cashers as a group. The Department communicated with a number of identified commercial check cashers during the two (?) years in which it was developing the legislative proposal in order to determine how the industry operates. In addition, the Department has been contacted by individual commercial check cashers that were concerned about the potential recommendations of a Grand Jury empanelled by the New York County Supreme Court regarding commercial check cashing and the possible resulting enforced activities by the New York County District Attorney. These commercial check cashers expressed an interest in obtaining regulation by the Department.

Because of the need to impose the regulatory regime upon commercial check cashers immediately, the Department adopted the amendments to Part 400 as an emergency rule. The Department expects that the experience of check cashers under the emergency rule may lead to further input from the commercial check cashing industry during the rule making process.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted. The amendments to Part 400 will impose no additional regulatory requirements upon public entities in rural communities.

Upon an examination of the addresses of the commercial check cashing entities culled from the FinCEN list, it appears all such entities are located in either large metropolitan areas or small cities of this state. Based on the experience of the Department in licensing and regulating retail check cashers, in virtually all cases they operate in the same types of urban areas. Therefore, it is anticipated that the emergency rule will not impose any additional regulatory requirements upon private entities in rural communities.

Job Impact Statement

A job impact statement is not submitted. The imposition of the regulatory regime for licensed check cashers upon currently non-regulated commercial check cashers can be expected to cause changes in the business operations of such cashers and this may affect employment within the industry. However, it is impossible to estimate the number of potential licensed commercial check cashers at this time, and therefore the size of the work force in this industry. Consequently, there is no way to meaningfully estimate the effect of any changes in business operations on employment within the industry.

A case in point is the "agent" population, discussed Section 1 of the Regulatory Flexibility Analysis relating to these amendments. The Department has no data at this time as to how many individuals are engaged in this intermediate check cashing activity between commercial customers and commercial check cashers. Under the amendments to Part 400, all such persons would either need to be licensed as check cashers or be employed by a licensed check casher. The extent to which such requirements may adversely affect the size of the agent population cannot be meaningfully estimated.

With respect to existing licensed retail check cashers, the proposed regulations should be economically beneficial and may induce business expansion and job growth.

Office of Children and Family Services

NOTICE OF ADOPTION

Statewide Automated Child Welfare Information System (SACWIS)

I.D. No. CFS-09-04-00015-A

Filing No. 31

Filing date: Jan. 10, 2005

Effective date: Jan. 26, 2005

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

Action taken: Amendment of Parts 428 and 441 and addition of Part 466 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 446

Subject: Statewide Automated Child Welfare Information System (SACWIS).

Purpose: To implement the State's SACWIS system in a manner that allows child welfare workers time to effectively communication with one another, enter information directly, eliminate duplicate entry of information, allow for direct determination of claims, improve the convenience to consumers of service, reduce the administrative burden of child welfare workers in social services districts and the agencies with which they contract to provide direct services, protect the confidentiality of individuals about whom information is recorded, meet the requirements of section 479 of the Federal Social Security Act (SSA) and 45 CFR parts 1355 and 1356 which mandate the collection of specified adoption and foster care information, and protect Federal financial participation.

Text of final rule: Paragraph (4) of subdivision (a) of section 428.15 is repealed and a new paragraph (4) is added to read as follows:

(4) *Such records, whether maintained by a social services district or provider agency must be retained in accordance with the following standards:*

(i) *records of a foster child must be retained for 30 years following the discharge of the child from foster care;*

(ii) *records of a child and family receiving preventive services must be retained for six years after the 18th birthday of the youngest child in the family. The provisions of this subparagraph apply where the sole service provided is preventive services. Where preventive services is provided in conjunction with or in addition to foster care, adoption or child protective services, the applicable standards for record retention in relation to foster care, adoption or child protective services as set forth in this section apply;*

(iii) *records of a child and family receiving child protective services must be maintained in accordance with the standards set forth in sections 422(5) and 422(8) of the Social Services Law and section 432.9(f) of this Title; and*

(iv) *records of an adopted child must be permanently retained.*

Paragraph (1) of subdivision (a) of section 441.7 is amended to read as follows:

(a) All authorized agencies shall:

(1) maintain current case records for each child in its care, in accordance with the requirements of section 372 of the Social Services Law, which records [shall] *must* be conveniently indexed and retained [until such child becomes 21 years of age] *in accordance with the requirements set forth in paragraph (4) of subdivision (a) of section 428.15 of this Title;* such [record shall] *records must* also include the intake study; [,] the plan of service; [,] plan for discharge and aftercare, where applicable; [,] the care and services provided, including social, psychiatric and psychological services, social history of the child and [his] *the child's* family; [,] certification of birth; [,] medical and surgical consent from parent or guardian; [,] record of school placement; [,] reports from other agencies; [,] all pertinent correspondence; [,] and periodic progress reports which [shall] *must* consist of social information, psychological or psychiatric reports, if applicable, medical and dental reports, reports from staff, and after care reports. The requirements of this paragraph [shall] *must* not be construed to require agencies to maintain duplicate records for those maintained by them pursuant to *Parts* [Part] 428 *and/or* 466 of this Subchapter.

A new Part 466 is added to read as follows:

PART 466

Implementation and Administration of the CONNECTIONS System
Section 466.1 Scope.

The provisions of this Part apply to the implementation and administration of the CONNECTIONS system. This Part establishes standards for the internal and external recording of information in the CONNECTIONS system, the protection of confidential individual identifiable information, the sealing and expungement of information and the security of the system.

Section 466.2 Definitions.

For the purposes of this Part the following definitions apply:

(a) The CONNECTIONS system means the statewide automated child welfare information system implemented and administered by OCFS pursuant to section 446 of the Social Services Law. The CONNECTIONS system contains, but is not limited to, those data elements required by applicable State and federal statutes and regulations, relating to the provision of child welfare services including foster care, adoption assistance, adoption services, preventive services, child protective services, and other family preservation and family support services.

(b) OCFS means the New York State Office of Children and Family Services, successor agency to the Department of Social Services and the Division for Youth, pursuant to chapter 436 of the Laws of 1997.

(c) A public or private agency means an authorized agency, as defined in paragraphs (a) or (b) of subdivision 10 of section 371 of the Social Services Law; a not-for-profit corporation, as defined in paragraph 5 of subdivision (a) of section 102 of the Not-for-Profit Corporation Law; or a public agency that receives prior approval from OCFS to provide foster care and/or child welfare services.

Section 466.3. Mandatory Use.

Upon issuance of an administrative directive by OCFS indicating that information regarding a child welfare service or services must be entered into the CONNECTIONS system, each social services district or public or private agency providing such service that has access to the CONNECTIONS system must use the CONNECTIONS system for recording the information in the form and manner prescribed by OCFS to satisfy the data requirements for the particular service. Any such administrative directive may require use of the CONNECTIONS system for all or part of the services or information to be documented, and may apply initially to a limited number of social services districts and/or public and private agencies.

Section 466.4 Confidentiality.

(a) Individual identifiable information contained in the CONNECTIONS system is confidential and may be disclosed only in a manner consistent with applicable statutory and regulatory standards.

(1) Individual identifiable information regarding children in foster care and their families is confidential and access to such information is allowable only pursuant to the standards set forth in sections 372, 373-a, 409-e and 409-f of the Social Services Law and applicable OCFS regulations including sections 357.3 and 430.12 of this Title.

(2) Individual identifiable information regarding children and families receiving preventive services is confidential and access to such information is allowable only pursuant to the standards set forth in sections 409-e and 409-f of the Social Services Law and applicable OCFS regulations including section 423.7 of this Title.

(3) Individual identifiable information regarding adoption assistance and adoption services is confidential and access to such information is allowable only pursuant to the standards set forth in section 114 of the Domestic Relations Law, sections 373-a and 409-f of the Social Services Law and applicable OCFS regulations including section 357.3 of this Title.

(4) Individual identifiable information regarding child protective services is confidential and access to such information is allowable only pursuant to the standards set forth in sections 422(4), 422(5), 422(6), 422(7), 422-a, 424(4) and 424(5) of the Social Services Law and applicable OCFS regulations including section 432.7 of this Title.

(5) In addition to the standards set forth in paragraphs (1)-(4) of this subdivision, information contained in the CONNECTIONS system is subject to all other applicable federal and State confidentiality standards, including but not limited to, those set forth in Article 27-F of the Public Health Law regarding confidential HIV-related information and section 459-g of the Social Services Law regarding the street address of residential programs for victims of domestic violence.

(b) Consistent with applicable statute and regulation, an employee of OCFS, a social services district or a public or private agency providing child welfare services may have access to client identifiable information

contained in the CONNECTIONS system only when access to such information is necessary for the employee to perform his or her specific job responsibilities.

(c) Each social services district and each public or private agency providing child welfare services that has access to the CONNECTIONS system must develop and implement policies and practices to maintain the confidentiality of individual identifiable information contained in the CONNECTIONS system consistent with applicable statutes and regulations including the taking of disciplinary action against any employee who fails to comply with the confidentiality standards set forth in this Part.

Section 466.5 Sealing and Expungement of Information.

(a) All individual identifiable information regarding a child and/or family receiving preventive services that are not provided in conjunction with or in addition to child protective, foster care or adoption services must be expunged from the CONNECTIONS system six years after the 18th birthday of the youngest child in the family.

(b) All individual identifiable information regarding a child and/or family receiving child protective services is subject to the sealing and expungement standards set forth in sections 422(5), 422(6) and 422(8) of the Social Services Law and section 432.9 of this Title.

(c) The expungement of individual identifiable information from the CONNECTIONS system includes the elimination of the electronic data and information from the electronic system or the elimination of the electronic data required to access such information.

Section 466.6 Security.

(a) OCFS, local social service districts, and public or private agencies providing child welfare services that have access to the CONNECTIONS system must establish and maintain a CONNECTIONS security plan addressing the following areas:

- (1) Physical security of CONNECTIONS resources;
- (2) Equipment security to protect equipment from theft and unauthorized use;
- (3) Software and data security;
- (4) Telecommunications security;
- (5) Personnel Access Control;
- (6) Contingency plans for meeting critical processing needs in the event of short or long-term interruption of services;
- (7) Emergency and/or disaster preparedness;
- (8) Designation of a security manager for OCFS and a security coordinator for the local district or public or private agency; and
- (9) A program for conducting periodic security reviews at least once every two years to evaluate physical and data security operating procedures and personnel practices and to determine whether appropriate, cost effective safeguards exist to comply with the areas set forth in this subdivision. A report of each security review and all relevant supporting documentation must be maintained and made available to OCFS upon request.

(b) Each social service district and each public or private agency providing child welfare services that has access to the CONNECTIONS system must immediately report in writing to the State Information Technology staff person designated by OCFS the loss or theft of any CONNECTIONS equipment and any event that may jeopardize the security of the CONNECTIONS system.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 466.4(a)(1) and 466.5(b).

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

Revised Regulatory Impact Statement

1. Statutory Authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to promulgate regulations to carry out its powers and duties.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Section 446 of the SSL requires OCFS to promulgate regulations in accordance with federal requirements for the establishment and administration of a statewide child welfare information system (SACWIS), known as CONNECTIONS. The regulations must set forth standards for timely submission of data elements relating to child welfare services, including foster care, adoption assistance, preventive services, child protective services and other family preservation and support services.

2. Legislative Objectives:

Section 446 of the SSL was enacted to implement the State's SACWIS system in a manner that allows child welfare workers time to effectively

communicate with one another, enter information directly, eliminate duplicate entry of information and allow for direct determination of claims and sanctions. The legislative objectives underlying section 446 of the SSL include designing a SACWIS system that improves the convenience to consumers of service, reduces the administrative burden of child welfare workers in social services districts and the agencies with which they contract to provide direct services, protects the confidentiality of individuals about whom information is recorded, meets federal requirements and protects federal financial participation. The proposed regulations also would implement specific rules and procedures for the establishment and administrations of CONNECTIONS and, in so doing, meet federal statutory and regulatory SACWIS requirements. Section 479 of the federal Social Security Act (SSA) and 45 CFR Parts 1355 and 1356 mandate the collection of specified adoption and foster care information. The regulations implement the statutory provisions in section 446 of the SSL that require regulations mandating the timely submission in CONNECTIONS of data elements relating to child welfare services.

3. Needs and Benefits:

The federal Omnibus Budget Reconciliation Act of 1993 provided enhanced federal funding (FFP) at the 75 per cent reimbursement rate to states to develop SACWIS systems to carry out the states' child welfare, foster care and adoption programs under Titles IV-B and IV-E of the SSA. This initiative also was intended to assist states to fulfill the federal reporting requirements of the Adoption and Foster Care Analysis and Reporting System (AFCARS) as specified by 45 CFR Part 1355. Failure to meet the AFCARS requirements may result in federal financial penalties. Section 446 of the SSL requires the State to implement the federal SACWIS requirements.

CONNECTIONS is being designed to develop a comprehensive response to children and families in need of child welfare services. Technological advances have prepared the path for the implementation of more efficient systems support to increase staff productivity and improve the quality of service delivery. Modern system solutions will assist in addressing child welfare information needs and at the same time protect the privacy concerns and interests of persons about whom information is entered into CONNECTIONS.

Under the CONNECTIONS approach, OCFS staff, child welfare workers at social services districts and public and private child welfare agencies will be linked through a computer network. This linkage will provide opportunities for communication and secure electronic exchange of information. Through the on-line access to case records and other case data, information can be shared in ways that will provide for increased timeliness of information, thereby allowing for approvals, monitoring and evaluation of services in a more rigorous manner and providing access to a wide variety of resources. The system will allow for better overall tracking of cases and an opportunity to integrate information previously available in several separate and discreet paper records and individual computer systems.

Over 18,000 child welfare workers will be affected by this change. They will be given the automated tools to reduce the paperwork associated with the delivery of child welfare services and these tasks and processes will be significantly streamlined. Child welfare workers at all levels have been involved in the development and testing of the CONNECTIONS system from its inception. Their involvement continues to provide valuable input necessary to develop the system in a manner that will meet their needs.

4. Costs:

Section 446 of the SSL requires both the implementation of CONNECTIONS and the promulgation of regulations for the timely recording of child welfare services information in the system. The fiscal impact of the development and operation of CONNECTIONS is the result of these statutory requirements. The costs for the development and operation of CONNECTIONS have already been budgeted through a combination of State and federal funds. To date, State funds have been used to cover the costs that are not federally reimbursable. In addition, over \$21 million has been budgeted for comprehensive training, implementation support and technical assistance activities over the next two years to assist CONNECTIONS system users in the local social services districts and voluntary agencies. These activities include classroom training, on-site support prior to and during implementation, automated desk aids, user manuals, video training tools and computer-based supports.

As caseworkers are currently required to provide, in paper format, the information required by these regulations to be inputted in CONNECTIONS, there is no fiscal impact anticipated for OCFS, social services districts or other public and private agencies providing child welfare ser-

vices as a result of the reporting requirements included in the proposed regulations. All other requirements are administrative in nature and, as a result, are not anticipated to have a fiscal impact.

5. Local Government Mandates:

Social services districts and other public and private agencies providing child welfare services are already required to report specific child welfare case information completely and timely in the manner and format required by OCFS. The regulations will require social services districts and applicable public and private child welfare services agencies to record such information in the CONNECTIONS system, rather than in another manner, upon the issuance of an administrative directive from OCFS. OCFS is phasing the development and implementation of the various case record provisions into CONNECTIONS to incorporate revisions to some of the case record documents that will improve case practice. Case workers will be trained in using these practices before full implementation is required. Once fully implemented, CONNECTIONS will result in more timely and appropriate placements, provide compliance with the Adoption and Safe Families Act (ASFA) and address Title IV-E eligibility review parameters. As a result, children will be better served and there will be a reduction in the risk of a loss in federal financial participation in their placement costs.

6. Paperwork:

Much of the paperwork associated with the delivery of child welfare services will be eliminated as a result of the implementation of CONNECTIONS. Automated tools will allow for the entry of information once and then allow that information to be displayed and transmitted to other required case documents conveniently and efficiently, as needed. Currently, there is significant duplication of data recording due to the existing child welfare computer information systems, including the Welfare Management System (WMS), Child Care Review System (CCRS) and the CONNECTIONS system components already in production. Caseworkers also are required to record duplicate information into the Uniform Case Record or other paper records. These various recording systems have led to workers being increasingly burdened by time consuming, duplicative paper work tasks. The duplicate tasks do not add to the provision of services and actually takes away from the direct service time that workers need to spend with clients. When CONNECTIONS is fully implemented, the need to record data in duplicative systems and forms will be eliminated, and CCRS will be discontinued from service.

7. Duplication:

The proposed regulatory amendments do not duplicate any existing State or federal requirements.

8. Alternatives:

There are no alternatives to these proposed regulations. Failure to implement them will expose OCFS and social services districts to potential federal financial - penalties, as well as jeopardize the State's ability to enhance the capabilities of child welfare workers to improve conditions for the clients they serve.

9. Federal Standards:

The proposed regulations comply with the child welfare reporting and information standards set by the federal government in accordance with section 479(b)(2) of the SSA and 45 CFR Parts 1355 and 1356. States are mandated to report electronically specified data regarding foster and adoptive children in compliance with the federal AFCARS requirements. In addition, having a fully compliant SACWIS system is one of the federal outcomes that states are measured against as part of the federal Child and Family Services Review required by 45 CFR Part 1355. The proposed regulatory requirements are consistent with the federal requirements.

10. Compliance Schedule:

Social services districts and the applicable public and private child welfare services agencies already have been provided the computers and associated technologies that are needed to record the required information in CONNECTIONS. OCFS will only issue administrative directives requiring social services districts and the applicable public and private agencies to record information in CONNECTIONS to the extent that those districts and agencies have the administrative and systems capability to implement the particular reporting requirements. Therefore, the social services districts and applicable public and private agencies will be able to comply with the regulatory requirements as they are implemented.

Revised Regulatory Flexibility Analysis

1. Effect on Small Business and Local Governments:

These proposed regulations will apply to public and private child welfare agencies that contract with social services districts to provide foster care, adoption and preventive services. Currently, 236 agencies have been provided with personal and laptop computers, printers, servers and

other hardware and software necessary to access and use CONNECTIONS. Of those agencies, 112 agencies provide foster care and preventive services, 79 agencies provide preventive services only, 37 agencies provide foster care only, and 3 agencies provide adoption services only. The regulation also will affect the 58 social services districts in the State.

2. Compliance Requirements:

Applicable public and private child welfare agencies and social services districts will be required to comply with the standards and requirements set forth in the regulations for implementing the statewide automated child welfare information system (SACWIS), known as CONNECTIONS in New York State, in accordance with State and federal law. The standards include mandated reporting, internal and external data confidentiality standards, and record retention requirements.

3. Professional Services:

Social services districts and the applicable public and private child welfare agencies will not have to hire additional staff to implement the regulations. Existing case workers and other staff who will be required to enter data into CONNECTIONS will be comprehensively trained to use the automated tools and capabilities the system provides. In addition, current training programs will be enhanced to emphasize the casework support that CONNECTIONS will bring. The social services districts and applicable public and private child welfare agencies already have staff acting as security coordinators for CONNECTIONS.

4. Compliance Costs:

Section 446 of the SSL requires both the implementation of CONNECTIONS and the promulgation of regulations for the timely recording of child welfare services data in CONNECTIONS. The fiscal impact of the development and operation of CONNECTIONS is the result of these statutory requirements. The costs of developing and operating CONNECTIONS have already been budgeted through a combination of State and federal funds. To date, State funds have been used to cover the costs that are not federally reimbursable. In addition, over \$21 million has been budgeted for comprehensive training, implementation support and technical assistance activities over the next two years to assist CONNECTIONS system users in the local social services districts and voluntary agencies. These activities include classroom training, on-site support prior to and during implementation, automated desk aids, user manuals, video training tools and computer-based supports.

Caseworkers are currently required to document in other computer systems and/or paper format the information that these regulations require be inputted into CONNECTIONS. Therefore, there is no fiscal impact anticipated for social services districts or other public and private child welfare services agencies as a result of the reporting requirements included in the proposed regulations. All other requirements are administrative in nature and, as a result, are not anticipated to have a fiscal impact.

5. Economic and Technological Feasibility:

The small businesses and local governments affected by the proposed amendments will have the economic and technological ability to comply with the proposed regulations. Social services districts and the applicable public and private child welfare agencies have already been provided the personal and laptop computers, printers, servers and other hardware and software necessary to access and use CONNECTIONS. Additional equipment devices requested by local districts and voluntary agencies will also be partially supported through State and Federal funds.

6. Minimizing Adverse Impact:

As previously mentioned, social services districts and the affected agencies already have the equipment needed to implement these regulations. CONNECTIONS will enable the federal Adoption and Foster Care Analysis and Reporting System (AFCARS) reporting requirements to be accommodated in a way so that the prescribed data is interwoven within the case flow process, while the actual reporting is compiled and accomplished by the State. Automated cues and reports will assist and remind workers, supervisors and administrators of coming due and overdue activities, assisting not only with AFCARS reporting, but in verifying compliance with other federal and State legal requirements.

7. Small Business Participation:

Since the inception of CONNECTIONS, information on the system's development and operation has been shared with social services districts and the applicable public and private child welfare agencies through written materials, face-to-face focus groups and meetings, teleconferences, surveys and questionnaires. In addition, OCFS established Executive Steering and Management Committees and numerous work groups to assist in developing the conceptual and detailed design of the CONNECTIONS' software applications. The Council of Family and Child Caring Agencies (COFCCA), an organization that represents most of the private

child welfare agencies as well individual representatives from some of those agencies participated on the Committee and work groups. Representatives of social services districts also participated in the design process. The ideas, opinions, suggestions and assistance of these stakeholders were instrumental in the decisions made at every phase of this project. The reporting and record keeping requirements set forth in the regulations will be implemented according to the design decisions that have been made through that process.

Revised Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas:

The proposed regulations would affect those public and private agencies located in rural areas that contract with social services districts to provide foster care, adoption and preventive services. Currently, there are approximately 100 such agencies located in counties with a population of less than 200,000. The regulations also will affect those social services districts that are located in rural areas.

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

Applicable public and private child welfare agencies and social services districts will be required to comply with the standards and requirements set forth in the regulations for implementing the statewide automated child welfare information system (SACWIS), known as CONNECTIONS in New York State, in accordance with State and federal law. The standards include mandated reporting, internal and external data confidentiality standards, and record retention requirements.

Social services districts and the applicable public and private child welfare agencies will not have to hire additional staff to implement the regulations. Existing case workers and other district staff who will be required to enter data into CONNECTIONS will be comprehensively trained to use the automated tools and capabilities the system provides. In addition, current training programs will be enhanced to emphasize the casework support that CONNECTIONS will bring. The social services districts and applicable public and private child welfare agencies also already have staff acting as security coordinators for CONNECTIONS.

3. Costs:

Section 446 of the SSL requires both the implementation of CONNECTIONS and the promulgation of regulations for the timely recording of child welfare services data in CONNECTIONS. The fiscal impact of the development and operation of CONNECTIONS is the result of these statutory requirements. The costs for developing CONNECTIONS have already been budgeted through a combination of State and federal funds. To date, State funds have been used to cover the costs that are not federally reimbursable. In addition, over \$21 million has been budgeted for comprehensive training, implementation support and technical assistance activities over the next two years to assist CONNECTIONS system users in the local social services districts and voluntary agencies. These activities include classroom training, on-site support prior to and during implementation, automated desk aids, user manuals, video training tools and computer-based supports.

Caseworkers are currently required to document in other computer systems and/or paper format the information that these regulations require be inputted into CONNECTIONS. Therefore, there is no fiscal impact anticipated for social services districts or other public and private child welfare services agencies as a result of the reporting requirements included in the proposed regulations. All other requirements are administrative in nature and, as a result, are not anticipated to have a fiscal impact.

4. Minimizing Adverse Impact:

All applicable public and private child welfare agencies and the social services districts have been provided the personal and laptop computers, printers, servers and other hardware and software necessary to access and use CONNECTIONS. CONNECTIONS will enable the federal AFCARS reporting requirements to be accommodated in a way so that the prescribed data is interwoven within the case flow process, while the actual reporting is compiled and accomplished by the State. Automated cues and reports will assist and remind workers, supervisors and administrators of coming due and overdue activities, assisting not only with AFCARS reporting, but in verifying compliance with other federal and State legal requirements.

5. Rural Area Participation:

Since the inception of CONNECTIONS, information on the system's development and operation has been shared with social services districts and the applicable public and private child welfare agencies through written materials, face-to-face focus groups and meetings, teleconferences, surveys and questionnaires. In addition, OCFS established Steering and Management Committees and numerous work groups to assist in developing the conceptual and detailed design of the CONNECTIONS' software

applications. The Council of Family and Child Caring Agencies (COFCCA), an organization that represents most of the private child welfare agencies along with individual representatives from some of those agencies, including agencies located in rural areas, participated on the Committee and work groups. Representatives of social services districts also participated in the design process. The ideas, opinions, suggestions and assistance of these stakeholders were instrumental in the decisions made at every phase of this project. The reporting and record keeping requirements set forth in the regulations will be implemented according to the design decisions that have been made through that process.

Job Impact Statement

Although non-substantive changes were made to the proposed regulations concerning standards relating to the implementation of CONNECTIONS, those changes do not require changes to the Job Impact Statement, as originally published.

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received comment from eight entities: one social services district, five voluntary authorized child caring agencies, one Advocacy organization and one law firm.

1) Six commenters expressed concern that the Regulatory Impact Statement and/or the Regulatory Flexibility Analysis indicated there would be no fiscal impact on voluntary child welfare agencies. These commenters expressed concern that the fiscal impact would be considerable for system implementation and training, changes in business practices, equipment, and use of the Data Warehouse to support local analysis and reporting. Three commenters requested changes to the Maximum State Aid Rates (MSARS) to cover additional costs.

Response: As the original Regulatory Impact Statement and Regulatory Flexibility Analysis noted, Section 446 of the Social Services Law (SSL) requires both the implementation of CONNECTIONS and the promulgation of regulations for the timely recording of child welfare services information in that system. The fiscal impact of developing and operating CONNECTIONS results from this statutory requirement; not from these regulations. Caseworkers currently must provide the information required by these regulations in paper format. These regulations require the information to be inputted in CONNECTIONS instead. However, as several comments were raised regarding the statutory implementation costs, further information about those costs is set forth below. The above-noted regulatory statements were similarly revised.

System Implementation and Training: Implementation of CONNECTIONS case management and financial management functionalities will be phased-in between February 2005 and November 2006. This phased approach responds to field requests for preparation tools, training and on-site support in advance of and during the production rollout. OCFS is investing over \$21 million in federal and State funding for training, on-site technical assistance and other implementation efforts during this time period. OCFS intends to provide: a series of structured tools and technical support to assist users in planning and preparing to implement the new system; classroom and laboratory training for approximately 17,000 child welfare staff throughout the State; hands-on assistance to social services districts and agencies prior and subsequent to implementation; automated on-line help support; automated and hard copy desk aids; and video training tools. The full participation in these activities by casework staff in social services districts and voluntary agencies will maximize their ability to adjust successfully to the new system with a minimum of disruption to their daily work activities.

Changes in Business Practices: The re-engineering of child welfare business processes will permit multiple people involved in a case to access records through CONNECTIONS. The CONNECTIONS system will provide caseworkers with a single automated tool to better manage their cases and workloads, resulting in program efficiencies and cost savings. The efficiencies gained will strengthen the quality of child welfare services in the State and support improved outcomes for children and families.

Equipment: A list was compiled of additional equipment requested by social services districts and voluntary agencies. Typically, these added devices would be considered supplemental equipment and the requesting social services district or voluntary agency would be responsible for the entire cost, including network maintenance costs. However, to assist in meeting these requests, OCFS will participate in equipment purchases by contributing both federal and State resources, thereby reducing the local cost. Furthermore, OCFS will pay for the network maintenance costs.

Use of Data Warehouse to Support Local Analysis and Reporting: OCFS is dedicating an additional \$1 million in federal and State funding to enhance the Data Warehouse's performance levels to better support local data analysis needs. Social services districts and voluntary agencies will

execute queries into the Data Warehouse, which will provide information to assist with data analysis, trending, and reporting. End users will use available reporting tools to create and save various types of reports.

Rate Structure: The State Fiscal Year 2004-05 MSARs include overall two-year cost adjustment factors of 4.4 percent and overall growth factors of 7 percent in non-personal service.

2) Two commenters asked about additional Help Desk support, and its quality, reliability and security.

Response: OCFS has already begun to implement a Build 18 support plan with the Enterprise Help Desk (EHD). Agents are currently on site two days per week to review the application, attend formal training, and develop situational help files in anticipation of user support needs. A CONNECTIONS Specialist triage system has been implemented to route application problem calls to knowledgeable agents. An additional \$3.8 million in federal and State funding will be dedicated to the EHD to cover anticipated increases in volume over a two-year period, including increasing the number of EHD agents as the application is rolled out.

3) Two commenters expressed concerns about the possibility of outages.

Response: OCFS, in partnership with the New York State Office For Technology, is implementing an infrastructure that maximizes redundancy. Other actions have been taken to minimize the risk and duration of any system-wide outages. OCFS has a Disaster Recovery and Business Continuity Plan to respond to any outages. Further, because CONNECTIONS security is user specific, if an outage occurs at just one or a limited number of sites, users will be able to access the system from other sites until it is restored to the affected sites.

4) Two commenters expressed general concern about reduced payments resulting from implementation of the Statewide Services Payment System (SSPS) and its relationship to Benefits Issuance and Control System (BICS) prior to CONNECTIONS implementation.

Response: If social services districts were properly paying voluntary agencies prior to SSPS implementation, there should be no reduction in payments when SSPS Phase II is implemented. A significant data cleansing effort was initiated prior to SSPS' implementation to assist social services districts in determining whether appropriate rates were being paid. Further enhancements to this system will provide for automated processing of rate adjustments, payments to foster care vendors on a child-specific basis, rate table functionality and retroactive processing for voluntary agency expenditures. These enhancements, make the payment process more accurate and streamlined, and eliminate the need to calculate payment rates manually. Child specific payments also will help voluntary agencies review cases to determine whether the proper amounts have been paid for a child.

SSPS also provides payment and claiming logic to support federal Title IV-E claiming requirements for foster care and adoption assistance. Payments that do not meet required edits will not be reimbursed with federal Title IV-E funds. This will better protect federal financial participation for these programs by improving the districts' compliance with federal Title IV-E requirements.

5) Two commenters questioned how the CONNECTIONS system would treat cases subject to this Advocates Settlement Agreement, and why the Agreement's information sharing restrictions was not mentioned in the proposed regulations. One asked that the Regulatory Impact Statement be amended to reference the Agreement.

Response: OCFS will implement the regulations in a manner consistent with the Settlement Agreement. However, the Agreement applies to a very small category of cases, *i.e.*, those cases in New York City where a family is receiving only preventive services from a child welfare services agency under a contract with the Administration for Children's Services. The Agreement does not apply to other child welfare services cases in New York City or to any child welfare services cases in the rest of the State. Because the regulations apply to child welfare services cases throughout the State, the decision was made not to amend the Regulatory Impact Statement in response to this comment. However, OCFS has reaffirmed its commitment to comply with the Settlement Agreement, to the extent it remains in effect, by direct correspondence with those making this comment.

6) Two commenters disagreed with the proposed retention standard for preventive-only cases.

Response: The proposed retention period was chosen because a person may receive preventive services up to the age of 18. A district may contract for the provision of such services. Under section 213(2) of the Civil Practices Laws and Rules, the statute of limitations for a contract cause of action is six years. Therefore, the regulations requires the retention of case

record information for six years past the 18th birthday of the youngest child in the case to address any contractual compliance issues that may arise. Accordingly, the proposed regulations were not revised.

7) Two commenter asked for further language distinguishing preventive-only cases from cases that may have had foster care services provided in conjunction with or in addition to preventive services.

Response: The proposed language is sufficiently clear that a case may be designated as a preventive-only case if only non-court ordered preventive services are being provided while the case is continuously open. If any foster care or protective services are provided to the family while the case is continuously opened, it may not be designated as a preventive-only case. Accordingly, the proposed regulations were not revised.

8) One commenter asked that the regulations specifically address when foster care records must be expunged.

Response: The proposed regulations provide the minimum amount of time foster care records are to be maintained. There is no statutory requirement that foster care records be expunged after a set period of time. Therefore, the regulations leave it to the districts or agencies' discretion to determine how long beyond the minimum retention period they wish to continue to store and care for such records. Accordingly, the proposed regulations were not revised.

9) One commenter suggested that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) be added to the several confidentiality standards with which users must comply.

Response: OCFS researched HIPAA and determined that the collection of health information in CONNECTIONS would not make the system subject to the HIPAA regulations, as it is not a covered entity as defined in the 45 CFR 160.103. For those social services districts and voluntary agencies that may have designated themselves as covered entities, there are no prohibitions under HIPAA that would prevent them from entering or maintaining health information about children in CONNECTIONS. Furthermore, the State is required by a variety of State and federal statutes and regulations to collect certain health-related child welfare information. For example, 45 CFR 1355, Appendix D (AFCARS), specifically requires states to collect and report certain adoption and foster care data elements for all children receiving federal Title IV-E funding, including conditions that require special medical care, such as chronic illnesses including HIV/AIDS, and whether a child is mentally retarded, visually or hearing impaired, physically disabled, or emotionally disturbed. Medicaid assistance information must also be captured in CONNECTIONS under federal law. HIPAA explicitly permits covered entities to disclose protected health information as required by law [see 45 CFR 164.512(a)]. Thus, HIPAA does not prevent a covered entity from disclosing, entering or maintaining such information in CONNECTIONS. Therefore, it would be inappropriate to include HIPAA in the list of confidentiality cites included in the CONNECTIONS regulations. Accordingly, the proposed regulations were not revised.

10) One commenter suggested that OCFS should add regulations governing records of a provider agency that ceases operation or stops being a provider agency.

Response: OCFS agrees with the commenter and has developed such a proposed regulation to address this area that will be included in another regulatory package that will soon be published for public comment. Accordingly, the proposed regulations were not revised.

11) One commenter recommended that the word "specific" be deleted from section 466(b) of the proposed regulations, which provides that access to information in the CONNECTIONS system by a caseworker should only be given when such information is "necessary to perform his or her specific job responsibilities."

Response: The proposed regulation is consistent with existing OCFS regulations dealing with the disclosure of client identifiable information in general by social services districts and voluntary agencies, as set forth in 18 NYCRR 357.5(g). Accordingly, the proposed regulations were not revised.

12) One commenter asked that the word "any" be deleted from the provision that requires the agencies' policies and practices for maintaining the confidentiality of information in the CONNECTIONS system include the requirement to take disciplinary action against "any" employee who fails to comply with the confidentiality standards.

Response: Section 466.4(c) provides that each social services district and agency providing child welfare services that has access to individual identifiable information develop and implement policies and practices, consistent with applicable statutes and regulations, to maintain the confidentiality of information contained in CONNECTIONS. These policies must include taking disciplinary action against any employee who fails to

comply with such standards. The regulations do not specify what form of disciplinary action must be taken in each case. However, the failure to comply with statutory and/or regulatory confidentiality standards is a serious issue that districts and agencies must address. Where there is non-compliance, a district or agency must take appropriate action against the offending person. Accordingly, the proposed regulations were not revised.

13) One commenter questioning whose responsibility it was to seal or expunge information and suggested that the CONNECTIONS system be programmed to automate the rules.

Response: The CONNECTIONS system will automate expungement and sealing of the child protective and preventive records maintained in the system, in accordance with the regulations. However, for any information that is maintained outside of the system, such as paper documents from third party sources, it is still the responsibility of the authorized agency to comply the expungement and sealing requirements. Accordingly, the proposed regulations were not revised.

14) One commenter asked that a cross reference to Section 422(6) of the SSL regarding the retention period for child protective services (CPS) records be added to Section 466.5(b) of the regulations.

Response: OCFS agrees with this comment and has added the cross-reference to the regulations. This is a technical, non-substantive change to the regulations.

Department of Correctional Services

NOTICE OF ADOPTION

Departmental Records and Release of Information

I.D. No. COR-45-04-00006-A

Filing No. 34

Filing date: Jan. 11, 2005

Effective date: Jan. 26, 2005

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

Action taken: Amendment of sections 5.1, 5.5, 5.23, 5.30, 5.35, 5.36 and 6.2; repeal of sections 5.21 and 5.24; and addition of new section 5.24 and Part 8 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 29(2) and 112; Public Health Law, parts 17 and 18; and the Health Information Portability and Accountability Act as implemented by 42 CFR parts 160 and 164

Subject: Departmental records and release of information.

Purpose: To conform to the requirements of the Health Information Portability and Accountability Act, and clarify procedures for custody and release of certain records and information.

Text or summary was published in the notice of proposed rule making, I.D. No. COR-45-04-00006-P, Issue of November 10, 2004.

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

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

Assessment of Public Comment

Comment

DOCS cannot by regulation create exemptions to the Freedom of Information Law.

Response

The revisions to the New York State Department of Correctional Services regulations 7 NYCRR Part 5, "Department Records", is not an attempt to create by regulation exemptions to the Freedom of Information Law. It is a guide for DOCS officials and the public on how to request and respond to requests for information. Confidentiality and disclosure of different types of records are governed by different laws. Section 5.23 has acknowledged that fact since 1978. The current revisions attempt to clarify which laws apply to medical records received, created and/or maintained by the Department. The recent passage of federal regulations (HIPAA privacy standards) has affected the interaction of these laws.

Comment

The New York State Court of Appeals has held that medical records in the possession of a state agency are accessible under the New York State Freedom of Information Law. *State v. Mantica*, 94 N.Y.2d 58 (1999).

Response

In the case cited, the Department of Health had denied a hospital patient access to his own medical records held by the DOH, arguing they were prohibited by Public Health Law 18 from redisclosing the medical records. The Court of Appeals affirmed the Appellate Division, which had held that to deny a patient disclosure of his or her own health care information would be "illogical and unreasonable" (248 A.D.2d 30, 32, 679 N.Y.S.2d 469). The Court of Appeals concluded that "under the circumstances of this case, petitioner is entitled to his medical records."

DOCS is not denying anyone access to his or her medical records. Access to medical records is available under HIPAA and Public Health Law § 18.

Comment

The cap on fees established by FOIL applies unless a different fee is prescribed by statute.

Response

This argument presupposes that DOCS medical records are governed by FOIL.

Comment

The underpinning of the proposed, new subsection 5.24(b), permitting disclosure of prisoners' medical records to the Attorney General's office or to outside counsel is incorrect, and this proposal should, therefore, be withdrawn. "Health care operations," as defined in 45 CFR § 165.501, include only "activities of the covered entity."

Response

45 CFR § 164.506 allows a covered entity to use and disclose protected health information (such as medical records) without the protected individual's authorization for treatment, payment and health care operations. "Disclosure" is defined in the HIPAA privacy regulations at 45 CFR § 160.103 as, "the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information" (emphasis added).

Only a portion of the definition of "health care operations" as defined in 45 CFR § 164.501 is quoted in the above comment. The definition of "health care operations" relevant to the proposed regulations is "Health care operations means any of the following activities of the covered entity to the extent that the activities are related to covered functions: (4) Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs". When DOCS utilizes the Attorney General's office in defense of medical malpractice claims, 8th amendment claims or any other claim necessitating the use of medical information, DOCS is conducting or arranging for legal services as a part of DOCS health care operations. Furthermore, the term "arranging for legal services" clearly contemplates that not all legal services are conducted in house, within the covered entity.

Governor's Working Group on Healthcare Reform, and reflect the adoption of the demonstration project as a program. The new 1.5/3/50 and 2/2/100 plan designs offer more affordable long term care insurance while offering dollar-for-dollar asset protection under Medicaid. The new 4/4/100 plan design provides greater coverage for residential facility care (e.g., an assisted living facility) and home care, provides greater choice of optional additional benefits (e.g., home modifications, informal caregiver training, etc. and offers full asset protection under Medicaid.

Substance of final rule: The Second Amendment to Regulation 144 makes various changes to and expands the New York State Partnership for Long Term Care program. This amendment adds minimum standards for three new plan designs (1.5/3/50, 4/4/100 and 2/2/100), changes the existing plan design (3/6/50) to incorporate Evolution Board resolutions, and reflects the permanence of the demonstration project as a program. Two of the new plan designs (1.5/3/50 and 2/2/100) offer more affordable long-term care coverage. The third new plan design (4/4/100) provides greater coverage for residential facility care and home care and provides greater choice of optional additional benefits (e.g., home modification, informal caregiver training, etc.).

The title of Part 39 of Title 11 is amended to revise the name of the program and to reflect the permanence of the demonstration project as a program as enacted under chapter 659 of the Laws of 1997.

The table of contents of Part 39 of Title 11 is amended to reflect the permanence of the demonstration project as a program, to identify the existing plan design as the "3/6/50" plan and to reflect the addition of the three new plan designs identified as the "1.5/3/50", "4/4/100", and "2/2/100" plans.

Section 39.0 is revised to change the name of the program and to indicate the demonstration project was made a permanent program as enacted under chapter 659 of the Laws of 1997. Also added to this section is a statement that the special eligibility for long-term care protection through the New York State Medicaid program may vary depending upon the particular plan design purchased.

Section 39.1 is amended to refer to the name of the permanent program.

Section 39.2 is amended to refer to the name of the permanent program and to correct the reference to limitations outside of the United States and its possessions in compliance with Section 52.25(b)(2)(vi) of Regulation 62.

Section 39.3 is amended to identify the existing plan design as the "3/6/50" plan to distinguish it from the new plan designs being established in sections 39.4, 39.5, and 39.6.

Subdivision 39.3(a) is amended to change "project" to "program" and to change "Part" to "section". Added to this section is a requirement that participating insurers selling a "3/6/50" product must also offer products meeting the minimums of the "1.5/3/50" and "2/2/100" plan designs under sections 39.4 and 39.6 to the prospective insured at the same time.

Subdivision 39.3(b) is amended to identify the existing minimum benefit standards apply to the "3/6/50" plan design. Also, the word "Part" is changed to "section".

Paragraph 39.3(b)(1) updates the minimum issue benefit amount to \$171 per day for 2004 and adds the minimum daily benefit beginning January 1, 2013.

Within paragraph 39.3(b)(2), item (i) is revised to substitute "provided" for "payable", to correct the reference to applicable Department of Health regulations, and to delete the reference to an insured as a "patient". Item 39.4(b)(2)(iii) is amended to substitute "provided" for "payable" and to change the reference to "Part" to "section". Item 39.4(b)(2)(iv) is changed to substitute "provided" for "paid".

A new paragraph 39.3(b)(3) is added establishing the minimum standard for a bed reservation benefit coverage at an amount equal to the nursing home daily benefit in effect under the policy/certificate for at least 20 days annually as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(3) is renumbered to 39.3(b)(4).

A new paragraph 39.3(b)(5) is added establishing the minimum standard for a hospice care benefit in an amount equal to the nursing home daily benefit in effect under the policy/certificate in an inpatient setting and at the home care daily benefit in effect under the policy/certificate in all other settings as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(4) is renumbered to 39.3(b)(6).

A new paragraph 39.3(b)(7) is added establishing the minimum standard for a care management benefit in an amount equal to the nursing home daily benefit in effect under the policy/certificate for at least two days per

Insurance Department

NOTICE OF ADOPTION

New York State Partnership for Long-Term Care Program

I.D. No. INS-44-04-00003-A

Filing No. 25

Filing date: Jan. 5, 2005

Effective date: Jan. 26, 2005

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

Action taken: Amendment of Part 39 (Regulation 144) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 3201, 3217, 3221, 3229, 4235, 4237 and art. 43; and Social Services Law, section 367-f

Subject: New York State Partnership for Long-Term Care Program.

Purpose: To add three new plan designs, change the existing plan design to incorporate Evolution Board resolutions and recommendations of the

year as set forth in the resolution approved by the Evolution Board of the Partnership in February 2000.

Former paragraph 39.3(b)(5) is renumbered to 39.3(b)(8).

Former paragraph 39.3(b)(6) is renumbered to 39.3(b)(9).

Former paragraph 39.3(b)(7) is renumbered to 39.3(b)(10).

Former paragraph 39.3(b)(8) is renumbered to 39.3(b)(11).

Former paragraph 39.3(b)(9) is renumbered to 39.3(b)(12).

A new paragraph 39.3(b)(13) is added establishing that an insurer may sell a policy/certificate on an indemnity, prepaid, or any basis other than expense incurred. However, an insurer selling such a policy/certificate must also offer a policy/certificate providing coverage on an expense incurred basis at the same time to the prospective insured.

A new section 39.4 adds the "1.5/3/50" plan design. This new plan design is based on the existing "3/6/50" plan design set forth in section 39.3 but provides for minimum coverage for a lesser period of time. Section 39.4 contains the same provisions as section 39.3 except for the following differences:

Subdivision 39.4(a) establishes the maximum coverages for a policy/certificate issued under this section at 2.5 years of nursing home coverage and 5 years of home care coverage. In addition, this paragraph establishes a requirement that participating insurers selling a "1.5/3/50" product must also offer a product meeting the minimum of the "2/2/100" plan design under section 39.6 to the prospective insured at the same time.

Subdivision 39.4(b) provides that a policy/certificate issued under this section must provide coverage on an expense incurred basis only.

Paragraph 39.4(b)(1) establishes the minimum period of coverage for nursing home care at 18 months for each covered person.

Within paragraph 39.4(b)(2), item (ii) sets forth that a complete substitution of home care benefits for nursing home care benefits would result in a lifetime maximum total of 36 months of home care benefits and item (iv) establishes that home care coverage that exceeds the minimum benefit standards of this section will not affect the requirement for a lifetime maximum total of 36 months of home care benefits.

Paragraph 39.4(b)(12) establishes the maximum elimination period for a policy/certificate issued under this section at 60 days.

Subdivision 39.4(c) sets forth an additional and optional feature that may be offered in a policy/certificate issued under this section. Paragraph 39.4(c)(1) establishes that, at the discretion of an insurer, home care benefit days may be combined to pay an amount in excess of the home care daily benefit amount in the policy/certificate. Where home care benefit days are combined, no more than the equivalent of 31 days of home care benefits will be provided in any one-month period. If the insurer offers this payment feature, each insured must also be offered a minimum 1.5/3/50 plan without this payment feature.

Subdivision 39.4(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status for expense-incurred coverage. A policy/certificate offering coverage on a per diem or other periodic basis (as permitted by the Internal Revenue Code) does not meet the standard set forth in subdivision (b) of this section for expense incurred coverage and is not permitted in this plan design.

A new section 39.5 adds the "4/4/100" plan design. This new plan design is similar to the "3/6/50" plan design set forth in section 39.3, as amended herein, but establishes that all levels of coverage (including nursing home, residential care facility services, assisted living (facility and non-facility), and home and community-based care) will be provided at the same minimum benefit level for a minimum of a four-year period. Section 39.5 contains the same provisions as section 39.3 except for the following differences:

Paragraph 39.5(b)(1) requires that a policy/certificate issued under this section will provide at least a lifetime maximum total of 4 years coverage for each covered person. The policy/certificate may express the 4 years of coverage in monetary terms. The monetary expression will be at least a lifetime maximum total of 1,460 days of coverage for each covered person multiplied by the minimum daily benefit amount under this section.

Paragraph 39.5(b)(2) eliminates the requirement in the existing plan design that two home care days be substituted for one nursing home day.

Paragraph 39.5(b)(3) requires coverage for residential care facility services that include but are not limited to nursing care, maintenance or personal care, therapy services, and room and board accommodations. Services must be rendered by an entity that is legally operating as a residential care facility under the laws of its jurisdiction. Examples include an assisted living facility or adult care facility. The minimum benefit for residential care facility services such as in an assisted living facility for adult day care facility is the minimum daily benefit amount in this section.

Paragraph 39.5(b)(4) establishes the minimum benefit standards for community-based care as well as home care. Item (i) establishes that home and community-based care includes assisted living care provided in a non-facility setting. Item (ii) establishes that the minimum home and community-based care coverage benefit will equal to the minimum daily benefit amount stated in this section. Item (iii) establishes that home and community-based care coverage that exceeds the minimum benefit standards of this section not affect the requirement for a lifetime maximum total of 48 months of home and community-based care benefits.

Paragraph 39.5(b)(6) establishes minimum coverage for bed reservation in a residential care facility at the minimum daily benefit amount in effect under the policy/certificate for at least 20 days annually.

Paragraph 39.5(b)(7) establishes the minimum respite care coverage benefit for nursing home, residential care facility, and/or home and community-based care services provided in lieu of informal caregiver services at the daily benefit amount in effect under the policy/certificate for at least 14 days regardless of where the respite care services are actually rendered and regardless of the actual cost.

Paragraph 39.5(b)(8) establishes the minimum hospice care coverage benefits at an amount equal to the daily benefit amount in effect under the policy/certificate regardless of where the services are actually rendered and regardless of the actual cost.

Paragraph 39.5(b)(9) establishes the alternate care benefits recognizes the inclusion of residential care facility services and home and community-based care services and provides the alternate care benefits at the daily benefit amount in effect under the policy/certificate issued under this section.

Subdivision 39.5(c) sets forth a list of additional and optional benefits from which one or more of the long term care services may be offered in a policy/certificate issued under this section up to a required aggregate lifetime maximum per covered person equal to but not exceeding the minimum daily benefit amount as stated in this section multiplied by 50.

Paragraph 39.5(c)(1) sets forth the list of long term care services as: additional nursing home care and residential care facility bed reservation benefits, additional respite care benefits, additional care management benefit, home modification benefit, informal caregiver training benefit, emergency response system benefit, therapeutic device benefit, supportive/durable medical equipment benefit, and specialized transportation benefit, such as specialized transportation to and from adult day care.

Paragraph 39.5(c)(2) requires that the additional and optional benefits provided will be deducted from the policy/certificate lifetime maximum coverage of at least 4 years per covered person subject to the limit stated in this subdivision.

Subdivision 39.5(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status.

A new section 39.6 adds the "2/2/100" plan design. This new plan design is based on the new "4/4/100" plan design set forth in section 39.5, as amended herein, but provides for minimum coverage for a lesser period of time. Section 39.6 contains the same provisions as section 39.5 except for the following differences:

Subdivision 39.6(a) establishes the maximum coverages for a policy/certificate issued under this section at less than 3 years of nursing home coverage and 3 years of home and community-based care coverage. In addition, this paragraph establishes a requirement that participating insurers selling a "2/2/100" product must also offer a product meeting the minimum of the "1.5/3/50" plan design under section 39.4 to the prospective insured at the same time.

Paragraph 39.6(b)(1) requires that a policy/certificate issued under this section will provide at least a lifetime maximum total of 2 years coverage for each covered person. The policy/certificate may express the 2 years of coverage in monetary terms. The monetary expression will be at least a lifetime maximum total of 730 days of coverage for each covered person multiplied by the minimum daily benefit amount.

Paragraph 39.6(b)(15) establishes the maximum elimination period for a policy/certificate issued under this section at 60 days.

Paragraph 39.6(c)(1) sets forth a list of additional and optional benefits from which one or more of the long term care services may be offered in a policy/certificate issued under this section up to a required aggregate lifetime maximum per covered person equal to but not exceeding the minimum daily benefit amount as stated in this section multiplied by 25.

Paragraph 39.6(c)(2) requires that the additional and optional benefits provided will be deducted from the policy/certificate lifetime maximum coverage of at least 2 years per covered person subject to the limit stated in this subdivision.

Paragraph 39.6(c)(3) establishes that, at the discretion of an insurer, home care benefit days may be combined to pay an amount in excess of the daily benefit amount in the policy/certificate. Where home care benefit days are combined, no more than the equivalent of 31 days of home care benefits will be provided in any one-month period. If the insurer offers this payment feature, each insured must also be offered a minimum 2/2/100 plan without this payment feature.

Subdivision 39.6(d) requires that a policy/certificate issued under this section must meet the standards required under federal and New York State laws and regulations for favorable tax qualification status for expense-incurred coverage. A policy/certificate offering coverage on a per diem or other periodic basis (as permitted by the Internal Revenue Code) does not meet the standard set forth in subdivision (b) of this section for expense incurred coverage and is not permitted in this plan design.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 39.6(a).

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

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

Non-substantive changes were made to section 39.6(a) of the regulation based upon a public comment that the original wording was unclear. The non-substantive change did not require modification of the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

The Second Amendment to Regulation 144 was published in the State Register on November 3, 2004 beginning a 45-day comment period ending on December 18, 2004. During this public comment period, we received only one comment which was from the Department of Health which is a New York State agency with statutory involvement in the regulation of the New York State Partnership for Long Term Care.

Summary of Comments: Regarding the minimum benefit standards for qualified policies/certificates for the 2/2/100 plan design, the Department of Health asked for changes in references to a "3/3/100" plan design and maximums of 3 years of nursing home coverage and 3 years of home and community-based care coverage) found in proposed Section 39.6(a). The request was made to correct a discrepancy with Section 367-f. 1. (a) of the Social Services Law as amended in August 2004.

Analysis of Issues Raised: Section 367-f. 1. (a) of the Social Services Law, as amended by Chapter 58 of the Laws of 2004, provides that insureds purchasing Partnership insurance coverage with a residential health care facility benefit of less than 3 years in duration who exhaust their insurance policy benefits are eligible for dollar-for-dollar asset protection when applying for Extended Medicaid Coverage. Insureds who exhaust their insurance policy benefits after purchasing Partnership insurance coverage with a residential health care facility benefit of 3 years or more in duration are eligible by statute for full asset protection when applying for Extended Medicaid Coverage.

The 2/2/100 plan design is intended to provide dollar-for-dollar asset protection. The published language noted under the "Summary of Comments" allows a policy with exactly 3 years of benefits for a residential health care facility to receive dollar-for-dollar asset protection when a policy with exactly 3 years of benefits for a residential health care facility must receive full asset protection. Therefore, the language discrepancy must be modified to comply with Chapter 58 of the Laws of 2004 as noted above. The actual difference between the original and revised language is only one day's worth of coverage and, therefore, is a non-substantive revision.

Analysis of Alternatives: Since the non-substantive change is requested to comply with statutory authority, no alternatives were explored or available.

Description of Changes Made: As a result of the above comment, the regulation (Section 39.6(a)) was modified to accurately reflect the statutory authority. The non-substantive change is as follows (NEW MATTER IS UNDERSCORED, MATTER IN BRACKETS IS DELETED):

"Additional products which exceed the basic policy/certificate minimum coverage will be permitted, but [no more] less than a 3/3/100 ([maximums of] 3 years of nursing home coverage and 3 years of home and community-based care coverage) plan design shall be offered under this section."

Office of Mental Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pre-Admission Certification for Residential Treatment Facilities for Children and Youth

I.D. No. OMH-04-05-00004-P

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

Proposed action: Amendment of section 583.9 of Title 14 NYCRR.

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

Subject: Pre-admission certification committees for residential treatment facilities for children and youth.

Purpose: To revise the pre-admission certification process.

Text of proposed rule: Subdivision 583.6 of 14 NYCRR is amended as follows:

Paragraph (e) of Subdivision 583.6 is repealed.

Subdivision 583.9 of 14 NYCRR is amended as follows:

§ 583.9 Pre-admission process; *expiration of eligibility.*

(i) The pre-admission certification committee shall reconfirm its determination of eligibility of a child when admission to a residential treatment facility does not occur within [45] 60 days of the determination of eligibility pursuant to [section 583.6(b)] *subdivisions (b) and (d) of section 583.6 and section 583.8* of this Part by *requesting an update of the child's status, including the child's clinical status, current placement, and willingness and ability to be admitted if offered a placement. The committee shall base its reconfirmation of eligibility on a review of the documentation provided. Such reconfirmation shall be made in writing and shall include the physician's signature. If a child found eligible is expected to be unavailable for admission for a period of less than 30 days, the child's eligibility shall be considered to be suspended. The child may be put back on eligibility status as of the date that the temporary suspension ends.* [The pre-admission certification committee shall base reconfirmation on a unanimous decision of those present. Such reconfirmation shall be made in writing and include the physician's signature.]

(j) *The pre-admission certification committee shall decertify the child from eligibility and shall provide written notice of the decertification to the referral agency contact and child and/or family if:*

(1) *the committee is notified or independently determines that the child has been placed in another appropriate setting and care in a residential treatment facility is no longer needed;*

(2) *the child is receiving appropriate services that meet the child's clinical needs;*

(3) *the parent(s) or guardian(s) state that the child's admission into a residential treatment facility is no longer desired;*

(4) *the child's clinical condition has deteriorated such that admission to a residential treatment facility as set forth in Section 583.8 of this Part would no longer be appropriate for a period of more than 30 days; or,*

(5) *that the child no longer meets criteria for admission.*

(k) The pre-admission certification committee shall provide written notification to the [child, or to the individual or agency making an application on behalf of the] *referral agency contact and child and/or child's parent or legal guardian, as appropriate, or to the Family Court, if the child is the subject of a proceeding currently pending in the Family Court:*

(1) that additional information or assessments have been requested prior to making an eligibility determination; (2) that an eligibility determination has been made and whether or not the child has been determined to be eligible; (3) that a referral has been made to another pre-admission certification committee for consideration for certification as priority for admission to a residential treatment facility bed designated in that region; or (4) that a certification [as priority] for admission to a residential treatment facility has been made.

[(k)] (l) The pre-admission certification committee shall act in a timely manner. (1) All applications shall be reviewed for completeness within seven calendar days of receipt. (2) Once all necessary information has been obtained, an eligibility determination shall be made within 30 calendar days. (3) Once an eligibility determination has been made, written notifica-

tion shall be made within seven calendar days. (4) *Eligibility shall be reviewed every 60 days as required by Section 583.9(i).*

Text of proposed 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

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: Sections 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 (RTF), respectively.

2. Legislative Objectives: Chapter 947 of the Laws of 1981 authorized the establishment of RTFs. The legislation established procedures for admission to RTFs, designated pre-admission certification committees to carry out these procedures, and provided for advisory boards to the pre-admission certification committees. The purpose of the pre-admission certification committees is to assure uniform access to residential treatment facilities for children and youth regardless of the current placement or source of referral of an individual child. The purpose of these amendments is to improve the operation of the pre-admission certification committees.

3. Needs and Benefits: The Office of Mental Health is proposing these regulations to better reflect existing practices concerning management of the RTF wait list. Removing children who no longer are eligible for placement will help in better management of the list, and more accurately reflect waiting time on the list. In addition, the requirement for periodic re-evaluation of the child's status assures that the RTF case managers have the most up-to-date information concerning the child's eligibility and mental health needs.

4. Costs:

(a) Costs to private regulated parties: There will be no mandated costs to the regulated parties associated with this amendment.

(b) Cost to state and local government: There are no costs to state and local governments associated with this amendment.

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

6. Paperwork: There are minimal paperwork changes associated with this amendment. Additional documentation regarding updates of the child's status are required. Lists of children awaiting placement will, however, be reduced in length.

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

8. Alternatives: The only alternative would be to continue the current process for pre-admission certification committees which would be less effective than the revised process.

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. In developing this proposed rule the Office of Mental Health consulted with the New York State Conference of Local Mental Hygiene Directors, an organization composed of all the County Directors of Community Services.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the amended rules will not have a significant impact on Residential Treatment Facilities for Children and Youth serving rural areas. In developing this proposed rule, the Office of Mental Health consulted with the New York State Conference of Local Mental Hygiene Directors, an organization composed of all the County Directors of Community Services. The majority of counties (44 of 57) in New York State, outside of New York City, meet the State's definition of rural county.

Job Impact Statement

The changes made by this amendment relate only to the pre-admission certification committees serving Residential Treatment Facilities for Children and Youth. It will not have any impact on jobs and employment activities.

Public Service Commission

NOTICE OF ADOPTION

Electric Safety Requirements by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-33-04-00021-A

Filing date: Jan. 5, 2005

Effective date: Jan. 5, 2005

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

Action taken: The commission, on Dec. 15, 2004, adopted an order in Case 04-M-0159 approving safety standards to ensure safety of the public from electric facilities.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: Safety requirements for New York electric utilities.

Purpose: To adopt uniform safety standards for all New York electric utilities subject to commission jurisdiction.

Substance of final rule: The Commission adopted electric safety requirements for New York electric utilities to ensure the public's safety from its electrical facilities.

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-0159SA1)

NOTICE OF ADOPTION

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

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

Filing date: Jan. 10, 2005

Effective date: Jan. 10, 2005

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

Action taken: The commission, on Dec. 15, 2004, adopted an order in Case 04-M-1078 allowing National Grid Communications, Inc. (GridCom) to attach wireless facilities on Niagara Mohawk's structures and property.

Statutory authority: Public Service Law, sections 70 and 110

Subject: License agreement between Niagara Mohawk and GridCom.

Purpose: To approve the terms of an agreement authorizing the installation of wireless facilities on Niagara Mohawk's transmission facilities.

Substance of final rule: The Commission approved a joint proposal by Niagara Mohawk Power Corporation (Niagara Mohawk) and National Grid Communications, Inc. (GridCom) authorizing GridCom to construct poles and related structures upon which telecommunications firms can attach their wireless facilities on property owned by Niagara Mohawk, 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-1078SA1)

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

Special Services by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-04-05-00006-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 9.

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

Subject: Special services performed by the company for customers at a charge.

Purpose: To revise certain cost elements associated with charges billed customers for special services furnished by the company.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. proposes to revise the cost elements associated with charges billed customers for special services furnished by the company by: 1) increasing its storeroom's handling rate from 12% to 14.5% to reflect current costs; and 2) decreasing the overhead rate to 4.0% when the labor cost for engineering or drafting services is separately stated.

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-G-0016SA1)

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

Portfolio Management Revenue Sharing Mechanism by Niagara Mohawk Power Corporation

I.D. No. PSC-04-05-00007-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 219.

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

Subject: Portfolio management revenue sharing mechanism.

Purpose: To clarify the company's existing mechanism.

Substance of proposed rule: Niagara Mohawk Power Corporation proposes to clarify that the 85/15 sharing between Niagara Mohawk customers and Niagara Mohawk shareholders will not take place until customers have received the first \$500,000 of annual optimization proceeds that is provided by the Portfolio Manager to the company under the terms of the Portfolio Management Contracts.

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-G-0017SA1)

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

Interdepartmental Gas Transportation Charges by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-04-05-00008-P

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

Proposed action: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a request filed by Consolidated Edison Company of New York, Inc. (Con Edison) to revise its interdepartmental gas transportation charges.

Statutory authority: Public Service Law, sections 66(12) and 80(10)

Subject: Interdepartmental gas transportation charges.

Purpose: To revise the fixed gas transportation charges, costs and allocations charged to Con Edison's steam department.

Substance of proposed rule: Consolidated Edison Company of New York, Inc. proposes to (i) revise the fixed gas transportation charge (*i.e.*, interdepartmental transfer charge) for local gas transportation to its steam department, (ii) add an incremental cost charge to the steam department and an annual update process to reflect changes to it, and (iii) allocate a share of the cost of common gas transmission system reinforcements for generators to the steam department. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule may be obtained from: Margaret Maguire, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223, (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-G-1623SA1)

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

Waiver of Certain Franchise Processes by the Town of Esopus

I.D. No. PSC-04-05-00009-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Esopus (Ulster County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Subject: Franchising process.

Purpose: To expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Esopus (Ulster County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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-V-1703SA1)

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

Waiver of Certain Franchise Processes by the Village of Ardsley

I.D. No. PSC-04-05-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Ardsley (Westchester County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Subject: Franchising process.

Purpose: To expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Ardsley (Westchester County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-V-0008SA1)

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

Waiver of Certain Franchise Processes by the Village of Nyack

I.D. No. PSC-04-05-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Nyack (Rockland County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Subject: Franchising process.

Purpose: To expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Nyack (Rockland County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-V-0009SA1)

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

Waiver of Certain Franchise Processes by the Village of Pomona

I.D. No. PSC-04-05-00012-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Pomona (Rockland County) for a waiver of 9 NYCRR sections 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Subject: Franchising process.

Purpose: To expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Village of Pomona (Rockland County) for a waiver of 9 NYCRR Part 594.1 through 594.4 and 594.4(b)(ii) pertaining to the franchising process.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-V-0010SA1)

State University of New York

**EMERGENCY
RULE MAKING**

State Basic Financial Assistance

I.D. No. SUN-40-04-00002-E

Filing No. 32

Filing date: Jan. 11, 2005

Effective date: Jan. 11, 2005

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

Action taken: Amendment of section 602.8(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(1)(c), 6221(c) and 6304(1)(b); and L. 2004, ch. 53 and 411

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

Specific reasons underlying the finding of necessity: The State University of New York finds that immediate adoption of amendments to the Code of Standards and Procedures for the Administration and Operation of Community Colleges (the code) is necessary for the preservation of the general welfare and that compliance with the requirements of subdivision 1 of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The 2004-2005 Education, Labor and Social Services Budget Bill (the budget) requires amendments to the existing funding formula for State financial assistance for operating expenses of community colleges of the State and City Universities of New York. The funding formula is to be developed jointly with the City University of New

York, subject to the approval of the Director of the Budget, and negotiations between the State University, City University and the Division of the Budget were not concluded until August 20, 2004 due to the late passage of the 2004-2005 Budget. Due to the late enactment of the 2004-2005 Budget, amendments to the code on an emergency basis for the 2004-2005 college fiscal year are necessary in order to:

1. provide timely State operating assistance to public community colleges of the State and City Universities of New York;
2. obtain the necessary revenue to maintain essential staffing levels, program quality, and accessibility.

Compliance with the provisions of subdivision (1) of section 202(6) of the State Administrative Procedure Act would be contrary to the public interest because, in light of the late enactment of the 2004-2005 Budget Bill. The requirements of subdivision (1) of section 202(6) of SAPA would not allow for implementation of the State financial assistance provided in the Budget Bill in time for the 2004-2005 community college fiscal year.

Subject: State basic financial assistance.

Purpose: To modify the existing limitations formula for basic State financial assistance for operating expenses of community colleges of the State University and the City University of New York in order to conform to the provisions of the Education Law and the 2004-2005 Budget Bill.

Text of emergency rule: (c) Basic State financial assistance.

(1) Full opportunity colleges. The basic State financial assistance for community colleges, implementing approved full opportunity programs, shall be the lowest of the following:

(i) two-fifths (40%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) two-fifths (40%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the current college fiscal year the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2300] \$2235; and

(b) up to one-half (50%) of rental costs for physical space.

(2) Non-full opportunity colleges. The basic State financial assistance for community colleges not implementing approved full opportunity programs shall be the lowest of the following:

(i) one-third (33%) of the net operating budget of the college, or campus of a multiple campus college, as approved by the State University trustees;

(ii) one-third (33%) of the net operating costs of the college, or campus of a multiple campus college; or

(iii) for the college fiscal year current, the total of the following:

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$1917] \$1863; and

(b) up to one-half (50%) of rental cost for physical space.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subdivision, a community college or a new campus of a multiple campus community college in the process of formation shall be eligible for basic State financial assistance in the amount of one-third of the net operating budget or one-third of the net operating costs, whichever is the lesser, for those colleges not implementing an approved full opportunity program plan, or two-fifths of the net operating budget or two-fifths of the net operating costs, whichever is the lesser, for those colleges implementing an approved full opportunity program, during the organization year and the first two fiscal years in which students are enrolled.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. SUN-40-04-00002-EP, Issue of October 6, 2004. The emergency rule will expire March 11, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Dona S. Bulluck, Associate Counsel, State University of New York, Office of University Counsel, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: Dona.Bulluck@suny.edu

Regulatory Impact Statement

1. **STATUTORY AUTHORITY:** Statutory authority for this rule making is found at Education Law, sections 355(1)(c), 6221(c), and 6304(1)(b), and Chapters 52 and 411 of the Law of 2004. This rule making implements the requirements of the 2004 Education, Labor and Social Services budget and governs the provision of State financial assistance for community colleges for the 2004-2005 community college fiscal year.

Education Law § 355(1)(c) directs the State University Trustees to promulgate standards and regulations covering the organization and operation of community college programs, including their state financial assistance.

Education Law § 6221(C) provides that the method and procedure of state aid to the CUNY community colleges shall be governed by Education Law § 6304, and that any rule or regulation adopted by the CUNY Board of Trustees regarding state aid shall be the same as any rule or regulation promulgated by the State University Trustees, as approved by the Director of the Budget.

Education Law § 6304(1)(b) provides that subject to the rules and regulations of the State University Trustees and the approval of the Director of the Budget, in determining eligibility for and payment of state financial assistance, the community colleges of the City University of New York shall be treated as a single community college.

2. **LEGISLATIVE OBJECTIVES:** The 2004-2005 State Budget appropriated operating funds for the community colleges of the State and City Universities of New York. The 2004-2005 Education, Labor and Social Services Budget Bill requires amendments to the existing funding formula for State financial assistance for operating expenses of community colleges of the State and City Universities of New York. This rule making is necessary to preserve the general welfare of these institutions.

3. **NEEDS AND BENEFITS:** The statutory provisions referenced above require the State and City Universities to jointly develop the funding formula for their respective community colleges. This rule making allows for the implementation of that funding formula. This rule making provides timely State operating assistance, as determined by the State Legislature, to the community colleges of the State and City Universities, which enables to receive the revenue necessary to maintain essential staffing levels as well as program quality and accessibility.

4. **COSTS:** The proposed regulation seeks to implement existing law and does not impose any new costs on community colleges or local sponsors. To the contrary, it provides financial assistance to the community colleges and does not impose any fiscal requirements upon the local sponsors.

5. **LOCAL GOVERNMENT MANDATES:** The proposed regulations do not impose any new requirements on local governments. These regulations are necessary to implement the terms of the 2004-2005 Education, Labor and Social Service Budget Bill.

6. **PAPERWORK:** The proposed regulation does not impose any new paperwork requirements on any of the parties.

7. **DUPLICATION:** The proposed amendments carry out specific requirements of the 2004-2005 Education, Labor and Social Services Budget Bill and are not redundant with other State requirements.

8. **ALTERNATIVES:** There are no alternative methods of implementing the terms of the 2004-2005 Education, Labor and Social Services Budget Bill since the implementation process is statutory.

9. **FEDERAL STANDARDS:** There are no federal standards that govern the operating expenses at community colleges of the State and City Universities of New York.

10. **COMPLIANCE SCHEDULE:** For most community college fiscal year commences on September 1st and ends on August 31st. State financial assistance is paid quarterly with the first payment to be made on September 1st.

Regulatory Flexibility Analysis

The State University finds that the proposed regulation will have no adverse impact on small businesses. This regulation provides for the payment of State financial assistance to the community colleges of the State and City Universities of New York. Said financial assistance is required under Education Law and the State Legislature has determined the amount of that assistance in adopting the 2004-2005 Education, Labor and Social Services Budget Bill. This rule making is not a discretionary act. It is required to carry out both the provisions of the Education Law and the intent of the New York State Legislature.

The proposed regulation will have no impact on small businesses. It does not impose any new reporting or recordkeeping requirements on small businesses nor does it impose any new recordkeeping or fiscal obligations on local sponsors of community colleges.

Rural Area Flexibility Analysis

1. **Types and estimated number of rural areas:** There are thirty (30) community colleges operating under the program of the State University of New York. These community colleges are located throughout the state, and some of them are located in and/or service rural areas. However, the rural areas that may be impacted by these regulations are those areas that already sponsor a community college.

2. Reporting, recordkeeping and other compliance requirements and professional services: These regulations do not impose any new recordkeeping or reporting obligations on rural areas. The proposed regulations will affect those rural areas where community colleges already exist or are serviced by a community college.

3. Costs: The proposed regulations do not have any impact on nor impose any fiscal obligations on rural areas. Only entities that currently sponsor a community college operating under the program of the State University are subject to this rule making.

4. Minimizing adverse impact: The proposed regulations have no adverse impact on rural areas. This rule making only applies to community colleges operating under the program of the State University and is required to implement the terms of the 2004-2005 State Budget Bill.

5. Rural area participation: This regulation is required to enact the terms of the 2004-2005 State Budget. The rural areas that will be affected by this regulation currently have community colleges and this regulation will facilitate their receipt of State funding for these institutions.

Job Impact Statement

No job impact statement is submitted with this notice because the Emergency adoption and proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This rule making governs the financing of community colleges operating under the program of the State University and will not have any adverse impact on the number of jobs or employment opportunities in the state.

NOTICE OF ADOPTION

State Basic Financial Assistance

I.D. No. SUN-40-04-00002-A

Filing No. 33

Filing date: Jan. 11, 2005

Effective date: Jan. 26, 2005

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

Action taken: Amendment of section 602.8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(1)(c), 6221(c) and 6304(1)(b); and L. 2004, ch. 53 and 411

Subject: State basic financial assistance.

Purpose: To modify the existing limitations formula for basic State financial assistance for operating expenses of community colleges of the State University and the City University of New York in order to conform to the provisions of the Education Law and the 2004-2005 Budget Bill.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. SUN-40-04-00002-EP, Issue of October 6, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Dona S. Bulluck, Associate Counsel, State University of New York, Office of University Counsel, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: Dona.Bulluck@suny.edu

Assessment of Public Comment

The agency received no public comment.

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

Specific reasons underlying the finding of necessity: Recent decisions issued by board panels have interpreted the current regulation as requiring reports of independent medical examinations (IMEs) be received by the board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the board is not open on legal holidays, Saturdays and Sundays, and that U.S. Post Offices are not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is precluded and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the board, workers' compensation insurance carrier/self-insured employer, claimant's treating provider and representative, and the claimant it is not possible to send the report by facsimile or electronic means. The recent decisions have greatly, negatively impacted the professionals who conduct IMEs, the IME entities, insurance carriers and self-insured employers. When untimely reports are precluded, the insurance carriers and self-insured employers are prevented from adequately defending their position. Accordingly, emergency adoption of this rule is necessary.

Subject: Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 6, 2005.

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

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

Workers' Compensation Board

EMERGENCY RULE MAKING

Independent Medical Examinations (IMEs)

I.D. No. WCB-04-05-00003-E

Filing No. 29

Filing date: Jan. 7, 2005

Effective date: Jan. 7, 2005

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

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

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

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

businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

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

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.