

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Ammonium Nitrate and Regulated Ammonium Nitrate Materials

**I.D. No.** AAM-48-05-00003-E

**Filing No.** 1353

**Filing date:** Nov. 9, 2005

**Effective date:** Nov. 9, 2005

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

**Action taken:** Addition of Part 154 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6) and 146-f

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

**Specific reasons underlying the finding of necessity:** This emergency rule is necessary for the preservation of the public health, public safety and general welfare because it implements Chapter 620 of the Laws of 2005, effective November 28, 2005, which requires the registration of persons and entities in New York State that sell, offer for sale or otherwise make available, ammonium nitrate or regulated ammonium nitrate materials. Ammonium nitrate is a common chemical compound used in fertilizer, but

which is also an explosive chemical used to make bombs such as those used in the 1993 World Trade Center and 1995 Oklahoma City bombings.

This rule, which has been developed in consultation with the State Office of Homeland Security, establishes the form for registering as a seller of ammonium nitrate and regulated ammonium nitrate materials, as defined in the rule. It also establishes the security requirements that must be taken by those required to register and the format for making and maintaining records of the sale of ammonium nitrate and regulated ammonium nitrate materials.

It is imperative that the requirements of Chapter 620 of the Laws of 2005 for registration, security measures and recordkeeping be implemented immediately. The adoption of the emergency rule will make this possible.

**Subject:** Ammonium nitrate and regulated ammonium nitrate materials.

**Purpose:** To implement L. 2005, ch. 620 relating to ammonium nitrate and regulated ammonium nitrate materials.

**Text of emergency rule:** A new Part 154 is added to Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York to read as follows:

#### Part 154

##### AMMONIUM NITRATE SECURITY

154.1 Definitions. For the purposes of this Part the following terms shall have the following meanings:

a. "Ammonium nitrate" means chiefly the ammonium salt of nitric acid. It shall not contain less than thirty-three percent nitrogen, one-half of which is the ammonium form and one-half of which is the nitrate form.

b. "Regulated ammonium nitrate materials" shall mean fertilizer product in solid form, comprising a mixture of components, one of which is ammonium nitrate, in circumstances where the nitrogen content derived from ammonium nitrate is more than twenty-eight percent of the material by weight.

c. "Ammonium nitrate retailer" means any person or entity in this state that sells, offers for sale, or otherwise makes available, ammonium nitrate or regulated ammonium nitrate materials.

154.2 Registration. (a) No person or entity in this state shall sell, offer for sale or otherwise make available ammonium nitrate or ammonium nitrate materials unless registered annually with the commissioner. Application for registration shall be made by completing and submitting the following form to the commissioner, together with an annual registration fee of fifty dollars, provided, however, that retailers who pay fees under this article shall be exempt from such fee: See Appendix in this issue.

(b) Every person or entity selling, offering for sale or otherwise making available ammonium nitrate or ammonium nitrate materials shall post and display at all times their registration certificate in a conspicuous place in the room where such business is carried on so that all persons visiting such place may readily see the same.

154.3 Security measures. Ammonium nitrate and regulated ammonium nitrate materials, while at all facilities whose owners and/or operators are required to be registered, shall be secured to provide reasonable protection against vandalism, theft or other unauthorized access. Such measures shall include, but not be limited to, ensuring that storage facilities are fenced or otherwise enclosed and locked when unattended and are inspected daily for signs of attempted entry, vandalism and structural integrity. An ongoing process of inventory control for ammonium nitrate and regulated ammonium nitrate materials stored at the facility shall be established and maintained.

154.4 Records. (a) Persons and entities required to be registered shall make and maintain, for a minimum of two years, a record in the following

format for every sale of ammonium nitrate and regulated ammonium nitrate materials: See Appendix in this issue.

(b) *Forms of identification.* Acceptable forms of identification are a valid driver's license or non-driver identification card issued by the New York State Commissioner of Motor Vehicles, the Federal Government, a state government, commonwealth, possession or territory of the United States or a provincial government of Canada; a valid passport of the United States or any other country; or valid United States military identification.

(c) *Access to records.* Persons and entities selling ammonium nitrate and regulated ammonium nitrate materials shall provide officers and employees of the New York State Department of Agriculture and Markets and the New York State Office of Homeland Security with access to records of such sales.

**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 February 6, 2005.

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

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

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

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

**Farm Wineries**

**I.D. No.** AAM-47-05-00001-E

**This regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and/or job impact statement** pertain(s) to a notice of emergency rule making, I.D. No. AAM-47-05-00001-E, printed in the *State Register* on November 23, 2005.

**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 the performance of the duties of the Department.

Section 76-a(5) of the Alcoholic Beverage Control Law provides, in part, that the Department of Agriculture and Markets and the State Liquor Authority are authorized to adopt rules and regulations as they may deem necessary to carry out the provisions of said subdivision, which shall include ensuring that in manufacturing wine farm wineries utilize grapes grown or produced in New York State to the extent they are reasonably available prior to utilizing grapes from an out-of-state source for such purpose.

2. Legislative objectives:

The statutory provisions pursuant to which the regulation is proposed are aimed at providing authorization to duly licensed farm wineries to manufacture or sell wine produced from grapes grown outside the State. Such authorization would be made after a determination that a natural disaster, act of God, or continued adverse weather condition has destroyed no less than forty percent of a specific grape varietal grown in New York State.

3. Needs and benefits:

The immediate adoption of this emergency rule is necessary for the preservation of the general welfare due to the adverse weather conditions during the grape growing season that have destroyed no less than forty percent of certain grape varietals grown or produced in New York State. Pursuant to subdivision 42 of section 16 of the Agriculture and Markets Law and subdivision 5 of section 76-a of the Alcoholic Beverage Control Law, as amended by Chapter 286 of the Laws of 2005, under such circumstances the Commissioner of Agriculture and Markets, in consultation with the Chairman of the State Liquor Authority, may give authorization to a duly licensed farm winery to manufacture or sell wine produced from

grapes grown outside New York State. Under ordinary circumstances a licensed farm winery may only manufacture or sell wines produced from grapes grown within New York State. Without the special authorization by Chapter 286 of the Laws of 2005 a farm winery would have to obtain a more expensive regular winery license in order to utilize out-of-state grapes. Said Laws further provide that no such authorization shall be granted to a farm winery licensee unless such licensee certifies to the Commissioner the quantity of New York grown grapes unavailable to the licensee due to natural disaster, act of God or continuing adverse weather conditions and satisfies the Commissioner that reasonable efforts were made to obtain grapes from a New York State source for wine making purposes.

This rule established the form by which farm wineries may make the certification required by the Law and may submit an application to the Commissioner for authorization to manufacture or sell wine produced from grapes grown outside the State.

In light of the destruction of no less than forty percent of certain New York grape varietals during this growing season, it is imperative that farm wineries are able to immediately submit the certifications and applications necessary to obtain the authorization they must have in order to manufacture or sell wine from grapes grown outside New York State. The adoption of this emergency rule establishing the form for such certification and application will make this possible.

4. Cost:

(a) Costs to regulated parties:

The costs to regulated parties are limited to the time and effort associated with completing and submitting the form prescribed by the rule. This is expected to take no more than fifteen minutes and to have a minimum cost since the information to be entered on the form is limited to that required by Chapter 286 of the Laws of 2005 and is already in the possession of the regulated parties. Completion and submission of the form is permissive and need only be done by those licensed farm wineries that wish to receive authorization to manufacture or sell wine from grapes grown outside New York State.

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

There will be no costs to local government or the State, other than the cost to the Department. The cost to the Department is limited to processing the forms established by the rule, is expected to be minimal and to be met with existing resources.

(c) Source:

Costs are based upon the Department's experience with similar programs involving the submission of forms for processing.

5. Local government mandates:

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

6. Paperwork:

The rule establishes the form by which farm wineries may make application for authorization to manufacture and sell wine from grapes grown outside New York State. As required by Chapter 286 of the Laws of 2005 in order to receive such authorization, such farm wineries are required to certify the quantity of grape varietals unavailable to them due to a natural disaster, act of God or continuing adverse weather condition during the growing season and to satisfy the Commissioner that they made reasonable efforts to obtain New York grown grapes from a New York source for wine making purposes.

7. Duplication:

The rule does not duplicate, overlap or conflict with any other rule or other legal requirements of the State and federal governments.

8. Alternatives:

The only alternative considered was to not establish the form by means of a rule. That alternative was rejected in favor of this rule so that the form could be formally adopted, published in the *State Register* and codified in 1 NYCRR.

9. Federal standards:

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

10. Compliance schedule:

The rule establishes a form for immediate use by farm wineries in the event they need to apply for authorization to manufacture or sell wine produced from grapes grown outside New York State. It is anticipated that farm wineries can begin to comply with this rule immediately since they have available the information required by Chapter 286 of the Laws of 2005 which can be entered on the form this rule establishes.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

There are approximately 160 licensed farm wineries in New York State. No local government will be affected by the rule.

## 2. Compliance requirements:

The rule establishes the form by which farm wineries may make application for authorization to manufacture and sell wine from grapes grown outside New York State. As required by Chapter 286 of the Laws of 2005, such farm wineries are required to certify the quantity of grape varieties unavailable to them due to a natural disaster, act of God or continuing adverse weather condition during the growing season and to satisfy the Commissioner that they made reasonable efforts to obtain New York grown grapes from a New York source for wine making purposes.

## 3. Professional services:

Farm wineries, most if not all of which, are small businesses are not likely to need professional services to comply with the rule.

The farm wineries that wish to complete and submit the form already have the information the form requires.

## 4. Compliance costs:

The costs to regulated parties are limited to the time and effort associated with completing and submitting the form prescribed by the rule. This is expected to take no more than fifteen minutes and to have a minimal cost since the information required by the form is limited to that required by Chapter 286 of the Laws of 2005 and is already in the possession of the regulated parties. Completion and submission of the form is permissive and need only be done by those licensed farm wineries that wish to receive authorization to manufacture or sell wine from grapes grown outside New York State. There will be no initial capital costs incurred by a regulated business or industry or local government to comply with the proposed rule and no annual cost for continuing compliance with the proposed rule.

## 5. Economic and technological feasibility:

Compliance with the rule is both economically and technologically feasible for the licensed farm wineries affected by it. Those farm wineries that wish to submit the form and seek authorization to utilize out-of-state grapes already have in their possession the information the form requires. It simply needs to be entered on the form and submitted to the Department.

## 6. Minimizing adverse impact:

The rule was designed to minimize adverse impact on the licensed farm wineries subject to it by permitting a farm winery to use one form to certify as many as ten varieties as unavailable to it due to a natural disaster, act of God, or continuing adverse weather condition during the growing season. The same form can be used to apply for authorization to manufacture or sell wine produced from grapes grown outside New York State. The form also allows the farm winery to set forth the efforts it made to obtain New York grown grapes from a New York State source for wine making purposes. Pursuant to Chapter 286 of the Laws of 2005, a farm winery must satisfy the Commissioner that reasonable efforts were made to obtain grapes from a New York State source for wine making purposes in order to qualify for authorization to manufacture or sell wine produced from grapes grown outside New York State.

By allowing farm wineries to provide all of the statutorily required information on one form and for all grape varieties, the rule takes into account the limited office resources of farm wineries and simplifies the process by which they make the required certification and apply for authorization from the Commissioner to manufacture or sell wine produced from grapes grown outside New York State.

## 7. Small business and local government participation:

The Department has received information from licensed farm wineries indicating that certain grape varieties are unavailable to them due to natural disaster, act of God or continuing adverse weather conditions. After investigating and compiling information as required by Chapter 286 of the Laws of 2005 the Commissioner has determined that a natural disaster, act of God, or continued adverse weather condition has destroyed no less than forty percent of several grape varieties grown or produced in New York State and used for winemaking. This emergency rule establishes the form by which licensed farm wineries can immediately make the certification and apply for the authorization permitted by Chapter 286 of the Laws of 2005. In the subsequent rulemaking to adopt the rule on a permanent basis licensed farm wineries will have the opportunity to comment as to the how, if at all, the form established by the rule can be improved.

**Rural Area Flexibility Analysis**

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

The approximately 160 licensed farm wineries in New York State are located throughout the rural areas of the State.

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

The rule establishes the form by which farm wineries may make application for authorization to manufacture and sell wine from grapes grown outside New York State. As required by Chapter 286 of the Laws of 2005, in order to receive such authorization, farm wineries are required to certify the quantity of grape varieties unavailable to them due to a natural disaster, act of God or continuing adverse weather condition during the growing season and to satisfy the Commissioner that they made reasonable efforts to obtain New York grown grapes from a New York source for wine making purposes. Farm wineries, most, if not all of which, are located in rural areas, are not likely to need professional services to comply with the rule. The farm wineries that wish to complete and submit the form already have the information the farm requires.

## 3. Costs:

The costs to regulated parties most, if not all of which, are located in rural areas are limited to the time and effort and have a minimal cost since the information required by the form is limited to that required by Chapter 286 of the Laws of 2005 and is already in the possession of the regulated parties. Completion and submission of the form is permissive and need only be done by those licensed farm wineries that wish to receive authorization to manufacture or sell wine from grapes grown outside New York State. There is no likely variation in such costs for the regulated private entities in rural areas to which the rule applies since they are generally similarly situated. There will be no initial capital costs incurred by a regulated business and no annual cost for continuing compliance with the proposed rule.

## 4. Minimizing adverse impact:

The rule was designed to minimize adverse impact on licensed farm wineries most, if not all of which, are located in rural areas, by permitting such wineries to use one form to certify as many as ten varieties as unavailable to it due to a natural disaster, act of God, or continuing adverse weather condition during the growing season. The same form can be used to apply for authorization to manufacture or sell wine produced from grapes grown outside New York State. The form also allows the farm winery to set forth the efforts it made to obtain New York grown grapes from a New York State source for wine making purposes. Pursuant to Chapter 286 of the Laws of 2005, a farm winery must satisfy the Commissioner that reasonable efforts were made to obtain grapes from a New York State source for wine making purposes in order to qualify for authorization to manufacture or sell wine produced from grapes grown outside New York State. The approaches suggested by SAPA § 202-bb(2) and similar approaches were considered to permit the statutory requirements to be met, while minimizing any adverse impact on the regulated parties in rural areas.

## 5. Rural area participation:

The Department will be proposing this emergency rule for permanent adoption. Through the notice and comment process of the State Administrative Procedure Act and the outreach conducted by the Department, regulated parties will have the opportunity to participate in the rule making process. The adoption of the rule on an emergency basis was necessary to establish the form farm wineries need in order to receive authorization this season to manufacture and sell wine from grapes grown outside New York State.

**Job Impact Statement**

## 1. Nature of impact:

By establishing the form farm wineries need to use to receive authorization to utilize grapes grown outside New York State, the rule will help preserve jobs and employment opportunities. The unavailability of certain New York grape varieties due to a natural disaster, act of God, or continuing adverse weather condition during the growing season makes the use of grapes grown outside New York State necessary if the affected farm wineries are to stay in business and continue to provide jobs and employment opportunities.

## 2. Categories and numbers affected:

The number of persons employed by the approximately 160 licensed farm wineries is not known.

## 3. Regions of adverse impact:

The farm wineries subject to the rule are located in the rural areas of the State. As noted in "1" above, the rule would have a positive impact on jobs and employment opportunities.

## 4. Minimizing adverse impact:

The rule was designed to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities in that it will help to keep farm wineries in business despite the unavailability of certain varieties of New York grown grapes that they usually rely upon. The rule was designed to minimize adverse impact on

farm wineries by permitting them to use one form to certify as many as ten varieties as unavailable to it due to a natural disaster, act of God, or continuing adverse weather condition during the growing season. The same form can be used to apply for authorization to manufacture or sell wine produced from grapes grown outside New York State. The form also allows the farm winery to set forth the efforts it made to obtain New York grown grapes from a New York State source for wine making purposes. Pursuant to Chapter 286 of the Laws of 2005, a farm winery must satisfy the Commissioner that reasonable efforts were made to obtain grapes from a New York State source for wine making purposes in order to qualify for authorization to manufacture or sell wine produced from grapes grown outside New York State.

By allowing farm wineries to provide all the statutorily required information on one form and for all grape varieties, the rule takes into account the limited office resources of farm wineries and simplifies the process by which they make the required certification and apply for authorization from the Commissioner to manufacture or sell wine produced from grapes grown outside New York State.

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## Banking Department

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### EMERGENCY RULE MAKING

#### Supervision of Article XII Investment Company Holding Companies and Their Subsidiaries

**I.D. No.** BNK-48-05-00004-E

**Filing No.** 1345

**Filing date:** Nov. 10, 2005

**Effective date:** Nov. 13, 2005

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

**Action taken:** Addition of Part 114 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 14(1)(k) and art. XII

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

**Specific reasons underlying the finding of necessity:** Need to meet European Commission timetable for being designated as providing equivalent supervision for certain U.S. headquartered financial groups with business activities in the European Economic Community.

**Subject:** Supervision of art. XII investment company holding companies and their subsidiaries for purposes of the European Union Financial Conglomerates Directive.

**Purpose:** To clarify the examination, supervision, regulation and enforcement authority of the Superintendent of Banks over financial conglomerates for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

**Text of emergency rule:** Part 114

**SUPERVISION AND REGULATION OF ARTICLE XII INVESTMENT COMPANY HOLDING COMPANIES AND THEIR SUBSIDIARIES FOR PURPOSES OF THE EUROPEAN UNION FINANCIAL CONGLOMERATES DIRECTIVE**

§ 114.1 Purpose and Scope.

Article XV of the Banking Law authorizes the formation of investment companies and Article XII of the Banking Law sets forth the rights and obligations of such investment companies. The purpose of this Part is to clarify the Superintendent's examination, supervision, regulation, and enforcement authority over financial conglomerates for purposes of carrying out equivalent supervision under the European Union Financial Conglomerates Directive.

§ 114.2 Definitions.

For purposes of this Part:

"Banking Law" means the New York Banking Law.

"Banking organization" means all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies organized under the Banking Law.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of an investment company, whether by means of the ownership of the voting stock or equity interests of such investment company or of one or more persons controlling such investment company, by means of a contractual arrangement or otherwise. Control shall be presumed to exist if any company, directly or indirectly, owns, controls or holds with the power to vote ten per centum or more of the voting stock or other equity interests of any investment company or of any company which owns, controls or holds with power to vote ten per centum or more of the voting stock or other equity interests of such investment company.

"Equivalent supervision" means a supervisory and regulatory regime meeting the standards required under the Financial Conglomerates Directive.

"Financial conglomerate" means a group meeting the definition of financial conglomerate under the Financial Conglomerates Directive and having an investment company within its structure.

"Financial Conglomerates Directive" means the European Union Financial Conglomerates Directive 2002/87/EC, as it may be amended from time to time.

"Investment company" means a banking organization organized pursuant to the Banking Law and subject to the provisions of Article XII of the Banking Law.

"Investment company holding company" means the top tier corporation or other entity that controls an investment company.

"Subsidiary" means a corporation or other entity at least 10 per centum of the voting stock or other equity interests of which is controlled directly or indirectly by an investment company holding company.

"Supervision Agreement" means an individual agreement entered into between a financial conglomerate and the Superintendent which provides for a detailed plan of supervision by the Superintendent over the financial conglomerate, including specific regulatory requirements applicable to the investment company holding company and its subsidiaries.

§ 114.3 Examination, Supervision, Regulation, and Enforcement Authority of the Superintendent over Investment Company Holding Companies and their Subsidiaries for Purposes of the European Union Financial Conglomerates Directive.

To assist the Banking Department in carrying out equivalent supervision of a financial conglomerate for purposes of carrying out the requirements of the Financial Conglomerates Directive, the Superintendent shall have examination, supervision, regulation, and enforcement authority over an investment company holding company and any of its subsidiaries to the same extent as he or she has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

This authority includes, but is not limited to, the authority to:

(1) apply Banking Law Section 36 relating to examinations and confidentiality of information to an investment company holding company and its subsidiaries, as if such entities were banking organizations;

(2) issue orders to an investment company holding company and its subsidiaries as provided in Banking Law Section 39, as if such entities were banking organizations;

(3) impose monetary penalties for violation of law or regulation, as provided in Banking Law Section 44, as if such entities were banking organizations;

(4) impose capital requirements on an investment company holding company and its subsidiaries, as appropriate or required in the judgment of the Superintendent;

(5) prescribe requirements for the keeping of books and records by the investment company holding company and its subsidiaries;

(6) require filing by the investment company holding company and its subsidiaries with the Superintendent of periodic reports of condition, reports of income, risk profiles, large exposures and such other reports as may be required by the Superintendent;

(7) levy assessments on the investment company holding company and its subsidiaries, as provided in Banking Law Section 17, as if such entities were banking organizations;

(8) issue such general or specific rules or regulations as may be necessary to effectuate the examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries for purposes of meeting the requirements of equivalent supervision under the Financial Conglomerates Directive.

§ 114.4 Supervision Agreements with Financial Conglomerates.

The Superintendent may enter into one or more Supervision Agreements with each financial conglomerate. Such Supervision Agreements

will set forth the specific plan of supervision and detailed regulatory requirements applicable to an investment company holding company and its affiliates (e.g., capital requirements, reporting requirements, transactional limitations, etc.). The Superintendent may exercise enforcement authority under Banking Law Sections 39 and 44 for breaches or violations of such Supervision Agreements.

Such Supervision Agreements shall be in addition to, and shall not serve as a limitation on, the Superintendent's examination, supervision, regulation and enforcement authority provided under this Part over investment holding companies and their subsidiaries to the same extent as the Superintendent has examination, supervision, regulation, and enforcement authority over any banking organization under the Banking Law.

#### § 114.5 Limitations.

The Superintendent's examination, supervision, regulation, and enforcement authority over investment company holding companies and their subsidiaries as provided in this Part is limited to those cases in which the Banking Department needs to provide equivalent supervision for a specific financial conglomerate under the Financial Conglomerates Directive.

The provisions of Banking Law Article XIII governing voluntary and involuntary liquidations of banking organizations shall not be applicable to investment company holding companies, although they are applicable to investment companies.

**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 February 7, 2006.

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

Section 14(1) of the Banking Law empowers the Banking Board to make, alter and amend rules and regulations not inconsistent with law. In addition, Section 14(1)(k) permits the Banking Board to prescribe the methods and standards to be used in examinations and valuations of assets of banking organizations. Article XII sets forth the powers as well as the duties and responsibilities of Article XII investment companies.

##### 2. Legislative objectives:

The rule promotes the legislative objective of maintaining the safety and soundness of banking organizations through effective examination and supervision. Banking Law Section 10 declares it to be the policy of New York that all banking organizations shall be supervised and regulated by the Banking Department in such manner as to ensure the safe and sound conduct of such business and to protect the public interest. Article XII sets forth the powers as well as the duties and responsibilities of Article XII companies. Such duties include recordkeeping and the provision of reports to the Superintendent. As banking organizations, Article XII companies are subject to examination by the Superintendent (B.L. Section 36) as well as to enforcement actions by the Superintendent (e.g., enforcement actions under B.L. 39; monetary penalties under B.L. 44).

The new rule clarifies the Superintendent's ability to carry out this supervision in those cases where equivalent supervision is required under the European Union Financial Conglomerates Directive (2002/87/EC) (the "Financial Conglomerates Directive" or "Directive") recently passed by the European Parliament.

##### 3. Needs and benefits:

The purpose of the new rule is to clarify the Superintendent's examination, supervision, regulation and enforcement authority over Article XII investment companies (i.e., banking organizations formed pursuant to Article XII of the Banking Law) and their affiliates in situations where the Banking Department is responsible for providing "equivalent supervision" (as defined in the rule) for such banking organizations and their affiliates, under the Financial Conglomerates Directive.

The Directive will require supervisors in non-European countries to provide so-called "equivalent supervision" over a financial conglomerate to that which would be required in Europe. Under the Directive, groups or conglomerates that have activities in one or more financial business areas, including banking, insurance and securities, will be required to demonstrate that a financial regulator in their home country provides adequate supervision for the conglomerate on a consolidated basis.

The Banking Department currently has several conglomerates or financial groups with operations in Europe that will become subject to the supervision requirements of the Financial Conglomerates Directive in

January 2005. These are large organizations which own Article XII banking corporations in New York and, as a result thereof, it is possible that the Banking Department would be required or requested to provide the required equivalent supervision for these organizations.

The ability of a U.S. supervisor fulfilling the role of equivalent supervisor to effectively examine and supervise a financial conglomerate must be clear. The requirements of the so-called equivalent supervision are broader than the supervision currently exercised by the Superintendent over Article XII investment companies owned by such entities, in that the Directive requires that the U.S. regulators effectively supervise the broader organization (i.e., from the parent level down) on a consolidated basis.

While this does not necessarily require that one supervisor functionally supervise and regulate each entity within a conglomerate, one supervisor will be relied upon to provide a coordinating role, and that supervisor must have a demonstrable ability to supervise, examine and regulate and take enforcement action against, if necessary, the organization as a whole. The Directive recognizes that many countries, including the U.S., regulate diverse financial conglomerates on a "functional" basis (i.e., insurance regulators regulate the insurance entities, securities regulators regulate the securities entities, etc.).

The Department has significant experience in providing consolidated supervision to large banking organizations, both in its role as supervisor of banks within a holding company structure and in its role as a consolidated supervisor for several Article XII companies owned by large financial institutions that have operations in Europe and abroad. The Department is also very accustomed to coordinating supervision among various regulators, including the banking, insurance and securities regulators in the U.S., as well as banking and other financial regulators in Europe and in other countries abroad.

The new rule is necessary to demonstrate and set forth unambiguously the Superintendent's powers and duties vis-à-vis the larger conglomerate organization in a situation where comprehensive equivalent supervision is required to be provided by the Superintendent. The regulation therefore serves the purpose of making it clear to both the European Union regulators and to the conglomerate organization the authority of the Superintendent in this regard. Specifically, the regulation makes explicit that the parent company of an Article XII organization within a financial conglomerate is an Article XII holding company and that, to carry out the required equivalent supervision, the Superintendent has the authority to exercise examination, supervision, regulation and enforcement authority over the Article XII holding company and any of its subsidiaries in the same manner as over any banking organization. In this way, the Superintendent can exercise the supervisory tools necessary to provide effective consolidated supervision. The regulation makes clear that this authority to supervise and regulate the Article XII holding company and its subsidiaries in the same manner as a banking organization only is necessary and therefore only will be employed when the Superintendent is required to provide equivalent supervision under the Financial Conglomerates Directive. Thus, the applicability of the rule is limited to such situations involving these financial conglomerates.

The Superintendent's authority to examine and exercise certain control over affiliates (e.g., parent, sister companies) of any banking organization is already quite broad (see e.g., Banking Law Section 36). However, in order for a U.S. supervisor to be deemed capable of equivalent supervision, the authority to both regulate and take enforcement action against the affiliates of a banking organization must be apparent. The new rule provides that clarification. The financial conglomerate organizations themselves favor such clarification since they wish to demonstrate that their home country supervisors can provide the required equivalent supervision.

If the European Union determines that the supervision in the organization's home country is not "equivalent" to that provided to an entity headquartered in the European Economic Community, the organization will be forced to restructure its European operations so that equivalent supervision may be provided by a European regulator from a top tier entity located in Europe. For most U.S. organizations, this is a highly undesirable result that would involve costly restructuring in Europe and added layers of regulatory oversight.

Accordingly, the new rule demonstrating the Superintendent's authority and ability to carry out supervision in a manner deemed acceptable under the Directive serves the public need for U.S. financial conglomerate organizations to demonstrate consolidated supervision by a home country regulator.

##### 4. Costs:

No significant new costs are imposed as a result of this rule. Banking organizations are already subject to monitoring and reporting require-

ments. This reporting would now be required at a consolidated level within the organization, which in many cases, is already being done. Any additional reporting or compliance requirements are a direct result of European Union Financial Conglomerates Directive itself. As noted in Section 3, "Needs and Benefits" above, U.S. organizations that are deemed to be financial conglomerates are in favor of the Superintendent's regulatory authority since, without such clarification, heavy costs of restructuring operations or duplicative regulation might be required to satisfy the European Union Directive.

5. Local government mandates:

The regulation imposes no burdens on local governments.

6. Paperwork:

Banking organizations, including Article XII companies, are currently subject to monitoring and reporting requirements. These requirements will continue and may need to be supplemented by reporting at the consolidated organizational level, which, in many cases is already done. Any such additional paperwork requirements, however, are a direct result, not of the new rule, but of new requirements imposed on the organizations under the European Union Directive which imposes new requirements on these organizations as a result of their European operations. These organizations favor reporting to a U.S. supervisor as a less costly alternative to direct reporting to European supervisors.

7. Duplication:

None. Various other U.S. supervisors, such as the Federal Reserve, the U.S. Securities and Exchange Commission, the Office of the Comptroller of the Currency and the Office of Thrift Supervision may be required to provide equivalent supervision to institutions under their jurisdiction that have European operations. However, supervision by federal regulators and the Banking Department would not be conflicting or duplicative, as an organization would only have one designated "equivalent supervisor" for purposes of the European Union Directive.

8. Alternatives:

a. Rely on Existing Authority

Consideration was given to relying on the Superintendent's existing authority to examine banking organizations and their affiliates, including the authority of the Superintendent to enter into quasi-contractual Supervision Agreements with an organization, such as a financial conglomerate. Although it was thought that it might be possible to demonstrate to the European Union that the Superintendent could carry out equivalent supervision based on existing authority, it was ultimately determined, in part based upon outreach to the European Commission ("Commission") and one organization that will be required to have consolidated equivalent supervision (see Section 11, "Outreach" below), that a regulation was necessary to clarify the extent of the Superintendent's examination, supervision, regulation and enforcement authority.

Banking Law Section 36 clearly grants the Superintendent the authority to examine banking organizations (which includes Article XII investment companies) as well as affiliates of banking organizations when necessary to determine the financial condition of a banking organization. The Superintendent can also issue enforcement orders against banking organizations under B.L. Section 39, and it is possible that certain activities of affiliates (e.g., ordering cease and desist, etc.) might be reachable through such orders. However, based on discussions with the Commission and European supervisors, it was clear to Department staff that the Commission, in order to make a determination that a supervisor could effectively provide equivalent supervision, strongly preferred, and would likely require, demonstrable express statutory or regulatory authority of the supervisor to carry out examination, supervision, regulation and enforcement over the conglomerate.

In the absence of the proposed rule, the Superintendent's authority to supervise the conglomerate in the manner required would be less clear. While the Superintendent has clear examination authority over affiliates when necessary to determine the financial condition of a banking organization, it is not clear that the Superintendent's authority to issue regulations applicable to, or enforcement orders or monetary penalties against, the financial conglomerate, extends to the banking organization's affiliates or parent company directly. The European Union as well as the financial conglomerate organizations for which the Banking Department may serve as equivalent supervisor both desire clarification to this effect. The proposed rule therefore would clarify that, for those organizations for which the Department is equivalent supervisor, the Superintendent's examination, supervision, regulation and enforcement authority extends to the Article XII company's top tier parent organization and other affiliates to the same extent as to any other banking organization.

A second approach utilizing the Department's existing authority would be to rely on the Superintendent's authority to enter into formal "Supervision Agreements" which set forth the Superintendent's plan of supervision, as well as the Superintendent's authority over the organization, and the organization's responsibilities as a supervised entity. Such agreements have been used in the past where consolidated supervision is required, and the uniqueness of each organization requires a tailored agreement. In fact, the new rule still calls for the use of such agreements with individualized supervision plans as part of the equivalent supervision framework. While in the past such comprehensive Supervision Agreements alone would be sufficient to demonstrate to European regulators that the U.S. regulator has a comprehensive plan of supervision for the organization, the new European Directive appears to require a firm statutory or regulatory expression of a U.S. supervisor's authority.

b. Promulgate a Regulation to Further Define Superintendent's Examination Authority Under Banking Law Section 36.

Another alternative that was considered was to adopt a general regulation of the Banking Board which would further define the scope of the Superintendent's examination authority under Banking Law Section 36. Such a regulation would also have been limited in nature and would have sought to define what is meant by "examination" of a banking organization in a situation where the banking organization is part of a group or conglomerate that requires equivalent supervision in the U.S. under the European Union Financial Conglomerates Directive.

This alternative was rejected by Department staff as less clear and less effective than the approach decided upon. For example, to accomplish the required end, the regulation would have needed to very broadly define the term "examination" to encompass the ability of the Superintendent to issue regulations and enforcement actions against both the banking organization and its affiliates.

Rather than demonstrate the Superintendent's authority as based solely on the examination authority described in B.L. Section 36, Department staff believes it is more appropriate to demonstrate the Superintendent's authority as arising out of her overall ability to supervise and regulate Article XII banking organizations and their affiliates.

The new rule is therefore a general Banking Board regulation based on Banking Law Section 14(1), 14(1)(k) and Article XII defining the Superintendent's specific expanded supervisory powers over the entities in a conglomerate whose top tier company is defined as an Article XII holding company in those cases in which the Banking Department needs to provide equivalent supervision as required under the Financial Conglomerates Directive.

9. Federal standards:

Not applicable. As noted above, various federal financial supervisors may also demonstrate their authority to provide consolidated equivalent supervision, but there are no specific standards which can be compared to those the Banking Department would apply to organizations under its supervision. While the supervisory regimes would likely be similar in order to accommodate the requirements of the European Union Directive, the specific requirements applicable to any given organization are individualized and part of a unique supervision plan.

10. Compliance schedule:

Not applicable. Organizations under the Department's supervision do not need to take affirmative steps to comply with the rule. Based upon the decision of European regulators whether the Banking Department will be required to provide equivalent supervision, the rule will either be applicable to such organizations or it will not. An individualized Supervision Agreement will then be worked out between the Banking Department and the organization, in consultation with European regulators.

11. Outreach:

In March 2004, a delegation of the Banking Department traveled to Brussels, Belgium and London, England to meet with staff of the Commission and the U.K.'s Financial Services Authority ("FSA"), respectively. The Commission is responsible for providing guidance to the various European financial supervisors on the supervisory regimes in other countries, including the U.S. Therefore, this body (including its technical committees) has the responsibility and the authority to determine whether the supervisory regimes in other countries are sufficiently "equivalent" to European regimes as required by the Directive. The Commission is therefore analyzing other supervisors' laws and regulations and practical approaches to supervision.

The FSA is one of the European financial supervisors with a major role in carrying out the Directive, particularly with respect to several of the U.S.-based financial conglomerates. This is because significant decision-making about which U.S. supervisor is best qualified to provide equivalent

supervision to a particular organization rests with the European financial supervisor where the majority of the conglomerate organization's operations reside.

The Banking Department delegation explained to both the Commission and the FSA how the Banking Department conducts supervision of banking organizations, the authority of the Superintendent, and the legal and regulatory framework for supervision. The FSA has worked extensively with the Department over the years and was already quite familiar with the Department as a supervisor. In addition, in March, the delegation shared with both these entities a draft of the new rule and explained how it would clarify the Superintendent's authority over conglomerates for purposes of the Financial Conglomerates Directive. The Commission staff indicated that it would provide comments as this body has the primary responsibility for evaluating equivalence. In May 2004, the Commission staff commented favorably on the proposed rule and indicated its belief that the rule would be found sufficient for the purposes of the Directive. The staff suggested only a few minor wording changes to more closely conform certain terminology to that of the Directive.

The draft regulation was also shared with one of the organizations under the Department's supervision that will require equivalent supervision and for which it is most likely that the Department might be required to be the supervisor to provide such supervision.

The organization in general found the draft rule to be helpful and acceptable in form. After consideration of the organization's comments the Department determined to adopt the rule on an emergency basis in its present form.

The organization also questioned whether the language in the rule stating that the Superintendent has authority over an Article XII holding company and its subsidiaries "to the same extent" as over banking organizations implied that all such affiliates of an Article XII must therefore be regulated as if they were banking organizations. The Banking Department advised that is that this is clearly not the intent of the rule or of the European Union Directive. Rather, this language reflects the Department's understanding that the European Commission wishes to see the equivalent authority available to the Superintendent for the supervision of the conglomerate as it would have over banking organizations.

The organization also had some inquiries about the technical terminology employed in the rule vis-à-vis the European Union Directive. These questions were cleared up to the organization's satisfaction based upon further discussions between the Department and the Commission staff to clarify this terminology.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not submitted because the proposed rule will not impose any adverse economic impact, or reporting, or record-keeping or other compliance requirements on small businesses or local governments. The proposed rule relates to supervision of the parents and affiliates of Article XII investment companies having financial business operations within the European Union. These entities are large financial conglomerates, which do not qualify as small businesses in New York State and are not local governments.

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

A Rural Area Flexibility Analysis is not submitted because the rule does not result in any hardship to a rural area based on the character and nature of a rural area. The rule relates to supervision of large financial conglomerates. It is apparent from the nature and purpose of the rule that it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

#### **Job Impact Statement**

A Job Impact Statement is not submitted because the proposed rule has no effect on the creation or elimination of jobs. The rule clarifies the Superintendent's examination, supervision, regulation and enforcement authority over Article XII companies and their affiliates in situations where the Banking Department needs to provide equivalent supervision for purposes of the European Union Financial Conglomerates Directive. Accordingly, it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

## **EMERGENCY RULE MAKING**

### **High Cost Home Loans**

**I.D. No.** BNK-48-05-00005-E

**Filing No.** 1355

**Filing date:** Nov. 10, 2005

**Effective date:** Nov. 13, 2005

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

**Action taken:** Amendment of Part 41 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 6-i and 6-l

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

**Specific reasons underlying the finding of necessity:** Chapter 626 of the Laws of 2002 became effective on April 1, 2003. Provisions of chapter 626, by the enactment of section 6-l of the Banking Law, affect the making of certain home mortgage loans, known as high cost home loans, on after the effective date. Part 41 of Title 3 NYCRR has governed the making of such loans prior to the effective date and is not in conformity with certain provisions of the chapter 626. Also, in certain limited instances, the proposed amendments to Part 41 will clarify certain provisions enacted by chapter 626. The revised Part 41 provides a comprehensive regulatory scheme under which mortgage lenders and brokers will be able to make high cost home loans.

**Subject:** The making of certain residential mortgage loans, referred to as high cost home loans.

**Purpose:** To conform the provisions of Part 41 of Title 3 NYCRR to various provisions of section 6-l of the Banking Law, and also to clarify certain provisions of such section 6-l.

**Substance of emergency rule:** Section 41.1(a) is amended to revise the definition of a lender subject to Part 41.

Section 41.1(b) is amended to revise the definition of an affiliate.

Section 41.1(c) is amended to make technical revisions.

Section 41.1(d) is amended to revise the definition of a bona fide loan discount point.

Section 41.1(e) is amended to revise the definition of a high cost home loan in regard to the points and fees threshold for determining such loans and limiting the exclusion of certain discount points in the computation of points and fees.

Section 41.1(f) is amended to revise the definition of loan amount.

Section 41.1(g) is amended to substitute a definition of "borrower" for "obligor."

Section 41.1(h) is amended to revise the definition of points and fees.

Section 41.1(j) is amended to make certain technical revisions.

Section 41.2(a) is amended to clarify the exceptions to the prohibition upon accelerating the indebtedness of high cost home loans.

Section 41.2(b) is amended to increase the term of a balloon mortgage payment to fifteen years.

Section 41.2(e) is amended to make certain technical revisions.

Section 41.2(g), relating to modification and deferral fees, is repealed and then added as a new paragraph 2 to section 41.3(d), relating to refinancing of high cost home loans.

Section 41.3(a) is amended by adding a new disclosure requirement and revising the time limits pertaining to an existing disclosure requirement.

Section 41.3(b) is amended to revise requirements relating to the residual income guidelines and the presumption of affordability; to add certain conditions in order to determine that repayment ability has been "corroborated by independent verification"; and to substitute "borrower(s)" for "obligor(s)" where the term appears in the text.

Section 41.3(c) is amended to revise the percentage of points and fees that may be financed in making a high cost home loan, and to revise the charges that may be excluded from such financed points and fees.

Section 41.3(d) is re-titled and amended to revise the limitations upon points and fees that may be charged by any lender when refinancing high cost home loans and to add a previously repealed paragraph (see revisions to section 41.2(g)) relating to modification of an existing high cost home loan.

Section 41.3(f) is added to prohibit the refinancing of special mortgages, except under certain conditions.

Section 41.3(g) is amended to delete a reference to median family income and to revise certain references.

Section 41.4(a) is amended to revise certain time limits applicable to a disclosure requirement.

Section 41.4(b) is amended to make a technical revision.

Section 41.4(d) is amended to revise certain time limits applicable to a disclosure requirement and to clarify the location of the disclosure upon certain mortgage loan application forms.

Section 41.5(a) is amended to clarify deceptive acts relating to splitting or dividing loan transactions.

Section 41.5(b)(2) is amended to clarify retention of fees by lenders and brokers in relation to unfair, deceptive or unconscionable practices.

Section 41.5(b)(4) is amended to revise the definition of loan flipping, as an unfair or deceptive practice, and to add revised conditions to determine whether a loan has a "net tangible benefit" to the borrower.

Section 41.5(b)(5) is amended to revise the definition of packing to make it consistent with other revisions to Part 41 and to revise certain time limits applicable to a disclosure requirement.

Section 41.5(b)(6) is amended to clarify the standards to determine that recommending or encouraging default of a home loan or other debt is an unfair or deceptive practice.

Section 41.7 is amended to revise the legend that appears on a high cost home loan mortgage.

Section 41.8 is amended to delete VA and FHA mortgage loans from the definition of exempt products.

Section 41.9 is amended to repeal the current provisions relating to correction of errors and to add new provisions.

Section 41.11, relating to prohibiting the financing of single premium insurance, is re-titled and amended to include other insurance premiums or payments for any cancellation or suspension contract or agreement.

**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 February 7, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Banking Law section 14(1) authorizes the Banking Board to adopt regulations not inconsistent with the law. Section 6-i of the Banking Law specifically states that no banking organization, partnership, corporation exempt organization, or other entity (hereafter "lenders") can make a mortgage loan in New York State unless those entities conform to Banking Law requirements pertaining to mortgage bankers (Article 12-D of the Banking Law) and rules and regulations promulgated by the Banking Board. Section 6-l of the Banking Law imposes new requirements upon the making of certain mortgage loans. Part 41 of the rules and regulations of the Banking Board was adopted pursuant to section 6-i of the Banking Law, and prior to approval of chapter 626 of the laws of 2002, which enacted section 6-l. Provisions of section 6-l, which are inconsistent with certain provisions of Part 41, supercede such regulatory provisions, and the Banking Board, in promulgating the amendments to Part 41, makes Part 41 consistent with section 6-l.

##### 2. Legislative objectives:

Part 41 is intended to provide consumer protections by establishing important consumer disclosure requirements and prohibiting contractual terms and practices that are unfair in the making of residential mortgage loans that are offered on a high-cost basis. Section 6-l is intended to have the same objectives. Since Part 41 provides the broad regulatory scheme under which high cost mortgage loans are made, it is necessary that its provisions be in conformity with section 6-l and also, in limited instances, clarify certain provisions of such section in order that lenders and brokers appropriately make high cost loans in conformity with the intended legislative objectives.

##### 3. Needs and benefits:

Part 41 was intended to regulate the making of residential mortgage loans within a certain segment of the mortgage loan market, referred to as the sub-prime, or non-conventional, mortgage loan market. The regulatory scheme defined by Part 41, by requiring certain disclosures and practices to be followed in the making of such loans, sought to prevent occurrences of predatory lending. Predatory lending occurs when the borrower or debtor does not have sufficient income or other financial resources to pay the monthly principal and interest payments or when equity in a residential property is stripped by repeated re-financings, primarily by the charging of excessive points and fees, when the borrower realizes no economic benefit.

Since the Legislature established a number of different standards regarding disclosures and practices in the making of such residential mortgage loans by enactment of section 6-l of the Banking Law, it is necessary that the comparative standards in Part 41 be made consistent with section 6-l.

Further, it is also necessary that certain provisions of section 6-l be clarified by the amendments to Part 41 in order that lenders and brokers may be in compliance with the requirements section 6-l when making such loans, given that such provisions are not otherwise defined by section 6-l nor has the Legislature provided any other guidance which would clarify the intended meaning of those provisions. The clarifying provisions of the amendments to Part 41 address determining "corroboration by independent verification" of a borrower's repayment ability and "net tangible benefit" to a borrower, both of which are critical standards in assessing whether instances of predatory lending have occurred.

##### 4. Costs:

The amendments to Part 41 should impose no additional cost upon mortgage lenders or brokers not otherwise imposed by the enactment of the comparative provisions of section 6-l of the Banking law to which the amendments conform Part 41. The amendments impose no additional cost upon the Banking Department or any other state agency, or any unit of local government.

##### 5. Local government mandates:

The amendments to Part 41 do not impose any requirements or burdens upon any units of local government.

##### 6. Paperwork:

The amendments to Part 41 do not impose any new paperwork requirements.

##### 7. Duplication:

None.

##### 8. Alternatives:

The Banking Department considered whether to forego amending Part 41 or to repeal Part 41 in light of the enactment of section 6-l of the Banking Law, given that section 6-l may be viewed legally as occupying the field of regulation of high cost home loans in the state of New York. It was determined that Part 41 provides a more extensive regulatory scheme than section 6-l for the making of such mortgage loans, and therefore it is appropriate to make the non-conforming provisions of Part 41 consistent with the comparative statutory provisions of section 6-l. In addition, the provisions of section 6-l that are clarified by the amendments will eliminate uncertainty among mortgage lenders and brokers in the making of such loans by articulating appropriate conditions, which such lenders and brokers must meet in order to be in compliance with certain non-defined statutory standards established by section 6-l.

##### 9. Federal standards:

In the initial promulgation of Part 41, the Banking Department stated the regulations established thresholds that were lower than the thresholds set by the Home Ownership Equity Protection Act (HOEPA). Subsequently, federal regulators modified the annual percentage rate threshold for first mortgages under HOEPA by making it identical to the corresponding threshold in Part 41. Section 6-l of the Banking Law establishes modified points and fees thresholds in certain instances that are more lenient for brokers and lenders than the comparable threshold in HOEPA. The definition of points and fees, in part, established by section 6-l refers to certain—but not all—provisions of HOEPA that define points and fees. The amendments would adopt the thresholds and definition established by section 6-l.

##### 10. Compliance schedule:

None. Any modification of existing disclosures or practices by lenders or brokers in regard to any cost home loans made on or after April 1, 2003 are the result of standards established by section 6-l of the Banking Law. Chapter 626, which enacted section 6-l, was approved on October 3, 2002, and brokers and lenders have had sufficient time to familiarize themselves with these standards and subsequently modify their disclosures and practices, if necessary, to comply with the standards of section 6-l. The revised provisions of Part 41 will assist brokers and lenders in complying with the section 6-l requirements.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic or technological impact upon small business beyond any such effects that may be caused by the requirements established by section 6-l of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse

economic or technological impact upon local governments. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Part 41 will not impose any adverse economic impact upon private entities in rural areas beyond any such effects that may be caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41. The amendments will not impose any adverse economic impact upon public entities in rural areas. The proposed amendments will impose no adverse reporting, recordkeeping or compliance requirements private on public entities in rural areas.

**Job Impact Statement**

A Job Impact Statement is not attached because the proposed amendments to Part 41 will not have any appreciable and/or substantial adverse impact on jobs and employment opportunities beyond any such effects that may be caused by the requirements established by section 6-1 of the Banking Law, applicable to the making of high cost home loans, to which the amendments conform Part 41.

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## Department of Civil Service

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**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-36-05-00006-A  
**Filing No.** 1360  
**Filing date:** Nov. 14, 2005  
**Effective date:** Nov. 30, 2005

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-36-05-00006-P, Issue of September 7, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-36-05-00007-A  
**Filing No.** 1357  
**Filing date:** Nov. 14, 2005  
**Effective date:** Nov. 30, 2005

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-36-05-00007-P, Issue of September 7, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-36-05-00008-A  
**Filing No.** 1359  
**Filing date:** Nov. 14, 2005  
**Effective date:** Nov. 30, 2005

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-36-05-00008-P, Issue of September 7, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-36-05-00010-A  
**Filing No.** 1361  
**Filing date:** Nov. 14, 2005  
**Effective date:** Nov. 30, 2005

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-36-05-00010-P, Issue of September 7, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-36-05-00011-A  
**Filing No.** 1358  
**Filing date:** Nov. 14, 2005  
**Effective date:** Nov. 30, 2005

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

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

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

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-36-05-00011-P, Issue of September 7, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Education Department

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### NOTICE OF CONTINUATION NO HEARING(S) SCHEDULED

#### Special Education Programs and Services

**I.D. No.** EDU-23-05-00018-C

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

**The notice of proposed rule making,** I.D. No. EDU-23-05-00018-P was published in the *State Register* on June 8, 2005.

**Subject:** Special education programs and services.

**Purpose:** To conform commissioner's regulations to the Federal Individuals with Disabilities Education Act, as amended by Pub L. 108-446, relating to: the education of students with disabilities who are homeless youth; school district professional development plans; attendance, mandatory medication and new entrant screenings; definitions; board of education responsibilities; membership of the committee on special education, subcommittee and committee on preschool special education; procedures for referral, evaluation, IEP development, placement and review; due process procedures; continuum of services; students being educated in private schools and State-operated and State-supported schools; day treatment programs; educational programs for preschool students with disabilities; and due process procedures for students with disabilities subject to discipline removals.

**Substance of rule:** The Commissioner of Education proposes to repeal Part 101 and amend sections 100.2(x), 100.2(dd), 200.1, 200.2, 200.3, 200.4, 200.5, 200.6, 200.7, 200.14, 200.16, 201.2, 201.3, 201.4, 201.5, 201.7, 201.8, 201.9, 201.10 and 201.11 of the Commissioner's Regulations, effective December 29, 2005, relating to the provision of special education programs and services to students with disabilities. The following is a description of the substance of the proposed amendments.

Section 100.2(x), as amended, requires a school district to: coordinate the transmittal of records for a student with a disability who is a homeless youth; provide comparable special education services to a homeless youth with a disability who enrolls in a school district; ensure the local education agency liaison assists in the enrollment and educational placement through coordination with the Committee on Special Education (CSE) for a student with a disability who is a homeless youth; and coordinate the implementation of the homeless provisions with IDEA.

Section 100.2(dd), as amended, requires a school district to include, as part of its professional development plan, a description of the professional development activities provided to school personnel who work with students with disabilities.

Part 101, relating to exemptions from attendance, is repealed.

Section 200.1, as amended, conforms definitions of assistive technology service, impartial hearing officer, mediator, parent, related services, school health services, special education, learning disability, surrogate parent and transition services; adds definitions of homeless youth, limited English proficiency, universal design and ward of the State, consistent with the federal and State definitions of these terms; and makes technical amendments to the definitions of guardian ad litem, general curriculum and prior written notice.

Section 200.2, as amended, adds child find requirements for students with disabilities who are homeless or wards of the State; adds data requirements consistent with federal law; adds new responsibilities relating to child find, evaluation, data collection and data reporting for students with disabilities placed in private elementary and secondary schools by their parents; requires instructional materials to be in a format that meets the National Instructional Materials Accessibility Standard as published in the *Federal Register*; ensures that amendments to individualized education

programs (IEPs) are disseminated consistent with Chapter 408 of the Laws of 2002; repeals requirements for a comprehensive system of personnel development and requires schools to include personnel development activities for staff working with students with disabilities in the professional development plan pursuant to section 100.2 of the Commissioner's regulations; requires boards of education and boards of cooperative educational services (BOCES) to establish written policies that identify the measurable steps it will take to recruit, hire, train and retain highly qualified personnel; requires school districts to develop policies and procedures that describe the guidelines for the provision of appropriate accommodations in the administration of district-wide assessments; and requires a school district to identify how, to the extent feasible, it will use universal design principles in developing and administering any district-wide assessments.

Section 200.3, as amended, requires that not less than one regular education teacher and not less than one special education teacher or provider be members of the CSE, a subcommittee thereof, and the committee on preschool special education (CPSE); and adds, consistent with amendments made to section 4402 of the Education Law by Chapter 194 of the Laws of 2004, that the additional parent member on the CSE may be a parent of a student who has been declassified or who has graduated within the past five years.

Section 200.4, as amended, conforms State regulations to federal law requirements relating to parental consent, individual evaluations and reevaluations, evaluation procedures, eligibility determinations including determinations of learning disabilities, IEP contents including transition services to be in effect beginning with the school year when the student turns age 15, the right of the parent to agree to alternative means of participation for CSE, subcommittee or CPSE meetings, annual review requirements, changes to the IEP after the annual review, and provision of services and transfer of records for students who transfer school districts.

Section 200.5, as amended, conforms State due process requirements to federal law relating to prior written notice, consent, notice of meetings, parent participation in CSE meetings, procedural safeguards notice, mediation, due process complaint notices, resolution sessions, impartial hearings, appeals of the decision of the State review officer and surrogate parents; establishes procedures for the appointment of surrogate parents that require consultation with the local social services district of other agency responsible for the care of the student for students who are wards of the state; and requires the appointment of a surrogate parent a reasonable time following the receipt of a referral for an initial evaluation, reevaluation or services.

Section 200.6, as amended, adds interim alternative educational settings to the required continuum of services for students with disabilities.

Section 200.7, as amended, conforms State requirements to federal law relating to due process for student placements in State-operated and State-supported schools.

Section 200.14, as amended, makes technical amendments and corrects a cross citation to the requirements for an annual review and reevaluation in section 200.4.

Section 200.16, as amended, conforms State requirements to federal law relating to individual evaluations, eligibility determinations, reevaluations, IEP development, annual reviews, procedural safeguards and due process procedures.

Section 201.2, as amended, conforms the definition of interim alternative education setting to federal law and adds a definition of serious bodily injury.

Section 201.3, as amended, conforms the CSE responsibilities for functional behavioral assessments and behavioral intervention plans to federal law.

Section 201.4, as amended, conforms State requirements to federal law relating to the establishment of a manifestation team and factors to determine if the behavior of a student was or was not a manifestation of the student's disability.

Section 201.5, as amended, revises the basis of knowledge as to whether a student is presumed to have a disability for discipline purposes to be consistent with federal law.

Section 201.7, as amended, makes technical changes relating to the manifestation team; adds serious bodily injury as a reason school personnel may change a student's placement to an interim alternative educational setting; and provides that school personnel may consider unique circumstances for students with disabilities relating to discipline decisions.

Section 201.8, as amended, establishes the authority of an impartial hearing officer to order a change of placement to an interim alternative educational setting, consistent with federal law.

Section 201.9, as amended, changes the coordination with a superintendent's hearing and other due process procedures applicable to all students to federal requirements.

Section 201.10, as amended, defines services a student with a disability must receive during suspensions of 10 school days or more and that the interim alternative educational setting shall be determined by the CSE.

Section 201.11, as amended, requires the pendency setting for students with disabilities during expedited impartial hearings to be the interim alternative educational setting or other disciplinary setting.

Technical amendments are also made to sections 200.1, 200.2, 200.3, 200.4, 200.5, 200.7, 200.14, 200.16 and Part 201.

**Changes to rule:** Since publication of a Notice of Proposed Rule Making in the *State Register* on June 8, 2005, substantive changes were made to the proposed rule and a Notice of Emergency Adoption and Revised Rule Making was published in the *State Register* on September 28, 2005. The following is a description of the substantive changes.

Section 200.1(ii), relating to the definition of parent, was revised to: add reference to individuals designated as a person in parental relation pursuant to Title 15-A of the General Obligations Law, as added by Chapter 119 of the Laws of 2005; to clarify when a foster parent may serve as the parent of the student; to add that when one or more party meets the definition of parent, the birth or adoptive parent must be presumed to be the parent; and to add that a person in parental relation may be designated pursuant to a judicial decree or order, except that a public agency that provides education or care for the student or a private agency that contracts with a public agency for such purposes may not act as the parent.

Section 200.1(qq), relating to the definition of related services, was revised to add that the term does not include a medical device that is surgically implanted, or the replacement of such device, to ensure consistency with federal law and Chapter 352 of the Laws of 2005.

Section 200.1(zz)(6), relating to the definition of a student with a learning disability, was revised for purposes of clarification to add a cross citation to section 200.4(c)(6), relating to the identification of a student with a learning disability.

Section 200.1(ccc), relating to the definition of surrogate parent, was revised to clarify when a student who is a ward of the State may need appointment of a surrogate parent.

Section 200.1(kkk), relating to the definition of ward of the State, was revised, in response to public comment and in consultation with the Office of Children and Family Services, to include all children in foster care, all children in custody of the Commissioner of Social Services or the Office of Children and Families and all children who are destitute and to make other technical language changes.

Section 200.2(a)(7), relating to procedures to locate, identify and evaluate all nonpublic private elementary and secondary school students with disabilities, was revised to require child find activities similar to activities undertaken for students with disabilities in public schools, to implement and otherwise ensure consistency with IDEA.

Section 200.2(b)(13) was revised, in response to public comment and consistent with State policy for State assessments, to require the board of education (BOE) to have policies that describe guidelines for the provision of appropriate accommodations necessary to measure the academic and functional performance of the student in the administration of districtwide assessments.

Sections 200.2(b)(11)(i) and 200.2(d)(1) and (2) were revised to correct the cross citation from section 200.4(g)(2) to 200.4(g).

Proposed section 200.3(e), relating to attendance at committee on special education (CSE), subcommittee or Committee on Preschool Special Education (CPSE) meetings has been deleted to ensure consistency with Chapter 352 of the Laws of 2005.

Section 200.4(b), relating to initial and reevaluations, has been revised, to ensure consistency with Chapter 352 of the Laws of 2005, to delete that a parent and school could agree that a reevaluation is not necessary; to retain, in response to public comment, language that an assessment be provided and administered in the student's native language or other mode of communication; and to retain, to ensure consistency with federal regulations, current language in section 200.4(b)(6)(xiv) which cross references federal regulations for procedures for evaluating students suspected of having a learning disability.

Section 200.4(d), relating to a student's individualized education program (IEP), been revised in response to public comment to add that the IEP must include present levels of academic achievement and functional performance; to clarify that each annual goal must include evaluative criteria, evaluation procedures and schedules to measure progress toward meeting the annual goal; to clarify that an alternate assessment aligned with alter-

nate achievement standards means the New York State Alternate Assessment; to clarify that the recommended program and services must, to the extent practicable, be based on peer-reviewed research; to clarify that the statement of the student's needs relating to transition must be documented on the IEP under present levels of performance; and to delete an unnecessary bracket and a cross citation to subdivision (g) of this section.

Section 200.4(g) has been revised to ensure consistency with Chapter 352 of the Laws of 2005 to delete that changes may be made to an IEP after the annual review without a meeting if parents and school districts agree. This section has been further revised in response to public comment to clarify that when an IEP is amended by the CSE without rewriting the IEP, the parent must receive a copy of the document that amends or revises the IEP or, upon request, the parent must be given a revised copy of the IEP with the amendments incorporated.

Section 200.5(b) has been revised to ensure consistency with Chapter 352 of the Laws of 2005 to delete that parent consent is needed prior to excusing a member of the CSE or CPSE from attending a meeting, since such excusal is not authorized; and, to ensure consistency with federal regulations implementing IDEA, to delete that consent for the initial evaluation of an unaccompanied homeless youth may be provided by an employee of a homeless shelter or facility.

Section 200.5(c) has been revised to ensure consistency with Chapter 352 of the Laws of 2005 to delete that the meeting notice must state that the parents and school district can agree that the attendance of a CSE member is not necessary or that a member may be excused.

Section 200.5(f) has been revised, consistent with Chapter 352 of the Laws of 2005, to change "due process hearing request notice" to "due process complaint notice."

Section 200.5(h) has been revised to ensure consistency with federal regulations to retain that the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the mediation process.

Section 200.5(i) has been revised, consistent with Chapter 352 of the Laws of 2005, to change "due process hearing request notice" to "due process complaint notice" throughout.

Section 200.5(j) has been revised, consistent with Chapter 352 of the Laws of 2005, to change "due process hearing request notice" to "due process complaint notice" throughout; and to clarify, in response to public comment, that the timeline for appointment of an impartial hearing officer (IHO) and the commencement of an impartial hearing are triggered by the date upon which the IHO receives the parties' written waiver of the resolution session, or the date the IHO receives the parties' written confirmation that a resolution session was held but no agreement could be reached, or the expiration of the 30-day period beginning with the receipt of the due process complaint notice, whichever occurs first.

Section 200.5(n) has been revised in response to public comment to clarify when a student who is a ward of the State would need a surrogate parent appointed; to delete that the determination of the need for a surrogate parent must be completed within a reasonable time following the receipt of the original request for a surrogate parent and replace it with the requirement to determine the need for a surrogate parent within a reasonable time following the receipt of a referral for an initial evaluation, reevaluation or services; and to add that the surrogate parent may alternatively be appointed by a judge overseeing the child's case.

Section 200.6(m) has been revised, consistent with IDEA, to clarify that a student placed in an interim alternative educational setting (IAES) must receive certain services.

Section 200.7(d)(1)(f)(ii), consistent with IDEA, has been revised to add that a parent could request mediation and/or an impartial hearing.

Section 200.14(d)(2) has been revised to delete the cross reference to section 200.4(g), since the proposed revision to this section makes a cross reference no longer necessary.

Section 200.16(d)(4) has been revised to delete the exception provided in section 200.4(g), since the proposed revision to this section makes a cross reference no longer necessary.

Section 201.2(k) has been revised, consistent with IDEA, to clarify that a student placed in an interim alternative educational setting (IAES) must receive certain services.

Section 201.3 was revised to correct a citation by deleting (2) and replace it with (b).

Section 201.4(b) has been revised for purposes of consistency to change committee on special education to CSE.

Section 201.7(e)(ii) and (iii) has been revised in response to public comment to add "under the jurisdiction of the educational agency."

Sections 201.10(c), (d) and (e) have been revised to track the federal language regarding the services a student must receive to be those that enable the student to continue to participate, as opposed to 'appropriately progress' in the general education curriculum and to progress, as opposed to 'achieve', the goals set out in the student's IEP; and to delete that the CSE shall determine the extent to which services are necessary.

Section 201.11(b) has been revised for purposes of clarification and consistency to delete the reference to federal regulations and replace it with a cross citation to section 200.5(j) of the Commissioner's Regulations.

**Expiration date:** June 8, 2006.

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

**Data, views or arguments may be submitted to:** Rebecca H. Cort, Deputy Commissioner, Office of Vocational and Educational Services for Individuals with Disabilities, (518) 474-2714, e-mail: vesid-spe@mail.nysed.gov

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Local Government Records Management

**I.D. No.** EDU-41-05-00011-RP

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

**Revised action:** Amendment of sections 185.5, 185.13 and 185.14 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 207 (not subdivided); and Arts and Cultural Affairs Law, section 57.25(2)

**Subject:** Local government records management.

**Purpose:** To make necessary changes and additions in order to update Records Retention and Disposition Schedule CO-2 and Records Retention and Disposition Schedule MI-1.

**Substance of revised rule:** The State Education Department proposes to amend sections 185.5, 185.13 and 185.14 of the Regulations of the Commissioner of Education, effective February 1, 2006, to revise and update Records Retention and Disposition Schedule CO-2 (8 NYCRR, section 185.13 – Appendix J) and Records Retention and Disposition Schedule MI-1 (8 NYCRR, section 185.14 – Appendix K).

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 12, 2005, the proposed rule has been substantially revised to improve item 159 in the County Attorney, Counsel or Public Defender section of Records Retention and Disposition Schedule CO-2 (8 NYCRR, section 185.13 – Appendix J). Instead of a single minimum retention period authorizing disposition of case files of a county attorney, counsel or public defender, the proposed item will now provide different retention periods for case files of a county attorney or counsel and case files of a public defender. The revised retention period will provide that public defenders are to retain such records for a lengthier period of time to meet future legal needs of clients while also enabling those clients to provide instructions on the disposition of case files relevant to themselves. The case files of a county attorney or counsel will continue to be authorized for disposition as previously proposed.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 185.13 (Appendix J).

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

**Data, views or arguments may be submitted to:** Carole Huxley, Deputy Commissioner, Education Department, Office of Cultural Education, Rm. 10A33, Cultural Education Center, Albany, NY 12230, (518) 474-5976, e-mail: chuxley@mail.nysed.gov

**Public comment will be received until:** 30 days after publication of this notice.

### Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 12, 2005, the proposed rule has been substantially revised as follows:

Item 159 in the County Attorney, Counsel or Public Defender section of Records Retention and Disposition Schedule CO-2 (8 NYCRR, section 185.13 – Appendix J) has been revised. Instead of a single minimum retention period authorizing disposition of case files of a county attorney, counsel or public defender, the proposed item will now provide different retention periods for case files of a county attorney or counsel and case files of a public defender. The revised retention period will provide that public defenders are to retain such records for a lengthier period of time to meet future legal needs of clients while also enabling those clients to provide instructions on the disposition of case files relevant to themselves. The case files of a county attorney or counsel will continue to be authorized for disposition as previously proposed.

The above revisions to the proposed rule do not require any further changes to the previously published Regulatory Impact Statement.

### Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 12, 2005, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The revisions to the proposed rule do not require any changes to the previously published Regulatory Flexibility Analysis or Rural Area Flexibility Analysis.

### Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 12, 2005, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, applies to local government records management and will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

### Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on October 12, 2005, the State Education Department received the following comment:

#### 1. COMMENT:

An official of the New York State Defenders Association commented on proposed item 159 in the County Attorney, Counsel or Public Defender section of Records Retention and Disposition Schedule CO-2, issued as 8 NYCRR, section 185.13 (Appendix J), indicating that the proposed retention period would not meet the needs of public defenders for retention of case files. The comment indicated that, in the absence of instructions to the contrary from former clients, such case files need to be retained for a substantially lengthier period than stated by the proposed item in order to meet possible future legal needs of clients. The comment also indicated that those clients should be able to provide instructions for the retention and disposition of case files pertinent to themselves. The commenter also recommended a change in the proposed retention period that would have the effect of permitting immediate disposition of case files after conclusion of a case based on instructions from the client.

#### DEPARTMENT RESPONSE:

The Department agreed that the proposed item 159 should be revised. This was accomplished by dividing the item into two parts, with one part applicable to county attorneys and counsels and the second part to public defenders. The proposed retention and disposition of case files of county attorneys and counsels remains unchanged from the previous proposal. The proposed retention and disposition of case files of public defenders was revised to require long-term retention of case files unless the former client provided instructions to the contrary. However, the Department did not revise the proposed retention period to permit immediate disposition of case files after case closure, based on client instructions, because such disposition would not meet the needs of counties or public defenders to maintain files of recently closed cases for possible legal or other uses relevant to those cases.

## Department of Health

### EMERGENCY RULE MAKING

#### Payment for Psychiatric Social Work Services

**I.D. No.** HLT-48-05-00006-E

**Filing No.** 1356

**Filing date:** Nov. 10, 2005

**Effective date:** Nov. 10, 2005

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

**Action taken:** Amendment of section 86-4.9 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201.1(v)

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

**Specific reasons underlying the finding of necessity:** The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

**Subject:** Payment for psychiatric social work services in art. 28 federally qualified health centers.

**Purpose:** To permit psychotherapy by certified social workers a billable service under certain circumstances.

**Text of emergency rule:** Pursuant to the authority vested in the State Hospital Review and Planning Council, and subject to the approval of the Commissioner of Health by Section 2803(2)(a) of the Public Health Law, section 86-4.9 of Subpart 86-4 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows to be effective upon filing with the Secretary of State:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services, visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the following services shall not constitute threshold visits: pharmacy, nutrition, medical social services *with the exception of clinical social services as defined in paragraph (g) of this section*, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to

the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee-for-service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g)(1) For purposes of this section, clinical social services are defined as,

(i) before September 1, 2004, individual psychotherapy services provided in a Federally Qualified Health Center by a certified social worker with psychotherapy privileges certification by the New York State Education Department, or by a certified social worker who is working in a clinic under qualifying supervision in pursuit of a psychotherapy privileges certification by the New York State Education Department.

(ii) on or after September 1, 2004, individual psychotherapy services provided in a Federally Qualified Health Center by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(2) Clinical social services provided in a part time clinic shall be ineligible for reimbursement under this paragraph. Clinical social services shall not include group psychotherapy services or case management services.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 31, 2005.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act [42 U.S.C. 1396a(a)(10)] and 1905(a)(2) of the Social Security Act [42 U.S.C. 1396d(a)(2)] require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act [42 U.S.C. 1395x(aa)] defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The legislative objective of this authority is to allow, in limited instances, social work visits to be a billable threshold service in Article 28 clinics. This amendment will allow psychotherapy by certified social workers (CSWs) as a billable visit under the following circumstances:

- Services are provided by a certified social worker with psychotherapy privileges (on their SED certification), or a CSW who is working in a clinic under qualifying supervision in pursuit of such certification.
- Payment will only be made for services that occur in Article 28 clinic base and extension clinics only. Billings by part-time clinics will not be allowed.
- Psychotherapy services only will be permitted, not case management and related services.
- Billings for group psychotherapy will not be permitted in Article 28 clinics.
- Payment will only be made for services that occur in Federally Qualified Health Centers (FQHCs).

**Needs and Benefits:**

For some time, the Department of Health (DOH) has interpreted existing regulation 10 NYCRR Part 86-4.9(c) as restricting threshold reimbursement for medical social work services in Article 28 outpatient and diagnostic and treatment center (D&TC) clinics. Advocacy groups (e.g., United Cerebral Palsy (UCP), Community Health Care Association of New York (CHCANYS)) have challenged this policy interpretation arguing that the prohibition only relates to the provision of social work services coincident to medical care, not to medical/behavioral health services provided by certified social workers.

In addition, DOH's policy interpretation has also been inconsistent with the billing practices of the Office of Alcoholism and Substance Abuse Services (OASAS), the Office of Mental Health (OMH), and the Office of Mental Retardation and Developmental Disabilities (OMRDD). It is clear that permitting certified social workers to be reimbursed for behavioral health services is the generally accepted practice model. Thus, this amendment will, to some extent, provide consistency with billing practices of other state agencies in Article 31, 16 and 32 clinics. Furthermore, recent Federal changes related to Medicaid reimbursement for FQHCs mandate that psychotherapy services provided by a social worker be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

**Costs:**

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

Annually the estimated gross Medicaid cost for all CSW psychotherapy visits in FQHCs totals \$600,000, with a state share of \$150,000. This increase is anticipated to be partially offset by the savings associated with the elimination of clinic payments for group psychotherapy and the prohibition of CSW psychotherapy in part-time clinics.

**Cost to the Department of Health:**

There will be no additional costs to DOH.

**Local Government Mandates:**

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

**Paperwork:**

This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

**Duplication:**

This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

**Alternatives:**

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for the services of certified social workers. In light of this federal requirement, no alternatives were considered.

**Federal Standards:**

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

**Compliance Schedule:**

The proposed amendment will become effective on the 1st day of the month following publication of a Notice of Adoption in the *State Register*.

**Regulatory Flexibility Analysis****Effect on Small Businesses and Local Governments:**

No impact on small businesses or local governments is expected.

**Compliance Requirements:**

This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

**Professional Services:**

No new professional services are required as a result of this proposed action. The proposed regulation will allow threshold visits to be billed in Article 28 clinics by CSW's with a "P" or "R" designation on their State Education Department's (SED) Certification or by CSWs who are working in a supervised situation towards that certification, in a primary or extension (not part-time) clinic. Although some providers might experience problems hiring the higher level of supervision, the new prospective reimbursement system for FQHCs should ease the hiring of this staff.

**Compliance Costs:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Economic and Technological Feasibility:**

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpre-

tation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Small Business Participation:**

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size.

**Rural Area Flexibility Analysis****Types and Estimated Number of Rural Areas:**

With the exception of part-time clinics, this rule will apply to all Article 28 primary and extension clinics (not part-time clinics) in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

**Compliance Costs:**

There are no direct costs associated with compliance. However, part-time clinic providers that perform fraudulent billing may be investigated and subsequently realize reduced Medicaid reimbursement.

**Minimizing Adverse Impact:**

There is no adverse impact.

**Opportunity for Rural Area Participation:**

The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and Association represent social workers from across the State, including rural areas.

**Job Impact Statement****Nature of Impact:**

It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

**Categories and Numbers Affected:**

There are approximately 58 FQHCs, FQHC look-alikes, and rural health clinics.

**Regions of Adverse Impact:**

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

**Minimizing Adverse Impact:**

The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center's reasonable costs for delivering covered services.

**Self-Employment Opportunities:**

The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Standards for the Use of Credit Information to Underwrite and Rate Personal Lines Insurance

**I.D. No.** INS-48-05-00007-E

**Filing No.** 1362

**Filing date:** Nov. 14, 2005

**Effective date:** Nov. 14, 2005

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

**Action taken:** Addition of Part 221 (Regulation 182) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and art. 28

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

**Specific reasons underlying the finding of necessity:** Article 28 of the Insurance Law, which goes into effect on April 23, 2005, requires an insurer that uses credit information to underwrite or rate risks for personal lines insurance to comply with certain requirements and limitations. Chapter 215 of the Laws of 2004, which enacted Article 28, requires the Superintendent to promulgate regulations necessary to effectuate the provisions of Article 28.

It is essential that this regulation be promulgated on an emergency basis to assure that consumers are afforded certain protections with respect to the use of credit information by an insurer in connection with personal lines insurance. Therefore, it is essential that insurers be made aware of the limitations upon and requirements for the use of credit information in the underwriting and rating of personal lines insurance as soon as possible. Insurers that use such information are required to file scoring models (or other scoring processes) with the Superintendent. Insurers must be given sufficient time to review the requirements with respect to such filings prior to the date Article 28 becomes effective.

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

**Subject:** Standards for the use of credit information to underwrite and rate personal lines insurance.

**Purpose:** To establish limitations upon, and requirements for, the permissible use of credit information by insurers to underwrite and rate risks for personal lines insurance business.

**Substance of emergency rule:** Section 221.0 provides that Chapter 215 of the Laws of 2004 added new Article 28 to the Insurance Law. Article 28 establishes limitations upon, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite or rate risks for personal lines insurance business.

Section 221.1 provides that this regulation applies to the use of credit information to underwrite and rate personal lines insurance policies applied for, or renewed, on or after April 23, 2005. It also provides that this regulation or Article 28 will not alter the requirements or limitations contained in the Insurance Law, Title 11 of the NYCRR, or the rules of the New York Automobile Insurance Plan or the New York Property Insurance Underwriting Association.

Section 221.2 provides definitions applicable to the regulation.

Section 221.3 provides prohibitions on the use of credit information and permissible use of credit information.

Section 221.4 provides the requirements for obtaining current credit information.

Section 221.5 provides standards for the disclosure of the use of credit information in the underwriting and rating of personal lines insurance policies.

Section 221.6 provides standards for notification when an insurer takes an adverse action based upon credit information.

Section 221.7 provides for dispute resolution and error correction if it is determined that the credit information used by an insurer to underwrite or rate a current insured was incorrect or incomplete.

Section 221.8 provides standards for the filing of credit scoring models (or other scoring processes) and revisions thereto, to the superintendent.

Section 221.9 provides standards for filings by the insurer.

Section 221.10 provides that an insurer that uses credit information in the underwriting and rating of personal lines insurance is required to complete and submit to the superintendent an Insurer Credit Information Compliance Certification. The Insurer Credit Information Compliance Certification shall be in a form prescribed by the superintendent.

**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 February 11, 2006.

**Text of emergency 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**

1. Statutory authority: Sections 201 and 301 of the Insurance Law, and Article 28 of the Insurance Law, as enacted by Chapter 215 of the Laws of 2004. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law as well as effectuating any power granted to the Superintendent under the Insurance Law and to

prescribe forms or otherwise make regulations. Article 28, as enacted by Chapter 215 of the Laws of 2004, establishes limitations upon, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite and rate risks for personal lines insurance business. Further, the Superintendent is directed to provide, by regulation, rules governing the use of credit information.

2. Legislative objectives: The Legislature, in enacting Chapter 215 of the Laws of 2004, wanted to assure that consumers are afforded certain protections with respect to the use of credit information for personal lines insurance. The Superintendent was directed to promulgate a regulation to establish limitations upon, and requirements for, the permissible use of credit information by insurers doing business in this State to underwrite and rate risks for personal lines insurance business.

3. Needs and benefits: Most insurers currently use credit information in the underwriting and initial tier placement of consumers for personal lines insurance. The purpose of this regulation is to establish rules to implement the provisions of Article 28. In accordance with Article 28, the regulation establishes and clarifies limitations upon, and requirements for, the permissible use of credit information by insurers doing business in New York State to assure that consumers are afforded certain protections when credit information is used to underwrite and rate risks for personal lines insurance business. The regulation clarifies prohibited and permitted uses of credit information in the underwriting and rating of personal lines insurance. The regulation sets forth whose credit information can be used, the form of the disclosure of the use of credit information and when the disclosure must be provided. The regulation sets forth standards for the notification when an insurer takes an adverse action based upon credit information. The regulation also requires an insurer to take corrective action within thirty days after it receives notice that the insured has obtained a determination pursuant to the process for dispute resolution and error correction under the federal Fair Credit Reporting Act that the credit information used by the insurer was incorrect or incomplete. The regulation also establishes rules for, and provides guidance to, insurers when filing their credit information requirements with the Superintendent.

4. Costs: This rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. This rule does not impose additional costs upon insurers. If an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producer or other entity will incur additional costs in producing and mailing these documents. However, the designation of an insurance producer or other entity for this purpose is optional, not mandatory, on the part of the insurer and presumably such arrangements will be subject to a contractual agreement between an insurer and its insurance producer(s) or other entities and will be used when it has an overall cost benefit. The notification requirements and submission of filings are required by the statute and the regulation is only implementing the statutory requirement.

5. Local government mandates: None.

6. Paperwork: Paperwork associated with the submission of a filing by an insurer should already be in place. The insurer is required to complete an Insurer Credit Information Compliance Certification for the scoring model (or other scoring processes) filing and any filing of revisions thereto. Also, the insurer is required to maintain records that the disclosures of the use of credit information and adverse action notifications have been provided to the consumer. Where an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producers or other entities will incur additional paperwork necessary to insure that the insurer is in compliance with the notice and record retention requirements.

7. Duplication: None.

8. Alternatives: In developing this rule, the Department reviewed the National Conference of Insurance Legislators (NCOIL) model for the use of credit information in personal insurance and various provisions of the Federal and Fair Credit Reporting Act and the Department did outreach with trade associations, consumer groups, and a third party modeler.

There are several provisions of the rule for which alternatives were considered by the Department, as follows.

An insurer who chooses to consider, for any given program of insurance, an absence of credit information or an inability to calculate an insurance score to underwrite or rate risks must choose one of the three options specified in Section 2803(e) of the law to apply to all of the consumers in that program of insurance who have no credit information or whose insurance score cannot be calculated. The three options have been incorporated into the rule. The language used in Section 221.3(a)(5)(iii) of the rule clarifies the parameters of the third option which requires that a

filing be made with, and be subject to the prior approval of, the Superintendent, with respect to an individual consumer. An alternative that has been suggested by some insurers is to permit such a filing to be made for a class of insureds. The Department considered this approach but rejected it because the law contemplates that such filing be made as to "the consumer" and not to a class of consumers. To further demonstrate the intention of the law not to treat all insureds who have no credit information or an insurance score as a class, Section 2802(d) prohibits an insurer from taking an adverse action against a consumer solely because he or she does not have a credit card account. Clearly, such insureds would fall into a "class" of insureds that could be defined as having an absence of credit information or an inability to calculate an insurance score but such a class would be violative of Section 2802(d) of the law.

Section 2802(g) of the law gives an insured, where an insurer has chosen to use credit information the right to request, not more often than once every 36 months, that the insurer re-underwrite and re-rate the policy based upon a current credit report or insurance score. Section 221.4(b)(1) of the rule requires that the insurer make any necessary adjustments including moving the insured to the appropriate tier, effective as of the date of the updated report or score. An alternative that has been suggested by the industry is that the insurer be permitted to delay implementation of the re-underwriting and re-rating until the next policy renewal date. The Department considered this approach but rejected it because the law does not provide that re-underwriting and re-rating can be delayed until some future date. It is clear that the Legislative intent was that the remedy be implemented as soon as possible in order to immediately provide the insured with an opportunity to get a lower premium based on current credit information. Some insurers indicated they might have problems with updating credit information mid-term. In order for them to avoid any problems, insurers are not precluded from choosing to automatically re-run credit scores every 36 months or more frequently, without the insured or the insured agent's request, to determine if the insured is eligible for a lower premium, more favorably priced tier, or placement with an affiliate of the insurer at a lower rate. It is noted that the NCOIL model differs from Article 28 of the Insurance Law in that the model requires that the insurer re-underwrite and re-rate the policy based upon a current credit report or insurance score no later than every 36 months and, if requested, on every renewal date.

Sections 221.4 and 221.7 of the rule require that an insurer, when re-underwriting or re-rating an insured based upon corrected, completed or updated credit information, consider not only whether the insured qualifies for placement in a lower-priced tier within the company, but also whether the insured qualifies for placement in an affiliate of the insurer at a lower rate (*i.e.*, if the affiliate would write the policy). In addition, when determining the amount of the refund due based on the correct credit information, Section 221.7 of the rule requires that the refund be calculated based on the appropriate tier/affiliate the insured would have been written in (assuming that the affiliate is still in the group and is still writing this business) if the insurer had used the correct credit information. This approach recognizes that when an insured applies for insurance from one company within a group of affiliated insurers, it is actually often applying to more than one company in the group. The alternatives the Department considered would have been to require re-underwriting and re-rating based only upon the filed rates and underwriting rules of the current insurer. The Department rejected this because where there is a group of affiliated insurers that includes insurers that do not have tiers the insureds of such insurers would not be able to benefit from a refund. Such a result would render the required statutory remedies for the use of incorrect or outdated credit information meaningless. Even where affiliate insurers each have more than one tier, the insured will not fully benefit by the re-rating and re-underwriting unless the insurer considers its affiliates' tiers as well. The Department believes that this approach is consistent with the law, which makes reference to the relationship between insurers and their affiliates in underwriting and rating. For example, under Section 2802(b) of the law, a placement with an affiliate on the basis of credit information does not constitute a denial of coverage.

Insurers operate in many different organizational structures. A trade association has expressed concern that some of these organizational structures may make it infeasible or inequitable for an insurer to offer a coverage with an affiliate and comply with Sections 221.4 and 221.7 of the proposed rule. An example of a different organizational structure is when an insurer within the group uses agents but it has an affiliate that is a direct writer. The applicant applies for insurance and is placed with the insurer that uses agents. However, upon re-underwriting and re-rating the insured, Sections 221.4 and 221.7 of the proposed rule would not require the direct

writer affiliate to offer the insured coverage. These sections were intended to address insurer-group underwriting where an applicant that applies for insurance with one insurer is also considered for coverage with other insurers within the group without the need to apply separately to each insurer. Under the example, the insured would not have to be offered coverage with the direct writer since the direct writer is not a part of the group underwriting done with the insurer that uses agents. Further, the direct writer requires the applicant to apply directly with that company. Sections 221.4 and 221.7 reflect clarifications suggested by the industry of the intent of the proposed rule.

Some insurers use credit information as an underwriting factor for initial tier or company placement. A trade association expressed concern that the use of the tier or company placement as an underwriting factor upon renewal would be considered to be using credit information upon renewal even if the insurer does not look at the insured's credit score upon renewal. The trade association suggested adding language similar to Section 2802(c) of the Insurance Law which states "nothing in this section shall be construed to prohibit an insurer from considering an insured's tier placement pursuant to Section 2349 of this chapter or placement with a company within a group of affiliated companies in conjunction with factors other than credit information as part of its renewal process." The proposed rule effectuates the provisions of Article 28 of the Insurance Law and does not supersede the provisions in the law. The proposed rule is not meant to restate every provision of the law and the Department believes that the proposed rule is clear in the permissible uses of credit information. For example consider the following situation:

- a) an insurer group consisting of two companies at two different rate levels which uses various factors in underwriting applicants,
- b) the two groups of applicants, A and B, both have the same underwriting characteristics except that those in group A have "excellent" credit scores and are placed in the company with the lower rate level, and those in group B have "poor" credit scores and are placed in the company with the higher rate level, and
- c) upon renewal, insureds in groups A and B remain in their respective companies with credit scores no longer being reviewed (except upon request as permitted by statute and regulation).

Under this example:

1. if the insurer group takes no rate action, the fact that insureds in group B pay higher rates than insureds in group A upon renewal does not violate Article 28 or the Regulation.
2. if the insurer group does make rate level adjustments to either of these companies, the Department would not consider such actions to be inconsistent with Article 28 or the Regulation provided such adjustments were based on the loss, expense and investment income experience, as set forth in the standards for rates in Article 23 of the Insurance Law.

Similarly, where one insurer has more than one tier and uses credit as one of the underwriting factors in the initial tier placement within the tiers, the fact that the insureds in one tier pay more than the other would not violate Article 28 or the Regulation. Furthermore, if the insurer makes rate level adjustments to any of its tiers, the Department would not consider such adjustments to be inconsistent with Article 28 or the Regulation provided such adjustments were based on the loss, expense and investment income experience of the tier(s), as set forth in the standards for rates in Article 23 of the Insurance Law.

Section 221.8(f) requires a third party that files scoring models on behalf of many insurers to provide the Department with certain information that would identify which insurer is using which scoring model. The Department also originally required the third party to provide the Superintendent with the name of each insurer's contact person and the person's telephone number. A trade association commented that such requirements would establish procedures that could lead to some confusion. The identification of the insurers and the scoring model they are using would assist the Department in evaluating the insurance company's decision on which version they choose to use. However upon further evaluation, the requirement for providing the contact person and the person's telephone number has been deleted from the rule as the third party may not necessarily have this information and the Department has this information from other sources.

The Department also considered some suggestions made by a consumer group. However, most of the suggestions conflict with the statute. For example, the consumer group wanted to amend the Regulation to require that all filed scoring models include loss experience to justify the use of credit information. The statute clearly does not require such information if scoring models are only used in initial underwriting.

The consumer group commented that when re-underwriting and re-rating the policy based upon new, updated or corrected credit information, the rate adjustment should be the "lowest rate possible" among all affiliates and tiers and not simply a "lower rate." Sections 221.4(b)(2) and 221.7(b)(2) states that the insured is eligible for placement in an affiliate at a lower rate in accordance with the affiliates' current underwriting rules. The insurer will have to follow its underwriting rules to determine which company to place the insured. An insurer cannot arbitrarily place an insured in a higher premium company if the insured is also eligible to be placed in a company with lower premiums if everything else remains the same. The purpose of the underwriting rules is to provide guidelines so that insureds with similar characteristics are placed in the same company.

The consumer group commented about disclosures regarding that not all insurers use credit information and that the insureds may wish to consider other options. The Department considers this to be more appropriately addressed in the Department's Consumer Guide to Automobile Insurance (Guide). The Department will add reference to insurers' use of credit information for the next updated version of the Guide.

The rule requires the submission of an Insurer Credit Information Compliance Certification for the scoring model (or other scoring processes) filing and any filing of revisions thereto. This will facilitate the review of the filings and enhance compliance with the statute and rule. The alternative of not requiring an Insurer Credit Information Compliance Certification was considered and rejected because it would provide the Department less assurance that insurers are complying with the law and increase the time needed to review scoring model filings and might result in the need for more market conduct reviews.

9. Federal standards: The provisions of the federal Fair Credit Reporting Act referred to in Article 28 of the Insurance Law are also referred to in the regulation.

10. Compliance schedule: The effective date of the enabling legislation, Chapter 215 of the Laws of 2004, is April 23, 2005. Pursuant to the law, insurers are required to file their scoring models (or other scoring processes) with the Superintendent. The Regulation further provides that on or after August 15, 2005 insurers shall file their scoring models (or other scoring processes) at least 45 days prior to use.

#### **Regulatory Flexibility Analysis**

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

The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized property/casualty insurers and believes that none of them would fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are independently owned and have under 100 employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

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

1. Types and estimated numbers of rural areas: This rule applies to property/casualty insurers licensed to do business in New York State. The insurers do business in every county in this state including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: There are requirements for the insurer under certain circumstances to provide written disclosure of the use of credit information and adverse action notifications when an adverse action has been taken. Also, the insurer is required to maintain records that the disclosures of the use of credit information and adverse action notifications have been provided to the consumer. Where an insurance producer or other entity has been designated by the insurer to issue disclosure notices and adverse action notices, the insurance producers or other entities will incur additional paperwork necessary to insure that the insurer is in compliance with the notice and record retention requirements.

3. Costs: Regulated persons under these regulations are insurers. Insurance producers or other entities may be designated by the insurer to issue disclosure notices and adverse notices, in which case the producer or other entity will incur costs in producing and mailing these documents. However, the designation of a producer or other entity for this purpose is optional, not mandatory, on the part of the insurer and presumably such arrangements will be subject to a contractual agreement and will be used

when it has an overall cost benefit. The submission of filings and notification requirements are required by the statute and the regulation is only implementing the statutory requirement. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This rule does not impose any additional burden on persons located in rural areas, and the Insurance Department does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: This agency action appeared as a proposal in the Insurance Department's January 2005 Regulatory Agenda.

#### **Job Impact Statement**

This rule should not have any adverse impact on jobs and employment opportunities in this state since it merely implements the provisions of Article 28 of the Insurance Law. The rule sets forth standards that the insurers must follow when using credit information for underwriting and rating purposes. The rule also sets forth guidelines that insurers must follow when submitting filings to the Superintendent.

## **EMERGENCY RULE MAKING**

### **Physicians and Surgeons Professional Insurance Merit Rating Plans**

**I.D. No.** INS-48-05-00008-E

**Filing No.** 1363

**Filing date:** Nov. 14, 2005

**Effective date:** Nov. 14, 2005

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

**Action taken:** Addition of Part 152 (Regulation 124) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301 and 2343(d) and (e); L. 2002, ch. 1, part A, section 42, as amd. by L. 2002, ch. 82, part J, section 16; and L. 2005, ch. 420

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

**Specific reasons underlying the finding of necessity:** Section 42 of Part A of Chapter 1 of the Laws of 2002, requires that any physician, surgeon or dentist who wants to participate in the excess medical malpractice insurance program established by the Legislature in 1986 must participate in a proactive risk management course. Section 42 authorized the Superintendent to promulgate regulations that provide for the establishment and administration of such plans. Section 42, as originally enacted on January 25, 2002, established an effective date of July 1, 2003 for participation in these courses. However, on May 29, 2002, Section 16 of Part J of Chapter 82 of the Laws of 2002 was enacted and the effective date was amended to July 1, 2002. Chapter 420 of the Laws of 2005 was enacted and amended the requirement for taking the follow-up course for eligibility in the excess medical malpractice insurance program from once every year to once every two years.

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

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

**Subject:** Physicians and surgeons professional insurance merit rating plans.

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

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

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

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

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

Section 152.8 is renumbered to be Section 152.12 and a new Section 152.8 is added to provide the standards for proactive risk management programs which are provided for insureds who wish to qualify for the excess medical malpractice insurance programs established by the Legislature.

A new Section 152.9 is added to provide eligibility requirements for participation in the excess medical malpractice insurance program.

A new Section 152.10 is added to provide coordination of the excess medical malpractice risk management courses with risk management courses that are offered for the purpose of providing premium credits.

A new Section 152.11 is added to provide guidelines for insurers in implementing risk management programs administered for insureds who wish to qualify for participation in the excess medical malpractice insurance program established by the Legislature.

Section 152.12 is amended to provide requirements for insurers conducting audits of insureds or for insureds to conduct self-review surveys. A new provision is added requiring insurers to report, by territory and medical specialty, the number of insureds participating in risk management programs who qualify for the excess medical malpractice insurance program.

**This notice is intended** to serve only as a notice of emergency adoption. This agency 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 February 11, 2006.

**Text of emergency 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**

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted under the Insurance Law and to prescribe forms or otherwise make regulations. Section 2343(d) provides that the Superintendent shall, by regulation, establish a merit rating plan for physicians professional liability insurance. Section 2343(e) provides that the Superintendent may approve malpractice insurance premium reductions for insured physicians who successfully complete an approved risk management course, subject to standards prescribed by the Superintendent by regulation. Section 42 of Part A of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005, requires that all physicians, surgeons and dentists participating in the excess medical malpractice insurance program established by the Legislature in 1986 participate in a proactive risk management program. Section 42 authorizes the Superintendent to promulgate regulations which provide for the establishment and administration of these risk management courses.

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

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

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

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

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

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

The enactment of Section 42 of Part A of Chapter 1 of the Laws of 2002, as amended by Section 16 of Part J of Chapter 82 of the Laws of 2002 and Chapter 420 of the Laws of 2005 requires that, as of July 1, 2002, physicians, surgeons and dentists participate in a proactive risk management program in order to be eligible to participate in the excess medical malpractice insurance program established by the Legislature.

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

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

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

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

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

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

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

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

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

courses is to improve patient care which ultimately translates into better patient care which will reduce the frequency and severity of medical malpractice losses.

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

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

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

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

With respect to the proactive risk management course, insurers will have to develop new procedures for the purposes of conducting audits and/or self-audits by insureds.

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

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

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

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

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

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

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

New York so that the content of the course relative to excess management will be consistent from course to course and also qualify for continuing medical education credit.

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

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

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

With respect to the proactive risk management course, insurers will have to develop new procedures for the purpose of conducting audits and/or self-audits by insureds.

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

insurers are already required to submit similar statistics regarding other risk management courses.

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

It is not expected that insurers would incur undue expenses in offering internet-based risk management courses to their insureds for the purpose of obtaining premium credits. In fact, it is likely that it is more cost effective to offer internet-based risk management courses to insureds in addition to, or in place of, risk management courses in the lecture format.

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

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

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

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

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

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

#### **Job Impact Statement**

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

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

#### **Reinsurance Credit from Unauthorized Insurers**

**I.D. No.** INS-48-05-00001-P

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

**Proposed action:** Amendment of Part 125 (Regulation 20) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 307(a), 308, 1301(a)(14), (c) and 1308

**Subject:** Credit for reinsurance from unauthorized insurers.

**Purpose:** To limit and apply other standards to securities eligible for deposit in a Regulation 20 trust fund for alien reinsurers when those securities are funded, or obligated to be funded, by cash flows that emanate from the alien reinsurers establishing the trust; and allow the superintendent to limit the amount of these types of securities that will be permitted in

any reinsurer's individual trust, with the maximum amount in any such trust fund being 40 percent of the total required.

**Text of proposed rule:** Section 125.4(c)(2) of Part 125 is hereby amended by adding a new subparagraph (iii) to read as follows:

(iii)(a) Any security which is intended to meet the standard of marketable securities as set forth in sub-paragraphs (i) or (ii) of this paragraph and which is in any part funded, or obligated to be in any part funded, by cash flows that emanate from the alien assuming insurer seeking to establish the trust shall only be permitted if, in addition to meeting the standards of Section 1404(a)(2):

(1) the Superintendent is notified by the alien assuming insurer at least thirty days prior to funding the trust with such a security and such security is approved by the Superintendent;

(2) the issuer of such security is unaffiliated with the alien assuming insurer establishing the trust;

(3) such security is rated A or higher (or the equivalent thereto) by a securities rating agency recognized by the Superintendent; and

(4) such security has a maturity date of less than 180 days.

(b) In no event shall securities, issued by one or more issuers, meeting the conditions set forth in clause (a) of this subparagraph and held in a trust fund established pursuant to this paragraph for each alien insurer exceed the percentage approved by the Superintendent of the total of the investments in each trust provided, however, that the Superintendent shall not approve an amount that exceeds forty percent of such total investments. The factors to be considered in determining the amount shall include the creditworthiness, the liquidity and the structure of the securities.

Clause 125.4 (d)(1)(iv)(b) of Section 125 is hereby amended to read as follows:

(b) (1) At least \$50 million of the trustee surplus shall be in the types of investments set forth in paragraphs 1, 2, and 3 of Section 1402(b) of the New York Insurance Law. Any other marketable securities that make up the trust funds and the surplus shall be of the types set forth in paragraphs 1, 2, 3, 8, and 10 of Insurance Law Section 1404(a) and foreign investments complying with paragraph (3) of subdivision (c) of this section. Letters of credit complying with clause (c) of this subparagraph may be used to fund the remainder of the trust funds and the surplus;

(2)(i) Any security which is intended to meet the standard of marketable securities of the type set forth in Section 1404(a)(2) and which is in any part funded, or obligated to be in any part funded, by cash flows that emanate from any members of the group seeking to otherwise comply with the foregoing provisions shall only be permitted if, in addition to meeting the standards of Section 1404(a)(2):

(A) the Superintendent is notified by the individual member of the group at least thirty days prior to funding the trust with such a security and such security is approved by the Superintendent;

(B) the issuer of such security is unaffiliated with members of the group seeking to establish the trust;

(C) such security is rated A or higher (or the equivalent thereto) by a securities rating agency recognized by the Superintendent; and

(D) such security has a maturity date of less than 180 days.

(ii) In no event shall the securities, issued by one or more issuers, meeting the conditions set forth in clause (a) of this subparagraph and held in trust in any of the individual member's trust funds established pursuant to this paragraph exceed the percentage approved by the Superintendent of the total of the investments in such member's trust provided, however, that the Superintendent shall not approve an amount that exceeds forty percent of such total investments. The factors to be considered in determining the amount shall include the creditworthiness, the liquidity and the structure of the securities.

**Text of proposed 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

**Data, views or arguments may be submitted to:** Michael Moriarty, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5127, e-mail: mmoriart@ins.state.ny.us

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 201, 301, 307(a), 308, 1301(a)(14), 1301(c) and 1308 of the Insurance Law. Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law

as well as effectuating any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations. Section 307(a) requires insurers doing business in the state to file an annual statement, in a form and containing such matters as shall be prescribed by the Superintendent, in the office of the Superintendent. Section 308 gives the Superintendent authority to require authorized insurers to require the filing of other reports relating to the insurer's transactions, condition or any matter connected therewith. Sections 1301(a)(14) and (c) and 1308 give the Superintendent the authority to prescribe, by regulation, the conditions under which a ceding insurer may be allowed credit, as an asset or as a deduction from loss and unearned premium reserves, for reinsurance recoverable from an assuming insurer not authorized in this state.

2. Legislative objectives: Article 13 of the Insurance Law establishes minimum standards for the assets of insurers, including when a ceding insurer may take credit for reinsurance recoverable from an assuming insurer not authorized in this state.

3. Needs and benefits: Regulation 20 [11 NYCRR 125.4(c)] provides that an insurer ceding risk to an alien insurer (non-U.S. insurer) may only reflect the benefit of that reinsurance if certain conditions are met. Regulation 20 provides alien reinsurers with the means whereby they may secure their United States obligations through the establishment of a multi-beneficiary trust. The current regulation requires that funds held in such a trust must be in the form of cash or readily marketable securities that meet certain standards. These amendments establish standards and limitations on such securities when they are of the type that are highly rated and are funded, or obligated to be funded, by cash flows that emanate from a group of alien reinsurers establishing the trusts to meet the requirements of Regulation 20. The limitations include a maximum allowance for such securities. The Superintendent will establish the limitation, with the maximum for each alien assuming reinsurer (or each member of a group of assuming reinsurers) not to exceed forty percent. While these types of securities reduce the alien reinsurers' cost of capital and thus can increase the availability of coverage for the licensed ceding insurer, such securities are premised to a certain extent on the creditworthiness of the very alien reinsurers seeking to establish the trust. Therefore it is prudent that these securities be subjected to certain standards and limitations that are not applicable to securities that are not premised on the creditworthiness of the alien reinsurers. In development of this proposal, the Department contacted representatives of non-U.S. reinsurers that may avail themselves of this option and to representatives of U.S. reinsurers that compete with the non-U.S. reinsurers. The non-U.S. reinsurers support these revisions as it would provide them with a more cost efficient alternative to funding the trust established under Regulation No. 20. They did not object to the standards applied, although they did indicate a minimum of forty percent is necessary to make this alternative more economically feasible. The Department incorporated the ability of the Superintendent to go to a maximum limitation of forty percent, with the authority to impose a lower limitation. This will provide an appropriate level of flexibility, while allowing a more conservative safeguard if necessary. The U.S. reinsurers oppose the change and recommend either prohibiting or severely limiting the amount of these types of securities that can be used in the trust on the basis that such securities are contrary to the requirement that they are unaffiliated with the alien reinsurers and that, even if legally are unaffiliated, the high concentration of such assets in the trust fund does not meet prudent diversification standards. The Department determined however, that these changes are necessary to ensure the availability of reinsurance for U.S. insurers. Furthermore, the proposal establishes standards, restrictions and approvals that were previously not required, thereby adding safeguards and oversight by the Department.

4. Costs: This rule imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. There are also no additional costs for regulated parties.

5. Local government mandates: This rule does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: The alien reinsurer or an underwriting member of an underwriting group availing itself of the alternative funding would be required to notify the Superintendent at least thirty days prior to depositing the securities in the trust. The security and the amount to be deposited in the trust must be approved by the Superintendent.

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

8. Alternatives: The alternatives were to: (1) revise the regulation to clearly prohibit the use of these alternative obligations which are premised on the creditworthiness of the alien reinsurers establishing the trust, or (2)

not change the regulation and leave it unclear as to whether these types of securities are currently permitted or not. The former would reduce a legitimate alternative to the alien reinsurers for funding of the trust and the latter would result in alien reinsurers being permitted to fund their entire trust with such obligations since these securities meet the standards set forth in the current regulation. The standards and limitations being proposed provide additional security for the protection of the United States insurers, and United States beneficiaries under reinsurance policies issued by such alien insurers or members of underwriting groups.

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

10. Compliance schedule: It is expected that regulated parties will be able to comply with this Part immediately.

#### **Regulatory Flexibility Analysis**

The Insurance Department finds that this amendment would not impose reporting, recordkeeping or other requirements on small businesses since the provisions of this Part apply only to authorized property/casualty insurers, certain alien reinsurers and members of underwriting groups. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of authorized property/casualty insurers and the trusteed surplus of alien insurers subject to this amendment and believes that none of them come within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act, because there are none which are both independently owned and have under 100 employees.

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

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

1. Types and estimated numbers of rural areas: This amendment applies to property/casualty insurers licensed to do business in New York State and seeking to take credit for reinsurance ceded to alien assuming reinsurers or members of underwriting groups. It establishes certain requirements for these insurers and reinsurers. The insurers do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: There is no additional paperwork required by the regulated ceding insurance companies which may be based in rural areas.

3. Costs: This rule imposes no additional costs for regulated insurers in rural areas.

4. Minimizing adverse impact: This amendment applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This amendment does not impose any additional burden on persons located in rural areas, and the Insurance Department does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: This agency action was included in the Insurance Department's Regulatory Agenda in June 2005.

#### **Job Impact Statement**

The proposed amendment should have no negative impact on jobs or economic opportunities in New York State. The amendment deals with the standards to be applied in determining whether a licensed property/casualty insurer may take credit for reinsurance ceded to an alien reinsurer or members of underwriting groups. While licensed insurers may change their choice of reinsurers to ensure that they receive credit for such reinsurance, it will not change the licensed companies need to obtain such reinsurance. Thus, there should be no negative impact on jobs or economic opportunities in New York State.

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## Office of Mental Health

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

**Mental Health Counselor, Marriage and Family Therapist, Creative Arts Therapist and Psychoanalyst**

**I.D. No. OMH-48-05-00002-P**

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

**Proposed action:** This is a consensus rule making to amend sections 587.4, 589.4, 589.8, 593.4, 594.4 and 595.4 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a)  
**Subject:** Mental health counselor, marriage and family therapist, creative arts therapist and psychoanalyst.

**Purpose:** To add definitions for new mental health practitioners.

**Text of proposed rule:** Subparagraph (ii) of Paragraph (2) of subdivision (d) of Section 587.4 is amended to read as follows:

(ii) Creative arts therapist is an individual who *is currently licensed as a creative arts therapist by the New York State Education Department or who has a master's degree in a mental health field from a program approved by the New York State Education Department and a registration or certification by the American Art Therapy Association, American Dance Therapy Association, National Association of Music Therapy or American Association for Music Therapy.*

Existing subparagraphs (iii), (iv), (v), (vi), (vii) and (viii) of Paragraph (2) of subdivision (d) of Section 587.4 are renumbered (v), (vi), (vii), (viii), (ix) and (x) and new subparagraphs (iii) and (iv) are added as follows:

(iii) *Marriage and family therapist is an individual who is currently licensed as a marriage and family therapist by the New York State Education Department.*

(iv) *Mental health counselor is an individual who is currently licensed as a mental health counselor by the New York State Education Department.*

Existing subparagraphs (ix), (x), (xi), (xii) and (xiii) are renumbered (x), (xi), (xii), (xiii) and (xiv) and a new subparagraph (ix) is added to read as follows:

(ix) *Psychoanalyst is an individual who is currently licensed as a psychoanalyst by the New York State Education Department.*

Part 589 of 14 NYCRR is amended as follows:

Subdivision (c) of Section 589.4 is amended as follows:

Paragraph (2) is amended, paragraphs (3), (4), (5), (6) and (7) are renumbered paragraphs (5), (6), (7), (8) and (9), paragraphs (8), (9), (10) and (11) are renumbered (11), (12), (13) and (14) and new paragraphs (3), (4) and (8) are added to read as follows:

(2) Creative arts therapist is an individual who *is currently licensed as a creative arts therapist by the New York State Education Department or who has a mental health field from a program approved by the New York State Education Department and a registration or certification by the American Art Therapy Association, American Dance Therapy Association, National Association of Music Therapy or American Association for Music Therapy.*

(3) Marriage and family therapist is an individual who is currently licensed as a marriage and family therapist by the New York State Education Department.

(4) Mental health counselor is an individual who is currently licensed as a mental health counselor by the New York State Education Department.

(8) Psychoanalyst is an individual who is currently licensed as a psychoanalyst by the New York State Education Department.

Paragraph (1) of subdivision (d) of Section 589.8 is revised to amend subparagraphs (x) and (xi) and to add new subparagraphs (xii), (xiii) and (xiv), to read as follows:

(x) social worker; [and]

(xi) therapeutic recreation specialist[.];

(xii) marriage and family therapist;

(xiii) mental health counselor; and

(xiv) psychoanalyst.

Part 593 is amended as follows:

Paragraph (2) of subdivision (a) of Section 593.4 is revised to renumber paragraphs (v) and (vi) as paragraphs (ix) and (x) and to add new paragraphs (v), (vi), (vii) and (viii) to read as follows:

(v) *a creative arts therapist who is currently licensed as a creative arts therapist by the New York State Education Department; or*

(vi) *a marriage and family therapist who is currently licensed as a marriage and family therapist by the New York State Education Department; or*

(vii) *a mental health counselor who is currently licensed as a mental health counselor by the New York State Education Department; or*

(viii) *a psychoanalyst who is currently licensed as a psychoanalyst by the New York State Education Department; or*

(ix) an individual having education, experience and demonstrated competence, as defined below:

(a) a master's or bachelor's degree in a human services related field; or

(b) in residential programs serving adults:

(1) an associate's degree in a human services related field and three years' experience in human services; or

(2) a high school degree and five years' experience in human services; or

[(vi)] (x) other professional disciplines which receive the written approval of the Office of Mental Health.

Part 594 is amended as follows:

Paragraph (9) of subdivision (a) of section 594.4 is revised to renumber paragraph (vi) as paragraph (x) and to add new paragraphs (vi), (vii), (viii) and (ix) to read as follows:

(vi) *a creative arts therapist who is currently licensed as a creative arts therapist by the Education Department; or*

(vii) *a marriage and family therapist who is currently licensed as a marriage and family therapist by the Education Department; or*

(viii) *a mental health counselor who is currently licensed as a mental health counselor by the Education Department; or*

(ix) *a psychoanalyst who is currently licensed as a psychoanalyst by the Education Department; or*

(x) other professional disciplines which receive the written approval of the Office of Mental Health.

Part 595 is amended as follows:

Paragraph (8) of subdivision (a) of section 595.4 is revised to renumber paragraphs (v) and (vi) as paragraphs (ix) and (x) and to add new paragraphs (v), (vi), (vii) and (viii) to read as follows:

(v) *a creative arts therapist who is currently licensed as a creative arts therapist by the New York State Education Department;*

(vi) *a marriage and family therapist who is currently licensed as a marriage and family therapist by the New York State Education Department;*

(vii) *a mental health counselor who is currently licensed as a mental health counselor by the New York State Education Department;*

(viii) *a psychoanalyst who is currently licensed as a psychoanalyst by the New York State Education Department;*

(ix) an individual having education, experience and demonstrated competence, as defined below:

(a) a master's or bachelor's degree in a human services related field;

(b) an associate's degree in a human services related field and three years experience in human services;

(c) a high school degree and five years experience in human services; or

[(vi)] (x) other professional disciplines which receive the written approval of the Office of Mental Health.

**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.

#### Consensus Rule Making Determination

No person is likely to object to this proposed rule making since it merely conforms sections of regulations listed to requirements of a statute. Chapter 676 of the Laws of 2002 established four new mental health professions: Mental Health Counseling, Marriage and Family Therapy, Creative Arts Therapy and Psychoanalysis by adding Article 163 to the State Education Law. The requirement to hold a valid license or permit for these four newly established mental health professions will be enforced by the State Education Department starting January 1, 2006.

These amendments merely add definitions for the four new mental health professions, that are consistent with Article 163 of the State Education Law, to sections of regulations that define professional staff.

#### Job Impact Statement

It is evident from the nature of the proposed rulemaking, which merely adds definitions of the four new mental health practitioners (mental health counselor, marriage and family therapist, creative arts therapist and psychoanalyst) to the sections of regulations listed, that the proposed amendments will not have a substantial adverse impact on jobs and employment activities.

## Office of Mental Retardation and Developmental Disabilities

### EMERGENCY RULE MAKING

#### Enrollment and Appeals in Medicare Prescription Drug Plans

**I.D. No.** MRD-48-05-00014-E

**Filing No.** 1365

**Filing date:** Nov. 15, 2005

**Effective date:** Nov. 15, 2005

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

**Action taken:** Addition of Subpart 635-11 and amendment of section 635-99.1 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07(a), (c), 13.09(b) and 13.15(a)

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

**Specific reasons underlying the finding of necessity:** On January 1, 2006 Medicare beneficiaries, can voluntarily elect to have their prescription drugs paid for under Medicare Part D. Certain individuals with both Medicare and Medicaid benefits, known as dually eligible persons, will be automatically enrolled in Medicare Part D. Medicaid will no longer pay for prescription drugs for dual eligible persons. However, unlike Medicaid and traditional Medicare, benefits will be paid not by the government, but by private companies, known as prescription drug plans. In order to receive these benefits, a person must enroll in a prescription drug plan.

In New York there are many prescription drug plans for persons to choose from. However, each plan has its own formulary (a list of drugs the plan covers), participating pharmacies and other features. Formularies, participating pharmacies and other features can vary from plan to plan.

Persons who are dually eligible are automatically enrolled in a prescription drug plan, but assignment to a particular plan is done on a random basis. A person could be enrolled in a plan that is not right for him or her. For example, the plan could not cover the medications he or she needs, or could use a pharmacy that is not convenient for the person. In order to be in a plan that is better for the individual, the person will have to change plans.

Beginning on November 15, 2005, Medicare beneficiaries can enroll in prescription drug plans, and persons who are dual eligible can change plans. Moreover, plans have exceptions and appeals processes whereby people can request additional coverage and benefits. OMRDD does not know how many people it serves are eligible for only Medicare. However, there are approximately 39,500 dual eligible persons to whom this regulation would apply.

This regulation authorizes certain people to make enrollment and exceptions and appeals decisions for consumers receiving services from OMRDD or from an OMRDD regulated provider. Without the regulation, these people could not enroll consumers in a prescription drug plan, change plans for consumers or request that plans cover additional drugs for a consumer. Consumers would be left without a prescription drug plan or, if dually eligible, could be enrolled in plans that do not meet their needs. Consumers would then have to pay for their prescriptions themselves or, in the case of consumers living in residential facilities certified by OMRDD, the operator of the residential facility would have to pay for the prescriptions. The regulation needs to be effective on November 15 so that enrollment changes and initial enrollments can take place for these consumers. If the regulation were adopted through the regular rulemaking process, the effective date would be after January 1, 2006, the effective date of the Part D program. Some dual eligible consumers would be enrolled in prescription drug plans that did not pay for their drugs and Medicare only consumers would not be receiving Medicare Part D benefits at all.

**Subject:** Enrollment and appeals in Medicare prescription drug plans.

**Purpose:** To identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

**Text of emergency rule:** • Add new Subpart 635-11 as follows:

*Subpart 635-11 Enrollment in a Medicare prescription drug plan.*

*Section 635-11.1 Applicability and definitions.*

(a) This subpart sets forth rules concerning who can enroll beneficiaries in a Medicare Part D prescription drug plan or in a Medicare Advantage Plan with prescription drug coverage, and who can pursue grievances, complaints, exceptions and appeals in such plans. These rules only concern beneficiaries who receive services which are operated, certified, authorized or funded by OMRDD.

(b) Definitions. As used in this subpart:

(1) "Act in the Part D review process" means doing any of the following within the Part D program:

(i) filing a grievance;

(ii) submitting a complaint to the quality improvement organization;

(iii) requesting and obtaining a coverage determination (including exception requests and requests for expedited procedures); and

(iv) filing and requesting appeals and dealing with any part of the appeals process.

(2) "Enroll and enrollment" means enrollment in a PDP and disenrollment from a PDP.

(3) "Party" means someone or an entity or organization.

(4) "PDP" means a prescription drug plan offered under the Medicare Part D program or a Medicare Advantage Plan that provides prescription drug coverage offered under the Medicare Part D program.

Section 635-11.2 Enrollment and reviews for persons residing in a residential facility operated or certified by OMRDD or a family care home.

(a) If a person has the ability to choose a PDP, or to act in the Part D review process, the person may enroll himself or herself or act in the Part D review process for himself or herself, or may appoint another party to enroll or act in the Part D review process for him or her.

(b) If a person lacks the ability to choose a PDP or to act in the Part D review process, but has a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, the guardian may enroll the person or act in the Part D process for the person or may appoint another party to enroll or act in the Part D review process for him or her.

(c) If a person is a minor and does not have a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, a parent may enroll him or her or act in the Part D review process for the person, or may appoint another party to enroll or act in the Part D review process for him or her.

(d) In all other situations, the chief executive officer (CEO) (see section 635-99.1) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may enroll the person or act in the Part D review process. The CEO or designee may also enroll the person or act in the Part D review process when any party specified in subdivisions (a)-(c) of this section who would otherwise enroll or act in the Part D review process is unwilling or unavailable.

(1) If a CEO or designee enrolls a person, he or she shall give written notice of such enrollment to the person's correspondent or advocate, and the person's Medicaid service coordinator.

(2) Process to request a different PDP.

(i) A correspondent or advocate may request that the person be enrolled in a different PDP. Such request must be in writing.

(ii) The agency or sponsoring agency shall consider the request and, if it agrees with the request, the CEO or designee shall enroll the person in the PDP requested and notify the advocate or correspondent of the enrollment.

(iii) If the agency or sponsoring agency does not agree with the request, the agency or sponsoring agency shall notify the correspondent or advocate in writing of the disagreement. The notice shall also inform the advocate or correspondent that he or she may appeal in writing to the DDSO Director.

(iv) If the advocate or correspondent appeals in writing to the DDSO Director, the DDSO Director shall review the request and relevant information and shall decide whether to enroll the person in a different PDP. Such decision shall be in writing and shall be sent to the correspondent or advocate and agency or sponsoring agency.

(v) While a request is being considered, the person shall remain enrolled in the PDP selected by the CEO or designee, or in a PDP in which the person is subsequently enrolled by the CEO or designee.

(3) Notwithstanding any other provision of this Title, if the person enrolls in a PDP (or a parent, guardian or appointee enrolls him or her) and the CEO or designee notifies the person, guardian, parent or appointee of the agency or sponsoring agency objection to the selection of the PDP, the agency or sponsoring agency is not fiscally responsible for any

excess costs that may be incurred, as a result of the selection of the PDP, compared to the costs of the PDP that would have been selected by the CEO or designee. The agency or sponsoring agency's written notification of the objection must inform the person, guardian, parent or appointee that the excess costs are not the responsibility of the agency or sponsoring agency and that the person, guardian, parent or appointee (whoever completed the enrollment) is responsible for the additional costs. Receipt of the written notification must be documented.

Section 635-11.3 Enrollment and reviews for persons not residing in a residential facility or a family care home.

(a) If a person has the ability to choose a PDP or to act in the Part D review process, the person may enroll himself or herself in a PDP or act in the Part D review process, or may appoint another party to enroll or act in the Part D review process.

(b) If a person lacks the ability to choose a PDP or to act in the Part D review process, but has a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, the guardian may enroll the person in a PDP or act in the Part D review process or appoint another party to enroll the person or act in the Part D review process.

(c) If the person is a minor and does not have a guardian lawfully empowered to enroll him or her in a PDP or to act in the Part D review process, a parent may enroll the person or act in the Part D review process, or may appoint another party to enroll the person or act in the Part D review process.

(d) In all other situations, or if any party specified in subdivisions (a)-(c) of this section who would otherwise enroll the person or act in the Part D review process is unwilling or unavailable, any of the following parties may enroll the person, act in the Part D review process or appoint another party to act in the Part D review process:

(1) an actively involved: spouse, parent, adult child, adult sibling, adult family member or friend, an advocate or correspondent; or

(2) if none of the above are willing and available, the CEO (or designee) of the agency providing service coordination for the person.

Section 635-11.4 Other responsibilities and rights of agencies and sponsoring agencies regarding enrollment and reviews.

(a) No CEO, officer, designee or employee of an agency or sponsoring agency shall solicit, accept or receive from a PDP, pharmacy or contractor of a PDP or pharmacy, for personal use or benefit (other than for the personal use or benefit of the person being enrolled), any payment, discount or other remuneration in consideration of, or as a result of, enrolling the person in a PDP.

(b) No CEO, officer, designee or employee of an agency or sponsoring agency shall charge, accept or receive payment from the person, family or anyone else for enrolling the person in a PDP, for providing advice and assistance in choosing a PDP or for acting for the person in the Part D review process.

(c) When a CEO or designee is authorized to act by this section or appointed to act in the Part D review process for a person, the CEO or designee may appoint a party outside of the agency to act in the Part D review process for the person.

(d) When a CEO or designee enrolls a person he or she shall choose a PDP based on the best interests of the person.

● Revisions to § 635-99.1 Glossary

(c) Agency. The ["agent" or] "operator" of a facility, program or service operated, [or] certified, authorized, or funded through contract by OMRDD. In the case of State-operated facilities, the [B/]DDSO is considered to be the "agency". [Certified] [f]Family care providers are not to be considered an agency (also see "agency, sponsoring").

(e) Agency, sponsoring. The administrator of one or more family care homes. In the case of family care homes operated under State auspice, the [B/]DDSO is considered to be the sponsoring agency.

Note: The following definitions are moved to the proper place in alphabetical order and the rest of the subdivisions renumbered accordingly.

(n) [B/] DDSO. *The Developmental Disabilities Services Office* is [T] the local administrative unit, responsible to the Division of Program Operations of OMRDD, that has major responsibility for the planning and development of community, residential and other program services. The B/ DDSO is responsible for coordinating the service delivery system within a particular service area, planning with community and provider agencies, and ensuring that specific placement of individuals and program plans and provider training programs are implemented. In New York City this unit is called the Borough Developmental Services Office (BDSO); elsewhere in the State it is called the Developmental Disabilities Services Office (DDSO).] of OMRDD. *The governing body of the DDSO is the central*

*office administration of OMRDD. The DDSO director is its chief executive officer.*

(o) Officer, chief executive. *Someone designated by the governing body (see section 635-99.1) with overall and ultimate responsibility for the operation of services certified, authorized or funded through contract by OMRDD, or his or her other designee for specific responsibilities and/or equipment as specified in written agency/facility policy. In a DDSO, this party is referred to as the director.*

**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 February 12, 2006.

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

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

**Regulatory Impact Statement**

1. Statutory Authority:

a. Section 13.07(a) of the Mental Hygiene Law gives OMRDD responsibility for assuring the development of comprehensive plans, programs and services in the areas of prevention, care, treatment, habilitation, rehabilitation, vocational and other education and training of persons with mental retardation and developmental disabilities.

b. Section 13.07(c) of the Mental Hygiene Law gives OMRDD responsibility for seeing that persons with mental retardation and developmental disabilities are provided with services, including care and treatment; that such services are of high quality and effectiveness and that the personal and civil rights of persons receiving such services are protected. This section of the law also requires that the services provided seek to promote and attain independence, inclusion, individuality and productivity for persons with mental retardation and developmental disabilities.

c. Section 13.09(b) of the Mental Hygiene Law requires the Commissioner of OMRDD to adopt rules and regulations necessary and proper to implement any matter under his jurisdiction.

d. Section 13.15(a) of the Mental Hygiene Law requires the Commissioner to establish, develop, coordinate and conduct programs and services of prevention, care, treatment, rehabilitation and training for the benefit of persons with mental retardation and developmental disabilities. This section also requires the Commissioner to take all actions necessary, desirable or proper to implement the purposes of the Mental Hygiene Law and to carry out the purposes and objectives of OMRDD within available funding.

2. Legislative Objectives: The emergency amendments further the legislative objectives embodied in sections 13.07(a), 13.07(c), 13.09(b) and 13.15(a) of the New York State Mental Hygiene Law by authorizing parties other than guardians to act on behalf of the many adult consumers served by OMRDD who do not have the capacity make decisions about the Medicare prescription drug benefit and who do not have guardians. The emergency amendments also authorize other parties to pursue appeals and other reviews for these consumers, so that their rights in a prescription drug plan will be protected.

3. Needs and Benefits: The new Medicare prescription drug program will begin January 1, 2006. This program is also known as Medicare Part D. Persons who are in Part D will have their prescription drugs paid for through private insurance plans, known as prescription drug plans. Persons who have Medicare must enroll in a prescription drug plan in order to receive this benefit. However, persons who have Medicare and Medicaid are automatically enrolled in a plan. These persons are known as dual eligible persons.

Dual eligible persons will be randomly assigned to a prescription drug plan. The formularies (lists of drugs each plan will cover), participating pharmacies and other services can vary from plan to plan, so that the plan to which a beneficiary is randomly assigned may not be the one best suited to that person's needs.

Unlike Medicare-only beneficiaries, dual eligible persons can change prescription drug plans at any time. From November 15 to December 31,

2005, dual eligible persons can change plans as often as they want. From January 1, 2006 on, dual eligible persons can change plans once a month.

Prescription drug plans are required to have review processes. These will allow persons to, for example, complain about the plan, request payment for a drug not on the plan's formulary, request a lower co-pay for a drug in a higher payment tier and appeal from any decision of the plan that is not what the beneficiary requested.

Federal regulations and policy state that only certain persons can make decisions about what prescription drug plan to choose and about pursuing a review: the beneficiary, someone appointed by the beneficiary or someone whom state law authorizes to act on behalf of a beneficiary. Federal guidelines cite guardians as an example of those whom state law authorizes to act for a beneficiary.

There are approximately 39,500 consumers who are dually eligible and who receive services from OMRDD or from an OMRDD regulated provider. Many of these consumers are adults, do not have the capacity to make decisions about the Medicare prescription drug benefit and do not have guardians. OMRDD developed the new regulations to help these consumers. These regulations serve as state law which will authorize other people to act on behalf of these consumers, so that they can be enrolled in the prescription drug plan that is right for them. These regulations also serve as state law which will authorize other people to pursue appeals and other reviews for these consumers, so that their rights in a prescription drug plan will be protected.

Specifically, if the person is over 18, without the ability to decide, does not have a guardian and lives in a residential facility, the agency operating the residence can make the decisions. The executive director of the agency has this decision making authority, but he or she can also designate someone else in the agency to make these decisions. If a guardian or parent is supposed to make the decisions, but is unwilling or unavailable, the CEO or designee of the residential agency decides.

For adult consumers living at home or on their own who do not have the ability to make decisions about Part D, and who do not have a guardian, any of the following can make Part D decisions: an actively involved spouse, parent, adult child, adult sibling, adult family member, adult friend, advocate or correspondent. If none of these people are available or willing, the CEO (or designee) of the Medicaid Service Coordination agency can choose.

November 15 is the first day that a dual eligible person can switch plans. The emergency regulations allow the persons it authorizes to act on a beneficiary's behalf to switch plans beginning on November 15.

4. Costs: OMRDD considers the emergency amendments to be cost neutral. These emergency amendments may result in some cost savings.

a. Costs to Regulated Parties: No new costs are projected to be incurred by the regulated parties due to the implementation and ongoing compliance with emergency amendments. The emergency amendments may result in cost savings because those consumers receiving services from OMRDD who are affected by the emergency amendments (or members of their families) will not have to seek guardianship to participate in a prescription drug plan or to switch to a more cost effective plan. In addition, the provider of residential services may experience some cost savings because the plan in which the dual eligible consumer is auto-enrolled may result in higher costs to the provider than the plan in which the consumer is enrolled through the mechanisms established by this regulation. Providers are responsible for the costs of all necessary medications that are not covered by a prescription drug plan or some other mechanism.

b. Costs to the Agency, the State and Local Governments: There are no costs to local governmental units or any other special districts. New York State may also experience savings as a provider of state-operated residences (see above). Additionally, New York State and its local governments may experience a savings in the cost of court operations since the emergency amendments make the guardianship process unnecessary for many consumers.

5. Local Government Mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: There are minimal new paperwork requirements resulting from the regulations. If the residential agency chooses to enroll residents the agency is required to notify the advocate or correspondent of the resident. On the other hand, paperwork associated with seeking guardianship and making guardianship decisions is avoided, if guardianship is necessary only to facilitate enrollment in a Medicare prescription drug plan. Paperwork necessary to enroll beneficiaries and act in the Part D review process would be necessary regardless of the promulgation of these regulations.

To facilitate enrollment processes, OMRDD has developed new forms that can be used to appoint someone to enroll the beneficiary. These optional forms can assist consumers, guardians, parents and others who seek to appoint someone else, and are available on the OMRDD website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

7. Duplication: None.

8. Alternatives: If OMRDD did not promulgate the emergency amendments, consumers receiving OMRDD services who are eligible for Medicare only, without the ability to choose a plan and without a guardian would be unable to participate in the Medicare Part D program. Consumers who are dually eligible and without the ability to choose the plan and without a guardian would be unable to move from plans that did not meet their needs, and possibly have to pay for medicines out-of-pocket (or have their residential providers incur such expenses), and have to pursue time-consuming exceptions and appeals that could be avoided by simply switching plans. Finally, some families and other friends would have to obtain guardianship for the sole purpose of enrolling the consumer in the plan that was suited to his or her needs. OMRDD deems all these scenarios unacceptable.

9. Federal Standards: The emergency amendments do exceed any minimum standards of the Federal government.

10. Compliance Schedule: OMRDD intends to finalize the emergency amendments as quickly as allowed by the requirements of SAPA.

#### **Regulatory Flexibility Analysis**

1. Effect on small businesses: These emergency amendments apply to providers of OMRDD residential services and/or providers of Medicaid Service Coordination (MSC), both State-operated and voluntary-operated.

OMRDD has determined, through a review of the certified cost reports, that the voluntary not-for-profit organizations which operate the facilities or provide MSC employ fewer than 100 employees at the discrete certified or authorized sites, and would, therefore, be classified as small business.

The emergency amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small business due to increased costs for additional services or increased compliance requirements. The amendments result in no new costs for these entities.

2. Compliance requirements: The emergency amendments require the regulated parties to notify the consumer's advocate (if applicable) and the correspondent (if applicable) of the plan when the CEO or his or her designee enrolls the consumer in a prescription plan or acts for a consumer in the process.

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

4. Compliance costs: There are no costs to local governments.

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

6. Minimizing adverse impact: These emergency amendments impose no adverse economic impact on local governments.

7. Small business and local government participation: OMRDD convened several task forces and committees concerning the implementation of the new Federal Medicare Part D benefit, including a work group that had as one of its specific charges the development of the emergency amendments. Membership of the various groups included providers of services, both State and voluntary-operated, provider association representatives, family members of consumers and other advocates for persons with developmental disabilities. Several of the task forces, committees and sub-committees will continue to meet to oversee the Part D implementation through out 2006.

Presentations and ongoing discussions has occurred with the Commissioner's Advisory Council on Family Care and the Statewide Committee on Family Support Services and also with the Part D task force (mentioned above) that helped develop this regulation. A series of informational mailings and frequent e-mail updates regarding Part D generally have been sent to affected providers beginning in June 2005. An instructional mailing, specific to the emergency amendments was sent on October 25, 2005 to 1,208 affected and/or interested parties. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

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

A Rural Area Flexibility Analysis for the emergency amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The emergency amendments identify and authorize those parties who may enroll or act for

a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

**Job Impact Statement**

A Job Impact Statement is not submitted because the amendment will not have an adverse impact on existing jobs or employment opportunities. The emergency amendments identify and authorize those parties who may enroll or act for a person who does not have the ability to enroll or act for herself or himself in a Medicare prescription drug plan.

## Public Service Commission

### NOTICE OF ADOPTION

**Litigation Costs by United Water New Rochelle, Inc.**

**I.D. No.** PSC-13-05-00018-A

**Filing date:** Nov. 9, 2005

**Effective date:** Nov. 9, 2005

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

**Action taken:** The commission, on Oct. 27, 2005, adopted an order in Case 05-W-0193 approving the request of United Water New Rochelle, Inc. (UWNR), with modifications, to defer and amortize expenses related to litigation.

**Statutory authority:** Public Service Law, sections 89-b(1) and 89-c(7)

**Subject:** Deferral of expenses.

**Purpose:** To approve UWNR's request to defer and recover litigation expenses.

**Substance of final rule:** The Commission approved the petition of the United Water New Rochelle (UWNR), with modifications, and permitted UWNR to defer expenses related to litigating the sales tax assessment and excess water usage charges by New York State Department of Tax and Finance and New York City Water Board, 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. (05-W-0193SA1)

### NOTICE OF ADOPTION

**Complaint by Home Depot U.S.A., Inc. and Linens 'n Things Against Independent Water Works, Inc.**

**I.D. No.** PSC-27-05-00020-A

**Filing date:** Nov. 9, 2005

**Effective date:** Nov. 9, 2005

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

**Action taken:** The commission, on Oct. 27, 2005, adopted an order in Case 05-W-0722 approving the petition of the Town of North Greenbush, Rensselaer County, to acquire the water system of the High Meadows Water Company, Inc.

**Statutory authority:** Public Service Law, section 89(h)

**Subject:** Acquisition of a water system.

**Purpose:** To approve the acquisition of a water system by the Town of North Greenbush.

**Substance of final rule:** The Commission approved the petition of the Town of North Greenbush, Rensselaer County, to acquire the water system

of the High Meadows Water Company, Inc., subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-W-0722SA1)

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

**Petition for Rehearing and/or Clarification of the Order Approving Gas Cost Incentive Mechanism Methodology by New York State Electric & Gas Corporation**

**I.D. No.** PSC-48-05-00009-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 grant a petition for rehearing and/or clarification by New York State Electric & Gas Corporation of the order approving gas cost incentive mechanism methodology, issued Oct. 7, 2005, and if granted, to consider revisions to the accounting treatment set forth in the order.

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

**Subject:** Consideration of a petition for rehearing and/or clarification and possible reconsideration of the accounting treatment in the order approving gas cost incentive mechanism methodology, issued Oct. 7, 2005.

**Purpose:** To grant New York State Electric & Gas Corporation's petition for rehearing and/or clarification and revise the accounting treatment set forth in the order approving gas cost incentive mechanism methodology, issued Oct. 7, 2005.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering whether to grant a petition for rehearing and/or clarification by New York State Electric & Gas Corporation (NYSEG) of the Order Approving Gas Cost Incentive Mechanism Methodology, issued October 7, 2005. If the Commission grants the petition, it will consider NYSEG's claim that some of the gas cost savings have already been credited to customers, and its request that the accounting treatment specified in the Order should be correspondingly modified.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(01-G-1668SA9)

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

**Implementation of the Phase II LIRA Program by National Fuel Gas Distribution Company**

**I.D. No.** PSC-48-05-00010-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 proposal of National Fuel Gas Distribution Company regarding the implementation of the phase II low income residential assistance proposal (LIRA) as provided for in the rate plan adopted by the commission in Case 04-G-1047.

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

**Subject:** Implementation of the Phase II LIRA Program for National Fuel Gas Distribution Company.

**Purpose:** To adopt a revised low-income program for National Fuel Gas Distribution Company.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a proposal of National Fuel Gas Distribution Company regarding the implementation of the Phase II Low Income Residential Assistance Proposal (LIRA) as provided for in the Rate Plan adopted by the Commission in Case 04-G-1047.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**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-1047SA2)

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

**Modification of Long-Term Indebtedness by Chautauqua Utilities, Inc.**

**I.D. No.** PSC-48-05-00011-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, or modify a petition filed on behalf of Chautauqua Utilities, Inc. (CUI) for authority to modify certain terms of its indebtedness.

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

**Subject:** Request of CUI for modification of long-term indebtedness approval.

**Purpose:** To consider CUI's request for modification of long-term indebtedness approval.

**Substance of proposed rule:** By petition filed November 1, 2005 (and supplemented on November 15, 2005), Chautauqua Utilities, Inc. seeks authority to extend a loan authorization (in the amount of \$680,000.00) with the Chautauqua County Industrial Development Agency and the New York Job Development Authority through March 30, 2006, or if necessary to a later date mutually agreed to by the parties. It also seeks authority to modify the previously-given approval for a promissory note with the Manufacturers and Traders Trust Company from \$340,000.00 to \$350,000.00. The debt will be used to construct the natural gas distribution system in the Town of North Harmony, Chautauqua County, New York.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**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-0576SA2)

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

**Waiver of Filing Requirements in Article VII Proceedings by Consolidated Edison Company of New York Inc.**

**I.D. No.** PSC-48-05-00012-P

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

**Proposed action:** Consideration of Consolidated Edison Company of New York Inc.'s request for waivers of 16 NYCRR sections 86.3(a)(1)(i); (iii); (a)(2); (b)(2); 86.6(b) and (c) and 88.4(a)(4) in its application for a certificate of environmental compatibility and public need for the construction and operation of the Cedar Street Project.

**Statutory authority:** Public Service Law, section 4(1) and 122(1)

**Subject:** Filing requirements in article VII proceedings concerning maps, drawings, explanations, descriptions and studies.

**Purpose:** To determine whether the appropriate filing requirements are met without imposing any undue burdens.

**Substance of proposed rule:** The Commission is considering a request from the Consolidated Edison Company of New York, Inc. (Consolidated Edison) for waivers of certain filing requirements of the Commission's rules. Specifically, Consolidated Edison seeks waivers of 16 NYCRR §§ 86.3(a)(1)(i); 86.3(a)(1)(iii); 86.3(a)(2); 86.3(b)(2); 86.6(b) and (c); and 88.4(a)(4). These provisions address various maps, drawings, explanations, descriptions and studies that are to accompany an application for a Certificate of Environmental Compatibility and Public Need. Consolidated Edison is seeking a Certificate to construct and operate a three-mile long, 138 kV underground electric transmission facility from the Washington Street Substation in the City of Mount Vernon, Westchester County, to the Cedar Street Substation in the City of New Rochelle.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**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-T-1369SA1)

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

**Water Rates and Charges by Grandview Waterworks Corp.**

**I.D. No.** PSC-48-05-00013-P

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

**Proposed action:** The Public Service Commission is considering tariff revisions filed by Grandview Waterworks Corp. to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 2—Water, to become effective May 1, 2006.

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

**Subject:** Water rates and charges.

**Purpose:** For approval to increase Grandview Waterworks Corp.'s annual revenues by about \$49,252 or 140 percent.

**Substance of proposed rule:** On November 9, 2005, Grandview Waterworks Corp. (Grandview or the company) filed to become effective May 1, 2006, Leaf No. 12, Revision 3 to its electronic tariff schedule, P.S.C. No.

2 - Water. Grandview is requesting to increase its annual operating revenues by \$49,252 or 140%. The company provides metered water to approximately 118 customers in two real estate developments known as Grandview Country Estates and The Willows, located in the Town of Kinderhook, Columbia County. The company proposes to increase its quarterly minimum charge for the first 10,000 gallons or less from \$69.13 to \$103.69 and its usage charge from \$4.93 per thousand gallons to \$8.63. Grandview's tariff, along with its proposed changes, is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us) located under Commission Documents). The Commission may approve or reject, in whole or in part, or modify the company's petition.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(05-W-1416SA1)

## State University of New York

### NOTICE OF ADOPTION

#### State Basic Financial Assistance for Operating Expenses of Community Colleges

**I.D. No.** SUN-34-05-00004-A

**Filing No.** 1364

**Filing date:** Nov. 15, 2005

**Effective date:** Nov. 30, 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) and 6304(1)(b); and L. 2002, chs. 53 and 83

**Subject:** State basic financial assistance for operating expenses of community colleges under the program of the State University of New York and the City University of New York.

**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 2005-2006 Budget Bill.

**Text or summary was published** in the notice of proposed rule making, I.D. No. SUN-34-05-00004-P, Issue of August 24, 2005.

**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, State University of New York, State University Plaza, Albany, NY 12246, (518) 443-5400, e-mail: [Dona.Bulluck@suny.edu](mailto:Dona.Bulluck@suny.edu)

#### Assessment of Public Comment

The agency received no public comment.