

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Captive Cervids

**I.D. No.** AAM-42-05-00004-E  
**Filing No.** 1115  
**Filing date:** Sept. 30, 2005  
**Effective date:** Sept. 30, 2005

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

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

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

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

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

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

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

New York State has 433 entities engaged in raising approximately 9,600 deer and elk in captivity with a value of several million dollars, and many of these entities have imported captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. The rule repeals a prohibition on the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless a permit authorizing such movement has been obtained from the Department prior to such importation or movement. Except for cervids moving directly to slaughter, permits shall be issued only for captive cervids that meet the health requirements established by the rule.

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

The promulgation of this regulation on an emergency basis is necessary because further introduction and spread of CWD into and within New York State would be devastating from both an animal health and economic standpoint given the threat the disease poses to the approximately 9,600 captive deer in the State and the 433 entities which raise them.

**Subject:** Captive cervids.

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

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 28, 2005.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

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

##### 2. Legislative Objectives:

The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State to control, suppress and eradicate such diseases and prevent the spread of infection and contagion. The Department’s proposed repeal of 1 NYCRR section 62.8 and adoption of 1 NYCRR Part 68 will further this goal by preventing the

importation of deer which may be infected with chronic wasting disease (CWD), and permitting CWD to be detected and controlled within the captive cervid population of the State.

##### 3. Needs and Benefits:

CWD is an infectious and communicable disease of deer belonging to the Genus *Cervus* (including elk, red deer and sika deer) and the Genus *Odocoileus* (including white tailed deer and mule deer). CWD has been detected in free-ranging deer and elk in Colorado, Wyoming, Nebraska, Wisconsin, South Dakota, New Mexico, Illinois and Utah. It has been diagnosed in captive deer and elk herds in South Dakota, Nebraska, Colorado, Oklahoma, Kansas, Minnesota, Montana, Wisconsin and New York and the Canadian provinces of Saskatchewan and Alberta.

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

New York State has 433 entities engaged in raising approximately 9,600 deer and elk in captivity with a value of several million dollars, and many of these entities import captive bred deer and elk from other states, including Wisconsin, a state with confirmed CWD. This rule repeals a rule that had prohibited, with certain exceptions, the importation of captive cervids susceptible to CWD and adopts a prohibition on the importation or movement of captive cervids into or within the State unless they are accompanied by a valid certificate of veterinary inspection and a permit authorizing such importation or movement has been obtained from the Department, in consultation with the New York State Department of Environmental Conservation. The rule establishes general health requirements for captive cervids, special requirements for captive cervids susceptible to CWD, requirements for a CWD Certified Herd Program, requirements for a CWD Monitored Herd Program, requirements for approved susceptible cervid slaughter facilities, requirements for the importation of captive susceptible cervids for immediate slaughter and requirements for the management of CWD positive, exposed or suspect herds of captive cervids. This is an essential disease control measure that will help to prevent the introduction of CWD into New York State, and permit it to be detected and controlled if it were to arise within the captive cervid population of the State.

##### 4. Costs:

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

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk range from \$500 to \$2,000 per animal. The value of deer range from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, the prior prohibition on the importation of captive cervids susceptible to CWD prevented the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. It is not known how many captive cervids will meet the health requirements of 1 NYCRR Part 68 or otherwise qualify for importation or movement within the State of New York. The number and value of the captive cervids that will continue to be prohibited from importation will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

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

The rule also requires that captive cervid operations, with the exception of special purpose herds, have proper restraining facilities, chutes, gates and corrals to capture and restrain cervids for diagnostic testing and inven-

tory. Assuming that the 30 farms that are currently tested have adequate handling facilities and that the 102 farms that are currently under tuberculosis quarantine will be special purpose herds, there are currently 79 farms that will need to upgrade their capture and restraint facilities. The owners of those farms will have to build catch pens and chutes at an approximate cost of \$10,000 to \$20,000 per farm.

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

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

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

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

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

(c) Source:

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

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

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

9. Federal Standards:

The federal government currently has no standards restricting the interstate movement of cervids due to CWD, but has proposed CWD regulations establishing a Federal CWD Herd Certification Program and governing the interstate movement of captive deer and elk. The proposed Federal regulations permit herd owners to enroll in State programs that are

determined to be equivalent to the proposed Federal program. The Department believes that the State CWD program established by this rule is equivalent to the proposed Federal program.

10. Compliance Schedule:

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

**Regulatory Flexibility Analysis**

1. Effect of Rule:

There are approximately 433 small businesses raising a total of approximately 9,600 captive cervidae (the family that includes deer and elk) in New York State. The rule would have no impact on local governments.

2. Compliance Requirements:

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

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

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

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

Regulated parties with herds containing at least one CWD susceptible cervid must have a perimeter fence that is at least eight feet high. Captive CWD susceptible cervid facilities and perimeter facilities must be inspected and approved by a state or federal regulatory representative.

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

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

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

Direct movement from a CWD monitored herd to an approved CWD slaughter facility requires a permit from the Department prior to movement; all animals moved must be individually identified with an approved identification tag and all animals must be slaughtered within six days of the time the animals leave the premises of the CWD monitored herd.

Approved CWD susceptible slaughter facilities must have holding pens constructed to prevent contact with captive or free-ranging cervid popula-

tions. Sample retention and holding facilities must be adequate to preserve and store diagnostic tissues for seventy-two hours after slaughter. A CWD susceptible cervid offal disposal plan must be developed, implemented and approved by the Department in consultation with the Department of Environmental Conservation.

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

The rule would have no impact on local governments.

#### 3. Professional Services:

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

#### 4. Compliance Costs:

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

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

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

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

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

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

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

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

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

##### (c) Source:

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

#### 5. Economic and Technological Feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation of the importation of captive deer into New York State will have an economic impact on the entities that imported a total of 360 captive deer into New York State in 2002, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater. The rule is technologically feasible. Captive deer imported into the State are already required to be accompanied by a health certificate. Endorsement of that certificate with the number of the permit issued by the Department presents no technological problem. The structural, recordkeeping and testing requirements of the rule involve existing technologies that are already in use.

#### 6. Minimizing Adverse Impact:

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

The rule would have no impact on local governments.

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

In developing this rule, the Department has consulted with representatives of the approximately 433 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

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

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

The approximately 433 entities raising captive deer in New York State are located throughout the rural areas of New York.

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

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

##### 3. Costs:

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

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. These farms produce venison with a value of approximately \$1,300,000 per year. During 2002, 195 elk and 165 deer were imported into New York. The value of elk ranges from \$500 to \$2,000 per animal. The value of deer ranges from \$50 to \$1,500 per animal. Using the most recent annual import data, average values of \$1,250 per animal for elk and \$775 per animal for deer, it is estimated that the prior prohibition on the importation of captive cervids susceptible to CWD prohibited the importation of 195 elk with a value of \$243,750 and 165 deer with a value of \$127,875 on an annual basis. The number and value of the captive cervids that will be prohibited from importation as a result of this rule will depend upon the extent to which the owners of herds

of captive cervids outside the State comply with the requirements of 1 NYCRR Part 68.

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

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

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

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

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

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

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

(c) Source:

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

4. Minimizing Adverse Impact:

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

5. Rural Area Participation:

In developing this rule, the Department has consulted with representatives of the approximately 433 deer owners known to the Department. In addition, the Department is notifying public officials and private parties of the adoption of the proposed rule on an emergency basis, as required by the State Administrative Procedure Act.

**Job Impact Statement**

1. Nature of Impact:

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

2. Categories and Numbers Affected:

The number of persons employed by the 433 entities engaged in raising captive deer in New York State is not known.

3. Regions of Adverse Impact:

The 433 entities in New York State engaged in raising captive deer are located throughout the rural areas of the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,600 captive deer currently raised by approximately 433 New York entities from the introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

**NOTICE OF ADOPTION**

**Hazard Analysis and Critical Control Point (HACCP) Plan for Seafood**

**I.D. No.** AAM-30-05-00012-A

**Filing No.** 1116

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 19, 2005

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

**Action taken:** Addition of Part 279 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18 and 214-b

**Subject:** Hazard Analysis and Critical Control Point (HACCP) Plan for seafood.

**Purpose:** To incorporate by reference the current Federal regulations set forth in 21 CFR part 123.

**Text or summary was published** in the notice of proposed rule making, I.D. No. AAM-30-05-00012-P, Issue of July 27, 2005.

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

**Text of rule and any required statements and analyses may be obtained from:** J. Joseph Corby, Director, Division of Food Safety and Inspection, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-4492

**Assessment of Public Comment**

The agency received no public comment.

**Department of Civil Service**

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-29-05-00012-A

**Filing No.** 1128

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 19, 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 a position in the exempt class in the Executive Department.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-29-05-00012-P, Issue of July 20, 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-29-05-00013-A**Filing No.** 1131**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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 a position in the exempt class in the Executive Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-29-05-00013-P, Issue of July 20, 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-29-05-00014-A**Filing No.** 1132**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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 a position in the exempt class in the Insurance Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-29-05-00014-P, Issue of July 20, 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-29-05-00015-A**Filing No.** 1126**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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 delete a position from and classify a position in the exempt class in the Department of Public Service.**Text was published in the notice of proposed rule making, I.D. No.** CVS-29-05-00015-P, Issue of July 20, 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-29-05-00016-A**Filing No.** 1130**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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 Banking Department.**Text was published in the notice of proposed rule making, I.D. No.** CVS-29-05-00016-P, Issue of July 20, 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-29-05-00017-A**Filing No.** 1129**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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-29-05-00017-P, Issue of July 20, 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-29-05-00018-A**Filing No.** 1125**Filing date:** Oct. 4, 2005**Effective date:** Oct. 19, 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 a position from and classify a position in the non-competitive class in the Department of Labor.**Text was published in the notice of proposed rule making, I.D. No.** CVS-29-05-00018-P, Issue of July 20, 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-29-05-00019-A

**Filing No.** 1127

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 19, 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 a position from the non-competitive class in the Department of Labor.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-29-05-00019-P, Issue of July 20, 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.

- v. 101.22 An inmate shall not stalk an employee, visitor or other person. Stalking includes, but is not limited to, conduct directed at a specific employee, visitor or other person where the inmate knows, or reasonably should know, that such conduct is likely to cause reasonable fear of material harm to the physical health, safety or property of such person. I, II, III
- xviii. 113.28 An inmate shall not possess any description or depiction of any correctional facility; any facility post description, staffing chart or related document; any Directive with a distribution code of "D" or any corresponding topical manual or facility policy and procedure. II, III
- xix. 113.29 An inmate shall not possess poppy seeds or any product containing poppy seeds. I, II, III
- ix. 180.19 An inmate shall comply with and follow the guidelines and instructions given by staff regarding alcohol screening tests. This includes providing a urine sample or taking a field test when ordered to do so. I, II, III

The rules with notable revisions are as follows:

- iii. 101.20 *An i[I]nmate[s] shall not engage in lewd conduct by intentionally masturbating in the presence of an employee, or intentionally expos[e]ing the private parts of [their]his or her bod[ies]y unless as part of a strip frisk, strip search, medical examination or other authorized purpose.* Tier I  
I, II, III
- ii. 107.11 *An i[I]nmate[s] shall not harass an employee[s] or any other person[s] verbally or in writing. [This]Prohibited conduct includes, but is not limited to, using insolent, abusive, or obscene language or gestures, or writing or otherwise communicating messages of a personal nature to an employee or [volunteers]any other person including a person subject of an order of protection with the inmate or who is on the inmate's negative correspondence list.* I, II, III
- i. 113.10 *An i[I]nmate[s] shall not make, possess, sell or exchange any item[of contraband] that may be classified as a weapon or dangerous instrument by description, use or appearance. A dangerous instrument is any instrument, article or substance which, under the circumstances in which it is used, attempted to be to be used or threatened to be used, is readily capable of causing bodily harm.* II, III

**Department of Correctional Services**

NOTICE OF ADOPTION

**Institutional Rules of Conduct**

**I.D. No.** COR-18-05-00006-A

**Filing No.** 1120

**Filing date:** Oct. 4, 2005

**Effective date:** Feb. 1, 2006

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

**Action taken:** Repeal of section 270.2B and addition of new section 270.2B to Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112 and 138

**Subject:** Institutional rules of conduct.

**Purpose:** To update the inmate rulebook that provides the foundation for consistent discipline and notifies inmates of the department's behavioral expectations.

**Substance of final rule:** Section 270.2B of Title VII. NYCRR is hereby repealed and a new section 270.2B adopted as follows:

In this proposal, the Department is adding five new rules, making notable revisions to five others and making minor amendments to almost all of the remaining rules in order to improve readability, employ consistent syntax and adopt a more direct "shall" "shall not" structure.

The new rules are as follows:

- ii. 101.11 An inmate shall not intentionally and forcibly touch the sexual or other intimate parts of an employee for the purpose of degrading or abusing such employee or for the purpose of gratifying the inmate's sexual desire. Forcible touching includes squeezing, grabbing, pinching and kissing. Tier I  
I, II, III

- xiii. 113.23 *In addition to those items of contraband specifically identified by this rule series, an i[ ]inmate[s] shall not[be in] possess[ion of] any[contraband items not listed in Rules 113.10 through 113.22. Contraband is any article that is not] item unless it has been specifically authorized by the superintendent or designee, the rules of the department or the local rules of the facility.* I, II, III
- ii. 121.11 *An inmate shall not engage in a telephone call to a telephone number which has been connected through call-forwarding or a call-forwarding service. [Inmate t]Telephone calls and telephone conversations shall be restricted to the telephone number dialed or otherwise placed by or for the inmate. Telephone call-forwarding, the use of a call forwarding service or other third-party phone call[s or] function, and the use of a credit card to place a call[s] are prohibited.* I, II, III

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 270.2B, Rules 101.11 and 101.20.

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

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

The Department of Correctional Services has concluded that the non-substantial changes made to inmate rules 101.11 and 101.20 do not necessitate submission of revised statements. Changes to these texts have been made in response to public comment and should clarify the Department’s intent.

**Assessment of Public Comment**

The Department received comments from several sources. Each of the letters addressed concerns with new proposed inmate rule 101.11. Several of the letters also indicated concerns with the proposed revision to rule 101.20, an existing inmate rule.

In essence, the comments fail to recognize the complications associated with addressing sexual misconduct in prison. There are essentially three types of sexual abuse in prison: staff-on-inmate sexual abuse, inmate-on-inmate sexual abuse, and inmate-on-staff sexual abuse. While certainly recognizing staff sexual misconduct, the comments fail to recognize that inmates are still capable of committing intentional and even criminal acts against staff and other inmates. For example, an inmate who forcibly rapes an employee is not the victim of staff sexual abuse. Similarly, an inmate who gropes an unsuspecting employee or who calls a female Correction Officer to his cell and masturbates in front of her should be disciplined. These rules, together with new comprehensive policies and training, are only a small part of the Department’s renewed initiative to address all types of sexual misconduct in prison.

Inmate Rule 101.11: The comments suggest a misperception that proposed rule 101.11, prohibiting an inmate from touching the sexual or other intimate parts of an employee or otherwise touching an employee in a sexually suggestive manner, fails to recognize the legal inability of an inmate to consent to sexual conduct with a Department employee due to the disparity of power. The concern expressed in the comments is well understood by the Department and this rule is not intended to punish a victim of staff sexual abuse. It should be noted that the Department recently issued a number of comprehensive policies and inmate orientation materials addressing sexual abuse by staff as well as by other inmates. Furthermore, the Department is in the process of initiating further training for all staff and improved inmate orientation on this topic.

It is well recognized, as a matter of law, that an inmate cannot legally consent to sexual conduct or contact with an employee. Nevertheless, an

inmate can touch an employee in a sexual manner against that employee’s will or by force. This rule prohibits *intentional* or *forcible* touching such as groping. It does not punish an inmate for coerced sexual behavior to which an inmate is incapable of consent under Penal Law § 130.05(3)(e), defined by the Department as staff-on-inmate sexual abuse.

This rule is also intended to deter the unwanted touching of the sexual or other intimate parts of the victim – who in this case is the employee. Staff members are encouraged to report any such unwanted touching immediately in order to correct the behavior. Taking affirmative corrective action when an inmate first displays such improper conduct helps maintain clear boundaries and may prevent the escalation of the situation into staff sexual abuse.

However, in response to the comments and in recognition of the potential misinterpretation of the proposed rule, a non-substantial revision to the text of the rule has been made to more closely track Penal Law § 130.52 “Forcible Touching.”

101.11 An inmate shall not *intentionally and forcibly* touch the sexual or other intimate parts of an employee *for the purpose of degrading or abusing such employee or for the purpose of gratifying the inmate’s sexual desire. Forcible touching includes squeezing, grabbing, pinching and kissing.*

Inmate Rule 101.20: This is a revision to the existing rule regarding lewd exposure, and it intends to clarify the scope of the rule. The comments objecting to this rule are not specific, but rather are based upon the same logic as the objection to rule 101.11.

The revision to this rule recognizes that the existing rule was intended to prohibit an inmate from intentionally masturbating or exposing himself to a staff member, usually for the purpose of embarrassing or degrading that staff member. However, the Department is aware that some inmates have been issued misbehavior reports when “caught” masturbating or undressed in their cell or room by an employee making routine rounds. The revision is intended to prevent the issuance of a misbehavior report to an inmate who is inadvertently observed masturbating or with the private parts of his or her body exposed, but who was not aware that a staff member was in a position to observe the act. However, the rule recognizes that if an inmate intentionally exposes himself to an employee or engages in other lewd acts, such conduct is prohibited.

It is noted that the published text of the proposed rule did not include certain exceptions where the inmate is required to expose parts of his or her body such as for a strip frisk or medical examination. A non-substantial revision to the text of this rule has been amended.

101.20 An inmate shall not engage in lewd conduct by intentionally masturbating in the presence of an employee, or intentionally exposing the private parts of his or her body, *unless as part of a strip frisk, strip search, medical examination or other authorized purpose.*

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

**Managed Harvest for Beaver, River Otter, Mink and Muskrat**

**I.D. No.** ENV-33-05-00016-A

**Filing No.** 1119

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 19, 2005

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

**Action taken:** Amendment of sections 6.1 and 6.2 of Title 6 NYCRR.

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

**Subject:** Managed harvest for beaver, river otter, mink and muskrat.

**Purpose:** To establish beaver, river otter, mink and muskrat trapping seasons.

**Text or summary was published** in the notice of proposed rule making, I.D. No. ENV-33-05-00016-P, Issue of August 17, 2005.

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

**Text of rule and any required statements and analyses may be obtained from:** Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8919, e-mail: grbatche@gw.dec.state.ny.us

**Additional matter required by statute:** State Environmental Quality Review Act (SEQR; ECL Article 8). Establishment of trapping regulations is covered by a Final Programmatic Impact Statement (FPIS) on wildlife game species management (DEC 1980) and Supplemental Findings (DEC 1994). The proposed action does not involve significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "Type II" action under DEC's SEQR regulations (6 NYCRR § 618.2[d][5]).

#### Assessment of Public Comment

Comments submitted to the Department concerning the proposed rulemaking are summarized below, followed by the Department's response:

##### Comment

The mink season should be longer in wildlife management units 4C and 5N so that muskrat populations can grow.

##### Response

While mink are predators of muskrats (and a variety of other wildlife), low muskrat populations are primarily due to poor or degraded habitat conditions. Many areas of New York no longer support large muskrat populations because their habitats have declined due to the conversion of open areas to brush and woodlands. Also, the mink season already is several months long, opening November 25 and closing on March 15. Department staff do not believe that a longer mink trapping season would have any significant effect on muskrat populations.

##### Comment

Beaver populations should be lowered in the vicinity of Upper and Lower Cascade Lakes to protect the fishery.

##### Response

Upper and Lower Cascade Lakes are within wildlife management unit (WMU) 5F. This WMU already has a long beaver season (October 29 to March 31); lengthening an already-long season may not help to control a localized beaver problem. Regional wildlife personnel in DEC's Region 5 (which includes WMU 5F) have been notified of this specific comment so that other options may be considered.

##### Comment

Trapping seasons should open when it is easier for young people and employed adults to trap, such as on Saturdays or the day after Thanksgiving, instead of normal work or school days.

##### Response

Trapping seasons for most species open and close on a fixed calendar date, rather than on a specific Saturday/Sunday where the calendar date varies from year to year. Fixed dates are intended to make it easier for participants to remember and plan for future trapping seasons. The Department has adopted fixed opening and closing dates based on surveys of trappers that showed a majority preferred this approach. To encourage the participation of young persons in trapping, the Department will evaluate other options for enhancing trapping opportunities for school-aged trappers.

##### Comment

Otter seasons should be expanded.

##### Response

Trapping seasons for river otter are only held where otter populations are large enough to sustain harvest. Wildlife management units currently closed to otter trapping will not be opened for trapping until the Department is able to document that otter may be harvested without detriment to long-term population viability.

##### Comment

Mink and muskrat trapping should be allowed whenever the beaver season is open.

##### Response

The Department is currently examining options for providing more mink and muskrat trapping opportunity without increasing the chances of incidental taking of river otter.

## Insurance Department

### EMERGENCY RULE MAKING

#### Claims for Personal Injury Protection Benefits

**I.D. No.** INS-42-05-00016-E

**Filing No.** 1122

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 4, 2005

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

**Action taken:** Amendment of sections 65-3.12 and 65-3.13 (Regulation 68-C) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2601, 5221 and Vehicle and Traffic Law, section 2407

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

**Specific reasons underlying the finding of necessity:** Section 11 of Chapter 452 of the Laws of 2005 amended Section 5106(b) and added a new subsection (d) to Section 5106 of the Insurance Law. These sections relate to the eligible insurer's liability to pay first party benefits. Section 11 codifies the rules contained within Insurance Department Regulation No. 68 that are applicable when multiple insurers may be responsible to the claimant for the processing of first party benefits. It also enhances the current arbitration procedures to provide an expedited eligibility hearing option, when required, to designate an insurer responsible for processing the first party benefits. The amendment uses the terms "special expedited arbitration" and "applicant" when referring to the "expedited eligibility hearing" and "claimant".

Chapter 452 of the Laws of 2005 becomes effective on September 8, 2005 and it is essential that this amendment be promulgated on an emergency basis in order to have the procedures in place to implement the provisions in the law. The amendment provides the mechanism for informing applicants of the availability of the special expedited arbitration option.

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

**Subject:** Claims for personal injury protection benefits.

**Purpose:** To require insurers to issue no-fault denials with specific wording so that the applicants will be aware that they can apply for special expedited arbitration to resolve the issue of which eligible insurer is designated for first party benefits.

**Text of emergency rule:** Subdivisions (b) and (c) of Section 65-3.12 is amended to read as follows:

(b) If a dispute regarding priority of payment arises among insurers who otherwise are liable for the payment of first-party benefits, then the first insurer to whom notice of claim is given pursuant to section 65-3.3 or 65.4(a) of this Subpart, by or on behalf of an eligible injured person, shall be responsible for payment to such person. Any such dispute shall be resolved in accordance with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part. *Once an insurer concludes that it was not the first insurer contacted to provide first party benefits it shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

*If, after contacting the insurer that we advised you has primary responsibility for the payment of first party benefits, that insurer refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(c) If the source of first-party benefits is at issue because the status of the injured person as a pedestrian or an occupant of a motor vehicle is in dispute, the insurer to whom notice of claim was given or if such notice was given to more than one insurer, the first insurer to whom notice was given shall, within 15 calendar days after receipt of notice, obtain an agreement with the other insurer or insurers as to which insurer will furnish no-fault benefits. If such an agreement is not reached within the aforementioned 15 days, then the insurer to whom such notice was first given shall

process the claim and pay first-party benefits and resolve the dispute in accordance with the arbitration procedures established pursuant to section 5105 of the Insurance Law and section 65-4.11 of this Part, and the insurer to whom notice was not given first shall issue a denial of claim form (NF-10) that includes the following statement in box 33:

*If, after contacting the insurer that we advised you has primary responsibility for the payment of first party benefits, that insurer refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

Paragraphs (2), (3) and (4) of Section 65-3.13(a) are amended to read as follows:

(2) An applicant who is a named insured or a relative of a named insured covered by additional personal injury protection benefits, and who, while an operator or occupant of a motor vehicle, sustains a personal injury arising out of the use or operation of such motor vehicle outside of New York State, shall institute the claim against the insurer of the named insured or the relative. Where there is more than one insurer which would be the source of benefits, the first such insurer applied to shall process the claim, unless the insurers agree among themselves that another such insurer will accept and pay the claim initially. (See subdivision [b] of this section.) *If the insurers do not reach an agreement, then any insurer that concludes it was not the first insurer contacted to provide first party benefits shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

*If, after contacting the insurer that we advised you has primary responsibility for the payment of first party benefits, that insurer refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(3) An applicant who is a named insured or a relative of a named insured covered for additional personal injury protection benefits, and who is neither an operator nor an occupant of a motor vehicle or a motorcycle, and who sustains a personal injury through the use or operation of a motor vehicle or a motorcycle shall institute the claim against the insurer of the named insured or the relative. Where there is more than one insurer which would be the source of benefits, the first such insurer applied to shall process the claim, unless the insurers agree among themselves that another such insurer will accept and pay the claim initially. (See subdivision [b] of this section.) *If the insurers do not reach an agreement, then any insurer that concludes it was not the first insurer contacted to provide first party benefits shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

*If, after contacting the insurer that we advised you has primary responsibility for the payment of first party benefits, that insurer refuses to process your claim, you have the option to submit this dispute for expedited arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

(4) An applicant who is not a named insured or a relative of a named insured covered for additional personal injury protection benefits, and who is an occupant of an insured motor vehicle covered for additional personal injury protection benefits or a motor vehicle operated by a person covered for additional personal injury protection benefits, and who sustains a personal injury through the use or operation of the insured motor vehicle outside of New York State, shall institute the claim against the insurer of the owner or operator of the insured motor vehicle. Where there is more than one insurer which would be the source of benefits, the first such insurer applied to shall process the claim unless the insurers agree among themselves that another such insurer will accept and pay the claim initially. (See subdivision [b] of this section.) *If the insurers do not reach an agreement, then any insurer that concludes it was not the first insurer contacted to provide first party benefits shall issue a denial of claim form (NF-10) that includes the following statement in box 33:*

*If, after contacting the insurer that we advised you has primary responsibility for the payment of first party benefits, that insurer refuses to process your claim, you have the option to submit this dispute for expedited*

*arbitration by providing a written request along with a \$40.00 filing fee to the organization listed under option two on the back of this form. This arbitration is limited solely to determining the insurer to process your claim only, and it will not resolve issues regarding pending bills or consider any other defense to payment.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 1, 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

#### **Consolidated Regulatory Impact Statement**

1. Statutory authority: Sections 201, 301, 2601, 5221 and Article 51 of the Insurance Law and Section 2407 of the Vehicle and Traffic 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 2601 prohibits insurers from engaging in unfair claim settlement practices and requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. Section 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation (MVAIC) in the payment of no-fault benefits to qualified persons. Article 51 of the Insurance Law authorizes the superintendent to promulgate simplified procedures for settlement of disputes involving no-fault claims.

2. Legislative objectives: Regulation 68 contains provisions implementing Article 51 of the Insurance Law, known as the Comprehensive Motor Vehicles Insurance Reparations Act, popularly referred to as the No-Fault Law. No-fault insurance was introduced to rectify many problems that were inherent in the existing tort system utilized to settle claims, and to provide for prompt payment of health care and loss of earnings benefits. Chapter 452 of the Laws of 2005 codifies the rules contained within Insurance Department Regulation No. 68 that are applicable when multiple insurers may be responsible to the claimant for the processing of the claim for first party benefits. It also enhances the current arbitration procedures to include an expedited eligibility hearing option, when required, to designate the insurer for first party benefits.

3. Needs and benefits: When there was a dispute regarding which insurer, among two or more responsible insurers regarding who would be responsible for the payment of the claim for first party benefits to the applicant, generally the insurer that received notice of the claim first was required by regulation to furnish the benefits. When an insurer failed to comply with this regulatory requirement, the applicant's recourse was to seek resolution of the dispute in arbitration or a court of competent jurisdiction. Because of the inherent delays in the resolution of cases in arbitration and court, a faster recourse was needed to assure accident victims that the failure of one or more insurers to meet their regulatory responsibility would not result in the failure of accident victims to be swiftly compensated for their economic losses. Chapter 452 of the Laws of 2005 provides for an expedited eligibility hearing option. These rules implement the law and require an insurer to issue a denial with specific language advising the applicant of the availability of special expedited arbitration to resolve the issue of which insurer is to be designated to process the claim for first party benefits. The rules also provide the procedures for administration of the special expedited arbitration for disputes regarding the designation of the insurer for first party benefits. By providing notification of, and procedures for, administration of the special expedited arbitration, an applicant can utilize the special expedited arbitration to expeditiously resolve all disputes regarding which insurer should be liable for the payment of the claim for first party benefits.

4. Costs: The arbitration alternative is mandated by Chapter 452 of the Laws of 2005 but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because insurers and self-insurers already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13, which provide for the resolution of most "priority of payment" disputes. Any additional costs associated with these rules would be the result of claims for which insurers or self-insurers do not agree to pay first-party benefits, thus causing the applicant to go to arbitration to resolve this dispute. The additional costs would include: the costs of defending cases, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. Health care providers that

may be considered small businesses and that accept assignments should not experience any adverse effects as a result of these amendments since the rules are providing them an option of using the special expedited arbitration under certain circumstances as specified in the rules. Since these procedures are intended to expedite no-fault payments in the rare cases where there is unresolved conflict between insurers, providers should find that the procedure will save them money.

5. Local government mandates: Some local governments are self-insured for no-fault benefits and those entities will have to comply with the requirements of these rules.

6. Paperwork: To the extent that additional applicants have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on insurers and self insurers associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. The insurers and self insurers will also incur additional paperwork to comply with record retention requirements. However, it is anticipated that there will be few requests for the special expedited arbitration and therefore paperwork should be minimal.

7. Duplication: None.

8. Alternatives: This procedure is required by the recent statutory amendment.

9. Federal standards: None.

10. Compliance schedule: These rules have an immediate effective date because of the effective date of Chapter 452 of the Laws of 2005. The AAA, insurers, and self insurers will be able to implement these rules immediately upon the regulation taking effect.

#### **Consolidated Regulatory Flexibility Analysis**

1. Effect of the rule: The Insurance Department finds that these rules will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments except as noted below. The basis for this finding is that these rules are primarily directed to property/casualty insurance companies authorized 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 less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self insure losses and the Department has no information to indicate that any self-insurers are small businesses.

A health care provider and eligible injured person may agree to an assignment of benefits, which effectively transfers both the right to receive benefits and the responsibility for pursuing available remedies when claims are denied from the eligible injured person to the health care provider. Some health care providers may be considered small business.

Some local governments are self-insured for no fault benefits.

2. Compliance requirements: To the extent that additional applicants have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on health care providers in filing for special expedited arbitration and providing documentary evidence. There will be additional paperwork requirements imposed on local governments that are self insured for no-fault benefits associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. The local governments will also incur additional paperwork to comply with record retention requirements. However, the arbitration alternative is mandated by Chapter 452 of the Laws of 2005. It is anticipated that there will be few requests for the special expedited arbitration and therefore paperwork should be minimal and the procedures established by this regulation should minimize adverse impact on the parties.

3. Professional services: The health care provider and local government are not required to use professional services to comply with the rules. However, it is at their option if they wish to use attorneys for the special expedited arbitration.

4. Compliance costs: Health care providers that may be considered small businesses and that accept assignments should not experience any adverse effects as a result of these amendments since the rules are providing them an option of using the special expedited arbitration under certain circumstances as specified in the rules. Since these procedures are intended

to expedite no-fault payments in the rare cases where there is unresolved conflict between insurers, providers should find that the procedure will save them money. Additional arbitration requests may be filed against local governments who are self insured for no-fault benefits because applicants can seek the resolution of priority of payments disputes in special expedited arbitration. Such disputes will require the self-insurers to incur the costs of defending cases, reimbursing filing fees whenever the applicants prevail in whole or part and paying applicants their attorney fees. The additional cases will increase the self insured local government's costs from the American Arbitration Association. The arbitration alternative is mandated by Chapter 452 but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because self-insurers are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13. As such, it is also anticipated that the additional aforementioned costs to self-insurers should be minimal.

5. Economic and technological feasibility: Compliance with the rules should be economically and technologically feasible for health care providers since the rules are providing them an option of using the special expedited arbitration under certain circumstances as specified in the rules. Compliance with the rules by self insured local governments should be economically and technologically feasible since the rules are using the procedures already in place for disputes involving late notices to now also apply to disputes involving which insurer is to be designated to process the claim for first party benefits. In addition, the notice requirements are using a form already in use by the companies.

6. Minimizing adverse impact: This rule applies uniformly to regulated parties and is mandated by statute. This rule does not impose any additional burden on small businesses and local governments, and the Insurance Department does not believe that it will have an adverse impact on these entities.

7. Small business and local government participation: This action was not contemplated at the time of the preparation of the Insurance Department's last Regulatory Agenda because the law was enacted after the Regulatory Agenda was published. Because of the effective date of the law, immediate regulatory action has to be taken. This notice is intended to provide small businesses, local governments, and public and private entities with the opportunity to participate in the rule-making process.

#### **Consolidated 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 (10) of the State Administrative Procedure Act. Some of the home offices of these insurers and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

A health care provider and eligible injured person may agree to an assignment of benefits, which effectively transfers both the right to receive benefits and the responsibility for pursuing available remedies when claims are denied from the eligible injured person to the health care provider. Some health care providers are in rural areas.

2. Reporting, recordkeeping and other compliance requirements: To the extent that additional applicants have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on insurers and self-insurers (including local governments self-insured for no-fault benefits) associated with defending cases in special expedited arbitration and submitting legal briefs and documentary evidence. There will also be paperwork associated with reimbursing filing fees and paying applicants their attorney fees whenever the applicants prevail in whole or part. The insurers and self-insurers will also incur additional paperwork to comply with record retention requirements. To the extent that additional applicants will also have to go to arbitration to resolve priority of payment disputes, there will be additional paperwork requirements imposed on health care providers in filing for special expedited arbitration and providing documentary evidence. However, the arbitration alternative is mandated by Chapter 452 of the Laws of 2005. It is anticipated that there will be few requests for the special expedited arbitration and therefore paperwork should be minimal and the procedures established by this regulation should minimize adverse impact on the parties.

3. Costs: The arbitration alternative is mandated by Chapter 452 of the Laws of 2005 but it is anticipated that the increase in cases utilizing the special expedited arbitration to resolve priority of payments disputes will be minimal, because insurers and self-insurers (including local governments self insured for no-fault benefits) already are required to be in compliance with subdivisions (b) and (c) of section 65-3.12 and paragraphs (2), (3) and (4) of section 65-3.13, which provide for the

resolution of most "priority of payment" disputes. Any additional costs associated with these rule would be the result of claims for which insurers or self-insurers do not agree to pay first-party benefits, thus causing the applicant to go to arbitration to resolve this dispute. The additional costs would include: the costs of defending cases, reimbursing filing fees whenever the applicants prevail and paying applicants' attorney fees. These additional cases will increase the insurers' and self insurers' share of costs from the American Arbitration Association. Health care providers that may be considered small businesses and that accept assignments should not experience any adverse effects as a result of these amendments since the rules are providing them an option of using the special expedited arbitration under certain circumstances as specified in the rules. Since these procedures are intended to expedite no-fault payments in the rare cases where there is unresolved conflict between insurers, providers should find that the procedure will save them money.

4. **Minimizing adverse impact:** This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State and is mandated by statute. This rule does not impose any greater 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 action was not contemplated at the time of the preparation of the Insurance Department's last Regulatory Agenda because the law was enacted after the Regulatory Agenda was published. Because of the effective date of the law, immediate regulatory action has to be taken. This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with the opportunity to participate in the rule-making process.

#### **Consolidated Job Impact Statement**

These rules should not have any adverse impact on jobs and employment opportunities in this State since the changes made only require insurers to issue no-fault denials with specific wording so that the applicants will be aware that they can apply for special expedited arbitration to resolve the issue of which eligible insurer is designated for first party benefits and provide the procedures for administration of the special expedited arbitration for disputes regarding the designation of the insurer for first party benefits.

## **EMERGENCY RULE MAKING**

### **Arbitration**

**I.D. No.** INS-42-05-00017-E

**Filing No.** 1123

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 4, 2005

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

**Action taken:** Amendment of section 65-4.5 (Regulation 68-D) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2601, 5221 and Vehicle and Traffic Law, section 2407

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

**Specific reasons underlying the finding of necessity:** Section 11 of Chapter 452 of the Laws of 2005 amended Section 5106(b) and added a new subsection (d) to Section 5106 of the Insurance Law. These sections relate to the insurer's liability to pay first party benefits. Section 11 codifies the resolution process when multiple insurers may be responsible to the claimant for the processing of first party benefits. It also enhances the current arbitration procedures to provide an expedited eligibility hearing option, when required, to designate an insurer responsible for processing the first party benefits. The amendment uses the term "special expedited arbitration" and "applicant" when referring to the "expedited eligibility hearing" and "claimant".

Chapter 452 of the Laws of 2005 becomes effective on September 8, 2005 and it is essential that this amendment be promulgated on an emergency basis in order to have the procedures in place to implement the provisions in the law. The amendment provides the procedures for administration of the special expedited arbitration for disputes regarding the designation of an insurer for the processing of first party benefits. By making the insurers and applicants aware of these procedures, applicants will be able to utilize special expedited arbitration when there is a dispute between multiple eligible insurers over which carrier has primary responsibility for the payment of first party benefits.

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

**Subject:** Arbitration.

**Purpose:** To provide the procedures for administration of the special expedited arbitration for disputes regarding the designation of the insurer for first party benefits.

**Text of emergency rule:** Subdivision (b) of Section 65-4.5 is amended to read as follows:

(b) Special expedited arbitration. (1) Special expedited arbitration shall be available for disputes involving [the]:

(i) The failure to submit notice of claim within 30 calendar days after the accident and where it has been determined by the insurer that reasonable justification for late notice has not been established; and

(ii) The proper application of subdivisions (b) and (c) of Section 65-3.12 of this Part and of paragraphs (2), (3) and (4) of Section 65-3.13(a) of this Part.

(2) (i) An applicant may request special expedited arbitration for resolution of the dispute involving late notice within 30 calendar days after mailing of the denial of claim by the insurer stating that reasonable justification for late notice has not been established.

(ii)(a) In regard to disputes related to subdivisions (b) and (c) of Section 65-3.12 or paragraphs (2), (3) and (4) of section 65-3.13(a) of this Part, an applicant may request special expedited arbitration to designate an insurer that is responsible for processing first-party benefits and additional first party benefits, after each insurer has issued a Denial of Claim form (NF-10) stating that the insurer is not the insurer eligible to process the first-party benefits claimed.

(ii)(b) Special expedited arbitration required by clause (a) of this subparagraph shall only designate an insurer to commence processing the claim based upon the first insurer notified that is otherwise liable for the payment of first party benefits. The insurer designated by the arbitration shall retain all rights of investigation afforded under statute and regulation, and the ultimate liability for payment of benefits shall be resolved in accordance with section 65-4.11 of this Subpart.

(3) At the time of [such] a request for special expedited arbitration, the applicant shall make a complete written submission supporting his or her position. [No] Any further written submissions shall be accepted [unless requested by] into evidence at the discretion of the arbitrator.

[(3)] (4) Applications for special expedited arbitration shall be submitted to the conciliation center of the designated organization and shall comply with the requirements for initiation of arbitration contained in [paragraph 65-4.2(b)(1)] subparagraph 65-4.2(b)(1)(iii) of this Subpart.

[(4)] (5) The applicant's submission shall be forwarded by the conciliation center to the insurer within 3 business days of receipt. The insurer may provide the center with reasonable special mailing or transmittal instructions to facilitate the processing of these arbitration requests.

[(5)] (6) The insurer shall respond in writing to the applicant's submission within 10 business days after the mailing by the center. No further submissions shall be accepted unless requested by the arbitrator.

[(6)] (7) The dispute shall be resolved solely upon the basis of written submissions unless the arbitrator concludes that the issues in dispute require an oral hearing.

[(7)] (8) The arbitrator shall issue a written decision within 10 business days after receipt of all written submissions from the parties or at the conclusion of an oral hearing.

[(8)] (9) For the purpose of special expedited arbitration, the superintendent may appoint arbitrators, qualified in accordance with the provisions of this section, to serve on a per diem basis. Such arbitrators shall contract with the designated organization. The rate of per diem compensation shall be determined by the designated organization, after consultation with the no-fault arbitrator screening committee subject to the approval of the superintendent. Such arbitrators shall be independent contractors, and shall not be employees or agents of the designated organization or the Insurance Department.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 1, 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**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was

previously printed under a notice of emergency rule making, I.D. No. INS-42-05-00016-E, Issue of October 19, 2005.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-42-05-00016-E, Issue of October 19, 2005.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of emergency rule making, I.D. No. INS-42-05-00016-E, Issue of October 19, 2005.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of emergency rule making, I.D. No. INS-42-05-00016-E, Issue of October 19, 2005.

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

**Claims for Personal Injury Protection Benefits**

**I.D. No.** INS-42-05-00005-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 65-3.9 and 65-3.10 (Regulation 68-C) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2601 and 5221 and Vehicle and Traffic Law, section 2407

**Subject:** Claims for personal injury protection benefits.

**Purpose:** To delete the words “or assignee” from two sections of the regulation and the words “or the applicant’s assignee” from one section of the regulation, all following the word “applicant.”

**Text of proposed rule:** Subdivision (a) of Section 65-3.9 is amended to read as follows:

(a) All overdue mandatory and additional personal injury protection benefits due an applicant [or assignee] shall bear interest at a rate of two percent per month, calculated on a pro rata basis using a 30-day month. When payment is made on an overdue claim, any interest calculated to be due in an amount exceeding \$5 shall be paid to the applicant [or the applicant’s assignee] without demand therefor.

Subdivision (a) of Section 65-3.10 is amended to read as follows:

(a) An applicant [or an assignee] shall be entitled to recover their attorney’s fees, for services necessarily performed in connection with securing payment, if a valid claim or portion thereof was denied or overdue. If such a claim was initially denied and subsequently paid by the insurer, the attorney’s fee shall be \$80. If such a claim was overdue but not denied, the attorney’s fee shall be equal to 20 percent of the amount of the first-party benefits and any additional first-party benefits plus interest payable pursuant to section 65-3.9 of this Subpart, subject to a maximum fee of \$60.

**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:** Buffy Cheung, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5587, e-mail: bcheung@ins.state.ny.us

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

**Consensus Rule Making Determination**

The rule makes non-substantive changes to the regulation. The rule deletes the words “or assignee” from two sections of the regulation and the words “or the applicant’s assignee” from one section of the regulation, all following the word “applicant”. The change is a clarification that deletes unnecessary words since there was no intent to treat an assignee differently from an “applicant” because when there is an assignment of No-Fault benefits from an eligible injured person to a health provider, the term applicant includes both the eligible injured person (assignor) and that person’s health provider (assignee).

**Job Impact Statement**

The proposed rule change will have no impact on jobs and employment opportunities in New York State because it is a technical change only to clarify the language of the regulation.

**Department of Labor**

**NOTICE OF ADOPTION**

**License, Registration, Inspection and Filing Fees of the Division of Safety and Health**

**I.D. No.** LAB-29-05-00020-A

**Filing No.** 1112

**Filing date:** Sept. 28, 2005

**Effective date:** Oct. 19, 2005

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

**Action taken:** Amendment of Part 82 of Title 12 NYCRR.

**Statutory authority:** Labor Law, sections 21.11, 23, 27, 200, 202, 202-c, 204, 458, 462, 867; and General Business Law, section 483

**Subject:** License, registration, inspection and filing fees of the Division of Safety and Health.

**Purpose:** To increase several fee categories to ensure efficient administration, on-site inspections and issuance of certificates and licenses and more accurately cover the current processing and inspection costs and expenses.

**Text or summary was published** in the notice of proposed rule making, I.D. No. LAB-29-05-00020-P, Issue of July 20, 2005.

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

**Revised rule making(s) were previously published in the State Register** on November 17, 2004.

**Text of rule and any required statements and analyses may be obtained from:** Diane Wallace Wehner, Legal Assistant, Department of Labor, Counsel’s Office, Rm. 509, State Office Campus, Bldg. 12, Albany, NY 12240, (518) 457-4380, e-mail: diane.wehner@labor.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**Office of Mental Health**

**NOTICE OF ADOPTION**

**Public Access to Records**

**I.D. No.** OMH-31-05-00007-A

**Filing No.** 1121

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 19, 2005

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

**Action taken:** Amendment of sections 510.6(c)(3) and 510.10 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Public access to records of the Office of Mental Health.

**Purpose:** To comply with statutory changes to the Freedom of Information Law.

**Text or summary was published** in the notice of proposed rule making, I.D. No. OMH-31-05-00007-P, Issue of August 3, 2005.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## Office of Mental Retardation and Developmental Disabilities

### EMERGENCY RULE MAKING

#### Requirements Related to Criminal History Record Checks

**I.D. No.** MRD-42-05-00001-E

**Filing No.** 1113

**Filing date:** Sept. 28, 2005

**Effective date:** Sept. 28, 2005

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

**Action taken:** Addition of sections 633.22 and 633.98 and amendment of sections 635.5, 633.99, 635-10.5, 679.6, 680.12, 681.14, 687.4, 687.8, and 690.7 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 1633; and Executive Law, section 845-b

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

**Specific reasons underlying the finding of necessity:** The regulations require fingerprinting and criminal history record checks for various individuals who provide services to people with developmental disabilities in the OMRDD system. The regulations are necessary to keep certain convicted criminals, including violent felons and sexual predators, out of positions that include regular and substantial contact with people with developmental disabilities. If regulations were not adopted as an emergency measure, convicted criminals could have unrestricted and unsupervised contact with consumers as new employees or volunteers or family care providers, which would endanger the health, safety and general welfare of people receiving services. Consumers could be unnecessarily victimized by people with criminal history records for the period of time between April 1 and the earliest date that regulations could be finalized using the regular regulatory process.

**Subject:** Requirements related to criminal history record checks.

**Purpose:** To implement L. 2004, ch. 575.

**Substance of emergency rule:** • Effective September 28, 2005. Replaces similar emergency regulations that were effective April 1, 2005 and June 30, 2005.

- New provisions (compared to June 30 emergency regulations)
  - Establishes a process whereby a provider of services can be approved by OMRDD.
  - Establishes a requirement that providers of services apply to become “approved providers” by November 1, 2005 if they contract with a voluntary agency or DDSO and provide transportation services or staff. By November 1, approved providers are required to have submitted requests concerning employees hired on or after October 1.
  - Requires checks to be requested for “deemed” employees of voluntary agencies, which include employees of contractors (except for approved providers or other voluntary agencies) who are hired or begin to work for the voluntary agency on or after October 1.
  - Includes a requirement that agencies and providers of services submit an annual criminal history record check statement to OMRDD.
  - Identifies actions that OMRDD may take for non-compliance.
- Applies to all providers, including residences (ICFs, IRAs, and CRs), family care homes, day programs (day treatment, day habilitation, day training, sheltered workshops, prevocational services), HCBS waiver services, Article 16 clinics, family support services, and individualized support services.
- Applies to some entities that have a contract with OMRDD.
- Requires agencies to appoint an “authorized party” to request criminal history record checks and receive the results.
- Requires that prospective employees, volunteers, and operators that have “regular and substantial unsupervised or unrestricted physical contact” with people receiving services consent to a criminal history record check.

- Requires that agencies ask applicants about pending criminal charges, in addition to convictions.
  - Defines employees of the provider that are subject to a criminal history record check to include people that are directly employed by the provider and other people providing similar services for the provider who are employed by other entities, such as temporary employment agencies or contractors.
  - Includes a list of jobs that are presumed to include this type of contact.
  - Provides that while the results of criminal history record checks are pending, employees and volunteers may not have unsupervised physical contact with people receiving services. Regulations specify restrictions placed on “temporarily approved provisional” employees and volunteers.
  - Provides that oversight of temporarily approved provisional employees and volunteers can be provided by an employee who has completed required training in incidents and abuse, and who was employed by the agency or completed an application before April 1, 2005 or whose criminal history record check has been completed.
  - Provides that temporarily approved provisional employees and volunteers may not be assigned personal care activities which require privacy unless the employee providing oversight is in the same room.
  - Provides that temporarily approved provisional employees and volunteers may not work the night shift in a residence.
  - Requires that requests for criminal history record checks be made through OMRDD. If a person has already had a check through OMRDD, providers may be able to use an expedited process without additional fingerprinting if OMRDD criteria are met.
  - Provides that OMRDD will make a determination in each case either to issue a denial (or direct the provider to issue a denial) or not to issue a denial (or not direct the provider to issue a denial). The determination process is put on hold for pending felony charges and may be put on hold for misdemeanor charges.
  - Establishes standards for OMRDD determinations that replicate the standards in the statute, with certain specified crimes that are presumptive disqualifying crimes. A new section 633.98 lists these crimes.
  - Provides that OMRDD will send a summary of the criminal history record information to agencies, which can assist in further decision-making by the agency (such as evaluating whether the applicant provided false information about convictions or pending charges). Approved providers will not receive the summary unless OMRDD is issuing a denial.
  - Provides that once a person has had a criminal history record check, OMRDD will let the provider know about future arrests. When they are notified, providers must take appropriate steps to protect people receiving services.
  - Requires that providers notify OMRDD when employees and volunteers separate from service, so that OMRDD can remove the name from its database.
  - Makes minor changes in current requirements to assess applicant backgrounds.
- Family care homes.**
- Includes family care respite providers, and adults living in homes where respite is provided.
  - Requires prospective family care providers and people who are to reside in a family care home and who are age 18 years and older to consent to a criminal history record check (except for individuals receiving family care services).
  - Requires current family care providers and residents of a family care home to consent to a criminal history record check, at the time of recertification.
  - Establishes that checks related to family care homes are requested by the sponsoring agency (DDSOs for most family care homes) and information is received by the sponsoring agency.
  - Requires criminal history record checks for current residents at the time of their 18th birthday.
  - Requires that a criminal history record check be conducted prior to or shortly after a new adult moves into the family care home. Additional processes are specified to safeguard people receiving services before the results of the criminal history record check are received.
  - Requires notifications to OMRDD about residency and provider status so that names can be removed from the OMRDD database.

- Requires additional notifications by family care providers about changes in residents of the family care home and arrests of household members.

**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 26, 2005.

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

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

c. OMRDD's authority, as stated in Section 16.33 of the Mental Hygiene Law, to require providers of services to request that a criminal history record check be conducted in specified situations.

d. OMRDD's responsibility, pursuant to section 845-b of the Executive Law, to promulgate regulations concerning criminal history record checks.

2. Legislative Objectives: These amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 16.33 of the Mental Hygiene Law and section 845-b of the Executive Law. The promulgation of these amendments will enhance the safety of people with developmental disabilities who receive services certified, authorized, approved or funded by OMRDD. Providers of services, with some exceptions, are required to comply, including certified residences and day programs, HCBS waiver services, Medicaid Service Coordination, family support services, and individual support services.

3. Needs and Benefits: The new law and these implementing regulations require fingerprinting and criminal history record checks for prospective employees and volunteers, family care providers and adults who are to reside in a family care home.

Based on the results of the criminal history record check, individuals who have been convicted of certain types of crimes will be denied positions which involve regular and substantial unsupervised or unrestricted physical contact with people receiving services. The results of the check will also enable providers (except for "approved providers") to verify criminal history record information provided in applications and make their own determinations about employment suitability, when OMRDD has not directed the denial of the application for the "subject party."

The regulations also include measures that can be used at the discretion of the provider (except for "approved providers") to temporarily approve new applicants while the results of the criminal history record check are pending. During this time, the activities of these employees and volunteers must be monitored. In this manner, new employees can be hired while people receiving services are safeguarded.

The new law and regulations will enhance consumer safety by keeping certain known offenders who have been convicted of certain crimes out of jobs that involve regular and substantial unsupervised or unrestricted physical contact with people receiving services.

The emergency regulations extend requirements to employees of entities under contract with provider agencies.

In addition, the regulations establish mechanisms for some providers of services to become "approved providers." Providers of services that contract with agencies to provide transportation services or staff are required to apply to OMRDD to become "approved providers" by November 1, 2005.

#### 4. Costs:

a. Costs to the Agency and to the State and its local governments: OMRDD estimates that the new requirements will result in approximately 24,000 requests for a criminal history record check on an annual basis, beginning on April 1, 2005. The total annual cost is estimated to be approximately \$5,553,000. This cost includes the costs of the processing fee charged by the Division of Criminal Justice Services, which is \$75 per check, and the related costs, including administrative costs, which are incurred by OMRDD.

OMRDD estimates that approximately 94 percent of the annual aggregate cost will be eligible for Medicaid funding. Therefore, approximately \$5,219,000 of the total costs will be subject to a 50 percent Federal share, and approximately \$333,000 will be borne entirely by the State. The new requirements will therefore result in the expenditure of approximately \$2,610,000 in Federal funds, and approximately \$2,943,000 in costs to the State.

There will be no cost to local governments as a result of the new requirements.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. The new requirements will not generally result in any costs to private regulated parties.

For programs eligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be a state-paid item, so that providers will not be incurring out-of-pocket expenses. These expenses will be considered an allowable cost in the rates and fees established for the programs.

For programs ineligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be borne by the State.

OMRDD will make facilities available for fingerprints to be taken at no out-of-pocket cost to the provider or subject party. However, OMRDD is permitting the provider or subject party to choose to use another entity to take the fingerprints (e.g. a local police department or some voluntary agencies) which may charge for that service. OMRDD is not providing reimbursement for those charges, so this cost must be borne by the provider.

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

6. Paperwork: Chapter 575 of the Laws of 2004 requires two new forms to be developed for use in the process of requesting criminal history record information. The forms are an informed consent form to be completed by the subject party and the request form to be completed by the authorized party designated by the provider. Temporarily approved employees and volunteers are required to complete an attestation regarding incidents/abuse. Adults who are to reside in a family care home must provide an attestation regarding convictions and pending charges. In addition, other forms will be required by OMRDD, such as a form to designate an authorized party or forms to be completed when someone who has had a criminal history record check is no longer subject to the check.

The regulations also contain a requirement to keep a current roster of subject parties.

7. Duplication: The regulatory amendment does not duplicate existing State or federal requirements. It should be noted that the Office of Mental Health (OMH) has a similar statutory requirement and is promulgating its own regulations on this subject, as required via Chapter 575. In terms of technology, OMH and OMRDD hope to integrate systems at a later date to arrive at a single technology solution. In anticipation of that effort, OMRDD and OMH have selected the same vendor, which was already under contract to provide a LiveScan solution for a joint project between other state agencies. To facilitate future integration, a common, consistent hardware and software platform was purchased by OMH and OMRDD. Preliminary discussions to identify a partnership strategy with OMH have begun.

8. Alternatives: OMRDD had considered standards requiring that the oversight provided for temporarily approved provisional employees and volunteers could only be provided by a supervisor or someone with one year's experience. However, OMRDD determined that this requirement might be difficult for some providers to implement and would not enhance consumer safety.

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

10. Compliance Schedule: OMRDD filed a similar emergency regulation on April 1, 2005 to implement Chapter 575 of the Laws of 2004, which became effective on April 1, 2005. A subsequent emergency regulation was filed June 30, 2005.

The provisions of these emergency regulations differ from the provisions of the emergency regulations filed June 30, 2005 in the following manner:

Sec. 633.5(c) is changed to clarify that the requirement for a check of the State Central Register of Child Abuse and Maltreatment is required only if the check is permitted by state law.

Sec. 633.22(a)(1)(ii) is changed to add additional specificity.

Sec. 633.22(b) is changed to add definitions of "approved provider" and "contracts with."

Sec. 633.22(b)(4)(ii) is changed to eliminate the examples.

Sec. 633.22(b)(8) is changed to incorporate the definition of "services for the mentally disabled" from the Mental Hygiene Law.

Sec. 633.22(d)(3) is added to specify that a provider is not required to request a check regarding subject parties who are already checked as employees of approved providers or another provider agency.

Sec. 633.22(f)(1)(ix) is added to prohibit employees of approved providers from being a temporarily approved provisional employee.

Sec. 633.22(j)(2)(iv) is added to include notification of a change in subject party status among the records maintained by a provider.

Sec. 633.22(n) is added to include procedures and requirements for approved providers.

Sec. 633.22(o) is added to specify contracting restrictions.

Sec. 633.22(p) is added to require the annual submission of a criminal history record check statement. Sec. 633.22(p) also specifies actions that may be taken by OMRDD if a provider of services is not in compliance.

OMRDD intends to finalize the proposed amendments within the time frames provided for by the State Administrative Procedure Act (SAPA).

#### **Regulatory Flexibility Analysis**

1. Effect on small business: These regulatory amendments will apply to providers of services that operate all programs certified, authorized, approved or funded through contract by OMRDD, except for the State and some other specified entities. In addition, small businesses providing transportation services or staff that contract with voluntary agencies or NYS are required to comply with provisions related to "approved providers."

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

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The new law and implementing regulations require a variety of compliance activities. These activities include: developing policies and procedures, designating authorized parties, completing criminal history record check request forms, denying employment at the direction of OMRDD, reviewing the summary of criminal history record information, evaluating the safety of consumers when a subject party is subsequently arrested, developing and maintaining records, and notifying OMRDD when employees separate from service.

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

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

For programs eligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be a state-paid item, so that providers will not be incurring out of pocket expenses. These expenses will be considered an allowable cost in the rates and fees established for the programs.

For programs ineligible for Medicaid funding, the cost of obtaining criminal history record information and OMRDD review of that information will be borne by the State.

OMRDD will make facilities available for fingerprints to be taken at no out-of-pocket cost to the provider or subject party. However, OMRDD is permitting the provider or subject party to choose to use another entity to take of the fingerprints (e.g. a local police department or some voluntary agencies) which may charge for that service. OMRDD is not providing reimbursement for those charges, so this cost must be borne by the provider.

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

6. Minimizing adverse economic impact: These amendments impose no adverse economic impact on local governments. As mentioned in the

Regulatory Impact Statement, OMRDD had considered requiring that oversight could only be provided by supervisors or employees with at least one year of experience. OMRDD determined that this requirement might be difficult for some providers to implement and would not enhance consumer safety, and has minimized any related adverse economic impact on providers of services by not incorporating these qualifications for the employees providing oversight.

7. Small business and local government participation: OMRDD convened a Criminal Background Check Advisory Group which included consumer representatives, family members, and provider representatives. The group met on Nov. 8, 2004 and on March 22, 2005. In addition, the OMRDD Criminal Background Check Regulations Workgroup included provider representatives, and met on four occasions beginning in December, 2004. Presentations were made to various affected groups including the Family Care Advisory Council and the Family Support Services Advisory Council. A series of informational mailings were sent to affected providers beginning in January, 2005. OMRDD also held a series of twelve Executive Overview sessions in February and March in various locations from Buffalo to Long Island and also presented six video conferences to locations throughout the State. A series of training sessions was conducted in September, 2005 related to contractors. OMRDD has also posted relevant information on its website at [www.omr.state.ny.us](http://www.omr.state.ny.us).

OMRDD distributed similar emergency regulations in April and June, and posted the regulations on the OMRDD website. No comments were received regarding the emergency regulations.

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

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, recordkeeping or other compliance requirements on public or private entities in rural areas because of the location of their operations (rural/urban). The amendments are concerned with requiring that providers of services request criminal history record checks for prospective employees and volunteers, and that checks are requested for family care providers and adult household members of family care homes. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties because of the location of their operations. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations. Specific effects of the rule on providers of services have been discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and/or employment opportunities. It is expected that the amendments will have a modest positive impact on jobs/employment opportunities because OMRDD anticipates creating new employment opportunities to take fingerprints, to process the results of the criminal history record check, and to make determinations based on the results.

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

### **Reimbursement Methodologies**

**I.D. No.** MRD-42-05-00014-P

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

**Proposed action:** Amendment of sections 635-10.5, 671.7, 679.6, 680.12, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

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

**Subject:** Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OMRDD to include a health benefit funding initiative.

**Purpose:** To implement a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees.

**Public hearing(s) will be held at:** 10:30 a.m., Dec. 5, 2005 at Capital District Psychiatric Center, 75 New Scotland Ave., Classroom 35, Albany, NY; and 2:30 p.m., Dec. 6, 2005 at Office of Mental Retardation and Developmental Disabilities, 44 Holland Ave., Counsel's Office Conference Rm., 3rd Fl., Albany, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [omr.state.ny.us](http://omr.state.ny.us)):** The proposed regulations support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain indispensable direct care staff.

OMRDD surveyed all provider agencies to determine what health insurance they currently offer. A benchmark of health care coverage was established by OMRDD based on the results of the survey data. In recognition of health care costs already incurred, Intermediate Care Facilities (ICF) and providers of certain home and community-based waiver services which have coverage at or above the benchmark will receive a 3.0 percent increase to operating costs. Providers of most OMRDD programs and services, including ICFs and the waiver programs noted above, whose employee health care benefits are below the benchmark may apply for additional funding. Providers below the benchmark which currently offer no health benefits may apply for \$2500 per employee to establish health benefits or reduce employee out-of-pocket health-related expenses. Providers below the benchmark which currently offer health benefits to some or all employees may apply for \$325 per employee to enhance health benefits or reduce employee out-of-pocket health-related expenses. To ensure that funds granted to providers below the benchmark are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the agency governing body (Board of Directors) before any health care funds are disbursed to the agency.

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

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

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

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law by making necessary revisions to the reimbursement methodologies for Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The proposed amendments will enhance reimbursement of providers of the referenced programs and services so as to help their employees defray the ever increasing costs of health care.

3. Needs and Benefits: Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person

may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of direct care staff. Among other efforts, OMRDD has implemented annual trend factor rate enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain indispensable direct care staff.

OMRDD surveyed all provider agencies to determine what health insurance they currently offer. A benchmark of health care coverage was established by OMRDD based on the results of the survey data. In recognition of health care costs already incurred, Intermediate Care Facilities (ICF) and providers of certain home and community-based waiver services which have coverage at or above the benchmark will receive a 3.0 percent increase to operating costs. Providers of most OMRDD programs and services, including ICFs and the waiver programs noted above, whose employee health care benefits are below the benchmark may apply for additional funding. Providers below the benchmark which currently offer no health benefits may apply for \$2500 per employee to establish health benefits or reduce employee out-of-pocket health-related expenses. Providers below the benchmark which currently offer health benefits to some or all employees may apply for \$325 per employee to enhance health benefits or reduce employee out-of-pocket health-related expenses. To ensure that funds granted to providers below the benchmark are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the agency governing body (Board of Directors) before any health care funds are disbursed to the agency.

##### 4. Costs:

a. Costs to the Agency and to the State and its local governments: The amendments will result in an annual aggregate increase of approximately \$26.2 million in reimbursements to affected providers of developmental disabilities services. This \$26.2 million cost in Medicaid will be evenly shared by the State and the federal governments. For affected HCBS waiver services the estimated cost will be approximately \$17.6 million; for specialty hospitals, approximately \$10,000; for community residence facilities, approximately \$490,000; for clinic treatment facilities, approximately \$300,000; for intermediate care facilities, approximately \$6.3 million, and for day treatment facilities, approximately \$1.5 million.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There may be some administrative costs associated with implementation and continued compliance with the amendments. However, overall, the change will have a positive fiscal impact on providers of services because the revisions are designed to provide them with additional funds to be utilized to reduce the health care expenditures of their employees.

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

6. Paperwork: There will be some paperwork associated with the preparation and forwarding of information regarding agency health insurance plans and governing body or board resolutions.

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

8. Alternatives: The proposed rule making represents what OMRDD believes to be the most effective way to provide funding increases designed to address health care costs. The proposed amendments have been developed with the participation and input of the service provider community to facilitate application of the funding where it is most needed by each individual agency. The alternative would be to revise the current reimbursement methodologies with a general increase in funding which does

not specifically require that the monies must be used to reduce employee health care expenditures. However, without the agency applications and associated governing body resolutions for providers below the established benchmark, there would be no guarantee that the added funds would be applied to the intended purpose.

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

10. Compliance Schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act so as to enable an effective date of January 1, 2006. As with similar targeted funding initiatives previously adopted by OMRDD, this agency will provide information and assistance in completing the application and board resolutions required by the regulations for providers below the benchmark.

#### **Regulatory Flexibility Analysis**

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies that are providers of Home and Community-based (HCBS) Waiver Services, Specialty Hospitals, Community Residence Facilities, Clinic Treatment Facilities, Intermediate Care Facilities, and Day Treatment Facilities. The OMRDD has determined, through a review of providers' certified cost reports, that the organizations which operate such facilities or provide such services employ fewer than 100 employees at the discrete certified or authorized sites and would therefore be classified as small businesses. OMRDD estimates that approximately 500 provider agencies would be affected by the proposed amendments.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not have any negative effects on these small business service providers. In fact, the proposed amendments to the various reimbursement methodologies have been developed to increase funding provided to these small business service providers in order to enhance their capacity to provide adequate health care benefits for their employees.

Direct care staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands-on, person-to-person needs of each individual requiring care. The direct care staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct care staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

OMRDD has been working for several years to improve recruitment and retention of direct care staff. Among other efforts, OMRDD has implemented annual trend factor rate enhancements for most programs, which have enabled voluntary provider agencies to give salary increases to direct care staff. However, the rising costs of health care have disproportionately impacted workers like direct care staff with more modest salaries. For some workers, the increase in out-of-pocket health care costs may have actually exceeded recent salary increases.

The proposed regulations support and sustain provider agencies and their staff, including direct care staff that are essential to the service delivery system by directly addressing the high cost of employee health care. This funding initiative will enable agencies to address the health care costs of their employees and enhance the ability of providers to hire and retain indispensable direct care staff.

OMRDD surveyed all provider agencies to determine what health insurance they currently offer. A benchmark of health care coverage was established by OMRDD based on the results of the survey data. In recognition of health care costs already incurred, Intermediate Care Facilities (ICF) and providers of certain home and community-based waiver services which have coverage at or above the benchmark will receive a 3.0 percent increase to operating costs. Providers of most OMRDD programs and services, including ICFs and the waiver programs noted above, whose employee health care benefits are below the benchmark may apply for additional funding. Providers below the benchmark which currently offer no health benefits may apply for \$2500 per employee to establish health benefits or reduce employee out-of-pocket health-related expenses. Providers below the benchmark which currently offer health benefits to some or all employees may apply for \$325 per employee to enhance health benefits or reduce employee out-of-pocket health-related expenses. To ensure that funds granted to providers below the benchmark are expended for their intended purpose, the regulations require that agencies whose funding applications are approved by OMRDD submit a resolution from the

agency governing body (Board of Directors) before any health care funds are disbursed to the agency.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

2. Compliance requirements: For providers below the established benchmark, there will be some compliance activities associated with the submission of applications for the additional funds and the required governing body or board resolution that will ensure their appropriate expenditure. OMRDD will provide the necessary guidance and assist providers below the benchmark in completion of the required documents to minimize the necessary workload.

3. Professional services: Depending on the labor situation of the individual provider, there may be some need for the advice of a labor relations professional to implement the benefit. The amendments will not add to the professional service needs of local governments.

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

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

6. Minimizing adverse economic impact: As discussed in the Regulatory Impact Statement, the amendments will have only positive economic impacts.

7. Small business and local government participation: The proposed amendments address an area of concern for both the providers and OMRDD. OMRDD has surveyed all voluntary provider agencies regarding their various health insurance benefit plans and has worked closely with the provider community in the development of the proposed regulations. Specifically, this funding initiative and the regulatory structure surrounding its implementation have been discussed with provider representatives on OMRDD's Provider Council composed of over 40 providers and representatives of provider associations. Membership on the Provider Council is diverse and representative of agencies both large and small from various geographic locations throughout New York State. The particulars have also been discussed with the Health Insurance Committee of the Provider Council including representatives of provider associations such as the NYS Association of Community and Residential Agencies, the NYS ARC, and the Cerebral Palsy Association of NYS.

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

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of their employees. The amendments provide additional funding and will only have positive fiscal impacts for providers.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

As discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments, there will be some compliance activities associated with submission of applications for the additional funds and the required governing body or board resolution that will ensure their appropriate expenditure. OMRDD will provide the necessary guidance and assist providers below the benchmark in completion of the required documents to minimize the necessary workload.

Finally, the amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because OMRDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OMRDD's reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement a funding initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care costs of

their employees and enhance their ability to hire and retain indispensable direct care staff. While the amendments do provide additional funding for the stated purposes, they will not result in any changes to current staffing levels of the affected facilities and services. There will therefore be no effect on the numbers of jobs and employment opportunities in New York State.

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

**HCBS Waiver Day Habilitation Services**

**I.D. No.** MRD-42-05-00015-P

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

**Proposed action:** Amendment of section 635-10.5 of Title 14 NYCRR.

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

**Subject:** Fee setting for HCBS waiver day habilitation services provided under the auspices of OMRDD.

**Purpose:** To implement an efficiency adjustment applicable to the reimbursement of HCBS waiver day habilitation services.

**Text of proposed rule:** Add new paragraph 635-10.5(c)(7) to read as follows:

(7) Effective January 1, 2006 for all regions there shall be an efficiency adjustment to day habilitation programs as described herein applied as a reduction to reimbursable operating costs.

(i) A determination shall be made as to whether each provider has a surplus or loss for all its day habilitation programs.

(a) Surplus/loss shall equal the difference between costs and the greater of:

- (1) billed revenue, or
- (2) gross revenue plus or minus any prior period revenue adjustments.

(b) For purposes of this efficiency adjustment:

- (1) Revenue and costs include day habilitation transportation.
- (2) Costs, and revenue other than billed revenue, for determining the surplus/loss calculations are from the 2003 or 2003-2004 cost reporting year.
- (3) Billed revenue is from the 2003 or 2003-2004 fee period.

(ii) Regional ranking of the surplus/loss.

(a) Within each of the three regions, the surplus/loss values are ranked by provider and identified in descending order.

(b) Within each region, the ranking is divided into five groups:

<i>Region I</i>	<i>Surplus/Loss Range</i>
<i>Efficiency Group 5</i>	<i>\$622,373 or more</i>
<i>Efficiency Group 4</i>	<i>\$158,879 to \$622,372</i>
<i>Efficiency Group 3</i>	<i>\$73,343 to \$158,878</i>
<i>Efficiency Group 2</i>	<i>\$2,353 to \$73,342</i>
<i>Efficiency Group 1</i>	<i>\$2,352 or less</i>
<i>Region II</i>	<i>Surplus/Loss Range</i>
<i>Efficiency Group 5</i>	<i>\$229,056 or more</i>
<i>Efficiency Group 4</i>	<i>\$75,604 to \$229,055</i>
<i>Efficiency Group 3</i>	<i>\$70,116 to \$75,603</i>
<i>Efficiency Group 2</i>	<i>\$2,575 to \$70,115</i>
<i>Efficiency Group 1</i>	<i>\$2,574 or less</i>
<i>Region III</i>	<i>Surplus/Loss Range</i>
<i>Efficiency Group 5</i>	<i>\$206,347 or more</i>
<i>Efficiency Group 4</i>	<i>\$69,121 to \$206,346</i>
<i>Efficiency Group 3</i>	<i>\$21,400 to \$69,120</i>
<i>Efficiency Group 2</i>	<i>\$(8,598) to \$29,399</i>
<i>Efficiency Group 1</i>	<i>\$(8,599) or more</i>

(c) Each of the five groups within each region is assigned an ordinal weight.

- Group 5 = 5*
- Group 4 = 4*
- Group 3 = 3*
- Group 2 = 2*
- Group 1 = 1*

(iii) Determination of total adjustment per fee.

(a) The total of the units of service in the 2005 or 2005-2006 day habilitation fee is multiplied by the provider's assigned ordinal weight and the result is multiplied by \$0.3579

(b) The reimbursable operating costs in the fee are reduced by the amount determined in clause (a) of this subparagraph.

(iv) Exceptions to assignment of Efficiency Group.

(a) A provider which had not submitted 2003 or 2003-2004 day habilitation costs to OMRDD by June 15, 2005 shall be assigned to Group 5 in its appropriate region.

(b) A provider which initially commenced operation of day habilitation programs between January 1, 2004 and December 31, 2005 in Regions II and III or one which initially commenced operation between July 1, 2004 and December 31, 2005 in Region I shall be assigned to Group 3 in its appropriate region.

(v) Recalculation of surplus/loss.

(a) Except for providers described in clause (iv)(a) of this paragraph, a provider may request a recalculation of the surplus/loss status determined in subparagraph (i) of this paragraph.

(b) The request shall be submitted to OMRDD in writing, via certified mail, return receipt requested, within 90 days of receipt of the fee computation in which the efficiency adjustment described in this paragraph is initially applied.

(c) The request shall include the provider's justification for the recalculation and shall be accompanied by programmatic and fiscal data substantiating the request. Such fiscal cost and revenue data shall be certified. OMRDD may request additional documentation as it deems necessary.

(d) OMRDD shall recalculate the provider's surplus/loss status. Such recalculation shall be sent to the provider in writing.

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

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

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

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

**Regulatory Impact Statement**

1. Statutory Authority:

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

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

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

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law by making revisions to the fee-setting methodology for Home and Community-Based (HCBS) waiver day habilitation services for persons with developmental disabilities. The enactment of proposed amendments will ensure the timely adjustment of funding to voluntary agency providers of such day habilitation services.

This funding is necessary in order to enable voluntary agencies that provide HCBS waiver day habilitation services to maintain such services in the areas of care, treatment, rehabilitation, and training of persons with mental retardation and other developmental disabilities.

3. Needs and Benefits: From the time of their inception, OMRDD has provided funding for HCBS waiver day habilitation services. Such funding is necessary to assure the continued delivery of services to persons with developmental disabilities who need such services. The proposed amendments address the timely adjustment and appropriate continuation of such funding. Specifically, the proposed amendments revise the reimbursement

methodology to adjust payments made to providers, consistent with State mandates and goals for increased operational efficiency.

OMRDD determined that it could adjust fees for HCBS waiver day habilitation services to encourage efficiencies in operation and still adequately reimburse voluntary agency operators of these programs. OMRDD has also decided to make such adjustments to the fees in time for the January 1, 2006 beginning of the fee year for programs in Regions II and III in order to minimize disruption.

4. Costs:

a. Costs to the Agency and to the State and its local governments: As of September 2005, there were 263 voluntary providers certified by OMRDD to provide HCBS waiver day habilitation services to approximately 23,000 consumers in New York State. The estimated cost to the State of New York on an aggregate basis is approximately \$423 million for the fee periods beginning January 1, 2006 and July 1, 2006. The efficiency adjustment implemented by the proposed amendments is expected to result in an estimated decrease in funding for HCBS waiver day habilitation services of approximately \$7.6 million on an annual aggregate basis. This represents a savings of approximately \$3.7 million in Federal funds and \$2.5 million in State funds. The decrease in overall funding will also result in a savings of approximately \$1.4 million divided among the counties, over what would otherwise have been expended by local governments for their share of these services.

b. Costs to private regulated parties: As stated, HCBS waiver day habilitation program will experience a reduction in reimbursements of approximately \$7.6 million on an annual aggregate basis as a result of the proposed amendments. OMRDD estimates that, on a statewide statistical average, such a day habilitation program would experience an average annual reduction in reimbursement of approximately \$295 per person served, based on an estimated 215 days of service per year. This reduction would need to be addressed by increased efficiencies in operations. There are no initial capital investment costs nor initial non-capital expenses. There are no other costs associated with implementation and continued compliance with the amendments.

These estimated cost impacts have been derived by applying the proposed revisions in the reimbursement methodology for HCBS waiver day habilitation services to the current levels of funding for programs certified as of September, 2005.

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

6. Paperwork: No additional paperwork will be required by the proposed amendments. The changes to the reimbursement will only change the fee-setting provisions for HCBS waiver day habilitation services.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to HCBS waiver day habilitation programs.

8. Alternatives: The only alternative would be to leave the current reimbursement methodology unchanged, and to not make the adjustment which OMRDD considers possible. The enactment of these proposed amendments reflects what OMRDD believes to be fiscally prudent, cost-effective adjustments to the reimbursement of HCBS waiver day habilitation services. The proposed changes implement variable functions and measures which represent OMRDD's best effort at adjusting fees of reimbursement for HCBS waiver day habilitation services in a way that will accommodate the realization of operational efficiencies where they can best be achieved and afforded, and in the most equitable distribution possible.

Through the weighting of values used in calculating the efficiency adjustment, there will be a greater impact on providers with surpluses and a lesser impact on providers with losses.

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

10. Compliance Schedule: OMRDD expects to adopt the proposed amendments so as to implement the revisions to the HCBS waiver day habilitation services reimbursement methodology in time for the beginning of the new fee periods of January 1, 2006 and July 1, 2006.

**Regulatory Flexibility Analysis**

1. Effect on small business: These proposed regulatory amendments will apply to voluntary not-for-profit corporations that provide HCBS waiver day habilitation services to persons with developmental disabilities in New York State. As of September 2005, there were 263 voluntary providers certified by OMRDD to provide such day habilitation services to approximately 23,000 consumers in New York State.

The OMRDD has determined, through a review of the certified cost reports, that the organizations which provide these HCBS waiver day habilitation services employ fewer than 100 employees at the discrete certified sites and would, therefore, be classified as small businesses.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses. OMRDD has determined that these amendments will not cause undue hardship to providers due to increased costs for additional services or increased compliance requirements.

2. Compliance requirements: There are no additional compliance requirements resulting from the implementation of these proposed amendments. The proposed amendments revise the reimbursement methodology for HCBS waiver day habilitation services to adjust payments made to providers, consistent with State mandates and goals for increased operational efficiency. While operators of the referenced facilities will need to address adjustments in funding through increased operational efficiencies, the amendments do not specifically impose any new requirements with which regulated parties are expected to comply.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports certified by licensed or public accountants. The proposed amendments do not alter this requirement. Therefore, no additional professional services are required as a result of these amendments.

4. Compliance costs: There are no additional compliance costs to regulated parties associated with the implementation of, and continued compliance with, these amendments.

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

6. Minimizing adverse economic impact: The purpose of these proposed amendments is to revise the reimbursement methodologies of the referenced programs and services to adjust payments made to providers, consistent with State mandates and goals for increased operational efficiency. OMRDD determined that it could adjust rates for HCBS waiver day habilitation services to encourage efficiencies in operation and still adequately reimburse voluntary agency providers of such services. The proposed amendments which implement variable functions and measures to adjust the day habilitation reimbursement methodology represent OMRDD's best effort at adjusting fees of reimbursement in a way which will accommodate the realization of efficiencies where they can best be achieved and afforded, and in the most equitable distribution possible. Through the weighting of values used in calculating the efficiency adjustment, there will be a greater impact on providers with surpluses and a lesser impact on providers with losses.

OMRDD has filed these amendments so as to enable their effective date to coincide with the beginning of fee periods for HCBS waiver day habilitation providers in Regions II and III, thus minimizing confusion and disruption associated with the changes.

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

7. Small business participation: In an effort to include small businesses as much as possible in the decisionmaking process, OMRDD has continued to meet regularly with the Commissioner's Provider Council. At these meetings, OMRDD has discussed with providers and representatives of provider associations that make up the council with accounts of the changes to the methodology being considered to achieve the desired efficiencies.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis for these proposed amendments is not being submitted because the amendments will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. There will be no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments. While the efficiency adjustment contained in the proposed amendments may have a slight adverse fiscal impact on providers of HCBS waiver day habilitation services, the geographic location of any given program (urban or rural) will not be a contributing factor to any such impact.

This is because the reimbursement methodology OMRDD uses to reimburse HCBS waiver day habilitation services is primarily based upon reported historical costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same geographic area. In addition, OMRDD's rate/fee-setting methodologies, including that used

for HCBS waiver day habilitation services, already consider and adjust for three geographic areas when regional comparisons are involved in determining reimbursable costs. They are: Region I (New York City), Region II (New York City Suburban) and Region III (Upstate New York). Thus, this reimbursement methodology, and the efficiency adjustment contained in the proposed amendments, have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

**Job Impact Statement**

A Job Impact Statement for these proposed amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and employment opportunities. The proposed rule making revises the reimbursement methodology for HCBS waiver day habilitation services to implement an efficiency adjustment. As is apparent from the information provided in the Regulatory Impact Statement, the efficiency adjustment will result in a reduction in reimbursements to providers of HCBS waiver day habilitation services that represents only a fraction of one percent of the total funding provided to these programs. The magnitude of the efficiency adjustment is, therefore, very unlikely to affect the staffing patterns of these facilities in any significant way.

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## Metropolitan Transportation Authority

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### NOTICE OF ADOPTION

**Unauthorized Sale of Transportation Services**

**I.D. No.** MTA-32-05-00016-A  
**Filing No.** 1118  
**Filing date:** Oct. 4, 2005  
**Effective date:** Oct. 19, 2005

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

**Action taken:** Addition of sections 1040.13, 1050.13, 1085.16 and 1097.16 to Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1203-a, 1204 and 1266

**Subject:** Penalties for the new crime of unauthorized sale of transportation services.

**Purpose:** To provide additional public notice.

**Text or summary was published** in the notice of proposed rule making, I.D. No. MTA-32-05-00016-P, Issue of August 10, 2005.

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

**Text of rule and any required statements and analyses may be obtained from:** Robin Bergstrom, Associate Counsel, Metropolitan Transportation Authority, 347 Madison Ave., New York, NY 10017, (212) 878-7317, e-mail: rbergstr@mtahq.org

**Assessment of Public Comment**

Only one comment relevant as to the proposed rule was received: A transit rider commented in support of the rule.

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## Department of Motor Vehicles

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

**All Terrain Vehicle Registration**

**I.D. No.** MTV-42-05-00006-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 Part 103 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 2290

**Subject:** All terrain vehicle registration.

**Purpose:** To comply with L. 2005, ch. 59.

**Text of proposed rule:** Subdivisions (a), (f) and (h) of Section 103.2 are amended to read as follows:

(a) Application for registration. *Every ATV sold by a dealer shall be registered at the time of sale by such dealer.* An application for an original registration of an ATV or any registration transaction other than a renewal may be made by mailing or delivering a properly completed application for such registration, the proper fee and appropriate documentation to any district office of the department or any office of a county clerk acting as agent of the commissioner for the issuance of ATV registrations. An application for the renewal of an ATV registration should be made in accordance with the directions contained on the renewal application mailed by the department to the registrant.

(f) Period of validity of registration. Every ATV registration issued shall expire on the [April 30th] *August 31st* after it has been issued, except that an ATV registration issued [during the months of March and April] *after April 1st* of any year may be issued to expire on the [April 30th] *August 31st* of the year following the year of issuance. The expiration date of the registration shall appear on the registration certificate and the month and year of expiration shall appear on the validating sticker issued for that registration.

(h) Fees. The fee for any original ATV registration [of 12 or fewer calendar months' duration] shall be \$10. [The fee for any original ATV registration of 13 or 14 months' duration shall be \$20.] The fee for the reregistration of any ATV shall be \$10. The fee for renewal of any ATV registration shall be \$10. *Annual fees shall not be prorated, and such fees shall be applicable to a year or any portion of a year.* The fee for a duplicate registration document, registration plate or validating sticker shall be \$3. The fee for a plate surrendered to a county clerk shall be \$1. In addition to the above fees, there shall be a fee of [\$3.25] *\$7.50* whenever any ATV number plate is issued.

Paragraph (4) of subdivision (e) of Section 103.2 is amended to read as follows:

(4) The validating sticker shall be placed in the [upper] center *right* of the number plate and such plate shall be placed on the rear of the ATV so as to be visible from the rear of the ATV.

A new subdivision (i) is added to section 103.2 to read as follows:

(i) *Additional fee. On and after July 11, 2005, the commissioner shall collect an additional \$15 for each individual resident and non-resident registration, and each renewal thereof. Such additional fee shall be deposited to the credit of the All Terrain Trail Development, Enforcement and Stewardship Fund as established by section 92-o of the State Finance Law. This additional fee shall also be collected from dealers at the time of original registration and at the time of each renewal.*

Subdivision (e) of Section 103.3 is amended to read as follows:

(e) As hereinafter provided, a registered dealer must provide the transferee with acceptable evidence of ownership and bill of sale which conforms to the requirements of subdivision (f) of this section. [A dealer may, with the consent of the transferee, act on behalf of the transferee to effectuate the registration of the transferred ATV.]

**Text of proposed rule and any required statements and analyses may be obtained from:** Michele L. Welch, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

**Data, views or arguments may be submitted to:** Sean J. Martin, Assistant Counsel, Department of Motor Vehicles, Empire State Plaza, Swan St. Bldg., Rm. 526, Albany, NY 12228, (518) 474-0871, e-mail: mwelc@dmv.state.ny.us

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

**Consensus Rule Making Determination**

The proposed regulation would amend 15 NYCRR 103.2(f) and (h) and add a new (i) to that Part so as to implement new requirements set forth in the Vehicle and Traffic Law that were passed as part of the 2005 State Budget. That legislation required that ATVs must be registered at the time of sale, and that an additional fee of \$15.00 be collected at the time of such registration and at each renewal. The monies generated by the additional fee are to be deposited to the credit of the All Terrain Vehicle Trail

Development, Enforcement and Stewardship Fund established by Section 92-o of the State Finance Law. Revenues in such fund are to be used to create new and enhance existing ATV trails and to aid in enforcing laws regulating ATV operation on said trails.

This is a consensus rule because the Commissioner has no discretion about whether to collect the additional fees or to allow for a different time or times for ATV registration. DMV is merely carrying out the will expressed by the State Legislature and the Governor.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this regulation because the amendment will not result in a substantial adverse impact on jobs and employment opportunities. The amendment, necessary to implement Chapter 59 of the Laws of 2005 concerns the registration of all terrain vehicles and the collection of a trail maintenance fee.

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## Committee on Open Government

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

#### **Access to Records**

**I.D. No.** COG-42-05-00003-P

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

**Proposed action:** This is a consensus rule making to amend section 1401.5(c)(3) and (e)(4) of Title 21 NYCRR.

**Statutory authority:** L. 2005 ch. 22; and Public Officers Law, section 89(3)

**Subject:** Access to records.

**Purpose:** To conform with amendments to law.

**Text of proposed rule:** Subdivision (c)(3) of section 1401.5 is amended to read as follows:

(3) acknowledging the receipt of a request in writing, including an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than twenty *business* days after the date of the acknowledgment, or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgment, providing a statement in writing stating the reason for inability to grant the request within that time and a date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part; or

Subdivision (e)(4) of section 1401.5 is amended to read as follows:

(4) fails to respond to a request within a reasonable time after the approximate date given or within twenty *business* days after the date of its acknowledgment of the receipt of a request;

**Text of proposed rule and any required statements and analyses may be obtained from:** Janet Mercer, Department of State, Committee on Open Government, 41 State St., Albany, NY 12231, (518) 474-2518, e-mail: jmercer@dos.state.ny.us

**Data, views or arguments may be submitted to:** Robert J. Freeman, Department of State, Committee on Open Government, 41 State St., Albany, NY 12231, (518) 474-2518, e-mail: rfreeman@dos.state.ny.us

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

#### **Consensus Rule Making Determination**

The purpose of the rule is to conform the language of sections 1401.5(c)(3) and 1401.5(e)(4) of Title 21 NYCRR to requirements found in subdivision 3 of section 89 of the Public Officers Law. These requirements concern agency responses to requests for records. No person is likely to object to the adoption of the proposed rule because it merely reconciles regulatory provisions with statutory language and is otherwise non-controversial.

#### **Job Impact Statement**

The purpose of the rule is to conform the language of sections 1401.5(c)(3) and 1401.5(e)(4) of Title 21 NYCRR to requirements found in subdivision 3 of section 89 of the Public Officers Law. These requirements concern

agency responses to requests for records. It is therefore apparent from the nature and purpose of the rule that it will not have a substantial impact on jobs and employment opportunities.

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## Office of Parks, Recreation and Historic Preservation

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

#### **Authorized Vehicles on Certain Long Island Parkways**

**I.D. No.** PKR-42-05-00002-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 section 415.6 of Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, section 3.09(8)

**Subject:** Authorized vehicles on certain Long Island parkways.

**Purpose:** To re-route truck traffic so that it avoids a stretch of parkway that has low height clearance.

**Text of proposed rule:** Subdivision (f) of section 415.6 of Title 9 NYCRR is AMENDED to read as follows.

(f) Trucks or trailers will be permitted to operate on the Montauk *Loop, Bay, and Ocean Parkways*, [and over] on the Meadowbrook [and Hecksher]Parkway[s] south of [Sunrise Highway] *Merrick Road (State Route 27A)* and [over]on the Robert Moses *Causeway, Hecksher Spur, and Wantagh Parkway South of Sunrise Highway (State Route 27)*, [Loop and Ocean Parkways south of Merrick Road] where it is necessary for them to do so to service and supply such areas or contiguous areas. Any vehicle or equipment or combination thereof exceeding 8 feet in width, 13 feet in height, 50 feet in length or having a weight greater than 22,400 pounds on any one axle shall not be operated over the aforesaid parkways, including bridges incidental thereto, except under written permit issued by the commissioner.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeffrey A. Meyers, Associate Attorney, Counsel's Office, Office of Parks, Recreation and Historic Preservation, Agency Bldg. 1, 19th Fl., Empire State Plaza, Albany, NY 12238, (518) 486-2921, e-mail: jeffrey.meyers@oprhp.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**

The Office of Parks, Recreation and Historic Preservation (OPRHP) has determined that these amendments to Title 9 NYCRR meet the qualifications for a consensus rule making, as no person is likely to object to their adoption. The rule change re-routes truck traffic so that it avoids a stretch of Parkway that has low height clearance.

The amendment of Section 415.6(f) would eliminate a recurring problem that exists on the Meadowbrook and Wantagh Parkways. Currently, the height clearance between Route 27A and Sunrise Highway on each Parkway is too low for truck traffic and many truck accidents have occurred at these locations. The resulting delays from truck accidents are enormous and effect all traffic on the Parkways. Traffic delays cause an increase in fuel consumption by cars and trucks waiting for the accident to be cleared and cause havoc in the schedules of all users of the Parkway. By changing the rule to allow truck traffic on the Parkways as indicated in the text, such accidents will be prevented, thereby assisting in the flow of commercial traffic in the area. Sufficient alternate routes exist in the area to accommodate the truck traffic that would be diverted. Once the rule change is in effect, appropriate signage will be placed to guide commercial traffic on a safe and appropriate route.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because the Office of Parks, Recreation and Historic Preservation has determined that the change to the regulation will not have a substantial adverse impact on

jobs and employment opportunities. The amendment of Section 415.6(f) would eliminate a recurring problem that exists on the Meadowbrook and Wantagh Parkways. Currently, the height clearance on Route 27A and Sunrise Highway on each Parkway is too low for truck traffic and many truck accidents have occurred at these locations. The resulting delays from truck accidents are enormous and effect all traffic on the Parkways. Traffic delays cause an increase in fuel consumption by cars and trucks waiting for the accident to be cleared and cause havoc in the schedules of all users of the Parkway. By changing the rule to allow truck traffic on the Parkways as indicated in the text, such accidents will be prevented, thereby assisting in the flow of commercial traffic in the area. Sufficient alternate routes exist in the area to accommodate the truck traffic that would be diverted. Thus, the change to the regulation would only have a positive effect upon on jobs and employment opportunities in the State of New York.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### System Average Interruption Frequency Index (SAIFI) by Central Hudson Gas & Electric Corporation

**I.D. No.** PSC-18-03-00003-A

**Filing date:** Sept. 30, 2005

**Effective date:** Sept. 30, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 00-E-1273 denying a request from Central Hudson Gas & Electric Corporation (Central Hudson) to utilize a different methodology for measuring targets established for the System Average Interruption Frequency Index (SAIFI), for the calendar year ending Dec. 31, 2002, under its current rate plan.

**Statutory authority:** Public Service Law, sections 5(1)(b) and (2), 65(1), 66(1), (2), (3), (5) and (9)

**Subject:** Authorization to utilize an alternate method for measuring SAIFI.

**Purpose:** To deny Central Hudson's request to utilize an alternate method for measuring SAIFI.

**Substance of final rule:** The Commission denied Central Hudson Gas & Electric Corporation's (Central Hudson) request to utilize a different methodology for measuring targets established for the System Average Interruption Frequency Index (SAIFI), for the calendar year ending December 31, 2002, under its current rate plan, and directed Central Hudson to make and account for the rate adjustments due ratepayers, incurred as a result of its failure to meet reliability performance targets in 2002 and 2004, 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.

(00-E-1273SA5)

### NOTICE OF ADOPTION

#### Major Electric Rate Increase by the City of Jamestown Board of Public Utilities

**I.D. No.** PSC-07-05-00010-A

**Filing date:** Sept. 29, 2005

**Effective date:** Sept. 29, 2005

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

**Action taken:** The commission, on Sept. 21, 2005, adopted an order in Case 04-E-1485 approving the City of Jamestown Board of Public Utilities' (BPU) request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 6—Electricity.

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

**Subject:** Three-year rate plan for BPU.

**Purpose:** To approve a three-year rate plan for BPU.

**Substance of final rule:** The Commission approved the terms of a three-year rate plan for the City of Jamestown Board of Public Utilities (BPU), beginning November 1, 2005, and directed BPU to file on not less than one day's notice, to take effect on a temporary basis on November 1, 2005, such electric tariff amendments as are necessary to effectuate Year 1 Rates as contained in the Joint Proposal, and to file such further amendments to effectuate Year 2 and Year 3 Rates as contained in the Joint Proposal. Such further tariff amendments shall be filed on not less than thirty days' notice to be effective on a temporary basis on November 1, 2006 and November 1, 2007, respectively, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-E-1485SA1)

### NOTICE OF ADOPTION

#### Pole Attachment Application Fees by InSITE Solutions, LLC

**I.D. No.** PSC-23-05-00011-A

**Filing date:** Sept. 30, 2005

**Effective date:** Sept. 30, 2005

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

**Action taken:** The commission, on Sept. 21, 2005, adopted an order concerning InSITE Solutions, LLC's complaint against Orange & Rockland Utilities, Inc. and Frontier Communications of New York, Inc. regarding pole attachment application fees.

**Statutory authority:** Public Service Law, section 119-a

**Subject:** Pole attachment application fees.

**Purpose:** To address a complaint regarding pole attachment application fees.

**Substance of final rule:** The Commission approved a petition of InSITE Solutions, LLC, in part, regarding pole attachment application fees charged by Frontier Communications of New York, Inc. (Frontier) and directed Frontier not to charge a separate pole attachment application fee if it does not change its accounting for the fee to accounts unrelated to elements of the pole attachment rate. The complaint against Orange & Rockland Utilities, Inc. regarding its pole attachment application fees is denied in all respects, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-C-0207SA1)

**NOTICE OF ADOPTION****Direct Load Control Pilot Program by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-27-05-00009-A

**Filing date:** Sept. 28, 2005

**Effective date:** Sept. 28, 2005

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

**Action taken:** The commission, on Sept. 21, 2005, adopted an order in Case 00-E-2054 approving a request by Consolidated Edison Company of New York, Inc. (Con Edison) to expand its pilot small business Direct Load Control (DLC) Program.

**Statutory authority:** Public Service Law, sections 2, 4, 5, 65 and 66

**Subject:** Con Edison's DLC Pilot Program.

**Purpose:** To approve Con Edison's request for the expansion of its DLC Pilot Program for small business customers.

**Substance of final rule:** The Commission approved a request by Consolidated Edison Company of New York, Inc. (Con Edison) to expand its Direct Load Control Pilot Program for small business customers and allowed Con Edison to recover associated costs through the Monthly Adjustment Clause, net of any related payments received from any other source, 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. (00-E-2054SA33)

**NOTICE OF ADOPTION****Implementation of Provisions of the Public Officers Law**

**I.D. No.** PSC-27-05-00019-A

**Filing No.** 1114

**Filing date:** Sept. 29, 2005

**Effective date:** Sept. 29, 2005

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

**Action taken:** Amendment of section 5.8(e) and Part 6 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 20(1); and Public Officers Law, sections 87(1)(b), 94(2)

**Subject:** Amendments to 16 NYCRR Part 6 and section 5.8(e).

**Purpose:** To bring the regulatory provisions into conformance with the Public Officers Law as amended, repeal obsolete provisions and make technical corrections to addresses and other regulatory provisions.

**Substance of final rule:** The Commission adopted amendments to Title 16 NYCRR Section 5.8(e) and Part 6 to bring the Commission's rules into conformance with the Public Officers Law as amended. The revision to Part 6 repeals obsolete provisions and makes technical corrections to update addresses and regulatory provisions. The revision to 16 NYCRR Section 5.8(e) updates this provision regarding discovery in light of the amendments to Section 6-1.4.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 6-1.3(b)(1), (c)(5) and 6-1.4(c).

**Text of rule and any required statements and analyses may be obtained from:** Elaine Lynch, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 486-2660, Jaclyn A.

Brilling, Acting Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

**Assessment of Public Comment**

One comment was received from Verizon New York Inc. (Verizon) asking for:

(1) Expansion of § 5.8(e) to cover all types of information protectible under the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6;

(2) Correction of errors in proposed §§ 6-1.3(b)(1), (c)(5) and 6-1.4(c); and

(3) Replacement of "Confidential" with "Protected" in various provisions of §§ 6-1.3 and 6-1.4.

Verizon agrees that appropriate protection is provided to the categories of information set forth in proposed § 5.8(e). It asserts, however, that the subdivision should be amended "to protect other types of information . . . if FOIL calls for their protection."

Verizon's request for a further amendment to § 5.8(e) is beyond the scope of this proceeding, the purpose of which is to consider how best to bring our regulations into conformance with POL provisions and to make technical corrections. Since 1983, when we adopted regulations implementing FOIL, the regulations have provided special procedures applicable in proceedings with administrative hearings for the handling of those records allegedly containing trade secrets. These procedures are similar to the special procedures specified in POL § 89(5) for the handling of alleged trade secrets and confidential commercial information by state agencies. In 1992, when regulations regarding discovery were adopted, it was decided to provide in § 5.8(e) that claims that information sought is exempt from discovery on the ground that it is a trade secret shall be treated in accordance with § 6-1.4. By contrast, different procedures were specified regarding the discovery of other information protectible under FOIL in § 5.8(d) and (f). Consistent with our previous determination that special discovery procedures apply when information described in POL § 89(5) is involved, and given the recent amendment to that statutory provision, we will amend § 5.8(e), as proposed, to apply to critical infrastructure information and confidential commercial information,<sup>1</sup> as well as trade secrets. We will not adopt the expansion of § 5.8(e) proposed by Verizon.

Verizon claims that § 6-1.3(b)(1) contains an error in that it refers only to critical infrastructure information and Verizon requests correction of this error. Actually, the provision refers to trade secrets and critical infrastructure information. For the sake of completeness, however, references to confidential commercial information will also be added.

Similarly, Verizon asserts that §§ 6-1.3(c)(5) and 6-1.4(c) erroneously refer to the status of "trade secret" information, whereas more than one category of information was meant. Verizon is correct and we will amend the regulations accordingly.

Verizon contends that, in various provisions of §§ 6-1.3 and 6-1.4, the word "confidential" should be replaced by "protected" to avoid confusion, because one of the categories protected under FOIL is "confidential commercial information." Even before the proposed revisions to the regulations, however, §§ 6-1.3(e)(2) and 6-1.4(a)(3) and (b)(3) referred to "confidential" status. Moreover, "protected" might be understood as referring to portions of records other than those reflected in POL § 89(5). Therefore, we will not adopt Verizon's proposal.

<sup>1</sup> It is not clear whether "trade secrets" and "confidential commercial information" constitute one or two categories of information; however, because they are specified separately in POL § 87(2)(d), which is referred to in POL § 89(5), we will specify them separately in our regulations.

(05-M-0603SA1)

**NOTICE OF ADOPTION****Request for Accounting Authorization to Defer Expenses by the Village of Freeport**

**I.D. No.** PSC-29-05-00024-A

**Filing date:** Sept. 28, 2005

**Effective date:** Sept. 28, 2005

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

**Action taken:** The commission, on Sept. 21, 2005, adopted an order in Case 05-E-0760 approving the petition of the Village of Freeport's Electric Department for accounting deferral.

**Statutory authority:** Public Service Law, sections 5(b), 65(1) and 66(1), (5), (9) and (12)

**Subject:** Uniform system of accounts—request for accounting authorization.

**Purpose:** To allow the Freeport Electric Department to defer expenses beyond the end of the current fiscal year.

**Substance of final rule:** The Commission approved the petition of the Village of Freeport's Electric Department for permission to defer \$539,800 of incremental pension and sick/vacation benefit expenses and off-set the incremental pension and sick/vacation expenses against the outstanding accumulated off-system sales credits due to customers, subject to the terms 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-E-0760SA1)

**NOTICE OF ADOPTION**

**Transfer of Ownership Interests by New York State Electric and Gas Corporation**

**I.D. No.** PSC-29-05-00025-A

**Filing date:** Sept. 29, 2005

**Effective date:** Sept. 29, 2005

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

**Action taken:** The commission, on Sept. 21, 2005, adopted an order approving a petition of New York State Electric and Gas Corporation to transfer ownership of two existing photovoltaic systems.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of ownership interests in solar electric generating facilities.

**Purpose:** To transfer ownership interests in solar electric generating facilities.

**Substance of final rule:** The Commission approved a petition of New York State Electric and Gas Corporation to transfer its ownership interests in two solar electric generating facilities.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0473SA1)

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

**Debt Service Surcharge to a Capital Improvement Surcharge by Cambridge Water Works Company**

**I.D. No.** PSC-42-05-00007-P

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

**Proposed action:** The commission is considering whether to grant, deny or modify, in whole or in part the request of Cambridge Water Works Company to restructure its debt service surcharge used to service principal and interest payments on bonds issued through the Environmental Facilities Corporation into a capital improvement surcharge to recover the remaining debt balance after the bonds were retired.

**Statutory authority:** Public Service Law, sections 89-c(10)(b), (e), 89-f

**Subject:** Debt service surcharge to a capital improvement surcharge.

**Purpose:** To restructure its debt service surcharge to a capital improvement surcharge to recover the remaining balance on its debt service surcharge.

**Substance of proposed rule:** The Commission is considering whether to grant, deny or modify, in whole or in part the request of Cambridge Water Works Company to restructure its Debt Service Surcharge used to service principal and interest payments resulting from bonds issued through the NYS Environmental Facilities Corporation into a Capital Improvement Surcharge to recover the remaining debt balance after the bonds were retired.

**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-W-1211SA1)

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

**Quarterly Surcharge by Arbor Hills Waterworks, Inc.**

**I.D. No.** PSC-42-05-00008-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, Arbor Hills Waterworks, Inc.'s request to institute a quarterly surcharge of \$296 per customer for a three year period to establish an escrow account to fund about \$238,000 of capital improvements.

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

**Subject:** Surcharge to fund an escrow account for capital improvements.

**Purpose:** To approve a quarterly surcharge of \$296 per customer for a three year period to establish an escrow account to fund about \$238,000 of capital improvements.

**Substance of proposed rule:** On September 20, 2005, Arbor Hills Waterworks, Inc. (Arbor Hills) filed for a surcharge of \$296 per customer per quarter for a three year period to establish an escrow account to fund about \$238,000 of capital improvements. Arbor Hills is about to begin a multi-year construction program to replace two of its wells, add additional storage, install the required booster pumping capacity and all necessary controls. It is estimated that this work will cost about \$238,000. The work will be done in stages as funds become available in the escrow account. Arbor Hills provides water service to 67 customers in a real estate development known as Arbor Hills in the Town of Lewisboro, Westchester County. Arbor Hills' tariff and proposed tariff amendment 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 the Commission Documents - Tariffs. The Commission may approve or reject, in whole or in part, or modify Arbor Hills' request.

**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-W-1143SA1)

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

**Water Rates and Charges by Wellesley Island Water Corp.**

**I.D. No.** PSC-42-05-00009-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a request filed Wellesley Island Water Corp. to adopt the tariff of The Thousand Islands Club Water Company, Inc. and to authorize a surcharge mechanism to collect \$108,000 for the capital work including the bypass of the existing water storage tank.

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

**Subject:** Water rates and charges.

**Purpose:** To adopt the tariff of The Thousand Islands Club Water Company, Inc. and assess a surcharge to collect \$108,000 for the capital work including the bypass of the existing water storage tank.

**Substance of proposed rule:** On October 3, 2005, Wellesley Island Water Corp. (Wellesley or the company), subsequent to its acquisition of The Thousand Islands Club Water Company, Inc. (Thousand Islands), filed a petition requesting permission to adopt the tariff of Thousand Islands. The company is also requesting permission to authorize a surcharge mechanism to collect \$108,000 for the capital work including the bypass of the existing water storage tank. Wellesley is proposing to surcharge all its customers and is currently serving approximately 207 customers. Both water systems are located on the southeast portion of Wellesley Island, Town of Alexandria, Jefferson County. The Commission may approve or reject, in whole or in part, or modify the company's request.

**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-W-1121SA1)

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

**Electronic Data Interchange Testing by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI**

**I.D. No.** PSC-42-05-00010-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 filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI (KeySpan) to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 1.

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

**Subject:** Deposit required by ESCO for electronic data interchange testing.

**Purpose:** To require a deposit from an energy services company in order for them to be able to participate in electronic data interchange testing with the Public Service Commission and KeySpan.

**Substance of proposed rule:** The Commission is considering KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI's (KeySpan) request to require an ESCO to pay a deposit in order for the ESCO to be allowed to participate in Electronic Data Interchange Testing with both the Public Service Commission and KeySpan.

**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-G-1226SA1)

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

**Electronic Data Interchange Testing by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY**

**I.D. No.** PSC-42-05-00011-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY (Brooklyn Union) to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12.

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

**Subject:** Deposit required by ESCO for electronic data interchange testing.

**Purpose:** To require a deposit from an energy services company in order for them to be able to participate in electronic data interchange testing with the Public Service Commission and Brooklyn Union.

**Substance of proposed rule:** The Commission is considering The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY's (Brooklyn Union) request to require an ESCO to pay a deposit in order for the ESCO to be allowed to participate in Electronic Data Interchange Testing with both the Public Service Commission and Brooklyn Union.

**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-G-1225SA1)

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

**Area Development and Business Incentive Rate Program by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY**

**I.D. No.** PSC-42-05-00012-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 12 to become effective Jan. 1, 2006.

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

**Subject:** Area Development and business Incentive Rate Program.

**Purpose:** To open a new window for the submission of applications for the Area Development and Business Incentive Rate Program.

**Substance of proposed rule:** On September 29, 2005, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY filed proposed tariff amendments to open a new window for the submission of applications for the Area Development and Business Incentive Rate Program for three years, from January 1, 2006 through December 31, 2008.

**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-G-1218SA1)

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

**Rider T—DC Conversion Program by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-42-05-00013-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 whether to approve or reject, in whole or in part, a proposal filed by the Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 9 to become effective Dec. 20, 2005.

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

**Subject:** Rider T—DC Conversion Program.

**Purpose:** To make revisions to the language of Rider T to clarify that the company may use remaining actual revenues received before Dec. 31, 2005, in combination with DC surcharge revenues received thereafter to offset DC conversion incentive expenses in 2006 and beyond.

**Substance of proposed rule:** On September 30, 2005, Consolidated Edison Company of New York, Inc. (Con Edison or the Company) filed proposed tariff amendments to revise the language of Rider T – DC Conversion Program, to clarify that the Company may use remaining actual revenues received before December 31, 2005, in combination with DC Surcharge Revenues received thereafter to offset DC conversion incentive expenses in 2006 and beyond. The proposed effective date of Con Edison’s filing is December 30, 2005. The Commission may approve, reject or modify, in whole or in part, Con Edison’s proposed tariff revisions.

**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-E-1232SA1)

**State University of New York**

**EMERGENCY  
RULE MAKING**

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

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

**Filing No.** 1117

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 4, 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. 2005 ch. 53

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

**Specific reasons underlying the finding of necessity:** The State University of New York finds that immediate adoption of amendments to the Code of Standards and Procedures for the Administration and Operation of Community Colleges (the Code) is necessary for the preservation of the general welfare and that compliance with the requirements of subdivision 1 Section 202 of the State Administrative Procedure Act would be contrary to the public interest. The 2005-2006 Education, Labor and Social Services Budget Bill (the Budget) requires amendments to the existing funding formula for State financial assistance for operating expenses of community college of the State and City Universities of New York. The funding formula is to be developed jointly with City University of New York, subject to the approval of the Director of the Budget. Although negotiations between the State University, City University and the Division of the Budget were concluded in April 2005, the State University Trustees were unable to take the necessary action to invoke the rule making process until July 15, 2005. Final adoption of the rule can not take place until November, 2005. Amendments to the Code on an emergency basis for the 2005-2006 college fiscal year are necessary in order to:

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

Compliance with the provision of subdivision (1) of Section 202(6) of the State Administrative Procedure Act would be contrary to the public interest. The requirements of subdivision (1) of Section 202(6) of SAPA would not allow implementation of the State financial assistance provided in the Budget Bill in time for the 2005-2006 college fiscal year.

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

**Purpose:** To modify existing limitations formula for basic State financial assistance for operating expenses of community colleges of the State University and City University of New York in order to conform to the provisions of the Education Law and the 2005-2006 Budget Bill.

**Text of emergency rule:** 602.8(c) Basic State financial assistance.

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

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

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

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$2235] \$2350; and

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

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

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

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

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

(a) the budgeted or actual number (whichever is less) of full-time equivalent students enrolled in programs eligible for State financial assistance multiplied by [\$1863] \$1,959; and

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. SUN-34-05-00004-P, Issue of August 24, 2005. The emergency rule will expire December 2, 2005.

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

#### **Regulatory Impact Statement**

This is a technical amendment to implement the provisions of the 2005-2006 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York.

#### **Regulatory Flexibility Analysis**

This is a technical amendment to implement the provisions of the 2005-2006 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York. It will have no impact on small businesses and local governments.

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

This is a technical amendment to implement the provisions of the 2005-2006 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York. This rule making will have no impact on rural areas or the recordkeeping or other compliance requirements on public or private entities in rural areas.

#### **Job Impact Statement**

This is a technical amendment to implement the provisions of the 2005-2006 Budget Bill. The amendment provides for the provision of State financial assistance for operating expenses of community colleges operating under the program of the State University of New York and the City University of New York. This rule making will have no impact on rural areas or the recordkeeping or other compliance requirements on public or private entities in rural areas.

## Office of Temporary and Disability Assistance

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

#### **Application for Safety Net Assistance**

**I.D. No.** TDA-42-05-00019-P

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

**Proposed action:** Amendment of section 350.4(a)(7) of Title 18 NYCRR.  
**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 355(3)

**Subject:** Application for safety net assistance.

**Purpose:** To clarify when an application for safety net assistance must be completed by a recipient of family assistance who has lost eligibility due to the 60 month time limit.

**Text of proposed rule:** Paragraph (7) of subdivision (a) of section 350.4 is amended to read as follows:

(7) When the *family assistance case of able-bodied individuals is closed due to ineligibility* [become ineligible] for family assistance by reason of the durational limits on receipt of assistance under section 369.4(d) of this Title [and members of the household desire to receive safety net assistance; provided, however, that applications shall be made using an abbreviated State form prescribed for the purpose, and, provided further, that such households in receipt of family assistance may be reclassified as safety net assistance recipients without application if the failure to submit an application is the result of district error, delay or inaction. In scheduling and rescheduling application interviews, if a recipient contacts the district to report an inability to attend, the social services district shall take into account hardships, such as a full-time employment schedule or extraordinary transportation difficulties]. For purposes of this paragraph, an able-bodied individual is one who is not exempt from the requirements to participate in work activities as set forth in 12 NYCRR 1300.2.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Grace, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-9498

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

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

#### **Regulatory Impact Statement**

##### **1. Statutory Authority:**

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Department of Social Services to promulgate regulations to carry out its powers and duties. Section 122 of Part B of Chapter 436 of the Laws of 1997 reorganized the Department of Social Services into the Department of Family Assistance with two distinct offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance (OTDA). The functions of the former Department of Social Services concerning the public assistance programs and the food stamp program were transferred by Chapter 436 to OTDA.

Section 34(3)(f) of the SSL requires the Commissioner of the Department of Social Services to establish regulations for the administration of public assistance and care within the State. Section 122 of Part B of Chapter 436 of the Laws of 1997 provides that the Commissioner of the Department of Social Services will serve as the Commissioner of OTDA.

Section 131(1) of the SSL requires social services districts, insofar as funds are available, to provide adequately for those unable to maintain themselves, in accordance with the provisions of the SSL.

Section 355(3) of the SSL requires this Office to promulgate regulations to carry out the provisions of the SSL concerning the provision of Family Assistance (FA).

##### **2. Legislative Objectives:**

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that public assistance and food stamp benefits are provided to eligible households.

##### **3. Needs and Benefits:**

When Congress enacted the Temporary Assistance for Needy Families Block Grant Program (TANF), it placed a 60 month lifetime limit on

receipt of TANF funded assistance. It did this in part to emphasize the urgency of achieving self-sufficiency. New York enacted a similar limit on the receipt of TANF funded assistance (primarily FA) in New York (see section 350 of the SSL). Unlike the federal government, however, New York provides a program, the Safety Net Assistance (SNA) program, for persons who remain needy after TANF funding is no longer available.

Currently, section 350.4(a)(7) of 18 NYCRR requires able-bodied individuals who become ineligible for FA by reason of the 60 month time limit to apply for SNA using an abbreviated State form designed for that purpose. The State wanted recipients who were able to work to acknowledge their need to achieve self-sufficiency and affirm their need for continuing assistance by completing the abbreviated SNA application. An abbreviated application form was utilized because the State did not want to overburden local districts at a time when thousands of recipients were reaching the end of the time limit. If the able-bodied recipient does not complete the SNA application by the end of the 60 months then the intent was that the district would close their FA case. However, to ensure that the State does not incur federal penalties for providing TANF money beyond 60 months, an automatic conversion process was instituted at the State level. If, for some reason, the district is unable to process the SNA application or close the case within proscribed timeframes, the case is now automatically converted to SNA without the recipient having to complete the SNA application.

Therefore, the use of the abbreviated application form and the automatic conversion process has diluted the self-sufficiency message the State sought to send. Able-bodied recipients' transition from FA to SNA has become a seamless process because they are able to complete the abbreviated SNA application before the end of the 60 month time limit, with no interruption of benefits, or they are automatically transferred to SNA.

The number of cases statewide reaching the 60 month time limit has decreased significantly from 44,000 in December 2001 to approximately 900 per month now. The current level of cases reaching the 60 month time limit now allows for a process that more effectively conveys to the recipient the expectation that they attain self-sufficiency within a certain timeframe and now makes this proposal administratively viable for local districts to do.

Closing the FA case of able-bodied recipients at the end of the 60 month time limit and requiring them to complete the standard SNA application process sends a very clear message that assistance is intended to be temporary. Furthermore, under this proposal local districts will be able to more accurately assess the recipients' needs and engage them in more appropriate self-sufficiency activities. These able-bodied recipients will never escape poverty without achieving some level of employment.

Requiring that a standard SNA application be completed is consistent with the federal and State goal of emphasizing renewed efforts to achieve self-sufficiency. While the requirement for submission of a new application to receive assistance is consistent with the Legislature's conception of 60 months of assistance as a milestone, it does not present an imposing barrier for those who continue to need assistance. The amendments do not compromise an individual's right to apply for assistance after their FA case is closed and, although there will be a 45 day wait during which the SNA application is considered, emergency needs must be met during that period.

#### 4. Costs:

The proposed amendments are designed to increase scrutiny of and provide more appropriate services to public assistance cases reaching the 60 month limit. It is estimated that approximately 10 to 20 percent of the FA recipients that reach the 60 month limit will not apply for SNA. This would result in savings in the SNA program.

Based on the maximum 20 percent reduction in the current 900 cases a month that exceed the 60 month limit, there would be 180 fewer cases a month that would be eligible for SNA. The standard of need for a three person case in New York City is \$691 per month and the estimated maximum gross annual savings in the first year would be \$9.58 million. Estimated minimum gross annual savings are expected to be \$4.79 million. However, because we expect people who do not apply immediately for SNA after the expiration of the 60 month period will apply for SNA at some point, we do not expect the maximum amount of savings to be realized after the first year that the amendments are effective. Any savings would be shared equally by the State and social services districts.

#### 5. Local Government Mandates:

The proposed amendments will require social services districts to determine the eligibility of able-bodied applicants for SNA, who were receiving FA but are no longer eligible for such assistance solely by reason of the

60 month durational limit on the receipt of FA, by reviewing the standard SNA application form rather than the abbreviated form.

#### 6. Paperwork:

The proposed amendments would require able-bodied applicant's for SNA who have lost eligibility for FA due to the 60 month durational limit to complete a standard SNA application form rather than the abbreviated form.

#### 7. Duplication:

The proposed amendments do not duplicate State or Federal requirements.

#### 8. Alternatives:

One alternative would be to retain the provision that permits an abbreviated State application form for SNA to be completed by able-bodied persons who lose eligibility for FA because of the 60 month durational limit. This alternative was rejected because, with the passage of time and the low number of persons who now lose eligibility for FA because of the durational limits, it was determined that the need to complete a standard SNA application would enable the social services districts to more accurately assess an able-bodied SNA applicant's needs and engage them in more appropriate self-sufficiency activities.

#### 9. Federal Standards:

The proposed amendments do not exceed Federal minimum standards for the same subject.

#### 10. Compliance Schedule:

Social services districts will be able to implement the proposed amendments when they become effective.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

The proposed amendments will not affect small business but will have an impact on the 58 social services districts in the State.

#### 2. Compliance requirements:

The proposed amendments will require social services districts to determine whether a person who was receiving Family Assistance but who is no longer eligible for such assistance because of the 60 durational limit on the receipt of such assistance is eligible for Safety Net Assistance. The districts also will be required to determine whether circumstances exist that prevent a Family Assistance recipient from applying for Safety Net Assistance.

#### 3. Professional services:

No new professional services will be required in order for social services districts to comply with the proposed amendments.

#### 4. Compliance costs:

The proposed amendments will not require the social services districts to incur any initial capital costs. It is expected that annual gross savings for the first year that the amendments are effective will be between \$4.79 million and \$9.58 million with any savings shared equally by the State and social services districts.

#### 5. Economic and technological feasibility:

The social services districts have the economic and technological means to comply with the proposed amendments.

#### 6. Minimizing adverse impact:

The proposed amendments will not have an adverse economic impact on social services districts.

#### 7. Small business and local government participation:

Several social services districts have been informed of the proposed changes and no objections to them have been expressed.

### **Rural Area Flexibility Analysis**

#### 1. Type and estimated numbers of rural areas:

The proposed amendments will affect the 44 rural social services districts in the State.

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

The proposed regulations would require social services districts to determine whether a person who was receiving Family Assistance but who is no longer eligible for such assistance because of the 60 month durational limit on the receipt of such assistance is eligible for Safety Net Assistance. The districts also will be required to determine whether there are circumstances that prevent a recipient of Family Assistance from applying for Safety Net Assistance.

The proposed amendments will not impose any new reporting requirements on social services districts in rural areas nor will the proposed amendments require social services districts in rural areas to hire people to implement the proposed amendments.

#### 3. Costs:

It is expected that annual gross savings for the first year that the amendments are effective will be between \$4.79 million and \$9.58 million with any savings shared equally by the State and social services districts.

4. Minimizing adverse impact:

The proposed amendments will not have an adverse economic impact on social services districts in rural areas.

5. Rural area participation:

Some social services districts in rural areas have been informed of the proposed changes and no adverse comments have been received.

**Job Impact Statement**

A job impact statement has not been prepared for the proposed regulatory amendment. It is evident from the subject matter of the amendment that the job of the worker making the decisions required by the proposed amendment will not be affected in any real way. Thus, the change will not have any impact on jobs and employment opportunities in the State.

## Workers' Compensation Board

### EMERGENCY RULE MAKING

**Independent Medical Examinations (IMEs)**

**I.D. No.** WCB-42-05-00018-E

**Filing No.** 1124

**Filing date:** Oct. 4, 2005

**Effective date:** Oct. 4, 2005

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

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

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

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

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

**Subject:** Filing written reports of Independent Medical Examinations (IMEs).

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 1, 2006.

**Text of emergency rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 401, Albany, NY 12207, (518) 486-9564, e-mail: office-ofgeneralcounsel@wcb.state.ny.us

**Regulatory Impact Statement**

1. Statutory Authority:

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

2. Legislative Objectives:

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

3. Needs and Benefits:

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

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

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the

Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

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

#### 4. Costs:

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

#### 5. Local Government Mandates:

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

#### 6. Paperwork:

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

#### 7. Duplication:

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

#### 8. Alternatives:

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

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

#### 9. Federal Standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance Schedule:

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

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

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

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

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

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

#### 2. Compliance requirements:

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

#### 3. Professional services:

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

#### 4. Compliance costs:

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

#### 5. Economic and technological feasibility:

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

#### 6. Minimizing adverse impact:

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

#### 7. Small business and local government participation:

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

### **Rural Area Flexibility Analysis**

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

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

#### 2. Reporting, recordkeeping and other compliance requirements:

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

#### 3. Costs:

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

#### 4. Minimizing adverse impact:

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

#### 5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent

medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

***Job Impact Statement***

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