RULE MAKING ACTIVITIES

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

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

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

Banking Department

EMERGENCY RULE MAKING

Licensed Cashers of Checks

I.D. No. BNK-43-05-00005-E
Filing No. 1155
Filing date: Oct. 11, 2005
Effective date: Oct. 12, 2005

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

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

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

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

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

Subject: Licensed cashers of checks.

Purpose: To regulate commercial check cashing.

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

Part 400
LICENSED CASHERS OF CHECKS
(Statutory authority: Banking Law, §§ 37[3], *367, 369,* 371, 372)

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

(a) Application [form]. *No person shall engage in the business of cashing checks, drafts or money orders, as principal, broker, agent or otherwise, for a consideration, without first obtaining a license from the superintendent. This licensing requirement applies whether such activities are conducted for customers who are natural persons or for any business, corporation, partnership, limited liability company or partnership, association, or sole proprietorship, or any other entity.* Application for a new license or for a change of control of a licensee shall be made upon forms issued by the superintendent. These forms may be obtained at Banking Department offices [located at Two Rector Street, 21st Fl., New York, NY 10006 and 194 Washington Ave., Albany, NY 12210.] *at the locations specified in Supervisory Policy G-1.* For purposes of this Part, the term person shall include a[n individual,] *natural person or a* partnership, corporation, association or any other entity. The term control shall mean having the power directly or indirectly to direct or cause the direction of the management and policies of a licensee, whether through the ownership of voting stock of a licensee, the ownership of voting stock of any corporation which possesses such power or otherwise and shall be presumed to exist if any person, directly or indirectly, owns, controls, or holds with power to vote 10 percent or more of the voting stock of any licensee or any person owning, controlling or holding with power to vote 10 percent or more of the voting stock of any licensee.

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

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

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

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

(a) Every licensee shall:

(1) Post and display at all times in *a* conspicuous place on the premises the license. [and also] *Every licensee that cashes one or more checks, drafts or money orders for any payees that are natural persons must post* the schedule of rates to be charged *with respect to such transactions involving payees that are natural persons.* The schedule shall be made of [plastic or metal] *durable material,* be no less than 30 inches wide and 36 inches high with letters at least ¾inch in size and indicate the fee applicable to the full amount of the check to be cashed that corresponds to the amount of the check. *The schedule shall indicate the fee that corresponds to the amount of the check. The amount of the check shall be set forth on the schedule in increments of $25.00 ranging from $25.00 to $2,000. The schedule shall also indicate the percentage charge imposed on all checks and the minimum charge of $1.00 per check.* The schedule shall be in English and in Spanish and posted in the customer's area.

Section 400.12 of the Superintendent's Regulations is amended to read as follows: [The] *Except with respect to the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons,* [licensee] *a licensee* shall be permitted to charge or collect a fee for cashing a check, draft or money order not to exceed (a) 1.5 per centum of the amount of the check, draft or money order, or (b) $1, whichever is greater. Effective January 1, 2005, and annually thereafter, the maximum per centum fee specified in clause (a) of this section, shall be increased by a per centum amount, based upon an increase in the annual consumer price index for the New York-Northern-N.J.-Long Island, NY-NJ-CT-PA area for all urban consumers (annual CPI-U), as reported by the Bureau of Labor Statistics of the U.S. Department of Labor for the calendar year preceding the year in which such increase is made compared to such annual CPI-U for the year prior to such preceding year. The maximum per centum fee that may be charged or collected for cashing a check, draft or money order pursuant to this section in effect at such time shall be multiplied by such computed per centum amount and the result added to such maximum per centum fee. The resulting sum shall be the revised maximum per centum fee, which shall be posted upon the internet site of the Banking Department (www.banking.state.ny.us) by the Superintendent not later than forty-five days following the public release of such annual index by the U.S. Department of Labor. Such revised maximum per centum fee shall be calculated and posted to the nearest one-hundredth of a per centum. Such revised maximum per centum fee shall be effective not later than forty-five days after the Superintendent shall have notified the Majority Leader of the Senate, the Speaker of the Assembly, and the Chairperson of both the Senate and Assembly Committees on Banks of his/her intention to change the maximum per centum fee pursuant to the provisions of Section 372.3 of the Banking Law and shall continue in effect until revised and increased in the next succeeding year based upon an increase in such annual index. If such annual CPI-U does not increase in any one year, the maximum per centum fee in effect during the year in which the index does not increase shall remain unchanged in the next succeeding year. Nothing herein shall be deemed to prohibit the Superintendent from setting, by regulation, a different maximum per centum fee at any time where the Superintendent shall find that such a fee is necessary and appropriate to protect the public interest and to promote the stability of the check cashing industry for the purpose of meeting the needs of the communities that are served by check cashers. *No maximum fee shall apply to the charging of fees by licensees for the cashing of checks, drafts or money orders for payees of such checks, drafts or money orders that are other than natural persons.*

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire January 8, 2006.

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

Regulatory Impact Statement

1. Statutory authority:

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

2. Legislative objectives:

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

3. Needs and benefits:

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

ensure that commercial check cashers are subject to licensing and regulation.

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

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

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

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

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

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

The amendments to Part 400.6 also incorporate the provisions of a current emergency regulation amending that section. Previously adopted amendments to Part 400.12 of the Superintendent's Regulations increased the maximum fee that licensed check cashers may charge and provide for an annual fee adjustment thereafter based on the increase in the consumer price index for the New York metropolitan area, if any. As a result of the amendments to Part 400.12, licensed check cashers need to revise their posted schedules of fees and charges.

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

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

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

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

4. Costs:

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

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

5. Local government mandates:

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

6. Paperwork:

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

7. Duplication:

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

8. Alternative approaches:

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

Consideration was given to leaving the retail check cashing signage provisions Part 400.6 unchanged. However, as the schedule of permissible fees has changed, failing to require changes in the signage would result in inaccurate fee disclosure. Moreover, as noted in "Needs and Benefits" above, it was determined that the need for licensed check cashers to make signage changes to reflect the new fee schedule imposed by the previously adopted amendments to Part 400.12 meant that simultaneously promulgating the changes in the signage requirements contained in the proposed amendments to Part 400.6 would provide an opportunity to improve the quality of disclosure to customers and provide greater flexibility in signage materials without imposing additional costs on licensed entities.

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of Rule:

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

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

Commercial check cashers service small business entities and are themselves small businesses. Customers of commercial check cashers typically are such small business entities as construction sub contractors, food and sundry suppliers, and garment industry vendors that receive payment in check for goods and services. These businesses many times operate on a cash basis, and the commercial check cashers facilitate the conduct of these businesses. This service enables owners of such busi-

nesses to forego the use of fixed banking facilities, which may be far removed from their place of business and operations, in order to convert payment checks to cash. There is no basis upon which to make a meaningful estimate of the number of small business entities serviced by commercial check cashers.

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

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

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

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

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

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

2. Compliance Requirements:

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

3. Professional Services:

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

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impact:

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

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

7. Small Business and Local Government Participation:

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

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

Rural Area Flexibility Analysis

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

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

additional regulatory requirements upon private entities in rural communities.

Job Impact Statement

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

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

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

Office of Children and Family Services

EMERGENCY RULE MAKING

Market Rates for Subsidized Child Care

I.D. No. CFS-43-05-00008-E
Filing No. 1159
Filing date: Oct. 11, 2005
Effective date: Oct. 11, 2005

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

Action taken: Amendment of section 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 410, and 410-x(4)

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

Specific reasons underlying the finding of necessity: The adoption of these regulations on an emergency basis is necessary for the preservation of the health, safety and welfare of children in need of subsidized child care services in this State. Section 410-x(4) of the Social Services Law requires that the market rates be sufficient to ensure equal access to eligible children to comparable day care available to children whose parents are not eligible to receive a subsidy. The current market rates were initially issued in October, 2003 and reflect rate data collected in 2003. Accordingly, the current rates are artificially low. The adjustments to the market rates are needed to address the significantly escalating costs of providing child care services. Social services districts have experienced difficulty in recruiting and retaining providers to care for subsidized children because the actual costs of providing child care are greater than the current market rates.

Continuing to maintain the existing rates could result in subsidized families losing their child care arrangements or being unable to find appropriate child care. As a result, such families could be forced to place their children in child care settings that are inappropriate or unsafe for their children, leave their children unsupervised, or leave their jobs or training programs. If they choose the latter option, the families may remain on public assistance for longer periods of time or return to public assistance. This would directly counter the overriding purpose of welfare reform to encourage families on public assistance to move into employment or training programs. Thus, the increases in the market rates are necessary to maintain and preserve the gains achieved for poor families under welfare reform. As a result of these regulations, public assistance recipients and other low income families will not have to decide between losing their employment income and placing their children in child care that is unsafe or inappropriate.

Delaying the adoption of these regulations would be contrary to the public interest because it could result in children from public assistance or other low income families receiving unhealthy or unsafe child care, or in persons leaving jobs or training programs and returning to public assistance, to the detriment of the public welfare system. Therefore, it is necessary to adopt these regulations on an emergency basis.

Subject: Market rates for subsidized child care.

Purpose: To update the market rates social services districts can pay for subsidized child care.

Text of emergency rule: Section 415.9(f) is amended to read as follows:

Where child care services are provided by multiple providers, reimbursement will be made for the actual cost of such services up to the applicable rate for each child care provider used. *However, if the combined reimbursement to the multiple providers would exceed one weekly market rate, in order to receive such reimbursement the parent or caretaker must demonstrate that the schedule of employment of the parent or caretaker or the special needs of the child necessitates that child care services be arranged with multiple providers. If the social services district determines that the parent or caretaker has not demonstrated that there is a necessity to use multiple providers, reimbursement is limited to one weekly market rate that is applicable for the type of provider who provides care for the highest number of hours. The social services district will determine how to distribute the reimbursement for the multiple providers.*

Section 415.9(j) is amended to read as follows:

Effective October 1, [2003] *2005*, following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week. The market rates are established in five groupings of social services districts. Except for districts noted as an exception in the market rate schedule, the rates established for a group apply to all districts in the designated group. The district groupings are as follows:

Group A: Nassau, Putnam, Rockland, Suffolk, Westchester

Group B: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren

Group C: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates

Group D: Albany, Dutchess, Orange, Ulster

Group E: Bronx, Kings, New York, Queens, Richmond

GROUP A COUNTIES:

Nassau, Putnam, Rockland, Suffolk, and Westchester

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$300	$265	$240	$250
Exceptions:				
Nassau	--	--	$248	$261
Westchester	$338	$317	$271	--
DAILY	$70	$60	$55	$54
Exceptions:				
Westchester	$75	$70	$58	--
PART-DAY	$47	$40	$36	$36
Exceptions:				
Westchester	$50	$47	$39	--
HOURLY	$8.88	$8.75	$8.81	$8.75

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$250	$225	$225	$225
Exceptions:				
Westchester	--	$246	--	--
DAILY	$56	$56	$55	$50
PART-DAY	$37	$37	$37	$33
HOURLY	$8.00	$8.00	$7.50	$7.50

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$250	$250	$243	$240
Exceptions:				
Rockland	--	--	$250	$250
Westchester	--	--	--	$250
DAILY	$58	$56	$55	$56
PART-DAY	$39	$37	$37	$37
HOURLY	$8.00	$8.00	$8.00	$8.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$0	$0	$0	$250
Exceptions:				
Nassau	--	--	--	$261
DAILY	$0	$0	$0	$54
PART-DAY	$0	$0	$0	$36
HOURLY	$0	$0	$0	$8.75

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$175	$158	$158	$158
DAILY	$40	$40	$39	$35
PART-DAY	$27	$27	$26	$23
HOURLY	$5.60	$5.60	$5.25	$5.25

GROUP B COUNTIES: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$190	$180	$166	$160
Exceptions:				
Monroe	--	$185	$173	--
DAILY	$45	$43	$39	$38
Exceptions				
Erie	--	--	$44	--
Monroe	--	$49	--	--
PART-DAY	$30	$28	$26	$25
Exceptions:				
Erie	--	--	$29	--
Monroe	--	$33	--	--
HOURLY	$7.00	$7.00	$6.25	$7.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$150	$145	$135	$135
Exceptions:				
Erie	--	$150	$140	--
Saratoga	--	$150	$150	$143
Schenectady	$170	$150	$150	$150
DAILY	$34	$33	$31	$31
Exceptions				
Columbia	$35	--	--	--
Erie	$38	$38	$34	$34
Saratoga	$35	$35	--	$33
Warren	--	--	--	$33
PART-DAY	$23	$22	$21	$21
Exceptions:				
Erie	$25	$25	$23	$23
Saratoga	--	--	--	$22
Warren	--	--	--	$22
HOURLY	$5.00	$5.00	$5.00	$4.41

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$158	$150	$150	$149
Exceptions:				
Erie	--	$173	$165	$160
Schenectady	$175	$175	$165	$160
DAILY	$38	$35	$34	$33
Exceptions:				
Erie	--	--	--	$34
PART-DAY	$25	$23	$23	$22
HOURLY	$5.00	$5.00	$5.00	$5.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$0	$0	$0	$160
DAILY	$0	$0	$0	$38
PART-DAY	$0	$0	$0	$25
HOURLY	$0	$0	$0	$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$105	$102	$95	$95
DAILY	$24	$23	$22	$22
PART-DAY	$16	$15	$15	$15
HOURLY	$3.50	$3.50	$3.50	$3.09

GROUP C COUNTIES:

Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$160	$150	$142	$130
Exceptions:				
Niagara	--	--	--	$138
DAILY	$39	$36	$34	$31
PART-DAY	$26	$24	$23	$21
HOURLY	$5.00	$5.00	$5.00	$5.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$135	$130	$125	$125
Exceptions:				
Clinton	--	--	--	$135
DAILY	$31	$31	$30	$30
Exceptions				
Clinton	--	--	--	$34
Sullivan	--	--	--	$31
PART-DAY	$21	$21	$20	$20
Exceptions:				
Clinton	--	--	--	$23
Sullivan	--	--	--	$21
HOURLY	$3.18	$3.00	$3.00	$3.00

GROUP FAMILY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$135	$130	$125	$125
DAILY	$34	$33	$31	$30
PART-DAY	$23	$22	$21	$20
HOURLY	$4.00	$4.00	$4.00	$4.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$0	$0	$0	$130
DAILY	$0	$0	$0	$31
PART-DAY	$0	$0	$0	$21
HOURLY	$0	$0	$0	$5.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$95	$91	$88	$88
DAILY	$22	$22	$21	$21
PART-DAY	$15	$15	$14	$14
HOURLY	$2.23	$2.10	$2.10	$2.10

GROUP D COUNTIES:
Albany, Dutchess, Orange, and Ulster
DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$205	$190	$175	$176
Exceptions:				
Dutchess	$227	$215	$197	--
DAILY	$49	$46	$44	$44
Exceptions:				
Albany	--	$50	$45	--
PART-DAY	$33	$30	$29	$29
Exceptions				
Albany	--	$33	$30	--
HOURLY	$7.00	$6.75	$6.50	$7.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$175	$175	$167	$175
Exceptions:				
Dutchess	$180	$180	$175	$180
Orange	$196	$181	$175	--
DAILY	$44	$41	$38	$38
Exceptions				
Dutchess	--	$45	$44	$45
Orange	--	--	--	$44
PART-DAY	$29	$27	$25	$25
Exceptions:				
Dutchess	--	$30	$29	$30
Orange	--	--	--	$29
HOURLY	$6.00	$6.00	$6.00	$6.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$185	$180	$175	$175
Exceptions:				
Orange	$200	$194	--	--
DAILY	$44	$44	$41	$40
PART-DAY	$29	$29	$27	$27
HOURLY	$6.00	$6.00	$6.00	$6.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$0	$0	$0	$176
DAILY	$0	$0	$0	$44
PART-DAY	$0	$0	$0	$29
HOURLY	$0	$0	$0	$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$123	$123	$117	$123
DAILY	$31	$29	$27	$27
PART-DAY	$21	$19	$18	$18
HOURLY	$4.20	$4.20	$4.20	$4.20

GROUP E COUNTIES:
Bronx, Kings, New York, Queens, and Richmond
DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$288	$255	$180	$177
DAILY	$67	$67	$50	$50
PART-DAY	$45	$43	$33	$33
HOURLY	$13.75	$17.00	$13.00	$11.65

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$150	$135	$125	$125
DAILY	$34	$35	$35	$31
PART-DAY	$23	$23	$23	$21
HOURLY	$15.00	$10.00	$11.00	$11.60

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$160	$150	$150	$140
DAILY	$38	$38	$36	$35
PART-DAY	$25	$25	$24	$23
HOURLY	$15.00	$13.00	$11.00	$16.00

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$0	$0	$0	$177
DAILY	$0	$0	$0	$50
PART-DAY	$0	$0	$0	$33
HOURLY	$0	$0	$0	$11.65

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE

AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	$105	$95	$88	$88
DAILY	$24	$25	$25	$22
PART-DAY	$17	$17	$17	$15
HOURLY	$10.50	$7.00	$7.70	$8.12

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

WEEKLY	$300
DAILY	$ 75
PART-DAY	$ 50
HOURLY	$ 17

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 8, 2006.

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

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Commissioner of the Office of Children and Family Services (Office) to establish rules, regulations and policies to carry out the Office's powers and duties under the SSL.

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

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant. The amount to be paid or allowed for child care assistance funded under the Block Grant and under Title XX shall be the actual cost of care but no more than the applicable rate established in regulations. Payment rates must be sufficient to ensure equal access for eligible children to comparable child care assistance in the substate area that are provided to children whose parents are not eligible to receive assistance under any federal or State programs. Payment rates must take into account the variations in the costs of providing child care in

different settings and to children of different age groups, and the additional cost of providing child care for children with special needs.

Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure such equal access for eligible children. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan covers the period October 1, 2003 through September 30, 2005 and the proposed State Plan for the period October 1, 2005 through September 30, 2007 has been submitted for approval by the federal government. The market rates that are being replaced were issued in October 2003 and were based on a survey conducted in 2003.

2. Legislative objectives:

The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

3. Needs and benefits:

The regulations are needed to adjust existing rates that were established based on a survey done in 2003. Since then, child care providers have experienced increased costs in operating their businesses. These costs are reflected in the higher rates that they are charging as compared to the existing rates. The rates need to be updated to reflect the increased rates in order to continue to provide subsidized families with equal access to child care comparable to that received by unsubsidized families as required by federal and State laws.

The methodology used by the Office to establish the payment rates for the regulations meets the federal and State statutory requirements for conducting a local survey of child care providers. Prior to conducting the market rate survey, a letter was mailed to all licensed and registered providers to inform them that they might be among the sample of providers who would be asked to participate in the market rate survey. The Office contracted with a market research firm to conduct the telephone survey in English and Spanish and had resources available to assist providers in other languages. The sample was drawn so that it encompassed the full range of providers within all geographic areas.

The payment rates were established based on approximately 4,800 completed telephone market rate surveys from licensed and registered providers throughout the State. Providers were asked for the rates they charge for full-time and part-time care, if applicable, based on the age of the child.

These rates were analyzed to determine the 75th percentile. The federal Administration of Children and Families has indicated in the preamble to the final rule for the Child Care and Development Fund that it regards the 75th percentile of the actual cost of care as sufficient to provide subsidized parents with equal access to child care providers. The rates that resulted were then clustered into five distinct groupings of social services districts based on rate similarities. Within each group, rates are differentiated by type of provider (*i.e.,* day care center, school-age child care, family day care, group family day care and legally-exempt family child care and in-home child care), age of child (*i.e.,* under 1 =, 1 =-2, 3-5, 6-12), and amount of time in care (*i.e.,* weekly, daily, part-day, and hourly). This data was compiled and analyzed by Suzanne Zafonte Sennett, Director within the Office's Bureau of Early Childhood Services.

The market rates for legally-exempt family child care and in-home child care were established based on a 70 percent differential applied to the market rates established for family day care. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider.

Revising the existing rates will help subsidized families to avoid losing their child care arrangements or being unable to find appropriate child care. This will help prevent such families from being forced to place their children in child care settings that are inappropriate or unsafe or to leave their children unsupervised. Avoiding such results is important because it can be detrimental to a child's development to experience disruption in care or to receive substandard or no care at all. The updated rates also will help subsidized families avoid having to choose whether to use their limited income to supplement the cost of child care services or to meet their basic living costs.

The proposed regulations clarify the maximum reimbursement that may be issued when a family uses multiple child care providers. When the combined reimbursement to multiple child care providers exceeds one weekly market rate, the caretaker must demonstrate that the caretaker's schedule of employment or the special needs of the child necessitates that child care services be arranged with multiple providers. If the family does not demonstrate a necessity to use multiple providers, then reimbursement is limited to the weekly market rate that is applicable for the type of provider who provides care for the highest number of hours.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2005-2006, social services districts received their allocations of $716,520,153 in federal and State funds under the New York State Child Care Block Grant, an increase of $5.9 million from the base amount allocated to districts for SFY 2004-05. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the adjusted market rates. In addition, social services districts had the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. When a caretaker uses multiple child care providers and the reimbursement exceeds one weekly market rate, districts will need to determine whether the situation requires multiple child care providers. Payment adjustments will have to be made, as appropriate.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Alternatives:

The adjustments in rates set forth in the regulations are necessary to implement the federal and State statutory and regulatory mandates. The language added to Section 415.9(f) is consistent with the intent of the existing regulations and is necessary to prevent recipient families and providers from exploiting the child care subsidy system by allowing providers to receive unwarranted payments in excess of the market rates. Some social services districts have informed the Office of instances in which recipient families have used multiple child care providers unnecessarily to evade the market rates, and maximize each provider's child care payments. Given the limited amount of child care subsidy funding and the unnecessary use of multiple providers in these situations, the Office made the regulatory change to prevent the abuse of the child care subsidy system, and provide more needed funding to eligible families. The Office is aware that some families legitimately need multiple providers to address their families unique circumstances. This regulatory change will not prevent those families from accessing the needed providers.

9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

10. Compliance schedule:

These provisions must be implemented effective on October 1, 2005.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 70,000 informal providers that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to the new market rates. When a family uses multiple child care providers and the reimbursement exceeds one weekly market rate, districts will need to determine whether the situation requires multiple child care providers. Payment adjustments will have to be made, as needed.

3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2005-06, social services districts received their allocations of $716,520,153 in federal and State funds under the New York State Child Care Block Grant, an increase of $5.9 million from the base amount allocated to districts for SFY 2004-05. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts had the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of approximately 4,800 licensed and registered child care providers throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care within the counties.

Social services districts will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access comparable to those families not receiving a child care subsidy. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of public assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

Social services districts will benefit from the clarification given regarding reimbursement when multiple child care providers are used. These regulations will strengthen the ability of social services districts to monitor payments so that families and child care providers do not receive unwarranted payments in excess of the market rates. Parents and caretakers will be able use multiple child care providers, with payments reflecting the appropriate market rate for each provider, when their employment schedule or the special needs of the children merit it.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from almost 4,800 providers and that information formed the basis for the updated market rates.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the new market rates. When a family uses multiple child care providers and the reimbursement exceeds one weekly market rate, districts will need to determine whether the situation requires multiple child care providers. Payment adjustments will have to be made, as needed.

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

3. Costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2005-2006, social services districts received their allocations of $716,520,153 in federal and State funds under the New York State Child Care Block Grant, an increase of $5.9 million from the base amount allocated to districts for SFY 2004-05. These increases in funding are sufficient to cover the increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts had the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers. The Office took a representative sample of approximately 4,800 completed surveys from licensed and registered child care providers throughout the State. The rates were analyzed to establish market rates at the 75th percentile of the amounts charged. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for rural counties are based on the actual costs of care within the counties.

Social services districts in rural areas will benefit from the increases in the rates. The increases will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

Child care providers in rural areas also will benefit from the increases in the market rates. The adjustments to the market rates will help address the escalating costs incurred by child care providers in operating their businesses. These providers will also be in a better position to serve low-income families who previously may not have had access to their programs due to their rates.

Social services districts will benefit from the clarification given regarding reimbursement when multiple child care providers are used. These

regulations will strengthen the ability of social services districts to monitor payments so that families and child care providers do not receive unwarranted payments in excess of the market rates. Parents and caretakers will be able use multiple child care providers, with payments reflecting the appropriate market rate for each provider, when their employment schedule or the special needs of the children merit it.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from almost 4,800 providers and that information formed the basis for the updated market rates.

Job Impact Statement

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

These regulations will have a positive impact on jobs or employment opportunities as the increased rates will allow child care providers to hire additional staff or improve the compensation they pay existing staff. Individuals who may have been discouraged from starting up new child care programs in low-income communities because the existing rates would not have been sufficient to support their operational costs may be encouraged by the new rates to establish such programs. In addition, by making child care more available and affordable for low-income working families, the regulations will improve the ability of employers to attract and retain employees and the ability of low-income workers to obtain and maintain jobs.

Education Department

EMERGENCY RULE MAKING

State Assessments and Graduation and Diploma Requirements

I.D. No. EDU-32-05-00015-E
Filing No. 1163
Filing date: Oct. 11, 2005
Effective date: Oct. 24, 2005

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

Action taken: Amendment of section 100.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents in June 2005.

Under current regulations, the minimum passing score on five required Regents examinations rises from 55 to 65 for those students who enter grade 9 in the 2005-2006 school year and thereafter. The revised policy phases in the 65 passing score on the five required Regents examinations to meet graduation requirements by requiring students who enter grade 9 in the 2005-06 school year to achieve 65 or higher on two required Regents examinations, by requiring students who enter grade 9 in the 2006-07 school year to achieve 65 or higher on three required Regents examinations, by requiring students who enter grade 9 in the 2007-08 school year to achieve 65 or higher on four required Regents examinations, and by requiring students who enter grade 9 in the 2008-09 school year to achieve 65 on the five required Regents examinations. The phase-in will give students and schools more time to improve achievement while keeping the educational system moving forward toward the goal of higher achievement for all students.

The proposed amendment will also allow students with disabilities entering grade 9 in September 2005 and thereafter to earn a local diploma if they take and pass the five required Regents examinations with a score of 55-64.

The proposed amendment also establishes an appeals process for students who score within three points of 65 on a required Regents examination for graduation and have a 65 or above course average. Students seeking an appeal must meet the following criteria to demonstrate that they meet the State learning standards: take the Regents examination under appeal at least two times; have a score on the Regents exam under appeal within three points of the 65 passing score on that examination; present evidence that they have received academic intervention services by the school in the subject area of the Regents examination under appeal; have an attendance rate of at least 95 percent for the school year during which they last took the Regents examination under appeal; have a course average in the subject under appeal that meets or exceeds the required passing grade by the school; and be recommended for an exemption to the graduation requirement by their teacher or Department chairperson in the subject of the Regents examination under appeal. A standing committee chaired by the school principal would review all appeals within 10 days of submission and make a recommendation to the superintendent of the school district or, in the case of New York City, the Chancellor or his/her designee. Students who are granted an appeal on one examination, and who have attained a passing score of 65 or above on each of the four remaining required Regents examinations, will be determined to have met all graduation requirements and earn a Regents diploma. Students who are granted an appeal on two examinations, and who have attained a passing score of 65 or above on each of the three remaining required Regents examinations, will receive a local diploma. A school will make a record of all appeals received and granted and report the information to the State Education Department. The record of appeals will appear on the New York State School Report Card.

The proposed amendment was adopted at the July 21-22, 2005 Regents meeting as an emergency measure, effective July 26, 2005, for the preservation of the general welfare, in order to ensure that students who will enter grade 9 in September 2005 are informed of the revision to the revised diploma and graduation requirements, and to otherwise ensure that schools and school districts are able to make any necessary adjustments in students' class schedules to ensure their timely graduation pursuant to such requirements. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 10, 2005.

The proposed amendment was adopted as a permanent rule at the October 6-7, 2005 meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act. Pursuant to SAPA section 202(5), the permanent adoption cannot become effective until after its publication in the State Register on October 26, 2005. However, the July emergency adoption will expire on October 23, 2005, 90 days after its filing with the Department of State on July 26, 2005. A second emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the amendment remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: State assessments and graduation and diploma requirements.

Purpose: To revise requirements for obtaining a Regents high school diploma, a Regents diploma with advanced designation, and a local high school diploma.

Substance of emergency rule: The Commissioner of Education proposes to amend section 100.5 of the Regulations of the Commissioner of Education, effective October 24, 2005, relating to school health services. The following is a summary of the substance of the proposed amendment:

The proposed amendment implements policy adopted by the Board of Regents at their June 2005 meeting concerning the phase-in of the graduation standard of 65 on required Regents exams. Under current regulations, the minimum passing score on the five required Regents examinations rises from 55 to 65 for those students who first enter grade 9 in the 2005-2006 school year and thereafter. The proposed amendment phases in the 65 passing score on the five required Regents examinations to meet graduation requirements, by requiring students who first enter grade 9 in the

2005-06 school year to achieve 65 or above on two required Regents examinations and a score of 55 or above on the remaining three required Regents examinations, by requiring students who first enter grade 9 in the 2006-07 school year to achieve 65 or above on three required Regents examinations and a score of 55 or above on the remaining two required Regents examinations, by requiring students who enter grade 9 in the 2007-08 school year to achieve 65 or higher on four required Regents examinations and a score of 55 on the one remaining required Regents examination, and by requiring students who enter grade 9 in the 2008-09 school year to achieve 65 on all five required Regents examinations.

The proposed amendment will provide an additional safety net for all students with disabilities entering grade 9 in the 2005-06 school year, by providing that students with disabilities may achieve a passing score of 55-64 on the five required Regents examinations to meet local diploma requirements.

The proposed amendment also establishes an appeal process for students who first enter grade 9 in September 2005 or thereafter and who fail, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation. Students seeking an appeal must meet the following criteria to demonstrate that they meet the State learning standards: have a score on the Regents exam under appeal that is within three points of the 65 passing score; present evidence that they have received academic intervention services by the school in the subject area of the Regents examination under appeal; have an attendance rate of at least 95 percent for the school year during which they last took the Regents examination under appeal; have a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the school; and be recommended for an exemption to the passing score on the required Regents examination under appeal by their teacher or Department chairperson in the subject area of the Regents examination under appeal. No student may appeal his or her score on more than two of the five required Regents examinations. A standing committee chaired by the school principal would review all appeals within 10 days of submission and make a recommendation to the superintendent of the school district or, in the case of New York City, the Chancellor or his/her designee. Students who are granted an appeal on one examination, and who have attained a passing score of 65 or above on each of the four remaining required Regents examinations, will be determined to have met all graduation requirements and earn a Regents diploma. Students who are granted an appeal on two examinations, and who have attained a passing score of 65 or above on each of the three remaining Regents examinations, will receive a local diploma. A school will make a record of all appeals received and granted, report the information to the State Education Department, and make the records available for the inspection by the Department.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of emergency/proposed rule making, I.D. No. EDU-32-05-00015-EP, Issue of August 10, 2005. The emergency rule will expire December 9, 2005.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

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

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State education department to alter the subjects of required instruction.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to the State learning standards, State assessments and graduation and diploma requirements.

NEEDS AND BENEFITS:

The proposed amendment will revise the graduation and diploma requirements first adopted by the Board of Regents in July 1999, and subsequently revised in November 2003, to help ensure that all students in the State's public schools have the skills, knowledge and understandings they need to succeed in the next century. The proposed changes are necessary to implement revisions to policy adopted by the Board of Regents in June 2005.

Under current regulations, the minimum passing score on five required Regents examinations rises from 55 to 65 for those students who entered grade 9 in the 2005-2006 school year and thereafter. The revised policy phases in the 65 passing score on the five required Regents examinations to meet graduation requirements by requiring students who enter grade 9 in the 2005-06 school year to achieve 65 or above on two required Regents examinations and a score of 55 or above on the remaining three required Regents examinations, by requiring students who enter grade 9 in the 2006-07 school year to achieve 65 or above on three required Regents examinations and a score of 55 or above on the remaining two required Regents examinations, by requiring students who enter grade 9 in the 2007-08 school year to achieve 65 or higher on four required Regents examinations and a score of 55 on the one remaining required Regents examination, and by requiring students who enter grade 9 in the 2008-09 school year to achieve 65 on all five required Regents examinations. The phase-in will give students and schools more time to improve achievement while keeping the educational system moving forward toward the goal of higher achievement for all students.

Despite the significant increase in the number of students with disabilities taking Regents level courses and passing Regents examinations, there still is a significant gap between the performance of special education and general education students. Therefore, the proposed amendment will provide an additional safety net for all students with disabilities entering grade 9 in the 2005-06 school year. Under this safety net, students with disabilities may achieve a passing score of 55-64 on the five required Regents examinations to meet local diploma requirements.

The proposed amendment also establishes an appeal process for students who first enter grade 9 in September 2005 or thereafter and who fail, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation. Students seeking an appeal must meet the following criteria to demonstrate that they meet the State learning standards: have a score on the Regents exam under appeal that is within three points of the 65 passing score; present evidence that they have received academic intervention services by the school in the subject area of the Regents examination under appeal; have an attendance rate of at least 95 percent for the school year during which they last took the Regents examination under appeal; have a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the school; and be recommended for an exemption to the passing score on the required Regents examination under appeal by their teacher or Department chairperson in the applicable subject area. No student may appeal his or her score on more than two of the five required Regents examinations. A standing committee chaired by the school principal would review all appeals within 10 days of submission and make a recommendation to the superintendent of the school district or, in the case of New York City, the Chancellor or his/her designee. Students who are

granted an appeal on one examination, and who have attained a passing score of 65 or above on each of the four remaining required Regents examinations, will be determined to have met all graduation requirements and earn a Regents diploma. Students who are granted an appeal on two examinations, and who have attained a passing score of 65 or above on each of the three remaining Regents examinations, will receive a local diploma. A school will make a record of all appeals received and granted, report the information to the State Education Department, and make the records available for the inspection by the Department.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: Based on the distribution of scores on Regents examinations of the 2000 student cohort (students who entered grade 9 in 2000) reported to the State Education Department by school districts, approximately 2,000-3,000 students would be eligible to seek an appeal out of the total statewide student population of about 200,000 students. The standing committee formed to review and make a decision on an appeal is made up of salaried administrators and teachers. The committee is expected to meet during the school day to review existing student records and to interview school staff and/or the student if needed. It is anticipated that the cost to the school district would be minimal and would be absorbed using existing staff and resources. It is estimated that the cost of the time for the standing committee to meet would not exceed $100 per student seeking an appeal.

(c) Costs to private regulated parties: None.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment revises the current requirements for meeting diploma and graduation requirements to give students and schools more time to improve achievement and to ensure that all students have continued opportunities to complete requirements for a high school diploma.

In the event of a student's appeal of his or her score on a required Regents examination, the school principal shall chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within ten school days of its receipt and make a recommendation to the school superintendent or, in New York City, to the Chancellor or his/her designee. The school superintendent or Chancellor or Chancellor's designee shall make a final determination to accept or deny the appeal.

PAPERWORK:

Each school shall keep a record of all appeals received and granted and report this information to the State Education Department on a form prescribed by the Commissioner. All school records relating to appeals of scores shall be made available for inspection by the State Education Department.

DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations.

ALTERNATIVES:

As an alternative to a phase-in of the 65 passing score on Regents examinations, the Board of Regents considered permitting general education students entering grade 9 in the 2005-2006 school year to graduate with a local diploma if the average of the sum of their passing scores on the five required Regents exams was 65 or above. Students entering grade 9 in the 2006-2007 school year would be required to pass the five exams with a score of 65 on each exam. This proposal was rejected because data provided to the State Education Department by school districts on the test results for students who entered grade 9 in 2000 showed a minimal difference between averaging and requiring a score of 65 on a certain number of exams.

The Board of Regents then considered a three-year phase-in of the requirement that the students achieve a score of 65 or above on the five required Regents examinations. After further consideration, the Board of Regents decided to adopt a phase-in of the requirement, but over a four-year rather than three-year phase-in period, to allow more time for schools and students to adjust curriculum and schedules and to ensure that students entering grade 9 in 2008 will be prepared to achieve the 65 passing score on all required Regents exams.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that schools and school districts will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment will revise graduation and diploma requirements for students attending the public schools, consistent with policy adopted by the Board of Regents in June 2005. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed rule applies to each of the 708 public school districts in the State, and to charter schools that are authorized to issue local and Regents diplomas with respect to State assessments and high school graduation and diploma requirements. At present, there are 4 charter schools offering a full high school program, 2 charter schools offering only 9th grade instruction, and 4 charter schools offering only 9th and 10th grade instruction.

COMPLIANCE REQUIREMENTS:

The proposed amendment will revise the graduation and diploma requirements first adopted by the Board of Regents in July 1999, and subsequently revised in November 2003, to help ensure that all students in the State's public schools have the skills, knowledge and understandings they need to succeed in the next century. The proposed changes are necessary to implement revisions to policy adopted by the Board of Regents in June 2005.

Under current regulations, the minimum passing score on five required Regents examinations rises from 55 to 65 for those students who entered grade 9 in the 2005-2006 school year and thereafter. The revised policy phases in the 65 passing score on the five required Regents examinations to meet graduation requirements by requiring students who enter grade 9 in the 2005-06 school year to achieve 65 or above on two required Regents examinations and a score of 55 or above on the remaining three required Regents examinations, by requiring students who enter grade 9 in the 2006-07 school year to achieve 65 or above on three required Regents examinations and a score of 55 or above on the remaining two required Regents examinations, by requiring students who enter grade 9 in the 2007-08 school year to achieve 65 or higher on four required Regents examinations and a score of 55 on the one remaining required Regents examination, and by requiring students who enter grade 9 in the 2008-09 school year to achieve 65 on all five required Regents examinations. The phase-in will give students and schools more time to improve achievement while keeping the educational system moving forward toward the goal of higher achievement for all students.

Despite the significant increase in the number of students with disabilities taking Regents level courses and passing Regents examinations, there still is a significant gap between the performance of special education and general education students. Therefore, the proposed amendment will provide an additional safety net for all students with disabilities entering grade 9 in the 2005-06 school year. Under this safety net, students with disabilities may achieve a passing score of 55-64 on the five required Regents examinations to meet local diploma requirements.

In the event of a student's appeal of his or her score on a required Regents examination, the school principal shall chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within ten school days of its receipt and make a recommendation to the school superintendent or, in New York City, to the Chancellor or his/her designee. The school superintendent or Chancellor or Chancellor's designee shall make a final determination to accept or deny the appeal.

Each school shall keep a record of all appeals received and granted and report this information to the State Education Department on a form prescribed by the Commissioner. All school records relating to appeals of scores shall be made available for inspection by the State Education Department.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

Based on the distribution of scores on Regents examinations of the 2000 student cohort (students who entered grade 9 in 2000) reported to the State Education Department by school districts, approximately 2,000-3,000 students would be eligible to seek an appeal out of the total statewide student population of about 200,000 students. The standing committee formed to review and make a decision on an appeal is made up of salaried administrators and teachers. The committee is expected to meet during the school day to review existing student records and to interview school staff and/or the student if needed. It is anticipated that the cost to the school district would be minimal and would be absorbed using existing staff and resources. It is estimated that the cost of the time for the standing committee to meet would not exceed $100 per student seeking an appeal.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on school districts. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting the regulatory requirements.

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment also applies to charter schools in such areas, to the extent they offer instruction in the high school grades and issue Regents diplomas and local diplomas. At present, there are no such charter schools located in rural areas.

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

The proposed amendment will revise the graduation and diploma requirements first adopted by the Board of Regents in July 1999, and subsequently revised in November 2003, to help ensure that all students in the State's public schools have the skills, knowledge and understandings they need to succeed in the next century. The proposed changes are necessary to implement revisions to policy adopted by the Board of Regents in June 2005.

Under current regulations, the minimum passing score on five required Regents examinations rises from 55 to 65 for those students who entered grade 9 in the 2005-2006 school year and thereafter. The revised policy phases in the 65 passing score on the five required Regents examinations to meet graduation requirements by requiring students who enter grade 9 in the 2005-06 school year to achieve 65 or above on two required Regents examinations and a score of 55 or above on the remaining three required Regents examinations, by requiring students who enter grade 9 in the 2006-07 school year to achieve 65 or above on three required Regents examinations and a score of 55 or above on the remaining two required Regents examinations, by requiring students who enter grade 9 in the 2007-08 school year to achieve 65 or higher on four required Regents examinations and a score of 55 on the one remaining required Regents examination, and by requiring students who enter grade 9 in the 2008-09 school year to achieve 65 on all five required Regents examinations. The phase-in will give students and schools more time to improve achievement while keeping the educational system moving forward toward the goal of higher achievement for all students.

Despite the significant increase in the number of students with disabilities taking Regents level courses and passing Regents examinations, there still is a significant gap between the performance of special education and general education students. Therefore, the proposed amendment will provide an additional safety net for all students with disabilities entering grade 9 in the 2005-06 school year. Under this safety net, students with disabilities may achieve a passing score of 55-64 on the five required Regents examinations to meet local diploma requirements.

In the event of a student's appeal of his or her score on a required Regents examination, the school principal shall chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within ten school days of its receipt and make a recommendation to the school superintendent or, in New York City, to the Chancellor or his/her designee. The school superintendent or Chancellor or Chancellor's designee shall make a final determination to accept or deny the appeal.

Each school shall keep a record of all appeals received and granted and report this information to the State Education Department on a form prescribed by the Commissioner. All school records relating to appeals of scores shall be made available for inspection by the State Education Department.

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

Based on the distribution of scores on Regents examinations of the 2000 student cohort (students who entered grade 9 in 2000) reported to the State Education Department by school districts, approximately 2,000-3,000 students would be eligible to seek an appeal out of the total statewide student population of about 200,000 students. The standing committee formed to review and make a decision on an appeal is made up of salaried administrators and teachers. The committee is expected to meet during the school day to review existing student records and to interview school staff and/or the student if needed. It is anticipated that the cost to the school district would be minimal and would be absorbed using existing staff and resources. It is estimated that the cost of the time for the standing committee to meet would not exceed $100 per student seeking an appeal.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents, and has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts and boards of cooperative educational services in rural areas. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting the regulatory requirements. The Regents policy upon which the proposed amendment is based applies to all schools. Therefore, it was not possible to establish different compliance and reporting requirements entities in rural areas, or to exempt them from the provisions of the proposed amendment.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment revises graduation and diploma requirements consistent with policy adopted by the New York State Board of Regents. The assessments and graduation requirements will help ensure that all students in New York State public schools have the skills, knowledge, and understandings they will need to succeed. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

EMERGENCY RULE MAKING

Duties and Responsibilities of the Chief Operating Officer

I.D. No. EDU-40-05-00003-E
Filing No. 1162
Filing date: Oct. 11, 2005
Effective date: Oct. 11, 2005

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

Action taken: Amendment of sections 3.8, 3.9 and 3.15 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided) and 305(1) and (6)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform the Rules of the Board of Regents to changes made in the internal organization of the State Education Depart-

ment, resulting in the elimination of the position of Chief Operating Officer.

The recommended action is being proposed as an emergency measure because such action is necessary for the preservation of the general welfare in order to ensure that the Rules of the Board of Regents are immediately brought into conformance with changes in the Department's internal organization, relating to the elimination of the position of Chief Operating Officer, so as to ensure that appropriate Department staff may assume the duties and responsibilities formerly exercised by the Chief Operating Officer in a timely and efficient manner.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their December 8-9, 2005 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: Duties and responsibilities of the Chief Operating Officer of the State Education Department.

Purpose: To repeal provisions relating to the Chief Operating Officer.

Text of emergency rule: 1. Section 3.8 of the Rules of the Board of Regents is amended, effective October 11, 2005, as follows:

§ 3.8 [Chief operating officer, counsel] *Counsel* and other personnel.

(a) There shall be [a chief operating officer,] a counsel to the Education Department and the University and such other personnel as may be appointed from time to time by the commissioner.

(b) The counsel shall be the deputy commissioner of education as specified in section 101 of the Education Law. In the absence or disability of the commissioner or when a vacancy exists in the office of commissioner, the counsel shall exercise and perform the functions, powers and duties conferred or imposed on the commissioner by statute and by rule of the Regents.

[(c) The chief operating officer shall advise the commissioner on the formulation and review of policy, budget planning and development, legislative program developments, and program planning and evaluation, shall supervise the administration of specific department programs as delegated by the commissioner, and shall perform special assignments as directed by the commissioner.]

[(d)] *(c)* There shall be in the department, in addition to the divisions established by statute, such other divisions and such bureaus as shall be established by the commissioner with the approval of the Regents.

2. Section 3.9 of the Rules of the Board of Regents is amended, effective October 11, 2005, as follows:

§ 3.9 Appointments.

The commissioner shall appoint all officers and employees of the department. Appointments to the positions of [chief operating officer,] deputy commissioner, associate commissioner, assistant commissioner and director of the Office of Professional Discipline shall be made with approval of the Board of Regents.

3. Section 3.15 of the Rules of the Board of Regents is amended, effective October 11, 2005, as follows:

§ 3.15 Authorization to execute contracts.

(a) The following persons only are authorized to execute contracts on behalf of the State Education Department:

(1) Commissioner of Education;

[(2) Chief Operating Officer;]

[(3)] *(2)* Counsel and Deputy Commissioner for Legal Affairs;

[(4)] *(3)* Deputy Counsel; and

[(5)] *(4)* Assistant Counsel.

(b) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-40-05-00003-P, Issue of October 5, 2005. The emergency rule will expire January 8, 2006.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 designates the Board of Regents as the head of the State Education Department and the Commissioner of Education as Chief administrative officer. The statute provides that the Regents may also appoint and, at pleasure, remove a deputy commissioner of education, who shall perform such duties as the Regents may assign by rule and who, in the absence or disability of the Commissioner or when a vacancy exists in the office of Commissioner, shall exercise and perform the functions, powers and duties conferred or imposed on the Commissioner by the Education Law.

Education Law section 305(1) provides that the Commissioner is the chief executive officer of the state system of education and of the Board of Regents. Section 305(6) provides that the Commissioner shall be responsible for the proper administration of the various officers and divisions of the State Education Department.

LEGISLATIVE OBJECTIVES:

Consistent with the authority granted to the Board of Regents and Commissioner of Education pursuant to Education Law sections 101 and 305, the proposed amendment repeals provisions relating to the appointment, duties and responsibilities of the position of Chief Operating Officer.

NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Rules of the Board of Regents to changes made in the internal organization of the State Education Department, resulting in the elimination of the position of Chief Operating Officer.

COSTS:

(a) Costs to State: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment is necessary to conform the Rules of the Board of Regents to changes in the internal organization of the State Education Department, and will not impose any costs on the State, local government, private regulated parties or the regulating agency.

PAPERWORK:

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment relates solely to the internal administration of the State Education Department and does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

DUPLICATION:

The proposed amendment relates solely to the internal administration of the State Education Department. There are no relevant statutes, rules or other legal requirements of the State and Federal governments, including those which may duplicate, overlap or conflict with the rule.

ALTERNATIVES:

The proposed amendment is necessary to conform the Rules of the Board of Regents to changes in the internal organization of the State Education Department, resulting in the elimination of the position of Chief Operating Officer. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no applicable standards of the Federal government for the subject area of the proposed amendment, which relates solely to the internal administration of the State Education Department.

COMPLIANCE SCHEDULE:

The proposed amendment relates solely to the internal administration of the State Education Department and does not impose any compliance requirements on any regulated parties.

Regulatory Flexibility Analysis

The proposed amendment relates solely to the internal organization of the State Education Department and does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

The proposed amendment relates solely to the internal organization of the State Education Department and does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on public and private sector interests in rural areas. Because it is evident from the nature of the proposed amendment that it does not affect such interests, no further steps were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed amendment relates solely to the internal organization of the State Education Department and will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the proposed amendment that no substantial impact will occur, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF ADOPTION

State Assessments and Graduation and Diploma Requirements

I.D. No. EDU-32-05-00015-A
Filing No. 1164
Filing date: Oct. 11, 2005
Effective date: Oct. 27, 2005

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

Action taken: Amendment of section 100.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

Subject: State assessments and graduation and diploma requirements.

Purpose: To revise requirements for obtaining a Regents high school diploma, a Regents diploma with advanced designation, and a local high school diploma.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. EDU-32-05-00015-EP, 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: Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Wilderness Areas in the Adirondack Park

I.D. No. ENV-43-05-00001-P

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

Proposed action: This is a consensus rule making to repeal section 190.13(f)(2) and add a new section 190.13(f)(2) to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m), 9-0105(1), (3); and Executive Law, section 816(3)

Subject: Wilderness areas in the Adirondack Park.

Purpose: To remove the requirement that day users possess a self-issuing permit in wilderness areas in the Adirondack Park in the Eastern High Peaks Zone.

Text of proposed rule: Paragraph (2) of subdivision (f) is repealed and a new paragraph (2) is added to read as follows:

In addition to the requirements of paragraph (1) of this subdivision, no overnight camper in the Eastern High Peaks Zone shall fail to possess a self-issuing permit.

Text of proposed rule and any required statements and analyses may be obtained from: Peter Frank, Department of Environmental Conservation, Bureau of Forest Preserve Management, 625 Broadway, Albany, NY 12233-4254, (518) 473-9518, e-mail: pjfrank@gw.dec.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 Department believes that there will be no objections to the promulgation of this regulation. 6 NYCRR 190.13(f)(2) currently requires any person who enters the Eastern High Peaks Zone in the High Peaks Wilderness Area to acquire a self-issuing permit when passing a registration facility at a trail head, and requires that they keep this permit in their possession while they remain in the Eastern High Peaks. This "trip ticket" requirement applies to both day and overnight users.

This regulation became effective on May 18, 2001, and was adopted to further certain goals set forth in the High Peaks Wilderness Complex Unit Management Plan ("UMP"), adopted in March, 1999. Specifically, the UMP notes on page 168 that such a registration system would likely enable the Department to gather more accurate data on user rates in the Eastern High Peaks, so that the effects of increasing public use on natural resources and visitor experiences could be better assessed. It was believed that such a permit would be an improvement over the pre-existing system, which gathered information from registrations at the trail register boxes which are located at hiking trailheads. It was also believed that the "trip tickets" would serve public education purposes, as the tickets would include information about applicable rules and regulations, safety, and general back country guidelines.

The Department has now had more than four years of experience with the "trip ticket" regulation. The Department has found the "trip ticket" requirement to be a success for overnight campers. Compliance with the requirement has been high for overnight users, and the information on overnight camping obtained as a result of the "trip ticket" system has been helpful to the Department in it's land management activities.

In contrast, the "trip ticket" requirement for day users has not been productive. Experience has shown that day users are even less likely to get "trip tickets" than they were to register at trail registers. Furthermore, the information that has been gathered by the Department from those "trip tickets" which have been completed by day users has been no more useful to Department land managers than the information previously obtained from trail registers. Also, the time spent at trailhead facilities stocked with "trip tickets" for day users and the time spent reviewing and analyzing them, has been burdensome for Department staff. This time would be more productively spent in managing the "trip ticket" system for overnight campers and in reviewing trail register information left by day users.

For these reasons, this rulemaking eliminates the "trip ticket" requirement for day users in the Eastern High Peaks, but continues the requirement for overnight users. A separate regulation, 6 NYCRR 190.13(f)(1), requiring anyone who enters the Eastern High Peaks to register, will continue to be effective. Thus, the Department will be able to acquire information on day use from these trail registers. Furthermore, information posted at these trail registers will educate day users on applicable rules and regulation, safety, and general back country guidelines, fulfilling one of the goals of the "trip ticket" system.

The only members of the public who will be impacted by this rulemaking are day users of the Eastern High Peaks. Since these day users have, by and large, not utilized the "trip ticket" system, it is unlikely that they will disagree with its repeal. Staff of the Adirondack Park Agency, which found the UMP to be consistent with the guidelines of the Adirondack Park State Land Master Plan, are supportive of the rulemaking.

Job Impact Statement

This regulatory amendment will drop a current requirement that day users in the Eastern High Peaks Zone possess a self-issuing permit. This requirement has not provided any useful information regarding use or decision making for future management needs.

A job impact statement is not submitted with the proposal because the proposal will have no adverse impact on existing or future jobs and employment opportunities.

Department of Health

EMERGENCY RULE MAKING

Nursing Home Pharmacy Regulations

I.D. No. HLT-43-05-00006-E
Filing No. 1156
Filing date: Oct. 11, 2005
Effective date: Oct. 11, 2005

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

Action taken: Amendment of section 415.18(g) and (i) of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

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

Specific reasons underlying the finding of necessity: There is an increasing need to have available to nursing home residents a wider number of antibiotic and pain management medications to respond quickly in the event of a health crisis to these medically fragile residents. Presently, emergency medication kits are limited as to their content and facilities are not permitted to have certain medications including controlled substances in the emergency kits. Delay in responding to resident needs because a medication is not immediately available in the facility, and has to be secured from the pharmacy, is resulting in needless suffering on the part of nursing home residents.

Subject: Nursing home pharmacy regulations.

Purpose: To make available in nursing home emergency medication kits, a wider variety of medications to respond to the needs to residents and allow verbal orders from a legally authorized practitioner.

Text of emergency rule: Subdivisions (g) and (i) of Section 415.18 are amended to read as follows:

Section 415.18 Pharmacy Services.

* * *

(g) Emergency medications. The facility shall ensure the provision of (an) emergency medication kit(s) as follows:

(1) The contents of each kit shall be approved by the medical director, pharmacist and director of nursing.

(2) [Controlled Substances shall be prohibited in emergency kits.] *Limited supplies of controlled substances for use in emergency situations may be stocked in sealed emergency medication kits.*

(i) Each such kit may contain up to a 24 hour supply of a maximum of ten different controlled substances in unit dose packaging, three of which may be injectable drugs.

(ii) Controlled substances contained in emergency medication kits may be administered by authorized personnel pursuant to an order of an authorized practitioner to meet the immediate need of a resident. Personnel authorized to administer controlled substances shall include registered professional nurses, licensed practical nurses or other practitioners, licensed/registered under Title VIII of the Education Law and authorized to administer controlled substances.

(iii) The facility shall maintain all records of controlled substances furnished or transferred from the pharmacy and the disposition of all controlled substances in emergency kits, as required by article 33 of the Public Health Law and corresponding regulations.

(3) For medications other than controlled substances [The] the medication contents of each kit shall be limited to injectables except that the kit may also include:

(i) sublingual nitroglycerine; and

(ii) up to five noninjectable, prepackaged medications not to exceed a 24-hour supply[; which are the same noninjectable, prepackaged medications in all emergency kits throughout the facility]. *The total number of noninjectables may not exceed 25 medications for the entire facility;*

(4) Each kit shall be kept and secured within or near the nurses' station.

* * *

(i) Verbal orders. All medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order, in which case the verbal order shall be given to a licensed nurse, or to a licensed pharmacist, immediately reduced to writing, authenticated by the nurse or registered pharmacist and countersigned by the prescriber within 48 hours. In the event a verbal order is not signed by the prescriber or a *legally* designated alternate [physician] *practitioner* within 48 hours, the order shall be terminated and the facility shall ensure that the resident's medication needs are promptly evaluated by the medical director or another legally authorized prescribing practitioner.

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 8, 2006.

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

Regulatory Impact Statement

Statutory Authority:

These regulation revisions of 10 NYCRR Section 415.18, Pharmacy Services, in nursing homes, are proposed under the authority granted to the Commissioner of Health under PHL Section 2803. The PHL outlines the responsibility to conduct inspections of health care facilities to determine compliance with statutes and regulations promulgated under the provisions of those statutes and authorizes the commissioner to propose rules, regulations and amendments thereto for consideration by the State Hospital Review and Planning Council "the Council". The Council, by a majority vote of its members, shall amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes as stated in the PHL.

Legislative Objectives:

The Department of Health possesses the comprehensive responsibility for the development and administration of programs, standards and methods of operation, and all other matters of policy with respect to nursing home services. Furthermore, through the Social Security Act, the federal government authorizes the State to administer programs and services through Medical Assistance (*i.e.*, Medicaid). This includes responsibility for standards of care within those settings, in order to ensure the health needs of recipients are met. These amended regulations will enable nursing homes to respond more quickly and efficiently to the health care needs of residents requiring emergency medications. The regulation will ensure the protection of the nursing home resident and promote the highest quality of care.

Needs and Benefits:

This proposal to amend 10 NYCRR sections 415.18(g) and 415.18(i) responds to the fact that current regulations for nursing home emergency medication kits and verbal orders are outdated and not in keeping with actual practice.

The State's nursing homes provide a variety of clinical services which were not anticipated when the current pharmacy services regulations were promulgated. The Rug-II case mix reimbursement methodology which began in 1986, has allowed nursing homes to open their doors to residents who require resources which were previously unavailable. Currently, nursing homes accept residents whose clinical needs at one time were met in a hospital. In addition, some nursing homes have units that address the unique needs of special populations such as HIV, traumatic brain injury (TBI), or ventilator residents.

The present regulation, section 415.18(g), provides for emergency medication kits but limits the contents to injectables. It also provides for the kit to contain sublingual nitroglycerine and up to five noninjectable prepackaged medications. At the time this regulation was promulgated, the extensive array of oral medications currently available did not exist and emergency medications were primarily viewed in terms of injectable medications. With the greater complexity of clinical conditions often seen in today's nursing home, resident issues of pain management have taken on greater significance. The availability of oral medications for pain and the wide range of antibiotics that did not exist at the time the regulations were written would significantly affect how nursing homes could respond to an emergency need of a resident.

The present regulations call for the contents of the emergency medication kits to be identical on every unit throughout the facility. At a time when the needs of residents were similar in terms of clinical management, this made sense. However, with nursing homes providing care to special populations including HIV, TBI and ventilator care, this requirement inhibits the most efficient use of emergency medications kits to best meet the unique clinical needs of special populations. When promulgated, these

regulations were seeking to address concerns that facilities would establish "mini" pharmacies by having a wide range of noninjectables in the emergency medication kit and that the presence of a high number of medications may result in administration errors. With safe product packaging that is present today, safety concerns have been significantly reduced. In addition, the proposed regulation changes would limit the total number of noninjectables that would be available in emergency kits to no more than twenty-five. This would further ensure resident safety and eliminate the concern that nursing homes might stock an unlimited amount of noninjectables in the emergency kits. The proposed revisions would also allow for the presence of controlled substances in nursing home emergency kits. This would allow for the nursing home to respond quickly to pain management concerns that are a major issue for some residents.

Regulations at 415.18(i) provide that all medications administered to residents shall be ordered in writing by a legally authorized practitioner unless unusual circumstances justify a verbal order. At the time the original regulations were promulgated only physicians could order medications. The proposed changes would insert the phrase designated alternate practitioner in place of designated alternate physician. This change would be reflective of current practices in which other prescribers, such as a nurse practitioner can order medications.

COSTS:

Costs to Regulated Parties:

There will be no additional costs to regulated parties.

Costs to State and Local Government:

There will be no additional costs to State or local governments.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed regulation imposes no program, duty, service, or other responsibility upon any city, town, village, school, fire or other special district.

Paperwork:

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

Duplication:

The regulation does not duplicate any federal or state regulation.

Alternative Approaches:

No alternative approaches were considered, since all nursing homes would be allowed flexibility in determining the contents of the emergency medication kit in their facility.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed regulation will be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect on Small Business and Local Government:

For the purposes of this Regulatory Flexibility Analysis, small businesses are considered any nursing home within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes would therefore be considered "small businesses."

Compliance Requirements:

The regulation would impose no additional recordkeeping or other affirmative acts.

Professional Services:

The regulation would impose no additional professional services.

Compliance Costs:

The regulation would impose no additional costs.

Economic and Technological Feasibility Assessment:

The proposed regulation would impose no compliance requirements which would raise technological or feasibility issues.

Minimizing Adverse Impact:

The agency considered the approaches listed in section 202-b(1) of SAPA and found them inapplicable. The regulation would impose no adverse impact on small businesses or local governments.

Small Business and Local Government Input:

The regulation would have no impact on small businesses and local governments. The regulation is supported by provider and consumer groups and feedback from these groups have been gathered. The proposed revisions have been sent to the Codes and Regulations Committee of the Council and have appeared on the agenda of the Codes and Regulations Committee which is made up of representatives of groups that have as their members representatives of small business and local government.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less that 200,000 and for counties with a population greater than 200,000, which include towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

The regulation would impose no additional reporting, record keeping or other affirmative acts.

Professional Services:

The regulation would not require additional professional services.

Compliance Costs:

The regulation would not impose additional costs.

Minimizing Adverse Impact:

The regulation would not result in any adverse economic impact on providers. The agency considered the approaches listed in section 202-bb (2) of SAPA and found them inapplicable.

Opportunity for Rural Area Participation:

The following groups are in support of the modification of 10 NYCRR 415.18:

New York Association of Homes and Services for the Aging
Nursing Home Community Coalition
New York State Health Facilities Association
New York State Office for Aging Long Term Care Ombudsman
Health Facility Association of New York
New York State Board of Pharmacy
New York Chapter of the American Society of Consulting Pharmacists

The proposed revisions will be sent to the Code Committee of the Council and appear on the agenda of the Code Committee which is made up of representatives of groups that have as their members representatives of rural areas.

Job Impact Statement

A Job Impact Statement is not necessary because it is apparent from the nature and purpose of the proposed regulation that it will not have a substantial adverse impact on jobs or employment opportunities. The proposal simply clarifies what drugs can be stocked in emergency medication kits, as well as who may sign verbal orders.

EMERGENCY RULE MAKING

Controlled Substances in Emergency Kits

I.D. No. HLT-43-05-00007-E
Filing No. 1158
Filing date: Oct. 11, 2005
Effective date: Oct. 11, 2005

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

Action taken: Amendment of sections 80.11, 80.47, 80.49 and 80.50 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3308(2)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis because immediate adoption is necessary to protect the public health and safety. Having consulted closely with administrators, nursing personnel and consultant pharmacists of Class 3a health care facilities (nursing homes, and other long-term facilities), the Department has determined that the current Part 80 and Part 400 regulations do not ensure timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. However, for purposes of this emergency justification, Class 3a institutional dispenser, Class 3a facility, and Class 3a health-care facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490. The proposed regulations exempt such adult care facilities from its provisions.

Current regulations require controlled substances to be administered to patients in Class 3a facilities only pursuant to a prescription. On urgent occasions, such as when a patient suffers a sudden seizure or onset of acute pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription to promptly treat the condition. Even if a practitioner is able to first issue a prescription in an emergency, the prescription may not immediately be dispensed by a pharmacy. In these situations, a patient is deprived of timely relief from severe symptoms and suffering. The proposed amendments will allow controlled substances to be maintained in an emergency medication kit in a Class 3a facility and administered to a patient in an emergency situation. To simultaneously protect the public health against the potential for diversion of such drugs, the amendments also specify limitations on their quantities, recordkeeping requirements for their administration, and security requirements for their safeguarding. Immediate adoption of these regulations is necessary to enhance and ensure the quality of health care of every patient in a long-term care facility. Ensuring timely access to controlled substances for immediate administration during medical emergencies will result in substantial benefit to the public health and safety.

Subject: Controlled substances in emergency kits.

Purpose: To allow class 5A facilities to obtain, possess and administer controlled substances in emergency kits.

Text of emergency rule: Paragraph (6) of subdivision (b) of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, a habitual user of narcotics or any other habit-forming drugs.

Paragraph (6) of subdivision (c), of Section 80.11 is amended to read as follows:

(6) [be] not *be*, and not have been, an habitual user of narcotics or other habit-forming drugs; and

Subdivision (f) of Section 80.11 is amended to read as follows:

(f) Persons conducting distributing activities of controlled substances within the State of New York shall obtain a class 2 license from the department, *except that:*

(1) Except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, a pharmacy may distribute a controlled substance to a practitioner in a Class 3a institutional dispenser limited solely for stocking in sealed emergency medication kits. Such distribution shall be pursuant only to a written request by the Class 3a facility indicating the name and address of the facility, the name and address of the pharmacy, the date of the request, the type and quantity of the drug requested and the signature of the authorized person making the request. With each distribution, the pharmacy shall provide the Class 3a facility with an itemized list indicating the name and address of the pharmacy, the name and address of the Class 3a facility, the date of the distribution, the type and quantity of the drug distributed, and the signature of the pharmacist.

Section 80.47 is amended by creating subdivisions (a), (b) and (c) and new subdivision (b) is amended to read as follows:

Section 80.47 Institutional dispenser, limited. *(a)* Nursing homes, convalescent homes, health-related facilities, *adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490* [homes for the aged], dispensaries or clinics not qualifying as institutional dispensers in license class 3 shall apply for an institutional dispenser, limited license. Such institutional dispensers qualifying for controlled substances privileges shall obtain a class 3a license from the department.

(b) An institutional dispenser licensed in class 3a may administer controlled substances to patients only pursuant to a prescription issued by an authorized physician or other authorized practitioner and filled by a registered pharmacy; except that [an] *controlled substances in emergency medication kits may be administered to patients as provided in Section 80.49(d) of this Part, except in an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.*

(c) An institutional dispenser, limited, licensed in class 3a, which is operated as an integral and physical part of a facility licensed as a class 3 institutional dispenser may be provided with bulk stocks of controlled substances obtained pursuant to such class 3 institutional dispenser license. Records of distribution and administration of such bulk stocks of controlled substances shall be kept as provided in section 80.48(a) of this Part.

Subdivision (c) of section 80.49 is amended and a new subdivision (d) is added to read as follows:

(c) A separate record shall be maintained of the administration of *prescribed* controlled substances indicating the date and hour of administration, name and quantity of controlled substances, name of the prescriber, patient's name, signature of person administering and the balance of the controlled substances on hand after such administration.

(d) In an emergency situation, a controlled substance from a sealed emergency medication kit may be administered to a patient by an order of an authorized practitioner. An oral order for such controlled substance shall be immediately reduced to writing and a notation made of the condition which required the administration of the drug. Such oral order shall be signed by the practitioner within 48 hours.

(1) For purposes of this subdivision, emergency means that the immediate administration of the drug is necessary and that no alternative treatment is available.

(2) A separate record shall be maintained of the administration of controlled substances from an emergency medication kit. Such record shall indicate the date and hour of administration, name and quantity of controlled substances, name of the practitioner ordering the administration of the controlled substance, patient's name, signature of the person administering and the balance of the controlled substances in the emergency medication kit after such administration.

(3) The institutional dispenser limited shall notify the pharmacy furnishing controlled substances for the emergency medication kit within 24 hours of each time the emergency kit is unsealed, opened, or shows evidence of tampering.

Subdivision (e) of section 80.50 is amended and a new paragraph (1) is added to read as follows:

(e) *Except as provided in paragraph (1) of this subdivision,* [I]*institutional dispensers limited may only possess controlled substances prescribed for individual patient use, pursuant to prescriptions filled in a registered pharmacy. These controlled substances shall be safeguarded as provided in subdivision (d) of this section.*

(1) Except for adult care facilities subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490, institutional dispensers limited may possess limited supplies of controlled substances in sealed emergency medication kits for use as provided in section 80.49(d) of this Part. Each kit may contain up to a 24-hour supply of a maximum of ten different controlled substances in unit dose packaging, no more than three of which may be in an injectable form. Each kit shall be secured in a stationary, double-locked system or other secure method approved by the 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 8, 2006.

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

Regulatory Impact Statement

Statutory Authority:

Section 3308(2) of the Public Health Law authorizes and empowers the Commissioner to make any regulations necessary to supplement the provisions of Article 33 of the Public Health Law in order to effectuate its purposes and intent.

Section 3321(1)(b) authorizes the commissioner to make regulations that exempt a pharmacy from the licensing requirements of article 33 for the sale of controlled substances to a practitioner for the immediate needs of the practitioner receiving such substances.

Legislative Objectives:

Article 33 of the Public Health Law, officially known as the New York State Controlled Substances Act, was enacted in 1972 to govern and control the possession, prescribing, manufacturing, dispensing, adminis-

tering, and distribution of licit controlled substances within New York. Section 3300-a expressly states that one of the statute's purposes is to allow the legitimate use of controlled substances in health care.

Needs and Benefits:

This regulation effectuates the above stated legislative purpose of section 3300-a of the New York State Controlled Substances Act. It will ensure timely access to controlled substances by practitioners and patients for emergency situations in extended care facilities and other health care facilities licensed by the Department as Class 3a, institutional dispenser limited. (See section 3302(18) of the Public Health Law for the definition of "institutional dispenser".) However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Section 80.47 of Title 10 regulations requires that controlled substances be administered to patients in healthcare facilities licensed by the Department as Class 3a institutional dispensers limited (*i.e.*; nursing homes, convalescent homes, health-related facilities, adult homes, homes for the aged, correctional facilities) only pursuant to a prescription issued by an authorized practitioner. The regulation also requires that such prescriptions must be dispensed by a registered pharmacy.

Administrators, nursing personnel, and consultant pharmacists of Class 3a facilities have expressed their concern to the Department that the prescription requirements of Section 80.47 are a restriction to timely access to controlled substances by practitioners and patients when immediate administration is medically necessary. On urgent occasions such as a sudden seizure or onset of intractable pain, the severity of the situation may make it impossible for a practitioner to first issue a prescription for the drug in order to promptly treat the condition. Further, Class 3a facilities do not have onsite pharmacies. Even if a practitioner is able to first issue a prescription for a controlled substance to treat a patient in an emergency, that prescription may not immediately be dispensed by an outside pharmacy because the pharmacy may be too distant from the Class 3a facility or the emergency may have occurred during the pharmacy's non-business hours. These situations can, and do, result in needed medications not being administered in a timely fashion to relieve a patient's severe symptoms or suffering.

The proposed amendment to Section 80.47 of the regulations authorizes the administration of a controlled substance from an emergency medication kit to a patient in an emergency situation in a Class 3a healthcare facility. Necessary complements to this amendment are the proposed amendments to Sections 80.11(f), 80.49 and 80.50(e) of Title 10 regulations. The proposed changed to Section 80.11(b)(6) is merely grammatical.

The amendment to Section 80.11(f) authorizes a licensed pharmacy to supply controlled substances to a practitioner in a Class 3a facility for stocking in emergency medication kits. The amendments to Section 80.50(e) authorize a Class 3a healthcare facility to possess a limited supply of controlled substances in an emergency medication kit and specify limitations on the quantities of such substances and requirements for their safeguarding. The amendment to Section 80.49 specifies recordkeeping requirements for controlled substances administered from emergency kits. When instituted together, these amendments will provide for timely access to controlled substances by practitioners and patients in the long-term care facility environment while simultaneously requiring adequate measures to ensure the security of such substances.

The federal Drug Enforcement Administration (DEA) also recognizes the need for storing controlled substances in emergency kits for administration to patients during urgent situations in long-term care facilities that are not eligible to hold a DEA registration. Since 1980, the DEA has issued a Statement of Policy containing guidelines for state regulatory agencies to follow when authorizing long-term care facilities to maintain such kits. Such guidelines have been incorporated in the proposed regulatory amendments.

The proposed regulatory amendments will enhance the quality of care of every patient in a long-term care facility licensed by the Department of Health. Such regulation will result in substantial benefit to the public health, which the Department has both a civic and legislative responsibility to ensure.

Costs:

Costs to Regulated Parties

Healthcare facilities licensed as Class 3a institutional dispensers limited already possess required secure cabinets for safeguarding controlled substances. Such secure cabinets can also safeguard emergency kits containing controlled substances. Those facilities choosing to maintain such emergency kits will incur minimal costs to do so. These costs will be reflected in the purchase of the limited supplies of controlled substances and the sealable emergency kits required to secure and store them.

Costs to State and Local Government

There will be no costs to state or local government.

Costs to the Department of Health

There will be no additional costs to the Department.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other specific district.

Paperwork:

Class 3a healthcare facilities are currently required by regulations to keep records of the receipt of all controlled substances prescribed for individual patients. Such facilities are also required to record all controlled substances dispensed and administered to such patients. These recordkeeping requirements would include the requisition and receipt of controlled substances for stocking in emergency medication kits.

Practitioners authorized to prescribe controlled substances are required by regulations to make a notation in a patient record of all controlled substances prescribed for that patient. The amendment to Section 80.47 requires that the administration of a controlled substance to a patient from an emergency kit in a Class 3a facility be pursuant to the written or oral medical order of a practitioner.

The Department anticipates a minimal increase in paperwork documenting the requisition, distribution, medical order, and administration of controlled substances contained in emergency medication kits. Such increase will be more than offset by the enhancement of healthcare for patients in the long term care environment.

Duplication:

The requirements of this proposed regulation do not duplicate any other state or federal requirement.

Alternatives:

The intent of the proposed regulation is to ensure access to controlled substance medications when urgently needed. The department believes it is in the best interest of the public health to authorize such accessibility to relieve pain or suffering. There are no alternatives that would ensure accessibility to controlled substances by practitioners and patients for emergency situations in long term care facilities and other health care facilities licensed as Class 3a, institutional dispenser limited.

Federal Standards:

The regulatory amendment does not exceed any minimum standards of the federal government. This amendment achieves consistency with existing federal and New York State laws and regulations promulgated to authorize the legitimate use of controlled substances in health care.

Compliance Schedule:

These regulations will become effective immediately upon filing a Notice of Emergency Adoption with the Secretary of State. At that time, in order that the public health derive maximum benefit from this regulatory amendment, all Class 3a license holders will be authorized to possess and administer controlled substances in an emergency medication kit to meet the immediate, legitimate need of a patient.

Regulatory Flexibility Analysis

Effect of Rule on Small Business and Local Government:

This proposed rule will affect practitioners, pharmacists, retail pharmacies, and nursing homes and other healthcare facilities licensed by the Department as Class 3a institutional dispensers limited. Local government will only be affected if it operates one of the above facilities.

According to the New York State Department of Education, Office of the Professions, as of April, 2003, there were 113,666 licensed and registered practitioners authorized to prescribe and order the administration of controlled substances. However, this rule will affect only those practitioners who prescribe or order the administration of controlled substances for patients and residents of long term care facilities or supply such facilities with controlled substances for emergency medication kits.

According to the New York State Board of Pharmacy, as of June 30, 2003, there were a total of 4,521 pharmacies in New York State. Of these, 60 are sole proprietorship, 297 are partnerships, 73 are small chains (fewer than 3 pharmacies per chain) and the rest are large chains or other corporations (some of which may be small businesses) or located in public institutions. According to the New York State Education Department's Office of the Professions, as of April 1, 2003, there were 18,950 licensed and registered pharmacists in New York. However, this rule will affect only those pharmacies and pharmacists that dispense prescriptions for controlled substances to patients and residents of long term care facilities or

supply such facilities with controlled substances for emergency medication kits.

Of the 1,282 healthcare facilities licensed by the department as Class 3a institutional dispensers limited, the rule will affect only those facilities that choose to maintain controlled substances in emergency medication kits. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Compliance Requirements:

There are no compliance requirements. While the proposed amendment authorizes Class 3a facilities to possess and administer controlled substances from emergency medication kits, the regulation does not require such facilities to do so.

Professional Services:

No additional professional services are necessary.

Compliance Costs:

Other than the cost of the controlled substances and sealable emergency medication kits for those Class 3a facilities choosing to possess such kits, there are no compliance costs associated with the proposed regulation.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimize Adverse Impact:

The agency considered the approaches in section 202-b(1) of SAPA and found them inapplicable. The proposed regulation minimizes any adverse impact by not requiring pharmacies to supply controlled substances to Class 3a facilities for emergency medication kits. Pharmacies are authorized to engage in such activity strictly on a voluntary basis.

Small Business and Local Government Participation:

To ensure that small businesses were given the opportunity to participate in this rule making, the Department met with the pharmacy societies representing independent pharmacies. Local governments are not affected.

During the drafting of this regulation, the Department met with the Pharmaceutical Society of the State of New York (PSSNY), the Chain Pharmacy Association of New York State, the New York Council of Health Systems Pharmacists, and the New York State Chapter of American Society of Consultant Pharmacists.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule will apply to participating pharmacies and Class 3a healthcare facilities located in all rural areas of the state. Outside of major cities and metropolitan population centers, the majority of counties in New York contain widespread rural areas. These can range in extent from small towns and villages, and their surrounding areas, to locations that are very sparsely populated.

Compliance Requirements:

There are no compliance requirements. The proposed amendment authorizes pharmacies to distribute limited supplies of controlled substances to Class 3a facilities for maintaining in emergency medication kits. The regulation also authorizes those healthcare facilities to possess and administer controlled substances to patients from such kits in an emergency situation. However, these actions are undertaken on a voluntary basis by both pharmacy and healthcare facility. The regulation does not require either party to participate.

Present regulations require pharmacies and Class 3a facilities to maintain specified records of dispensing, receipt, and administration of controlled substances. The proposed regulation requires a minimum of additional recordkeeping to ensure limited access to emergency medication kits and safeguarding of the controlled substances contained therein. However, for the purpose of this impact statement, Class 3a institutional dispenser, Class 3a facility, and Class 3a healthcare facility shall not mean an adult care facility subject to the provisions of Title 18 NYCRR Parts 487, 488 and 490.

Professional Services:

Pharmacies already employ the professional services of licensed and registered pharmacists. Class 3a healthcare facilities employ the services of practitioners, nurses, and consultant pharmacists. The proposed regulation would require no additional professional services, either public or private, in rural areas.

Compliance Costs:

Compliance costs to pharmacies opting to distribute limited supplies of controlled substances to Class 3a facilities will be negligible, since these pharmacies already maintain an existing inventory of such controlled substances. Other than the cost of the controlled substances and the sealable medication kits in which to store them, the compliance cost to Class 3a facilities choosing to possess such kits will be minimal.

Economic and Technological Feasibility:

The proposed rule is both economically and technologically feasible. Class 3a healthcare facilities that choose to possess and administer controlled substances from emergency medication kits will use existing equipment for security and recordkeeping requirements.

The Department anticipates that these facilities will incur minimal expenditures for limited supplies of controlled substances and the sealable emergency kits in which to store them. Such expenditures will be more than offset by the enhancement of medical care for patients in Class 3a healthcare facilities.

Minimizing Adverse Impact:

The agency considered the approaches in Section 202-bb(2) of SAPA and found them inapplicable.

In ensuring access to controlled substances for legitimate medical treatment by practitioners and patients in Class 3a healthcare facilities, the proposed amendment does not impose any adverse impact upon rural areas. In fact, because in a rural setting pharmacies supplying prescriptions for controlled substances may be located at increased distances from long term care facilities, it is anticipated that these healthcare facilities would derive maximum benefit for their patients by being authorized to maintain limited supplies of controlled substances in sealed medication kits for use in emergency situations.

Rural Area Participation:

During the drafting of this regulation, the Agency met with and solicited comment from consultant pharmacists to Class 3a facilities, many of which are located in rural areas. It was the overwhelming consensus that pharmacists could better meet and greatly enhance the healthcare of the patients they serve in such facilities by being authorized to supply controlled substances for emergency medication kits. Administrative and nursing personnel in such facilities have also voiced to the Agency their need for emergency access to controlled substances for administration to patients to alleviate suffering in urgent situations. The agency addressed many of these concerns in the proposed regulation.

Job Impact Statement

Nature of Impact:

This proposal will not have a negative impact on jobs and employment opportunities. In benefitting the public health by ensuring access to controlled substances for legitimate healthcare needs, the proposed amendment is not expected to either increase or decrease jobs overall.

NOTICE OF ADOPTION

Adult Care Facility Inspection Reports

I.D. No. HLT-09-05-00007-A
Filing No. 1157
Filing date: Oct. 11, 2005
Effective date: Oct. 26, 2006

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

Action taken: Amendment of sections 486.2 and 486.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 460 and 461

Subject: Adult care facility inspection reports.

Purpose: To conform regulations to statute, requiring that the department's inspection reports find whether each area of an ACF operation is or is not in compliance with regulations, pursuant to a recent supreme court decision.

Text or summary was published in the notice of proposed rule making, I.D. No. HLT-09-05-00007-P, Issue of March 2, 2005.

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

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

Assessment of Public Comment

The Department received one set of comments in regard to the ACF Inspection Reports regulation. Our response to comments made is as follows:

Comment:

A comment states "The fact that full inspections must review all areas of operation, while partial or complaint inspections review limited areas, warrants a distinction between the full and partial or complaint inspections in Section 486.2(i). Moreover, a listing of the areas inspected in a partial or complaint inspection are necessary to ensure compliance with Social Services Law Section 461-l(2)(c)."

Response:

Neither existing statute (Social Services Law Article 7) nor existing regulations (Title 18 NYCRR Part 486) require distinguishing an inspection report to the specific type of inspection conducted by the surveyor. Currently, for all inspections, the cover letter accompanying the written report of the inspection indicates the type of inspection conducted. As the proposed regulation provides, the written report of inspection sent to the operator would include "a statement attesting [to] the areas reviewed." This provision negates the need to distinguish between inspection reports in regulation. As a clarification of the language advanced by the Department, this point will be further emphasized by the following addition:

"(1) *a statement attesting that of the areas reviewed, if no violations or findings are noted in a given area, then said area(s) shall be deemed to be in compliance with applicable requirements* [identification of any areas in which the facility meets or exceeds compliance with applicable requirements];" (emphasis identifies addition).

Comment:

A comment states "Corrective actions are more specific than the cited violations regarding whether facility-wide rectification is required, thus supporting the change of the word 'violations' to 'corrective actions' in Section 486.5(a)(3) to offer greater clarity in the regulation."

Response:

This proposed change would entirely alter the intent and meaning of Section 486.5(a)(3). It would require a statement of corrective action in all instances, even where the manner of appropriate rectification is obvious, rather than only those instances where appropriate as advanced by the Department and, therefore, no change will be made in this proposal.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

HCBS Day Habilitation and Prevocational Services

I.D. No. MRD-43-05-00017-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(c) and (e) of Title 14 NYCRR.

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

Subject: Revision of reimbursement methodologies for HCBS day habilitation and prevocational services.

Purpose: To create new definitions of billing units of service, establish statewide regulatory standards for the service duration associated with each billing unit, and enhance provider accountability; establish clear standards to document the provision of services; and simplify the price setting reimbursement methodologies.

Text of proposed rule: 635-10.5(c) Day habilitation services.

(1) The following shall apply to day habilitation services provided on or after January 1, 2006.

(2) Day habilitation services shall be reimbursed as either Individual Day Habilitation, Supplemental Individual Day Habilitation, Group Day Habilitation or Supplemental Group Day Habilitation.

(i) Individual Day Habilitation services are services that are provided with a staff-to-consumer ratio of no greater than one consumer per staff member. Individual Day Habilitation services are delivered on weekdays and have a service start time prior to 3:00 p.m. OMRDD will authorize a provider to deliver Individual Day Habilitation services only where at least 90% of the planned schedule of activities involves one-on-one service provision. There will be one Individual Day Habilitation price for each agency that OMRDD authorizes to deliver the service.

(ii) Supplemental Individual Day Habilitation services are services that are provided with a staff-to-consumer ratio of no greater than one consumer per staff member. Services are delivered on weekdays with a start time at 3:00 p.m. or later or anytime on weekends. OMRDD will authorize a provider to deliver Supplemental Individual Day Habilitation services only where at least 90% of the planned schedule of activities involves one-on-one service provision. There will be one Supplemental Individual Day Habilitation price for each agency that OMRDD authorizes to deliver the service.

(iii) Group Day Habilitation services are services that are typically provided to two or more enrolled consumers. Group Day Habilitation services are delivered on weekdays and have a service start time prior to 3:00 p.m. There will be one Group Day Habilitation price for each agency that OMRDD authorizes to deliver the service.

(iv) Supplemental Group Day Habilitation services are services that are typically provided to two or more enrolled consumers. Group Day Habilitation services are delivered on weekdays with a start time at 3:00 p.m. or later or anytime on weekends. There will be one Supplemental Group Day Habilitation price for each agency that OMRDD authorizes to deliver the service.

(3) An annual price period is a 12-month period as follows:

(i) for providers in the counties of New York, Bronx, Queens, Kings and Richmond, July 1st to June 30th;

(ii) for providers in all other counties, January 1st to December 31st;

(iii) for day habilitation providers defined in subparagraph (i) of this paragraph, there will be a one-time, six-month price period from January 1, 2006 to June 30, 2006.

[(1)]*(4)* Day habilitation service costs are those costs related to the aggregate of all services selected and identified in the individualized service plan (ISP) *and Day Habilitation Plan* for each person participating in the program.

Note: Current subparagraphs (i) and (ii) remain unchanged.

(iii) Reimbursement shall be contingent upon prior OMRDD approval and documentation that those participating in the program have received the services as specified in each person's individual*ized* service plan (ISP) *and Day Habilitation Plan.*

(iv) For Individual Day Habilitation and Supplemental Individual Day Habilitation services, total annual reimbursable costs derived through the application of the above methodology shall be trended in accordance with subdivision (i) of this section and divided by the total annual projected hours of utilization.

[(iv)]*(v) For Group Day Habilitation and Supplemental Group Day Habilitation services,* [T] *t*otal *annual* reimbursable costs derived through the application of the above methodology shall be trended in accordance with subdivision (i) of this section and divided by total [person days] *annual projected full and half units.* [Total person days shall be the higher of reported person days or computed person days as defined pursuant to either clause (a) or (b)(1) or (2) of this subparagraph.]

Note: Rest of current subparagraph (iv) is deleted.

(5) The unit of service for Individual Day Habilitation and Supplemental Individual Day Habilitation services shall be one hour equaling 60 minutes and is reimbursed in 15-minute increments. When there is a break in the service delivery during a single day, for billing purposes, the provider may combine the duration of each non-continuous period of service provision (or "session") that is provided during the day, when at least one service/staff action delivered in accordance with the individual's Day Habilitation Plan is documented for each session.

(i) Only time when Individual Day Habilitation or Supplemental Individual Day Habilitation staff are present with the consumer and providing services may be counted toward the billable service time (see subparagraph (iii) of this paragraph).

(ii) For each continuous service delivery period or session, the Individual Day Habilitation or Supplemental Individual Day Habilitation provider must document the service start time and the service stop time and the provision of at least one service/staff action delivered in accordance with the individual's Day Habilitation Plan.

(iii) Billable service time is time when staff are providing face-to-face Individual Day Habilitation or Supplemental Individual Day Habilitation services to an individual in accordance with the individual's Day Habilitation Plan. The following cannot be counted toward the Individual Day Habilitation or Supplemental Individual Day Habilitation billable service time:

(a) Time spent in group activities may not be counted as billable service time;

(b) Where Individual Day Habilitation or Supplemental Individual Day Habilitation staff accompany the consumer to any other separately reimbursed service, the time spent at the separately reimbursed service cannot be counted as billable service time. Travel time to and from the separately reimbursed service also cannot be counted as billable service time;

(c) Time spent traveling to the first Individual Day Habilitation or Supplemental Individual Day Habilitation activity of the day and time spent traveling home or to another service at the conclusion of the Individual Day Habilitation or Supplemental Individual Day Habilitation service may not be counted as billable service time, with an exception made for time-limited travel training services (see subparagraph (iv) of this paragraph).

(iv) When Individual Day Habilitation or Supplemental Individual Day Habilitation staff provide time-limited travel training services to a consumer who is traveling to the first Individual Day Habilitation or Supplemental Individual Day Habilitation activity of the day and traveling home or to another service at the conclusion of the Individual Day Habilitation or Supplemental Individual Day Habilitation service, the time spent receiving travel training services may be counted as billable service time as long as:

(a) the travel training service is provided on a time-limited basis, and;

(b) travel training is specifically identified in the consumer's Day Habilitation Plan.

(v) Supplemental Individual Day Habilitation services may not be billed to Medicaid for consumers who live in residential settings with 24-hour staffing; for example, Supervised Individual Residential Alternatives (IRAs) and Supervised Community Residences (CRs).

(6) Unit of service for reimbursement of Group Day Habilitation and Supplemental Group Day Habilitation.

(i) Group Day Habilitation and Supplemental Group Day Habilitation services are reimbursed in full or half units of service:

(a) The agency may bill a full unit of service when the agency delivers and documents at least two services delivered in accordance with the individual's Day Habilitation Plan and provides a program day duration of four to six hours (see subparagraph (ii) of this paragraph).

(b) The agency may bill a half unit of service when the agency delivers and documents at least one service delivered in accordance with the individual's Day Habilitation Plan and provides a program day duration of at least two hours.

(ii) The program day duration for both Group Day Habilitation and Supplemental Group Day Habilitation is the length of time that the person is participating in the Group Day Habilitation or Supplemental Group Day Habilitation services. The following cannot be counted as part of the program day duration:

(a) Time spent at any other separately reimbursed service that occurs during the Group Day Habilitation or Supplemental Group Day Habilitation program day, e.g., clinic services;

(b) Time spent traveling from the Group Day Habilitation or Supplemental Group Day Habilitation service to any other separately reimbursed service and returning from the separately reimbursed service;

(c) Time spent traveling to the first Group Day Habilitation or Supplemental Group Day Habilitation activity of the day and time spent traveling home or to another service at the conclusion of the Group Day Habilitation or Supplemental Group Day Habilitation program day; and

(d) Mealtime.

(iii) Supplemental Group Day Habilitation services may not be billed to Medicaid for consumers who live in residential settings with 24-hour staffing; for example, Supervised Individual Residential Alternatives (IRAs) and Supervised Community Residences (CRs).

(7) Billing limits for Group Day Habilitation and Supplemental Group Day Habilitation.

(i) On a given day, a maximum of one and a half units per consumer, either one full unit and one half unit, or three half units, may be reimbursed for:

(a) Group Day Habilitation only, or

(b) Any combination of Group Day Habilitation or Prevocational Services (see subdivision 635-10.5(e)).

(ii) On a given day, a maximum of one full unit per consumer, either one full unit or two half units, may be reimbursed for Supplemental Group Day Habilitation.

(8) If OMRDD determines that there has been, or will be, a deviation between the actual units of service paid to a provider and the projected units of services used in determining the price, OMRDD may recalculate the price using the actual units of service paid. In deciding whether to recalculate a price using actual units of service, OMRDD will consider the material difference between projected and annual units of service, the effect that the recalculation would have on the provider's reimbursement for day habilitation services, the provider's financial position, and changes in the provider's programs or services.

Note: Rest of subdivision (c), *i.e.*, paragraph (2), is renumbered accordingly.

635-10.5(e) Prevocational [s]Services.

(1) The following shall apply to Prevocational Services provided on or after January 1, 2006.

(2) An annual price period is a 12-month period as follows:

(i) for providers in the counties of New York, Bronx, Queens, Kings and Richmond, July 1st to June 30th;

(ii) for providers in all other counties, January 1st to December 31st;

(iii) for Prevocational Services providers defined in subparagraph (i) of this paragraph, there will be a one-time, six-month price period from January 1, 2006 to June 30, 2006.

[(1)]*(3)* Prevocational Services costs are those costs related to the aggregate of all services selected and identified in the individualized service plan (ISP) *and Prevocational Services Plan* for each person receiving prevocational services.

[(2)]*(4)* Allowable prevocational costs shall be based on allowable [p]Prevocational [s]Services as identified in section 635-10.4(c) of this Subpart, and Subpart 635-6 of this Part, and incurred by an approved provider of service responsible for the delivery of such services.

[(3)]*(5)* Reimbursement for [p]Prevocational [s]Services shall be determined through a budget review process.

Note: Current subparagraphs (3)(i) and (ii) remain unchanged, subparagraph (iii) is deleted and subparagraph (iv) is renumbered as (iii) and amended as follows:

[(iv)]*(iii)* The [hourly] price for [p]Prevocational [s]Services shall be determined by dividing the approved budgeted costs for all individuals included in the budget by the total [projected hours of service specified in ISPs of said persons] *annual projected full and half units*.

[(4)]*(6)* Reimbursement shall be contingent upon prior OMRDD approval and documentation that [p]Prevocational [s]Services are specified in each person's ISP *and Prevocational Services Plan*.

Note: Rest of current paragraph (e)(4) is deleted.

(7) Unit of service for reimbursement for Prevocational Services.

(i) Reimbursement for Prevocational Services shall be claimed on an individual basis. Prevocational Services shall be billed on a full and half unit basis.

(a) The agency may bill a full unit of service when the agency delivers and documents at least two services delivered in accordance with the individual's Prevocational Services Plan and provides a program day duration of at least four hours (see subparagraph (ii) of this paragraph).

(b) The agency may bill a half unit when the agency delivers and documents at least one service delivered in accordance with the individual's Prevocational Services Plan and provides a program day duration of at least two hours.

(ii) The program day duration for Prevocational Services is the length of time that the person is present at the provider's "vocational/work program" where Prevocational Services are provided. The following cannot be counted as part of the program day duration:

(a) Time spent at any other separately reimbursed service that occurs during the Prevocational Services program day, e.g., clinic services;

(b) Time spent traveling from the Prevocational Service to the separately reimbursed service and returning from the separately reimbursed service;

(c) Time spent traveling to the first Prevocational Services activity of the day and time spent traveling home or to another service at the conclusion of the Prevocational Services program day; and

(d) Mealtime.

(8) Billing limits for Prevocational Services.

(i) On a given day, a maximum of one and a half units per consumer, either one full unit and one half unit, or three half units, may be reimbursed for:

(a) Prevocational Services only, or

(b) any combination of Prevocational Services or Group Day Habilitation.

(ii) Where more than one agency delivers services on a given day to the same consumer, the total number of units billed for that day by all agencies may not exceed the maximum allowed daily units described in subparagraph (i) of this paragraph.

(9) If OMRDD determines that there has been, or will be, a deviation between the actual units of service paid to a provider and the projected units of services used in determining the price, OMRDD may recalculate the price using the actual units of service paid. In deciding whether to recalculate a price using actual units of service, OMRDD will consider the material difference between projected and annual units of service, the effect that the recalculation would have on the provider's reimbursement for prevocational services, the provider's financial position, and changes in the provider's programs or services.

Note: Current paragraphs (e)(5) and (e)(6) are renumbered as (e)(10) and (e)(11).

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(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, and 43.02 of the Mental Hygiene Law by making necessary revisions to the reimbursement methodology for Home and Community-Based (HCBS) Waiver Day Habilitation and Prevocational Services. The proposed amendments will ensure the continuation of appropriate funding, under the HCBS waiver, to providers of these two types of services.

3. Needs and Benefits:

Since their inception almost fifteen years ago, HCBS Waiver Services have grown from a small part of the OMRDD service delivery system to become the largest service for people with developmental disabilities in New York State. The proposed amendments will revise the reimbursement methodologies for HCBS Waiver Day Habilitation and Prevocational Services by creating new definitions of billing units of service, establishing statewide regulatory standards for the service duration associated with each billing unit, and enhancing accountability. In addition, the amendments establish clear standards for documenting the provision of services.

The proposed regulations also clarify that providers cannot bill Medicaid for Supplemental Group Day Habilitation and Supplemental Individual Day Habilitation provided to persons living in residential settings with 24-hour staffing. These two forms of day habilitation services are designed for people who live at home or in Supportive Individualized Residential Alternatives (IRAs), Supportive Community Residences (CRs), Family Care Homes, or other residences without 24-hour staffing. Separate Medicaid billing of "supplemental" services is allowed only for consumers in these living situations. Consumers who live in residential settings with 24-hour staffing, such as Supervised IRAs or Supervised CRs, may participate in "supplemental" services, although, as with other after-hours activities in which the resident participates, the residential facility is responsible for the cost.

The proposed amendments will also simplify the price setting reimbursement methodologies. These services are currently reimbursed by multiple prices per provider agency. The proposal will reduce the complexity of billing for multiple prices by consolidating the prices into a single price for each type of Day Habilitation and a single price for Prevocational Services for each provider agency. Streamlining the prices will also simplify provider billing requirements and help minimize billing errors.

The amendments will not affect the provision of services to consumers.

4. Costs:

a. Costs to the Agency and to the State and its local governments: Since services are not being increased or reduced by this proposal, the amendments will have no fiscal effect on these overall costs of service provision, either for the State or for the Medicaid program. There will also be no new costs to local governments as a result of the proposed amendments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the amendments. The change will not have fiscal impacts for providers of services because the revisions are designed to achieve revenue neutrality.

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: Regulations that established HCBS Waiver Day Habilitation and Prevocational Services were developed almost fifteen years ago at the inception of the program. The original regulations focused on the most essential regulatory standards and included only minimal documentation requirements. Based on extensive experience over the past decade, OMRDD has recognized the need to enhance accountability and ensure compliance with standards applicable to the Medicaid program in general.

Over the past several years, OMRDD has instituted new policies that establish documentation requirements for a variety of HCBS Waiver Services, including Day Habilitation and Prevocational Services. Many elements of the proposed regulations incorporate documentation requirements that are already specified in policy documents. For example, the policies require documentation of a service that is delivered in accordance with the consumer's Day Habilitation Plan or Prevocational Services Plan each day that services are delivered. For services delivered to some consumers, the proposed regulations will not impose any additional documentation beyond the current policy documents. For others, the proposed regulations will require minimal documentation beyond current policy requirements.

As stated, the regulations create new definitions of billing units of service, and establish standards related to program day duration. Documentation of the program day duration such as time in/time out for Clinic Services received during the program day, or start/stop times for Individual Day Habilitation, will necessitate a minimal amount of additional notation. Furthermore, the proposed regulations require that more than one specific service must be documented on a daily basis for longer program days. OMRDD anticipates developing model checklists that can be used at the discretion of the provider for this purpose. Providers may also have to record minimal documentation of overall program features such as the duration of the scheduled program day. OMRDD anticipates that current staff will be responsible for satisfying the minimal new documentation requirements contained in this proposed rule making.

7. Duplication:

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

8. Alternatives:

The proposed rule making contains what OMRDD believes to be necessary amendments to enhance accountability and to streamline and simplify the reimbursement methodologies for Day Habilitation and Prevocational Services. The proposed amendments have been developed with the participation and input of the service provider community and represent the most viable resolution of the issues and concerns of affected parties. The only alternative would be to not revise the current regulations. Without the billing and documentation requirements and the price simplifi-

cation included in this rule, the enhanced accountability would not be achieved.

9. Federal Standards:

Current Federal requirements for Medicaid and HCBS Waiver programs, which contain general documentation requirements, apply to HCBS Waiver Day Habilitation and Prevocational Services. The proposed regulations include documentation requirements that are more detailed than the applicable Federal standards.

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. OMRDD will provide all necessary information, training, and guidance to providers regarding the new requirements before they become effective.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which provide HCBS Waiver Day Habilitation and/or Prevocational Services to persons with developmental disabilities. The OMRDD has determined, through a review of the providers' certified cost reports, that the organizations which 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 263 Day Habilitation provider agencies and 89 Prevocational Service 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 HCBS Waiver Day Habilitation and/or Prevocational Service providers, and that they will continue to provide appropriate funding for the delivery of such services.

The proposed amendments will revise the reimbursement methodologies for HCBS Waiver Day Habilitation and Prevocational Services by creating new definitions of billing units of service, establishing statewide regulatory standards for the service duration associated with each billing unit, and enhancing provider accountability. In addition, the amendments establish standards for documenting the provision of services.

The proposed amendments will also simplify the price setting reimbursement methodologies. These services are currently reimbursed by multiple prices per provider agency. The proposal will reduce the complexity of billing for multiple prices by consolidating the prices into a single price for each type of Day Habilitation and a single price for Prevocational Services for each provider agency. Streamlining the prices will also simplify provider billing requirements and help minimize billing errors.

Since services are not being increased or reduced by this proposal, the amendments will have no fiscal effect on these overall costs of service provision, either for the State or for the Medicaid program. There will also be no new costs to local governments as a result of the proposed amendments.

2. Compliance requirements: As discussed in the Regulatory Impact Statement, there will be some minimal compliance activities associated with clarifying billing and documentation standards. However, the requirements will be more than offset by the increased accountability.

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

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments. The provision of HCBS Waiver Day Habilitation and Prevocational Services already includes certain necessary administrative and paperwork requirements. As discussed in the Regulatory Impact Statement, OMRDD believes that there will some minimal increase in service documentation attributable to the proposed amendments. However, all documentation requirements associated with this rule making reflect current Medicaid and HCBS Waiver rules. OMRDD anticipates that current staff will be responsible for satisfying the minimal new documentation requirements contained in this proposed rule making.

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 no adverse economic impacts.

7. Small business and local government participation: The proposed amendments address the concerns of the provider community and are the culmination of several years of discussions with representatives from providers and provider organizations on OMRDD's Unit of Service Task Force. Small business providers have therefore been extensively consulted, and had ample opportunity for input in the development of the proposed rule making.

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 or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

The proposed amendments will revise the reimbursement methodologies for HCBS Waiver Day Habilitation and Prevocational Services by creating new definitions of billing units of service, establishing statewide regulatory standards for the service duration associated with each billing unit, and enhancing accountability. In addition, the amendments establish clear standards for documenting the provision of services. The proposed amendments will also simplify the price setting reimbursement methodologies.

As discussed in the Regulatory Impact Statement, there will be some minimal compliance activities associated with clarifying billing and documentation standards. However, the requirements will be more than offset by the increased accountability. Further, 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 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 HCBS Waiver Day Habilitation and Prevocational Services by creating new definitions of billing units of service, establishing statewide regulatory standards for the service duration associated with each billing unit, and enhancing accountability. In addition, the amendments establish clear standards for documenting the provision of services. The proposed amendments will also simplify the price setting reimbursement methodologies.

As discussed in the Regulatory Impact Statement, OMRDD believes that there will some minimal increase in service documentation attributable to the proposed amendments. However, OMRDD anticipates that current staff will be responsible for satisfying the minimal new documentation requirements contained in this proposed rule making.

The proposed amendments will have no fiscal effect on providers of these services. Since services are not being increased or reduced by this proposal, there will be no effect on the staffing patterns of regulated service providers and no effect on jobs and employment opportunities in New York State.

New York City Transit Authority

NOTICE OF ADOPTION

Use of Transit Facilities

I.D. No. NTA-47-04-00002-A
Filing No. 1154
Filing date: Oct. 11, 2005
Effective date: Dec. 5, 2005

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

Action taken: Amendment of sections 1035.2, 1040.2, 1040.5, 1040.8, 1050.2, 1050.4, 1050.5, 1050.6, 1050.7, 1050.9, 1050.11, and 1050.12 of Title 21 of NYCRR.

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

Subject: Conduct and safety of the public in the use of transit facilities, and paratransit eligibility criteria.

Purpose: To improve police officer enforcement capability, enhance customer safety, clarify the meaning and intent of certain provisions, conform the language of certain provisions to the Americans with Disabilities Act, and make technical revisions and corrections.

Substance of final rule: AMENDMENT TO PART 1035 OF TITLE 21 NYCRR - Paratransit Eligibility Criteria

Section 1035.2

A technical revision to correct a typographical error occurring when this provision was last amended is made to Section 1035.2(a) of rules relating to eligibility for paratransit services.

AMENDMENT TO PART 1040 OF TITLE 21 NYCRR - Staten Island Rapid Transit Operating Authority (SIRTOA) Rules of Conduct

Section 1040.2 A new definition of "fare media" is added. "Fare media" means the various instruments accepted for payment of fare. [Section 1040.2(g)]

A new definition of "service anima" is added, patterned after the definition used by the Federal Transit Administration (FTA) to describe animals trained to perform certain tasks for persons with disabilities. [Section 1040.2(l)]

A new definition of "sound production devices" is added. [Section 1040.2(m)]

Section 1040.5

Currently, placing one's feet on a seat in a train or on a platform bench is not specifically prohibited. A specific prohibition is therefore added to address this issue. At the time same, placing a package or other item on an empty seat would be a summonsable offense only when it tended to interfere with transit operations or the comfort of other passengers such as the ability of another passenger to obtain a seat. [Section 1040.5(a)]

Straddling a bicycle in motion, wearing in-line skates (or roller skates) or standing on a skateboard constitute conduct that is potentially harmful to others but, currently, is not adequately addressed. This revision enhances enforcement by including a prohibition against straddling a bicycle that is in motion, wearing skates or standing on a skateboard. [Section 1040.5(j)]

Smoking is not permitted anywhere within the SIRTOA system. Section 1040.5(o) is amended so as to delete the language which currently allows smoking in specifically designated locations.

Currently, there appears to be uncertainty as to whether the provisions of section 1040.5(u) which prohibit riding on the platform between cars of a train also prohibit utilizing the platform for purposes of moving between cars. More important, the use of end doors to move between cars carries with it inherent safety hazards whether or not the train is in motion. Accordingly, the use is amended to prohibit the use of end doors except in the case of an emergency or when passengers are directed to do so by a SIRTOA conductor or a police officer. [Section 1040.5(v)]

A specific prohibition against "turnstile jumping", entering through an exit gate, etc. is added [section 1040.5(x)]. Situations arise where passengers "jump" a turnstile or enter through an exit gate when their time-based card is swiped improperly or malfunctions. In other instances, some passengers "jump" a turnstile when their improperly swiped or malfunctioning pay-per-ride MetroCard does not grant access, only to discover, after the fact, that a fare had been deducted from their card and then seek to defend a charge of fare evasion on that basis. These situations may not give rise to a sustainable charge of theft of services, however, "turnstile jumping" and related conduct, whatever the stated rationale, creates an environment of disorder including the perception among other passengers that the fare was evaded.

Section 1040.8

The provisions regarding service animals are revised so as to conform to the FTA interpretation of requirements under the Americans with Disabilities Act (ADA). Most important is a provision which supercedes any requirement of licensure or written documentation for the animal, if the individual bringing the animal into the system can credibly explain how the animal is needed to perform a task that the person is unable to perform due to his or her disability. As bulletins have been issued previously incorporating the FTA standards, this amendment serves simply to formally codify current practice.

AMENDMENT TO PART 1050 OF TITLE 21 NYCRR - New York City Transit Authority (NYCTA) Rules of Conduct

Section 1050.2

A new definition of "service animal" is added, patterned after the definition used by the Federal Transit Administration (FTA) to describe animals trained to perform certain tasks for persons with disabilities. [Section 1050.2(c)]

A technical revision is made to the definition of "person". [Section 1050.2(g)]

The definition of "fare media" is amended to delete the reference to the term "token" inasmuch as tokens are no longer sold or accepted in the subways or on buses. [Section 1050.2(i)]

A new definition of "farecards" is added to differentiate specifically between value-based and time-based MetroCards. [Section 1050.2(j)]

A new definition of "payment of fare" is added which specifically references the use of time-based farecards. [Section 1050.2(k)]

Section 1050.4

A prohibition against "turnstile jumping", entering through an exit gate, etc. is added to section 1050.4(a) which deals with payment of fare and access to NYCTA facilities. Situations arise currently where passengers "jump" the turnstiles or enter through an exit gate when their time-based card is swiped improperly or malfunctions. They then seek to have a charge of fare evasion dismissed on the theory that since they had already prepaid for unlimited transportation for a specified period (e.g., 7 days), they therefore cannot be guilty of fare evasion. In other instances, some passengers "jump" the turnstile when their improperly swiped or malfunctioning pay-per-ride MetroCard does not grant access, only to discover, after the fact, that a fare had been deducted from their card and then seek to defend a charge of fare evasion on that basis. However, "turnstile jumping" and related conduct, whatever the stated rationale, create an environment of disorder, including the perception among other passengers that the fare was evaded.

A technical revision is made to Section 1050.4 (c) to provide specifically provide that authorized agents of NYCTA may sell MetroCards.

Section 1050.5

Prohibitions against vandalizing or otherwise damaging New York City Transit property are currently found in two separate provisions of the Rules, Section 1050.5(a) and Section 1050.6(a). Both sections are amended so that the prohibition is contained solely within section 1050.5(a). This simplifies enforcement and allows for more informative statistical analysis. In addition, several technical revisions are made to section 1050.5(a) in order to clarify language including language to make clear that attempts to damage property are prohibited.

Section 1050.6

As noted above, section 1050.6(a) is amended to consolidate prohibitions against damaging New York City Transit property exclusively in section 1050.5(a). It is also amended to specifically provide that acts which tend to interfere with the provision of service, to obstruct traffic and to interfere with safe operation are not permitted.

Voter registration activities are specifically included as a permissible non-transit use or activity. NYCTA currently permits this type of activity, provided that general safety oriented restrictions are observed. [Section 1050.6(c)]

Other revisions to section 1050.6(c) dealing with non-transit uses of the system do not effect substantive change but merely restructure some of its language so that the restrictions are expressed more clearly.

A provision is added to Section 1050.6(d)(3) to provide specifically that persons with farecards issued based on specified individual eligibility criteria which allow entry into the system either for no charge or at a reduced fare are obligated to produce the card for physical inspection when requested to do so by a police officer or NYCTA personnel. In addition, a specific requirement is added that the name of the eligible holder of such farecard be clearly visible on the card.

Section 1050.7

Smoking is not permitted anywhere within the transit system. Section 1050.7(b) is amended so as to delete the language which currently allows smoking in specifically designated locations.

Currently, placing one's feet on a seat of a subway or bus or platform bench is not specifically prohibited. A specific prohibition is therefore added to address this issue. At the same time, placing a package or other item on an empty seat would be prohibited only when it tended to interfere with transit operations or the comfort of other passengers such as the ability of another passenger to obtain a seat. [Section 1050.7(j)]

Straddling a bicycle in motion, wearing in-line skates (or roller skates) or standing on a skateboard constitute conduct that is potentially harmful to others but, currently, is not adequately addressed. In particular, with respect to skates and skateboards, it is often difficult to sustain a charge of a

violation where offending individuals are stationary at the time they are observed by a police officer. This revision would enhance enforcement by including a prohibition against straddling a bicycle that is in motion, wearing skates or standing on a skateboard. Additionally, scooters are added to the list of vehicles which may not be ridden in the system. [Section 1050.7(k)]

Section 1050.9

Catwalks and emergency stairs are added to the list of areas specifically identified in the prohibition against entering areas not open to the public. [Section 1050.9(a)]

Currently, there appears to be uncertainty as to whether the provisions of section 1050.9(d) which prohibit riding between subway cars also prohibit the act of moving between cars. The use of end doors to move between cars carries with it inherent safety hazards whether or not the train is in motion. Accordingly, the use of end doors is prohibited except in the case of an emergency or when passengers are directed do so by an NYCTA conductor or a police officer.

The provisions regarding use of service animals are revised so as to conform the language of the rules to current practice which incorporates the FTA interpretation of requirements under the ADA. Most important is a provision which would supercede any requirement of licensure or written documentation for the animal, if the individual bringing the animal into the system can credibly explain how the animal is needed to perform a task that the person is unable to perform due to his or her disability. Both NYCTA and the New York City Police Department have previously issued bulletins incorporating the FTA standards and this amendment serves simply to formally codify current practices. [Section 1050.9(h)]

General Revisions

All references to Transit Police and Transit Police Officers contained within Part 1050 are deleted and replaced by references to the New York City Police Department and New York City Police Officers, reflecting the merger of the Transit Police into the New York City Police Department. In addition, the term "token booth" is replaced with the term "station booth".

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1040.4(f), 1040.5(v), 1050.6(f), 1050.9(c) and (d).

Text of rule and any required statements and analyses may be obtained from: David Goldenberg, New York City Transit Authority, 130 Livingston St., Rm. 1207, Brooklyn, NY 11201, (718) 694-5454

Revised Regulatory Impact Statement

Subsequent to the publication of the Notice of Proposed Rule Making in the New York *State Register* on November 24, 2004, several modifications, all of which have been categorized as nonsubstantive for purposes of the State Administrative Procedure Act, were made to the initial proposal based on public comment received and further internal review of those comments.

1. The proposed rule amendment to restrict photography and videotaping in the transit system has been withdrawn. The agency, in consultation with the New York City Police Department, has concluded that the powers currently available to police personnel under existing law are sufficient to provide for the security and protection of our passengers and the transit system. [Sections 1040.4(f) and 1050.9(c).]

2. The proposed rule amendment to limit passenger movement between cars by use of the end doors has been modified by the addition of clarifying language to specifically provide that passengers may use the end doors in an emergency or when directed to do so by a conductor or a New York City police officer. [Sections 1040.5(v) and 1050.9(d).]

3. The rule modification as originally proposed dealing with consumption of liquids on subways and buses was a technical change intended to clarify certain arguably ambiguous language in the rule of longstanding prohibiting the drinking of liquids from an open container. However, the concerns raised in the public comments have resulted in an agency decision that the revision is unnecessary and the rule should continue in its existing form. Consequently, the technical revision initially proposed is being withdrawn at this time. [Section 1050.6(f).]

No further changes to the previously published Regulatory Impact Statement are required.

Regulatory Flexibility Analysis

Nonsubstantive revisions, as described in the Revised Regulatory Impact Statement filed herewith, have been made to the proposed rule since publication of Notice of Proposed Rule Making in the *State Register* on November 24, 2004. However, as revised, this rule still addresses only the conduct of members of the public in their use of transit facilities (and makes a technical revision to paratransit eligibility criteria) and, therefore, will not create any adverse economic impacts or reporting, recordkeeping or other compliance requirements on small businesses or local governments. As such, a Regulatory Flexibility Analysis for Small Business and Local Governments is not required.

Rural Area Flexibility Analysis

Nonsubstantive revisions, as described in the Revised Regulatory Impact Statement filed herewith, have been made to the proposed rule since publication of Notice of Proposed Rule Making in the *State Register* on November 24, 2004. However, as revised, this rule extends only to transit facilities and paratransit operations within the five counties of the City of New York and does not affect rural areas as that term is defined in SAPA section 102(10) and Executive Law section 481. As such, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

Nonsubstantive revisions, as described in the Revised Regulatory Impact Statement filed herewith, have been made to the proposed rule since publication of Notice of Proposed Rule Making in the *State Register* on November 24, 2004. However, as revised, this rule still addresses only the conduct of members of the public in their use of transit facilities (and makes a technical revision to paratransit eligibility criteria) and therefore will not have any impact on jobs or employment opportunities. As such, a Job Impact Statement is not required.

Assessment of Public Comment

Summary:

Public comment was sought and received on the proposed revisions during the State Administrative Procedure Act (SAPA) public comment period which commenced November 24, 2004. In addition, public comment was also sought and received from late May 2004 through November 23, 2004 in advance of the SAPA public comment period.

The majority of comments received were in response to the proposal to ban photography and videotaping in the transit system. The second highest number of comments was in response to the proposed rule which would greater restrict passenger movement between subway cars by use of the car's end doors. Comments were also received on the proposed new, specific prohibitions against "turnstile jumping" and placing feet on seats, as well as technical clarifications to existing prohibitions pertaining to the consumption of liquids on conveyances, and riding bicycles, skates or skateboards in the transit system. An analysis is set forth below.

Analysis:

Section 1050.4(a) A series of public comments were received in opposition to the "turnstile jumping" prohibition expressing the view the prohibition was unfair where an individual had a valid MetroCard but was kept out of the transit system because of a malfunctioning card or turnstile.

After consideration of these comments it remains the view of the agency that "turnstile jumping" and related unauthorized entry into the transit system, regardless of the reason, creates an environment of disorder, including a perception amongst other customers that a fare has been evaded and that this should be the primary concern. As such, it is the view of the agency that the rule should be adopted as initially proposed.

Section 1050.6(f)

A series of public comments expressing mixed views were received on the issue of consuming liquids on conveyances. Some members of the public expressed the view that this proposal would hinder passengers who drink their morning coffee on the train. However, others were in favor of this proposal, as it would promote cleaner subways and buses, and passengers would have fewer concerns about a drink being spilled on the floor, creating a hazardous condition, or spilled on their person, creating possible injury in the case of hot liquids.

The rule modification as originally proposed dealing with consumption of liquids on subways and buses was a technical change intended to clarify certain arguably ambiguous language in the rule of longstanding prohibiting the drinking of liquids from an open container. However, the concerns raised in the public comments have resulted in an agency decision that the revision is unnecessary and the rule should continue in its existing form. Consequently, the technical revision initially proposed is being withdrawn at this time.

Section 1050.7(j)

A series of public comments were received on the issue of placing a specific prohibition against placing one's feet on a seat of a train car or bus or platform bench. The majority of these comments were in opposition either because it was felt the rule was intrusive or no harm was done if one's feet were placed on the seat at a time where there were no passengers desiring a seat. However, a substantial number of comments were received in favor of this proposal. These individuals felt that other passengers were inconsiderate when they put their feet on seats, because in so they were dirtying the seats and creating health hazards. Some favored extending the

scope of the prohibition by prohibiting placement of feet on the subway car poles.

After consideration of these comments it remains the view of the agency that the rule as initially proposed would promote cleaner facilities while also assuring more available seating. As such, it is the view of the agency that the rule should be adopted as initially proposed.

Section 1050.7(k)

A series of public comments were received on the issue of the rule relating to bicycles, skates and skateboards. The majority of individuals commenting were in favor of the proposed clarifications of existing prohibitions. While one individual felt that the rule was unimportant, many considered the proposal necessary for the free flow of traffic and to prevent injuries. Several individuals suggested that the ends of subway cars should be designated for bicycles and strollers, so as to minimize disruptions and/or injuries to other passengers; other comments suggested a higher fare for those with bicycles.

After consideration of these comments it remains the view of the agency that the rule as initially proposed would enhance the safety of the riding public. In addition, it is the view of the agency that suggested further revisions would prove impractical. As such, it is the view of the agency that the rule should be adopted as proposed and without modification.

Section 1050.9(c)

A large number of comments were received from both individuals and organizations on the proposed ban on photography and videotaping in the system, expressing variously policy, practical and legal concerns, including the frequently expressed view that the proposal would unduly restrict tourists and others who wished to photograph the system for personal, artistic or historical purposes. Some recommended alternative approaches to restrict photography and videotaping on the system to a lesser degree than as proposed such as by requiring a special permit for photography and videotaping. A smaller number of individuals expressed support for the proposal.

After consideration of these comments, the agency, in consultation with the New York City Police Department, has concluded that the powers currently available to police personnel under existing law are sufficient to allow for the security protection of our passengers and the transit system. Accordingly, this proposed rule modification is being withdrawn at this time.

Section 1050.9(d) of NYCT Rules A series of comments were received on the proposed ban on the use of end doors of train cars with the majority opposed to the prohibition. The views expressed of those opposed were that it was often necessary to move between cars because of an emergency, uncomfortable temperatures, odors or situations perceived as threatening.

After consideration of these comments, it remains the view of the agency that the use of end doors to move between creates inherent safety hazards whether or not the train is in motion. In response to public comment, the published proposal was modified to clarify that end doors could always be used in the case of an emergency. Except for this modification and the replacement of the tem authority personnel with authority conductor, it is the view of the agency that the rule should be adopted as initially proposed in order to best promote the safety of the riding public.

Power Authority of the State of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates for Power and Energy

I.D. No. PAS-43-05-00002-P

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

Proposed action: Revisions to rates for New York City Governmental Customers for rate year 2006.

Statutory authority: Public Authorities Law, section 1005

Subject: Rates for power and energy.

Purpose: To maintain the system's fiscal integrity.

Substance of proposed rule (Full text is not posted on a State website): Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes increased rates for the New York City Governmental Customers ("NYC Governmental Customers" or "Customers") for Rate Year 2006.

The Authority proposes to increase the "Fixed Costs" component of the overall (production and delivery) rates by 1.1% on average compared to 2005 rates charged to the Customers who are signatories to the new supplemental Long Term Agreements ("LTAs"). For Customers who are non-signatories to any LTA, the Authority proposes to increase the overall (production and delivery) rates by 9.2% on average ("Non-Signatory Rates") compared to 2005 rates.

Written comments on the proposed firm demand charge revision will be accepted through Monday, December 12, 2005, at the address below. For further information, contact:

POWER AUTHORITY OF THE STATE OF NEW YORK
Angela D. Graves, Deputy Secretary
123 Main Street, White Plains, New York 10601
(914) 287-3092, (914) 681-6949 (fax)
angela.graves@nypa.gov

Text of proposed rule and any required statements and analyses may be obtained from: Angela D. Graves, Power Authority of the State of New York, 123 Main St., 15-M, White Plains, NY 10601, (914) 287-3092, e-mail: angela.graves@nypa.gov

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

Statements and analyses are 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.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection Agreement between Frontier Communications of Rochester, Inc. and Time Warner ResCom of New York, LLC

I.D. No. PSC-43-05-00011-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 Frontier Communications of Rochester, Inc. and Time Warner ResCom of New York, LLC for approval of an interconnection agreement executed on Aug. 8, 2005.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement.

Substance of proposed rule: Frontier Communications of Rochester, Inc. and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby Frontier Communications of Rochester, Inc. and Time Warner ResCom of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until August 8, 2007, or as extended.

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

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

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

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

(05-C-1149SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standby Rates by Rochester Gas and Electric Corporation

I.D. No. PSC-43-05-00012-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 Rochester Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. Nos. 18 and 19 to become effective Jan. 1, 2006.

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

Subject: Standby rates.

Purpose: To make modifications to Service Classification No. 14—Standby Service in compliance with commission order adopting provisions of joint proposals with conditions, issued May 20, 2004 in Cases 03-E-0765, 02-E-0198 and 03-G-0766.

Substance of proposed rule: On October 4, 2005, Rochester Gas and Electric Corporation (RG&E) filed proposed tariff amendments for approval to make modifications to Service Classification No. 14 – Standby Service, filed in compliance with Commission Order Adopting Provisions of Joint Proposals with Conditions, issued May 20, 2004, in Cases 03-E-0765, 02-E-0198 and 03-G-0766. The Commission may approve, reject or modify, in whole or in part, RG&E'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. Brilling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(03-E-0765SA7)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

System Benefit Charge

I.D. No. PSC-43-05-00013-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 a reallocation of System Benefit Charge (SBC) funds to advise consumers on taking measures to conserve energy to avoid higher than usual costs.

Statutory authority: Public Service Law, sections 4(1), 5(2), 66(1) and (2)

Subject: System Benefit Charge (SBC) major program category funding, reallocation.

Purpose: To advise consumers on taking measures to avoid higher than usual energy costs.

Substance of proposed rule: The System Benefits Charge (SBC) program addresses the need to fund certain public benefit programs unlikely to be assumed by the energy marketplace during the transition to full electric retail competition. In response to changing priorities, the Commission is considering reallocating SBC funds in the amount of $500,000 from unused funds in the Environmental Disclosure category to combined Peak Load Reduction, Energy Efficiency, and Outreach & Education category for the SBC program through June 30, 2006. This reallocation of funds would be in addition to a similar $500,000 reallocation approved by the Commission on September 21, 2005, on an emergency basis.

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

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

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

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

(04-E-0952SA37)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mini Rate Increase by the Village of Castile

I.D. No. PSC-43-05-00014-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 Village of Castile to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 1 to become effective Jan. 1, 2006.

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

Subject: Mini rate increase.

Purpose: To increase annual electric revenues by $19,394 or 5 percent.

Substance of proposed rule: On October 5, 2005, the Village of Castile (the Village) filed proposed tariff amendments to increase its annual electric revenues by approximately $19,394 or 5% to become effective January 1, 2006. The Commission may approve, reject or modify, in whole or in part, the Village'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. Brilling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(05-E-1247SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rider J—NYPA Power for Jobs Service Rider by Orange and Rockland Utilities, Inc.

I.D. No. PSC-43-05-00015-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 Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its schedule for electric service—P.S.C. No. 2 to become effective Jan. 1, 2006.

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

Subject: Rider J—NYPA Power for Jobs Service Rider.

Purpose: To eliminate the term limitations contained in Rider J—NYPA Power for Jobs Service Rider and indicate that the term will be established in customer's contract with NYPA.

Substance of proposed rule: On October 6, 2005, Orange and Rockland Utilities, Inc. (O&R) filed proposed tariff amendments to eliminate the term limitations contained in Rider J – New York Power Authority (NYPA) Power for Jobs Service Rider and indicate that the term will be established in the customer's contract with NYPA to become effective January 1, 2006. The Commission may approve, reject or modify, in whole or in part, O&R'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. Brilling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(05-E-1250SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Safety of the Telephone Network

I.D. No. PSC-43-05-00016-P

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

Proposed action: The commission is considering ordering all facilities-based telephone companies, including payphone providers, in New York State: (1) to adhere to the National Electric Safety Code and the National Electric Code, or demonstrate that exemption from one or more provisions of the codes is appropriate, based on a showing that valid technical reasons prevent compliance with such provision(s); and (2) for all payphone providers, to test their installations annually for stray voltage.

Statutory authority: Public Service Law, sections 92-c(8), 94(2) and 98

Subject: Safety of the telephone network, including payphones.

Purpose: To implement stray voltage testing of all facilities-based telephone companies and payphones in New York State.

Substance of proposed rule: The Commission is considering ordering in Case 04-M-0159 (Proceeding on Motion of the Commission to Examine the Safety of Electric Transmission and Distribution Systems – Implications of Stray Voltage Issues as They Relate to Telephone and Cable Companies) all facilities-based telephone companies, including payphone providers, in New York State (1) to adhere to the National Electric Safety Code and the National Electric Code, or demonstrate that exemption from one or more provisions of the Codes is appropriate, based on a showing that valid technical reasons prevent compliance with such provision(s); (2) for all payphone providers, to test their installations annually for stray voltage.

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

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

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

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

(04-M-0159SA4)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Pick Four Wagers

I.D. No. RWB-43-05-00003-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 add a new section 4011.26 and amend section 4122.46 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227, 301 and 305

Subject: Pick Four wagers in thoroughbred and harness racing.

Purpose: To expressly authorize the Pick Four wager in thoroughbred horse racing, and establish a clear hierarchy of winners in the event of a money tie among betting entries in a harness race. The rule will make uniform the provisions of the thoroughbred Pick Four rule and the harness Pick Four rule.

Text of proposed rule: Section 4011.26 is renumbered Section 4011.28 and a new section 4011.26 is added to read as follows:

4011.26 Pick four pools.

(a) The pick four (or other approved name) is a form of pari-mutuel wagering conducted on four races specifically designated as pick four races by the board. Each bettor selects, in order, the first placed horse in each of the four races designated and advertised by the track as pick four races, in the race order so designated by the board.

(b) The pick four is not a parlay and has no connection with nor relation to the other betting pools for the respective races. The pick four pool shall be held entirely separate from all other pools and is no part of a daily double, exacta, quinella, triple, superfecta or other wagering pool.

(c) Resale of pick four tickets from one individual to another is prohibited, shall be grounds for ejection, and may be deemed illegal gambling.

(d) Races in which pick four pools shall be conducted shall be clearly designated in the program and racing cards issued by the corporation.

(e) The design of the pick four tickets shall be clearly and immediately distinguishable from other pari-mutuel tickets.

(f) Scratched horses and nonstarters. At any time after wagering begins on the pick four pool, should an entire betting entry or field be scratched or declared a nonstarter in any pick four race, no further tickets selecting such betting entry or field shall be issued, and wagers upon such betting entry or field, for purposes of the pick four pool, shall be deemed wagers upon the betting entry or field (designated horse) upon which the most wagering money has been registered at the track in the win pool at the close of win pool betting for such race. (In the event of a money tie, the tied betting entry or field [with the lowest program number] upon which the most wagering money has been registered at the track in the place pool at the close of place pool betting for that race shall be designated.) Wagers in the pick four pool upon an entry or field of horses from which a starter or starters may have been scratched will, in the case of such entry or field, be deemed wagers upon the horse or horses remaining in such entry or field; except at tracks with totalizator capability to record wagers selecting a coupled entry (or field) and wagers selecting any individual constituent horses therein (merging such wagers for odds display and payoff purposes), in which case, the wagers upon scratched constituent horses will be deemed wagers upon the "designated horse" in such race. In case no starter remains representing any betting entry or field, wagers upon such entry or field shall be deemed wagers upon the "designated horse" in the race affected by the scratch. Should the balance of a betting entry or field race as a nonbetting starter for purposes of other pari-mutuel pools, as provided in sections 4009.20 and 4009.21 of this Part, wagers upon such

entry or field shall be deemed wagers upon the "designated horse" for such race. Should a programmed starter be scratched or declared a nonstarter in any pick-four race prior to the start of the first leg, the betting operator shall be authorized to refund any tickets designating betting entries affected thereby prior to such first leg.

(g) Failure to select a winning combination. (1) If no pick four ticket is sold combining the winners of the four pick four races, all pick four tickets designating three winners shall be considered winning tickets and the net pool distributed equally to holders of said tickets.

(2) If no pick four ticket is sold combining the winners of three such races, all pick four tickets designating two winners shall be considered winning tickets and the net pool distributed equally to holders of said tickets.

(3) If no pick four ticket is sold combining the winners of two such races, all pick four tickets designating one winner shall be considered winning tickets and the net pool distributed equally to holders of said tickets.

(4) If no pick four ticket is sold designating any winner to win in the designated pick four races, the pick four shall be declared off and the gross pool refunded.

(5) When the condition of the turf course(s) warrants a change of racing surface in any of the legs of the pick four races, and such change has not been known to the public prior to the close of wagering for the pick-four pool, the stewards shall declare the changed leg(s) an "all win" race(s) for pick-four wagering purposes only. An "all win" race(s) will assign the winner of that race(s) to each pick-four ticket holder as their selection for that race.

(6) If any of the designated races are cancelled or declared "no race," the pick four will be determined by the winners of the remaining race or races.

(h) Dead heats. In the event of a dead heat for win in any or all pick four races, all pick four tickets designating either horse to win in said race or races shall be eligible for participation in the remaining pick four races, and the net pool shall be equally distributed to the winners, that is, the net pool will be divided by the total amount represented by all winning tickets and the resulting price, per dollar, and after breakage, shall be the payoff price, which shall be uniform for any winning combination.

(i) In the event of occurrences not encompassed within the explicit provisions of this section, distribution shall be formulated on the basis of established pari-mutuel practice and in accordance with the distribution philosophy set forth in this section; provided, nevertheless, that if full distribution of the pool is made on the basis of outstanding tickets, the method of formulation announced by the track, and upon which basis payments have been made, shall be deemed conclusively correct and not subject to review.

(j) Copies of this section shall be made available free of charge by the track to the public in the public betting area of the track.

Subdivision (b) of Section 4122.46 is amended to read as follows:

(b) The pick four is not a parlay and has no connection with nor relation to the other betting pools for the respective races. The pick four pool shall be held entirely separate from all other pools and is no part of a daily double, exacta, *quinella*, triple, *superfecta* or other wagering pool.

Subdivision (f) of Section 4122.46 is amended to read as follows:

(f) Scratched horses and nonstarters. At any time after wagering begins on the pick four pool, should an entire betting entry or field be scratched or declared a nonstarter in any pick four race, no further tickets selecting such betting entry or field shall be issued, and wagers upon such betting entry or field, for purposes of the pick four pool, shall be deemed wagers upon the betting entry or field (designated horse) upon which the most wagering money has been registered at the track in the win pool at the close of win pool betting for such race. (In the event of a money tie, the tied betting entry or field [with the lowest program number] *upon which the most wagering money has been registered at the track in the place pool at the close of place pool betting for that race* shall be designated.) Wagers in the pick four pool upon an entry or field of horses from which a starter or starters may have been scratched will, in the case of such entry or field, be deemed wagers upon the horse or horses remaining in such entry or field; except at tracks with totalizator capability to record wagers selecting a coupled entry (or field) and wagers selecting any individual constituent horses therein (merging such wagers for odds display and payoff purposes), in which case, the wagers upon scratched constituent horses will be deemed wagers upon the "designated horse" in such race. In case no starter remains representing any betting entry or field, wagers upon such entry or field shall be deemed wagers upon the "designated horse" in the race affected by the scratch. Should the balance of a betting entry or field race as a nonbetting starter for purposes of other pari-mutuel pools, as provided in section 4122.27 of this Part, wagers upon such entry or field shall be deemed wagers upon the "designated horse" for such race. Should a programmed starter be scratched or declared a nonstarter in any pick-four race prior to the start of the first leg, the betting operator shall be authorized to refund any tickets designating betting entries affected thereby prior to such first leg.

Text of proposed rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206-1668, (518) 453-8460, ext. 3300, e-mail: gpronti@racing.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

Board staff has determined that no person is likely to object to the rule as written because it makes technical changes and is otherwise non-controversial.

The amendment to create new section NYCRR 4011.27 entitled "Pick four pools" for thoroughbred is similar to the pari-mutuel wagers currently authorized by the Board's existing Pick Six Rule, 9E NYCRR 4011.23. This amendment make technical amendments to reduce the number of horses selected by the bettor allows from six to four. The Pick four pool rule is less complicated than the Pick six rule because it doesn't include added payments to winners or carryover pools, and therefore it can be adopted with technical amendments.

No person is likely to object to the adoption of a Pick four rule because a Pick four wager is already available to patrons at New York Racing Association tracks pursuant to NYCRR 4011.26, which permits a thoroughbred association or corporation, with prior permission from the Board, to offer a "Pick four" bet type under chapter 9, Pari-Mutuel Wagering, Uniform Rules of Racing, as adopted and published in December, 1996 by the Association of Racing Commissioners International ("ARCI"). This rule merely incorporates an existing wager into the Board's rules. The Board has received no objection or derrogatory information regarding NYRA's existing Pick four rule, and therefore the Board has determined that this rule amendment is non-controversial and no person is likely to object to the Board's Pick four rule.

This amendment also includes amendments to sections 4011.27(f) and 4122.46 (f) entitled "Scratched horses and nonstarters" which the Board has determined is non-controversial and no person is likely to object to it. By amending the existing harness "Pick four pools" rule, the thoroughbred and harness rules would be made consistent with each other, and would offer a fairer resolution to the bettor if there is a money tie among betting entries. This amendment would create consistency in the pari-mutuel system for the betting public in the event of a Pick four wager tie, and remove. The current rule provides that the bettor will be assigned the post time favorite as his selection when there is a track change. The post time favorite is the horse that has the lowest odds and may not originally have been a choice of the pick four bettor. It's not appealing to the pick four bettor to have his bet automatically assigned to the favorite that the bettor dislikes, and discourages pick four betting on race dates with inclement weather and/or forecasts. Accordingly, fans and racetrack management favor a more equitable rule. By giving the fans an "all win" in this situation, and amending the rule to permit a "pick four winner" to be a bettor who selects four winners, or three winners and no more than one "all win," will provide a more equitable result for pick four bettors on inclement weather days, and will encourage them to play the pick four on those days.

Job Impact Statement

The Board has determined that this rule will have no substantial adverse impact on jobs. This rulemaking proposes to modify pari-mutuel wagering patterns and pools to offer a "Pick four" wager using existing totalizator equipment and procedures. As such, the adoption of this rule will have no impact on jobs.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Grand Slam Wager

I.D. No. RWB-43-05-00004-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 add section 4011.27 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227, 228 and 229

Subject: Grand Slam wager is an exotic wager involving a single bet on four races, evidenced by a single ticket and representing an interest in a single betting pool.

Purpose: To offer a new wager that is attractive to both neophytes and experienced bettors, thereby increasing wagering handle and revenues to the State.

Text of proposed rule: A new section 4011.27 of Title 9 NYCRR is added to read as follows:

Section 4011.27. New rule text.

(a) Board approval. The racing association or corporation must obtain written approval from the Board for the initial scheduling or specific performances of Grand Slam races or any other name used to characterize this bet type, and identify the pari-mutuel pool and any required distribution percentages. Changes to the approved Grand Slam format, or suspension of previously approved Grand Slam wagering, require prior approval from the Board.

(b) Grand Slam Pools. (1) The Grand Slam requires selection of the official first, second or third-place finisher in each of the first three races in a series of four designated Grand Slam races. A completed winning Grand Slam wager requires the selection of the official first place finisher in the fourth and final event in this same series of races. The Grand Slam wager is classified as an exotic bet and is subject to the prevailing exotic takeout rate set forth in sections 228 and 229 of the Racing Pari-Mutuel Wagering and Breeding Law 9 (between fifteen to twenty-five per centum of total deposits in pools resulting from on-track exotic bets and selected by a racing association or corporation and approved by the Board).

(2) The Grand Slam pool shall be apportioned under the following method:

Grand Slam Wager with No Carryover:

(i) The net Grand Slam pool shall be distributed from a single betting pool to participants who selected the first, second or third-place finisher in the first three races of a series of four Grand Slam races completing a winning wager with the selection of the first place finisher in the fourth and final Grand Slam event in this same series, based upon the official order of finish.

(ii) If there are no winning wagers taking into account all four segments of the Grand Slam wager, the pool shall be distributed as a single price pool to those who selected the first place finisher in the fourth and final Grand Slam event in this series of races along with the greatest number of first, second or third-place finishes each of which had an accompanying show pari-mutuel payout, in accordance with section 4009.22, in each of the first three races in the series of four designated Grand Slam races. All results are based upon the official order of finish for each race.

(3) If there is a dead heat for first in any of the Grand Slam segments involving:

(i) Official program numbered horses representing the same betting interest, the Grand Slam pool shall be distributed as if no dead heat occurred.

(ii) Official program numbered horses representing two or more betting interests, the Grand Slam pool shall be distributed from a single betting pool with a winning wager including each betting interest participating in the dead heat provided each entrant has a pari-mutuel show payout within its race.

(4) If there is a dead heat for second and/or third in any of the first three races in a series of four designated Grand Slam contests involving:

(i) Horses representing the same betting interest, the Grand Slam pool shall be distributed as if no dead heat occurred.

(ii) Horses representing two or more betting interests, the Grand Slam pool shall be distributed from a single betting pool with a winning wager including the betting interest which finished first or any betting interest involved in the dead heat for second or third providing the horse has a show pari-mutuel payout.

(5) Should a betting interest in any of the Grand Slam contests be scratched:

(i) The actual favorite, as evidenced by total amounts wagered in the Win pool at the host association for the contest at the close of wagering on that contest, shall be substituted for the scratched betting interest for all purposes, including pool calculations. In the event that the Win pool total for two or more favorites is identical, the substitute selection shall be the betting interest with the greatest amount of money in the place pool. The totalisator shall produce reports showing each of the wagering combinations with substituted betting interests which became winners as a result of the substitution, in addition to the normal winning combination.

(ii) Should a scratch or scratches occur in any of the first three races in a series of four designated Grand Slam contests and subsequently show wagering is cancelled due to an insufficient number of remaining betting interests, this race for winning Grand Slam wagering purposes would include the win and place horse only.

(6) The Grand Slam pool shall be canceled and all Grand Slam wagers for the individual performance shall be refunded if at least two contests included as part of a Grand Slam wager are canceled or declared "no contest".

(7) If at least one race included as part of a Grand Slam wager is canceled or declared "no contest", but not more than the number specified in subsection 6 of this rule, the net pool shall be distributed from a single betting pool to those bettors whose selections finished first, second or third in the greatest number of Grand Slam contests in the first three races in a series of four designated Grand Slam contests. In determining a pari-mutuel distribution under this section, a finish of first in the final and fourth designated Grand Slam contest race for the performance in question shall have the same weight as a finish of first, second or third in the greatest number of Grand Slam contests in the first three races in a series of four designated Grand Slam contests.

(8) When the condition of the turf course warrants a change of racing surface in any of the legs of the Grand Slam races, and such change has not been made known to the betting public prior to the close of wagering for the Grand Slam pool, the stewards shall declare the changed leg(s) a "no contest" for Grand Slam wagering purposes and the pool shall be distributed in accord with subsection (7) of this rule.

(9) Providing information to any person regarding covered combinations, amounts wagered on specific combinations, number of tickets sold, or number of live tickets remaining prior to the third segment of the wager being made official is strictly prohibited. This shall not prohibit necessary communication between totalisator and pari-mutuel department employees for processing of pool data.

Text of proposed rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, Racing and Wagering Board, One Watervliet Ave. Ext., Albany, NY 12206-1668, (518) 453-8460, ext. 3300, e-mail: gpronti@racing.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

Board staff has determined that no person is likely to object to the rule as written because it makes technical changes and is otherwise non-controversial.

The amendment to create new section NYCRR 4011.27 entitled "Grand slam wager" for thoroughbred is similar to the pari-mutuel wagers currently authorized by the Board's existing Pick Six Rule, 9E NYCRR 4011.23, the harness Pick Four Rule, 9E NYCRR 4122.46, and the thoroughbred Pick four wager, which has been offered through the New York Racing Association under the authority of current rule 9E NYCRR 4011.26. This amendment make technical amendments to allow variations on the Pick Four wagering scheme, allowing the bettor to include a number of horses in their selection for the first three races in a four-race series, and requiring the player to select the winner of the fourth race. The Grand Slam Wager is similar to Pick Four Wager insofar as the player still has to select four horses in each leg of a four race series. The variation is that for the first three races, the horses don't need to win; they only need to come in first, second or third. This rule expands the Pick Four wager beyond the first place winner to include second and third place horses in the first three legs of the four race series.

No person is likely to object to the adoption of a Pick four rule because a Pick four wager is already available to patrons at New York Racing Association tracks pursuant to NYCRR 4011.26, which permits a thoroughbred association or corporation, with prior permission from the Board, to offer a "Pick four" bet type under chapter 9, Pari-Mutuel Wagering, Uniform Rules of Racing, as adopted and published in December, 1996 by the Association of Racing Commissioners International ("ARCI"). This rule merely makes allowances for player's selections in the first three legs of the Pick Four. The Board has received no objection or derrogatory information regarding NYRA's existing Pick four rule, and therefore the Board has determined that this rule amendment is non-controversial and no person is likely to object to the Board's Pick four rule.

Job Impact Statement

The Board has determined that this rule will have no substantial adverse impact on jobs. This rulemaking proposes to modify pari-mutuel wagering patterns and pools to offer a "Grand slam" wager using existing totalizator equipment and procedures. As such, the adoption of this rule will have no impact on jobs.

Department of State

NOTICE OF ADOPTION

Administration and Enforcement of the Uniform Code

I.D. No. DOS-34-04-00010-A
Filing No. 1161
Filing date: Oct. 11, 2005
Effective date: Jan. 1, 2007

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

Action taken: Repeal of Part 1203 and addition of new Part 1203 to Title 19 NYCRR.

Statutory authority: Executive Law, section 381

Subject: Administration and enforcement of the Uniform Code.

Purpose: To revise the minimum standards applicable to a program for administration and enforcement of the Uniform Fire Prevention and Building Code.

Text or summary was published in the notice of proposed rule making, I.D. No. DOS-34-04-00010-P, Issue of August 25, 2004.

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

Text of rule and any required statements and analyses may be obtained from: Ray Andrews, Department of State, Division of Code Enforcement and Administration, 41 State St., Albany, NY 12231-0001, (518) 474-4073

Assessment of Public Comment

The comment period for the proposed rule making included five hearings that were held in Hempstead, Latham, Syracuse, Williamsville and Yorktown Heights. Fifteen individuals provided testimony at these hearings. In addition, six individuals submitted written comment. All who commented were local government officials representing either their individual municipalities or associations whose membership is composed of municipal officials responsible for code enforcement and/or fire prevention.

The rule making will repeal an existing regulation that prescribes standards for the administration and enforcement of the Uniform Fire Prevention and Building Code (19 NYCRR Parts 1220 -1226) and adopt a new regulation that will serve the same function. The new regulation is more detailed and comprehensive than the old regulation originally adopted in 1985. No one who commented on the proposed rule making objected to the stated goal of updating the regulation that establishes administration and enforcement standards. However, some objected to particular provisions included in the proposed new regulation. In some instances, others expressed support for provisions that some found objectionable.

Among the comments submitted were assertions that the proposed regulation is too explicit and detailed and takes a "micro management" approach in establishing standards for municipal programs for administration and enforcement of the Uniform Code. The Department of State has concluded that an increased level of detail from the current regulation is necessary to ensure that the Uniform Code is effectively administered and enforced in all municipalities across the State. The old regulation proposed for repeal listed the components that are required in a minimally acceptable program for administration and enforcement of the Uniform Code, but did not provide much detail regarding the specifics of those required components. Consequently, the specifics of program components were largely left to the discretion of individual municipalities. For local governments experienced in the enforcement of construction and fire prevention codes who already had municipal enforcement programs in place, the absence of detailed directives with regard to the required program components was not a problem. For the most part, their existing municipal programs already complied with the standards required by the regulation. However, for municipalities with little or no experience in code enforcement prior to the effective date of the Uniform Code, the absence of detail proved problematic.

During the past twenty years, the Department has learned while providing training and technical assistance to local officials, or when conducting audits and investigations of municipal enforcement programs in response to resident complaints, that many municipalities require and desire more detailed directives than are currently provided by the applicable regulation. Many local governments needed to establish municipal programs where none had existed before and the lack of experience in code administration and enforcement made it difficult for local officials to make the choices that best suited local needs and circumstances.

In 2002, the Uniform Code was amended by replacing its existing text with text from seven model codes developed by the International Code Council (ICC). The updated code contains many new features, approaches and methodologies for building construction, fire safety and property maintenance. The revised Uniform Code, like the ICC codes upon which it is based, is designed to be administered through a program of rigorous enforcement, not only during the construction process but with regard to existing buildings as well. Whereas, formerly the Uniform Code often required several specific safety features to be incorporated into the construction of a building depending upon its occupancy classification, the revised code, based upon the national models, provides more options in the construction of buildings. This flexibility, however, is grounded upon the expectation that code administration and enforcement will be a continuing and consistent factor during the life of the building. In developing the proposed new regulation, the Department of State has sought to prescribe standards for administration and enforcement of the Uniform Code which will ensure the establishment of municipal enforcement programs that effectively administer the revised provisions of the code.

In the past, municipal enforcement programs that focused primarily on the construction process could achieve a reasonable level of code compliance within the community. With the recent revision of the Uniform Code, it has become necessary for municipalities to include in their municipal enforcement program a similar focus upon the monitoring and administration of code provisions that address the maintenance of existing buildings. Fire safety practices and property maintenance are as important a part of the Uniform Code as construction standards. Consequently, the proposed regulation includes as required components of a municipal program for administration and enforcement features such as operating permits and greater standardization in the scheduling of fire safety/property maintenance inspections. Although some may wish to characterize these requirements as an attempt to "micro-manage" local government administration and enforcement, the inclusion of such components in a minimally acceptable municipal enforcement program is necessary if the updated Uniform Code is to be effectively enforced.

Several comments claimed that the proposed regulation would increase the cost of administering and enforcing the Uniform Code for local governments. These complaints regarding increased costs were for the most part attributed to the new requirement that operating permits be a part of a municipal enforcement program and to the requirement that fire safety/property maintenance inspections be conducted at least once every three years rather than "at intervals consistent with local conditions" as required by the current regulation. The parties objecting to increased costs argued that municipalities cannot allocate any additional resources for code enforcement and administration and adoption of the proposed regulation would constitute an unfunded mandate. Furthermore these local government representatives asserted that no additional requirements regarding code administration and enforcement should be imposed upon municipalities unless state aid disbursed in accordance with State Finance Law § 54-g is reinstated.

State Finance Law § 54-g, adopted at the same time as the Uniform Code Act (Article 18 of the Executive Law), provides for annual state assistance to local governments for support of activities related to fire prevention and building codes. Funds for such state assistance are collected through imposition of a surcharge on the premiums for certain fire insurance policies. From 1982 through 1990 monies were appropriated and disbursed to municipalities in accordance with State Finance Law § 54-g. Beginning in 1991, state budgets no longer contained an appropriation for the disbursement of state assistance pursuant to State Finance Law § 54-g, although monies are still collected from the surcharge on fire insurance policy premiums.

The Department of State agrees with municipal officials who argue that disbursement of state assistance pursuant to State Finance Law § 54-g should be reinstated. However, it is a matter beyond the control of the

Department of State. Municipal officials must pursue this matter with their State legislators. Whether or not state assistance is disbursed in accordance with State Finance Law § 54-g should not be considered a limiting factor on the responsibility of the Secretary of State pursuant to Executive Law § 381 to promulgate regulations prescribing minimum standards for administration and enforcement of the Uniform Code. It should also be noted that most, if not, all local governments collect fees from regulated parties as part of the municipal administration and enforcement of the Uniform Code. A fee to cover the costs associated with the issuance of an operating permit may be collected just as fees are currently collected for the issuance of a building permit. Consequently requiring operating permits to be used as part of a municipal code enforcement program should not result in the municipality incurring expenses that are not recoverable.

While some objected to requiring operating permits as a component of a program for administering and enforcing the Uniform Code, others supported their use. A town fire marshal speaking at the Hempstead public hearing stated that his municipality was already using operating permits and found them "to be a great assist to us in how we inspect and regulate ... facilities. They give us an extra enforcement tool...an additional tool for our local justice system." Unfamiliarity with the use of operating permits may be the major reason that some oppose their inclusion in municipal enforcement programs. Many of the objections to requiring operating permits as part of municipal code enforcement were a concern that such devices would add significantly to the operations and costs of the municipal program. Other objections appear to be nothing more than opposition to the addition of any new requirements. The concern that using operating permits will add significantly to the workload of local government is misplaced because operating permits may be easily integrated with the issuance of certificates of occupancy and the performance of periodic fire safety or property maintenance inspections. For instance, areas of public assembly must be inspected annually and operating permits must be issued for areas of public assembly containing more than 100 persons. Issuance of the operating permit could occur at the completion of a annual inspection revealing no deficiencies or violations. Similarly, a hazardous material storage facility subject to periodic inspection could be issued an operating permit on the basis of an inspection evidencing compliance with the Uniform Code.

Several comments objected to the proposed regulation requiring fire safety/property maintenance inspections at intervals not to exceed three years. Municipal representatives argued the proposed prescribed intervals cannot be achieved with existing manpower and therefore would impose added costs upon municipalities. They argued that the minimum interval be lengthened or that the current requirement that such inspections be conducted "at intervals consistent with local conditions" be retained.

Periodic fire safety and property maintenance inspections are necessary to ensure continuing compliance with several of the safety precautions of the Uniform Code. As noted earlier, the revised provisions of the Uniform Code that took effect January 1, 2003 are based upon a national model and are designed to be administered through a program of rigorous enforcement that focuses on the use and maintenance of buildings as well as their construction. Periodic inspection is the most effective, and at times the only, method for achieving compliance with many of the fire safety and property maintenance requirements of the Uniform Code. Too often during the past twenty years, the Department of State has learned that for some municipalities the regulatory requirement that inspections be conducted at intervals consistent with local conditions means that such inspections are never performed. If this practice continues, the level of compliance with the revised provisions of the Uniform Code is likely to suffer. Consequently, the Department has concluded that an interval between periodic inspections must be specified.

It is difficult if not impossible to determine what is the optimal interval between periodic fire safety/property maintenance inspections. One may look to the fire safety provisions of the Uniform Code for guidance. For instance, part of a fire safety inspection is the review of building records to ensure that a building's fire protection equipment has been maintained in accordance with the Uniform Code. A review of the provisions of the code that establish maintenance and inspection requirements for fire protection systems reveals that over 450 potential types of maintenance and inspection procedures are addressed. Approximately 400 of these require maintenance and/or inspection by the building owner at intervals not to exceed one year. Periodic inspection by the municipality at least once every three years would ensure that building owners skip no more than two required system maintenance operations or inspections.

The Department of State has learned that many New York municipalities that perform periodic fire safety inspections do so at least once every three years. This appears to be an interval with which many municipalities are comfortable. Clearly, municipalities who are not performing inspections at least once every three years will need to add or reassign staff if they are to comply with a requirement to perform inspections more frequently. However, for all the reasons noted above more frequent inspections are necessary if the Uniform Code is to be effectively administered and enforced.

Finally, a number of comments stated that the effective date of the proposed regulation should be delayed to provide local governments with adequate time to budget for necessary changes to the municipal enforcement program and to review and update local laws if necessary. The Department of State agrees that a delayed effective date for the regulation is appropriate. The Notice of Adoption will specify January 1, 2007 as the effective date to provide municipalities with sufficient time to implement any necessary changes to their local enforcement programs.

State University of New York

NOTICE OF ADOPTION

Traffic Control Changes at the State University of New York at Stony Brook

I.D. No. SUN-21-05-00006-A
Filing No. 1152
Filing date: Oct. 5, 2005
Effective date: Oct. 26, 2005

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

Action taken: Amendment of section 584.5 of Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Traffic control changes on the campus of the State University of New York at Stony Brook.

Purpose: To more clearly designate traffic flow and fire zones and lanes.

Text or summary was published in the notice of proposed rule making, I.D. No. SUN-21-05-00006-P, Issue of May 25, 2005.

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

Text of rule and any required statements and analyses may be obtained from: Lynette M. Phillips, State University of New York at Stony Brook, 328 Administration Bldg., Stony Brook, NY 11794-1212, (631) 632-6110, e-mail: Lynette.Phillips@sunysb.edu

Assessment of Public Comment

The agency received no public comment.

Department of Taxation and Finance

NOTICE OF ADOPTION

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel

I.D. No. TAF-33-05-00001-A
Filing No. 1160
Filing date: Oct. 11, 2005
Effective date: Oct. 11, 2005

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

Action taken: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon of the fuel use tax on motor fuel and diesel motor fuel for the calendar quarter beginning Oct. 1, 2005, and ending Dec. 31, 2005, and reflect the aggregate rate per gallon on such fuels for such calendar quarter for purposes of the joint administration of the fuel use tax and the art. 13-A carrier tax.

Text or summary was published in the notice of proposed rule making, I.D. No. TAF-33-05-00001-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: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: diane_ohanian@tax.state.ny.us

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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Credit for Personal Income Tax

I.D. No. TAF-43-05-00009-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 120 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; and 697(a)

Subject: Credit for personal income tax imposed by another state, a political subdivision of another state, the District of Columbia, or a province of Canada.

Purpose: To change department policy concerning the submission of a copy of the tax return of another political jurisdiction when a taxpayer claims a credit for income tax paid to such political jurisdiction and amend regulations to reflect legislative changes.

Substance of proposed rule (Full text is posted at the following State website: www.tax.state.ny.us): Section 620 of the Tax Law provides for a credit for residents against the New York State personal income tax for any income tax imposed by another state of the United States, a political subdivision of such state, the District of Columbia, or a province of Canada on income both derived from such political jurisdiction and subject to New York State personal income tax. Section 620-A provides for a similar credit against the separate tax imposed by section 603 of the Tax Law on the ordinary income portion of a lump sum distribution both derived from another political jurisdiction and subject to tax under section 603.

Part 120 of the Personal Income Tax Regulations provides guidance for both of these credits.

The primary purpose of this rule is to amend Part 120 to change Department policy by eliminating the requirement of the submission of a copy of the tax return of another political jurisdiction outside New York State when a taxpayer claims the resident tax credit for the income tax imposed by the other political jurisdiction. This rule also updates Part 120 to reflect legislative changes to sections 620 and 620-A of the Tax Law. Among these are the inclusion of income taxes imposed by a province of Canada as being available for the resident credit and the rule for Subchapter S corporation shareholders claiming the resident credit. The rule also shortens the sections by removing obsolete and unnecessary material, including several examples, which are deleted because the limitations demonstrated in the examples are adequately explained in the text. The rule also contains technical and clarifying amendments.

Text of proposed rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: Diane_Ohanian@tax.state.ny.us

Data, views or arguments may be submitted to: Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn_Kaltenborn@tax.state.ny.us

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

Consensus Rule Making Determination

The Department of Taxation and Finance has considered the proposed amendments to Part 120 of Title 20 NYCRR and has determined that no person is likely to object to the rule as written.

The primary purpose of these amendments is to change Department policy by eliminating the requirement that a taxpayer submit a copy of the tax return of another political jurisdiction when the taxpayer claims the New York State resident credit for the income tax imposed by the other political jurisdiction. These amendments also update Part 120 of Title 20 NYCRR to reflect statutory changes, remove unnecessary material, and make technical and clarifying amendments.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. The primary purpose of the rule is to change Department policy by eliminating the requirement of the submission of a copy of the tax return of another political jurisdiction outside New York State when a taxpayer claims the resident credit for the income tax imposed by such other political jurisdiction. This rule also reflects legislative changes to sections 620 and 620-A of the Tax Law.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Extensions of Time to File

I.D. No. TAF-43-05-00010-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 152.12, 152.13, 157.1(a)-(b), 157.4(b), 157.5(a) and (b)(1)-(2); repeal sections 157.2, 157.3 and 157.6; and add new sections 157.2 and 157.3 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 652(a); 657(a); and 697(a)

Subject: Extensions of time to file.

Purpose: To allow taxpayers that file a proper application for an extension of time to file their New York State income tax returns and automatic six-month extension of time, rather than the previously allowed four-month automatic extension period.

Text of proposed rule: Section 1. The unlettered paragraph in section 152.12 of the Personal Income Tax regulations is amended to read as follows:

Any New York State income tax return required to be filed under this Subchapter, by or for a resident individual, a nonresident individual, a partnership, a resident estate or trust or a nonresident estate or trust, must be delivered [or], mailed, *or transmitted* to [:New York State Income Tax, W.A. Harriman Campus, Albany, NY 12227] *the address or location as directed in the appropriate forms and instructions.*

Section 2. The unlettered paragraph in section 152.13 of such regulations is amended to read as follows:

All applications for extensions of time must be delivered [or], mailed, *or transmitted* to [: New York State Income Tax, W.A. Harriman Campus, Albany, NY 12227] *the address or location as directed in the appropriate forms and instructions.* (see Part 157 of this Article).

Section 3. Subdivisions (a) and (b) of section 157.1 of such regulations are amended to read as follows:

(a) *(1)* The Department [of Taxation and Finance] may grant a reasonable extension of time for filing any New York State income tax return, statement, or other required document or for payment of New York State income tax or estimated tax (or any installment) on such terms and conditions as it may require. However, with the exception of a taxpayer who is outside the United States and Puerto Rico or who intends to claim nonresident status pursuant to the provisions of section [105.20(b)(2) of this Title] *605(b)(1)(A)(ii) of the Tax Law,* no such extension shall be for more than six months.

(2) To be granted any of the extensions described in paragraph (1) of this subdivision, individuals serving in the Armed Forces of the United States are required to comply with the terms and conditions of this Part. However, section 696 of the Tax Law provides certain individuals who are serving or who have been injured while serving in combat zones, contingency operations where the individual is deployed outside the United States away from the individual's permanent duty station, or qualified hazardous duty areas with additional time to file returns, make payments of tax, and claim any credits or refunds. See section 696 of the Tax Law for more detailed information.

(b) An extension of time to file a New York State personal income tax return automatically extends to the same date the time to file a City of New York resident personal income tax return, [a City of New York nonresident earnings tax return,] a City of Yonkers resident income tax surcharge return, and a City of Yonkers nonresident earnings tax return.

Section 4. Section 157.2 of such regulations is repealed and a new section 157.2 is added to read as follows:

Sec. 157.2 Application for automatic extension of time for filing New York State income tax returns.

(a) The Department will grant an automatic six-month extension of time to file a New York State income tax return beyond the date prescribed for filing the return upon the proper application by the individual, partnership, or fiduciary required to file the return. The application must be filed on or before the date prescribed for filing the return.

(b) The Department will set forth in the appropriate forms and instructions the different methods, along with the terms and conditions for each, for individuals, partnerships, and fiduciaries to a make proper application for the automatic extension of time to file a New York State income tax return. The methods may include, but are not limited to, the use of the appropriate New York State application form, the corresponding federal application form, electronic filing, and the Department's web site application process.

(c) (1) (i) In the case of a an individual or a fiduciary, the application for automatic extension of time for filing a New York State income tax return must be accompanied by a full remittance of the amounts properly estimated as New York State personal income tax, City of New York tax, and City of Yonkers tax remaining unpaid as of the date prescribed for filing the return.

(ii) For purposes of this Part, the "New York State personal income tax" means the amount of New York State personal income tax imposed under article 22 of the Tax Law; the City of New York tax means the City of New York personal income tax imposed under Chapter 17 of Title 11 of the Administrative Code of the City of New York; and the "City of Yonkers tax" means the City of Yonkers income tax surcharge on residents imposed under article IX of the Codes and Ordinances of the City of Yonkers and the City of Yonkers earning tax on nonresidents imposed under article X of the Codes and Ordinances of the City of Yonkers.

(2) In the case of an individual or a fiduciary, and notwithstanding any other provision of this Title, the application for automatic extension of time for filing the income tax return must be accompanied by a full remittance of any sales and compensating use taxes remaining unpaid as of the date prescribed for filing the income tax return (see Part R3 of Chapter 62 of the Laws of 2003, as amended by Part V of Chapter 686 of the Laws of 2003).

(d) Any automatic extension of time for filing a New York State income tax return granted under this section will not operate to extend the time for the payment of any New York State personal income tax, City of New York tax, City of Yonkers tax, or sales and compensating use taxes due on the return. (However, see section 157.5 of this Part for extension of time for payment of New York State personal income tax, City of New York tax, and City of Yonkers tax. Also, see section 2392.1 of this Title for provisions relating to the presumption of reasonable cause for purposes of not imposing the late payment addition to tax).

(e) Except in undue hardship cases, the Department will not grant an extension of time to file a New York State income tax return unless the provisions for application set forth both in this section and in the appropriate forms and instructions have been met.

Section 5. Section 157.3 of the regulations is repealed and a new section 157.3 is added to read as follows:

Sec. 157.3 Additional extension of time.

(a) "Maximum period of extension of time to file a New York State income tax return." Except as provided in subdivision (b) of this section, the maximum period of extension of time to file a New York State income tax return under the provisions of Section 657 of the Tax Law and of this Part is six months. The period of extension is computed from the original due date of the income tax return.

(b) "Additional extension of time to file beyond six months." (1) The Department may grant an extension of time to file for longer than six months to a taxpayer:

(i) who is outside the United States and Puerto Rico, or

(ii) who intends to claim nonresident status pursuant to section 605(b)(1)(A)(ii) of the Tax Law.

(2) A taxpayer who qualifies under paragraph (1) of this subdivision may make application for an extension of time to file beyond six months from the original due date of the income tax return by making a written request as prescribed in the appropriate forms and instructions.

Section 6. Subdivision (b) of section 157.4 of such regulations is amended to read as follows:

(b) "Application for additional [two-month] *four-month* automatic extension of time to file." Where a New York State personal income tax return cannot be filed on or before the end of the automatic two-month extension of time referred to in subdivision (a) of this section, a taxpayer will be allowed an additional [two-month] *four-month* extension of time if such taxpayer files an application and makes the required payment of New York State personal income tax, City of New York tax, and City of Yonkers tax on or before the end of such automatic two-month extension of time in accordance with the provisions of section 157.2 of this Part. Interest at the rate prescribed by the Commissioner [of Taxation and Finance] (see Part 2393 of this Title) on any balance of New York State personal income tax, City of New York tax, and City of Yonkers tax will be due from the due date of the New York State personal income tax return (determined without regard to any extension of time) to the date of payment.

Section 7. Subdivision (a) and paragraphs (1) and (2) of subdivision (b) of section 157.5 of such regulations are amended to read as follows:

(a) "Income tax payments." The Department [of Taxation and Finance] may, apart from any extension of time to file a New York State income tax return, grant a reasonable extension of time for payment of the New York State personal income tax, City of New York tax, and City of Yonkers tax upon receipt of a letter from the taxpayer giving complete information as to the reasons for such taxpayer's inability to make payment of the New York State personal income tax, City of New York tax, and City of Yonkers tax on or before the prescribed due date. However, except as provided in subdivision (b) of this section, where the time for payment of any New York State personal income tax, City of New York tax, and City of Yonkers tax is extended, interest will be added at the rate prescribed by the Commissioner [of Taxation and Finance] (see Part 2393 of this Title) on any balance due from the original due date of the New York State income tax return (determined without regard to any extension of time) to the date of payment.

(b) "Estimated tax payments." (1) The Department [of Taxation and Finance] may grant an extension of time for paying any installment of estimated tax required to be paid, in order to avoid the addition to tax imposed under section 685(c) of the Tax Law (see section 185.3 of this Title), without interest. Such extension, however, will only be granted because the taxpayer is seriously ill or for other compelling reasons. A request for an extension of time for paying any installment of estimated tax should be made by letter and mailed to New York State Income Tax, W. A. Harriman Campus, Albany, N.Y. 12227.

(2) An extension of time for paying any installment of estimated tax will normally be limited to one month and, except in cases of a taxpayer who is outside the United States and Puerto Rico or a taxpayer who intends to claim nonresident status pursuant to section [105.20(b)(2) of this Title] *605(b)(1)(A)(ii) of the Tax Law,* no extension will be granted for more than six months.

Section 8. Section 157.6 of such regulations is repealed.

Section 9. This regulation shall apply to taxable years beginning on or after January 1, 2005.

Text of proposed rule and any required statements and analyses may be obtained from: Diane M. Ohanian, Tax Regulations Specialist 4, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-2254, e-mail: Diane_Ohanian@tax.state.ny.us

Data, views or arguments may be submitted to: Marilyn Kaltenborn, Director, Taxpayer Services Division, Department of Taxation and Finance, Bldg. 9, State Campus, Albany, NY 12227, (518) 457-1153, e-mail: Marilyn_Kaltenborn@tax.state.ny.us

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

Consensus Rule Making Determination

The Department of Taxation and Finance has determined that no person is likely to object to the adoption of this rule as written because it repeals regulatory provisions that are no longer applicable and makes technical, editorial, and conforming changes that are not controversial in nature.

The primary purpose of the rule is to remove an unnecessary administrative burden placed on both taxpayers and the Department by allowing taxpayers that file a proper application for an extension of time to file their New York State income tax returns an automatic six-month extension of time, rather than the previously allowed four-month automatic extension

period. Taxpayers will no longer be required to file a second application for an additional two-month extension period to obtain the maximum six months allowed by section 657(a) of the Tax Law.

The secondary purpose of the amendments is to remove two rules which do not reflect current Department practice. The rules being repealed authorize the Department to: (1) terminate, at its discretion, certain automatic extensions, and (2) require a taxpayer to file a tentative New York State income tax return as a condition of being granted an extension. The procedures contained in these rules are no applicable to any person because they are no longer utilized by the Department.

The amendments will also update guidance concerning where to file certain returns and requests for extensions of time, and will add a cross reference to section 696 of the Tax Law for taxpayers seeking filing relief under the combat zone provisions of the Tax Law.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities. The purpose of the rule is to allow taxpayers that file a proper application for an extension of time to file their New York State income tax returns an automatic six-month extension of time, rather than the previously allowed four-month automatic extension period. Taxpayers will no longer be required to file a second application for an additional two-month extension period to obtain the maximum six months allowed by section 657(a) of the Tax Law.

The rule also removes obsolete provisions which no longer reflect Department practice and updates guidance concerning where to file certain returns and requests for extensions of time. Since these amendments simply reflect existing Department practice, it is evident that they will have no impact on jobs or employment opportunities.