

# 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

#### Compliance with Community Reinvestment Act Requirements

**I.D. No.** BNK-38-05-00008-E

**Filing No.** 951

**Filing date:** Sept. 2, 2005

**Effective date:** Sept. 2, 2005

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

**Action taken:** Amendment of Part 76 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 10, 14(1) and 28-b

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

**Specific reasons underlying the finding of necessity:** The purpose of the Community Reinvestment Act (“CRA”) is to encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations. Every New York State chartered bank must comply with both the State and federal CRA laws and regulations and is examined by State and federal regulators with respect to CRA.

Effective September 1, 2005, State chartered banks will have to comply with the amended federal CRA regulations recently adopted jointly by the

Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

When Part 76 was first adopted, and for the subsequent amendments made thereto, the State CRA regulation was designed to create compatibility with the federal CRA regulations so that banks chartered under the New York Banking Law would not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden. Consequently, the recently adopted CRA federal amendments which become effective September 1, 2005, necessitate the emergency adoption of the amendments to Part 76 of the General Regulations of the Banking Board to make the State CRA regulations compatible with the federal CRA regulation.

**Subject:** Compliance with Community Reinvestment Act requirements.

**Purpose:** To encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations.

**Substance of emergency rule:** Section 76.2(b) is amended to include references to “metropolitan divisions” in determining an area’s median family income.

Section 76.2(f) is amended to revise the definition of “community development” to include activities that revitalize or stabilize disaster areas and distressed or underserved middle-income nonmetropolitan geographies.

Section 76.2(q) is amended to add a definition of “metropolitan division”.

Sections 76.2(q) to 76.2(w) are renumbered to account for the added definition in Section 76.2(q), as noted above.

Section 76.2(t) is amended to raise the asset threshold for a “small banking institution” to \$1 billion, to introduce the new concept of an “intermediate small banking institution,” and to add provisions for adjusting the asset thresholds for small and intermediate small banking institutions.

Section 76.2(u) is amended to reflect the aforementioned renumbering, and to update references to the Banking Department’s address.

Section 76.2(v) is amended to reflect the aforementioned renumbering, to clarify a reference to Federal Reserve Regulation BB and to update references to the Banking Department’s address.

Section 76.5(a) is amended to replace the requirement for biennial CRA examinations with more flexible CRA examination scheduling criteria and to clarify the connection between the numerical ratings specified in Part 76 and the words commonly used to describe the rating.

Section 76.5(b) is amended to provide examples of laws, rules and regulations that, when violated, could lead to reduced CRA performance ratings.

Section 76.6(b) is amended to include references to metropolitan divisions.

Section 76.6(c)(1) is amended to include references to metropolitan divisions.

Section 76.8(a)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending as part of the institution’s CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(b)(2) is amended to eliminate a reference to loan renewals.

Section 76.8(c)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution’s CRA

performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.8(d) is amended to clarify that the loans being discussed in the Section are community development loans.

Section 76.8(d)(1) is amended to identify the specific data an institution must maintain if it elects to have regulators consider certain optional types of lending by an affiliate of the institution as part of the institution's CRA performance evaluation. The Section also is amended to include references to the locations of various offices where an individual can obtain copies of a specified document.

Section 76.10(d)(1) is amended to clarify the circumstances under which additional consideration will be given for branches located outside low- or moderate-income areas.

Section 76.10(d)(2) is amended to clarify the criteria for evaluating an institution's record of opening new branches and closing existing branches.

Section 76.10(f) is amended to add a provision specifying that the Banking Department will look favorably upon an institution's efforts to establish a Banking Development District.

Section 76.12(a)(1) is added to identify which performance criteria apply to small banking institutions that are not intermediate small banking institutions.

Section 76.12(a)(2) is added to identify the performance criteria that apply to intermediate small banking institutions.

Section 76.12(b) is added to delineate the Lending Test criteria that apply to all small banking institutions.

Section 76.12(c) is added to identify the Community Development Test performance criteria that apply only to intermediate small banking institutions.

Section 76.13(g)(1) is amended to correct an inaccurate cross-reference.

In addition, various technical amendments have been made to Part 76 to correct punctuation, renumber subparagraphs, and make similar minor adjustments.

**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 November 30, 2005.

**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, or at the department's website: www.banking.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Banking Law Sections 10, 14(1) and 28-b authorize the Banking Board to promulgate rules and regulations effectuating the provisions of the Community Reinvestment Act ("CRA").

##### 2. Legislative objectives:

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low- and moderate income neighborhoods, consistent with safe and sound operations. The proposed amendments to Part 76 make compatible the New York State CRA regulations to the changes made to the federal CRA regulations, recently adopted jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (the "Federal Agencies") that become effective on September 1, 2005. As a result, the proposed amendments will establish a CRA framework paralleling that in the federal CRA regulation, by which the State of New York Banking Department ("Banking Department") can assess a banking institution's record of helping to meet the credit needs of its local community.

##### 3. Needs and benefits:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Thus, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. This proposal primarily seeks amendments to Part 76 with respect to certain provisions of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

Specifically, the proposed rule includes amendments that reduce the regulatory burden imposed on banks with an asset size between \$250 million and \$1 billion, now referred to as "intermediate small banking

institutions", without regard to holding company affiliation, by exempting them from CRA loan data collection and reporting obligations. The intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory burden on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

As mentioned above, the proposed rule includes the implementation of a community development test for intermediate small banking institutions that will provide a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small banking institution, and the bank's responsiveness through such activities to community development lending, investment, and service needs, is evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment area(s), and the number and types of opportunities for community development activities.

The proposed rule also revises the definition of "community development" to increase the number and kinds of tracts in which bank activities are eligible for community development consideration.

Specifically, the category of community development with respect to activities that "revitalize or stabilize" is revised to provide that activities that revitalize or stabilize areas designated by the federal agencies as "distressed or underserved nonmetropolitan middle-income geographies" will qualify as community development activities. In addition, the proposed rule extends the definition of "community development" to cover efforts made by banks to revitalize or stabilize designated disaster areas.

Further, the proposed rule amends Part 76 to reflect certain technical changes to the regulation implementing the CRA to conform to changes made by the Office of Management and Budget ("OMB") regarding the standards for defining Metropolitan Statistical Areas, and changes related to census tracts adopted by the U.S. Bureau of the Census ("Census"). OMB standards for defining statistical areas provide nationally consistent definitions to use when collecting, tabulating and publishing federal statistics by geographic area. The CRA regulation relies on OMB standards for defining metropolitan areas for purposes of CRA data collection and reporting and for delineating institutions' assessment areas.

The CRA definition of "geography" affects CRA assessment area delineation, data collection and reporting. The CRA regulation defined the term "geography" as a "census tract or a block-numbering area delineated by the United States Bureau of the Census in the most recent decennial census." Beginning with the 2000 Census, the Census only assigns tracts and no longer assigns block-numbering areas. Accordingly, the proposed regulation amends the definition of geography to delete the term "block-numbering area".

Proposed amendments to Part 76 also establish a CRA examination schedule for State chartered banks that will more closely align, to the extent feasible, the State CRA examination schedule with that of the bank's federal regulator, thereby eliminating, when possible, non-concurrent CRA examinations.

In addition, the proposed rule includes certain amendments that will clarify the existing CRA regulations to assist regulated entities whose CRA performance is being assessed. In particular, Part 76 is amended to clarify, by way of examples, actions that evidence discrimination, or evidence credit practices that violate an applicable law, rule, or regulation. Such evidence will adversely affect the evaluation of a bank's CRA performance.

Also included in the proposed rule are clarifying amendments that: (a) describe the level of CRA performance associated with the CRA numerical performance ratings currently referred to throughout the regulation, (b) explain the criteria currently considered for evaluating a bank's CRA performance with respect to branch distribution, (c) specify the data referred to that must be maintained with respect to additional lending activity if banks elect to have additional lending activity considered in assessing their CRA performance, (d) make explicit the Banking Department's already existing practice to consider a bank's efforts to establish a Banking Development District in evaluating the bank's service test CRA performance criteria, and (e) state the Department's existing practice to apply the CRA performance criteria uniformly.

In addition to the foregoing, there are other small amendments to Part 76 in the form of corrections and updates that make current references to

the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

#### 4. Costs:

Costs to State Government: None.

It is expected that there will not be an increase in the amount of examiner hours needed to conduct CRA examinations of State-chartered banks by amending the State's CRA regulations to create compatibility with the federal CRA regulations, and establishing a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.

Costs to Local Government: None.

Costs to the Regulated Entities:

The Banking Department expects that because every New York State-chartered bank must comply with both the State and federal CRA laws and regulations, and the proposed rule primarily seeks amendments to the State's CRA regulation to create compatibility with the federal CRA regulations, there will be no additional costs to the regulated entities due to the proposed amendments to Part 76.

It is expected that the proposed rules, overall, will result in cost-savings to the regulated entities. Specifically, because the amendments to Part 76 primarily create compatibility with the federal CRA regulations, New York State-chartered banks that are subject to both the State and federal CRA laws and regulations will not incur the additional costs that would likely result if the regulated entities were required to satisfy two conflicting sets of CRA regulations. The estimated savings to the regulated entities in this regard can not be quantified by the Banking Department because there are a number of factors affecting a bank's CRA compliance costs, including the institutions asset size, the scope and type of its CRA programs, and the personnel involved in administering the programs and compliance with CRA.

Additionally, because the proposed rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, eliminating the regulatory burden of non-concurrent examinations, when possible, in this area will eliminate additional costs to the regulated entities for CRA examinations. The Banking Department is unable to estimate the savings to the regulated entities in this respect because the costs to an institution for an on-site CRA examination can vary greatly according to the institution's asset size, the scope and type of its CRA programs, and the number of personnel needed to assist in connection with the examination.

#### 5. Local government mandates:

The proposed rule 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:

The proposed rule will provide regulatory relief for State-chartered banks with an asset size between \$250 million and \$1 billion (intermediate small banking institutions) because it exempts these banks from CRA loan data collection and reporting obligations. As a result, such intermediate small banking institutions will be relieved of their obligation to collect and report information to the State and federal regulators about small business, small farm, and community development loans.

Additionally, since the proposed rule establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator, a reduction in paperwork will result since the banks will have to produce the necessary paperwork only once per CRA evaluation period for concurrent examinations.

#### 7. Duplication:

Every New York State-chartered bank must comply with both the State and federal CRA laws and regulations. Consequently, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. The proposed rule seeks amendments to Part 76 of the State CRA regulation to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law do not have to satisfy conflicting sets of CRA regulations.

#### 8. Alternative approaches:

Proposal—New York State-chartered banks must comply with both the State and federal CRA laws and regulations. Therefore, each State-chartered bank is examined by the State and a federal regulator to measure how well it meets the credit needs of its local communities. As previously

discussed in the Needs and Benefits section contained herein, the rule is necessary as proposed because it primarily amends Part 76 in various ways so that the State CRA regulation is compatible with the federal CRA regulation and establishes a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator.]

Due to the fact that State-chartered banks are required to comply with State and federal laws and regulations with respect to CRA, the Banking Department reasoned when Part 76 was first established, and during subsequent amendments thereto, that the State CRA regulation should be compatible with the federal CRA regulation. This approach to CRA has provided the regulated institutions with a consistent set of performance criteria with respect to their CRA activity. Accordingly, the proposed rule seeks amendments to Part 76 that will again provide a consistent approach to CRA compliance for the regulated entities so that they will not have to satisfy conflicting sets of CRA regulations. To the extent possible, it will also enable them to be examined concurrently by the State and federal regulator for CRA purposes, thereby eliminating the regulatory burden of non-concurrent CRA examinations. In the past, preventing regulated institutions from having to satisfy two different sets of CRA regulations has reduced their CRA regulatory burden. For that reason, it is expected that the current proposed rule will have a similar effect.

Do not propose the rule—If this alternative were considered, regulated entities would be faced with CRA compliance requirements under the State and federal regulations that would be substantially different. The regulated entities also would be required to submit to non-concurrent CRA examinations by the State and federal regulators. As explained in the Needs and Benefits section, this approach was not considered because the Banking Department believes that it is unnecessary to increase the regulatory burden placed on State-chartered banks by having them comply with conflicting sets of CRA regulations and subjecting them to non-concurrent CRA examinations.

#### 9. Federal standards:

Federal CRA regulations recently adopted by the Federal Agencies become effective on September 1, 2005. The proposed rule seeks amendments to the State CRA regulation to make it compatible with the federal CRA regulations.

#### 10. Compliance schedule:

Compliance with the proposed rule is required upon adoption of the rule.

#### **Regulatory Flexibility Analysis**

The proposed rule makes amendments to Part 76, the State's CRA regulation, primarily to make it compatible with the recently amended federal CRA regulations, which become effective September 1, 2005. All New York State-chartered banks must comply with both the State and federal CRA laws and regulations.

#### Effect of the rule:

With respect to asset size of the State-chartered banks, the proposed rule specifically includes amendments to Part 76 similar to the changes recently adopted in the federal CRA regulations, that reduce the regulatory burden imposed on banks with an asset size between \$250 million and \$1 billion (referred to as "intermediate small banking institutions"), without regard to holding company affiliation. These amendments will exempt intermediate small banking institutions from CRA loan data collection and reporting requirements. Also, the intermediate small banking institutions will not be subject to the lending, investment, and service CRA performance tests. Instead, their CRA performance will be evaluated under the small bank lending test combined with a flexible new community development CRA performance test. This has the effect of reducing regulatory burden on institutions that fall within this category because they are relieved from their obligation to collect and report information about small business, small farm, and community development loans.

The implementation of a new community development test for the intermediate small banking institutions will provide a more appropriate framework for assessing community reinvestment performance by these banks. The number and amount of community development loans, the number of qualified investments, and the provision of community development services by an intermediate small bank, and the bank's responsiveness through such activities to community development lending, investment, and service needs is evaluated in the context of the individual bank's capacities, business strategy, the bank's assessment area(s), and the number and types of opportunities for community development activities. Accordingly, because the performance standards for the intermediate small banking institutions will have the effect of reducing regulatory burden on these institutions, it is apparent that the amendments will not impose any

appreciable or substantial adverse impact on State-chartered banks licensed under New York Law.

The proposed rule affects State-chartered banks. It will have no effect on local governments because there are no local governments that are State-chartered banks.

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

A Rural Area Flexibility analysis is not submitted because the rule does not result in any hardship to a regulated party in a rural area. As is more fully described in the Regulatory Impact Statement, the proposed rule contains amendments to Part 76 to make various changes with respect to the ways in which the CRA performance is assessed for banks with a certain asset size to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. Proposed amendments to Part 76 also establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

Consequently, there is nothing about the character and nature of the proposed rule that would make it difficult for, or prevent State-chartered banks from complying with the rule based on a particular office location. Accordingly, it is unlikely that the rule would cause regulated parties to seek flexibility with respect to any part, or parts thereof, even if the regulated parties were located in a designated rural area as defined in New York State Executive Law Section 481(7).

#### **Job Impact Statement**

The purpose of CRA is to encourage banking institutions to help meet the credit needs of their local communities, including low and moderate income neighborhoods, consistent with safe and sound operations. Every New York-State chartered bank must comply with both the State and federal CRA laws and regulations and is examined by State and federal regulators with respect to CRA. Recent amendments to the federal CRA regulation that apply to federal as well as State-chartered banks were adopted and will become effective September 1, 2005. Accordingly, the amendments to Part 76, the State's CRA regulations, are proposed primarily to create compatibility with the federal CRA regulation so that banks chartered under the New York Banking Law will not have to satisfy conflicting sets of CRA regulations, thus substantially reducing their regulatory burden.

As is more fully described in the Regulatory Impact Statement, the proposed rule contains amendments to Part 76 to make various changes with respect to the ways in which certain bank's CRA performance is assessed to make the State CRA rules compatible with the recently adopted amendments to the federal CRA regulation. Furthermore, proposed amendments to Part 76 establish a CRA examination schedule for State-chartered banks that will be more closely aligned, to the extent feasible, with the CRA examination schedule of the bank's federal regulator. Additionally, amendments to Part 76 seek to clarify certain provisions of the existing State CRA regulation to assist the regulated entities whose CRA performance is being assessed. Finally, there are certain amendments to Part 76 in the form of corrections and updates that make current references to the location of the New York City office of the Department, re-number sections of the rule as needed, remove redundant terminology, insert proper cross-referencing and correct typographical errors.

Accordingly, based on the nature and purpose of the proposed rule, it will have no impact on jobs in New York State.

### **NOTICE OF ADOPTION**

#### **Interlocking Directors and Officers of Banking Organizations and Bank Holding Companies**

**I.D. No.** BNK-22-05-00001-A

**Filing No.** 949

**Filing date:** Sept. 21, 2005

**Effective date:** Sept. 2, 2005

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

**Action taken:** Amendment of section 70.2 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 130(3)(b), 143(3)(b), 209(3)(b), 247(5)(b), 399(5)(b) and 399-a(2)

**Subject:** Interlocking directors and officers of banking organizations and bank holding companies.

**Purpose:** To eliminate the requirement that interlock permissions granted by the Banking Board must be expressed in a special regulation.

**Text or summary was published** in the notice of proposed rule making, I.D. No. BNK-22-05-00001-P, Issue of June 1, 2005.

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

**Text of 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

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

The agency received no public comment.

### **NOTICE OF ADOPTION**

#### **Executive Officer and Director Interlocks at Banking Organizations**

**I.D. No.** BNK-22-05-00002-A

**Filing No.** 950

**Filing date:** Sept. 2, 2005

**Effective date:** Sept. 21, 2005

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

**Action taken:** Addition of section 207.3 to Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 130(3)(b), 143(3)(b), 209(3)(b), 247(5)(b), 399(5)(b) and 399-a(2)

**Subject:** Permission for executive officer and director interlocks at banking organizations.

**Purpose:** To grant permission to Scott Shay to serve as both an executive officer of Signature Bank and a director of Bank Hapoalim, B.M., a foreign banking corporation maintaining a branch in New York.

**Text or summary was published** in the notice of proposed rule making, I.D. No. BNK-22-05-00002-P, Issue of June 1, 2005.

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

**Text of 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

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

The agency received no public comment.

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

#### **Overdraft Check Fees**

**I.D. No.** BNK-38-05-00007-P

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

**Proposed action:** Amendment of Parts 6 and 32 of Title 3 NYCRR.

**Statutory authority:** Banking Law, sections 14(1), 14-g, 14-h, 108(8), 202, 235-c and 383(13)

**Subject:** Changing fees for accepting or honoring checks/payment orders ("checks") that overdraw accounts; increasing maximum fee for returning an overdraft check; and clarifying terms.

**Purpose:** To permit banking institutions to charge fees for paying overdraft checks to the same extent as Federal banking institutions; to increase the maximum fee for returning checks.

**Public hearing(s) will be held at:** 10:00 a.m. on Oct. 17, 2005, at Proshansky Auditorium, Graduate Center, City University of NY, 365 Fifth Ave., New York, NY

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

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

**Text of proposed rule:** PART 32

MAXIMUM CHARGES FOR PAYMENT MADE AGAINST INSUFFICIENT FUNDS, UNCOLLECTED BALANCES AND RETURN ITEMS; CERTAIN DISCLOSURES

(Statutory authority: Banking Law, Sections 14(1), 108(8), 202[(8)], 235-c, 383(13))

Section 32.1 is amended to read:

32.1 Maximum charges

(a) Insufficient funds. The establishment of [a charge] *charges* that [is] *are* imposed by a bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation (*collectively a "banking institution"*) in connection with a check drawn or other written order [drawn] upon, *or electronic transfer sought to be effectuated against*, insufficient funds or uncollected balances, [irrespective] *irrespective* of whether the check, order [instrument] *or electronic transaction (collectively an "item")* is paid, accepted or returned by the *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation], is a business decision to be made by each *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation], in its discretion, according to sound banking judgment and safe and sound banking principles. A *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation] *shall be deemed to have reasonably [establishes] established* such [a charge] *charges* if it [considers] *considered* the following factors, among others:

(1) the cost incurred by the *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation], plus a profit margin, in providing the service;

(2) the deterrence of misuse by customers of banking services;

(3) the enhancement of the competitive position of the *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation] in accordance with its marketing strategy; and

(4) the maintenance of the safety and soundness of the *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation].

*In establishing charges under this subdivision, a banking institution may consider the nature of the account and may determine to establish different charges for an account that is opened and maintained primarily for personal, household or family purposes than for an account that is not, and, in determining such charges, may also establish different charges depending upon whether the item is to be paid, accepted or returned.*

(b) Return items. The maximum charge which may be [imposed] *established* by a *banking institution* [bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation] in connection with an *item* [a check or other written order] received by it for deposit or collection and subsequently dishonored and returned by the drawee is [\$10] \$20. *The provisions of this subdivision shall apply only to an account that is opened and maintained primarily for personal, household or family purposes.*

Part 6 is amended by adding a new Section 6.8 to read as follows:

§ 6.8 Overdraft Protection Charges.

(a) *The Banking Board hereby finds that the promulgation of this section is consistent with the policy of the State of New York as declared in section 10 of the New York Banking Law and thereby protects the public interest, including the interests of depositors, creditors, shareholders, stockholders and consumers and is necessary to achieve or maintain parity between banks and trust companies, savings banks and savings and loan associations and national banks and federal savings associations, respectively, with respect to rights, powers, privileges, benefits, activities, loans, investments or transactions.*

(b) *The Banking Board hereby finds that title 12, United States Code, section 24 (Seventh) permits national banks to lend money. Title 12, United States Code, section 1464 permits federal savings associations to accept deposits.*

(c) *The Banking Board hereby finds that title 12, Code of Federal Regulations, Section 7.4002 provides that national banks may impose charges and fees on their customers, and title 12, Code of Federal Regulations, Section 557.12(f) allows federal savings associations to impose charges and fees regardless of any state laws. Both the Office of the Comptroller of the Currency and the Office of Thrift Supervision, in interpreting these sections, permit national banks and federal savings associations to impose greater daily charges in connection with overdraft protection programs than is otherwise allowed under New York Banking Law for banks and trust companies, savings banks and savings and loan*

*associations. (See Joint Guidance on Overdraft Protection Programs, 70 Federal Register 9127 (February 23, 2005), applicable to banks and trust companies and Guidance on Overdraft Protection Programs, 70 Federal Register 8428 (February 18, 2005), applicable to savings banks and savings and loan associations.)*

(d) *Notwithstanding any other provision of law or regulation, State-chartered banks, trust companies, savings banks and savings and loan associations may impose charges for paying or accepting checks or other written orders drawn on, or effectuating electronic transactions from, accounts containing insufficient funds in cases in which the drawer of the check or other written order, or the account holder seeking to effectuate the electronic transaction, does not have a written agreement for an overdraft line of credit pursuant to Sections 108(5), 235(8-b) or 380(2) of the Banking Law to the same extent and subject to the same conditions as national banks and federal savings associations, respectively.*

**Text of proposed 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

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

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

**Regulatory Impact Statement**

1. Statutory authority. Sections 108(8), 202, 235-c and 383(13) of the Banking Law authorize the Banking Board to regulate the fees charged by banking institutions, including licensed branches of foreign banking corporations, when paying, accepting, or returning checks drawn on accounts not having sufficient funds or having uncollected balances. Sections 14-g and 14-h authorize the Banking Board to adopt a rule or regulation permitting, respectively, banks and trust companies, and savings banks and savings and loan associations (hereafter "banking institutions"), to exercise the same rights and powers and engage in the same activities as, respectively, national banks and federal savings associations on substantively the same terms and conditions. Thus, to the extent that any provision of the Banking Law, including specifically the above noted sections other than sections 14-g and 14-h, does not permit banks, trust companies, savings banks and saving and loan associations to exercise the same rights or powers or engage in the same activities as national banks or federal savings association, or to do so to the same extent, then the Banking Board may adopt a rule or regulation allowing such banking institutions to do so, subject to any conditions the Banking Board deems appropriate.

2. Legislative objectives. The Legislature sought when enacting the provisions of sections 108(8), 235-c and 383(13) of the Banking Law to regulate the amount of fees charged when paying, accepting, or returning a check for which sufficient funds did not exist in the account on which the check was drawn. Further, the Legislature specified in section 108(8) that if the banks and trust companies charged any additional fees in such situations, such fees would constitute the charging of interest and be subject to other provisions of law, including the Banking Law, that govern the charging of interest.

The Legislature intended that sections 14-g and 14-h of the Banking Law allow State-chartered banking institutions, by Banking Board adoption of rules and regulation, to exercise the same rights and powers, and engage in the same activities as federally chartered banking institutions without requiring that the Legislature enact additional amendments to the Banking Law. Presumably, if other provisions of the Banking Law did not empower State chartered banking institutions to do the same things or to the same extent as federally chartered banking institutions, or even conflicted with the authorizations granted federally chartered banking institutions to do so, sections 14-g and 14-h were intended to permit the Banking Board by rule or regulation to enable State chartered banking institutions to so operate in the same fashion as federally chartered institutions.

3. Needs and benefits. All banking institutions, whether state or federally chartered, are authorized or permitted to charge fees related to the payment of checks submitted for collection or deposit. This applies to both the bank to which a check is submitted for collection or deposit as well as the bank of the accountholder on which the check is drawn. The bank must ultimately make payment on the check if the account contains sufficient funds at the time of presentation. Banks may charge related fees if there are not sufficient funds in the account when such checks are presented, whether the check is dishonored or not accepted and returned to the drawer or accepted and paid. In addition, the bank to which the check has been presented for collection or deposit may charge the person presenting the check a returned check charge, if the check ultimately is not accepted by the bank on which it is drawn.

Traditionally, if an account did not contain sufficient funds when a check was presented for payment to the bank on which it is drawn, the bank would not honor or accept the check, or "bounce" the check. The drawer of the check was charged a fee for attempting to overdraw the account and the incident would cause a report to be made by the bank to credit rating agencies, thus having a negative effective upon the accountholder's credit score. Banks however have long honored on an exception basis checks of some accountholders that occasionally overdraw the account on which the check was drawn. The banks may or may not have charged fees for doing so. These accountholders tended to be customers with long standing and extensive business relationships with the bank that likely include the presence of additional accounts in the bank that contained sufficient funds to cover the check amount. It may be this practice that was the impetus for the banking industry to formalize programs or products to honor checks drawn on accounts not having sufficient funds. Initially, these programs included linked accounts and overdraft lines of credit. Under the former arrangement, if an accountholder has multiple accounts in the bank, such as a savings account, the overdraft is debited against an account having sufficient funds or funds are automatically transferred from that account to the account on which the check is drawn sufficient to cover the check amount. Again, a fee may or may not be charged by the bank for this service.

Under the latter arrangement, the overdraft line of credit, banks may or may not impose a fee initially for each check that overdraws or continues to overdraw such account, but they charge interest on the amount by which the account is overdrawn until the account is brought current. The overdraft line of credit constitutes an extension of credit usually to a specified limit. As an extension of credit, the overdraft line of credit is therefore subject to whatever interest rate or usury limits may be imposed by a state. The overdraft line of credit, which is pursuant to the account agreement or contract, necessitates the bank honor all such checks that overdraw the account to the specified credit limit.

A more recent evolutionary innovation apparently of the overdraft line of credit product is the overdraft or bounce protection product or program. Under a bounce protection arrangement, banks are not entering into a written agreement to extend credit. Banks cover the amount of the overdraft and charge fees for honoring the checks. Such programs, which vary among federal banking institutions and state-chartered banking institutions, where permitted, generally contain the following features:

- inform customers that the program is an account feature and advertise the use of the program;
- provide automatic coverage for customers meeting certain criteria but such criteria usually entail no credit underwriting;
- impose an aggregate limit on the amount of such overdrafts and advise the customers of these limits;
- include other types of transactions such as ATM withdrawals and point-of-sale transactions, pre-authorized automated debits for certain bill payments, etc.;
- impose an initial or one-time fee that may or may not be the equivalent of the fee charged for not accepting the check and impose a daily fee in addition or as an alternative to a one-time fee for each day the account remains overdrawn;
- continue to accept checks for which the account does not have sufficient funds up a certain limit and impose identical fees on each such check; and
- offer the program as a discretionary service under which the bank at any time may refuse to accept any such check.

It is noted that when bouncing a check, in addition to the adverse credit report it causes the accountholder, the refusal to accept a check for payment also imposes additional costs upon the bank. When checks are not processed and cleared normally through the payment system, banks must engage in a specialized and exceptional process to refuse payment and advise the initial presenting bank and the customer that the check does not represent good funds. Thus, for all concerned interests, it is more productive and beneficial if checks causing overdrafts are accepted or honored. However, in doing so, banks are undertaking a risk, because failure of the accountholder ultimately to bring the account current means a loss of funds and income to the bank.

With respect to whether New York State chartered banking institutions may offer bounce protection, as noted above, the provisions of Section 108(8), 202, 235-c and 383(13) of the Banking Law regulate the amount of fees banking institutions may charge when paying, accepting, or returning a check for which sufficient funds do not exist. Further, section 108(8) provides that if banks and trust companies charge any additional fees in such situations, such fees would constitute the charging of interest and be

subject to other provisions of law, including the Banking Law, that govern the charging of interest.

Section 32.1 and 32.2 of Part 32 of the General Regulations of the Banking Board essentially re-state these statutory provisions and the requirements are made applicable to all banking institutions (except credit unions) chartered or licensed by the Superintendent. With respect to the charge relating to paying, accepting or returning a check or other written payment order pursuant to section 32.1(a), a maximum dollar amount is not specified. Rather, the regulations specify that establishing such a charge is a business decision to be made by each banking institution and further provide that such determination is reasonable if the institution considers the following factors:

- (1) the cost to the institution, plus a profit margin, in providing the service;
- (2) the deterrence of misuse of the service by the banking customer;
- (3) the enhancement of the competitive position of the institution in regard to its marketing strategy; and
- (4) the maintenance of safety and soundness by the institution.

Section 32.1(a) mirrors parallel regulations of the Comptroller of the Currency (12 CFR 7.4002) that apply to national banks when charging customers non-interest charges and fees for similar check transactions. Though section 32.1(a) would appear upon an initial reading to permit banking institutions to charge fees to the same extent as national banks when providing a bounce protection program, section 108(8) of the Banking Law also requires that any additional charges for checks or other payment orders not having sufficient funds must be treated as the charging of interest. Section 32.2 of the General Regulations of the Banking Board also repeats these statutory provisions. Subsequent fee charges by banking institutions therefore would be subject to caps on interest rates and criminal usury ceilings imposed respectively by the Banking Law and the Penal Law. In contrast, however, the Federal Reserve Board and the Comptroller of the Currency have permitted banks to charge higher fees even if connected with loan or credit products in certain respects, and this interpretation has been upheld by the federal courts. Thus, whether national banks charge one fee when accepting a check that overdraws an account, a daily fee, or both, such fees would not be subject to this state's caps on interest rates or the criminal usury ceilings. Consequently, use of the wild card authority is necessary to permit State-chartered institutions to charge daily fees to the same extent as national banks.

In order for banking institutions to offer bounce protection programs to the same extent as national banks, it is necessary that the Banking Board adopt the proposed rule amending Part 6 by adding a new section 6.8. Further, the amendments to Part 32, which amend section 32.1, clarify that charges related to overdrawing accounts, whether the transaction is accepted or not, apply to any type of account transaction, such as an ATM or POS transaction. This amendment conforms the scope of Part 32 regarding types of transactions causing overdrafts to the policy applicable to national banks and federal savings associations.

In addition, the amendments to Part 32 clarify that banking institutions may set charges of different amounts for accepting or not accepting checks which overdraw accounts. The amendments also clarify that banking institutions may set charges of different amounts for different types of accounts. In setting such amounts, however, banking institutions must make such determinations in conformance with the standards set forth in section 32.1(a) and noted above. With respect to differentiating the amounts of charges by type of account, the terms and conditions of commercial and other non-consumer account relationships between customers and banking institutions, including fees or interest that may be charged, are generally subject to whatever agreement can be reached between the two parties. Because of the potential leverage the non-consumer customer can exert, such accounts do not require the degree of regulatory oversight afforded consumer accounts.

In regard to the proposed amendment to Section 32.1(b), checks that are received for deposit or collection but subsequently dishonored and returned by the institution on which they are drawn, are subject to a maximum \$10 fee that may be charged the customer by the banking institution that has received the check for deposit or collection. As noted above, a returned check imposes increased costs upon the banking institutions involved compared to the honoring of a check that overdraws an account. The amendment to section 32.1(b) increases the maximum returned check charge from \$10 to \$20.

The banking industry in the past has suggested that no cap should be placed also on return check charges, and national banks are not subject to a cap on such charges. However, business entities and consumers have no method to determine immediately, when a check is offered in payment for

goods or services, whether it represents good funds in the account on which it is drawn. This fact may change in the future as modern electronic clearing mechanisms at the point of sale allow for immediate clearing of checks and become more widespread, but this capability will not be available to consumers who receive checks in payment. Further, to the extent that banking institutions expand bounce protection programs and thereby honor or accept more checks not having sufficient funds, the number of checks returned will be reduced, thus not imposing a returned check charge on businesses or consumers depositing or seeking collection of such checks. The cap of \$10 has not been increased for more than two decades and this increase seems appropriate given inflationary costs over time and the positive effect any future expansion of bounce protection programs may have upon the occurrence of returned check charges.

4. Costs. The proposed rule would cause an increase in costs for consumers that have accounts with bounce protection, if the banking institutions charge a daily fee when a check overdraws an account. However, this cost may be offset by the benefit of not receiving negative credit reports because of bounced checks, the effect of which may result in higher interest rate costs if such consumers borrow money.

Businesses and units of government may experience increased costs associated with returned check charges, since these entities predominantly incur returned check charges. On the other hand, the expansion of consumer bounce protection programs may result in fewer returned checks for businesses and units of local government.

5. Local government mandates. The proposed rule imposes no mandates upon units of local government.

6. Paperwork. The proposed rule imposes no additional paperwork requirements upon non-banking businesses or units of local government. It is also presumed the proposed rule will not cause additional paperwork or record keeping requirements for banking institutions for which such clerical operations are already highly automated. Bouncing checks causes significant additional clerical and recordkeeping operations for banking institutions for which any expansion of bounce protection programs may have at least an offsetting effect.

7. Duplication. None.

8. Alternatives. There are no alternatives by which banking institutions may provide bounce protection programs to the same extent as national banks or federal savings associations, absent an amendment of section 108(8) of the Banking Law.

9. Federal standards. In November 2002, the Federal Reserve Board (FRB) sought comment about the operation of overdraft programs and received numerous comments, mostly from industry representatives describing how the programs operate. Public comments by the federal regulatory agencies indicated the agencies were planning to provide guidance on bounce protection programs. In May 2004, the FRB issued proposed rules amending Regulation DD (12 CFR 230), Truth in Savings, relating to the uniformity and adequacy of information provided consumers regarding bounce protection programs. This regulatory initiative was issued as a Final Rule, May 2005, and is effective July 1, 2006. This rule may be reviewed via the Banking Department's web-page ([banking.state.ny.us](http://banking.state.ny.us)) through the link to the FRB's web-page or a copy may be obtained from the same source as indicated for the text of the proposed rule making.

In June 2004, a proposed Interagency Guidance on Overdraft Protection Programs was issued by the Federal Financial Institution Examination Council agencies (Office of the Comptroller of the Currency (OCC), FRB, Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS) and the National Credit Union Administration (NCUA)). The proposed Interagency Guidance addressed three areas: Safety and Soundness Considerations, Legal Risks and Best Practices. The section on Safety and Soundness sought to ensure that banking institutions adopted adequate policies and procedures to address the risk associated with offering overdraft protection products. The section on Legal Risks outlined several federal consumer compliance laws, generally alerted banking institutions to the need to comply with applicable federal and state law in offering such products, and advised institutions to have legal counsel review their overdraft protection programs to ensure overall compliance. The Best Practices section provided examples of the practices currently observed and recommended by the banking industry in offering these programs and generally addressed the marketing and communications related to offering the programs and the disclosure and operation of program features. Public comment was received from the banking institutions, trade associations, vendors of the overdraft products, consumer and community groups, government officials, and individual consumers.

In February 2005, a final Joint Guidance on Overdraft Protection Programs (70 Federal Register 9127 (February 23, 2005)), was issued by the OCC, the FRB, the FDIC, and NCUA. The OTS also issued a final Guidance on Overdraft Protection Programs (70 Federal Register 8428 (February 18, 2005)) which differed in certain respects from the Joint Guidance. The agencies issuing the Joint Guidance consider all overdraft programs to be credit products, but they do not consider the fees for paying overdraft items a finance fee subject to Regulation Z disclosure requirements since the institution has not agreed in writing to pay overdrafts. In contrast, the OTS' final Guidance takes the position that depending on the particular overdraft program, it may or may not be a credit product. Given the general characteristics of most bounce protection programs, especially in contrast to an overdraft line-of-credit, the OTS considers the charges in connection with such programs to be fees for services.

The Joint Guidance generally adopted the proposed Interagency Guidance without significant substantive change, except in one respect, and this revision was also adopted by the OTS in issuing its final Guidance. Both Guidances under the Safety and Soundness commentaries advise institutions to write off any overdraft balances, including any related fees, for which the account is not brought current within sixty (60) days. The Interagency Guidance initially recommended a thirty (30) day write off period, but industry comments recommended the period be extended to give customers more time to bring such accounts current. Finally, the OTS final Guidance deleted the commentary on Legal Risks, except to recommend that any overdraft program should be reviewed by legal counsel.

The Best Practices set forth in both Guidances are not herein reviewed other than to note the practices generally address giving the customers appropriate disclosures of how such programs operate, including but not limited to the types of the transactions covered, the aggregated limit of the overdraft, the discretionary nature of bounce protection, and the fees charged. However, the OTS final Guidance did incorporate best practices not contained in the Joint Guidance. The OTS Guidance advises that thrift institutions should not manipulate transaction-clearing processes so as to maximize fees, and the Guidance also advises not allowing consumers to access overdraft amounts unless the customer is informed the transaction will cause the overdraft fee and is given an opportunity to cancel the transaction. If this notice is not feasible because of the type of transaction, then the customer should be given the opportunity to make the bounce protection unavailable by type of transaction. The Best Practices issued by the Joint Guidance and the OTS final Guidance are posted on the Banking Department's web-page ([www.banking.state.ny.us](http://www.banking.state.ny.us)) and copies may be obtained from the same source as indicated for the text of the proposed rule making.

It is noted that the proposed regulation adding section 6.8 authorizes State-chartered banks and trust companies to offer bounce protection programs to the same extent and subject to the same conditions and as national banks. The amendment adding section 6.8 authorizes State-chartered savings banks and savings and loan associations to offer bounce protection programs to the same extent and subject to the same conditions and as federal savings associations. Therefore, the Joint Guidance standards will be applicable to the bounce protection programs of banks and trust companies and the OTS final Guidance will be applicable to savings banks and savings and loan associations. Best Practices, or the principles within, are enforceable as supervisory standards to the extent they are required by other applicable federal or state statutes or regulations.

10. Compliance schedule. The proposed rulemaking will become effective upon final adoption and banking institutions may commence bounce protection programs thereafter in accordance with the requirements of the final rulemaking.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: It is expected that, pursuant to final approval of this proposed rule-making, banking institutions (State-chartered banks, trust companies, savings banks and saving and loan associations) which vary in size from the smallest to the largest institutions will offer overdraft or bounce protection programs to the same extent as national banks and federal savings association may. The adoption of this rule is expected to result in a net increase in fee income for any banking institutions that adopt bounce protection or modify existing programs to charge daily fees for overdrafts.

For other businesses, the amendment to section 32.1(a) clarifying that such provisions apply only to consumer accounts may or may not increase costs for customers having commercial or other types of checking accounts with banking institutions. It is dependent upon a banking institution whether to and, if so, how much to charge such account holders for over-

drawing their accounts, whether such checks are returned, paid or accepted.

The amendment to section 32.1(b), increasing the maximum returned check charge, presumably would increase costs for businesses, both large and small, since businesses, more so than consumers, likely submit for payment or collection the predominant number of checks not having sufficient funds. Businesses in most instances have no way of determining immediately, when a check is offered in payment for goods or services, whether it represents good funds in the account on which it is drawn at the time of sale or good funds at the time it is presented for payment to the banking institution on which it is drawn. This fact may change in the future as modern electronic clearing mechanisms at the point of sale allow for immediate clearing of checks and become more wide spread, but presumably smaller businesses will have this capability later rather than sooner compared to larger businesses. Further, to the extent that banking institutions expand bounce protection programs and thereby honor or accept more checks not having sufficient funds, the number of checks returned to businesses that submit them for payment or collection will be reduced, thus reducing the businesses' costs associated with returned checks.

While it is presumed that units of local government would not use bounce protection programs, they potentially are subject to the costs associated with returned checks given in payment by residents for fees, taxes and services. However, every representation made above regarding the effects of returned check costs upon non-banking businesses are also applicable to units of local government.

2. Compliance requirements: In order to offer bounce protection programs, banking institutions, as reflected by the federal Interagency Guidance and the OTS Guidance, which are adopted as conditions of the Part 6 amendment, will need to insure that such programs meet the appropriate safety and soundness standards and legal sufficiency standards, and conform to the best practices standards as set forth in the Guidance that pertains to the particular type of banking institution.

There are no compliance requirements applicable to businesses other than banking institutions or to any unit of government.

3. Professional services: Bounce protection programs require certain software program capabilities to insure proper administration of the programs. It is expected that smaller sized banking institutions will use outside or third-party software vendors to mount such software capabilities, while larger sized banking institutions may have sufficient in-house information technology resources to not require the use of outside vendors.

4. Compliance costs: It is expected that all banking institutions will experience increased compliance costs at least in initially mounting these programs because of the need to insure the programs meet the appropriate Guidance standards as discussed above. It is likely that adequate software programs or capabilities are necessary in order to meet proper safety and soundness standards. While bounce protection programs may increase banking institutions' fee income and reduce costs associated with dishonoring or not accepting checks having insufficient funds, if customers are permitted to overdraw accounts beyond set amounts and do not bring the accounts current within a certain specified time period, significant monetary losses may be incurred by the banking institutions.

The proposed rule making imposes no compliance costs on non-banking businesses and units of government.

5. Economic and technological feasibility: The proposed rulemaking should impose no adverse economic or technological burden on banking institutions. The software capabilities for mounting such programs have been well developed during the last five years, and the institutions already have available all of the necessary account and customer communications capabilities needed to appropriately advise customers of account balances, charged fees, and provide periodic statements and other appropriate notices that may be required by the Guidance standards.

6. Minimizing adverse economic impact: It is expected that while certain operational costs will increase in the administration of bounce protection programs, the net fee income will increase for banking institutions. In addition, by honoring or accepting checks which overdraw accounts, banking institutions as a whole reduce costs by allowing such checks to be processed and cleared normally through the payment system. When checks are not honored or accepted, then banking institutions engage in an irregular and in some respects extraordinary process to refuse payment and advise the initial presenting banking institution and the customer that the check does not represent good funds. Further, a customer that has taken the check in payment for goods or services and has presented the check for payment or collection incurs usually a returned check charge. This cost will not occur if the account has bounce protection and the check amount is within the parameters of the bounce protection program. In

addition, since the banking institution on which a check having bounce protection is drawn does not submit a negative report to credit bureaus regarding the customer's account, the customer's credit rating or score is not adversely affected. Thus, while the customer may pay the banking institution additional fees because of overdrawing the account, it may be less expensive for the customer to experience the costs associated with bounce protection, than to pay higher interest rates for extensions of credit by a banking institution or other lending institutions.

7. Small business participation and local government participation: Small banking institutions as members of the New York Bankers Association, the Independent Bankers Association of New York State, and the Community Bankers Association of New York State have strongly supported this rule making. Individual CEOs of small banking institutions have expressed support for the rulemaking. The text has not been reviewed by the banking trade associations prior to publication of the rule. The proposed rule has not been reviewed by trade associations representing other business interests or by associations representing the various units of local government.

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

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on entities in rural areas. This agency finds that this rule will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

The proposal would allow financial institutions in rural areas to offer overdraft or bounce protection programs to their customers, which may result in increased fee revenue for those banks. Further, consumers in rural areas who use checks or automatic or point-of-sale electronic transactions to pay bills and purchase consumer goods or make ATM withdrawals may have fewer transactions refused or not accepted because of insufficient funds. This may help businesses in rural areas avoid costs associated with returned checks, and, in addition, consumers avoid adverse credit reports which banking institutions would make to the credit rating agencies if the check or electronic transaction is not honored.

#### **Job Impact Statement**

It is apparent from the nature and purpose of this rule will not have any adverse impact on jobs or employment opportunities. The proposal would allow, but not require, New York State chartered financial institutions to offer overdraft or bounce protection programs to their customers to the same extent as their federally regulated counterparts. As employers, financial institutions who choose to offer these programs may realize an increase in fee revenue and a reduction in overhead costs associated with not accepting and subsequently returning checks, which would not adversely affect jobs or employment opportunities.

---



---

## Department of Environmental Conservation

---



---

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

#### **Migratory Game Bird Hunting Regulations for the 2005-2006 Season**

**I.D. No.** ENV-38-05-00002-EP

**Filing No.** 939

**Filing date:** Aug. 31, 2005

**Effective date:** Aug. 31, 2005

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

**Action taken:** Amendment of sections 2.25 and 2.30 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

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

**Specific reasons underlying the finding of necessity:** The Department of Environmental Conservation (Department) is adopting this rule by emergency rulemaking to conform state migratory game bird hunting

regulations with the federal regulations for the 2005-2006 season and flyway guidelines for resource conservation. Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. Environmental Conservation Law Section 11-0307 requires that the Department adjust state migratory game bird regulations to maintain consistency with federal regulations. The final federal regulations are adopted in late summer, thereby necessitating emergency adoption of state regulations in order to have them in place for the migratory game bird seasons that begin in September.

Immediate adoption of this rule is necessary to preserve the general welfare by implementing New York State's 2005-2006 waterfowl hunting regulations. Law enforcement problems, public dissatisfaction, and adverse economic impacts would ensue if migratory game bird hunting regulations were not adjusted annually to conform with federal regulations and hunter preferences.

**Subject:** Migratory game bird hunting regulations for the 2005-2006 season.

**Purpose:** To adjust State migratory bird hunting regulations to conform with Federal regulations.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.dec.state.ny.us](http://www.dec.state.ny.us)):** The text of this rulemaking, which amends 6 NYCRR Sections 2.25, "Hunting upland game birds," and 2.30, "Migratory game birds," includes the following regulatory changes: technical corrections to the definition of migratory game birds; changes to the delineation of goose hunting area boundaries for Canada geese during regular goose seasons in some areas; an increase in the daily bag limit for Canada geese during the September season in the Lake Champlain Zone; changes to clarify what species of geese may be taken during Canada goose and snow goose seasons; a decrease in the daily bag and possession limits for scaup; reduction in season length for brant in all areas; consolidation of duck and merganser bag limits; season date adjustments for other waterfowl species (i.e., ducks, snow geese, and brant) in all areas; and clarification of Federal duck stamp and Harvest Information Program requirements.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire November 28, 2005.

**Text of rule and any required statements and analyses may be obtained from:** Bryan L. Swift, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8919, e-mail: [blswift@gw.dec.state.ny.us](mailto:blswift@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.

**Additional matter required by statute:** State Environmental Quality Review Act (SEQR; ECL Article 8). Establishment of hunting regulations is covered by a Final Programmatic Impact Statement (FPIS) on wildlife game species management (DEC 1980) and Supplemental Findings (DEC 1994), and by a federal EIS on issuance of annual regulations permitting the sport hunting of migratory birds (USFWS 1988). The proposed action does not involve any significant departure from established and accepted practices as described in the FPIS and is therefore classified as a "Type II" action pursuant to DEC's SEQR regulations (6 NYCRR § 618.2 [d][5]).

### Regulatory Impact Statement

#### 1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) authorizes the Department of Environmental Conservation (DEC) to provide for the recreational harvest of wildlife giving due consideration to ecological factors, the natural maintenance of wildlife, public safety, and the protection of private property. ECL Sections 11-0307, 11-0903, 11-0905 and 11-0909 and 11-0917 authorize DEC to regulate the taking, possession, transportation and disposition of migratory game birds.

#### 2. Legislative Objectives

The legislative objective of the above-cited laws is to ensure adoption of state migratory game bird hunting regulations that conform with federal regulations made under authority of the Migratory Bird Treaty Act (16 U.S.C. §§ 703-711). Season dates and bag limits are used to achieve harvest objectives and equitably distribute hunting opportunity among as many hunters as possible. Regulations governing the manner of taking upgrade the quality of recreational activity, provide for a variety of harvest

techniques, afford migratory game bird populations with additional protection, provide for public safety and protect private property.

#### 3. Needs and Benefits

The primary purpose of this rulemaking is to adjust annual migratory game bird hunting regulations to conform with federal regulations for the 2005-2006 season and flyway guidelines for resource conservation. This rulemaking also reflects preferences of hunters in New York and includes a change concerning crows (move hunting regulations for crows to 6 NYCRR § 2.30 from 6 NYCRR § 2.25) in order to conform to the classification of crows as migratory game birds in the ECL.

Migratory game bird population levels fluctuate annually in response to a variety of environmental factors, including weather conditions, predation, and human activities, such as land use changes and harvest. As a result, federal regulations pertaining to hunting of migratory birds are reviewed and adjusted annually. The Department annually reviews and promulgates state regulations in order to maintain conformance with federal regulations, as required by Environmental Conservation Law Sections 11-0307 and 11-0903, and to address ecological considerations and user desires.

The Department is proposing the following regulatory changes: technical corrections to the definition of migratory game birds to conform with current state and federal law; changes to the delineation of goose hunting area boundaries for Canada geese during regular goose seasons in some areas; an increase in the daily bag limit for Canada geese during the September season in the Lake Champlain Zone; changes to clarify what species of geese may be taken during Canada goose and snow goose seasons; a decrease in the daily bag and possession limits for scaup; reduction in season length for brant in all areas; consolidation of duck and merganser bag limits; season date adjustments for other waterfowl species (i.e., ducks, snow geese, and brant) in all areas; and clarification of Federal duck stamp and Harvest Information Program requirements.

Changes to the definition of migratory game birds contained in Department regulations will eliminate ambiguity about the legal status of swans and crows. All waterfowl species (ducks, geese and swans) are defined by federal regulations and the ECL as migratory game birds; crows are defined as migratory game birds by the ECL, and there are federal regulations that pertain to hunting of crows.

Changes to Canada goose hunting areas and bag limits will provide for more effective management of resident (local-nesting) and migrant populations that occur in New York.

Clarification of species that may be taken during various goose seasons was necessary due to recent changes in Canada goose taxonomy and federal authorization to permit incidental taking of species that sometimes occur in New York and may be hard to distinguish in the field.

A reduction in the bag limits for scaup was made in response to a record low continental population estimate for this species. The proposed changes for brant are also in response to a lower population estimate this year, and in accordance with a flyway management plan. Reduced harvest of this species will allow for faster population recovery to desired levels.

Consolidation of duck and merganser bag limits will reduce complexity of our regulations, which most hunters support. Other season date and bag limit adjustments contained in this rulemaking are intended to maximize hunting opportunities when they are most desired (for example, maximizing the number of weekend days open to hunting), within constraints established by the U.S. Fish and Wildlife Service (USFWS).

Season dates and bag limits for the Lake Champlain Zone are consistent with regulations established in adjoining areas of Vermont, in accordance with federal regulations and a long standing interstate agreement.

Clarification of Federal duck stamp and Harvest Information Program requirements was necessary to clarify and standardize Department guidance to the public and improve hunter compliance with these license requirements.

#### 4. Costs

These revisions to 6 NYCRR 2.25 and 2.30 will not result in any increased expenditures by state or local governments or the general public. Costs to DEC for implementing and administering this rule are continuing and annual in nature. These involve preparation and distribution of annual regulations brochures and news releases to inform the public of migratory game bird hunting regulations for the coming season.

#### 5. Paperwork

The proposed revisions to 6 NYCRR 2.25 and 2.30 do not require any new or additional paperwork from any regulated party.

#### 6. Local Government Mandates

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

## 7. Duplication

Section 2.30 largely duplicates federal migratory game bird hunting regulations. Each year, the USFWS establishes "framework" regulations which specify allowable season lengths, dates, bag limits and shooting hours for various migratory game bird species based on their current population status. Within constraints of the federal framework, New York selects specific hunting season dates and bag limits for various migratory game birds, based primarily on hunter preferences. These selections are subsequently included in a final federal rule making (50 CFR Part 20 Section 105), which appears annually in the Federal Register in September. However, Sections 11-0307 and 11-0905 of the ECL specify that DEC shall fix annually by regulation, migratory game bird hunting seasons and bag limits which conform with the federal regulations. This requires that Section 2.30 be amended annually.

## 8. Alternatives

The principal alternative, no action, would result in state waterfowl hunting regulations that do not conform with federal guidelines. Leaving season dates and bag limits unchanged would also result in a significant loss of hunting opportunity, public dissatisfaction, and adverse economic impacts because they would not reflect hunter preferences or alleviate goose damage through sport harvest to the extent possible.

## 9. Federal Standards

There are no federal environmental standards or criteria relevant to the subject matter of this rulemaking. However, there are federal regulations for migratory game birds. This rulemaking will conform state regulations to federal regulations, but will not establish any environmental standards or criteria.

## 10. Compliance Schedule

All waterfowl hunters must comply with this rulemaking during the 2005-2006 and subsequent hunting seasons.

**Regulatory Flexibility Analysis**

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with migratory bird hunting are administered by the New York State Department of Environmental Conservation (DEC) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, sell hunting licenses, but this rule does not affect that activity. Thus, there will be no effect on reporting or recordkeeping requirements imposed on those entities.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Small businesses currently benefit when migratory bird hunters spend money on goods and services. Additional goose hunting activity will not require any new or additional reporting or recordkeeping by any small businesses or local governments. For these reasons, the Department has concluded that this rulemaking does not require a Regulatory Flexibility Analysis.

**Rural Area Flexibility Analysis**

The purpose of this rulemaking is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas, other than individual hunters. Therefore, a Rural Area Flexibility Analysis is not required.

All reporting or recordkeeping requirements associated with hunting are administered by the New York State Department of Environmental Conservation (Department) or the U.S. Fish and Wildlife Service (USFWS). Small businesses may, and town or village clerks do, issue hunting licenses, but this rulemaking does not affect that activity.

Based on the Department's past experience in promulgating regulations of this nature, and based on the professional judgement of Department staff, the Department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. Rural areas benefit when migratory bird hunters spend money on goods and services. However, additional hunting activity will not require any new or additional reporting or recordkeeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rulemaking is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the Department has

concluded that this rulemaking does not require a Rural Area Flexibility Analysis.

**Job Impact Statement**

The purpose of this rulemaking is to amend migratory game bird hunting regulations. The Department of Environmental Conservation (Department) has historically made regular revisions to its migratory game bird hunting regulations. Based on the Department's experience in promulgating those revisions and the familiarity of regional Department staff with the specific areas of the state impacted by this proposed rulemaking, the Department has determined that this rulemaking will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Hunters will not suffer any substantial adverse impact as a result of this rulemaking because it is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. In fact, this rulemaking may slightly increase the number of participants or the frequency of participation in migratory game bird hunting, especially for Canada geese. For this reason, the Department anticipates that this rulemaking will actually have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

---



---

## Insurance Department

---



---

### EMERGENCY RULE MAKING

**Healthy New York Program**

**I.D. No.** INS-38-05-00004-E

**Filing No.** 940

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** Addition of section 362-2.7 and amendment of sections 362-2.5, 362-3.2, 362-4.1, 362-4.2, 362-4.3, 362-5.1, 362-5.2, 362-5.3 and 362-5.5 of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4318, 4326 and 4327

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

**Specific reasons underlying the finding of necessity:** It is estimated that approximately 3 million New York citizens currently do not have health insurance coverage. Access to employer based insurance coverage is heavily impacted by changes in the economy. Many small businesses do not offer health insurance to their employees due to its cost. A significant percentage of the uninsured in this State and Nationwide are employed by small businesses which do not offer health insurance coverage. Chapter 1 of the Laws of 1999 authorized the development of the Healthy New York program for the purpose of bringing affordable health insurance coverage to currently uninsured working people. The program targets uninsured small businesses with a significant percentage of low-wage workers and uninsured individuals at lower income levels. Since the program's commencement in 2001, over 27,000 uninsured workers have already benefited from Healthy New York. After several years of operation, we have determined that certain changes allowing for choice in health insurance benefit packages, improved and simplified eligibility and recertification requirements, and an increased reduction in premiums will encourage even more uninsured small businesses and uninsured low income individuals to purchase health insurance coverage.

Consequently, it is critical for this regulation to be adopted as promptly as possible. For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

**Subject:** Amendments to the Healthy New York Program to reduce cost, lessen complexity, and add a second benefit package.

**Purpose:** To reduce Healthy New York premium rates by adjusting the stop loss reimbursement corridors to enable more uninsured businesses

and individuals to afford health insurance; lessen complexity in eligibility determination; eliminate the well-child copayment; create a second benefit package; allow members to select a benefit package at annual recertification or when the premium rate changes; establish clear rules with respect to determining employment eligibility; clarify employer contribution requirements for part-time workers, qualify Healthy New York as coverage eligible for a federal tax credit - generally improving the Healthy New York Program based upon feedback of affected parties; change the loss ratio standard for Healthy New York contracts from small group to individual; require reports from the insurers pertaining to stop loss reimbursement or loss ratio to be certified.

**Substance of emergency rule:** The second amendment to regulation 171 makes various changes to the Healthy New York program with respect to providing for choice in benefits, enhanced and simplified eligibility requirements and reduced premium rates.

Subsection 362-2.5(a) is amended to allow health maintenance organization to provide insured individuals with forms necessary for recertification 90 days prior to their due date.

Subsection 362-2.5(b) is amended to eliminate the requirement for supporting documentation with annual recertification.

Subsection 362-2.5(d) is deleted to discontinue the requirement that health plans mail Healthy NY a written reminder of their obligation to recertify sixty days prior to the date coverage would terminate due to a failure to recertify.

Subsection 362-2.5(e) is amended to delete a cross reference to a subsection that has been deleted and relabeled as subsection (d).

Subsection 362-2.5(f) is relabeled as subsection (e).

Subsection 362-2.7(a) is added to delete the copayment applied to well-child visits effective June 1, 2003.

Subsection 362-2.7(b) is added to require health plans to offer an additional Healthy New York benefit package which does not include prescription drugs and to allow qualifying small employers and qualifying individuals to choose among the Healthy New York benefit packages. The subsection also provides that qualifying small employers must elect to provide the same benefit package to all of their employees. The subsection also provides that once enrolled in the program, any change in the selection of a benefit package may occur at the time of annual recertification or at anytime the premium rate changes. Notice of this option must be included with any notice of rate change.

Subsection 362-2.7(c) is added to provide that individuals eligible for a federal tax credit under the Trade Adjustment Act of 2002 shall be deemed to have satisfied the pre-existing condition waiting period within the Healthy NY program in full.

Subsection 362-3.2(h) is revised to clarify that qualifying small employers choosing to offer coverage to part-time workers may choose the level of premium contribution they make on behalf of part-time workers.

Subsection 362-3.2(j) is revised to provide that small employer applicants shall be considered to have provided group health insurance if they have arranged for group health insurance coverage on behalf of their employees and contributed more than a de-minimus amount on behalf of their employees. The subsection also defines de-minimus contributions through January 31, 2005 as those that do not exceed an average of \$50 per employee per month. Beginning February 1, 2005, de-minimus contributions are those that do not exceed an average of \$75 per employee per month for employers in the counties of Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester or an average of \$50 per employee per month for employers in all other counties. De-minimus contributions shall not prevent small employers from qualifying to purchase health insurance coverage through the Healthy NY program.

Subsection 362-3.2(m) is amended to delete the requirement for supporting documentation with annual recertification.

Subsection 362-4.1(a) is revised to change the definition of "employed person" to include any person employed and receiving monetary compensation currently or within the past 12 months.

Subsection 362-4.1(b) is revised to delete the definition of "episodic employment."

Subsection 362-4.1(c) is re-labeled as subsection 362-4.1(b).

Subsection 362-4.2(i) is revised to delete the requirement for supporting documentation at annual recertification.

Subsection 362-4.2(k) is added to provide that applicants for qualifying individual health insurance contracts may meet the Healthy New York eligibility requirement regarding employment by demonstrating that their spouse (residing in their household) is an employed person.

Subsection 362-4.3(b) is amended to delete the requirement that child support be counted as parental income for the purposes of determining income eligibility.

Subsection 362-4.3(d) is revised to recognize that supporting documentation is not required upon annual recertification.

Subsection 362-5.1(b) is revised to amend the claims corridors for the small employer stop loss fund and the qualifying individual stop loss fund to include claims paid on behalf of a covered member in excess of \$5,000 and less than \$75,000, beginning in calendar year 2003.

Subsection 362-5.1(d) is amended to delete an unnecessary description of the prior claims corridor amounts.

Subsection 362-5.2(c) is amended to change a reference to the prior claims corridor from a specific dollar amount to a general reference so that it is applicable regardless of the dollar amount.

Subsection 362-5.2(f) is amended to insert the word "the." This corrects a technical error.

Subsection 362-5.3(e) is amended to change the loss ratio standard for Healthy New York contracts from small group to individual.

Subsection 362-5.3(f) is added to provide that health maintenance organizations and participating insurers may reinsure their Healthy New York business in whole or in part if they determine it would favorably impact premium rates. The subsection also provides that the impact of any such reinsurance shall be factored into the premium rates for affected qualifying group health insurance premiums and individual health insurance premiums.

Subsection 362-5.3(g) is added to provide that no later than 30 days from the effective date of this regulation, health maintenance organizations and participating insurers shall submit the policy form amendments and premium rate adjustments necessitated by these amendments.

Subsection 362-5.5(a) is amended to require that reports pertaining to stop loss reimbursement or loss ratio be certified by an officer of the company that such report is accurate and complete.

**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 November 29, 2005.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The authority for the amendment to 11 NYCRR 362 is derived from sections 201, 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4318, 4326 and 4327 of the Insurance Law. Sections 201 and 301 authorize the superintendent to prescribe regulations interpreting the provisions of the Insurance Law as well as effectuating any power granted to the superintendent under the Insurance Law, to prescribe forms or otherwise to make regulations. Section 1109 authorizes the superintendent to promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to the contracts between a health maintenance organization and its subscribers. Section 3201 authorizes the superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state. Section 3216 sets forth the standard provisions to be included in individual accident and health insurance policies written by commercial insurers. Section 3217 authorizes the superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies. Section 3221 sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers. Section 4235 defines group accident and health insurance and the types of groups to which such insurance may be issued. Section 4303 sets forth benefits that must be covered under accident and health insurance contracts. Section 4304 includes requirements for individual health insurance contracts written by non-profit corporations. Section 4305 includes requirements for group health insurance contracts written by not-for-profit corporations. Section 4318 sets forth requirements for accident and health insurance contracts that include a pre-existing condition provision. Section 4326 authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the superintendent to modify the copayment and deductible amounts for qualifying health insurance contracts. Section 4326(g) authorizes the superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002. Section 4327 creates two stop-loss funds and requires the superintendent to promulgate regula-

tions setting forth the procedures for the operation of the stop loss funds and distribution of monies therefrom. Section 4327(b) sets the stop loss corridors for calendar year 2001. Section 4327(d) provides that, except as specified in subsection (b) with respect to calendar year 2001, the level of stop loss coverage need not be the same. Section 2807-v(1)(h) & (i) of the Public Health Law directs the distribution of funds for purposes of services and expenses related to the Healthy New York program.

2. Legislative objectives: A significant number of New York residents are currently uninsured. A large portion of New York State's uninsured population is made up of individuals employed in small businesses. Due in part to the rising cost of health insurance coverage, many small employers are currently unable to provide health insurance coverage to their employees. Additionally, the problem of the uninsured has been exacerbated by national events impacting the labor market and access to employer based health insurance coverage. Chapter 1 of the Laws of 1999 enacted the Healthy New York Program; an initiative designed to encourage small employers to offer health insurance to their employees and to encourage uninsured individuals to purchase health insurance coverage.

3. Needs and benefits: This amendment to Part 362 of 11 NYCRR is necessary to introduce a second Healthy New York benefit package at a reduced premium rate. The second benefit package provides for a lower cost alternative and gives individuals and small businesses choice of a benefit package that meets their needs. Any change in benefit package selection may occur at the time of annual recertification or when the premium rate changes. Any notice of rate change must include notice of this option to change benefit packages. The amendment deletes the well child copayment applicable to Healthy New York in order to enhance access to preventive and primary care for children. The amendment permits Healthy New York to be considered qualifying health insurance under the federal Trade Act of 2002 to allow those qualifying for a federal tax credit to benefit from that credit. The amendment revises the eligibility requirements relating to employment in order to lessen complexity and enhance access. The amendment provides that child support payments shall not be treated as income of the parents for the purpose of determining household income eligibility equitably. The amendment deletes the applicability of certain documentation requirements in connection with the recertification process and facilitates re-certification closer to annual renewal date. This will allow for simplification of the re-certification process to assist in ensuring continuity of coverage for low income individuals. The amendment clarifies that qualifying small employers choosing to offer coverage to part-time workers may choose the level of premium contribution on behalf these workers to encourage employers to extend coverage to part-time workers. The amendment provides that employers making a de-minimus contribution to employee premiums shall not be crowded out of the Healthy New York Program for this reason. Through January 31, 2005, de-minimus contributions are those that do not exceed an average of \$50 per employee per month. Beginning February 1, 2005, de-minimus contributions are those that do not exceed an average of \$75 per employee per month for employers in the counties of Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester or an average of \$50 per employee per month for employers in all other counties. This de-minimus amendment will avoid penalizing vulnerable employers for such premium contributions and will encourage these employers to purchase Healthy New York subject to a 50% premium contribution requirement. The amendment clarifies that health maintenance organizations and participating insurers may reinsure their Healthy New York business if it achieves a favorable premium impact. The amendment also adjusts the stop loss corridors for the program in order to effectuate a level of premium reduction sufficient to encourage more currently uninsured businesses and individuals to purchase comprehensive health insurance coverage. These revisions should provide low-income individuals and vulnerable small businesses with enhanced access to Healthy New York. This amendment changes the loss ratio standard for Healthy New York contracts from small group to individual and requires that insurer's reports pertaining to stop loss reimbursement or loss ratio be certified.

4. Costs: The Health Care Reform Act allocated a fixed amount to the Healthy New York program to encourage uninsured businesses and individuals to purchase health insurance. This amendment will not alter the amounts dedicated to the program. However, this amendment will increase the per head cost to the State to be distributed from the overall allocation for the program for workers enrolled in Healthy New York. The amount of this increase will depend on the actual claims experience of the Healthy New York insured population. Because the amendment enhances access to Healthy New York, we would also expect that the amendment will cause the program to operate at enrollment levels which are consistent with the

program's full funding capacity. At the same time, by bringing affordable insurance protections to the currently uninsured population, this amendment will avert costs to the State resulting from uninsured individuals accessing necessary and emergency health care services. Enhanced access to market based coverage will result in an introduction of private dollars into the New York's healthcare system along with a savings to heavily subsidized State programs. Further, enhanced access to preventive and primary care services should result in cost savings related to improved children's health.

5. Local government mandates: This amendment imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: This amendment will not impose any new reporting requirements. This amendment simplifies the recertification process reducing the administrative burden and paperwork requirements for health plans and enrollees. This amendment requires that insurers certify all reports pertaining to stop loss reimbursement and loss ratio but does not require any additional reports.

7. Duplication: There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. Alternatives: Throughout the initial implementation of Healthy New York, input has been obtained from interested parties including consumer groups; health plans; health plan associations; business groups; association groups; local chambers of commerce and academics. In addition, independent reports have been prepared examining the impact of the program on the uninsured population. In developing the reports, the contractor interviewed health plans, brokers, businesses and enrollees. Claims data submitted by the participating health plans has also been analyzed. The alternative to introducing a lower cost benefit package would be continuing the current structure of offering a single benefit package option. This alternative was rejected in order to provide businesses and individuals with choice of the benefit package which best meets their needs and to provide for a lower cost alternative. With respect to the amendment to delete the well child copayment, the alternative would be to retain a copayment on these services. This alternative was rejected because it discourages access to preventive and primary care for children. This change was requested by health plans, providers and consumers. The alternative to changing the pre-existing condition exclusion for those eligible to receive a federal tax credit would leave those covered by Healthy NY unable to benefit from the credit. The alternative to addressing employment standards would be to retain the existing fragmented definition of employment within the eligibility criteria. The amended employment standard will lessen complexity, facilitate the application process, and enhance access to the Healthy New York program. The alternative to providing that child support shall not be counted as the income of the parents in determining household income eligibility would be continuing to count such payments as parental income. Consistent with requests of consumers and health plans, this revision will enhance access to the program while ensuring more equitable consideration of parental income. The alternative to simplifying the re-certification process would be continuing with the current requirements on re-certification. The Department believes the revision will assist in ensuring continuity of coverage for low-income individuals. No alternative was considered on providing clarification of employer's ability to choose the appropriate level of premium contribution on behalf of part-time workers. The program was already administered to allow employers choosing to cover part-time workers to choose the premium contribution on their behalf. With respect to the provision providing a de minimus exception to the program's crowd out requirement for employers which are contributing minimally toward payment of employee premiums, the alternative would be continuing to bar employers contributing minimally to premiums from participation in Healthy New York. We have received feedback from employers, brokers, and health plans that providing for an exception would be most equitable. This amendment will permit such employers to purchase Healthy New York subject to a program requirement that they contribute a full 50% of the Healthy New York premium. Concerning the provision addressing reinsurance, the alternative would be an absence of clarification or guidance on the use of reinsurance mechanisms. The Department wishes to clearly advise of the availability of private reinsurance mechanisms to favorably impact Healthy NY premiums. The alternative to changing the stop loss reimbursement levels would be to continue with the current reimbursement levels. Based upon a review of the program's claims data by the Department, health plans and an independent contractor, we have determined that the adjusted stop loss corridors are the most appropriate for the program. We have received feedback from health plans, chambers of commerce, business groups, academics, consumer groups and

consumers that the Healthy New York small business program would be improved by enhanced price separation between Healthy New York and other small group products. We have also received feedback that the individual program would be improved if the Healthy New York premium constituted a smaller percentage of the member's household income. Adjustment of the stop loss corridors will achieve enhanced price separation in the small group market while reducing the percentage of income Healthy New York subscribers will need to commit to payment of premium. Increase of the loss ratio standard for Healthy New York contracts will increase the percentage of premium dollar that is received in claims by members. After two complete year's experience, the Department believes that the amendments set forth above will best serve the needs of the program.

9. Federal standards: The Federal Trade Adjustment Act of 2002 extends a federal tax credit to certain individuals to be applied towards the purchase of health insurance. This amendment adjusts the pre-existing condition exclusion period within the Healthy NY to bring it into compliance with the requirements of the Trade Adjustment Act in order to enable eligible individuals to obtain the benefit of this credit.

10. Compliance schedule: This rulemaking will be effective upon adoption. HMOs and providers achieved the June 1, 2003 compliance date without problems because this regulation was previously filed on an emergency basis in March, June, and September 2003.

**Regulatory Flexibility Analysis**

1. Effect of rule: The amendment will affect qualifying small employers, including individual proprietors, by providing them with even greater access to affordable options for comprehensive health insurance. Employers will be provided with choice in the health insurance benefit option that meets their needs, enhanced and simplified eligibility, and improved Healthy New York premium rates. These modifications should encourage the purchase of health insurance coverage through the Healthy New York program. In turn, this will diminish the number of uninsured in New York State. The amendment will not affect local governments. The amendment will affect health maintenance organizations and licensed insurers in New York State, none of which fall within the definition of small business as found in Section 102(8) of the State Administrative Procedure Act.

2. Compliance requirements: Qualifying small employers and individual proprietors must provide health maintenance organizations and insurers with a certification of eligibility on an annual basis for continued participation in the Healthy New York program. There are no compliance requirements for local governments. This amendment eases existing compliance requirements.

3. Professional services: The qualifying small employer and individual proprietor should not require professional services to comply with the amendment.

4. Compliance costs: The implementing legislation requires that small businesses wishing to participate in the Healthy New York program complete an initial form certifying as to their eligibility to participate in the program. There should be no costs associated with completing this form since the information requested in support of an applicant's eligibility certification is readily available to the small employer. This regulatory amendment does not impose any additional costs. The amendment should reduce insurance costs for small businesses. The amendment imposes no costs to local governments.

5. Economic and technological feasibility: The Healthy New York program is designed to make health insurance premiums more affordable to small businesses. Compliance with the amendment should be economically and technologically feasible for small businesses since it requires no action on their part.

6. Minimizing adverse impact: The amendment minimizes the adverse impact on small employers by lowering premium rates and increases access to affordable health coverage.

7. Small business and local government participation: Adjustment of the stop-loss corridors resulting in premium reduction is based on the Department's discussions with Chambers of Commerce, small businesses and providers. Other changes to the program result from concerns expressed to the Department by providers, Chambers of Commerce, business councils, and small businesses. This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with an additional opportunity to participate in the rule-making process.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: Health maintenance organizations and insurers to which this regulation is applicable do business in every county of the state, including rural areas as defined under

Section 102(13) of the State Administrative Procedure Act. Small businesses and working uninsured individuals meeting the eligibility criteria for participation in the Healthy New York program and individuals in need of health insurance coverage are located in every county of the state including rural areas as defined under Section 102(13) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires health maintenance organizations to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Insurance Department by the health maintenance organizations. This revision will not add any new reporting requirements. This amendment does require that a notice of rate change include a notice of the right to change benefit packages. Nothing in this revision distinguishes between rural and non-rural areas.

3. Costs: The Healthy New York program is funded from state monies as part of the Health Care Reform Act of 2000. There are no costs to local governments. Qualifying small businesses and individuals will benefit from the revisions to Part 362 due to the resulting reduced premium rates for Healthy New York insurance. This will benefit those businesses and individuals in both rural and non-rural areas of the State. Additionally, this amendment should facilitate the program's goals of encouraging individuals to purchase insurance on their own behalf and encouraging businesses to purchase insurance on behalf of their employees. This regulation has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the amendment will impact all affected entities the same. Furthermore, the result of the amendment should ultimately be a favorable one since it decreases premium rates and reduces some program complexity.

5. Rural area participation: Adjustment of the stop-loss corridors resulting in premium reduction is based on the Department's discussions with health plans, Chambers of Commerce, small businesses and consumers. Other changes to the program result from concerns expressed to the Department by providers, HMOs, Chambers of Commerce, business councils, small businesses, and consumers. This notice is intended to provide small businesses, local governments, and public and private entities in rural and non-rural areas with further opportunity to participate in the rule-making process.

**Job Impact Statement**

This amendment will not adversely affect jobs or employment opportunities in New York State. This amendment is intended to improve access to comprehensive health insurance for individuals, the working uninsured and small employers. This amendment reduces the cost of Healthy New York health insurance, a program for the uninsured, by creating choice in benefit structure, easing confusion regarding eligibility terms, and generally improving access to Healthy New York insurance.

---



---

## State Liquor Authority

---



---

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

**Increase in Amount of Retail Bonds**

**I.D. No.** LQR-38-05-00001-P

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

**Proposed action:** Amendment of Part 81 of Title 9 NYCRR.

**Statutory authority:** Alcoholic Beverage Control Law, section 112

**Subject:** Increase in amount of retail bonds.

**Purpose:** To impose a larger bond claim in situations where a licensee has defaulted and gone out of business after charges have been brought.

**Text of proposed rule:** 9 NYCRR 81: RULE 9 BONDS OF LICENSEES AND PERMITTEES

Promulgated by the State Liquor Authority pursuant to Section 112 of the Alcoholic Beverage Control Law:

Sec. 81.1. Requirement of bond.

Each licensee and each permittee of the kinds and classes hereinafter prescribed shall file with the Liquor Authority a bond to the people of the State of New York, issued by a surety company approved by the Superintendent of Insurance as to solvency and responsibility, and authorized to transact business in this state, in the penal sum hereinafter prescribed, conditioned that such licensee or permittee will not suffer or permit any violation of the provisions of the Alcoholic Beverage Control Law or the rules of the State Liquor Authority. All bonds shall undertake that any costs taxed or allowed in any action or proceeding will be paid to the extent of [\$1,000] \$2,500 in addition to the penal sums specified in this rule.

Sec. 81.2. Filing bond. The bond prescribed by this rule shall accompany the application for the license or permit.

Sec. 81.3. Penal sum of bonds.

(a) Licenses. The following is the schedule of penal sums of bonds to be filed in support of the various licenses:

<i>Manufacturer</i>	<i>Bond</i>	
Cider Producer	[1,000]	2,500
Farm winery	[1,000]	2,500
<i>Vendor</i>	[1,000]	2,500
<i>Retail (Off-Premises)</i>		
Beer (Grocery, Drug Store, Supply Ship)	[1,000]	2,500
Wine (Wine Store)	[1,000]	2,500
Liquor (Liquor Store)	[1,000]	2,500
<i>Retail (On-Premises)</i>		
Beer		
Club, Hotel, Eating Place or Ball Part-Stadium	[1,000]	2,500
Railroad Car, other than Option C	None	
Vessel (including Fishing Vessel)	[1,000]	2,500
Summer Licenses (Club, Hotel, or Eating Place)	[1,000]	2,500
Wine and Beer		
Club, Hotel or Restaurant	[1,000]	2,500
Special	[1,000]	2,500
Liquor, Wine and Beer		
Bottle Club	[1,000]	2,500
Special	[1,000]	2,500
Restaurant, Hotel, Club Luncheon Club, Catering Establishment or Vessel	[1,000]	2,500
Railroad Car, other than Option C	None	
Railroad Car, Option C only	[1,000]	2,500
Summer Licenses (Club, Hotel Restaurant or Vessel)	[1,000]	2,500
Aircraft	[1,000]	2,500

(b) Permits. The following is the schedule of penal sums of bonds to be filed in support of the various permits:

	<i>Bond</i>	
Broker (Annual)	[1,000]	2,500
Solicitors	[1,000]	2,500
Trucking (regardless of number of vehicles operated by permittee)	[1,000]	2,500

Sec. 81.4. Filing bond rider.

Before a license or permit certificate is endorsed or any change is made on the face of the certificate or to the licensed premises for any of the following reasons, a bond rider, covering such endorsement or change, must first be obtained from the surety company which issued the bond filed in support of the license or permit, and filed with the appropriate zone office of the Liquor Authority.

(a) Endorsement of a license pursuant to Section 122.

(b) Removal of the premises to another location.

(c) Additional space included in the licensed premises, whether such additional space includes a new house number or not. (This shall apply to any outdoor space, including a sidewalk café.)

(d) Change of name of an individual licensee as the result of marriage, court order or otherwise.

(e) Change of corporate name upon a certificate issued by the Secretary of State.

(f) Transfer of employment by a solicitor.

Sec. 81.5. Return of bond.

Where a license or permit has been issued by the Authority, the bond filed in support of the license or permit shall not be returned to the licensee or permittee. A bond may not be returned even though the license or permit

was immediately surrendered for cancellation and refund and was never actually used. A bond filed in support of a license or permit may be returned only to a person whose application was disapproved or disapproved without prejudice.

Sec. 81.6. Rule inapplicable to governmental agency.

This rule shall not apply to any license or permit issued to any department, board, commission or other agency of the state or to any political subdivision of the state.

Sec. 81.7. Replacement and restoration of bonds.

(a) No license shall be issued to any person and no licensee shall traffic in alcoholic beverages unless there is in effect and on file with the Authority a surety company bond as required by this rule.

(b) Where payment of the full amount of a surety company bond has been directed or claimed by the Authority in disciplinary proceedings, the licensee shall file a new bond. Where payment of a part of the bond has been directed or claimed by the Authority in disciplinary proceedings, the licensee shall file with the Authority a rider of the surety company certifying that the full amount of the bond has been restored and is effective. Such new bond or rider shall be filed within 10 days from the date of the Authority's order. Failure of the licensee to comply shall constitute good and sufficient cause for the revocation, cancellation, suspension, recall or non-renewal of the license. The requirements of this paragraph shall not apply when the license period during which the surety bond was effective has expired.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara J. Lord, Associate Attorney, State Liquor Authority, 317 Lenox Ave., New York, NY 10027, (212) 961-8342

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

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

**Regulatory Impact Statement**

1. STATUTORY AUTHORITY

Section 112 of the ABC Law authorized the Authority to require that licensees and permittees of one or more classes or kinds to file with the application a bond to the people of the State of New York issued by a surety company approved by the Superintendent of Insurance as to its solvency and responsibility and authorized to transact business in this state. There are slightly more than 100 insurance companies so approved by the Superintendent.

The Authority is given the responsibility to set the penal sum of these bonds. Enforcing the penalty of a bond is within the discretion of the Authority and enables the Authority to collect penalties for violations of the ABC Law.

2. LEGISLATIVE OBJECTIVES

The Legislature envisioned that Sec. 112 would provide an added enforcement tool against licensees who have been found to have violated the provisions of the ABC Law. This is especially true where a licensee has gone out of business after charges have been brought.

3. NEEDS AND BENEFITS

Since the amount of retail bonds has not been increased since 1967 and the Consumer Price Index has increased by 400% since then, it has been proposed that the amount of retail bonds be increased from \$1,000 to \$2,500. Additionally, in 1989 the Legislature added the power to impose civil penalties up to \$10,000 against many retail licensees and permittees. The increase in penal bonds will provide a means to collect a civil penalty against a licensee who has gone out of business or has no other assets.

The Authority has discussed the current situation with regard to retail bonds. There are many cases where licensees default and go out of business after charges have been brought. No meaningful penalty can be imposed against them except for the penal bond. It is, therefore, proposed that the maximum bond claim be increased for retail licensees and permittees. The increase in the amount of the bond will affect new licenses and the renewal of existing licenses.

How licenses are issued. Applications for retail licenses are filed with the three Zone Offices located in Albany and its satellite office in Syracuse, Buffalo or New York City. Applications are reviewed for mandatory reasons for disapproval, felony convictions, revocation of a license for cause within two years, person under 21 or not a U. S. citizen or alien not lawfully admitted for permanent residence, person not licensed who has been convicted of violation of ABC Law within 2 years of conviction, for premises within 200 feet and on the same street or avenue of church, school, synagogue or other place of worship. The Authority also considers discretionary factors such as public convenience and advantage and the public interest. Application is then acted on by License Board or referred to Members of the Authority.

The cost of a retail license is divided into 4 categories based on the population of the location where the premises are located. The first category is composed of 4 counties in NYC: NY County, Kings, Bronx and Queens. The second is Richmond County in NYC, and the Cities of Buffalo, Rochester, Syracuse and Yonkers. The third category contains the cities of Albany, Mount Vernon, New Rochelle, Schenectady, Utica and White Plains. The fourth category is all other areas. The cost of the license and requirements related thereto are not incumbent upon the amount of sales or the number of employees the establishments has. General Information - the number of licenses affected will be approximately 48,248.

#### 4. COSTS

To regulated parties: The current cost of bonds is approximately \$50 for one year or \$75 for two years and \$100 for three years. A corresponding increase in the cost of the bond by 2-1/2 times could be put into effect, above the current rate pending decision of the Insurance Department. However, the cost of the penal bond will be determined by the ratemaking process of the State Insurance Department.

To local governments: None

To the State Liquor Authority: None

#### 5. LOCAL GOVERNMENT MANDATES

No program, service, duty, or responsibility is imposed by the proposed amendment upon any county, city, town, village school district, fire district, or other special district.

#### 6. PAPERWORK

The proposed amendment does not impose any new paperwork or recordkeeping requirements.

#### 7. DUPLICATION

There are no rules or other legal requirements of the State and Federal governments which duplicate, overlap, or conflict with the amendment.

#### 8. ALTERNATIVES

The Authority considered increasing the bond amount or attaching assets of companies, but decided that this amount and procedure were fair and appropriate. Legislation has been enacted that would provide for a default judgment to be entered and executed against property of a licensee. This would not assist in collection from defunct businesses.

#### 9. FEDERAL STANDARDS

The proposed amendment does not exceed any minimum standard of the Federal government for the same or similar subject area.

#### 10. COMPLIANCE SCHEDULE

Once the Members of the Authority have finally adopted the proposed Rule and that is printed in the *State Register* and the New York State Insurance Department has approved the increase in rates for bonds. Thereafter, when an application is filed, the new applicant will have to supply a bond for \$2,500. Subsequent renewals will also require a \$2,500 bond. However, each licensee will be responsible for its actions.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of rule:

The proposed amendment directs that bonds currently required by the Alcoholic Beverage Control Law continue to be filed with the State Liquor Authority. The proposed amendment increases the amount of the penal bond to be paid for the bond required by the Alcoholic Beverage Control Law, which will necessarily increase the amount to be paid.

The Authority cannot provide the number of small businesses affected by this Rule. The cost of the license and requirements related thereto are not incumbent on the amount of sales or the number of the employees the establishment has.

This rule making will affect small businesses, however, the Authority is unable to determine the number of small businesses affected due to the fact that our records do not reflect how many licensees fall under the definition of small business.

##### 2. Compliance requirements:

The proposed amendment has no effect on compliance requirements on regulations on regulated parties and does not affect local governments.

##### 3. Professional services:

No professional services will be needed by a small business or local government to comply with the proposed amendment.

##### 4. Compliance costs:

There will be an increase in the cost of the penal bond to the licensees. An Initial capital cost and continuing costs will be incurred by a regulated business or industry. We have estimated the cost of the bond to be 2-1/2 times the cost of the current amounts, which is approximately \$50 for one year, \$75 for two years and \$100 for three years, subject to a decision by New York State Insurance Department. The insurance companies which issue the penal bonds will petition the New York State Insurance Department for an increase on the premium rate. Local government will have no additional costs in connection with the proposed amendment.

##### 5. Economic and technological feasibility:

The proposed amendment will not have an adverse economic impact upon small businesses or local governments. The proposed amendment does not require that small businesses or local governments adopt any new or additional technology or expend any funds for new or additional technology.

##### 6. Minimizing adverse impact:

The proposed amendment will have a minimal adverse effect upon small businesses and none for local governments. Currently and historically, the amounts of bonds required to be posted are a level amount, not based on the size of the business of the licensee.

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

There have been no discussions with the staff of the Authority, and local Governments or small businesses. This is because the authority does not have records that categorize which businesses are designated as small businesses. The proposed amendment will have no effect on the volume of paperwork required.

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

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

The proposed amendment will apply equally to all the rural areas of the State, as well as all urban areas.

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

Regulated parties will not have to undertake any additional reporting, recordkeeping, or other affirmative acts to comply with the proposed amendment. No professional services will be needed in a rural area to comply with the proposed amendment.

##### 3. Costs:

Capital costs or continuing costs will be incurred by a regulated business or industry in connection with the proposed amendment. The current cost of the bond, which is approximately \$50 for one year, \$75 for two years and \$100 for three years, may increase by 2-1/2 times subject to the rate approved by the Department of Insurance. The insurance companies which issue the penal bonds will petition the New York State insurance Department for an increase on the premium rate. No local area will have additional costs in connection with the proposed amendment.

##### 4. Minimizing adverse impact:

The proposed amendment will have a minimal adverse effect on businesses in rural areas. The proposed amendment will have no effect on the volume of paperwork required. Currently and historically the amounts of bonds required to be posted are a level amount, not based on geographical location of the licensee. Since the amount of the bonds is uniform statewide and unlike the license fees, is not based on the population of the locality where the premises are located, there is nothing that can be done to minimize any adverse impact on businesses in rural areas.

##### 5. Rural area participation:

Because the bond amount to be posted does not vary by the geographical location of the licensee, there was minimal reason for discussions with licensees or trade associations. The cost of the license and requirements related thereto are not incumbent upon the amount of sales or the number of employees the establishment has.

#### **Job Impact Statement**

The State Liquor Authority finds that the proposed amendment will have no impact on jobs and employment.

## Office of Mental Health

### EMERGENCY RULE MAKING

#### Criminal History Record Review

**I.D. No.** OMH-38-05-00009-E

**Filing No.** 952

**Filing date:** Sept. 6, 2005

**Effective date:** Sept. 6, 2005

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

**Action taken:** Addition of Part 550 and amendment of sections 87.3(e)(1) and 551.7(a)(1) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.35; Executive Law, section 845-b(h)(12)

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

**Specific reasons underlying the finding of necessity:** This regulation is needed to implement OMH's statutory duty to facilitate requests for criminal background record checks, which are required by law as of April 1, 2005. This law is intended to protect mental health clients from risk of abuse or being victims of criminal activity. The regulations are necessary to implement the law as of its effective date so that we can fulfill our statutory imposed duty of ensuring the health, safety, and welfare of clients are not unreasonably placed at risk.

**Subject:** Criminal history record review of certain prospective employees and volunteers of providers of mental health services, and natural operators of such providers, licensed or otherwise approved by OMH.

**Purpose:** To require prospective employees and volunteers of providers of mental health services who will have regular and substantial unrestricted or unsupervised physical contact with clients, and natural person operators of providers of services, to undergo criminal history record checks.

**Substance of emergency rule:** Chapter 643 of the Laws of 2003, as amended by Chapter 575 of the Laws of 2004, imposed the requirement of criminal history record checks on each prospective operator, employee, or volunteer of certain mental health treatment providers who will have regular and substantial unsupervised or unrestricted physical contact with the clients of such providers. The purpose of this legislation was to enable providers of services for persons with mental illness to secure appropriate and properly trained individuals to staff their facilities and programs, by verifying criminal history information received from individuals seeking employment or volunteering their services.

The legislation requires the Office of Mental Health to promulgate regulations that establish standards and procedures for the criminal history record checks contemplated in the statute. Accordingly, these regulations would establish provisions governing the procedures by which fingerprints will be obtained, and outlining the requirements and responsibilities on both the part of the Office and providers of services with regard to this process.

**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 December 4, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Julie Anne Rodak, Director, Bureau of Policy, Regulation and Legislation, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: colejar@omh.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.35 of the Mental Hygiene Law provides that each provider of mental health services subject to its requirements must request, through the Office of Mental Health, a criminal history background check for each prospective operator, employee, or volunteer of such provider of services.

Paragraph (12) of subdivision (h) of Section 845-b of the Executive Law requires the Office of Mental Health to promulgate rules and regulations necessary to implement criminal history information requests.

##### 2. Legislative Objectives:

Chapter 575 of the Laws of 2004 requires the Office of Mental Health to promulgate any rules or regulations necessary to implement the provisions of Section 31.35 of the Mental Hygiene Law. These regulations are intended to fulfill this requirement.

##### 3. Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of employees and volunteers in mental health programs are dedicated, compassionate workers who provide quality care, there are cases where criminal activity and patient abuse take place at the very programs that are intended to help persons with mental illness seek recovery. While this proposal will not eliminate all instances of abuse in mental health programs it will eliminate many of the opportunities for individuals with a criminal record to be alone with those most at risk.

Pursuant to Chapter 575 of the Laws of 2004, this proposal requires providers of mental health services, including those that are licensed, who contract with, or who are otherwise approved by the Office of Mental Health, to request the Office to obtain criminal history information from the Division of Criminal Justice Services concerning each prospective employee or volunteer who will have regular and substantial unsupervised or unrestricted contact with the providers' clients. Prospective licensed operators of mental health services will be required to have a criminal background check through this process as well.

Each provider subject to these requirements must designate one or more "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective employee or volunteer who will have regular, unsupervised client contact can be permanently hired or retained, he or she must consent to having his/her fingerprints taken and a criminal history check performed. The fingerprints will be taken by an Office of Mental Health-designated fingerprinting entity and sent to the Office, who will then submit them to the Division of Criminal Justice Services. The Division will provide criminal history information for each person back to the Office. Prospective licensed operators of mental health services must follow the same process.

The Office of Mental Health will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the person cannot be hired or retained, (e.g., the person has a felony conviction for a sex offense or a violent felony). In some cases, a person may have a criminal background that does not rise to the level where the Office will require employment of the person to be terminated. The proposed regulations allow the provider to obtain sufficient information to enable it to make its own determination as to whether or not to employ or retain such person. There will also be instances in which the criminal history information reveals an arrest or felony charges without a final disposition. In those cases, the Office will, in accordance with Chapter 575, hold the application in abeyance until the charge is resolved.

Before the Office can advise a provider that it intends to require that the employee or volunteer be terminated or not hired/retained, the proposal carries forth the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her application should not be denied. If the Office nonetheless maintains its determination to advise the provider to terminate the employee or volunteer, the provider must notify the person that this criminal history information is the basis for the denial of employment or service.

The proposed regulation establishes certain responsibilities of providers in implementing the criminal record review required by Chapter 575. For example, a provider must notify the Office when an individual for whom a criminal history has been sought is no longer subject to such check. Providers must also ensure that prospective employees or volunteers who will be subject to the criminal background check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division of Criminal Justice Services.

##### 4. Costs:

The proposed regulations implement a system that will require providers of services licensed, funded, or approved by the Office of Mental Health to obtain all information from a prospective employee or volunteer

necessary for the purpose of initiating a criminal history record check. While the statute does not require all new employees to be fingerprinted, for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers. The Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, it is intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. There is also a statutory fee of \$75 to obtain a criminal history record check from the Division of Criminal Justice Services; however, this amount will be fully borne by the Office of Mental Health. At an estimated number of 15,000 fingerprint requests per year, annual cost of this fee for the Office is approximately \$1,125,000.00. Estimated start-up costs to the Office of Mental Health, which include the purchase of LiveScan technology and supporting equipment, activities, and systems, and staffing costs, are approximately \$900,000.

#### 5. Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts.

#### 6. Paperwork:

In order to assist providers in fulfilling their responsibilities in implementing Chapter 575 of the Laws of 2004, the Office has created a Criminal History Information Tracking System (CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, and the system is designed to generate the two forms mandated in the statute (an informed consent form and a request form), it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Aside from record retention requirements necessary for monitoring compliance, the regulatory amendment will not require providers of service to furnish additional information, reports, records, or data.

#### 7. Duplication:

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

#### 8. Alternatives:

The only alternative to the regulatory amendments which was considered was inaction, which is not advisable as the Office of Mental Health is required by Chapter 575 of the Laws of 2004 to promulgate implementing regulations.

#### 9. Federal Standards:

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

#### 10. Compliance Schedule:

The Office of Mental Health filed a similar emergency regulation on April 1, 2005 to implement Chapter 575 of the Laws of 2004, which became effective on that date. The Office intends to finalize the proposed amendments within the time frames provided in the State Administrative Procedure Act.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

A total of roughly 720 agencies operate mental health programs that are licensed or funded by the Office of Mental Health (OMH) in New York State would be subject to this regulation, some of which would be considered "small businesses." In addition, local governments that operate mental health service providers subject to approval or authorization of OMH will be required to comply with the statute and these regulations. While Chapter 575 of the Laws of 2004 does not require all new employees to be fingerprinted (only those prospective employees or volunteers who will have "regular and substantial unsupervised or unrestricted contact with clients"), for purposes of systems design, the Office has estimated

that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10,514 full time equivalent employees, and 2,390 full time equivalent volunteers, state-wide.

#### 2. Compliance Requirements:

Providers of service that are subject to these requirements must, by statute, request criminal history information concerning prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record information must be obtained through the Office of Mental Health, which will pay the \$75 fee to the Division of Criminal Justice Services for each history requested. Providers of service must inform prospective employees and volunteers of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees/volunteers cannot be hired before a determination is received from the Office of Mental Health about whether or not the application must be denied, providers can give temporary approval to prospective employees and permit them to work so long as they do not have unsupervised contact with clients.

#### 3. Professional Services:

No additional professional services will be required by small businesses or local governments to comply with this rule.

#### 4. Compliance Costs:

The direct cost of \$75 per criminal history record check request will be absorbed by the Office of Mental Health.

#### 5. Economic and Technological Feasibility:

The Office has created a Local Provider Applicant Registration system, which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data elements must be input into the system, it intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. This technology will be accessible through existing computer networks. There may be a very small number of providers that do not have any computer from which they can access this technology; OMH will work with those providers either to identify a way to obtain such access or identify another alternative.

#### 6. Minimizing Adverse Impact:

Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, OMH has developed its compliance plan with the goal of minimizing adverse impact of compliance to the greatest extent possible. The Local Provider Applicant Registration system is one example of a strategy intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Furthermore, OMH has endeavored to maximize its capability to have fingerprints taken electronically, through a system called LIVE SCAN. LIVE SCAN is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. The card would then need to be mailed to the Division of Criminal Justice Services by OMH. However, before OMH could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into OMH databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint card is difficult to read.

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint preview is provided, so the person taking the print would know the quality of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

While OMH's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, our strategy is designed to utilize the LIVE SCAN technology to the greatest extent possible as of April 1, 2005.

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

The Office of Mental Health (OMH) reached out to affected parties by posting information about Chapter 575 of the Laws of 2004 on its website in January and February, coupled with informational letters to the field. The draft regulations were widely shared (via posting on our website) and comments solicited from all affected parties. Informational briefings were provided regionally to trade groups. Per statute, the regulations will be reviewed by members of the Mental Health Services Council.

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

##### 1. Effect of Rule:

A total of roughly 720 agencies operate mental health programs that are licensed or funded by the Office of Mental Health (OMH) in New York State would be subject to this regulation, some of which are located in rural areas. While Chapter 575 of the Laws of 2004 does not require all new employees to be fingerprinted (only those prospective employees or volunteers who will have "regular and substantial unsupervised or unrestricted contact with clients"), for purposes of systems design, the Office has estimated that the average annual "turnover" rate for full time employees at 30%. In all catchment areas, the total estimate of annual hires is 10, 514 full time equivalent employees, and 2,390 full time equivalent volunteers, statewide.

##### 2. Reporting, Recordkeeping, and other Compliance Requirements:

Providers of service that are subject to these requirements, including those in rural areas, must, by statute, request criminal history information concerning prospective employees or volunteers who will have regular and substantial unsupervised or unrestricted contact with clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record information must be obtained through the Office of Mental Health, which will pay the \$75 fee to the Division of Criminal Justice Services for each history requested. Providers of service must inform prospective employees and volunteers of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees/volunteers cannot be hired before a determination is received from the Office of Mental Health about whether or not the application must be denied, providers can give temporary approval to prospective employees and permit them to work so long as they do not have unsupervised contact with clients.

##### 3. Costs:

The direct cost of \$75 per criminal history record check request will be absorbed by the Office of Mental Health.

##### 4. Minimizing Adverse Impact:

Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, OMH has developed its compliance plan with the goal of minimizing adverse impact of compliance to the greatest extent possible. The Local Provider Applicant Registration system is one example of a strategy intended to reduce the administrative burden related to implementation of Chapter 575 of the Laws of 2004. Furthermore, OMH has endeavored to maximize its capability to have fingerprints taken electronically, through a system called LIVE SCAN. LIVE SCAN is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process.

Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. The card would then need to be mailed to the Division of Criminal Justice Services by OMH. However, before OMH could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into OMH databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint card is difficult to read.

With LIVE SCAN, a scanner and laptop computer are used rather than an ink pad and a paper card. Rather than rolling his fingers in ink, a person would lay his hand on top of a scanner screen. A real-time fingerprint preview is provided, so the person taking the print would know the quality of the print is acceptable before it can be sent to the Division of Criminal Justice Services. The information would then be automatically transmitted to the Division, eliminating the need to mail cards anywhere. Thus, the turnaround time for processing criminal history information is significantly less than under the "ink and roll" method.

While OMH's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, particularly in rural areas where access to State-operated LIVE SCAN machines may be

more difficult, our strategy is designed to utilize the LIVE SCAN technology to the greatest extent possible as of April 1, 2005.

##### 5. Rural Area Participation:

The Office of Mental Health (OMH) reached out to affected parties by posting information about Chapter 575 of the Laws of 2004 on its website in January and February, coupled with informational letters that were mailed to affected parties in the field. The draft regulations were widely shared (via posting on our website) and comments solicited from all affected parties. Informational briefings were provided regionally to trade groups. Per statute, the regulations will be reviewed by members of the Mental Health Services Council.

#### **Job Impact Statement**

A Job Impact statement is not necessary for this filing. Proposed 14 NYCRR Part 550 should not have any adverse impact on the existing employees and volunteers of providers of mental health services as it applies only to future prospective employees and volunteers. It is anticipated that the number of all future prospective employees/volunteers of mental health providers of services who have regular and substantial unsupervised or unrestricted physical contact with clients will be reduced to the degree that the criminal history record check reveals a criminal record barring employment.

---



---

## Office of Mental Retardation and Developmental Disabilities

---



---

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

#### **Surrogate Decision-Makers**

**I.D. No.** MRD-38-05-00010-P

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

**Proposed action:** Amendment of section 633.11 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions, when professional medical treatment is recommended for a person who lives in an OMRDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself.

**Purpose:** To add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates authorized to make informed consent decisions.

**Text of proposed rule:** • Clause 633.11(a)(1)(iii)(a) is amended as follows:

(a) If a person is less than 18 years of age, consent shall be obtained from [a parent, a guardian lawfully empowered to give such consent, a surrogate decisionmaking committee (see glossary) pursuant to article 80 of the Mental Hygiene Law and regulations promulgated thereunder. If no such parent, guardian or surrogate decisionmaking committee is available or willing to consent, no professional medical treatment shall be initiated without a court order so directing.] *one of the surrogates listed, in the order stated:*

(1) a guardian lawfully empowered to give such consent;

(2) an actively involved (see section 633.99) spouse;

(3) a parent;

(4) an actively involved adult sibling (see section 633.99);

(5) an actively involved adult family member (see section

633.99);

(6) a local commissioner of social services with custody over the person pursuant to the social services law or family court act (if applicable); or

(7) a surrogate decisionmaking committee (SDMC)(see section 633.99) or a court of competent jurisdiction.

• Clause 633.11(a)(1)(iii)(b) is amended as follows:

(b) If a person is 18 years of age or older, but lacks capacity to understand appropriate disclosures regarding proposed professional medi-

cal treatment or a determination of insufficient capacity has been made pursuant to clause [(d)] (g) of this subparagraph, informed consent to such proposed professional medical treatment shall be obtained from one of the surrogates listed, in the order stated:

(1) a guardian lawfully empowered to give such consent or the person's duly appointed health care agent or alternate agent (see section 633.20 and Article 29-C of the Public Health Law)[,];

(2) an actively involved spouse[.];

(3) an actively involved parent[.];

(4) an actively involved adult child[.];

(5) an actively involved adult sibling;

(6) an actively involved adult family member;

(7) the Consumer Advisory Board (see section 633.99) for the Willowbrook Class (only for Class members it fully represents); or

(8) a surrogate decisionmaking committee (SDMC) or a court of competent jurisdiction. [Consent shall be sought for the proposed professional medical treatment from parties on this list in the order stated.]

[(1)]If the first available party on this list objects to the proposed service plan, or if no party is available or willing to give consent, application may be made to a court of competent jurisdiction.]

[(2)]If application is made to a court by the agency/facility subsequent to the objection of one of the above parties because such action is considered in the best interest of the individual, notice of such application shall be given to the objecting party.]

• New clauses 633.11(a)(1)(iii)(c) - (e) are added to read as follows:

(c) If the first surrogate on the list in clause (a) or (b) is not reasonably available and willing, and is not expected to become reasonably available and willing to make a timely decision given the person's medical circumstances, application shall be made to the next surrogate on the list, in the order of priority stated.

(d) If more than one party exists within a category on the list in clause (a) or (b) utilizing the standard of active involvement, consent shall be sought first from the party with a higher level of active involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.

(e) If the first reasonably available and willing surrogate listed above objects to the proposed treatment, consent shall not be sought from other surrogates on the list. If the agency considers the proposed treatment to be in the best interests of the person, application may be made to a court of competent jurisdiction or, if the surrogate does not object to an SDMC proceeding, to the SDMC. Notice of any such application shall be given to the objecting party.

Note: the rest of subparagraph 633.11(a)(1)(iii) is renumbered accordingly.

• Section 633.99 is amended by adding, deleting or changing the following definitions. Existing section 633.99 is renumbered as appropriate:

(s) Available, reasonably. A surrogate to be contacted can be contacted with diligent efforts within a reasonable time by an attending physician or other party seeking to obtain either informed consent for the purposes of section 633.11, or a DNR decision pursuant to section 633.18. [A criterion whereby a party to be contacted can be contacted with diligent efforts, made within a reasonable time with respect to the need for a resuscitation decision, by an attending physician, chief executive officer, or a designated staff.]

(t) Board, Consumer Advisory. A seven member board established in conformance with the requirements of the Willowbrook Consent Judgment.

Note: Current subdivisions (t) - (bf) are renumbered as (u) - (bg).

[(bg)] (bh) Involved, actively. Significant and ongoing involvement in a person's life so as to have sufficient knowledge of the person's needs.

Note: Current subdivisions (bh) - (bn) are renumbered as (bi) - (bo).

[(bo)] [Member, actively involved family. Someone 18 years of age or older who is related to a person in a facility and who has demonstrated in the opinion of the program planning team, significant and ongoing involvement in a person's life, as well as sufficient knowledge of the person's individual needs.]

(bp) Member, family. Any party related by blood, marriage or legal adoption.

Note: Current subdivisions (bp) - (bu) are renumbered as (bq) - (bv).

[(bv)] (bw) Parent. [The] A biological or legally adoptive mother [and/] or father [of a minor].

Note: Current subdivisions (bw) - (cx) are renumbered as (bx) - (cy).

(cz) Sibling. One of two or more parties having at least one common parent.

Note: Current subdivisions (cy) - (dd) are renumbered as (da) - (df). [(de)](dg) Surrogate. For the purposes of section 633.18 and 633.18, a party designated to act in the place of a person receiving services by the provisions of the respective regulations.

For the purposes of section 633.13 of this Part only, someone designated to advocate on behalf of a person who may be/who will be the subject of research. Designation is made in conformance with section 633.13(a)(3)(ii)(b) of this Part.

Note: Current subdivisions (df) - (dm) are renumbered as (dh) - (do).

**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. Section 13.07 of the New York State Mental Hygiene Law establishes that OMRDD shall have responsibility for seeing that persons with developmental disabilities receiving care and treatment have their personal and civil rights protected.

b. The 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. Section 16.00 of the New York State Mental Hygiene Law enables the commissioner of OMRDD to regulate and assure the quality of services provided to persons with developmental disabilities.

2. Legislative Objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b) and 16.00 of the New York State Mental Hygiene Law by the expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions to include actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board. This furthers OMRDD's responsibility to assure the consistent high quality of services for persons with developmental disabilities.

3. Needs and Benefits: Brothers, sisters and other family members cannot (except for parents, spouses and adult children) currently make decisions about informed consent for adults receiving services, unless they are court-appointed guardians. The revisions would add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates allowed to make informed consent decisions, when professional medical treatment is recommended for a person who resides in an OMRDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself.

In addition, the proposed amendments recognize health care agents appointed by a health care proxy. Health care agents can currently make informed consent decisions in accordance with the provisions of other laws and regulations, however they are not listed as a surrogate decision-maker in the current regulation. The proposed revisions also include guidance to assist providers in determining which surrogate is the most appropriate decision-maker, and in determining when it is appropriate to bypass surrogates because they are not "reasonably available."

The proposed amendments recognize the increasing role played in the lives of consumers by all family members, including siblings and other family members that are not currently listed in the regulation. Consumers who were raised as members of a natural or adoptive family develop lifelong bonds with family members that continue after they move to an OMRDD operated or certified residence. Even for consumers who were raised apart from their families, an increasing number of family members are becoming involved with the consumer's life. While parents are typically the most involved advocate, it is common for siblings or other family members to assume a predominant advocacy role as parents age. These family members should be able to make important decisions about surgery or other serious medical procedures.

The proposed revisions also address a longstanding concern that professional medical treatment may be unnecessarily delayed because a decision must be sought from a Surrogate Decisionmaking Committee or court instead of from an involved sibling or other family member, or the Willowbrook Consumer Advisory Board.

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

a. Costs to Regulated Parties: No new costs are projected to be incurred by the regulated parties due to the implementation and ongoing compliance with proposed amendments. The proposed amendments may result in modest cost savings because the providers of the residential services may be able to avoid the expenses associated with accessing the Surrogate Decisionmaking Committee or court to obtain informed consent.

b. Costs to the Agency, the State and Local Governments: The proposed amendments add no new costs to these entities. However, there may be some modest savings because the Surrogate Decisionmaking Committee and courts should see a decrease in new cases and their attendant costs.

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

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: OMRDD considered not adding "actively involved sibling" as a separate category. However, OMRDD considered that, after parents, siblings almost always play a greater role in the lives of persons receiving services than other family members, and therefore, should be included as a separate category.

The alternative would be to include siblings as equal to other actively involved family members. However, this would not recognize the unique role that siblings play.

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

10. Compliance Schedule: Due to the nature of the purpose of the proposed amendments it is OMRDD's intent to finalize the proposed amendments as quickly as allowed by the requirements of SAPA.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments for these proposed amendments is not submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, economic and technological feasibility or other compliance requirements on small businesses and local governments. The amendments propose the expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions, when professional medical treatment is recommended for a person who lives in an OMRDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself. The revisions would add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates authorized to make informed consent decisions. There is no impact on small businesses or local governments anticipated.

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

A Rural Area Flexibility Analysis for the proposed amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The amendments propose the expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions, when professional medical treatment is recommended for a person who lives in an OMRDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself. The revisions would add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates authorized to make informed consent decisions. There is no impact specific to rural areas anticipated.

#### **Job Impact Statement**

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The amendments propose the expansion of the list of surrogate decision-makers who are authorized to make informed consent decisions, when professional medical treatment is recommended for a person who lives in an OMRDD operated or certified residence and the person does not have the capacity to make the decision for herself or himself. The revisions would add actively involved siblings, actively involved family members and the Willowbrook Consumer Advisory Board to the existing list of surrogates authorized to make informed consent decisions. OMRDD antic-

ipates that there will be no impact on existing or future employment opportunities.

---



---

## Public Service Commission

---



---

### NOTICE OF ADOPTION

#### **Water Rates and Charges by Boniville Water Company, Inc.**

**I.D. No.** PSC-34-04-00033-A

**Filing date:** Aug. 31, 2005

**Effective date:** Aug. 31, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 04-W-0936 approving Boniville Water Company, Inc.'s (Boniville) request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 4—Water.

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

**Subject:** Revenue increase for Boniville.

**Purpose:** To approve a revenue increase for Boniville.

**Substance of final rule:** The Commission approved Boniville Water Company, Inc.'s (Boniville) request to increase annual revenues by \$21,940 or 55.5% to become effective September 1, 2005 and directed Boniville to file the necessary amendments to effectuate the change and to individually notify customers in writing no later than September 15, 2005, subject to the terms and conditions set forth in the order.

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

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

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

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-W-0936SA1)

### NOTICE OF ADOPTION

#### **Water Rates and Charges by Edgewood Lakes, Inc.**

**I.D. No.** PSC-52-04-00010-A

**Filing date:** Aug. 31, 2005

**Effective date:** Aug. 31, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 04-W-1556 approving Edgewood Lakes, Inc.'s (Edgewood) request to make various changes in the rates, charges, rules and regulations contained in its tariff schedule, P.S.C. No. 4—Water.

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

**Subject:** Revenue increase for Edgewood.

**Purpose:** To approve a revenue increase for Edgewood.

**Substance of final rule:** The Commission approved Edgewood Lakes, Inc.'s (Edgewood) request to increase annual revenues by \$4,180 or 49.7% to become effective September 1, 2005 and directed Edgewood to file the necessary amendments to effectuate the change and to individually notify customers in writing no later than September 15, 2005, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to

be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-W-1556SA1)

**NOTICE OF ADOPTION**

**Extraordinary Expenses by United Water New York Inc.**

**I.D. No.** PSC-13-05-00019-A

**Filing date:** Sept. 2, 2005

**Effective date:** Sept. 2, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 05-W-0194 approving United Water New York Inc.'s (UWNY) request to defer \$107,110 of costs related to painting its Valley Cottage water storage tank.

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

**Subject:** Deferral of extraordinary expenses.

**Purpose:** To approve UWNY's request to defer \$107,110 in extraordinary expenses.

**Substance of final rule:** The Commission approved a petition by United Water New York Inc. (UWNY) to defer \$107,110 in extraordinary expenses related to painting a water storage tank and directed UWNY to amortize over a ten-year period commencing from the date the tank was returned to service, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-W-0194SA1)

**NOTICE OF ADOPTION**

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

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

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 05-E-0205 approving the petition of Herbert E. Hirschfeld, on behalf of Trump Village Section One to submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

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

**Subject:** Request to submeter electricity.

**Purpose:** To grant Trump Village Section One authorization to submeter electricity.

**Substance of final rule:** The Commission approved a request by Herbert E. Hirschfeld, on behalf of Trump Village Section One, to submeter electricity at 2940 Ocean Parkway, Brooklyn, New York, in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0205SA1)

**NOTICE OF ADOPTION**

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

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

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 05-E-0206 approving the petition of Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section Two to submeter electricity at 2940 Ocean Pkwy., Brooklyn, NY.

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

**Subject:** Request to submeter electricity.

**Purpose:** To grant Trump Village Section Two authorization to submeter electricity.

**Substance of final rule:** The Commission approved a request by Herbert E. Hirschfeld, P.E., on behalf of Trump Village Section Two, to submeter electricity at 2940 Ocean Parkway, Brooklyn, New York, in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (05-E-0206SA1)

**NOTICE OF ADOPTION**

**Residential Distributed Generation Rates by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-17-05-00014-A

**Filing date:** Sept. 6, 2005

**Effective date:** Sept. 6, 2005

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

**Action taken:** The commission, on July 20, 2005, adopted on order in Case 02-M-0515 regarding Consolidated Edison Company of New York, Inc.'s (Con Edison) residential distributed generation service.

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

**Subject:** Residential distributed generation.

**Purpose:** To direct Con Edison to make tariff revisions related to distributed generation rates.

**Substance of final rule:** The Commission directed Consolidated Edison Company of New York, Inc. (Con Edison) to file further tariff amendments for residential distributed generation (DG) rates, to become effective on a temporary basis, for 1-4 family dwellings removing the load factor eligibility requirement, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(02-M-0515SA15)

### NOTICE OF ADOPTION

#### Renewable Portfolio Standard Program by NGP Power Corporation on Behalf of Lyonsdale Biomass, LLC

**I.D. No.** PSC-19-05-00013-A

**Filing date:** Aug. 31, 2005

**Effective date:** Aug. 31, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 03-E-0188 approving the application of NGP Power Corporation (NGP Power) for Lyonsdale Biomass, LLC to participate in the commission's Renewable Portfolio Standard Program (RPS Program).

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

**Subject:** Request to participate in the RPS Program.

**Purpose:** To grant Lyonsdale Biomass, LLC authority to participate in the RPS Program.

**Substance of final rule:** The Commission approved a request by NGP Power Corporation, on behalf of its subsidiary, Lyonsdale Biomass, LLC (Lyonsdale), for authority to participate in the Commission's Retail Renewable Portfolio Standard (RPS) as a maintenance resource and directed Lyonsdale to select one of two options for RPS support, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(03-E-0188SA7)

### NOTICE OF ADOPTION

#### Submetering of Electricity by the Witkoff Group on Behalf of Ten Hanover, LLC

**I.D. No.** PSC-20-05-00029-A

**Filing date:** Sept. 2, 2005

**Effective date:** Sept. 2, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 05-E-0496 approving the petition of Ten Hanover, LLC to submeter electricity at 10 Hanover Sq., New York, NY.

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

**Subject:** Request to submeter electricity.

**Purpose:** To grant Ten Hanover, LLC authorization to submeter electricity.

**Substance of final rule:** The Commission approved a requested by Ten Hanover, LLC to submeter electricity at 10 Hanover Square, New York, New York, in the territory of Consolidated Edison Company of New York, Inc.

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

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(05-E-0496SA1)

### NOTICE OF ADOPTION

#### Submetering of Electricity by Iskalo Development Corporation

**I.D. No.** PSC-20-05-00032-A

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** The commission, on Aug. 24, 2005, adopted an order in Case 05-E-0507 approving the petition of Iskalo Development Corporation to submeter electricity at 535 Washington St., Buffalo, NY.

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

**Subject:** Request to submeter electricity.

**Purpose:** To grant Iskalo Development Corporation authorization to submeter electricity.

**Substance of final rule:** The Commission approved a request by Iskalo Development Corporation to submeter electricity at 535 Washington Street, Buffalo, New York, in the territory of Niagara Mohawk Power Corporation.

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

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(05-E-0507SA1)

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

#### Implementation of the RPS Program

**I.D. No.** PSC-38-05-00011-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 specific design details and methodologies pertinent to 2006-08 Renewable Portfolio Standard (RPS) Program procurements pursuant to the commission's order approving implementation plan, adopting clarifications, and modifying Environmental Disclosure Program that was issued on April 14, 2005.

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

**Subject:** Procurement and related matters pertinent to implementation of the RPS Program.

**Purpose:** To establish methodologies and standards for 2006-08 Program procurements.

**Substance of proposed rule:** The New York Public Service Commission is considering specific design details and methodologies pertinent to 2006-08 Renewable Portfolio Standard (RPS) Program procurements. The Commission discussed procurement matters generally in its Order Regarding Retail Renewable Portfolio Standard, issued on September 24, 2004 in Case 03-E-0188 (September Order) and Order Approving Implementation Plan, Adopting Clarifications, and Modifying Environmental Disclosure Program, issued on April 14, 2005 (April Order).

In the April Order, the Commission directed Department of Public Service Staff (Staff) to recommend for its approval: the funding and procurement levels for solicitations to be held through at least the next two procurements, the procurement and pricing models and the criteria to be used for the evaluation of proposals submitted under the models, and the best method to measure incremental biomass generation. Other related matters are also under consideration.

The Commission is considering retaining the levels and targets established in the September Order. Regarding procurement models, the Commission is considering continuing the option for New York State Energy Research and Development Authority (NYSERDA) to employ the request for proposals, auctions, and standard offer models, whether singly or in combination. More specifically, the Commission is considering the use of: (1) a sealed, "pay-as-bid" auction under a structure similar to that employed for RFP-916; (2) a "Descending," or "Declining" Clock, clearing price variation of the auction model; and (3) a fixed price, "standard offer" approach.

The Commission is considering: (1) whether the standard offer should be limited to "smaller" projects; *i.e.*, those producing less than a threshold amount of energy on an annual basis, and, if so, what the threshold amount should be; (2) whether the standard offer should be optional or mandatory for projects below the threshold level; (3) how the standard offer price should be determined; and (4) whether it should be geared to particular eligible resources.

The Commission is also considering whether the maximum contract duration of 10 years, as was employed under RFP-916, should be reconsidered. The Commission is seeking comment on longer term lengths.

To encourage development of the voluntary green market, the Commission is considering placing a limit on the amount of output from any facility that could be offered into an RPS solicitation. The Commission is also considering authorizing NYSEDA, as Central Administrator, to transfer the rights to renewable attributes in an equitable manner under circumstances that would not contradict the goals of the RPS Program.

Regarding pricing matters, the Commission is considering requiring use of a fixed price method based on a dollar per megawatt-hour (MWh) calculation. Regarding eligibility to participate in competitive procurements, the Commission is considering: (1) at the bid stage, relying on an appropriate level of monetary security to ensure the entry of only responsible bids; and/or (2) the advisability of objective, contractual post-selection developmental milestone requirements, or the posting of further monetary security, whether singly or in combination, to ensure eventual performance.

Regarding measurement of incremental biomass generation, the Commission is considering determining the "baseline" and thereby the incremental generation levels based on either: (1) the relative investment in expanding the generating capacity of the facility; (2) the historical biomass power output in MWh; and/or (3) a combination of these two approaches. Regarding use of adulterated biomass, the Commission is considering the use of a multi-step testing process to determine eligibility. Under this procedure, the use of adulterated biomass shown to exceed the emissions rates of unadulterated biomass for any substance on a list of "targeted pollutants" would be ineligible under the RPS program.

Regarding the use of pipeline quality biogas transported over a common carrier, the Commission is considering limiting RPS eligibility to energy produced as a result of new collection activity, whether through expanded collection at an existing facility or through the development of entirely new gas production resources. The Commission is also considering a requirement that, in addition to other eligibility requirements that currently exist, landfill gas must be converted into electrical energy in the same control area in which the gas is collected.

The Commission is considering and seeks comments on methods and procurement design measures that will ensure that New York State receives the economic development benefits envisioned by the September Order. The Commission is also considering how the status, structure, and requirements of regional renewables programs may affect the design of future procurements under the New York RPS.

The Commission may accept, reject, or modify any proposals relating to these matters. Comments are sought on all matters discussed herein.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03E-0188SA10)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Implementation of the RPS Program

I.D. No. PSC-38-05-00012-P

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

**Proposed action:** As discussed in the Commission's order approving implementation plan, adopting clarifications, and modifying Environmental Disclosure Program, issued on April 14, 2005, and based upon discussions among workshop participants, the commission is considering unbundling environmental attributes from energy, allowing entities with physical bilaterals to participate in the RPS Program, and urging the development of an attribute tracking system that is compatible with the systems of neighboring control areas.

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

**Subject:** Unbundling environmental attributes from energy, physical bilaterals, development of an attributes tracking system and related matters pertinent to implementation of the RPS Program.

**Purpose:** To improve market liquidity so as to contribute to the success of the 2006-08 RPS Program procurements.

**Substance of proposed rule:** The New York Public Service Commission is considering specific rules and design details pertinent to the Renewable Portfolio Standard (RPS) Program. In the RPS September 24, 2004 Order (September Order) and the April 14, 2005 Order (April Order), the Commission generally discussed matters concerning the "unbundling" of environmental attributes from energy and the development of a certificate based tracking and trading system.

In the April Order, the Commission directed Department of Public Service Staff (Staff), in consultation with New York State Energy Research and Development Authority (NYSERDA) and the New York Independent System Operator (NYISO), to examine all aspects of "unbundling" and transitioning the Environmental Disclosure Program (EDP) to a certificate based tracking and trading system. In addition to such an examination, the Commission also directed Staff, after consultation with NYSEDA and the NYISO, to provide recommendations with regard to these issues.

Regarding unbundling, the Commission is considering allowing participating renewable generators to enter into physical bilateral agreements for the sale of energy separate from the RPS environmental attributes to which such energy was associated.

The Commission is also considering authorizing Staff and NYSEDA, in consultation with the NYISO, to begin the design of a certificate based tracking and trading system to facilitate communication/tracking of energy and attribute transactions within and between control areas, support compliance with current and future policy initiatives and support growth in competitive, voluntary markets. The tracking system would reflect all underlying electricity transactions recorded by the NYISO, including all imports and exports.

The Commission may accept, reject, or modify any proposals relating to these matters. Comments are sought on all matters discussed herein.

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

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

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

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

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

(03-E-0188SA11)

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

**Recovery of Unavoided Costs by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-38-05-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part a petition of Consolidated Edison Company of New York, Inc. for recovery of unavoidable costs associated with phase 6 of its retail access program.

**Statutory authority:** Public Service Law, section 66(9)

**Subject:** Request to recover \$10.18 million of unavoidable costs related to retail access program.

**Purpose:** To consider granting recovery of unavoidable costs.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject in whole or in part a petition of Consolidated Edison Company of New York, Inc. for deferral and recovery of \$10.18 million of unavoidable costs associated with phase 6 of its retail access program.

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

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

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

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

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

(05-E-0931SA1)

## Racing and Wagering Board

**EMERGENCY  
RULE MAKING**

**Post-Race Blood Gas Testing Procedures for Thoroughbred and Harness Race Horses**

**I.D. No.** RWB-38-05-00005-E

**Filing No.** 941

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** Addition of sections 4038.18(f), 4043.8-4043.10, 4109.7(f), 4120.13-4120.15 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 207, 227, 301, 305, 401, 405, 902; Unconsolidated Law, section 8162(1)

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

**Specific reasons underlying the finding of necessity:** In January 2005, the U.S. Justice Department arrested a New York-licensed thoroughbred trainer and a prominent New York-licensed harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention

to the issue of milkshaking and the need to adopt testing programs and penalties for such Amilkshaking@ practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

**Subject:** Post-race blood gas testing procedures for thoroughbred and harness race horses.

**Purpose:** To detect and deter the prohibited practice known as "milkshaking."

**Substance of emergency rule:** 4043.8(a) Establishes method of testing thoroughbred racehorses to detect excess levels of total carbon dioxide (TCO<sub>2</sub>) using a Clinical Auto Analyzer, establishes the threshold for excess TCO<sub>2</sub> at 37 millimoles per liter.

4043.8(b) Establishes penalties for excess TCO<sub>2</sub> violations in a thoroughbred race horse ranging from a 60-day license suspension and \$1,000 fine to a maximum 60-day license suspension with a \$5,000 fine with a possible one-year Board-imposed license suspension. Includes provision for purse redistribution in case of a positive excess TCO<sub>2</sub> test.

4043.8(c) Establishes procedures for stewards to grant relief in cases where excess TCO<sub>2</sub> levels are found, to allow a thoroughbred horse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO<sub>2</sub> levels in a horse.

4043.8(d) Establishes that any person participating in the thoroughbred racehorse blood gas testing or thoroughbred racehorse guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4043.8(e) Establishes minimum standards for guarded quarantine of a thoroughbred race horse at a race track operated by a track association.

4043.9(a) Establishes a post-race blood gas-testing program for thoroughbred race horses, and pre-race guarded quarantine procedures and requirements for thoroughbred horses that have been tested and found to have excess TCO<sub>2</sub> levels.

4043.9(b) Establishes pre-race guarded quarantine for horses under the care of a trainer who has been found to have had a horse under his care and custody that was tested and found to have excess TCO<sub>2</sub> levels in the previous 12 months.

4043.9(c) Establishes pre-race guarded quarantine requirements for a thoroughbred horse that has been tested and found to have excess TCO<sub>2</sub> levels.

4043.10 Establishes punishment for failure to cooperate in the thoroughbred post race gas-testing program.

4038.18 Allows claimants in a claiming race to void a claim on a thoroughbred horse that is subsequently found to have excess TCO<sub>2</sub> levels.

4120.13(a) Establishes method of testing harness racehorses to detect excess levels of total carbon dioxide (TCO<sub>2</sub>) using a Clinical Auto Analyzer, establishes the threshold for excess TCO<sub>2</sub> at 37 millimoles per liter.

4120.13(b) Establishes penalties for excess TCO<sub>2</sub> violations in a harness racehorse ranging from a 60-day license suspension and \$1,000 fine to a maximum one-year license suspension with a \$5,000 fine with a possible one-year Board-imposed suspension. Includes provision for purse redistribution in case of a positive excess TCO<sub>2</sub> test.

4120.13(c) Establishes procedures for judges to grant relief in cases where excess TCO<sub>2</sub> levels are found, to allow a harness racehorse owner or trainer to place the horse in guarded quarantine to support a claim of naturally occurring excess TCO<sub>2</sub> levels in a horse.

4120.13(d) Establishes that any person participating in the harness racehorse blood gas testing or thoroughbred guarded quarantine program shall act at the direction of the Racing and Wagering Board.

4120.13(e) Establishes minimum standards for guarded quarantine of a harness racehorse at a race track operated by a track association.

4120.14(a) Establishes a post-race blood gas-testing program for harness racehorses, and pre-race guarded quarantine procedures and requirements for harness racehorses that have been tested and found to have excess TCO<sub>2</sub> levels.

4120.14(b) Establishes pre-race guarded quarantine for harness racehorses under the care of a trainer who has been found to have had a harness racehorse under his care and custody that was tested and found to have excess TCO<sub>2</sub> levels in the previous 12 months.

4120.14(c) Establishes pre-race guarded quarantine requirements for a harness racehorse that has been tested and found to have excess TCO<sub>2</sub> levels.

4120.15 Establishes punishment for failure to cooperate in the harness post race gas testing program.

4109.7(f) Allows claimants in a claiming race to void a claim on a harness racehorse that is subsequently found to have excess TCO<sub>2</sub> levels.

**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 November 29, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Mark A. Stuart, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206, (518) 453-8460, e-mail: mstuart@racing.state.ny.us

#### **Regulatory Impact Statement**

(a) Statutory authority. Racing, Pari-Mutuel Wagering and Breeding Law, §§ 101, 207, 227, 301, 305, 401, 405, 902; Unconsolidated Laws, § 8162(1). Legislative Objectives. This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

(b) Needs and benefits. This rulemaking is necessary to assure the public's confidence and continue the high degree of integrity in racing at the pari-mutuel betting tracks. This rulemaking will detect and deter the administration of alkali agents to thoroughbred racehorses and harness racehorses for the purpose of affecting the performance of such horse during a pari-mutuel wagering race.

The administration of alkali agents into a racehorse is commonly known as "milkshaking," where a person administers a mixture of sodium bicarbonate, sugar and water to a horse prior to a race mitigate the effects of lactic acid on the horse's muscles during the race, thereby gaining an advantage. Lactic acid is a naturally occurring byproduct of intense muscular exercise in mammals, and the accumulation of lactic acid in such muscles causes fatigue. Some people associated with racehorses believe that the administration of an alkaline substance, such as bicarbonate of soda, can neutralize the effect of lactic acid in a horse's muscles. This has resulted in the use of alkalinizing agents, or "milkshakes" which are administered to a racehorse in an attempt to alter the performance of the horse. Based on this belief, people have administered milkshakes to racehorses on the day of a race with the intent to gain a racing advantage.

This rulemaking is necessary to establish empirical standards and testing procedures for the enforcement of Board Rule 4043.3(d) and Board Rule 4120.3(d), which apply to thoroughbred and harness racehorses respectively and state "No person shall, attempt to, or cause, solicit, request, or conspire with another or others to. . . administer a mixture of bicarbonate of soda and sugar in any of their forms in any manner to a horse within 24 hours of a racing program at which such horse is programmed to race. It shall be the trainer's responsibility to prevent such administration."

Horses that have received an alkalinizing agent will exhibit elevated levels of TCO<sub>2</sub> over and above normal levels. This rulemaking will establish the ion selective electrode method with a clinical auto analyzer as a standard means of detecting elevated TCO<sub>2</sub> in horses, and 37 millimoles per liter as the threshold level for TCO<sub>2</sub>.

In January 2005, the U.S. Justice Department arrested a New York licensed thoroughbred trainer and a prominent New York harness driver and charged the two with milkshaking a thoroughbred at Aqueduct Raceway in December 2003 to increase the odds that the horse, A One Rocket, would win. According to the Justice Department, this was not an isolated incident and such violations occurred regularly. This case has brought national attention to the issue of milkshaking and the need to adopt testing programs and penalties for such "milkshaking" practices. Clearly, the practice of milkshaking race horses is detrimental to the integrity of the sport of horse racing, erodes public confidence in pari-mutuel wagering events, and invites criminal abuse and exploitation.

This rulemaking will benefit thoroughbred and harness racing by ensuring the betting public that horses that compete in pari-mutuel races have not been tampered with through the administration of alkali agents, thereby ensuring that no extraordinary advantage has been given to the horse through prohibited substances.

#### **(c) Costs.**

(i) Thoroughbred horse owners may be subject to the cost of a pre-race guarded quarantine imposed upon any single horse found to have excess TCO<sub>2</sub> levels that has not been determined to be physiologically normal for such horse. The track association sponsoring the race is responsible for making available a pre-race quarantine stall, and for maintaining an access log system in either paper or electronic form. The length of time for such quarantine shall be determined by the stewards, and will have an impact on the cost of guarded quarantine. The cost of a paper log is approximately \$10 retail for a ring binder and 500 pages of paper. The cost of an

electronic record, such as a personal computer or laptop computer, starts at \$400 in ordinary retail stores.

(ii) There are no costs imposed upon the Racing & Wagering Board, the state or local government because the TCO<sub>2</sub> testing program will be implemented utilizing the Board's existing medication testing program, personnel and facilities.

(iii) The Board cannot fully provide a statement of costs the trainers for pre-race guarded quarantine because the actual cost of establishing a pre-race guarded quarantine varies greatly from location to location in New York State, and the physical characteristics of the buildings within which a horse of quarantined. All horses that race at a New York State thoroughbred or harness racetrack are currently afforded stable space for free, so the only added cost that can be expected will be the cost of a guard. A pre-race guarded quarantine may require one guard per horse, or one guard for many horses, depending upon the access points that need to be controlled for an effective guarded quarantine. The Board's rulemaking requires that the subject horse is kept in an area where access to the subject horse is restricted to authorized licensed trainers, owners and veterinarians as submitted by the owner, that guards maintain a record of all licensed persons who have had access to the horse while in guarded quarantine, along with the time and purpose of the visit. In addition to the distinctive limitations that the guarded quarantine barn will have upon the cost, the wages of a guard varies depending upon the racetrack itself. According to track representatives, the hourly cost of guard may range from \$7 per hour up to \$20 per hour, depending on the individual racetrack, experience required for the specific duties (e.g. a stable guard who is responsible for surveillance only compared to a quarantine supervisor who is responsible for also identifying illegal paraphernalia, treatments or procedures) and local pay scale. The minimum time that a horse is to be quarantined is six hours, and the maximum time for quarantine is 72 hours.

(d) Paperwork. Owners of any horse that has been found to have an excess levels of TCO<sub>2</sub> will be required to submit a letter to the steward or judge of the track where the subject horse is to race, stating that the subject horse has a normally elevated level of TCO<sub>2</sub>. Such a letter is necessary for a horse to continue racing while under a guarded quarantine. Track associations will be required to maintain access logs, either paper or electronic, for a period of 90 days after the guarded quarantine period.

(e) Local government mandates. This rulemaking will not impose any program, service, duty, or responsibility upon any county, city, town, village, school district fire district or other special district.

(f) Duplication. Since the New York State Racing & Wagering Board is the exclusively responsible for the regulation of pari-mutuel wagering activities in New York State, there are no other relevant rules or other legal requirements of the state or federal government regarding total carbon dioxide testing of thoroughbred racehorses and harness racehorses in New York State.

(g) Alternative approaches. The Board did not consider any other significant alternatives because no other significant alternates are available. The rulemaking is based upon an established TCO<sub>2</sub> testing program already adopted and in use by the New Jersey Racing Commission. To date, New Jersey is the only state that conducts TCO<sub>2</sub> testing and there are no other TCO<sub>2</sub> testing methods adopted in any other state. The testing procedure included in this rulemaking is the only TCO<sub>2</sub> test that has been reviewed and declared reliable by a state court, in this case, the New Jersey Supreme Court recognized the reliability of the Beckman test generally and as applied by the New Jersey Racing Commission (Campbell v. New Jersey Racing Commission, New Jersey Supreme Court, 169 N.J. 579, 781 A.2d 1035, October 11, 2001.)

(h) Federal standards. There are no federal standards applicable to the subject area of state-regulated pari-mutuel wagering activity.

(i) Compliance schedule. The practice known as "milkshaking" of horses in already prohibited by rule under 9E NYCRR 4043.3 for thoroughbred racehorses and 9E NYCRR 4120.3 for harness racehorses. All of the provisions of this rulemaking shall be effective immediately upon filing with the Department of State.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for small businesses and governments is not attached because it is apparent from the nature of the rulemaking that the rulemaking will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small business or local governments. The TCO<sub>2</sub> test mirrors existing medication testing programs, and while some horse owners may be required to bear the cost of a guarded quarantine, the costs are elective based upon the licensed owner's or trainer's decision to determine the horse's excess TCO<sub>2</sub> levels prior to entering the horse in a race.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not attached because it is apparent from the nature of the rulemaking that the rulemaking 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.

**Job Impact Statement**

This rulemaking will not have an adverse impact on jobs and employment opportunities as apparent from its nature and purpose. This rulemaking utilizes existing testing personnel and facilities. This rulemaking may create jobs for guards who are experienced and trained in detention barn security procedures insofar as such skills are necessary in securing a guarded quarantine.

## EMERGENCY RULE MAKING

**Administration of Race Day Medications**

**I.D. No.** RWB-38-05-00006-E

**Filing No.** 942

**Filing date:** Sept. 1, 2005

**Effective date:** Sept. 1, 2005

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

**Action taken:** Amendment of section 4005.5 of Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, section 101

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

**Specific reasons underlying the finding of necessity:** This rule is necessary to allow veterinarians employed by the New York State Racing & Wagering Board and licensed thoroughbred racing associations to administer race day medications to horses. Recently, thoroughbred racing associations adopted procedures and policies whereby race horses are segregated into limited access security barns. This practice was adopted to prevent the administration of prohibited medications to the horse. The only veterinarians that are allowed into these limited access security barns are veterinarians employed by the New York State Racing and Wagering Board or the thoroughbred racing association. This rule amendment would allow these veterinarians access to race horses in limited access security barns for the purpose of administering medications which are authorized for race day administration per 9E NYCRR 4043.2.

**Subject:** The administration of race day medications by veterinarians employed by the New York State Racing and Wagering Board and licensed thoroughbred racing associations.

**Purpose:** To allow the administration of board-authorized race day medications to horses that are quartered in limited access security barns by board or association veterinarians. Currently, such veterinarians are prohibited from administering medications except in emergencies. Such security bars are designed to prohibit the unauthorized administration of certain medications. Nevertheless, the board has authorized the administration of certain medication on the day that a horse will race, including the medication known as furosemide. This amendment will allow the board veterinarian or association veterinarian to administer such race day medications and preserve the integrity of the limited access security barns.

**Text of emergency rule:** Amendment is made to section 4005.5 of 9E NYCRR to add new language.

No veterinarian employed by the commission or by an association shall be permitted, during the period of his employment, to treat or prescribe for any horse for compensation or otherwise, except in case of emergency, or in the case of race day medication as authorized by Board Rule 4043.2.

**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 November 29, 2005.

**Text of emergency rule and any required statements and analyses may be obtained from:** Mark A. Stuart, Racing and Wagering Board, One Watervliet Ave. Ext., Suite 2, Albany, NY 12206, (518) 453-8460, e-mail: mstuart@racing.state.ny.us

**Regulatory Impact Statement**

Statutory authority: Section 101(1) of the Racing, Pari-Mutuel Wagering and Breeding Law vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State.

Legislative objectives: This amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

Needs and benefits: This rule is necessary to allow veterinarians employed by the New York State Racing and Wagering Board and licensed thoroughbred racing associations to administer race day medications to horses. Recently, thoroughbred racing associations adopted procedures and policies whereby race horses are segregated into limited access security barns. This practice was adopted to prevent the administration of prohibited medications to the horse. The only veterinarians that are allowed into these limited access security barns are veterinarians employed by the New York State Racing and Wagering Board or the thoroughbred racing association. This rule amendment would allow these veterinarians access to race horses in limited access security barns for the purpose of administering medications which are authorized for race day administration per 9E NYCRR 4043.2.

The rule is intended to allow the administration of Board-authorized race day medications to horses that are quartered in limited access security barns by Board or association vets. Currently, such vets are prohibited from administering medications except in emergencies. Such security barns are designed to prohibit the unauthorized administration of certain medications. Nevertheless, the Board has authorized the administration of certain medication on the day that a horse will race, including the medication known as Lasix. This amendment will allow the Board vet or association vet to administer such race day medications and preserve the integrity of the limited access security barn.

Costs: There are no projected costs to regulated persons or state and local governments associated with the amendment of 9E NYCRR 4005.5. This amendment will create an exception to an existing rule to permit a veterinarian employed by the Racing and Wagering Board or a racing association to administer medications to horses. There are no costs associated with making such an exception.

Paperwork: There is no additional paperwork required by or associated with this rule amendment.

Local government mandates: This rule would impose no local government mandates.

Duplication: There are no other state or federal requirements similar to the provisions contained in the rule amendment.

Alternative approaches: There are no other significant alternatives to this rule, which was narrowly drafted to accomplish the stated benefits in thoroughbred races of significant merit and interest.

Federal standards: The rule does not exceed any minimum standards of the federal government because there are no applicable federal rules.

Compliance schedule: This emergency rule amendment is effective upon filing. Compliance can be accomplished immediately without need for modification of existing procedures.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendment merely expand the parlay bet to proposition wagers and increase the amount of races upon which a parlay bet may be made from six to eight. These amendments do not impact upon State Administrative Procedure Act § 102(8). Nor do they affect employment. The proposal will not impose an adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, because the Board rules have previously allowed parlay bets to be made on other betting pools

---

## Department of State

---

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

**Guidance Documents**

**I.D. No.** DOS-13-05-00009-C

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

**The notice of proposed rule making**, I.D. No. DOS-13-05-00009-P was published in the *State Register* on March 30, 2005.

**Subject:** Guidance documents.

**Purpose:** To implement the provisions of State Administrative Procedure Act, section 202-e concerning guidance documents.

**Substance of rule:** This is a consensus rule making to add Part 265 to Title 19 NYCRR.

**Changes to rule:** No substantive changes.

**Expiration date:** March 30, 2006.

**Text of proposed rule and changes, if any, may be obtained from:** Deborah Ritzko, Director, Division of Administrative Rules, Department of State, 41 State St., Albany, NY 12231, (518) 474-6957, e-mail: dritzko@dos.state.ny.us

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

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

**Shared Municipal Services Incentive Awards Grant Program**

**I.D. No.** DOS-38-05-00003-P

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

**Proposed action:** Addition of Part 814 to Title 19 NYCRR.

**Statutory authority:** State Finance Law, section 54(10)(H)

**Subject:** Shared Municipal Services Incentive Awards Grant Program.

**Purpose:** To establish eligibility requirements and criteria for the program.

**Text of proposed rule:** Part 814 is added to Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York to read as follows:

**PART 814**

**SHARED MUNICIPAL SERVICES INCENTIVE AWARDS**

**Section 814.1 Purpose.**

The purpose of this regulation is to implement the requirements of State Finance Law Section 54 (10) (H) which established a competitive grant program for "two or more municipalities to cover costs associated with mergers, consolidations, cooperative agreements, dissolutions and shared services." It directed the Secretary of State to adopt rules and regulations to implement the program.

**Section 814.2 Definitions.**

As used in this Part, the following words and terms shall have the stated meaning:

(a) Consolidation means two or more adjoining towns in the same county consolidate as one town pursuant to Article 5-B of the Town Law; two or more adjoining villages consolidate as one village pursuant to Article 18 of the Village Law, or; two or more school districts consolidate as one district pursuant to Article 31 of the Education Law.

(b) Cooperative agreement means an agreement entered into by two or more municipalities pursuant to Article 5-G of the General Municipal Law or other authorizing statutes for the performance among themselves or one for the other of their respective functions, powers and duties on a contract or cooperative basis.

(c) Dissolution means the dissolution of a town pursuant to Article 5-A of the Town Law or the dissolution of a village pursuant to Article 19 of the Village Law.

(d) Merger means the transfer of functions, powers or duties of a city, town or village within the same county, to each other or to the county, pursuant to the Alternate County Government Law, or; pursuant to any other legislative authority which may be enacted after the effective date hereof for such transfers of functions, powers or duties or for the merger of a county, city, town or village with any of such other units of local government.

(e) Municipality means a county, city, town, village and school district.

(f) Secretary means the New York State Secretary of State.

(g) Shared services means the joint provision, performance or delivery of a service, facility, activity, project or undertaking by two or more municipalities which each may lawfully undertake separately.

**Section 814.3 Eligibility.**

(a) Applications for assistance under this Part may be made only by two or more municipalities which jointly submit requests on forms established by the Secretary.

(b) Grants may be used to cover legal and consultant services, feasibility studies, capital improvements and other necessary expenses related to costs associated with mergers, consolidations, cooperative agreements, dissolutions and shared services by municipalities.

**Section 814.4 Grant awards**

(a) Subject to annual appropriations by the Legislature, grants will be made to successful applicants pursuant to the review and approval criteria set forth herein, in an amount not to exceed one hundred thousand dollars (\$100,000.00) per municipality.

(b) Applicants will be required to provide matching funds, equal to ten percent of the total approved cost.

(c) State assistance shall be available on a reimbursement basis. Grantees shall submit periodic invoices and requests for payment as work is performed and costs incurred.

(d) Grantees may request an advance payment in an amount not to exceed 25 percent of the total amount of State assistance for the project.

(e) No part of a grant shall be used by the grantee for recurring expenses such as salaries, utilities and fuel.

(f) Prior to the final reimbursement payment, grant recipients shall submit to the Secretary copies of studies, agreements and other products resulting from the grant award.

**Section 814.5 Review and approval criteria**

(a) All applications will be rated in accordance with the rating system established by the Secretary. Criteria used to rate applications will generally include the following:

- (1) Demonstrated need for the project.
- (2) The likelihood of timely completion of the project.
- (3) The potential for municipal cost savings, productivity enhancement or streamlined administration.
- (4) The number of municipalities involved or the size of the service area.
- (5) The likelihood of instituting permanent changes to municipal structure or service delivery resulting in cost savings, enhanced productivity or streamlined administration over the long term.
- (6) The ability of the project to serve as a demonstration program for other municipalities to reduce costs, enhance productivity or streamline administration.
- (7) Whether the project would advance other State or municipal programs for municipal efficiency and cost savings.
- (8) The geographic distribution of other fundable projects in any given application cycle.

**Section 814.6 Contents of application and procedures.**

(a) Application for assistance shall be on forms prescribed by the Secretary. Applications shall contain the following:

- (1) The names and contact information for each municipality applying for assistance.
- (2) Designation of contact person or grant administrator.
- (3) Identification of key personnel who will work on the project for the municipalities.
- (4) A resolution of each municipality's governing body requesting such assistance.

(5) A detailed description of the proposed activity to be funded.

(6) A work program including time periods for achieving stated objectives.

(7) A budget including identification of all funding sources and local matching funds.

(8) Any inter-municipal agreements entered into or proposed to be entered into to carry out the activity.

(9) A description of how the proposal responds to each of the rating and approval criteria described in this Part.

(b) Application information and procedures.

(1) The Department of State will provide outreach services to inform municipalities of the availability of funding and provide information to applicants concerning application preparation and submission.

(2) Project time periods and work programs may be adjusted by the Department of State as a condition of entering in to a contract for State assistance, to ensure the timely and successful completion of a project for which funds are awarded. The Department of State may, in its discretion, choose not to enter into contracts and cancel grant awards which do not contain mutually established time periods and work programs.

(3) All projects must be undertaken pursuant to a contract with the Department of State which shall require, in addition to the requirements of the Department of State, Attorney General and State Comptroller, that all contracts not to be performed by the officials and employees of the grantee be entered into in accordance with General Municipal Law sections 103 and 104-b.

**Text of proposed rule and any required statements and analyses may be obtained from:** Richard L. Hoffman, Department of State, 41 State St., Counsel's Office 8th Fl., Albany, NY 12231, (518) 474-6740, e-mail: Rhoffman@dos.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.

**This action was not under consideration at the time this agency's regulatory agenda was submitted.**

#### **Regulatory Impact Statement**

1. Statutory Authority:

Section 54 (10) (H) of the State Finance Law, enacted by the Legislature in 2005 as part of the Article VII budget bill (L. 2005, c. 63) established the "shared municipal services incentives award" grant program for two or more municipalities administered by the Secretary of State. It directed the Secretary to adopt regulations implementing the program prior to accepting applications from eligible municipalities and school districts.

2. Legislative Objectives:

By enacting Section 54 (10) (H) of the State Finance Law, the Legislature sought to establish incentives for two or more municipalities to share services, undertake consolidations, enter into cooperative agreements and study dissolutions. It enacted a voluntary program to cover the costs associated with such actions, including but not limited to legal and consultant services, feasibility studies, capital improvements and other necessary expenses. The legislature established a maximum grant award of \$100,000 per municipality and required a 10% local match. For Fiscal year 2005-06 the legislature appropriated \$2.75 million.

3. Needs and Benefits:

There are over 1600 general purpose local governments in New York and 677 school districts. Together they account for a significant portion of State aid (\$15.9 billion school district aid in 2005-06 alone) and local property taxes. The Shared Municipal Incentives Award program encourages local cost cutting efforts by providing State funds for shared services, mergers and consolidations.

4. Costs:

a. Costs to regulated parties.

This is a voluntary program. Municipalities that are awarded a grant will receive up to \$100,000 per municipality. A 10% local match is required. Municipalities are expected to realize cost savings from the program.

b. Costs to the agency.

The Legislature has appropriated \$200,000 for administration of the program.

c. Cost information.

The Department of State has consulted with municipal associations representing, counties, cities, towns and villages, none of which has indicated there will be any cost to their member municipalities. As noted, this is a grant program which should result in cost savings to municipalities.

5. Paperwork:

There are no paperwork or reporting requirements imposed except for standard documentation of expenses incurred in order to receive reimbursement, and documentation of results obtained by grant recipients.

6. Local Government Mandates:

There are no mandates involved in this voluntary grant program.

7. Duplication:

The regulation does not duplicate, overlap or conflict with any other federal, state or local rule or statute.

8. Alternatives:

State Finance Law § 54 (10) (H) requires the Secretary to adopt rules and regulations to establish eligibility requirements, application requirements and grant criteria. The Department has consulted with municipal associations, who have not objected to the content of the regulations nor requested alternative approaches.

9. Federal Standards:

There are no federal standards relevant to this matter.

10. Compliance Schedule:

This is a voluntary program which does not involve compliance requirements.

#### **Regulatory Flexibility Analysis**

Small Businesses:

The proposed rule establishes criteria pertaining to a municipal grant program and does not affect small businesses. Accordingly, a regulatory flexibility analysis for small businesses is inapplicable and was not prepared.

Local Governments:

The proposed rule does not impose an adverse economic impact on local governments nor does it impose reporting, recordkeeping, or other compliance requirements on local governments. Therefore, pursuant to 202-b (3) (a) of the State Administrative Procedure Act, the Department finds that a Regulatory Flexibility Analysis does not need to be prepared, for the following reasons:

1. Effect of rule:

The rule would establish a voluntary grant program under which municipalities and school districts may receive funds for shared services and other intermunicipal cost-saving measures.

2. Compliance requirements:

There are no compliance requirements except for documentation of work performed by any grantee.

3. Professional services:

Professional services are not required to comply with the grant program. Costs for professional services engaged by a municipality pursuant to a grant would be reimbursed through the grant program.

4. Compliance costs:

No compliance costs are imposed. This is a voluntary grant program.

5. Economic and technological feasibility:

In as much as no compliance is required, there are no economic or technological feasibility issues.

6. Minimizing adverse impact:

There will be no adverse impact on local governments because this is a voluntary grant program designed to result in cost savings for municipalities and school districts.

7. Local government participation:

Notwithstanding that there will be no adverse impact upon local governments, the Department has consulted with municipal associations, none of whom have expressed concerns about the proposed rule.

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

Pursuant to § 202-bb (4) (a), the Department has determined that the proposed rule would not have an adverse impact on rural areas and would not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, and a Rural Area Flexibility Analysis need not be prepared for the following reasons:

1. Types and estimated numbers of rural areas:

The proposed rule would apply uniformly throughout the State.

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

The proposed rule does not impose any recordkeeping or other affirmative acts on municipalities and school districts. Municipalities and school districts that choose to submit grant applications will be required to pro-

vide documentation of work performed if they are the recipient of a grant award.

3. Costs:

This is a voluntary grant program which does not involve costs to grant recipients, who can be expected to realize cost savings as a result of the program.

4. Minimizing adverse impact:

Because the proposed rule would establish a voluntary grant program designed to assist municipalities and school districts with shared intermunicipal cost savings, there will be no adverse impact on public or private entities in rural areas.

5. Rural area participation:

The Department has consulted with municipal associations representing counties, cities, towns and villages in all areas of the State, including rural areas, who do not object to the proposed rule.

**Job Impact Statement**

Pursuant to § 201-a (2) (a) of the State Administrative Procedures Act, the Department has determined that the proposed rule will not have a substantial adverse impact on jobs and employment opportunities, and that a Job Impact Statement need not be prepared, for the following reasons:

The proposed rule would implement a voluntary grant program whereby municipalities and school districts would be eligible for awards for intermunicipal cost-saving measures. Eligible grant activities include costs associated with mergers, consolidations, cooperative agreements, dissolutions and shared services. Covered costs include legal and consultant services, feasibility studies, capital improvements and other necessary expenses. In some cases this could result in municipalities performing functions jointly or sharing employees which could see a long-term stabilization of the municipal workforce, or a slight decrease through attrition. Any such losses, however, should result in cost savings to municipalities to allow them to continue to provide a sustainable level of services for residents and taxpayers, which will in turn prevent job and employment opportunity losses through annual budget reductions.

The Legislature enacted State Finance Law § 54 (10) (H) to provide municipalities and school districts with incentives to find ways to counter rising municipal budgets and property tax increases. Increasing taxes or reducing services are the two options municipalities have to continue their role to provide public services. The proposed rule would implement the legislation by providing a third option -incentives to seek cost savings on an intermunicipal basis- which could prevent or minimize a reduction in services, thereby positively affecting municipal and school district employment.

training shall be established. The current provisions of 18 NYCRR 369.4(f) require the social services districts to confirm the attendance in high school or the equivalent level of vocational or technical training of all minors, not just those 18 years of age. The proposed amendment would make the requirements of 18 NYCRR 369.4(f) consistent with those of 18 NYCRR 369.2(c) and reduce the administrative burden on social services districts.

**Changes to rule:** No substantive changes.

**Expiration date:** March 30, 2006.

**Text of proposed rule and changes, if any, may be obtained from:** Ronald Speier, Office of Temporary and Disability Assistance, 40 N. Pearl St., Albany, NY 12243, (518) 474-6573

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

---



---

## Office of Temporary and Disability Assistance

---



---

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

**Verification of School Attendance**

**I.D. No.** TDA-13-05-00001-C

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

**The notice of proposed rule making**, I.D. No. TDA-13-05-00001-P was published in the *State Register* on March 30, 2005.

**Subject:** Verification of school attendance.

**Purpose:** To relieve social services districts of verifying school attendance of children under the age of 18.

**Substance of rule:** The proposed rule that is being continued would relieve social services districts of the responsibility of verifying school attendance of children under the age of 18.

Section 369.2(c) of 18 NYCRR provides that a child is eligible for family assistance if under 18 years of age, or if under 19 if she or he is a full-time student regularly attending a secondary school, or in the equivalent level of vocational or technical training. That section also provides that the fact that a child 18 years of age is a full-time student in a secondary school or in the equivalent level of vocational or technical