

# RULE MAKING ACTIVITIES

---

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

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

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

---

---

## Department of Agriculture and Markets

---

---

### EMERGENCY RULE MAKING

#### Captive Cervids

**I.D. No.** AAM-16-06-00005-E  
**Filing No.** 401  
**Filing date:** March 29, 2006  
**Effective date:** March 29, 2006

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

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

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

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

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

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

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

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

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

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

**Subject:** Captive cervids.

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

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

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 26, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

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

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

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

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

##### 2. Legislative Objectives:

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

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

##### 3. Needs and Benefits:

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

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

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

##### 4. Costs:

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

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

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer in the State that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences, that they have an average of 20 adult cervids and a 160-acre square enclosure, it would require two miles of fence extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape at a cost of \$1.00 a foot, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7’ plastic mesh and \$2.00 per foot for posts (\$20 post every 10

feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

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

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

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

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

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

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

(c) Source:

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

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

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

9. Federal Standards:

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

10. Compliance Schedule:

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

**Regulatory Flexibility Analysis**

1. Effect of Rule:

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

2. Compliance Requirements:

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

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

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

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

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

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

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

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

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

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

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

The rule would have no impact on local governments.

### 3. Professional Services:

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

### 4. Compliance Costs:

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

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

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming the farms will use post extensions and wire or tape, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as a CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

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

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

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

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

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

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

#### (c) Source:

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

### 5. Economic and Technological Feasibility:

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

### 6. Minimizing Adverse Impact:

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

The rule would have no impact on local governments.

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

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

### **Rural Area Flexibility Analysis**

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

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

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

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

ceived a federal premises identification number. It is not anticipated that regulated parties in rural areas will have to secure any professional services in order to comply with the rule.

3. Costs:

(a) Costs to regulated parties:

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

Owners of captive cervids within New York State will incur certain costs as a result of this rule. The New York State Department of Environmental Conservation currently regulates 129 farms with whitetailed deer. DEC requires these farms to have an eight-foot fence, as does this rule. There are 82 farms with elk, red deer, sika deer or mule deer that do not have whitetailed deer. Assuming that half of these farms do not have adequate fences; that these farms have on average 20 adult cervids and a 160-acre, square, enclosure, it would require 2 miles of extensions to raise the fence to eight feet. Assuming that the farms will use post extensions and wire or tape, since at that height, only a visual barrier is needed, the cost to each of the 41 farms that will need to upgrade their fences will be \$10,560, at \$1.00 per foot. The cost of erecting a solid barrier or a second fence on a farm in an area of the State designated as a CWD containment area is estimated to be approximately \$1.00 per foot of fence for 7' plastic mesh and \$2.00 per foot for posts (\$20 post every 10 feet) or \$16,000 for two miles of fence. There are currently two cervid farms in the existing designated CWD containment area.

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

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

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

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

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

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

(c) Source:

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

4. Minimizing Adverse Impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses by limiting the requirements to those which comply with the proposed USDA requirements for state CWD programs and which are necessary to prevent

the introduction of CWD into New York State and permit it to be detected and controlled if it were to arise within the State. It was concluded that a total prohibition against the importation of cervids susceptible to CWD was not necessary, given the imposition of a permit system, health requirements and a CWD Certification Program. These requirements will protect the health of the State's captive cervid population, while giving herd owners access to healthy animals from states with comparable regulatory programs.

5. Rural Area Participation:

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

**Job Impact Statement**

1. Nature of Impact:

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

2. Categories and Numbers Affected:

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

3. Regions of Adverse Impact:

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

4. Minimizing Adverse Impact:

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

**EMERGENCY  
RULE MAKING**

**Halal Foods Protection Act of 2005**

**I.D. No.** AAM-16-06-00016-E

**Filing No.** 406

**Filing date:** April 4, 2006

**Effective date:** April 4, 2006

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

**Action taken:** Addition of Part 258 to Title 1 NYCRR.

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

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

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

**Subject:** Implementation of the Halal Foods Protection Act of 2005.

**Purpose:** To implement legislative directive to adopt a rule regarding the filing by persons certifying food as halal of qualifications to provide halal certification.

**Text of emergency rule:** A new Part 258 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is adopted to read as follows:

*PART 258*

*258.1 Statement of Qualifications of Persons Certifying Food as Halal. Every person (including an individual, partnership, corporation, and association) who certifies non-prepackaged food as halal shall file with the Department of Agriculture and Markets a statement, upon a form provided by the Department, of that person's qualifications to certify food as halal. Such statement may include the certifier's background, training, education, experience and any other information that shows the certifier's qualifications. The form may be filed electronically on the Department's website at <http://www.agmkt.state.ny.us/> or by mail or fax to the New York State Department of Agriculture and Markets, Division of Food Safety and Inspection, 10B Airline Drive, Albany, New York 12235.*

*258.2 Registration of Persons Certifying Non-Prepackaged Food as Halal. Every person (including an individual, partnership, corporation and association) who manufactures, produces, processes, packs or sells non-prepackaged food represented or branded as halal shall file with the Department of Agriculture and Markets, upon a form provided by the Department, the name, address and telephone number of the person certifying the food as halal. The form may be filed electronically on the*

Department's website at <http://www.agmkt.state.ny.us/> or by mail or fax to the New York State Department of Agriculture and Markets, Division of Food Safety and Inspection, 10B Airline Drive, Albany, New York 12235.

**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 July 2, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

The Halal Foods Protection Act of 2005 (L. 2005, C. 529) directs that any rule necessary for implementation of the Act be adopted by the Commissioner of Agriculture and Markets on an emergency basis. The Act requires that in accordance with regulations set by the Commissioner, persons certifying non-prepackaged food as halal file with the Commissioner a statement of their qualifications to provide that certification. The Act also requires that in accordance with regulations set by the Commissioner, persons who manufacture, produce, process, pack and sell non-prepackaged food represented as halal file with the Department the name, address and phone number of the person certifying the food as halal.

##### 2. Legislative Objectives:

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

##### 3. Needs and Benefits:

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

##### 4. Costs:

The filing cost to persons certifying food as halal will be minimal; filing can be done electronically or by mailing or faxing a written statement of qualifications to the Department. The Department will incur an estimated cost of \$50,000 to facilitate electronic filing. There is no cost to local governments.

##### 5. Local Government Mandates:

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

##### 6. Paperwork:

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

##### 7. Duplication:

None.

##### 8. Alternatives:

None. The Legislature directed, in the Halal Protection Act of 2005, that the proposed regulation be adopted.

##### 9. Federal Standards:

None.

##### 10. Compliance Schedule:

Immediate.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of Rule:

Persons certifying non-prepackaged food as halal must file a statement with the Department of their qualifications to provide such certification as required by the Halal Foods Protection Act of 2005 (L. 2005, C. 529). Persons manufacturing, producing, processing, packing or selling non-prepackaged food represented as halal will file with the Department the name, address and phone number of the person certifying the food as halal. There are approximately 400 food establishments in New York that sell halal food. It is estimated that there are 200 persons certifying food as halal who would be affected by this regulation.

##### 2. Compliance Requirements:

Persons certifying non-prepackaged food as halal will file with the Department a statement of their qualifications to provide such certification. Persons manufacturing, producing, processing, packing or selling non-prepackaged food represented as halal will file with the Department

the name, address and phone number of the person certifying the food as halal. Local governments are not affected by the proposed rule.

##### 3. Professional Services:

None.

##### 4. Compliance Costs:

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

##### 5. Economic and Technological Feasibility:

See 4 above.

##### 6. Minimizing Adverse Impact:

The filing is statutorily required by the Halal Foods Protection Act of 2005.

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

None. The filing is legislatively directed.

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

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

The proposed rule has uniform statewide impact.

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

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

##### 3. Costs:

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

##### 4. Minimizing Adverse Impact:

There is no identifiable adverse impact.

##### 5. Rural Area Participation:

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

#### **Job Impact Statement**

##### 1. Nature of Impact:

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

##### 2. Categories and Numbers Affected:

Persons providing such certification of non-prepackaged food as halal and persons manufacturing, producing, processing, packing and selling such food will be affected. The number is unknown.

##### 3. Regions of Adverse Impact:

The proposed rule has uniform statewide impact.

##### 4. Minimizing Adverse Impact:

There is no identifiable adverse impact.

---



---

## Office of Children and Family Services

---



---

### EMERGENCY RULE MAKING

#### **Permanency, Safety and Well-Being of Children**

**I.D. No.** CFS-16-06-00006-E

**Filing No.** 402

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

**Action taken:** Addition of section 426.10, amendment of sections 421.4, 421.6, 421.17, 423.2, 426.4, 428.1- 428.10, 430.8, 430.9, 430.11, 430.12,

431.9, 432.2, 441.21, 441.22, 443.2, 476.2, 507.2 and repeal of sections 430.1- 430.7, 441.20 and 430.13 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 383-c, 384 and 409-e; and Family Court Act, art. 10-A and section 1017

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

**Specific reasons underlying the finding of necessity:** The adoption of these regulations on an emergency basis is necessary for the preservation of the health, safety and welfare of children placed outside of their homes. Chapter 3 of the Laws of 2005 takes effect on December 21, 2005, and provides children placed out of their homes with more timely and effective judicial and administrative reviews in order to promote permanency, safety and well-being. Chapter 3 of the Laws of 2005 also contains authority for promulgating these regulations on an emergency basis, such that the benefits and protections afforded children who have placed outside of their homes will not be delayed. Delaying the adoption of these regulations would be contrary to the public interest because it could delay implementation of the enhanced procedures contained in Chapter 3 of the Laws of 2005, which are designed to improve permanency outcomes for children in foster care and those placed directly in the custody of a relative or other suitable person. Therefore, it is necessary to adopt these regulations on an emergency basis.

**Subject:** Promotion of permanency, safety and well-being of children who have been placed outside of their homes.

**Purpose:** To improve permanency outcomes for children in foster care.

**Substance of emergency rule:** Section 421 (Adoption Services)

The amendments conform the requirements for periodic court reviews, permanent neglect proceedings and conditional surrenders with amendments enacted by Chapter 3 of the Laws of 2005 (Permanency Bill).

Section 426.10 (Title IV-E Foster Care and Adoption Assistance)

Adds a new section to meet Title IV-E State Plan requirements regarding the specific goal for the maximum number of children who remain in foster care for more than 24 months.

Sections 423.2 (Definitions), 430.9 (Appropriate Provision of Mandated Preventive Services), 430.11 (Appropriateness of Placement), 431.9 (Termination of Parental Rights by Local Social Services Agency), 432.2 (Child Protective Service: Responsibilities and Organization), 441.21 (Casework Contacts), 441.22 (Health and Medical Services), 443.2 (Authorized Agency Operating Requirements), 476.2 (Terms and Conditions) and 507.2 (Special Assessments, Examinations and Tests Required for Children in Foster Care)

These sections are amended to reflect the change of the permanency goal from "independent living" to "another planned living arrangement with a permanency resource", as enacted by Chapter 3 of the Laws of 2005.

Part 428 (Standards for Uniform Case Records)

The amendments conform the requirements for periodic family assessments and service plans, plan amendments, service plan reviews and permanency hearing reports with Chapter 3 of the Laws of 2005. It adds such requirements for children placed by a court in the direct custody of a relative or other suitable person. It adds a case consultation requirement with certain required parties in order to meet the review requirements prior to the development of the permanency hearing report and the permanency hearing required by Chapter 3 of the Laws of 2005. It also conforms the requirements for seeking and obtaining information about absent and non-respondent parents and other relatives in accordance with the new Chapter Law.

Part 430 (Additional Limitations on Reimbursement Utilization Review for Foster Care and Preventive Services)

18 NYCRR 430.1 through 430.7 and 430.13 are repealed to reflect the repeal of sections 153-d and 398-b of the Social Services Law by Chapter 83 of the Laws of 2002. 18 NYCRR 430.8 is amended to reflect the uniform case recording standards set forth in 18 NYCRR Part 428. 18 NYCRR 430.12 is amended to add further definition to the service plan review process, including making the administrative service plan review unnecessary when a permanency hearing meets the federal requirements for an administrative or judicial review. In addition the permanency planning goal of "independent living" is changed to "another planned living arrangement with a permanency resource" in accordance with Chapter 3 of the Laws of 2005.

Section 431.9 (Termination of Parental Rights by a Local Social Services Agency)

The amendment makes minor conforming changes to reflect Chapter 3 of the Laws of 2005, so that considerations related to a determination to terminate parental rights are made in relation to the permanency hearing schedule.

Section 441.20 (Family Court Review of the Status of Children in Foster Care)

This section is repealed as it has been made obsolete by Chapter 3 of the Laws of 2005.

Technical amendments are made to sections 423.2 and 426.4 to make corrections to cross-references necessitated by the repeal of other sections.

**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 June 26, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

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

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

Section 1017 of the Family Court Act (FCA), as amended by Chapter 3 of the Laws of 2005, authorizes the collection of certain information on non-respondent parents and relatives of children when the court determines that such children must be removed from their homes. Furthermore, such section authorizes the placement of the child with a non-respondent parent, relative or other suitable person.

Article 10-A of the FCA establishes uniform procedures for permanency hearings for all children who are placed in foster care either voluntarily or as abused or neglected children, or are directly placed with a relative or other suitable person pursuant to Article 10 of the FCA and all foster children who are completely freed for adoption.

Section 383-c of the SSL establishes the criteria for the surrender of custody and guardianship of a child in foster care to an authorized agency.

Section 384 of the SSL establishes the criteria for the surrender of custody and guardianship of a child not in foster care to an authorized agency.

Section 409-e of the SSL establishes the requirements for the completion, updating and review of assessments and services plans for all children who are in foster care and who are at risk of placement into foster care.

##### 2. Legislative objectives:

Chapter 3 of the Laws of 2005 provides children placed out of their homes with more timely and effective judicial and administrative reviews in order to promote permanency, safety and well-being. To effectuate this purpose, Chapter 3 grants the courts continuing jurisdiction over children in foster care placements under Article 10 of the Family Court Act, children who have been voluntarily placed in foster care, and children who have been completely freed for adoption; improves permanency outcomes for children in foster care; and provides for comprehensive reform of the provisions of law which govern the permanency hearing processes for children placed in the foster care or placed directly with a relative or other suitable person under Article 10 of the FCA. Chapter 3 of the Laws of 2005 further addresses the issue of conditional surrenders for adoption and any associated agreement that has been made for ongoing contact and communication between the adopted child and the birth parent and/or sibling or half sibling of the adopted child. This legislation also establishes standards for enforcement of the terms of conditional surrenders both prior and subsequent to the adoption of the child based on the best interests of the child.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

##### 3. Needs and benefits:

The regulations implementing Chapter 3 of the Laws of 2005 provide for a more frequent series of administrative reviews and service plan development activities involving all parties with a stake in the outcome. The regulations support permanency planning through enhancing the service plan review process and the collection of comprehensive and timely information for the development of the permanency hearing report. The regulations also set out the critical areas of review necessary to advance the

child's permanency plan. In accordance with the legislation, these regulations provide a specific means for meeting documentation requirements with regard to a child's out-of-home placement or for any child considered for foster care. The regulations implement the change of the permanency goal from "independent living" to "discharge to another planned living arrangement with a permanency resource". The regulations support the need to locate an absent parent and other relatives of a child in out-of-home placement, in order to consider each of those persons as a resource for the child. The regulations also provide that any person designated by the child's birth parent to be the child's adoptive parent in a conditional surrender to be a certified or approved foster parent or an approved adoptive parent, in support of a child's need for a safe, permanent home.

#### 4. Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

#### 5. Local government mandates:

The primary mandates are on local social services districts and voluntary authorized agencies to prepare for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review that districts and agencies already conduct with such persons. In addition, they must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts. However, the requirement for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. The requirements established by the regulations are in keeping with the intent of Chapter 3 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

#### 6. Paperwork:

Chapter 3 of the Laws of 2005 requires the completion of a permanency hearing report for filing with the court and sharing with other persons involved in the case for all children in foster care, with the exception of non-completely freed juvenile delinquents and persons in need of supervision, and all children directly placed in the custody of a relative or other suitable person pursuant to Article 10 of the FCA. This is a new requirement for child welfare staff who serve children impacted by Chapter 3. OCFS, in collaboration with OCA, the Administration for Children Services in New York City and a representative sample of local social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the SSL have increased when a child is removed from his or her home. It is anticipated that there will be implementation costs associated with these regulations. The impact will be dependent on the individual district's or agency's current circumstances and capacity. This impact will be mitigated by the introduction of an automated permanency hearing report in 2007. In addition, this increase is partially offset by the first reassessment being due one month later than had previously been required.

#### 7. Duplication:

The regulations do not duplicate other State requirements.

#### 8. Alternatives:

There are no alternatives to these regulations as they are governed by the statutory requirements of Chapter 3 of the Laws of 2005.

#### 9. Federal standards:

This legislation facilitates permanency planning for such children and assists New York State to comply with federal standards set forth in the federal Adoption and Safe Families Act of 1996 (ASFA) and other eligibility requirements under Title IV-E of the Social Security Act. Each time a permanency hearing is delayed, a child potentially stays needlessly longer in foster care. If the permanency hearing is not timely, pursuant to federal Title IV-E standards, the local social services district is at jeopardy of losing federal Title IV-E funding for foster care for the child, until an appropriate court finding of reasonable efforts to enable a child to return home safely, if the goal is reunification, or that reasonable efforts were made to finalize the child's permanency plan is made. Chapter 3 improves permanency by granting the Family Court continuing jurisdiction over the child during foster care placement. By providing the Court with continuing jurisdiction, legal authority of the local social services district over the child placement does not lapse until completion of the child's permanency hearing or further direction of the court. Prior to enactment of Chapter 3 a lapse in legal authority could occur resulting in ineligibility for reimbursement under Title IV-E of the Social Security Act for foster care for the child. It is expected that continuing jurisdiction should reduce by months the time a child might spend in foster care.

#### 10. Compliance schedule:

Compliance with the regulations must begin immediately upon filing. December 21, 2005 is the effective date of the relevant sections of Chapter 3 of the Laws of 2005.

### **Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

Social services districts will be affected by the regulation. There are 58 social services districts. The St. Regis Mohawk Tribe is authorized as a social services district to provide child welfare services pursuant to its State/Tribal Agreement with OCFS. Voluntary authorized agencies also will be affected by the proposed regulation. There are approximately 250 of such agencies.

#### 2. Compliance Requirements:

The regulations would impose requirements on local social services districts and voluntary authorized agencies in relation to the preparation for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review they already conduct with such persons. In addition, the districts and agencies must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts and the voluntary authorized agencies with which they contract. The requirements established by the regulations are consistent with the requirements and intent of Chapter 3 of the Laws of 2005 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

### 3. Professional Requirements:

It is expected that there will be implementation costs associated with Chapter 3 and the regulations. The impact will be dependent upon the district's or agency's current circumstances and staffing. Current training programs will be enhanced to emphasize the casework support addressed by the regulations, meaning appropriate staff must be trained.

### 4. Compliance Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

### 5. Economic and Technological Feasibility:

Chapter 3 of the Laws of 2005 requires the completion of a permanency hearing report for filing with the court and sharing with other persons involved in the case for all children in foster care, with the exception of non-completely freed juvenile delinquents and persons in need of supervision, and all children directly placed in the custody of a relative or other suitable person pursuant to Article 10 of the Family Court Act (FCA). This is a new requirement for child welfare staff who serve children impacted by Chapter 3. The regulation will not impose any additional economic or technological burdens on social services districts or child welfare services providers. Districts and agencies will not need additional computers beyond those already provided by the State. The economic impact of implementation will vary.

### 6. Minimizing Adverse Impact:

The Office of Children and Family Services (OCFS), in collaboration with the Office of Court Administration (OCA), the Administration for Children Services in New York City and a representative sample of local

social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. However, requirements for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. Furthermore, the impact will be mitigated by the introduction of an automated permanency hearing report in 2007. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the Social Services Law (SSL) were expanded by Chapter 3 of the Laws of 2005 when a child is removed from his or her home. This expansion is partially offset by the first reassessment being due one month later than had previously been required. Finally, OCFS has submitted a Title IV-E State Plan amendment to the federal government, so that a permanency hearing can take the place of the administrative service plan review meeting with a third party reviewer to meet the federal requirement that the case be reviewed by an administrative or judicial review with an independent reviewer, as long as the permanency hearing is held and completed within six months of the previous service plan review.

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

OCFS actively sought and obtained the input of local social services districts in designing the permanency hearing reports and in defining the requirements for family assessments and services plans, service plan reviews and case consultations to prepare for the permanency hearings.

### **Rural Area Flexibility Analysis**

#### 1. Effect on Rural Areas:

The regulations will affect the 44 social services districts that are in rural areas. The St. Regis Mohawk Tribe is authorized as a social services district to provide child welfare services pursuant to its State/Tribal Agreement with OCFS. Those voluntary authorized agencies in rural areas contracting with social services districts to provide foster care and adoption services also will be affected by the regulations. Currently, there are approximately 100 such agencies.

#### 2. Compliance Requirements:

The regulations would impose requirements on local social services districts and voluntary authorized agencies in relation to the preparation for permanency hearings by conducting a case consultation with case members and other participants. Although case consultation is currently required, these regulations impose a formal structure and process. This case consultation is in addition to the service plan review they already conduct with such persons. In addition, the districts and agencies must prepare permanency hearing reports on the prescribed statutory schedule, increasing documentation requirements upon local social services districts and the voluntary authorized agencies with which they contract. The requirements established by the regulations are consistent with the requirements and the intent of Chapter 3 of the Laws of 2005 – that children served by the child welfare system are in settings where they are as safe as possible, and that such children reside in permanent homes as soon as reasonably can be accomplished.

Additionally, the regulations reflect the repeal of sections 153-d and 398-b of the SSL by Chapter 83 of the Laws of 2002 which, previous to repeal, had authorized OCFS to sanction social services districts if they did not meet certain requirements, including those relating to timely filing of certain court review petitions that have been eliminated by Chapter 3 of the Laws of 2005. The repeal of 18 NYCRR 430.1 through 430.7 and 430.13 are necessary to reflect these statutory changes.

### 3. Professional Services:

It is expected that there will be implementation costs associated with Chapter 3 and the regulations. The impact will be dependent upon the district's or agency's current circumstances and staffing. Current training programs will be enhanced to emphasize the casework support addressed by the regulations, meaning appropriate staff must be trained.

### 4. Compliance Costs:

The implementation of these regulations and the underlying statutory provisions have both state and local costs associated with them. Local costs are partially offset by expected improvements in case processing, avoidance of federal sanctions and more rapid achievement of permanency for children in care and the associated savings attached to a shorter length of stay.

State activities related to the implementation of the statute and regulations will result in the delay of the final release of CONNECTIONS due to the redesign of current aspects of Build 18 (Case Management) and to incorporate the regulatory changes into the design of Build 19 (Financial Management).

There are anticipated costs as well as savings for local social service districts and voluntary authorized agencies as a result of implementation of the statutory provisions underlying these regulations. Initial implementation, as with any major policy and practice change, will require additional staff time to learn the new process and, with these regulations, to complete the statutorily required permanency hearing report and conduct case consultations prior to the development of permanency hearing reports in a more formal manner than is currently required. These staff costs will be offset, in part, by: the elimination of the requirements for administrative service plan reviews whenever the family court permanency hearing meets the federal requirement for such review to be held at least every six months; the elimination of the requirement for case consultations prior to service plan reviews; the elimination of filing of petitions with family court in most child welfare related matters, and elimination of the personal service of notice of hearings. Due to date certain calendaring of permanency hearings, it is anticipated that there will be a reduction in court adjournments resulting from the legislation underlying the regulations. This will reduce the time staff must spend in family court. Staff costs will be further offset when development work is completed so that the permanency hearing report is pre-filled and generated electronically, customized for the child's age and permanency planning goal.

Additional savings to local districts include anticipated reduced lengths of foster care stays for some children as a result of permanency hearings held more frequently than is now the case. There is also the potential to avoid foster care placements at the time of emergency removals by requiring hearings in all cases. The implementation of these regulations and the underlying statutory provisions will also eliminate lapsed authority for foster care placements, as the court retains continuing jurisdiction until the child is discharged, and will promote more timely reasonable efforts determinations by the court, thereby reducing the compliance items for which the State, and therefore the local districts, may be sanctioned in the secondary federal Title IV-E review scheduled in New York State for August 2006 and subsequent Title IV-E reviews.

#### 5. Minimizing Adverse Impact:

The Office of Children and Family Services (OCFS), in collaboration with the Office of Court Administration (OCA), the Administration for Children Services in New York City and a representative sample of local social services districts developed templates for use Statewide to meet the permanency hearing report requirement and to alleviate the need for local social services districts to design and create their own reports. However, requirements for preparation, filing and serving of petitions for most child welfare related court hearings no longer exists, thus offsetting such increased documentation requirements. Furthermore, the impact will be mitigated by the introduction of an automated permanency hearing report in 2007. Additionally, the requirements for Uniform Case Record documentation in accordance with section 409-e of the Social Services Law (SSL) were expanded by Chapter 3 of the Laws of 2005 when a child is removed from his or her home. This expansion is partially offset by the first reassessment being due one month later than had previously been required. Finally, OCFS has submitted a Title IV-E State Plan amendment to the federal government, so that a permanency hearing can take the place of the administrative service plan review meeting with a third party reviewer to meet the federal requirement that the case be reviewed by an administrative or judicial review with an independent reviewer, as long as the permanency hearing is held and completed within six months of the previous service plan review.

#### 6. Small Business Participation:

OCFS actively sought and obtained the input of local social services districts in designing the permanency hearing reports and in defining the requirements for family assessments and services plans, service plan reviews and case consultations to prepare for the permanency hearings.

#### Job Impact Statement

The regulations address various functions of social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies in relation to achieving permanency for children in foster care. It is anticipated that these functions will be assumed by the current staff of such agencies and that the regulations will not have a substantial impact on jobs or employment opportunities in either public or private child welfare agencies. A full job statement has not been prepared for the regulations that are implementing Chapter 3 of the Laws of 2005. The regulations would not result in the loss of any jobs.

## Department of Correctional Services

### NOTICE OF ADOPTION

#### Establishment of Time Allowance Committee

**I.D. No.** COR-05-06-00003-A

**Filing No.** 403

**Filing date:** March 31, 2006

**Effective date:** April 19, 2006

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

**Action taken:** Amendment of section 261.1(b) of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112, 137 and 803

**Subject:** Establishment of time allowance committee.

**Purpose:** To establish a list of time allowance committee members.

**Text or summary was published** in the notice of proposed rule making, I.D. No. COR-05-06-00003-P, Issue of February 1, 2006.

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

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

#### Assessment of Public Comment

The agency received no public comment.

## Education Department

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

#### Uniform Violent and Disruptive Incident Reporting System

**I.D. No.** EDU-45-05-00008-C

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

**The notice of proposed rule making,** I.D. No. EDU-45-05-00008-P was published in the *State Register* on November 9, 2005.

**Subject:** Uniform violent and disruptive incident reporting system.

**Purpose:** To provide a ranking, standard for reporting, and more concise definition of reportable offenses as required by the uniform violent and disruptive incident reporting system for the reporting of incidents by school districts, BOCES, charter schools and county vocational educational and extension boards, as required by Education Law, section 2802; and establish the use of a school violence index as a comparative measure of the level of school violence in a school.

**Substance of rule:** The Commissioner of Education proposes to amend subdivision (gg) of section 100.2 of the Commissioner's Regulations, effective June 15, 2006. Since publication of a Notice of Proposed Rule Making in the *State Register* on November 9, 2005, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith. The following is a description of the substance of the proposed amendments.

In general, subdivision (gg) of section 100.2 is amended to establish clearer definitions of terms and incidents, a ranking of the seriousness of incidents, and a common discipline standard to be used for the reporting of incidents. The amendments also establish the use of a school violence index as a comparative measure of the level of school violence in a school. The substantive amendments are as follows:

Section 100.2(gg)(1) is amended to provide a ranking of the seriousness of incidents and additional clarity to the definitions of physical and serious physical injury, sex offenses, robbery, arson, kidnapping, reckless endangerment, minor assaults, intimidation, burglary, criminal mischief,

larceny, riot, weapons possession, drug and alcohol use, possession, or sale, and other disruptive incidents.

Section 100.2(gg)(2) is amended to provide instructions regarding the recording and reporting of offenses and the discipline standard to use in determining if an incident should be reported.

Section 100.2(gg)(3) is amended to establish a time frame for school districts to submit the summary of violent and disruptive incident reports.

Section 100.2(gg)(4) is amended to provide the types of incidents that shall be included in the report.

Section 100.2(gg)(8) is added to establish the use of a school violence index commencing with the 2005-2006 school year as a comparative measure of the level of violence in a school.

**Changes to rule:** Since publication of a Notice of Proposed Rule Making in the State Register on November 9, 2005, changes were made to the proposed rule and a Notice of Revised Rule Making was published in the *State Register* on February 8, 2006. The following is a description of the changes.

Section 100.2(gg)(1)(v)(k), relating to the definition of "weapon", has been revised to clarify that "other dangerous and deadly instruments" should be reported only when possessed with an intent to use the item as a weapon, so that items such as nail files or pens or pencils that are not ordinarily considered weapons are only reported where there is an intent to use them as a weapon. Accordingly, the provision is revised to read as follows: "any other dangerous or deadly instrument possessed with intent to use the same unlawfully against another."

Section 100.2(gg)(1)(vi)(b)(1) and 100.2(gg)(8) have been revised to replace the term "serious sex offenses" with the term "forcible sex offenses" to address misperceptions that the Department does not consider all sex offenses to be serious offenses and to clarify the sex offenses reporting requirements for school districts.

Section 100.2(gg)(1)(vi)(i) has been revised to replace the phrase "minor assaults" with "minor altercations" in order to distinguish conduct involving physical contact and no physical injury from an "assault", which is generally understood to include physical injury.

**Expiration date:** November 9, 2006.

**Text of proposed rule and changes, if any, may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Jean Stevens, Interim Deputy Commissioner, Education Department, Office of Elementary, Middle, Secondary and Continuing Education, Rm. 873, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Requirements for Certification in the Educational Leadership Service

**I.D. No.** EDU-16-06-00017-P

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

**Proposed action:** Amendment of Subparts 80-2, 80-3 and 80-5 and sections 52.21(c) and 7.1 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 210 (not subdivided); 305(1), (2) and (7); 3001(2); 3003(1), (3) and (5); 3004(1); 3006(1)(b); 3007(2); 3009(1); 3604(8)

**Subject:** Requirements for certification in the educational leadership service.

**Purpose:** To strengthen requirements that candidates must meet for certification as a school building leader, school district leader, and a school district business leader for service as a school administrator in New York State public schools.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.highered.nysed.gov/tcert>):** The Board of Regents and the Commissioner of Education propose to amend the Rules of the Board of Regents and the Regulations of the Commissioner of Education, relating to requirements for the certification in the educational leadership service. The following is a summary of the substance of the amendment.

Section 7.1 of the Rules of the Board of Regents is amended to include certificates for the educational leadership service in the list of the general classifications of certificates for which the Commissioner of Education may make regulations.

Clause (b) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 52.21 of the Regulations of the Commissioner of Education is amended to require registered college programs leading to the initial certificate as a school building leader to inform applicants in writing prior to admission of the experience requirement for certification.

Clause (b) of subparagraph (ii) of paragraph (3) of subdivision (c) of section 52.21 is amended to require registered college programs leading to the professional certificate as a school district leader to inform applicants in writing prior to admission of the experience requirement for certification.

Clause (c) of subparagraph (vi) of paragraph (3) of subdivision (c) of section 52.21 is amended to correct the certification examination name in the program completion requirements for registered programs leading to certification as a school district leader and provide for a waiver of this requirement if the examination is not available prior to program completion.

Subparagraph (vii) of paragraph (3) of subdivision (c) of section 52.21 is added to establish requirements for companion programs in school district leadership not leading to the professional certificate.

Paragraph (4) of subdivision (c) of section 52.21 is amended to change various requirements for the alternative school district leader program, leading to the transitional D certificate and the professional certificate as a school district leader, as follows:

The name of the certification examination for the transitional D is corrected and a waiver of this requirement is provided if the examination is not available at the time the candidate applies and upon qualification qualifies for the transitional D certificate. Mentored and supervised experience requirements for the professional certificate are clarified. In addition, the amendment clarifies and prescribes requirements for program completion and recommendation for the professional certificate as a school district leader.

Clause (c) of subparagraph (vi) of paragraph (5) of subdivision (c) of section 52.21 is amended to correct the certification examination name in the program completion requirements for registered programs leading to certification as a school district business leader and provide for a waiver of this requirement if the examination is not available prior to program completion.

Subparagraph (vii) of paragraph (5) of subdivision (c) of section 52.21 is added to establish requirements for companion programs in school district business leadership not leading to the professional certificate.

The title of Subpart 80-2 of the Regulations of the Commissioner of Education is amended to indicate that this Subpart contains requirements for certificates in the administrative and supervisory service applied for on or before September 1, 2006, among other classes of certificates.

Subdivision (a) of section 80-2.1 prescribes conditions that must be met to permit candidates to apply for certification in the administrative and supervisory service under the old series requirements prescribed in Subpart 80-2.

Paragraph (4) of subdivision (a) of section 80-2.4 prescribes that existing scope of practice for the permanent certificate as a school district administrator, that it qualifies the holder to serve as a school district administrator, school administrator and supervisor, and school business administrator.

The title of Subpart 80-3 of the Regulations of the Commissioner of Education is amended to indicate that this Subpart contains requirements for certificates in the educational leadership service applied for on or after September 2, 2006.

Subdivision (a) of section 80-3.1 prescribes conditions that would require the candidate to apply for certification in the educational leadership service under the new series requirements prescribed in Subpart 80-3.

Sections 80-3.2, 80-3.3, 80-3.4, and 80-3.7 are amended to clarify that these provisions relate to requirements for certificates in the classroom teaching service.

Section 80-3.6 is amended to establish professional development requirements for holders of professional certificates in the educational leadership service. The amendment also requires a certificate holder to submit evidence documenting that he or she has met the professional development requirement, if the certificate holder requests a hearing on this matter.

Section 80-3.10 is added to prescribe requirements for certificates for the educational leadership service. Subdivision (a) establishes requirements for the school building leader (principal, housemaster, supervisor, department chairman, assistant principal, coordinator, unit head and any other person serving more than 25 percent of his or her assignment in any building level leadership position shall hold this certificate). Paragraph (1) of subdivision (a) establishes requirements for the initial certificate as a

school building leader, including education, examination and experience requirements. Paragraph (2) of subdivision (a) establishes requirements for the professional certificate as a school building leader, including the experience requirement.

Subdivision (b) establishes requirements for school district leader (superintendent of schools, district superintendent, deputy superintendent, associate superintendent, assistant superintendent and any other person having responsibilities involving general district-wide administration, except a person serving as a school district business leader, shall hold this certificate).

Paragraph (1) establishes requirements for the validity of the professional certificate as a school district leader.

Paragraph (2) provides that holders of a professional certificate as a school district leader may not serve as a school building leader unless they are certified as a school building leader or school administrator and supervisor under the requirements of Part 80 of this Title and may not serve as a school district business leader unless they are certified as a school district business leader or school business administrator under the requirements of Part 80 of this Title or are otherwise authorized by law to serve as a school district business leader.

Paragraph (3) establishes requirements for a professional certificate as a school district leader in the educational leadership service. Subparagraph (i) contains the regular requirements for the professional certificate as a school district leader. Subparagraph (ii) contains requirements for alternative route one, the alternative school district leader certification program, as prescribed in section 80-5.15 of this Part. Subparagraph (iii) contains requirements for alternative route two, the certification of exceptionally qualified persons through screening panel review.

Subdivision (c) establishes requirements for school district business leader (deputy superintendent of schools for business, associate superintendent of schools for business, assistant superintendent of schools for business and any other person having professional responsibility for the business operation of the school district shall hold this certificate).

Paragraph (1) establishes requirements for the validity of the professional certificate.

Paragraph (2) provides that holders of a professional certificates as school district business leader may not serve as a school building leader unless they are certified as a school building leader or school administrator and supervisor under the requirements of Part 80 of this Title and may not serve as a school district leader unless they are certified as a school district leader or school district administrator under the requirements of Part 80 of this Title.

Paragraph (3) establishes requirements for a professional certificate as a school district business leader in the educational leadership service.

Section 80-5.15 is repealed and a new section 80-5.15 is added to establish alternative requirements for school district leader certificates. Subdivision (a) establishes requirements for the transitional D certificate for service as a school district leader, applicable to a candidate enrolled in an alternative school district leader certification program pursuant to section 52.21(c)(4) of this Title. Subdivision (b) establishes requirements for the professional certificate as a school district leader, applicable for a candidate holding a transitional D certificate and matriculated in an alternative school district leader certification program pursuant to section 52.21(c)(4) of this Title.

Section 80-5.17 is amended to establish requirements for the conditional initial certificate in the title school building leader.

Section 80-5.20 is added to establish requirements for the endorsement of certificates for service as a school district leader and school district business leader.

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education, Education Department, Rm. 979, Education Bldg. Annex, 879 Washington Ave., Albany, NY 12234, (518) 474-5851, e-mail: hedepcom@mail.nysed.gov

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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Section 207 of the Education Law grants general rule making authority to the Regents to carry into effect the laws and policies of the State relating to education.

Section 210 of the Education Law grants to the Regents the authority to register domestic and foreign institutions in terms of New York standards.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and authorizes the Commissioner to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (7) of section 305 of the Education Law authorizes the Commissioner of Education to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the State's public schools.

Subdivision (1) of section 3003 of the Education Law authorizes the Commissioner of Education to certify school superintendents for service in the State's public schools.

Subdivision (3) of section 3003 of the Education Law authorizes the Commissioner of Education, at the request of a school district or BOCES, to issue a Superintendent's certificate to exceptionally qualified persons.

Subdivision (5) of section 3003 of the Education Law authorizes the Commissioner of Education to certify Superintendents of Business for service in the State's public schools.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in the State's public schools.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

Subdivision (2) of section 3007 of the Education Law authorizes the Commissioner of Education to endorse a certificate issued by another state.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

Subdivision (8) of section 3604 of the Education Law provides State aid for four conference days and authorizes school districts to use one or more of such conference days to provide staff development relating to implementation of the new high learning standards and assessments, as adopted by the Board of Regents.

#### **2. LEGISLATIVE OBJECTIVES:**

The amendment carries out the legislative objectives of the above-referenced statutes by establishing requirements for the certification of school administrators for service in New York State public schools.

#### **3. NEEDS AND BENEFITS:**

The purpose of the proposed amendment is to strengthen requirements that candidates must meet in order to be certified as school building leaders, school district leaders, and school district business leaders for service in New York State public schools. The amendment requires candidates for certification to complete approved programs, and eliminates the transcript evaluation route to certification in the educational leadership service. This will improve the educational preparation of school administrators by requiring them to complete coordinated, well developed programs, rather than a series of individual courses chosen by the candidate.

The amendment will require candidates for the initial certificate as a school building leader to pass the New York State Assessment for school building leaders. For professional certificates in school district leadership and school district business leadership, the New York State assessments are incorporated as part of education program completion requirements. These requirements will be implemented when the examinations become available. The certification examinations will help to ensure the competency of new educational leaders employed in the State's public schools.

The amendment requires college programs that lead to the initial certificate for school building leaders and to the professional certificate for school district leaders to advise applicants in writing that they must meet an experience requirement to be certified. This will help ensure that applicants are fully aware of certification requirements prior to enrollment.

The amendment establishes experience requirements for school building leaders. For the initial certificate as a school building leader, the candidate must have three years of experience in classroom teaching and/or pupil personnel service. Administrative and supervisory service will no longer be credited, as it is for the old series provisional certificate. For the

professional certificate, the candidate must have at least three years experience in an educational leadership position, including at least one-year at the building level, instead of the old series permanent certificate requirement of two years of experience in any school administrative/supervisory position, and the candidate must be mentored in prescribed cases. These changes will strengthen the preparation of building leaders by providing them with pertinent experience working directly with students.

The amendment establishes professional development requirements for school leaders. Professional certificate holders who are regularly employed by a school district or BOCES must complete 175 clock hours of professional development every five years. That number is reduced by half for individuals not regularly employed by a school district or BOCES. This is needed to help ensure that administrators have current knowledge.

The amendment limits the scope of practice for school district leaders certified under the new series. Holders of a professional certificate as a school district leader may not serve as a school building leader or as a school district business leader unless they are certified in these areas as well. The limitation on the scope of practice is appropriate because the knowledge and skills needed for service as a school building leader or school district business leader differ from that needed for service as a school district leader.

The amendment establishes alternative requirements for school districts leaders who are exceptionally qualified candidates and employed under the transitional D certificate. This change is needed to provide a new pathway for exceptionally qualified candidates who have demonstrated exemplary leadership but who do not have requisite experience in a school setting.

The amendment establishes requirements for two-year nonrenewable conditional initial certificates for school building leaders. This provides a means for individuals who are certified as building level administrators in other states to become certified in New York State while meeting the examination requirement.

The amendment establishes requirements for the endorsement of a certificate of another state for service as a school district leader or a school district business leader. This is needed to provide an expedited means to certification for experienced school district leaders and school district business leaders who are certified in other states.

#### 4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department.

(b) Costs to local governments: The amendment requires that school building leaders be mentored in the first year of employment in a public school while meeting the experience requirement for the professional certificate, unless they have two years prior experience as an educational leader. Assuming no funding from the State for this purpose and that three-quarters of new school building leaders will not have release time component in their mentoring programs, the Department estimates that the mentoring will cost school districts and BOCES on average about \$2,000 per new school building leader. The amendment requires school districts or BOCES that elect to participate in the alternative school district leadership program to provide mentoring to holders of the transitional D certificate. The Department estimates that this will cost school districts and BOCES about \$6,000 per certificate holder.

The amendment requires professional certificate holders who are regularly employed by a school district or BOCES to complete professional development approved by the school district or BOCES pursuant to its professional development plan. What entity provides the professional development and who will bear the cost is a matter to be decided by the school district or BOCES. Assuming that the district or BOCES will bear the cost and assuming an average cost of \$15 per clock hour, the Department estimates that the cost will be about \$525 per year (35 clock hours per year  $\times$  \$ 15) per certificate holder.

(c) Cost to private regulated parties: The amendment will require candidates to pass assessments for school building leader, school district leader, and school district business leader when they become available. The fee for each certification examination is expected to be \$284.

Professional certificate holders who are not regularly employed by a school district or BOCES will bear the cost of professional development. They will have to complete 17.5 clock hours of professional development per year (87.5 hours over five years). The Department estimates that this will cost the certificate holder about \$262.50 per year, based on a cost of \$15 per clock hour (17.5 clock hours  $\times$  \$15).

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the

amendment will not impose any additional costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

The amendment requires holders of the initial certificate as school building leader to be mentored in the first year of employment in a public school, while they are meeting the experience requirement for the professional certificate. The amendment is flexible, permitting school districts and BOCES to determine the mentoring program based upon local needs. The amendment requires mentoring for holders of the transitional D certificate. Only school districts or BOCES that elect to participate in the alternative school district leadership program will have to provide the mentoring.

The amendment requires school districts and BOCES to approve in its professional development plan, acceptable professional development for holders of the professional certificate in the educational leadership service in their employ. The amendment does not mandate that school districts or BOCES themselves provide the professional development.

#### 6. PAPERWORK:

Candidates seeking certification must apply to the Department, an existing requirement. In addition, the amendment will require candidates to pass certification examinations when they become available, requiring application to the testing agency.

#### 7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements.

#### 8. ALTERNATIVES:

After discussion with the Board of Regents and other interested parties, the State Education Department determined that the assessment requirement should be delayed. Originally, it was to be implemented with the new certification series effective September 2, 2006. The regulation now provides that the assessment requirement will be imposed when the examinations become available. The Department needs the additional time to work with interested parties and the testing agency to develop the content of the test.

Also, a provision was added to permit the endorsement of a certificate of another state for service as a school district leader or school district business leader. This was added to ease access to certification for experienced administrators who are certified in other states.

#### 9. FEDERAL STANDARDS:

There are no Federal standards that establish requirements for the certification of educational leaders for service in the State's public schools.

#### 10. COMPLIANCE SCHEDULE:

The amendment establishes a phase-out period for the old certification series. Candidates who apply for certification under the old series by September 1, 2006 will have one year to meet the requirements of the old series. Candidates who apply on or after September 2, 2006 will be subject to the requirements of the new series, unless specifically exempted in the regulations. No additional period of time is needed for regulated parties to meet the new requirements.

#### **Regulatory Flexibility Analysis**

##### (a) Small Businesses:

The proposed amendment concerns requirements that individuals must meet to be certified in the educational leadership service authorizing service as school administrators in New York State public schools. The amendment pertains to certification requirements applicable to individuals and related requirements applicable to public school districts and boards of cooperative educational services (BOCES). It does not regulate small businesses. The amendment does not impose any reporting, recordkeeping, or compliance requirements and will not have an economic impact on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken.

##### (b) Local Governments:

###### 1. Effect of the rule:

The proposed amendment concerns requirements that an individual must meet to be certified in the educational leadership service for employment in the State's public schools. The amendment contains requirements applicable to all public school districts and BOCES in the State, relating to the certification of such individuals.

###### 2. Compliance requirements:

The amendment requires that holders of the initial certificate as school building leaders must be mentored in their first year of employment at a school district or BOCES in New York State, while meeting the experience requirement for the professional certificate as school building leader, unless they already have had two years of experience as an educational

leader. This provision indirectly requires the school district and/or BOCES to provide the mentoring. The amendment is flexible, permitting the employing school district or BOCES to determine the requirements for this mentoring program based upon local needs. The amendment also requires school districts and BOCES that elect to participate in the alternative requirements for school district leadership program to provide mentoring and supervision to candidates while under the transitional D certificate and meeting the experience requirement for the professional certificate.

The amendment requires each school district and BOCES to approve in its professional development plan acceptable professional development for educational leaders who hold the professional certificate and are regularly in their employ. The amendment does not mandate that school districts and BOCES themselves provide the professional development, only that they specify what would be acceptable.

#### 3. Professional services:

The proposed amendment will not require school districts or BOCES to employ additional professional services in order to comply.

#### 4. Compliance costs:

The amendment will impose costs on school districts and Boards of Cooperative Educational Services (BOCES) that wish to employ school leaders under the new certificate series. It requires that school building leaders be mentored in the first year of employment in a public school while meeting the experience requirement for the professional certificate, unless they already have had two years of experience as an educational leader. Assuming there is no funding from the State for this purpose and that three-quarters of new teachers will not have release time component in their mentoring programs, the Department estimates that the mentoring will cost school districts and BOCES on average about \$2,000 per new building level administrator. The amendment also requires school districts and BOCES that elect to participate in the alternative school district leadership program to provide mentoring to holders of the transitional D certificate. The Department estimates that this will cost school districts and BOCES about \$6,000 per certificate holder.

The amendment requires professional certificate holders who are regularly employed by a school district or BOCES to complete professional development approved by the school district or BOCES pursuant to its professional development plan. What entity provides the professional development and who will bear the cost is a matter to be decided by the school district or BOCES. However, assuming that the school district or BOCES will bear the cost and assuming an average cost of \$15 per clock hour, the Department estimates that the cost will be about \$525 per year (35 clock hours per year × \$15) per certificate holder.

#### 5. Economic and technological feasibility:

Meeting the requirements of the proposed amendment is economically and technologically feasible. The amendment will impose costs on school districts and BOCES relating to the certification of educational leaders for service in the public schools, as stated above in "Compliance Costs".

6. Minimizing adverse impact: The purpose of the proposed amendment is to strengthen requirements that candidates must meet in order to be certified as school building leaders, school district leaders, and school district business leaders for service in New York State public schools. Through the certification requirements, the amendment indirectly establishes requirements that school districts and BOCES must meet when they employ individuals who hold the new certification titles. It is not possible to exempt school districts and BOCES from these requirements because they all relate to certification requirements for service in the State's public schools. The amendment provides school districts and BOCES with a great deal of flexibility in how they meet these requirements. The amendment requires school building leaders to be mentored in their first year of employment in the public schools while meeting the experience requirement for the professional certificate. It permits school districts and BOCES to develop their own mentoring programs for building leaders, based upon local needs. It also permits school districts and BOCES the flexibility to define acceptable professional development for individuals in their regular employ. Also, only school districts and BOCES that elect to participate in the alternative school district leader program would be required to provide mentoring to holders of the transitional D certificate in that program.

#### 7. Local government participation:

During the development of the proposed rule, comments were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board is composed of representatives of school districts and BOCES, among others. Comments were also solicited from the City School District of the City of New York, and the State's district superin-

tendents and school superintendents representing BOCES and school districts across the State. Comments were also solicited from professional organizations representing administrators and other professionals employed in the public schools of New York State.

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

##### 1. Types and estimate of the number of rural areas:

The proposed amendment will affect candidates for certification in the educational leadership service and indirectly establish related requirements for school districts and Boards of Cooperative Educational Services (BOCES) in all parts of the State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The proposed amendment establishes requirements that candidates must meet in order to be certified as school building leaders, school district leaders, and school district business leaders for service in New York State public schools. The amendment requires candidates for certification to complete approved programs, and eliminates the transcript evaluation route to certification in the educational leadership service.

The amendment will require candidates for the initial certificate as a school building leader to pass a certification examination, the New York State Assessment for school building leaders. For professional certificates in school district leadership and school district business leadership, the New York State assessments are incorporated as part of education program completion requirements. These requirements will be implemented when the examinations become available.

The amendment requires college programs that lead to the initial certificate for school building leaders and to the professional certificate for school district leaders to advise applicants in writing that they must meet an experience requirement to be certified.

The amendment establishes new experience requirements for school building leaders. For the initial certificate as a school building leader, the candidate must have three years of experience in classroom teaching and/or pupil personnel service. For the professional certificate, the candidate must have at least three years experience in an educational leadership position, including at least one-year at the building level and that experience must be mentored in prescribed cases. The amendment is flexible, permitting the employing school district or BOCES to determine the requirements of the mentoring program based upon local needs.

The amendment establishes a professional development requirement for school leaders. Professional certificate holders who are regularly employed by a school district or BOCES must complete 175 clock hours of professional development every five years. That number is reduced by half for candidates not regularly employed by a school district or BOCES. The amendment requires school district or BOCES to approve in its professional development plan acceptable professional development for holders of the professional certificate in the educational leadership service in their employ. The amendment does not mandate that school districts or BOCES themselves provide the professional development.

The amendment limits the scope of practice for school district leaders certified under the new series. It provides that holders of a professional certificate as a school district leader may not serve as a school building leader or as a school district business leader unless they are certified in these areas as well.

The amendment establishes alternative requirements for school districts leaders who are exceptionally qualified candidates. For the transitional D certification, the candidates must be matriculated in a registered alternative school district leader certification program, demonstrate exceptional qualifications for a school district leadership position through exemplary leadership service, have the endorsement of the college program as exceptional qualified, have an employment and mentored support commitment from a school district or BOCES, hold a graduate degree, and pass the New York State assessment for school district leadership if available. For the professional certificate the candidate must hold the transitional D certificate and a graduate degree, complete the alternative school district leadership program, including 60 semester hours of graduate study which may include study completed prior to admission to the program, and three years of educational leadership service and/or classroom teaching service, and/or pupil personnel service experience, including at least one year of service as a school district leader under the transitional D certificate.

The amendment establishes requirements for a two-year nonrenewable conditional initial certificate as a school building leader. The candidate must meet all requirements for the initial certificate as a school building leader except the examination requirement, and hold a valid regular certifi-

cate in an equivalent title to the title school building leader in a state party to the interstate agreement on qualifications of educational personnel.

The amendment establishes requirements for the endorsement of a certificate of another state or territory of the United States or the District of Columbia for service as a school district leader and school district business leader. The candidate must hold an equivalent certificate in such other jurisdiction, meet the general requirements for certification in Subpart 80-1, hold a masters or higher degree or have equivalent educational preparation, and have at least three years of relevant experience in the 10 years immediately preceding application for the certificate or have equivalent experience.

Candidates seeking certification in the educational leadership service will have to apply to the State Education Department for certification, which is an existing requirement. In addition, the amendment will require candidates to pass certification examinations when they become available. This will require the candidate to apply to the testing agency for the examination. The amendment does not establish any other reporting or recordkeeping requirement and does not require regulated parties to hire professional services in order to comply.

### 3. Costs:

The amendment will require candidates to pass certification examinations when they become available for the certificate sought in school building leadership, school district leadership, and/or school district business leadership. The fee for each of these certification examinations is expected to be \$284.

The amendment also establishes a professional development requirement for holders of the professional certificate in the education leadership service. Professional certificate holders who are not regularly employed by a school district or BOCES will bear the cost of 17.5 clock hours of professional development per year (87.5 clock hours over five years). The Department estimates that this will cost the certificate holder about \$ 262.50 per year, based on a cost of \$15 per clock hour (17.5 clock hours × \$15). The amendment requires professional certificate holders who are regularly employed by a school district or BOCES to complete professional development approved by the school district or BOCES pursuant to its professional development plan. What entity provides the professional development and who will bear the cost is a matter to be decided by the school district or BOCES. However, assuming that the school district or BOCES will bear the cost and assuming an average cost of \$15 per clock hour, the Department estimates that the cost will be about \$525 per year (35 clock hours per year × \$15) per certificate holder.

The amendment will impose costs on school districts and Boards of Cooperative Educational Services (BOCES) that wish to employ school leaders under the new certificate series. It requires that school building leaders be mentored in the first year of employment while meeting the experience requirement for the professional certificate, unless they already have had two years of experience as an educational leader. Assuming there is no funding from the State for this purpose and that three-quarters of new teachers will not have release time component in their mentoring programs, the Department estimates that the mentoring will cost school districts and BOCES on average about \$2,000 per new building level administrator. The amendment also requires school districts or BOCES that elect to participate in the alternative school district leadership program to provide mentoring to holders of the transitional D certificate. The Department estimates that this will cost school districts and BOCES about \$6,000 per certificate holder.

### 4. Minimizing adverse impact:

The amendment establishes requirements for the certification of educational leaders authorizing employment in the State's public schools. The State Education Department does not believe that establishing different standards for candidates who live or work in rural areas is warranted. A uniform standard ensures the quality of certified school administrators in all parts of the State.

### 5. Rural area participation:

During the development of the proposed rule, comments were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State. Comments were also solicited from State's district superintendents and school superintendents, representing BOCES and school districts across the State, including rural areas. Comments were solicited from all postsecondary institutions in the State that offer programs preparing candidates for certification in the educational leadership service, including institutions located in rural areas of

New York State. In addition, comments were solicited from professional organizations representing administrators and other professionals employed in the public schools throughout New York State, including rural areas.

### Job Impact Statement

The purpose of the proposed amendment is to strengthen requirements that candidates must meet in order to be certified as school building leaders, school district leaders, and a school district business leaders for service in New York State public schools. The amendment would establish education, experience and examination requirements for certification in these titles.

This amendment concerns requirements that candidates must meet to be certified as school building leaders, school district leaders, and school district business leaders in the New York State public schools. The amendment does not affect the number of jobs or the number of employment opportunities for school administrators in New York public schools, or in any other field. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Definition of Unprofessional Conduct in the Practice of Public Accountancy

I.D. No. EDU-16-06-00018-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 29.10(a), (d), (e), (f) and (g) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 6502(1) and (3-a); 6504 (not subdivided); 6506(1); 6509(9); 6510(8); and 7401 (not subdivided)

**Subject:** Definition of unprofessional conduct in the practice of public accountancy.

**Purpose:** To prescribe definitions of unprofessional conduct in the practice of public accountancy by updating the names of entities that promulgate generally accepted auditing standards and generally accepted accounting principles; establish reporting requirements; and set forth definitions of unprofessional conduct based upon actions of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB).

**Text of proposed rule:** 1. Paragraph (7) of subdivision (a) of section 29.10 of the Rules of the Board of Regents is amended, effective July 13, 2006, as follows:

(7) permitting the public accountant's name to be associated with statements purporting to show financial position or results of operations in such a manner as to imply that he or she is acting as an independent certified public accountant or public accountant, unless:

(i) the licensee has complied with generally accepted auditing standards. The State Board for Public Accountancy may consider statements on auditing standards promulgated by [an organization whose standards are generally accepted by other licensing jurisdictions] *the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board for licensees subject to such requirements, or a recognized national accountancy organization whose standards are generally accepted by other regulatory authorities* in the United States, including but not limited to:] the American Institute of Certified Public Accountants, to be interpretations of generally accepted auditing standards. Departures from such standards, or other standards considered by the State Board to be applicable in the circumstances, must be justified by a licensee who does not follow them; and

(ii) the licensee expresses an opinion on financial statements or financial data presented in conformity with generally accepted accounting principles. The State Board for Public Accountancy may consider those principles promulgated by [an organization whose principles are generally accepted by other licensing jurisdictions] *a recognized national accountancy organization whose standards are generally accepted by other regulatory authorities* in the United States, including but not limited to: [the American Institute of Certified Public Accountants and] the Financial Accounting Standards Board, *the Government Accounting Standards Board, and the International Accounting Standards Board*, to be generally

accepted accounting principles. If financial statements or data contain departures from generally accepted accounting principles but the licensee can demonstrate that the financial statements or data would have been misleading had generally accepted accounting principles been followed, the licensee's opinion should describe the departure, its approximate effect if practicable, and the reasons why compliance with generally accepted accounting principles would have otherwise been misleading;

2. Paragraph (13) of subdivision (a) of section 29.10 of the Rules of the Board of Regents is repealed, effective July 13, 2006.

3. Subdivision (d) of section 29.10 of the Rules of the Board of Regents is added, effective July 13, 2006, as follows:

(d) *The definitions of unprofessional conduct prescribed in sections 29.1 and 29.10 of this Part that apply to licensees shall also apply to public accountancy firms, meaning any form of business organization that is authorized to engage in the practice of public accountancy and is subject by law to Regents disciplinary proceedings and penalties in the same manner and to the same extent as licensees, unless public accountancy firms are specifically exempted from the definitions of unprofessional conduct in such sections of this Part.*

4. Subdivision (e) of section 29.10 of the Rules of the Board of Regents is added, effective July 13, 2006, as follows:

(e) *Reportable events.*

(1) *For purposes of this subdivision, public accountancy firm shall have the meaning defined in subdivision (d) of this section.*

(2) *Unprofessional conduct in the practice of public accountancy shall include failure of a licensee or public accountancy firm to submit a written report, as prescribed in paragraph (3) of this subdivision, to the department within 45 days of the occurrence of any of the following events, even though all available appeals have not yet been exhausted, unless exempted from disclosure pursuant to paragraph (5) of this subdivision or excused for good cause as determined by the department, such as a circumstance beyond the licensee's or public accountancy firm's control that prevented timely compliance:*

(i) *conviction of a licensee, a registered partnership, or public accountancy firm in New York State or any other jurisdiction of a crime that constitutes a felony or misdemeanor in the jurisdiction of conviction. For purposes of this subparagraph, conviction shall include a plea of guilty or no contest, or a verdict or finding of guilt that has been accepted and entered by a court of competent jurisdiction;*

(ii) *receipt of a court decision awarding a monetary judgment in excess of twenty-five thousand dollars in a civil action brought in a court of competent jurisdiction or an award in excess of twenty-five thousand dollars in an arbitration proceeding in which the licensee, the registered partnership, or public accountancy firm is found to be liable for:*

(a) *negligence, gross negligence, recklessness, or intentional wrongdoing relating to the practice of public accountancy in New York State;*

(b) *fraud or misappropriation of funds relating to the practice of public accountancy in New York State;*

(c) *breach of fiduciary responsibility relating to the practice of public accountancy in New York State; or*

(d) *preparation, publication, and/or dissemination of false, fraudulent, and/or materially incomplete or misleading financial statements, reports, or information relating to the practice of public accountancy in New York State;*

(iii) *receipt of written notice of imposition of a disciplinary penalty upon the licensee, the registered partnership, or public accountancy firm, including but not limited to, censure, reprimand, sanction, probation, monetary penalty, suspension, revocation, or other limitation on practice, relating to the practice of public accountancy, issued by:*

(a) *the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board;*

(b) *another agency of the United States government that regulates the practice of public accountancy;*

(c) *an agency of the government of another state or territory of the United States that regulates the practice of public accountancy; or*

(d) *an agency of the government of another country that regulates the practice of public accountancy;*

(3) *The report to the department shall consist of the following:*

(i) *for a conviction as prescribed in subparagraph (i) of paragraph (2) of this subdivision, the report shall consist of a copy of the certificate of conviction, or comparable document of the court;*

(ii) *for a court decision or arbitration award as prescribed in subparagraph (ii) of paragraph (2) of this subdivision, the report shall*

*consist of a copy of the court decision or arbitration award and any findings of facts or special verdict form;*

(iii) *for a written notice of imposition of a disciplinary penalty upon the licensee, as prescribed in subparagraph (iii) of paragraph (2) of this subdivision, the report shall consist of a copy of the notice; or*

(iv) *in lieu of the documentation described in subparagraphs (i), (ii), or (iii) of this paragraph, a narrative statement on a form prescribed by the department setting forth information specified by the department, including but not limited to the date and jurisdiction of the court decision and/or judgment, conviction, arbitration award, or notice of imposition of disciplinary penalty, as applicable.*

(4) *A public accountancy firm shall be responsible for reporting reportable events relating to the public accountancy firm, and shall designate an individual to make such reports. An individual licensee shall be responsible for reporting those reportable events specifically relating to the licensee. Licensees who are partners in a registered partnership may designate an individual to report reportable events relating to the registered partnership, but each such licensee shall be responsible for ensuring the reporting of the reportable events.*

(5) *Failure to submit a report which is subject to a confidentiality order, clause or provision in a court decision or arbitration award under subparagraphs (i) or (ii) of paragraph (2) of this subdivision shall not be deemed to constitute unprofessional conduct under the following conditions:*

(i) *the court or arbitrator has included language in such decision that specifically provides that the decision shall not be reported to the department pursuant to this subdivision; or*

(ii) *the licensee or firm demonstrates to the satisfaction of the department that the licensee or firm explicitly informed the court or arbitrator in writing prior to execution of any confidentiality order, clause or provision of the duty to report such decision to the department and the effect of any confidentiality order, clause or provision on such duty of disclosure, and the confidentiality order, clause or provision does not expressly provide for disclosure to the department.*

(6) *Reports submitted to the department in accordance with this subdivision shall be files of the department relating to the investigation of possible instances of professional misconduct and shall be confidential in accordance with the provisions of subdivision (8) of section 6510 of the Education Law.*

(7) *Nothing in this subdivision shall have any effect upon the duty of the licensee or firm to respond fully to all questions on any re-registration application which shall become due, or to respond to written communications from the department pursuant to section 29.1(b)(13) of this Part.*

5. Subdivision (f) of section 29.10 of the Rules of the Board of Regents is added, effective July 13, 2006, as follows:

(f) *Unprofessional conduct in the practice of public accountancy shall include:*

(1) *having admitted guilt to or having been found guilty of improper professional practice or professional misconduct in a disciplinary proceeding brought by the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board, where the conduct upon which the finding or admission of guilt was based would, if committed in New York State, constitute professional misconduct under the laws of New York State, provided that in any adversary proceeding conducted pursuant to subdivision (3) of section 6510 of the Education Law, the individual licensee or public accountancy firm shall have the rights set forth in that subdivision; or*

(2) *having voluntarily consented to a revocation or temporary or permanent suspension of the authority to appear or practice as an accountant before the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board, or having voluntarily surrendered such authority; or having voluntarily consented to a revocation or temporary or permanent suspension from further association with any public accounting firm registered pursuant to Chapter 98 of Title 15 of the United States Code, or having voluntarily surrendered such authority; or having voluntarily consented to a revocation or temporary or permanent suspension of registration under Chapter 98 of Title 15 of the United States Code, or a voluntary surrender of such registration; all after a disciplinary action was commenced by the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board where any conduct charged resulting in the consent to such revocation or temporary or permanent suspension or surrender would, if committed in New York State, constitute professional misconduct under the laws of New York State; and where the date of such consent or surrender is on or after January 1, 2007. In any adversary proceeding conducted pursuant*

to subdivision (3) of section 6510 of the Education Law, the individual licensee or public accountancy firm shall have the rights set forth in that subdivision.

6. Subdivision (g) of section 29.10 of the Rules of the Board of Regents is added, effective July 13, 2006, as follows:

(g) *Unprofessional conduct in the practice of public accountancy, as such practice relates to the audit in the practice of public accountancy of an issuer of publicly traded securities that is subject to the Federal Sarbanes-Oxley Act of 2002, shall include, for purposes of subdivision (f) of this section, a failure of a licensee or public accountancy firm, as appropriate, to meet the standards prescribed in the following provisions of Federal law: subdivisions (a), (b), (g), (h), (i), (j), (k), and/or (l) of section 78j-1 of Title 15 of the United States Code (United States Code, 2000 edition, Volume 7, and Supplement II, Volume 1 to the 2000 edition; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP, Washington, DC 20402-0001; available at the NYS Education Department, Office of the Professions, 2M West Wing, Education Building, 89 Washington Avenue, Albany, NY 12234). To the extent that the United States Securities and Exchange Commission or the Public Company Accounting Oversight Board have exempted or excepted licensees or public accountancy firms from these standards, such exemptions or exceptions shall also apply to the requirements of this subdivision.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Deputy Commissioner, Office of Higher Education, Education Department, Rm. 979, Education Bldg. Annex, 879 Washington Ave., Albany, NY 12234, (518) 474-5851, e-mail: hedepcom@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Subdivision (1) of section 6502 of the Education Law requires licensees to be registered with the State Education Department to practice in New York State.

Subdivision (3-a) of section 6502 of the Education Law requires the State Education Department to request and review any information which reasonably appears to relate to professional misconduct in his/her professional practice in New York State and any other jurisdiction, prior to registration of the licensee.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions, and the State Education Department to administer it.

Subdivision (1) of section 6506 of the Education Law authorizes the Regents to promulgate rules in the supervision of the practice of the professions.

Subdivision (9) of section 6509 of the Education Law authorizes the Regents to define in its rules unprofessional conduct.

Subdivision (8) of section 6510 of the Education Law provides that the files of the State Education Department relating to the investigation of possible instances of professional misconduct or the unlawful practice of any profession licensed by the Board of Regents shall be confidential.

Section 7401 of the Education Law establishes the definition of the practice of public accountancy.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed regulations carry out the intent of the aforementioned statutes that the Regents shall regulate the practice of the licensed professions and define unprofessional conduct.

##### 3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to prescribe definitions of unprofessional conduct in the practice of public accountancy by updating the names of entities that promulgate generally accepted auditing standards and generally accepted accounting principles, establishing reporting requirements, and setting forth definitions of unprofessional conduct based upon actions of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB).

Regents Rule section 29.10(a) requires public accountants to comply with generally accepted auditing standards and generally accepted accounting principles. The amendment updates the entities that promulgate generally accepted auditing standards applicable to public accounting by

adding the SEC and the PCAOB. These organizations have promulgated auditing standards in accordance with Federal law in the audit of an issuer of publicly traded securities that is subject to the Federal Sarbanes-Oxley Act of 2002.

The amendment updates the entities that promulgate generally accepted accounting principles to add the Government Accounting Standards Board and the International Accounting Standards Board, organizations that establish accounting principles for financial transactions in the governmental and international environments, respectively. The American Institute of Certified Public Accountants is deleted because the entity that currently establishes generally accepted accounting principles is the Financial Accounting Standards Board.

The amendment deletes paragraph (13) of subdivision (a) of section 29.10 of the Rules, and moves this provision in a modified form to a separate subdivision (d) of section 29.10. It clarifies that definitions of unprofessional conduct that apply to licensed public accountants also apply to public accountancy firms. It is more appropriately set out in a separate subdivision because it applies to the entire section 29.10.

The amendment establishes requirements for the reporting of prescribed events to the State Education Department. The amendment requires a firm or licensee to report to the State Education Department the occurrence of the following events within 45 days of their occurrence: conviction of a crime that constitutes a felony or misdemeanor; receipt of a court decision in a civil action or an arbitration proceeding awarding a money judgment in excess of \$25,000 where the licensee or firm is found liable for wrongdoing relating to the practice of public accountancy in New York State; and receipt of notice of disciplinary penalty by a government agency relating to the practice of public accountancy. This is needed to ensure that the State Education Department has timely information on possible instances of professional misconduct.

The amendment establishes as unprofessional conduct having admitted guilt or having been found guilty of improper professional practice or professional misconduct in a disciplinary proceeding brought by the SEC or PCAOB, where the underlying conduct constitutes professional misconduct in New York State. It establishes as unprofessional conduct having voluntarily consented to a limitation on practice such as a revocation or temporary suspension of practice, or surrender of such authority, after a disciplinary action was commenced by the SEC or PCAOB, where any conduct charged resulting in the practice limitation would if committed in New York constitute professional misconduct.

These provisions are needed to provide a means to leverage the significant resources of the Federal government, which investigates through the SEC and the PCAOB violations of auditing standards and requirements in the auditing of publicly traded firms. The public accountant or public accountancy firm will have been afforded full due process opportunities at the Federal level, and the rights in an adversary proceeding set forth in section 6510(3) of the Education Law in the action commenced by the State Education Department.

The amendment incorporates by reference provisions of Federal law (15 USC 78j-1[a], [b], [g], [h], [i], [j], [k], and [l]) that establish auditing requirements relating to the audit in the practice of public accountancy of an issuer of publicly traded securities that is subject to the Federal Sarbanes-Oxley Act of 2002. Section 78j-1(a) requires public accountancy firms to establish procedures to detect illegal activities that would have a direct and material effect on the audit, to find related party transactions, and to evaluate whether the issuer has the ability to continue as a going concern. Section 78j-1(b) establishes auditors' responsibilities when illegal acts are discovered. Section 78j-1(g) establishes prohibited non-audit services that a public accounting firm may not provide an issuer when the firm is contemporaneously performing an audit. Section 78j-1(h) and (i) establishes non-audit services that a public accounting firm may provide an issuer when the firm is contemporaneously performing an audit provided that such services are pre-approved by the audit committee of the issuer or are de minimus. Section 78j-1(j) establishes requirements for audit partner rotation, prohibiting an audit if the lead audit partner or the audit partner responsible for review, has performed audit services for that issuer in each of the five previous fiscal years of the issuer. Section 78j-1(k) establishes reports that accountancy firms must make to the audit committee of the issuer. Section 78j-1(l) prohibits an accountancy firm from performing an audit for an issuer, if the chief executive officer, controller or other specified officer of the issuer was employed by the accountancy firm and participated in any capacity in an audit during the one-year period preceding the date of the initiation of the audit.

The amendment limits the use of this definition of unprofessional conduct which incorporates the above Federal statutory requirements to

proceedings brought under section 29.10(f), where there is a prior action by the SEC or PCAOB. This is needed to provide the State Education Department with additional bases to proceed with a disciplinary action based upon the disciplinary proceeding brought by the SEC or PCAOB, among other bases such as failure to meet generally accepting auditing standards as prescribed in section 29.10(a)(7).

#### 4. COSTS:

(a) Cost to State government: The State Education Department will use existing personnel to review reports submitted by licensees and accountancy firms, and to proceed with any disciplinary actions based upon the new definitions of unprofessional conduct.

(b) Cost to local government: The amendment does not impact on local governments and therefore, imposes no additional costs on them.

(c) Cost to private regulated parties: The amendment will not impose costs on public accountants or public accountancy firms, except for the cost of reporting prescribed events. The Department estimates this cost to be approximately \$475 per reportable event, calculated by estimating \$425 for staff time to monitor possible reportable events and process the reports (one hour of time for a professional staff member at \$400 per hour and one hour of time for a support staff member at \$25 per hour) and \$50 for copying and mailing costs.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the State Education Department will use existing resources to implement the proposed amendment.

#### 5. LOCAL GOVERNMENT MANDATES:

The amendment establishes definitions of unprofessional conduct in the practice of public accountancy by licensed individuals and public accountancy firms. The regulations do not impose any programs, service, duty, or responsibility upon local governments.

#### 6. PAPERWORK:

The amendment requires licensees and firms to report to the State Education Department prescribed events. The licensee or firm must submit copies of specified documents or a narrative description of the event.

#### 7. DUPLICATION:

The amendment does not duplicate other existing State requirements. The amendment complements and coordinates with Federal requirements.

#### 8. ALTERNATIVES:

Staff of the State Education Department worked with the State Board for Public Accountancy, representatives from the profession and other interested State Agencies to develop the amendment. The Department considered promulgating a regulation that would define as unprofessional conduct the imposition of any sanction by the SEC or PCAOB. After consultation with interested parties, the Department determined that this approach was too broad.

The Department proposed an amendment that would have established a prima facie case of unprofessional conduct when an individual licensee has consented to a monetary penalty of at least \$50,000 or a public accountancy firm has voluntarily consented to a monetary penalty of at least \$250,000, after a disciplinary was instituted by the SEC or PCAOB, and where any conduct charged is professional misconduct under the laws of New York State. After discussing this alternative with the Regents and interested parties, the Department determined to eliminate this definition and consider it in the future after additional study.

A previous draft of the amendment included seven categories of reportable events. The current proposal includes three: convictions of a licensee or firm for a crime constituting a felony or misdemeanor, receipt of a court decision or arbitration award, awarding at least \$25,000, in which the licensee or firm was engaged in enumerated wrongdoing relating to the practice of public accountancy in New York State, and receipt of a written notice of imposition of disciplinary penalty by a government agency relating to the practice of public accountancy. After consultation with the Regents and the interested parties in the field, the Department determined to eliminate four categories in order not to overburden regulated parties with reporting requirements.

A previous draft included definitions of unprofessional conduct relating to the audit of issuers of publicly traded equity securities not subject to the Sarbanes-Oxley Act, establishing conflict of interest provisions similar to those described above for audits of issuers of securities subject to Sarbanes-Oxley. After discussion with the Regents and interested parties, the Department decided to delete these provisions and consider them in the future after additional study.

#### 9. FEDERAL STANDARDS:

The amendment does not exceed Federal standards. It complements and coordinates with Federal requirements relating to the audit of issuers

of public traded securities subject to the Federal Sarbanes-Oxley Act of 2002.

#### 10. COMPLIANCE SCHEDULE:

The amendment is effective on its stated effective date. However, the provision that defines as unprofessional conduct having voluntary consented to a significant limitation on practice such as a revocation or temporary suspension of practice, or having surrendered such authority, after a disciplinary action was commenced by the SEC or PCAOB has a delayed effective date. It only applies when the date of such consent or surrender is on or after January 1, 2007. This will provide time to put licensees and public accountancy firms on notice of the new definition.

#### **Regulatory Flexibility Analysis**

##### (a) Small Businesses:

##### 1. EFFECT OF RULE:

This proposal establishes in the definition of unprofessional conduct in the practice of public accountancy a definition of unprofessional conduct based upon action of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB). The PCAOB reports that there are 1,632 domestic and foreign public accountancy firms registered to audit publicly traded companies, including 126 registered to practice in New York. The Department estimates that fewer than 100 of these New York firms are small businesses.

Another provision of the proposed amendment defines as unprofessional conduct, the failure of any licensee or firm to report within 45 days the occurrence of any one of three specified events and specifies acceptable reporting formats. This provision will impact a larger portion of public accountancy firms. As of November 2005, there were 2,885 public accountancy firms registered with the State Education Department. The American Institute of Certified Public Accountants reports that about 80 percent of its membership employed by public accountancy firms are employed by small firms. Applying this percentage, the Department estimates that there are about 2,308 public accountancy firms that are small businesses that would be subject to the reporting requirement.

##### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment prescribes definitions of unprofessional conduct in the practice of public accountancy by updating the names of entities that promulgate generally accepted auditing standards and generally accepted accounting principles, establishing reporting requirements, and setting forth definitions of unprofessional conduct based upon actions of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB).

Regents Rule section 29.10(a) requires public accountants to comply with generally accepted auditing standards and generally accepted accounting principles. The amendment updates the entities that promulgate generally accepted auditing standards applicable to public accounting by adding the SEC and the PCAOB. The amendment updates the entities that promulgate generally accepted accounting principles to add the Government Accounting Standards Board and the International Accounting Standards Board.

The amendment establishes requirements for the reporting of prescribed events to the State Education Department. The amendment requires a firm or licensee to report to the State Education Department the occurrence of the following events within 45 days of their occurrence: conviction of a crime that constitutes a felony or misdemeanor; receipt of a court decision in a civil action or an arbitration proceeding awarding a money judgment in excess of \$25,000 where the licensee or firm is found liable for wrongdoing relating to the practice of public accountancy in New York State; and receipt of notice of disciplinary penalty by a government agency relating to the practice of public accountancy.

The amendment establishes as unprofessional conduct having admitted guilt or having been found guilty of improper professional practice or professional misconduct in a disciplinary proceeding brought by the SEC or PCAOB, where the underlying conduct constitutes professional misconduct in New York State. It establishes as unprofessional conduct having voluntary consented to a limitation on practice such as a revocation or temporary suspension of practice, or surrender of such authority, after a disciplinary action was commenced by the SEC or PCAOB, where any conduct charged resulting in the practice limitation would if committed in New York constitute professional misconduct.

The amendment incorporates by reference provisions of Federal law (15 USC 78j-1[a], [b], [g], [h], [i]), [j], [k], and [l]) that establish auditing requirements relating to the audit in the practice of public accountancy of an issuer of publicly traded securities that is subject to the Federal Sarbanes-Oxley Act of 2002. The amendment limits the use of this definition of unprofessional conduct which incorporates the above Federal statu-

tory requirements to proceedings brought under section 29.10(f), where there is a prior action by the SEC or PCAOB.

Section 78j-1(a) requires public accountancy firms to establish procedures to detect illegal activities that would have a direct and material effect on the audit, to find related party transactions, and to evaluate whether the issuer has the ability to continue as a going concern. Section 78j-1(b) establishes auditors' responsibilities when illegal acts are discovered. Section 78j-1(g) establishes prohibited non-audit services that a public accounting firm may not provide an issuer when the public accountancy firm is contemporaneously performing an audit. Section 78j-1(h) and (i) establishes non-audit services that a public accounting firm may provide an issuer when the firm is contemporaneously performing an audit provided that such services are pre-approved by the audit committee of the issuer or are de minimus. Section 78j-1(j) establishes requirements for audit partner rotation, prohibiting an audit if the lead audit partner or the audit partner responsible for review, has performed audit services for that issuer in each of the five previous fiscal years of the issuer. Section 78j-1(k) establishes reports that accountancy firms must make to the audit committee of the issuer. Section 78j-1(l) prohibits an accountancy firm from performing an audit for an issuer, if the chief executive officer, controller or other specified officer of the issuer was employed by the accountancy firm and participated in any capacity in an audit during the one-year period preceding the date of the initiation of the audit.

### 3. PROFESSIONAL SERVICES:

The proposed amendment will not require public accountancy firms that are classified as small businesses to hire professional services to comply.

### 4. COMPLIANCE COSTS:

The amendment will not impose costs on public accountancy firms that are small businesses, except for the cost of reporting prescribed events. The Department estimates this cost to be approximately \$475 per reportable event, calculated by estimating \$425 for staff time to monitor possible reportable events and process the reports (one hour of time for a professional staff member at \$400 per hour and one hour of time for a support staff member at \$25 per hour) and \$50 for copying and mailing costs.

### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and is economically feasible. See above "Compliance Costs" for the economic impact of the amendment.

### 6. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements should apply to all firms, regardless of size, to ensure a uniform high standard of professional practice in the practice of public accountancy. It is not unusual for firms, not-for-profit organizations and local governments to contract with small accounting firms for audit services. The definitions of unprofessional conduct in the practice of public accountancy should apply regardless of the size of the public accountancy firm to help ensure high quality practice by all entities authorized to practice public accountancy.

### 7. SMALL BUSINESS PARTICIPATION:

The State Board for Public Accountancy, which includes members who have experience in a small business environment, assisted in the development of the proposed regulation. In addition, the State Education Department provided the New York State Society of Certified Public Accountants, which includes members who own and operate small businesses, with draft regulatory language and engaged in an ongoing conversation with this organization as the Department developed this proposal.

#### (b) Local Governments:

The proposed amendment establishes definitions of unprofessional conduct in the practice of public accountancy. These definitions are applicable to licensed public accountants and public accountancy firms and could form the basis for professional discipline proceedings against the licensees and firms. It will not impose an adverse economic impact or reporting, recordkeeping, or other compliance requirements on local governments. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis for local governments is not required and one has not been prepared.

### **Rural Area Flexibility Analysis**

#### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed regulation will apply to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At present, about 35,970 individuals are licensed and registered to practice public accountancy in

New York State. Of these, 2,076 reported a permanent address of record that was in a rural county. There are 2,885 firms registered to practice public accountancy in New York State. Of these, the Department estimates that approximately 175 are located in a rural county of New York State.

### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment prescribes definitions of unprofessional conduct in the practice of public accountancy by updating the names of entities that promulgate generally accepted auditing standards and generally accepted accounting principles, establishing reporting requirements, and setting forth definitions of unprofessional conduct based upon actions of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB).

Regents Rule section 29.10(a) requires public accountants to comply with generally accepted auditing standards and generally accepted accounting principles. The amendment updates the entities that promulgate generally accepted auditing standards applicable to public accounting by adding the SEC and the PCAOB. The amendment updates the entities that promulgate generally accepted accounting principles to add the Government Accounting Standards Board and International Accounting Standards Board.

The amendment establishes requirements for the reporting of prescribed events to the State Education Department. The amendment requires a firm or licensee to report to the State Education Department the occurrence of the following events within 45 days of their occurrence: conviction of a crime that constitutes a felony or misdemeanor; receipt of a court decision in a civil action or an arbitration proceeding awarding a money judgment in excess of \$25,000 where the licensee or firm is found liable for wrongdoing relating to the practice of public accountancy in New York State; and receipt of notice of disciplinary penalty by a governmental agency relating to the practice of public accountancy.

The amendment establishes as unprofessional conduct having admitted guilt or having been found guilty of improper professional practice or professional misconduct in a disciplinary proceeding brought by the SEC or PCAOB, where the underlying conduct constitutes professional misconduct in New York State. It establishes as unprofessional conduct having voluntary consented to a limitation on practice such as a revocation or temporary suspension of practice, or surrender of such authority, after a disciplinary action was commenced by the SEC or PCAOB, where any conduct charged resulting in the practice limitation would if committed in New York constitute professional misconduct.

The amendment incorporates by reference provisions of Federal law (15 USC 78j-1[a], [b], [g], [h], [i], [j], [k], and [l]) that establish auditing requirements relating to the audit in the practice of public accountancy of an issuer of publicly traded securities that is subject to the Federal Sarbanes-Oxley Act of 2002. The amendment limits the use of this definition of unprofessional conduct which incorporates the above Federal statutory requirements to proceedings brought under section 29.10(f), where there is a prior action by the SEC or PCAOB.

Section 78j-1(a) requires public accountancy firms to establish procedures to detect illegal activities that would have a direct and material effect on the audit, to find related party transactions, and to evaluate whether the issuer has the ability to continue as a going concern. Section 78j-1(b) establishes auditors' responsibilities when illegal acts are discovered. Section 78j-1(g) establishes prohibited non-audit services that a public accounting firm may not provide an issuer when the public accountancy firm is contemporaneously performing an audit. Section 78j-1(h) and (i) establishes non-audit services that a public accounting firm may provide an issuer when the firm is contemporaneously performing an audit, provided that such services are pre-approved by the audit committee of the issuer or are de minimus. Section 78j-1(j) establishes requirements for audit partner rotation, prohibiting an audit if the lead audit partner or the audit partner responsible for review, has performed audit services for that issuer in each of the five previous fiscal years of the issuer. Section 78j-1(k) establishes reports that accountancy firms must make to the audit committee of the issuer. Section 78j-1(l) prohibits an accountancy firm from performing an audit for an issuer, if the chief executive officer, controller or other specified officer of the issuer was employed by the accountancy firm and participated in any capacity in an audit during the one-year period preceding the date of the initiation of the audit.

The amendment establishes no additional recordkeeping requirements and will not require public accountants or public accountancy firms to hire professional services in order to comply.

### 3. COSTS:

The amendment will not impose costs on public accountants and public accountancy firms, including those that are located in rural areas, except for the cost of reporting prescribed events. The Department estimates this cost to be approximately \$475 per reportable event, calculated by estimating \$425 for staff time to monitor possible reportable events and process the reports (one hour of time for a professional staff member at \$400 per hour and one hour of time for a support staff member at \$25 per hour) and \$50 for copying and mailing costs.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for licensed public accountants or public accountancy firms that are located in rural areas. The Department has determined that definitions of unprofessional conduct should apply to individuals and firms practicing public accountancy, no matter their geographic location, to ensure a uniform high standard of competency across the State. Because of the nature of the proposed amendment, establishing different standards for licensed individuals and public accountancy firms located in rural areas of New York State is inappropriate.

#### 5. RURAL AREA PARTICIPATION:

The State Board Public Accountancy assisted in the development of the proposed regulation. This Board includes members who live and work in rural areas of New York State. In addition, the State Education Department provided the New York State Society of Certified Public Accountants, which includes members who live and work in rural areas of the State, with draft regulatory language concerning the proposed regulation and engaged in an ongoing conversation with this organization as the Department developed the current proposal.

#### Job Impact Statement

The purpose of the proposed amendment is to prescribe definitions of unprofessional conduct in the practice of public accountancy by updating the names of entities that promulgate generally accepted auditing standards and generally accepted accounting principles, establishing reporting requirements, and setting forth definitions of unprofessional conduct based upon actions of the United States Securities and Exchange Commission (SEC) or the Public Company Accounting Oversight Board (PCAOB).

The proposed amendment establishes standards of practice for New York State licensed public accountants and public accountancy firms. It sets forth standards that licensees and firms must already meet pursuant to Federal law, and establishes violations of such standards as definitions of unprofessional conduct that could subject licensees and firms to professional discipline. In addition, the amendment establishes a reporting requirement for events that relate to possible instances of professional misconduct. This amendment will not affect the number of jobs or employment opportunities in public accountancy or in any other field. Because evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Accreditation of Teacher Education Programs

I.D. No. EDU-16-06-00019-P

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

**Proposed action:** Amendment of section 52.21(b)(2)(iv)(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided); 210 (not subdivided); 215 (not subdivided); 305(1) and (2); 3001(2); and 3004(1)

**Subject:** Accreditation of teacher education programs.

**Purpose:** To define limited conditions under which registered teacher education programs leading to certification in the classroom teaching service may receive from the State Education Department a deferral of the date by which they must be accredited.

**Text of proposed rule:** Clause (c) of subparagraph (iv) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective July 13, 2006, as follows:

(c) Accreditation.

(1) (i) For programs registered on or before September 1, 2001, the requirements of subclause (2) of this clause shall be met by December 31, 2006, *except as provided in subclause (3) of this clause.* [For such programs, the institution shall submit to the acceptable profes-

sional education accrediting association or the department pursuant to the Regents accreditation process, the self-study or its equivalent as prescribed by the department, required for the accreditation review, by July 1, 2004.]

(ii) For programs registered for the first time after September 1, 2001, the requirements of subclause (2) of this clause shall be met within seven years of the date of the commencement of such initial registration.

(2) Programs shall be *continuously* accredited by either:

(i) an acceptable professional education accrediting association, meaning an organization which is determined by the department to have equivalent standards to the standards set forth in this Part; or

(ii) the Regents, pursuant to a Regents accreditation process.

(3) *Exceptions. Programs that meet the requirements of either item (i) or (ii) of this subclause shall receive a deferral of the date by which they must be accredited, in accordance with the requirements of each item.*

(i) *Deferral for programs awaiting accreditation decision. Programs registered on or before September 1, 2001 that are awaiting an accreditation decision from their chosen accreditor following an accreditation review which included a site visit conducted on or before December 31, 2006, shall meet the accreditation requirement in subclause (2) of this clause by December 31, 2007.*

(ii) *Deferral for programs under corrective action plan. Programs registered on or before September 1, 2001 that have been denied accreditation between January 1, 2005 and December 31, 2007, may request from the department a deferral of the date by which they must be accredited in accordance with the requirements of this item.*

(A) *Such programs denied accreditation between January 1, 2005 and July 12, 2006 must submit a written request to the department for the deferral of the date for accreditation by September 1, 2006. Such programs denied accreditation between July 13, 2006 and December 31, 2007 must submit to the department a written request for such deferral within 15 days of receiving written notice of the determination denying accreditation.*

(B) *Such programs may be granted by the department a deferral of the date by which they must be accredited, provided that the programs submit a corrective action plan that is acceptable to the department. Such corrective action plan must be submitted to the department within 60 days of the programs' submission of the request for the deferral of the date for accreditation. The corrective action plan must adequately address the deficiencies identified by the accreditor and establish an acceptable date by which the programs will be accredited based upon a plan to remedy such deficiencies. The department shall review the corrective action plan to determine whether to grant the deferral of the date for accreditation.*

(C) *Where the deferral of the date for accreditation is granted, the department shall determine the date by which the programs must be accredited. Such date shall be stated in the corrective action plan and shall not exceed three years from the date of the department's written notice to the programs of the determination to grant the deferral of the date for accreditation. During the period of the implementation of the corrective action plan, the programs shall demonstrate to the department that the programs are making adequate progress toward meeting the chosen accreditor's standards. Any determination denying re-registration of the programs based upon the initial accreditation review shall be held in abeyance and the programs shall continue to be registered during the period of the review by the department of the programs' request for accreditation deferral and the implementation of an acceptable corrective action plan.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Deputy Commissioner, Office of the Professions, Education Department, 2M West Wing Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: opdepcom@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Section 207 of the Education Law grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 210 of the Education Law grants to the Board of Regents authority to register domestic and foreign institutions in terms of New York standards.

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the education supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and the Board of Regents and authorizes the Commissioner to enforce the laws relating to the education system and to execute education policies determined by the Board of Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (2) of section 3001 of the Education Law requires as a qualification for teaching in the New York public schools the possession of a teacher's certificate under the authority of the Education Law.

Section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to approval by the Board of Regents, regulations governing the examination and certification of teachers employed in all public schools of the state.

## 2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the legislative objectives of the above-referenced statutes by amending requirements for the accreditation of teacher education programs leading to certification in the classroom teaching service, which is a program registration requirement.

## 3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to define limited conditions under which registered teacher education programs leading to certification in the classroom teaching service may receive from the State Education Department a deferral of the date by which they must be accredited.

Under current regulations, teacher education programs leading to certification in the classroom teaching service that were registered prior to September 1, 2001 must be accredited by an acceptable professional education accrediting association or the Board of Regents by December 31, 2006, in order to maintain their registration status. At the present time, 111 institutions offer teacher education programs that must be accredited by December 31, 2006 under the existing requirement. Of these, 59 institutions have achieved accreditation, 29 institutions are awaiting an accreditation decision after a site visit, and 23 institutions will have a site visit this spring or fall.

The Department believes that it is necessary to give teacher education programs additional time to achieve accreditation, under limited conditions. Over the last five years, site visits have already occurred at 88 of the 111 institutions that offer teacher education programs for which accreditation is required by December 31, 2006. Due to the challenges programs face in preparing for accreditation and the demands of scheduling so many site visits in this short period of time, accreditation site visits at all registered teacher education programs have not been completed to date. As stated above, site visits have been scheduled at the remaining 23 institutions through the fall 2006 semester. Consequently, it is likely that the accreditation review will not be completed by December 31, 2006 for some programs. The amendment extends until December 31, 2007 the date by which accreditation must be achieved for programs that have had a site visit as part of their accreditation review by December 31, 2006, and are awaiting an accreditation decision.

Many teacher education programs have never sought accreditation before, and accreditation will require them to change their procedures and internal controls, and add additional personnel and resources. As a result, some programs may need additional time to resolve first-time accreditation issues that resulted in an initial denial of accreditation. The amendment provides these programs more time to resolve these issues under limited conditions. For programs denied accreditation during a limited period of time, January 1, 2005 through December 31, 2007, the amendment permits a deferral of the date by which accreditation must be achieved, provided that the programs submit a corrective action plan acceptable to the State Education Department. The corrective action plan must adequately address deficiencies identified by the accreditor and establish an acceptable date by which the programs will be accredited, which may not exceed three years from the date of the Department's written notice granting the deferral of the date for accreditation.

The amendment is needed to provide the Department with regulatory flexibility to accommodate sound teacher preparation programs that demonstrate the ability to earn accreditation within the short term. Without the amendment, programs may be subject to de-registration for not meet-

ing the accreditation requirement by December 31, 2006. The amendment is intended to provide needed flexibility to permit programs to address deficiencies, thereby limiting disruptions to students while helping to ensure improvements in program quality.

## 4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government, including the State Education Department. The Department will use existing personnel and resources to process requests for deferral of the accreditation date and to review corrective action plans.

(b) Costs to local government: The proposed amendment will not impose any additional costs upon local government.

(c) Costs to private regulated parties: The proposed amendment will require programs that seek a deferral of the accreditation date, after accreditation is initially denied, to submit to the State Education Department a corrective action plan that addresses deficiencies identified by the accreditor. The Department estimates that the cost of developing the plan will be between \$1,240 and \$2,500 (one professional employed for 40 hours at a cost of between \$25 and \$50 per hour, and one clerical staff member employed for 20 hours at a cost of between \$12 and \$25 per hour). The Department believes that many of the programs will use existing personnel to develop the corrective action plan, and therefore the costs will not be additional costs to the institution.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State government," the amendment will not impose any additional costs on State government, including the State Education Department.

## 5. PAPERWORK:

Programs initially denied accreditation and seeking deferral of the date for accreditation will have to apply to the State Education Department for such deferral and submit corrective action plans explaining how they will remedy the deficiencies identified by their chosen accreditor.

## 6. LOCAL GOVERNMENT MANDATES:

The amendment concerns the accreditation of teacher education programs. The proposed amendment does not impose any program, service, duty or responsibility upon local governments.

## 7. DUPLICATION:

The proposed amendment does not duplicate any existing State or Federal requirements.

## 8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered.

## 9. FEDERAL STANDARDS:

There are no applicable standards of the Federal government establishing accreditation requirements for teacher education programs.

## 10. COMPLIANCE SCHEDULE:

The amendment would be effective on its stated effective date. The amendment provides mandate relief by deferring the date by which eligible teacher education programs must be accredited. Because of the nature of the proposed amendment, no additional period of time is needed to enable regulated parties to comply.

### **Regulatory Flexibility Analysis**

The proposed amendment defines limited conditions under which registered teacher education programs leading to certification in the classroom teaching service may receive from the State Education Department a deferral of the date by which they must be accredited. The amendment establishes requirements that must be met by colleges and universities that offer registered teacher preparation programs. It does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

### **Rural Area Flexibility Analysis**

#### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all higher education institutions that offer teacher education programs leading to certification in the classroom teaching service that were registered prior to September 1, 2001 and have not achieved accreditation, including those in the State's 44 rural counties and 71 towns in urban counties with a population density of 150 per square mile or less. The Department estimates that 15 to 20 institutions will obtain a deferral of the date for accreditation pursuant to this amendment, including 5 to 7 that are located in a rural area of New York State.

## 2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The purpose of the proposed amendment is to define limited conditions under which registered teacher education programs leading to certification in the classroom teaching service may receive from the State Education Department a deferral of the date by which they must be accredited.

Under current regulations, teacher education programs leading to certification in the classroom teaching service that were in existence as of September 2001 must be accredited by an acceptable professional education accrediting association or the Board of Regents through the Regents accreditation process by December 31, 2006 in order to maintain their registration status. The amendment extends until December 31, 2007, the date by which accreditation must be achieved for programs awaiting an accreditation decision, provided that these programs have had a site visit as part of their accreditation review by December 31, 2006.

For programs denied accreditation during a limited period of time, January 1, 2005 through December 31, 2007, the amendment permits a deferral of the date by which accreditation must be achieved, provided that the programs submit a corrective action plan acceptable to the State Education Department. Such programs denied accreditation between January 1, 2005 and July 12, 2006 must submit a written request to the State Education Department by September 1, 2006. Programs denied accreditation between July 13, 2006 and December 31, 2007 must submit the request within 15 days of receiving notice of the determination denying accreditation.

Programs must submit the correction action plan to the Department within 60 days of the programs' submission of the deferral request. The corrective action plan must adequately address deficiencies identified by the accreditor and establish an acceptable date by which the programs will be accredited, which shall not exceed three years from the date of the Department's written notice granting the deferral of the date for accreditation. During the period of the implementation of the corrective action plan, the programs shall demonstrate to the Department that they are making adequate progress toward meeting the chosen accreditor's standards.

The proposed amendment will not require regulated parties, including those located in rural areas, to hire professional services in order to comply, and will not impose any additional recordkeeping requirements.

## 3. COSTS:

The proposed amendment will require programs that seek a deferral of the accreditation date, after accreditation is initially denied, to submit to the State Education Department a corrective action plan that addresses deficiencies identified by the accreditor. The Department estimates that the cost of developing the plan will be between \$1,240 and \$2,500 (one professional employed for 40 hours at a cost of between \$25 and \$50 per hour, and one clerical staff member employed for 20 hours at a cost of between \$12 and \$25 per hour). The Department believes that many of the programs will use existing personnel to develop the corrective action plan, and therefore the costs will not be additional costs.

## 4. MINIMIZING ADVERSE IMPACT:

The amendment provides mandate relief by providing a one-time process to defer that date by which an institution of higher education must earn accreditation of its teacher education programs. Because of the nature of the proposed amendment, the State Education Department does not believe it to be warranted to establish different requirements for institutions located in rural areas.

## 5. RURAL AREA PARTICIPATION:

During the development of the proposed amendment, the content of the proposed amendment was discussed with the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives who live and/or work in rural areas, including secondary and post-secondary faculty and administrators. The same discussion occurred with the Board of Regents, which includes representatives from all New York State regions, including rural areas of New York State. In addition, the proposed amendment has been sent to all colleges and universities in New York State that offer teacher education programs leading to certification in the classroom teaching service, including those located in rural areas of New York State.

### Job Impact Statement

The purpose of the proposed amendment is to define limited conditions under which registered teacher education programs leading to certification in the classroom teaching service may receive from the State Education Department a deferral of the date by which they must be accredited. The amendment provides mandate relief to colleges and universities that offer

teacher education programs by authorizing the deferral of the date by which their teacher education programs must achieve accreditation in order to continue to be registered by the State Education Department. The amendment will not affect jobs or employment opportunities in these teacher education programs. The amendment will not affect jobs or employment opportunities in any field. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### State Graduation and Diploma Requirements for Mathematics

I.D. No. EDU-11-06-00006-RP

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

**Proposed action:** Amendment of section 100.5 of Title 8 NYCRR.

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

**Subject:** State graduation and diploma requirements for mathematics.

**Purpose:** To revise mathematics graduation and diploma requirements consistent with policy adopted by the New York State Board of Regents.

**Text of proposed rule:** 1. Paragraph (3) of subdivision (a) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective June 15, 2006, as follows:

(3) Students first entering grade nine in the 2001-2002 school year, but prior to the 2008-2009 school year, shall have earned at least 22 units of credit including two credits in physical education to receive either a Regents or local high school diploma. Students first entering grade nine in the 2008-2009 school year and thereafter shall have earned at least 22 units of credit including two credits in physical education to receive a Regents diploma. Such units of credit shall incorporate the commencement level of the State learning standards in: English; social studies; mathematics, science, technology; the arts (including visual arts, music, dance and theatre); languages other than English; health, physical education, family and consumer sciences; and career development and occupational studies. Such units of credit shall include:

(i) English, four units of *commencement level* credit;

(ii) . . .

(iii) . . .

(iv) mathematics, three units of *credit of mathematics*, which shall be at a more advanced level than grade eight, [and] shall meet commencement-level learning standards as determined by the commissioner, *provided that no more than two credits shall be earned for any Integrated Algebra, Geometry, or Algebra 2 and Trigonometry commencement level mathematics course;*

(v) . . .

(vi) . . .

2. Paragraph (5) of subdivision (a) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective June 15, 2006, as follows:

(5) State assessment system. (i) Except as otherwise provided in subparagraphs (ii), (iii), and (iv) of this paragraph, all students shall demonstrate attainment of the New York State learning standards:

(a) . . .

(b) Mathematics:

(1) for students who first enter grade nine prior to September 1997, by passing either the Regents competency test in mathematics, or a Regents examination in mathematics; or

(2) for students who first enter grade nine in September 1997 and thereafter, by passing a *commencement level* Regents examination in mathematics. For purposes of a Regents endorsed diploma a score of 65 shall be considered passing. For a local diploma a score of 55-64, as determined by the school, also may be considered passing up through the 2007-2008 school year; or

(3) . . .

(4) . . .

3. Paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective June 15, 2006, as follows:

(7) Types of diplomas. (i) . . .

- (ii) . . .
- (iii) . . .

(iv) Earning a Regents diploma. Students first entering grade nine in 2001 and thereafter shall meet the commencement level New York State learning standards by successfully completing 22 units of credit and five New York State assessments distributed as specified in clauses (a) through (k) of this subparagraph. After passing the required New York State assessment or approved alternative in mathematics, science, and English language arts, the remaining units of credit required in that discipline may be in specialized courses. A specialized course is a course that meets the requirements of a unit of credit as defined in section 100.1(a) of this Part and the New York State commencement *level* learning standards as established by the commissioner. A specialized course develops the subject in greater depth and/or breadth and/or may be interdisciplinary. Successful completion of one unit of study in an interdisciplinary specialized course may be awarded only one unit of credit but may be used to meet the distribution requirements in more than one subject. In a public high school, an interdisciplinary specialized course shall be taught by a teacher certified in at least one of the subjects.

- (a) . . .
- (b) . . .
- (c) Mathematics, three units of credit and [the] *a commencement level* Regents examination in mathematics designated by the commissioner or an approved alternative pursuant to section 100.2(f) of this Part. [Students must pass either the Regents examination titled Mathematics A, or until January 2002, both Regents examinations titled Course I and Course II or both Course I and Mathematics A.]
- (d) . . .
- (e) . . .
- (f) . . .
- (g) . . .
- (h) . . .
- (i) . . .
- (j) . . .
- (k) . . .

(v) Earning a Regents diploma with advanced designation. To earn a Regents diploma with an advanced designation a student must complete, in addition to the requirements for a Regents diploma:

(a) additional Regents examinations in mathematics as determined by the commissioner or approved alternatives pursuant to section 100.2(f) of this Part. Students *entering grade 9 prior to September 2009* must pass [the] *two of the three commencement level* Regents examinations in *mathematics* [titled] *through one of the following combinations: Mathematics A and Mathematics B, or Mathematics A and Algebra 2 and Trigonometry* [or the three Regents examinations titled Course I, Course II and Course III or the two Regents examinations titled Mathematics A and Course III]. *Students entering grade 9 in September 2009 and thereafter must pass all three commencement level Regents examinations in mathematics titled Mathematics A or Integrated Algebra, Geometry, and Algebra 2 and Trigonometry.*

- (b) . . .
- (c) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .

(x) *Students who first enter grade nine in September 2009 and thereafter who complete all coursework and testing requirements for the Regents diploma with advanced designation in mathematics and/or science, and who pass, with a score of 85 or better, three commencement level Regents examinations in mathematics and/or three commencement level Regents examinations in science, will earn a Regents diploma with advanced designation, with an annotation on the diploma that denotes mastery in mathematics and/or science, as applicable.*

**Final rule as compared with last published rule:** Substantial revisions were made in section 100.5(b)(7)(v).

**Text of proposed rule and any required statements and analyses may be obtained from:** Anne Marie Koschnick, Legal Assistant, Office of Counsel, Education Department, State Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, e-mail: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Jean Stevens, Interim Deputy Commissioner, Education Department, Office of Elementary, Middle, Secondary and Continuing Education, Rm. 873, Education Bldg. Annex, Albany, NY 12234, (518) 474-5915

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on March 15, 2006, the proposed amendment has been substantially revised.

Section 100.5(b)(7)(v) has been substantially revised to clarify that students entering grade 9 prior to September 2009 must pass two of the three commencement level Regents examinations in mathematics through one of the following combinations: Mathematics A and Mathematics B, or Mathematics A and Algebra 2 and Trigonometry.

Non-substantial revisions were also made in section 100.5(a)(3)(iv) and 100.5(b)(7)(v) to replace the term “Algebra 2/Trigonometry” with “Algebra 2 and Trigonometry.”

The above revisions to the proposed amendment require that the Needs and Benefits and Local Government Mandates sections of the Regulatory Impact Statement be revised to read as follows:

**NEEDS AND BENEFITS:**

The proposed amendment will revise the mathematics graduation and diploma requirements first adopted by the Board of Regents in July 1999, and subsequently revised in November 2003, to help ensure that all students in the State’s public schools have the mathematics skills, knowledge and understandings they need to succeed in the new century. In March 2005, the Board of Regents adopted revised high school performance indicators for mathematics courses in Algebra, Geometry, and Algebra 2 and Trigonometry. The proposed changes to section 100.5 of the Regulations of the Commissioner of Education are now necessary to implement revisions to mathematics graduation and diploma requirements adopted by the Board of Regents in October 2005.

Under current regulations, students must earn three units of credit in mathematics to meet the graduation and diploma requirements. In October 2005, the Board of Regents revised the commencement level mathematics graduation and diploma requirements to align with the revised high school performance indicators for the following three mathematics courses: Integrated Algebra, Geometry, and Algebra 2 and Trigonometry. The mathematics Regents examinations will be revised to reflect the change in the State learning standard for mathematics and the commencement level performance indicators for these courses.

The proposed amendment also limits to two the number of units of credit earned for any of these three commencement level mathematics courses (Integrated Algebra, Geometry, and Algebra 2 and Trigonometry). It clarifies that students entering grade 9 prior to September 2009 must pass two of the three commencement level Regents examinations in mathematics through one of the following combinations: Mathematics A and Mathematics B, or Mathematics A and Algebra 2 and Trigonometry, and that students who enter grade 9 in September 2009 and thereafter must pass all three commencement level Regents examinations titled Mathematics A or Integrated Algebra, Geometry, and Algebra 2 and Trigonometry to meet State graduation and diploma requirements. The proposed amendment also provides for students who first enter grade 9 in September 2009 and thereafter, who complete all coursework and testing requirements for the Regents diploma with advanced designation in mathematics and/or science, and who pass, with a score of 85 or better, three commencement level Regents examinations in mathematics and/or three commencement level Regents examinations in science, an annotation on their Regents diploma with advanced designation that denotes mastery in mathematics or science, as applicable.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment is necessary to implement policy adopted by the Board of Regents at their October 2005 meeting. The proposed amendment revises the mathematics graduation and diploma requirements for students attending the public schools and does not impose any additional compliance requirements on school districts or charter schools. The proposed amendment revises the current mathematics high school graduation and diploma requirements by establishing three commencement level mathematics courses in Integrated Algebra, Geometry, and Algebra 2 and Trigonometry for which new mathematics Regents examinations will be aligned and which students must pass to meet State graduation and diploma requirements.

**Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Revised Rule Making in the State Register on March 15, 2006, the proposed amendment has been substantially revised as described in the Revised Regulatory Impact Statement submitted herewith.

The revisions to the proposed amendment require that the Compliance Requirements section of the Regulatory Flexibility Analysis for Small Businesses and Local Government be revised to read as follows:

**COMPLIANCE REQUIREMENTS:**

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

Under current regulations, students must earn three units of credit in mathematics to meet the graduation and diploma requirements. In October 2005, the Board of Regents revised the commencement level mathematics graduation and diploma requirements to align with the revised high school performance indicators for the following three mathematics courses: Integrated Algebra, Geometry, and Algebra 2 and Trigonometry. The mathematics Regents examinations will be revised to reflect the change in the State learning standard for mathematics and the commencement level performance indicators for these courses.

The proposed amendment also limits to two the number of units of credit earned for any of these three commencement level mathematics courses (Integrated Algebra, Geometry, and Algebra 2 and Trigonometry). It clarifies that students entering grade 9 prior to September 2009 must pass two of the three commencement level Regents examinations in mathematics through one of the following combinations: Mathematics A and Mathematics B, or Mathematics A and Algebra 2 and Trigonometry, and that students who enter grade 9 in September 2009 and thereafter must pass all three commencement level Regents examinations titled Mathematics A or Integrated Algebra, Geometry, and Algebra 2 and Trigonometry to meet State graduation and diploma requirements. The proposed amendment also provides for students who first enter grade 9 in September 2009 and thereafter, who complete all coursework and testing requirements for the Regents diploma with advanced designation in mathematics and/or science, and who pass, with a score of 85 or better, three commencement level Regents examinations in mathematics and/or three commencement level Regents examinations in science, an annotation on their Regents diploma with advanced designation that denotes mastery in mathematics or science, as applicable.

The proposed amendment does not require any additional changes to the previously published Regulatory Flexibility Analysis.

**Revised Rural Area Flexibility Analysis**

Since publication of a Notice of Revised Rule Making in the State Register on March 15, 2006, the proposed amendment has been substantially revised as described in the Revised Regulatory Impact Statement submitted herewith.

The revisions to the proposed amendment require that the Reporting, Recordkeeping and Other Compliance Requirements section of the Rural Area Flexibility Analysis be revised to read as follows:

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

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

Under current regulations, students must earn three units of credit in mathematics to meet the graduation and diploma requirements. In October 2005, the Board of Regents revised the commencement level mathematics graduation and diploma requirements to align with the revised high school performance indicators for the following three mathematics courses: Integrated Algebra, Geometry, and Algebra 2 and Trigonometry. The mathematics Regents examinations will be revised to reflect the change in the State learning standard for mathematics and the commencement level performance indicators for these courses.

The proposed amendment also limits to two the number of units of credit earned for any of these three commencement level mathematics courses (Integrated Algebra, Geometry, and Algebra 2 and Trigonometry). It clarifies that students entering grade 9 prior to September 2009 must pass two of the three commencement level Regents examinations in mathematics through one of the following combinations: Mathematics A and Mathematics B, or Mathematics A and Algebra 2 and Trigonometry, and that students who enter grade 9 in September 2009 and thereafter must pass all three commencement level Regents examinations titled Mathematics A or Integrated Algebra, Geometry, and Algebra 2 and Trigonometry to meet State graduation and diploma requirements. The proposed amendment also

provides for students who first enter grade 9 in September 2009 and thereafter, who complete all coursework and testing requirements for the Regents diploma with advanced designation in mathematics and/or science, and who pass, with a score of 85 or better, three commencement level Regents examinations in mathematics and/or three commencement level Regents examinations in science, an annotation on their Regents diploma with advanced designation that denotes mastery in mathematics or science, as applicable.

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

**Job Impact Statement**

The proposed amendment has been substantially revised as described in the Revised Regulatory Impact Statement submitted herewith.

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

---



---

## Department of Environmental Conservation

---



---

**ERRATUM**

A Notice of Continuation, I.D. No. ENV-46-05-00010-C, pertaining to Environmental Remediation Programs, published in the April 5, 2006 issue of the *State Register* contained an incorrect expiration date. The rule will expire March 15, 2007.

The Department of State apologizes for any confusion this may have caused.

**NOTICE OF ADOPTION****Mechanically Propelled Vessels on Lows Lake**

**I.D. No.** ENV-46-05-00011-A

**Filing No.** 404

**Filing date:** April 3, 2006

**Effective date:** April 19, 2006

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

**Action taken:** Amendment of section 196.4(b) and addition of section 196.4(d) to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101(3)(b), (3)(d), 3-0301(1)(d), (1)(i), (2)(m) and 9-0105(1)

**Subject:** Prohibition of mechanically propelled vessels by the public on Lows Lake.

**Purpose:** To prohibit the use of motorboats by the public on Lows Lake.

**Text of final rule:** 1. Paragraphs (1), (2) and (3) of subdivision (b) of 6 NYCRR Section 196.4 are amended to read as follows:

(b) Notwithstanding the prohibitions set forth in subdivision (a) of this section:

(1) the use of mechanically propelled vessels and aircraft is permitted on water bodies specified in [subdivision (a)] *subdivisions (a) and (d)* of this section by or under the supervision of appropriate officials, in cases of sudden, actual and ongoing emergencies involving the protection or preservation of human life or intrinsic resource values, such as search and rescue operations, forest fires, or oil spills or similar, large-scale contamination of water bodies;

(2) the use of aircraft by administrative personnel on the water bodies specified in [subdivision (a)] *subdivisions (a) and (d)* of this section is permitted upon the written approval of the Commissioner for a specific major administrative, maintenance, rehabilitation, or construction project if that project involves conforming structures or improvements, or the

removal of non-conforming structures or improvements, provided that such use of aircraft will be confined to off-peak seasons for the area in question and normally will be undertaken at periodic intervals of three to five years, unless extraordinary conditions, such as fire, major blow-down or flood, mandate more frequent work or work during peak periods;

(3) the use of aircraft on the water bodies specified in [subdivision (a)] subdivisions (a) and (d) of this section is permitted for a specific major research project conducted by or under the supervision of a state agency if such project is for purposes essential to the preservation of wilderness values and resources, no feasible alternative exists for conducting such research on other state or private lands, such use is minimized, and the project has been specifically approved in writing by the Commissioner after consultation with the Adirondack Park Agency;

2. A new subdivision (d) of 6 NYCRR Section 196.4 is added to read as follows:

(d) *It is unlawful for any person to possess or operate mechanically propelled vessels on Lows Lake, located in the Town of Long Lake, Hamilton County and the Towns of Clifton and Colton, St. Lawrence County, including those expanses of water connected to the main body of Lows Lake, commonly known as Grass Pond, located in the Town of Clifton in St. Lawrence County, and Tomar Pond, located in the Town of Long Lake, Hamilton County. Nothing herein shall prohibit littoral landowners on Lows Lake, or guests of such littoral landowners, from possessing or operating a mechanically propelled vessel on such water bodies.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in Part 196, section 196.4(d).

**Text of rule and any required statements and analyses may be obtained from:** Peter J. Frank, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 473-9518, e-mail: pjfrank@gw.dec.state.ny.us

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

Non-substantive changes were made to Part 196, Section 196.4, subdivision (d). The Town of Colton was added to the description in the express terms. It was inadvertently left out of the original express terms. Its inclusion will aid in the description of the location of Lows Lake. Since this is a minor non-substantive change, revisions to the statements for the RIS, RFA, RAFA and JIS were not necessary.

No other changes were made to the regulation, therefore the original RIS, RFA and statements for the RAFA and JIS have not changed.

**Assessment of Public Comment**

Comment: We support the amendment to protect the Lows Lake Area and bring its use in conformity with the Adirondack Park State Land Master Plan. Motorboats cause water, air and noise pollution, churning up sediments, disturbing wildlife, spreading invasive species, and emitting carbon contributing to climate change.

Response: Comment noted.

Comment: The use of the word "littoral" makes the regulation complex and confusing, and should be rewritten in plain English.

Response: The word "littoral" is a legal term which has a precise common law meaning as interpreted by New York State courts. Substitution of a plain English phrase for this term of art might not capture the many nuances of the term as so interpreted.

Comment: The regulation, in authorizing the "guests" of littoral owners of the lake to use motorboats on the lake, is too open ended; "guest" should be defined as being a "gratuitous overnight guests."

Response: Distinguishing between overnight guests and "daytime only" guests of riparian owners has no basis in law of riparian land ownership. Guests of littoral landowners have the same rights as the littoral landowners themselves.

Comment: The guests of littoral owners of the lake should not be allowed to use motorboats on the lake.

Response: See prior comment. Restricting the ability of guests of littoral landowners in such a way could raise "takings" issues under the United States Constitution.

Comment: Allowing guests of littoral landowners to use motorboats opens the possibility of commercial or consensual arrangements whereby people are inappropriately claimed to be guests of littoral landowners in order to facilitate improper motorized access to the Lake.

Response: Private land on the lake is classified as "resource management" by the Adirondack Park Agency, and any commercial use of such property would require a permit from that Agency. Before issuing such a permit, the Agency would presumably take note of the Master Plan provision indicating that the preservation of the wild character of the Lows Lake-Bog River-Oswegatchie wilderness canoe route without motorboat

or airplane usage is the primary management goal for the Lows Lake Primitive Area. Furthermore, as indicated in the UMP, the Department will continue to monitor the use of aircraft and motorboats on the lake by littoral landowners to see if further adjustments are necessary.

Comment: The Department should, as indicated in its 2005 Regulatory Agenda, address aircraft use on the Lake.

Response: The Department will address aircraft use on Lows Lake as called for in the Bog River Flow Complex Unit Management Plan adopted on January 30, 2003. The plan calls for a phase out of aircraft use over a five year period. The Department will address this in a separate rule making thereby not complicating the existing regulation with a regulation that will not go into effect for several years.

Comment: The Department should also promulgate long overdue regulations on other issues, such as banning the use of motorized equipment in Wilderness areas and banning the storage of personal property on Forest Preserve lands.

Response: Comment noted. The Department continues to review its regulations and propose changes but must determine which rule makings to prioritize.

Comment: The proposed regulation discriminates against older New Yorkers and those with disabilities, improperly includes an exemption for littoral landowners, and has no environmental basis. The lake belongs to all of us. The Forever Wild clause preserved the land for the people of the state but this regulation chips away at the ability of the public to use and enjoy the land.

Response: The regulation implements provisions of the Bog River Flow Complex Unit Management Plan, adopted on January 30, 2003. This UMP, in turn, implements provisions contained in the Adirondack Park State Land Master Plan, which provides on page 79 that the preservation of the wild character of the Lows Lake-Bog River-Oswegatchie wilderness canoe route without motorboat or airplane usage . . . is the primary management goal for the Lows Lake primitive area. However, the Master Plan's guidelines apply only to the public use of mechanically propelled vessels on the Lake. It does not control, regulate or otherwise restrict the exercise of any private property rights which overburden Forest Preserve lands, such as any rights which littoral landowners might have. The Department is continuing to review the rights of littoral landowners on Lows Lake.

The Department disagrees that the regulation arbitrarily restricts many of the elderly and the disabled from engaging in hunting, fishing, and other recreational activities which the Department offers to the public. Consistent with Article XIV, Section 1 of the New York State Constitution, Master Plan guidelines, approved Unit Management Plans, Department regulations and other applicable, law, the Department strives to offer the public—including people with disabilities—a continuum of recreational experiences on State Forest Preserve lands. Some elderly and disabled persons, as well as some younger and able-bodied persons, wish to experience recreational activities on lakes which are characterized by quiet and solitude, and this regulation will give them an additional place to go to access Department programs in such a setting. Persons who prefer to access Department programs by mechanically propelled vessels may access Department programs at other Forest Preserve lakes, many of which are nearby. For instance, Horseshoe Lake in the Horseshoe Lake Wild Forest is in close proximity to Lows Lake and is currently open to the public use of mechanically propelled vessels.

Furthermore, consistent with the terms of an Order on Consent in the case of Galusha et al. v. New York State Department of Environmental Conservation et al., 98-CV-117 (Lek/RWS) (United States District Court for the Northern District of New York), the Department has been aggressively developing accessible facilities in order to improve access by the disabled to recreational programs.

Comment: DEC should adopt motorboat bans on other sensitive water bodies as well.

Response: Banning motorboats from other waterbodies is beyond the scope of this rule making, which is intended to implement provisions contained in the Bog River Flow Complex Unit. Management decisions on whether to ban motorboats from other Forest Preserve waterbodies will be made within the context of the appropriate unit management plans.

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

**Big Game Hunting Regulations**

**I.D. No. ENV-16-06-00022-P**

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

**Proposed action:** Amendment of sections 1.20, 1.27 and 1.31 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0903, 11-0907 and 11-0913

**Subject:** Big game hunting regulations.

**Purpose:** To improve the management of black bear and white-tailed deer.

**Public hearing(s) will be held:** 7:00 p.m., May 17, 2006 at Schoharie County Cooperative Extension, 173 S. Grand St., Cobleskill, 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:** Section 1.20, "Deer management permits-application and issuance," paragraph (c)(1) is amended to read as follows:

(1) An applicant with three of more preference points [will] may be issued his/her first choice DMP during the initial application period.

Section 1.27 "Alternative deer harvest strategies," paragraph (a)(2) is amended to read as follows:

(2) The table below describes the minimum antler requirements, by wildlife management unit (WMU) as described in section 4.1 of this Title, for an antlered deer to be legally taken.

Minimum antler requirements	Wildlife management Unit
(i) At least one antler with at least 3 points. Each point must be at least 1 inch long measured from the main antler beam.	3C, 3H, 3J, 3K
(ii) Any antlered deer	all other WMUs

Section 1.31 "Hunting black bear," paragraph (a)(5) is amended to read as follows:

(5) Catskill bear range means WMUs 3A, 3C, 3H, 3J, 3K, 3M, 3P, 4F, 4G, 4H, 4O, 4P, 4R, 4S, 4X, and 4W (as defined in Section 4.1 of this Title), except those areas specifically closed to big game hunting by the Environmental Conservation Law.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeremy Hurst, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8867, e-mail: jehurst@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.

**Regulatory Impact Statement**

1. Statutory Authority:

Section 11-0303 of the Environmental Conservation Law directs the Department of Environmental Conservation to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Section 11-0903(8) provides the authority to set open seasons, open areas, bag limit, manner of taking, possession and disposition of bear and parts of bears, and the intentional and incidental feeding of bears. Section 11-0903(10) provides the specific authority to set manner of taking, possession, open seasons and bag limits for the harvest of deer. Section 11-0907 governs open seasons and bag limits for deer and bear. Section 11-0913 governs the issuance of deer management permits.

2. Legislative Objectives:

The legislative objective behind the statutory provisions listed above is to establish, or authorize the Department to establish by regulation, certain basic wildlife management tools, including the setting of open areas, and restrictions on methods of take and possession. These tools are used by the Department to maintain desirable wildlife species in ecological balance, while observing sound management practices.

3. Needs and Benefits:

The Department proposes to change the black bear hunting regulations by opening Wildlife Management Units (WMUs) 4F, 4G and 4H in the

northern Catskills to archery, regular and muzzleloading hunting seasons for black bear.

In recent years, black bear numbers have increased through much of southeastern New York. Bears have also expanded their range in the northern Catskills. Their opportunistic foraging behavior has contributed to a growing number of negative interactions with people. This has been especially problematic for some areas in WMUs 4F, 4G, and 4H.

During the past decade, the Department held a series of meetings in the Catskills to discuss the black bear management issues that have resulted from increasing numbers of bear/human interactions, and to develop a statewide black bear management plan. Part of the planning framework addressed bear management in areas occupied by bears now and in areas that may be occupied in the future. The most recent component of the black bear management plan was the creation and use of Stakeholder Input Groups (SIGs) that were asked to identify and prioritize bear impacts and to help Department staff develop black bear management objectives. Three SIGs were established during the fall and winter of 2003-2004 to prioritize bear impacts and recommend actions which might enhance positive impacts and lessen negative impacts in the northern and southern Catskill and Allegany portions of New York's bear range.

The northern Catskill SIG identified the need to reduce nuisance and damage occurrences to both commercial and private property as a key impact for the area being considered. In response, the Department has intensified public education efforts to reduce human induced bear problems and is working to evaluate the effectiveness of public education in reducing bear problems.

Another primary management action specifically suggested by the northern Catskills group was the expansion of bear hunting in WMUs 4O, 4P, 4F, 4G, and 4H. These units have clearly shown an increase in negative interactions in both the agricultural and residential communities.

WMUs 4O and 4P were opened to bear hunting during the regular season in November 2004. In the fall of 2005, both WMUs were open for the entire season, and the combined harvest in those units in the 2005 season was 55 bears. The restructuring of the southern big game hunting season in 2005 also increased the opportunity to better control bear numbers in this portion of the State.

WMUs 4F, 4G and 4H have demonstrated an increasing trend in the number and frequency of bear nuisance problems in recent years. Bear activity and complaint levels have risen by over 100 percent since 1999. The continued expansion of the bear hunting area to include WMUs 4F, 4G and 4H is aimed at the stabilization and or reduction in the number of bears in these areas and thus the reduction of negative interactions between bears and people.

The Department also proposes a minor change to the regulations governing the issuance of Deer Management Permits (DMPs), and an expansion of the current antler restriction pilot program to include two adjacent WMUs.

A regulated annual harvest of deer is necessary to maintain deer populations in balance with deer range, natural food supplies and human land uses. Harvests achieved through legal hunting are needed to meet mandated responsibilities for the efficient management of wildlife resources, the maintenance of desirable species in ecological balance, and the creation of conditions where people and deer can live in harmony. A long term declining trend in the number of licensed deer hunters may jeopardize the Department's future ability to manage wild deer populations. Increasing recreational opportunities may enhance hunter satisfaction and thus continued participation.

Current regulations require that deer management permits be issued to anyone possessing three or more preference points. However, when deer numbers are below the population objective and few permits are needed to achieve target harvest, the Department should not issue permits as liberally as required by the current regulation. This regulatory change will not affect landowners since they will retain the highest probability to receive DMPs when deer populations necessitate population regulation. The proposed amendment will provide a more equitable distribution of DMPs during periods of reduced deer abundance.

There has been a significant increase in interest involving the creation of a different standard for buck hunting in New York, in part due to interest in similar programs in adjoining states. The objective of these efforts is to create a balance among the age classes of the male portion of the deer population by protecting male yearlings (i.e., deer approximately 18 months old). Current law defines a legal buck as a deer with at least one antler three inches in length. "Antler restrictions" typically use a higher antler point count to protect yearling males and achieve a better balance of age ratios.

A pilot antler restriction program was established in 2005 in WMUs 3C and 3J. During the past two years, considerable support has been identified among stakeholders to expand this pilot program to include WMUs 3H and 3K. Increased hunter satisfaction and participation, and an improved balance between age classes of deer are expected outcomes of this proposal.

4. Costs:

This change will not effect the costs for either the Department or for hunters.

5. Local Government Mandates:

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

6. Paperwork:

This amendment does not require any additional paperwork by any regulated entity.

7. Duplication:

None.

8. Alternatives:

Failure to implement actions to control the number and distribution of bears could result in an increase in the number of destruction permits issued outside of the normal seasons, and result in further increase in bear nuisance and damage problems. Failure to amend the deer hunting regulations will make the Department less effective in improving the statewide deer management program. Therefore, the Department does not consider a "no action" alternative to be viable.

9. Federal Standards:

There are no federal standards associated or applicable to the proposed rule.

10. Compliance Schedule:

Hunters will be required to comply with the new regulations beginning with the start of the archery deer and bear hunting seasons in the Southern Zone during the 2006-2007 license year, which begins October 1, 2006.

**Regulatory Flexibility Analysis**

The proposed rule making will revise regulations concerning the extension of areas open to black bear hunting in the Catskill range, expansion of the pilot antler restriction program for deer hunting, and the procedures for issuing Deer Management Permits. The Department of Environmental Conservation (Department) has historically made regular revisions to hunting regulations in an effort to maintain the long-term population viability while observing sound management practices and improving hunter satisfaction. 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 rule making, the Department has determined that this rule making will not impose an adverse economic impact on small businesses or local governments. The proposed revisions will increase the areas open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season. The proposed changes to the regulations pertaining to deer hunting will enhance deer hunter satisfaction, and have negligible effect on small businesses or local governments.

The Department has also determined that these amendments will not impose any reporting, recordkeeping, or other compliance requirements on small businesses or local governments. All reporting or recordkeeping requirements associated with hunting are administered by the Department.

Therefore, the Department has concluded that a regulatory flexibility analysis is not required.

**Rural Area Flexibility Analysis**

The proposed rule making will revise regulations concerning the extension of areas open to black bear hunting in the Catskill range, expansion of the pilot antler restriction program for deer hunting, and the procedures for issuing Deer Management Permits. The Department of Environmental Conservation (Department) has historically made regular revisions to hunting regulations in an effort to maintain the long-term population viability while observing sound management practices and improving hunter satisfaction. 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 rule making, the Department has determined that this rule making will not impose an adverse economic impact on rural areas. The proposed revisions will increase the areas open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season. The proposed changes to the regulations pertaining to deer hunting will enhance deer hunter satisfaction, thereby having a positive effect on rural areas.

The Department has also determined that this rule will not impose any reporting, recordkeeping, or other compliance requirements on public or

private entities in rural areas. All reporting or recordkeeping requirements associated with hunting are administered by the Department.

Therefore, the Department has concluded that a rural area flexibility analysis is not required.

**Job Impact Statement**

The proposed rule making will revise regulations concerning the extension of areas open to black bear hunting in the Catskill range, expansion of the pilot antler restriction program for deer hunting, and the procedures for issuing Deer Management Permits. The Department of Environmental Conservation (Department) has historically made regular revisions to hunting regulations in an effort to maintain the long-term population viability while observing sound management practices and improving hunter satisfaction. 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 rule making, the Department has determined that this rule making will not impose a substantial adverse impact on jobs and employment opportunities.

Few, if any, persons actually hunt as a means of employment. Those few for whom hunting is an income source (e.g., professional guides) will not suffer any substantial adverse impact as a result of this proposed rule making because it increases the areas open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season. The proposed changes to the regulations pertaining to deer hunting will enhance deer hunter satisfaction, and have negligible effect on employment opportunities. For this reason, the Department anticipates that this rule making will have no impact on jobs and employment opportunities. Therefore, the Department has concluded that a job impact statement is not required.

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

**Scallops and Oysters**

**I.D. No.** ENV-16-06-00021-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 49 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0323 and 13-0327

**Subject:** Scallops and oysters.

**Purpose:** To establish new regulations for the conservation and management of scallops and oysters.

**Text of proposed rule:** A new part 49 is added to 6 NYCRR to read as follows:

*Part 49*

*"Shellfish Management"*

*(Statutory Authority: Environmental Conservation Law, Sections 13-0319, 13-0323 and 13-0327)*

*Section 49.1 Bay Scallops ("Argopecten irradians")*

*(a) Purpose. The purpose of this section is to establish conservation and management measures necessary to promote and restore the viability of sustainable bay scallop populations in Peconic bays and other waters of the Marine District.*

*(b) Open season. Bay scallops may be taken during the period from the first Monday in November to March 31, both inclusive.*

*(c) Harvest restrictions, size limit, annual growth line.*

*(1) No person shall take bay scallops except during the open season identified in subdivision b of this section.*

*(2) Except as provided in paragraph 5 of this subdivision, no person shall take bay scallops that do not have an annual growth line or that measure less than two and one-quarter inches from the middle of the hinge to the middle of the bill.*

*(3) Scallops shall be culled when taken.*

*(4) Except as provided in paragraph 5 of this subdivision, any bay scallops taken that do not have an annual growth line or that measure less than two and one-quarter inches from the middle of the hinge to the middle of the bill shall be immediately returned alive to the water.*

*(5) When unintentionally and unavoidably taken, bay scallops which do not have an annual growth line or that measure less than two and one-quarter inches from the middle of the hinge to the middle of the bill shall comprise, by number, no more than two percent of the total catch. For purposes of determining compliance with this subdivision, not less than one representative U.S. standard bushel may be selected from the total catch for examination. If the bushel selected for examination is found to*

contain a number of scallops in excess of two percent by count that do not have an annual growth line or that measure less than two and one-quarter inches from the middle of the hinge to the middle of the bill, the entire catch from which such bushel was taken shall be deemed to contain in excess of two percent scallops, and shall be subject to seizure and applicable penalties under the law.

(d) Gear Restrictions.

(1) Bay scallops may be taken by dredge or scrape, having an opening at the mouth not to exceed thirty-six inches in width, when towed by a boat operated by mechanical power, or other means provided that such dredge or scrape is brought aboard by hand power without the use of a mechanical device.

(2) Bay scallops shall not be taken on Sundays by use of a dredge or other device operated by power.

(e) Catch limits. A person shall not take in excess of ten bushels of bay scallops in one day. Two or more persons occupying the same boat while taking bay scallops may take in the aggregate not more than twenty bushels in one day.

(f) Possession and sale. The following provisions shall apply to possession and sale of bay scallops:

(1) No person shall possess bay scallops for sale for food purposes from April 1 to the first Monday in November. The provisions of this section shall not prohibit the possession of bay scallops, or sale of such scallops, which have been taken from approved areas during the period from the first Monday in November to March 31, both inclusive, shucked and packed in approved packages and frozen, and thereafter kept in a frozen state.

(2) Bay scallops that may lawfully be sold pursuant to the provisions of the Fish and Wildlife Law and regulations adopted pursuant thereto, if lawfully taken in another state or country, may be transported into this state and possessed, bought and sold at any time.

(g) Scallop salvage and relay. Notwithstanding the provisions of subdivision c of section 49.1, the department may issue permits to transplant or salvage scallops of any age, subject to department supervision and regulation, when upon due investigation the department shall find that such scallops are in danger of destruction as the result of predators or wind and tidal action, or other causes.

Section 49.2 Oysters (Family Ostreidae)

(a) Purpose. The purpose of this Section is to establish conservation and management measures necessary to protect and sustain viable populations of oysters in the Marine District.

(b) Definitions. The following terms and their derivatives when used in this Section shall have the following meanings:

(1) "Cultured" means any activities involved in the raising, breeding, growing, planting and containment of oysters which requires the issuance of a permit pursuant to section 13-0316 of the Environmental Conservation Law.

(2) "Landed" means to set or put on shore from any boat or vessel, or to place on to any dock, pier, shore or other structure any oysters taken from the waters of the marine and coastal district.

(3) "Transplanted" means any transfer of oysters from shellfish lands within or without the State to shellfish lands within the State, which requires the issuance of a permit pursuant to article 13 of the Environmental Conservation Law.

(4) "Waters of the marine and coastal district" means all those tidal waters and the lands thereunder which are located within the marine and coastal district as defined in section 13-0103 of the Environmental Conservation Law.

(c) Size limit.

(1) Except as provided in paragraph 4 of this subdivision, Oysters ("Crassostrea virginica") less than three inches in the longest diameter shall not be taken, possessed on the waters of the marine and coastal district, or landed. This size limit shall not apply to oysters transplanted or cultured under permit from the Department subject to the provisions of sections 13-0316, 13-0319 and 13-0321.

(2) Oysters shall be culled when taken.

(3) All oysters which may not be taken pursuant to the provisions of paragraph (1) of this subdivision shall be immediately returned alive to the water.

(4) Oysters measuring less than 3 inches in longest diameter shall not comprise, by number, more than 5 percent of any bushel, or other package or container of different measurement of oysters taken from the catch.

**Text of proposed rule and any required statements and analyses may be obtained from:** Debra A. Barnes, Department of Environmental Con-

servation, 625 Broadway, Albany, NY 12233, (631) 444-0483, e-mail: dabarnes@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:** A negative declaration has been prepared pursuant to the State Environmental Quality Review Act, and is on file with the Department.

**Regulatory Impact Statement**

1. Statutory authority:

Environmental Conservation Law (ECL) Sections 13-0323 and 13-0327 authorize the Department of Environmental Conservation (Department) to fix by regulation measures for the management of oysters and scallops including size limits, catch and possession limits, open and closed seasons, closed areas, restrictions on manner of taking and landing, requirements for permits and eligibility, recordkeeping and identification requirements, and requirements relating to transportation, possession and sale.

2. Legislative objectives:

It is the objective of the above cited statutory authority that the Department establish conservation measures necessary for the protection, management and re-establishment of sustainable bay scallop and oyster resources in New York waters.

3. Needs and benefits:

ECL Section 13-0327 as amended by Chapter 204, Laws of 2005, delayed the opening of the bay scallop season from the first Monday in October to the first Monday in November and required that only those scallops having an annual growth line and measuring not less than two and one-quarter inches from the middle of the hinge to the middle of the bill be taken. The delay in the harvest season was intended to allow bay scallops additional time to grow, mature, and maximize spawning potential, which is essential for the long-term survival of the bay scallop resource. The harvest restrictions placed on "bug" scallops were necessary to ensure that all scallops will be able to spawn at least once prior to harvest.

The proposed rule is consistent with these existing statutory requirements and is necessary to prevent any lapse in the management measures required for the continued protection of this commercially important resource. New York's bay scallop resource has experienced a 99 percent decline since 1985 due to repeated blooms of the brown tide which devastated bay scallop populations in Peconic and Gardiner's Bays. This rule is needed to provide appropriate protection for undersized "bug" scallops and adult scallops to ensure the long-term survival of the resource and rehabilitation of this important fishery.

ECL Section 13-0323 as amended by Chapter 155, Laws of 2005, authorizes the Department to adopt regulations for the management of oysters (Family Ostreidae). There is currently no minimum size limit for the taking of oysters in state waters. However, most municipalities on Long Island have established minimum size limits for the taking of oysters from town-owned underwater lands. The proposed rule is needed to establish a minimum size limit for the taking of oysters, and thereby create consistency between state and town regulations for the taking of oysters. Establishment of a minimum size limit for oysters will also benefit the long-term viability of oyster populations in the Marine District.

Under the terms of the rule, oysters which have been cultivated or transplanted under permit from the Department will be exempt from the minimum size limit. This will benefit marine hatchery and on/off-bottom culture permit holders who are engaged in the cultivation of oysters and will not have any negative impact on wild oyster resources. The majority of oysters harvested and sold in New York State are raised and cultured by aquaculture permit holders.

4. Costs:

(a) Cost to State government:

There are no new costs to state government resulting from this action.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

There will be no costs to the Department for implementation and administration of this rule.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

## 7. Duplication:

The proposed rule does not duplicate any state or federal requirement.

## 8. Alternatives:

A "no action" alternative was considered. If this rule is not adopted by July 2006, there will be no restrictions on the harvest and sale of bay scallops in New York upon the expiration of existing subdivisions 1-6 of ECL Section 13-0327. This will result in the uncontrolled harvest and sale of bay scallops of any size, which would have significant adverse impacts on the viability and restoration of the resource which is already at low population levels. Failure to adopt this rule would ultimately be detrimental to the commercial shellfish harvesters who benefit from the harvest of this economically important species. This alternative was rejected as not being protective of the resource and fishery.

A "no action" alternative was also considered for the oyster size limit provisions of this rule. Failure to adopt this rule will place an unnecessary burden on law enforcement due to the inconsistency between state and town regulations on oyster harvest. The uncontrolled harvest of oysters of any size in state waters is not protective of the resource and long-term viability of oyster populations in state waters. The proposed rule would create a consistent management approach which will benefit the oyster fishery and restoration of oyster resources. The "no action" alternative was rejected as not being protective of the resource.

## 9. Federal standards:

None.

## 10. Compliance schedule:

Compliance with the proposed rule would be required immediately upon the effective date of the rule, if adopted. The Department would provide notifications to harvesters, shippers, aquaculturists and towns to make them aware of these changes. The Department's public website would also be updated to reflect these changes.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

Small businesses affected by the proposed rule will include shellfish harvesters, processors and aquaculture permit holders. The number of shellfish harvesters engaged in the commercial harvest of bay scallops and oysters varies each year based on availability of the resource. For 2005, there were a total of 1,706 shellfish digger permit holders, 20 bay scallop shipper permit holders (shucker/packer) and 86 aquaculture permit holders (25 Marine Hatchery and 61 On/Off-Bottom Culture). Only a small percentage of shellfish digger permit holders, on average about ten percent, participate in the harvest of bay scallops and oysters.

This rule is consistent with existing statutory requirements for the taking of bay scallops. It is expected that the management measures in this rule will result in the potential for increased income to shellfish harvesters and scallop shippers as bay scallop populations rebuild and become available for harvest.

The oyster size limit provisions of this rule should not negatively impact shellfish harvesters because similar size restrictions are already required for the harvest of oysters from most town owned underwater lands pursuant to local town shellfish codes. This rule also allows for an exemption for those oysters cultivated under permit from the Department which will support the oyster aquaculture businesses established in New York and not place any unnecessary burden on that industry.

Towns having management authority over shellfish resources would be required to adopt regulations or codes that are as restrictive as state law or regulation. Presently, nine towns have adopted oyster size limits for the taking of oysters from town owned underwater lands. Towns also have the option of being more restrictive than state law or regulation. The proposed rule is designed to be consistent with town codes controlling the taking of bay scallops and oysters.

## 2. Compliance requirements:

The proposed rule would establish a minimum size limit for the taking of oysters in state waters. The provisions of the proposed rule involving the taking of bay scallops are consistent with the existing statutory requirements and would impose no additional compliance requirements on the industry.

## 3. Professional services:

None.

## 4. Compliance costs:

There are no capital costs that will be incurred by the regulated business or industry to comply with the proposed rule.

## 5. Economic and technological feasibility:

There is no additional technology required for small businesses or local governments, so there are no economic or technological impacts for these

entities. This action has been determined to be economically feasible for all affected parties.

## 6. Minimizing adverse impact:

The proposed rule would not impose any adverse impacts on the regulated shellfish industry and businesses. The protection and maintenance of long term sustainable shellfish resources will have a positive effect on the shellfish industry as well as wholesale and retail markets for these food products. Failure to take appropriate actions to protect these commercially important shellfish resources could result in further decline of these resources which are already at low population levels. The proposed rule is designed to establish adequate protection of these shellfish resources, while at the same time allow for harvest to be undertaken at levels that do not adversely impact the viability of the resource.

## 7. Small business and local government participation:

The proposed rule has been discussed at several meetings of the New York State Shellfish Advisory Committee (SAC). The provision of the proposed rule which establishes a minimum oyster size limit of 2.5 inches in length and allows for an aquaculture exemption was passed by vote of the majority of SAC members in attendance at a meeting held on November 18, 2002. Town shellfish managers, shellfish harvesters, and aquaculturists supported the size requirement, which they felt was necessary for enforcement of town size limits. However, after review of existing town oyster size limits and size limits for other states which were based on a minimum size of 3 inches in length or longest diameter, this provision was changed to 3 inches in longest diameter to be consistent with town and other state shellfish codes pertaining to oyster harvest.

The proposed rule concerning the taking of bay scallops was discussed at SAC meetings held in October 2005 and February 2006. The recently enacted amendment to the ECL pertaining to scallop harvest was initiated by The Nature Conservancy and representatives of East End Baymen's Associations, who indicated that a delay in the scallop season and other changes to scallop harvest regulation would assist their efforts to restore the bay scallop resource in the Peconic Bays. Town shellfish managers from local government participated in meetings of the SAC and discussions on the development of the proposed rule.

**Rural Area Flexibility Analysis**

The proposed rule applies to the taking of bay scallops and oysters from the marine waters of New York. Commercial harvest of bay scallops is primarily undertaken in the waters of Peconic and Gardiner's Bays, located on the eastern end of Long Island in Suffolk County and, to a lesser extent, in parts of western Suffolk and Nassau counties. Commercial harvest of oysters is primarily undertaken in certain town waters located within Suffolk and Nassau counties. Bay scallops and oysters are found only in waters of the marine and coastal district of New York, which includes the counties of Nassau, Suffolk, Kings, Queens, Bronx and Richmond. The Department of Environmental Conservation has determined that there are no rural areas within the marine and coastal district. Consequently, the Department has determined that this rule does not impact rural areas or any public or private entities located in rural areas. Further, the proposed rule does not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Since no rural area will be affected by the proposed rule, a Rural Area Flexibility Analysis is not required.

**Job Impact Statement**

The Department of Environmental Conservation (Department) has determined that the proposed rule will not have a substantial adverse impact on jobs and employment opportunities. Therefore, a job impact statement is not required.

The purpose of the proposed rule is to establish conservation measures necessary for the protection and management of sustainable bay scallop and oyster resources in New York waters. The provisions of the proposed rule controlling the taking of bay scallops are consistent with existing statutory requirements in Environmental Conservation Law Section 13-0327 and will not adversely impact jobs or employment opportunities.

The establishment of a minimum size limit for oysters is supported by the shellfish industry and local town governments. This provision will allow for an aquaculture exemption and is designed to benefit existing aquaculture businesses and promote potential growth of oyster aquaculture in New York.

The proposed rule does not impose any new substantive requirements. Therefore, the Department has concluded that there will not be any substantial adverse impacts on jobs or employment opportunities as a consequence of this rule making.

---



---

## Office of General Services

---



---

### NOTICE OF ADOPTION

#### State Employees Federated Appeal (SEFA)

**I.D. No.** GNS-44-05-00010-A

**Filing No.** 405

**Filing date:** April 4, 2006

**Effective date:** June 30, 2006

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

**Action taken:** Repeal of Part 335 and addition of new Part 335 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 200; State Finance Law, section 201(1)

**Subject:** Charitable contributions through State Employees Federated Appeals (SEFA).

**Purpose:** To establish rules governing the administration of, and participation in, the State Employees Federated Appeal (SEFA), so that employee contributions would be maximized through providing objective and quantifiable participation standards, a centralized application process, a system of accounting, and increased protection of employee privacy.

**Substance of final rule:** Replacing 9 NYCRR 335 with a new Part 335 (State Employees Federated Appeal (SEFA)) provides an updated system for the solicitation of charitable contributions among state employees via payroll deduction. The proposed regulations provide for new participation standards for charities as well as procedures for accounting and the distribution of funds.

Section 335.1 states the purpose and scope of the proposed regulations as well as a general overview of the proposed SEFA structure. The proposed regulations provide a uniform, effective, and efficient policy for solicitation of charitable contributions via payroll deduction among employees of the State. The purpose of the proposed rules is to encourage and facilitate the conduct of such fundraising campaigns and to preclude multiple solicitations of State employees with its adverse effect on the orderly conduct of State business.

The SEFA program will be structured such that the Commissioner will designate one qualified charitable organization in each county or group of counties to manage the campaign and distribute charitable contributions under the direction and guidance of a Local SEFA Committee. Each Local SEFA Committee will be made up of state employee participants, the federated community campaign, and other federations of charitable organizations and/or unaffiliated participants. A Statewide SEFA Council, comprised of representatives from the Local SEFA Committees, will provide centralized services to the Local SEFA Committees. A Statewide SEFA Cabinet will be established, comprised of state agency commissioners (or their designees) appointed by the Governor as well as representatives of organized labor. The Statewide SEFA Cabinet will be responsible for providing continuity and support to the campaign. This will include promoting the campaign on a statewide basis as well as recruiting of state employee participants.

Section 335.2 provides definitions for terms used throughout the proposed regulations.

Section 335.3 establishes the Local SEFA Committees. Each Local SEFA Committee will be comprised of representatives of State employees, the federated community campaign, other federations of charitable organizations and/or unaffiliated participant organizations. Only State employee participants however, are given the authority to vote. Local SEFA Committees are given the responsibility of adopting a written conflict of interest policy as well as by-laws for conducting business and meetings. Each Local SEFA Committee is also responsible for conducting eligibility screenings of all organizations that have applied for participation in its campaign area. Additionally, the Local SEFA Committees are responsible for adopting the budget submitted by the federated community campaign and approving the federated community campaign's plan for supporting or performing charitable services within the campaign over the next campaign term.

Section 335.4 establishes the Statewide SEFA Council. The Statewide SEFA Council shall consist of two representatives from each of five or more geographic regions established by the Commissioner. These representatives shall be employee participants and selected by a majority vote of

the Local SEFA Committee chairpersons within each region. The Statewide SEFA Council is responsible for adopting a written conflict of interest policy and by-laws for conducting business and meetings. It is also responsible for conducting eligibility screenings to make decisions regarding the eligibility of all organizations that have timely applied for participation in SEFA. The Statewide SEFA Council shall oversee and provide centralized services to the annual solicitation campaign, maintain a uniform naming and numbering system to identify participants, and maintain a list of participants. The Statewide SEFA Council shall annually adopt a budget and may annually retain a charitable organization to support the annual solicitation campaign, the Statewide SEFA Council and the Statewide SEFA Cabinet.

Section 335.5 establishes the Statewide SEFA Cabinet. The Statewide SEFA Cabinet consists of a representative of the Statewide SEFA Council and representatives of management and labor. The Cabinet shall adopt a written conflict of interest policy and by-laws for conducting its business and meetings. The Statewide SEFA Cabinet shall be responsible for providing continuity and volunteer support to the campaign (including promotion on a statewide basis) and the recruitment of State employee participants.

Section 335.6 establishes the eligibility requirements for participation in a SEFA campaign. To be eligible, an organization must be a charitable organization that is duly registered and current in its annual financial filings with the Department of Law, unless it has received, and provided, written confirmation from the Attorney General that it is exempt from such registration and filing. It shall operate and comply with all requirements of state and federal laws and regulations related to nondiscrimination as well as equal employment opportunities. Additionally, it shall provide or support a bona fide program or programs that serve health, welfare or recreational purposes. Participants must also have certain documents available for inspection upon request.

An application for participation in an annual solicitation campaign shall be submitted between December first of the year preceding and January fifteenth of the first year in which participation in the SEFA annual solicitation campaign is sought. All applications are to be sent to the Statewide SEFA Council and then applications to only one campaign area will be forwarded by the Statewide SEFA Council to the appropriate Local SEFA Committee. The Statewide SEFA Council shall develop an application form and as part of the application, along with other information an applicant shall provide a completed signed copy of the organization's IRS Form 990, a computation of the percentage of total support and revenue spent on administration and fundraising, and a statement describing the program activities of the charitable organization.

Section 335.7 establishes the federated community campaign and its eligibility provisions, functions and duties. To be eligible as a federated community campaign, a charitable organization shall comply with all qualifications for SEFA participants and shall have successfully conducted fundraising campaigns of a similar scope or nature for at least two years preceding its approval. A federated community campaign shall, among other things, manage the campaign fairly and equitably, conduct its own organization's operations separately from the operations conducted on behalf of SEFA participants, prepare an annual budget, prepare a financial report for the annual solicitation campaign, and be subject to the decisions and supervision of the Local SEFA Committee. Additionally, the federated community campaign shall act as a fiduciary with respect to its receipt and timely distribution of contributions.

Section 335.8 provides for substitutions of existing federated community campaigns. The federated community campaigns approved prior to the effective date of these regulations shall continue in force and effect. A charitable organization may apply to replace a federated community campaign in a campaign area and may apply to solicit contributions from State employees in a county or group of counties having no federated community campaign.

Section 335.9 provides for revocation of eligibility of a participant. If the Statewide SEFA Council determines that a SEFA participant has not maintained the required eligibility qualifications of this Part, or any other applicable state or federal law or regulation, such participant may be removed from the annual solicitation campaign by a majority vote of the Statewide SEFA Council. Additionally, if a participant fails to receive any contributions in the three immediately preceding campaigns, then such participant may be removed from that campaign by majority vote of the Statewide SEFA Council. Any participating charitable organization, federation of charitable organizations or federated community campaign receiving notice of a determination of removal may appeal such determination in accordance with Article 78 of the Civil Practice Law and Rules. The

removed participant may reapply for admission, upon a showing of changed circumstances, after the expiration of a one-year period from the end of the annual solicitation campaign following the determination of removal.

Section 335.10 provides for the distribution of contributions and pledges among participating organizations. Contributions and pledges designated to specific participant charitable organizations are to be distributed to those organizations, minus only the deduction for the SEFA campaign's administrative costs. Undesignated contributions and pledges to the campaign shall be distributed pro rata. Local SEFA Committees shall review the financial report of the campaign for the previous year and the proposed annual budget. The Local SEFA Committee shall determine a fixed administrative cost percentage for the calculation of administrative costs for the next campaign. The administration cost percentage shall not exceed fifteen percent of the sum of SEFA contributions received in the prior calendar year, less pass through contributions received in the prior year.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in Part 335.

**Text of rule and any required statements and analyses may be obtained from:** William Mayer, Office of General Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-5607, e-mail: SEFA@ogs.state.ny.us

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

Section 200 of the Executive Law authorizes the Commissioner of the Office of General Services (OGS) to adopt, amend or rescind rules and regulations relating to the discharge of his functions, powers and duties and those of OGS as prescribed by law.

Section 201(1) of the State Finance Law grants authority to the Commissioner of OGS to approve a single federated community campaign (FCC) in a defined region for the purpose of solicitation of charitable contributions from state employees. The statute also provides that the Commissioner may promulgate such rules and regulations as may be necessary to implement the authority granted therein.

##### 2. Legislative objectives:

The objectives of State Finance Law § 201 were to control the effects of multiple solicitations for charitable contributions among State employees in the workplace and to provide an efficient means of enabling State employees to contribute to charitable causes in their communities and across the State. This proposal seeks to reduce government involvement in the decisions of employees regarding the participation of charities, reduce time demands on the state work force, and expand the pool of volunteers available to support the solicitation of employees.

The proposal recognizes that the annual charitable campaign generally has been operating in an effective manner but needs to respond to efficiencies offered by modern business processes. These regulations should result in higher workplace efficiency among the state workforce, objective participation standards, improved accountability, an increased level of administrative efficiency, and a heightened awareness of employee privacy rights.

##### 3. Needs and benefits:

An FCC is a charitable non-profit organization, named by the Commissioner of OGS by county or groups of counties that solicits and distributes funds to non-profit organizations. Upon the written direction of an employee, the Comptroller deducts the specified amount from the employee's salary and distributes it to the employee's account maintained by the FCC serving the county in which the employee is employed. Until 1980, no regulations existed governing State Employees Federated Appeals (SEFA). SEFA was simply administered by business practices that had been developed through custom.

The proposed regulations are needed to provide a centralized, uniform and objective admission process. In July 1980, the Albany County Supreme Court held that the standard for participation had to be articulated and objective. Additionally, the Court enjoined the Comptroller from authorizing charitable distributions until the Commissioner of OGS adopted regulations that articulated objective participation standards. *Matter of International Service Agencies v O'Shea*, 104 Misc. 2d 1071.

In 1993, the Environmental Federation of New York, Inc. (EFNY) brought an action in Albany County Supreme Court against the Commissioner of General Services, alleging that the SEFA participation standards in practice were arbitrary and capricious. In an unpublished opinion, the Court held that the review of applications for participation by each of the SEFA regions frequently resulted in conflicting and inconsistent participation standards. The salient aspect of the decision was that admission of a charitable organization to participate in SEFA in one FCC area would now

result in that charitable organization gaining admission to all of the FCC areas. The Court found that an FCC could not rationally determine that a charitable organization did not meet the eligibility requirements of the current regulations when another FCC applying the same eligibility requirements determined that the same charitable organization did meet the eligibility requirements.

The proposed regulations will help to assure fiscal integrity. The current regulations do not adequately address a range of fiduciary issues. The proposed regulations provide for a uniform system of accounting and distribution to participants. Because current regulations fail to address accounting, it is impossible to account for the total funds distributed from state payroll systems, total expenses, net distributions or cash on hand. It is also impossible to derive a statewide account because each FCC has a different fiscal year and a stand alone accounting system. The proposed regulations will enable a statewide accounting mechanism by requiring each FCC to prepare a cash reconciliation report for each calendar year. The report will be filed with the Annual Financial Report that is required by the Attorney General's Charities Bureau and prepared by each of the FCCs serving SEFA.

##### 4. Costs:

There are no added costs as a result of this proposal. In fact, the proposed regulations should result in a savings to the State. The current SEFA structure requires charities to submit applications to each of the 23 FCCs. Each FCC currently utilizes six state employees to review applications for a total of 138 statewide. The proposed regulations would reduce the total number of state employees needed to review the majority of applications to ten. This would result in an estimated annual savings of \$10,000.00.

Additionally, current regulations produce 23 local lists of participants known as campaign brochures. Each list uses a different numbering system to identify each charity. The absence of a uniform numbering system is a barrier to payroll automation. The State's current annual payroll data processing costs are estimated to be \$700,000 per year. The data processing task is currently duplicated by the 23 FCCs that carry out pledge card designation instructions. The 23 FCCs' pledge card processing costs are estimated to be \$77,000 per year. Automation of the pledge processing system could substantially reduce annual data processing costs. To facilitate automation of pledge card processing and improve distribution, the proposed regulations enable a uniform numbering system.

Any costs associated with the "Statewide SEFA Council" will be funded within the current 15% overhead percentage and are offset by eliminating redundant costs incurred by the 23 committees.

##### 5. Local government mandates:

There are no local government mandates included in the proposal.

##### 6. Paperwork:

The only paperwork required by this proposal is a cash reconciliation report for the previous calendar year. However, cash reconciliation should already be a part of the FCC's normal operations. The report must be attached as part of the Annual Financial Report that each FCC is required to file with the Charities Bureau each calendar year.

There will actually be a reduction in paperwork for those charities seeking to participate in more than one FCC. Currently, the regulations require each charity to submit a separate application for each FCC that it is seeking to participate in. Under the proposed regulations, each charity would only be required to submit one application to be eligible to participate in additional FCCs.

Current paperwork associated with governmental handling of appeals will be eliminated.

##### 7. Duplication:

This proposal does not duplicate any other rules or legal requirements because it is the sole authorized charitable solicitation of New York State employees.

##### 8. Alternatives:

The first alternative considered was to leave the current regulations unchanged. This was not acceptable because the current regulations do not address the objective participation issues raised in the EFNY decision and they reflect outdated business practices resulting in unnecessary costs to the State and charities.

A second alternative was to only amend the regulations to allow for centralized review of applications that would address the objective participation issues raised by the court in the EFNY decision. This was rejected because OGS decided that it was also necessary to address the fiduciary issues of accounting, timely distribution and access to information. Additionally, OGS decided that enabling a uniform numbering system was

necessary to automate state payroll and FCC pledge card processes that would result in a savings to both the State and the participating charities.

During the development of these proposed regulations, extensive outreach was conducted. OGS requested comments from the Charities Bureau, the Comptroller, the SEFA Statewide Campaign Manager, the United Way of NYS, Community Health Services of New York, and the 2005 Statewide Campaign Leadership Co-Chairs. Written comments were received from the Charities Bureau, Community Health Services of New York and the United Way of NYS.

Much of the regulations reflect comments made by many of those organizations and individuals. For example, the Charities Bureau recommended that undesignated funds (i.e., funds contributed by employees who do not designate recipients) be distributed in the same proportions as designated funds and that an eligibility requirement based on direct public support be eliminated. Community Health Services of New York recommended that the regulations include a requirement that SEFA funds be maintained in separate accounts, that there be notice of all meetings and that there be an eligibility requirement based on a failure to receive any designated funds. The United Way of NYS recommended that Council volunteers be eligible to receive reimbursement for travel expenses, that funding be established to support Statewide SEFA Cabinet operations, and that current SEFA participants be grandfathered into the proposed program. All of these suggestions were incorporated into the proposed regulations.

There were also many comments that were not incorporated into the proposed regulations. For example, their recommendation to adopt an overhead provision that differs from the Combined Federal Campaign (CFC) (the federated community campaign for federal government employees) computation was rejected because it would have added to the administrative burden on participants and FCCs. Their recommendation to eliminate eligibility criteria based on the IRS Form 990 "program services" allocated by the campaign area, the State, the United States, or internationally was rejected because OGS determined that the computation of program services by region offers a quantifiable objective measure for the eligibility criteria of "bona fide" service and the criteria indicates what region the charity provides services to.

Community Health Services of New York also made recommendations that were not included in the proposed regulations. Their recommendation to expand the number of employees participating on the Local SEFA Committees would raise taxpayer costs and decrease the efficiencies of committee operations. Additionally, their suggestion to expand the term of the campaign beyond the last four months of the calendar year would have increased disruption in the workplace.

The current paper based contract between the FCCs and the participants is not included in the proposed regulations because it is not uniformly applied by the 23 committees and adds substantial administrative burdens on the participants and FCCs. In the proposed regulations the Statewide SEFA Council is given the authority to adopt a uniform recertification process and to publish (electronically or otherwise) the 23 FCCs' overhead percentages and dates of distribution.

Additionally, the United Way of NYS made recommendations that were not incorporated into the proposed regulations. Their recommendation to grant time off for state employee volunteers was rejected because the Commissioner lacks the authority to do so. Their recommendation to extend the campaign period was rejected because it would cause additional disruption to the state work force. The suggestion to allow non-state employees to vote was rejected because voting by individuals working as volunteers or employees of charities would result in a conflict of interest with other participants. Finally, the United Way of NYS suggested leaving the current policies for distribution of undesignated funds the way it exists. Currently, there is no uniformity in the way FCCs distribute undesignated funds. The proposed regulations require a pro rata distribution of undesignated funds. This will make the regulations consistent with the method of distribution mandated by the CFC and recommended by the Charities Bureau.

#### 9. Federal standards:

There are no federal government standards governing the establishment of a charitable solicitation of state employees. The federal government conducts a solicitation of its employees similar to SEFA, known as the CFC. CFC regulations are published at 5 CFR Part 950. Where possible, this proposal adopts requirements similar to those of 5 CFR Part 950.

#### 10. Compliance schedule:

The rule shall be effective June 30, 2006.

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

After receiving comments during the public comment period, it was determined that OGS would make certain non-substantial changes based upon requests from a number of organizations. Revised supporting documents are not required or necessary because the non-substantial changes did not cause any revisions to be made to those documents.

#### Assessment of Public Comment

During the comment period which commenced upon publication of the Notice of Proposed Rule Making in the State Register on November 2, 2005, comments were received from Community Health Charities of New York, Community Works of New York State, Affordable Housing Partnership, the Charities Bureau of the Office of the Attorney General, the United Way of New York State, America's Charities, The Capital Region SEFA Committee, the United Way of Northeastern New York, and a joint communication from CSEA/AFSE Local 1000, the Public Employees Federation, United University Professions, Organization of NYS Management/Confidential Employees, Council 82, and AFSCME.

All comments received during the comment period were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act. The issues raised by these comments, significant alternatives suggested by them, statements of the reasons why alternatives suggested by such comments were not incorporated into the rule, and descriptions of the non-substantial changes made to the rule as a result of such comments are found below. Additionally, several technical and grammatical suggestions were made and incorporated into the final rule text.

#### COMMENTS BY COMMUNITY HEALTH CHARITIES OF NEW YORK

COMMENT: Community Health Charities of New York recommended that § 335.3(a)(1)(iii) be amended to clarify that both "other federations of charitable organizations" and "unaffiliated participant organizations" should be notified that they may have representatives on a Local SEFA Committee.

RESPONSE: In § 335.3(a)(1)(iii), the word "or" has been replaced by "and" to clarify the notice requirements.

COMMENT: Community Health Charities of New York recommended that § 335.4(b) be amended to expand the organizations that may be retained by the Statewide SEFA Council from only Federated Community Campaigns ("FCCs") to all charitable organizations.

RESPONSE: Section 335.4(b)(1) was amended to expand the organizations that may be retained by the Statewide SEFA Council from FCCs only, to all charitable organizations.

COMMENT: Community Health Charities of New York recommended that § 335.4(b)(i) be amended so that the total pledges and contributions received by an FCC are used to calculate appropriate expenses for budget purposes, rather than only designated pledges and contributions.

RESPONSE: No change is made because the current formula is objective and may be easily calculated.

COMMENT: Community Health Charities of New York recommended that clarification be made regarding § 335.6(a)(3) and determination of a bona fide program.

RESPONSE: Section 335.6(a)(3)(iii) has been amended to clarify that if the presumptions of (i) and (ii) are not met, (iii) may be considered.

COMMENT: Community Health Charities of New York commented that §§ 335.7(a)(2) and (b)(3) preclude any federation, except the United Way, from serving as an FCC since no other federation provides direct programs or services.

RESPONSE: The phrase, "conduct a bona fide program that provides, health, welfare or recreational services", has been removed to reflect State Finance Law § 201(1), directing that "FCC" mean a charitable non-profit organization that solicits funds for distribution among a substantial number of charitable non-profit organizations.

COMMENT: Community Health Charities of New York recommended that § 335.9(c)(6) only be relevant to subsection (a) and not (b), to avoid a participant being removed from all campaigns if it fails to receive contributions for 3 years in a particular campaign.

RESPONSE: Section 335.9(b) was amended to state that if a participant fails to receive any contributions in any campaign area in three consecutive annual solicitation campaigns, then such participant may be removed from the annual solicitation campaign by a majority vote of the Statewide SEFA Council.

COMMENT: Community Health Charities of New York recommended that § 335.10(b)(1) be amended to not allow contributions designated to specific charities to be considered part of the computation for distribution of non-designated funds.

RESPONSE: No change is made. The current distribution formula was determined as a result of input from many sources.

COMMENT: Community Health Charities of New York recommended that § 335.10(b)(2) be amended to not allow participants receiving designated contributions to be included in the distribution of funds from the undesignated pool of funds.

RESPONSE: No change is made. The current distribution formula was determined as a result of input from many sources.

**COMMENTS BY COMMUNITY WORKS OF NEW YORK STATE AND AFFORDABLE HOUSING PARTNERSHIP OF THE CAPITAL REGION, INC.**

COMMENT: The Community Works of New York State recommended that the Statewide SEFA Cabinet establish the bylaws and conflict of interest policies that would be binding on all SEFA committees.

RESPONSE: No change is made. State Finance Law § 201(1) calls for SEFA campaigns to be organized by county or groups of counties producing a regional system. Bylaws and conflict of interest statements that would be appropriate for one region of the state may not be appropriate for another region.

COMMENT: The Community Works of New York State recommended that the FCCs be required to seek approval from their Local SEFA Committee for any new expenses prior to the expenditure being made. Approval of budget modifications by the Local SEFA Committee would ensure that unnecessary costs would not be incurred.

RESPONSE: No change is made. The FCCs operate under the oversight of the Local SEFA committee. Just as the board of directors does not provide daily corporate management, the Local SEFA Committee does not manage the daily operations of the FCCs. The risk that a Committee may not approve an FCC's expenditure should be adequate.

COMMENT: The Community Works of New York State recommended that a new § 335.4(b)(5) be added to require an audit of the FCCs and the Local SEFA Committees' books and records to ensure compliance with the standards in the regulations.

RESPONSE: No change is made. FCCs are required by § 335.7(a)(1) to comply with the qualifications of § 335.6. FCCs are thereby required to be current with annual financial filings with the Department of Law. The audit standards for financial filings with the Department of Law are set out in § 172-b of the Executive Law.

COMMENT: The Community Works of New York State recommended that § 335.7(c)(7) define "timely distribution", to require that funds be distributed by the FCC on a least a quarterly basis.

RESPONSE: No change is made. Section 335.7(c)(4) requires the budget of the FCC to provide for distributions and the approximate timing of distributions. Section 335.3(b) provides that the Local SEFA Committee approves or rejects the budget. Timing of distribution for campaigns that raise millions of dollars should not be the same as campaigns that raise thousands of dollars.

COMMENT: The Community Works of New York State recommended that the FCCs not be allowed to deduct administrative costs from cash contributions to organizations through SEFA, since these contributions are outside the payroll deduction process.

RESPONSE: No change is made. Handling of contributions by cash and check is labor intensive. This issue is addressed by the Committee's power set out in § 335.7(c)(4) to approve or reject the budget, which includes administrative costs.

COMMENT: The Community Works of New York State recommended that undesignated funds be distributed equally among all approved participating organizations in SEFA or that the undesignated funds be divided into two parts: one half allocated equally to all organizations in SEFA and the other half allocated based on the pro-rata formula in the proposed regulations.

RESPONSE: No change is made. The distribution process at the FCC is not maintained with out significant costs. Every check written adds administrative costs that do not benefit charity. The proposed distribution of undesignated funds is consistent with the decision in ISA v. O'Shea, 104 Misc 2d 1071, 1078, as well as the Combined Federal Campaign (CFC) conducted for federal government employees. SEFA committees have the duty to distribute undesignated funds according to articulated objective standards. (ISA v. O'Shea, 104 Misc 2d 1071, 1078.) The distribution of undesignated funds in the CFC is done on a pro-rata basis (5 CFR 950.501(a)).

COMMENT: The Community Works of New York State recommended that, to participate in SEFA, federations only be required to have at least 10 members rather than at least 15. As an alternative, if federations are required to have 15 members, existing federations with less than 15 members currently participating in the SEFA campaigns, should be grandfathered in.

RESPONSE: No change is made. Consistency between SEFA standards and CFC standards helps reduce administrative confusion and costs. The CFC, at 5 CFR 950.301 (c), sets the standard for the minimum number of members to be considered a federation at 15.

COMMENT: The Community Works of New York State recommended that, when a federation goes below 15 members due to removal of a member, the affected federation not be eliminated from SEFA and be permitted a period of one year to secure additional members.

RESPONSE: No change is made. Consistency between SEFA standards and CFC standards helps reduce administrative confusion and costs. The CFC, at 5 CFR 950.301 (c), sets the standard for the minimum number of members to be considered a federation at 15.

COMMENT: The Community Works of New York State recommended that § 335.7 be amended to provide that a competitive bid process be employed when selecting the FCC. This would allow the Commissioner of the Office of General Services to review applicants based on the necessary qualifications set forth in the proposed regulations and their ability to provide these services at a competitive rate.

RESPONSE: No change is made. Section 335.8 allows any charitable organization to apply to replace an existing FCC.

COMMENT: The Community Works of New York State recommended that organizations receiving funds through SEFA be prohibited from being an FCC, because it presents a conflict of interest to be both the beneficiary of a campaign and the FCC administering the campaign.

RESPONSE: No change is made. State employees should not be denied the ability to donate to charitable organizations acting as FCCs. Section 335.7(a)(1) holds an FCC to the same qualifications as other participants.

COMMENT: The Community Works of New York State commented that there appeared to be a conflict in the procedure for denials of applications to the SEFA campaign. Section 335.4(a)(3) states that an Article 78 is the proper vehicle to appeal a denial. However, § 335.4(c) indicates that decisions of the Statewide SEFA Council, with respect to admission, are final and binding. Community Works recommended § 335.4(c) be deleted and that due process requires that a method of appeal be included.

RESPONSE: An appeal by Article 78 may only be made after the exhaustion of administrative remedies. Section 335.4(c) has been amended to state that decisions of the Statewide SEFA Council, with respect to admission, shall be final and binding and appealable only as provided by § 335.4(a)(3), in recognition of the belief and conviction that the distribution of voluntary contributions of state employees should be solely the decisions of such employees or their authorized representatives.

COMMENT: The Community Works of New York State recommended that the proposed regulations be effective for the 2007 campaign rather than the 2006 campaign.

RESPONSE: The implementation dates have been amended to reflect the new 2007 effective date of the regulation.

COMMENT: The Community Works of New York State recommended deleting the clause in § 335.6(b) that allows for application approval or denial notices to be transmitted electronically without a signature, electronic or otherwise. It is their position that there will be no record of the author of the approval or denial notice if there is no signature, electronic or otherwise.

RESPONSE: No change is made. Communications may be authenticated by many methods other than handwritten signatures. The cost of requiring paper and manual process would needlessly drop the effectiveness of employee donations to charity.

**COMMENTS BY THE OFFICE OF THE ATTORNEY GENERAL**

COMMENT: The New York State Attorney General Office's Charities Bureau ("Charities Bureau") commented that SEFA participants should be required to annually certify that they have complied with the registration and financial reporting requirements of Article 7-A of the Executive Law and § 8-1.4 of the Estates, Powers and Trusts Law. Additionally, the Charities Bureau commented that the regulations should require that specific disclosure language required by section 174-b(1) of the Executive Law be placed in all SEFA brochures and any other solicitations by SEFA.

RESPONSE: Section 335.6(b)(2)(v) and (vi) are added to include the certification requested by the Charities Bureau and to clarify that the Statewide SEFA Council may require added information with applications. Additionally, § 335.7(c)(3)(i)(h) is added to require specific disclosure language to be included in campaign brochures.

COMMENT: The Charities Bureau commented that the regulations should include an additional participant qualification requiring a tax exempt organization to make its IRS 990 Form available upon request, pursuant to IRC § 6104(d) and applicable IRS regulations.

RESPONSE: Section 335.6(a)(7) is added to provide a qualification of participation in compliance with Internal revenue Code Section 6104(d)(4).

COMMENT: The Charities Bureau commented that the provisions of § 335.9(a), authorizing payment of contributions to organizations that have been removed from participation in the campaign, should be deleted.

RESPONSE: Section 335.9(a) is amended to provide that beginning in 2008, an annual re-certification will be conducted by the Statewide SEFA Council, and that in the event there is a determination that eligibility standards are not maintained, receipt of funds shall be stopped.

#### COMMENTS BY UNITED WAY OF NEW YORK STATE

COMMENT: The United Way of New York State recommended that the definition of "Annual Solicitation Campaign", and the timeframe for the campaign, be changed so that new hires could be officially solicited or campaigns could be conducted in state agencies "whenever the time was right".

RESPONSE: No change was made. The purpose of the rule is to limit the disruption in the workplace that is caused by unlimited charitable solicitation of State employees. Extending the campaign beyond the current four-month period would impose significant added costs to the taxpayer. The four-month period established for the SEFA campaign is already significantly longer than the six-week period authorized for the solicitation of the Federal workforce by the CFC described at 5 CFR 950.102(a).

COMMENT: The United Way of New York State recommended that Local SEFA Committees be trained on a regional basis with curriculum and materials developed or approved by the SEFA Council, rather than by the FCC, to ensure consistency.

REPLY: No change is made. The Statewide SEFA Council is authorized by § 335.4(a)(4) to provide for oversight of centralized services, including training of the Local SEFA Committees.

COMMENT: The United Way of New York State recommended that the contract with each participating charity or federation be restored to confirm that the charity continues to meet all the participation qualifications and agrees to abide by the rules for the campaign, and to specify how and when funds will be distributed. The Committee also recommended that if a participant refuses to sign the contract, it should be grounds for revocation in the next campaign.

RESPONSE: No change is made. To decrease administration costs, and rather than require each participant to send the same signed contract information to each of the 23 campaigns, the current contract is replaced by annual certification of eligibility with the publication of the committee's budgeted administration cost percentage. Electronic notification is authorized to promote cost efficiencies.

COMMENT: The United Way of New York State recommended § 335.3(a)(4) be amended to require that the Local SEFA Committees only approve the FCC's plan for supporting SEFA campaign services within the campaign area over the next campaign term, rather than for all charitable services within the campaign area.

RESPONSE: Sections 335.3(a)(4) and 335.7(5) have been amended so that the plan is limited to campaign services.

COMMENT: The United Way of New York State recommended that the expectations for procedures drafted by the FCCs to be approved by the Local SEFA Committees under § 335.3(a)(7), be clarified or deleted.

RESPONSE: Section 335.3(a)(7) has been deleted and § 335.3(a)(4) has been amended to reference "campaign services" rather than "charitable services". The provisions of § 335.3(a)(4) are broad enough to cover the approval task.

COMMENT: The United Way of New York State recommended that reimbursements for the FCC retained to staff the Council and the Cabinet, as well as reasonable travel expenses for Council and Cabinet meetings, be required rather than remain an option.

RESPONSE: Section 335.4(b)(1) allows the state employees serving on the Statewide SEFA Cabinet to authorize travel reimbursement for Council and Cabinet members. Flexibility requires leaving the issue to the judgment of the state employees on the Council.

COMMENT: The United Way of New York State recommended that the responsibilities given to the Statewide SEFA Cabinet and Statewide SEFA Council be clarified. It appeared as though both entities were charged with training and other responsibilities had not yet been delegated.

RESPONSE: Section 335.5(c) is amended to no longer require the Statewide SEFA Cabinet to provide training for state employee participants. Section 335.4(a)(4) is amended to state that included in the centralized services that the Statewide SEFA Council may provide are campaign

reporting systems, database systems, Internet services, and web development and maintenance.

COMMENT: The United Way of New York State recommended that the distinct roles of the Statewide SEFA Cabinet and the Statewide SEFA Council either be made clearer or be merged because serving on the Council and the Cabinet may cause hardship to the local SEFA Chairs in terms of time off from work and travel to meetings, in addition to their responsibilities on their Local SEFA Committee.

RESPONSE: Section 335.5(a) was amended to require only the Chairperson of the Statewide SEFA Council or their designee to serve on the Statewide SEFA Cabinet. Section 335.5(b) clarifies that the Statewide SEFA Council may request the Governor and organized labor to staff the Statewide SEFA Cabinet.

COMMENT: The United Way of New York State recommended that before a uniform numbering and naming system is included as a requirement in the regulations, a cost/benefit analysis be undertaken by OSC and/or OGS.

RESPONSE: No change is made. Currently there are 23 separate listings of participants with conflicting numbering systems and inconsistent naming of charities. Centralizing the list of participants is needed to support the annual certification of participants called for by § 335.9. It also allows state employees to identify participants so they may access web-based registration data maintained by the Charities Bureau. Additionally, it will eliminate the redundant costs of preparing 23 unique listings of participants. Section 335.4(a)(5) is amended to require the Statewide SEFA Council to create a uniform list of participants, to be used beginning in 2008, rather than 2007.

COMMENT: The United Way of New York State recommended expanding the scope of organizations eligible to staff the Council/Cabinet from FCCs to include "other qualified charitable organizations".

RESPONSE: The Cabinet consists of State Employees who may or may not decide to retain a charitable organization to support the annual solicitation campaign. Section 335.4(b) was amended to provide that "an FCC or other charitable organization" may be retained by the Statewide SEFA Council to support it and the Statewide SEFA Cabinet.

COMMENT: The United Way of New York State recommended language requiring that an organization demonstrate that program services are provided in the campaign area they are applying to.

RESPONSE: The intent of the regulations is to encourage broad participation. If a participant does not receive any distributions for 3 years, then it will be removed from participation in that particular campaign area.

COMMENT: The United Way of New York State recommended that, when determining whether a program is bona fide under § 335.6(a)(3), the nature of the program services should take precedence over monetary guidelines.

RESPONSE: The numeric standards set out in § 335.6(a)(3)(i) are articulated objective measures of "bona fide programs that serve health, welfare or recreational purposes" and meet the requirement of *ISA v. O'Shea*, 104 Misc 2d 1071. The term "program service" is defined by the IRS instructions and on the IRS form 990. Elimination of the presumptions would produce a subjective rather than objective participation standard.

COMMENT: The United Way of New York State recommended that notification of action on an application be required to take place one week after the last day in February, since the Council has until the last day in February to act.

RESPONSE: Section 335.6(b) has been amended to require notification to applicants be made by March 7.

COMMENT: The United Way of New York State recommended that the proposed pro rata distribution of undesignated funds, based on the distribution of designated funds, be an option rather than mandated, thus allowing the Local SEFA Committee the ability to address local needs or disasters.

RESPONSE: State employees may address local needs through designations. The proposed distribution of undesignated funds is consistent with the Court's decision in *ISA v. O'Shea*, 104 Misc 2d 1071, 1078 as well as the Federal program. SEFA committees have the duty to distribute undesignated funds according to articulated objective standards. *ISA v. O'Shea*, 104 Misc 2d 1071, 1078. The distribution of undesignated funds in the Combined Federal Campaign is done on a pro-rata basis. 5 CFR 950.501(a).

COMMENT: The United Way of New York State commented that the proposed pro rata distribution of undesignated funds puts the FCC, as a charitable federation, at a disadvantage because the FCC is closely scrutinized and sometimes criticized for providing any publicity about their work to state employees.

RESPONSE: No change is made. The current § 335.10(d)(5) provides that brochures and publicity designed by FCCs are to be free of disproportionate publicity. The proposed § 335.3(a)(6) continues the existing standard.

COMMENT: The United Way of New York State requested clarification regarding the reporting of a campaign's administrative cost percentage and plan for distribution of funds.

RESPONSE: Section 335.10(d)(5) has been renumbered § 335.10(d)(4) and has been amended to state that the administrative cost percentage is to be reported to the Statewide SEFA Council.

COMMENT: The United Way of New York State recommended that projected administrative costs be required on the May 15 deadline, rather than an actual percentage. The United Way recommends submitting a figure based on the prior campaign, and then reconciling after the campaign is over.

RESPONSE: No change is made. The section calls for the reporting of the budgeted administrative cost percentage, not the actual percentage.

#### COMMENTS BY AMERICA'S CHARITIES

America's Charities is in agreement with the comments submitted by Community Health Charities of New York. America's Charities submitted the following additional comments.

COMMENT: America's Charities suggested that the definition of "health, welfare and recreation" be reasonably interpreted in favor of eligibility and not exclusion. They also recommended that education and animal welfare organizations be included.

RESPONSE: Section 335.2(n) has been modified to clarify that the definition of "health, welfare and recreation" includes those organizations whose purposes are beneficial to public welfare. This is consistent with IRS requirements.

COMMENT: America's Charities was concerned that § 335.9(b), regarding the revocation of eligibility, allows for revocation based on designations an organization receives from one SEFA region.

RESPONSE: Section 335.9(b) was amended to state that if a participant fails to receive any contributions in any campaign area in three consecutive annual solicitation campaigns, then such participant may be removed from the annual solicitation campaign by a majority vote of the Statewide SEFA Council.

#### COMMENTS BY CAPITAL REGION SEFA COMMITTEE

COMMENT: The Capital Region SEFA Committee recommended that the proposed Statewide SEFA Council and Cabinet be combined and that the distinct roles for the two groups be merged.

RESPONSE: Section 335.5 is intended to recognize the current functions of the Statewide Leadership that are not addressed in current regulations.

COMMENT: The Capital Region SEFA Committee recommended that reimbursement for reasonable travel expenses for local Chairs to attend Council/Cabinet meetings, be paid from the Local SEFA Committee's budget.

RESPONSE: No change is made. Section 335.4(b)(1) allows the state employees serving on the Statewide SEFA Cabinet to authorize Council and Cabinet members to receive travel reimbursement. To ensure consistency regarding the granting of reimbursements, it is best to leave the responsibility with the Statewide SEFA Cabinet. The regulations do not prohibit payments coming from the Local SEFA Committee budgets if that is determined to be desirable.

COMMENT: The Capital Region SEFA Committee recommended that the proposed regulations continue to require that an organization be in existence for at least three years before it is eligible to participate in SEFA.

RESPONSE: Section 335.6(b)(2)(i) changes the word "audit" to the phrase "annual financial statement filed with the department of law" and clarifies that the IRS Form 990 not be an initial return. By requiring a Form 990 that is not an initial return, the applicant is establishing that it has a track record of public support, without adding the administrative costs of providing, handling, and reviewing three IRS Form 990's.

#### COMMENTS BY UNITED WAY OF NORTHEASTERN NEW YORK

The United Way of Northeastern New York is in agreement with the comments submitted by Capital Region SEFA Committee. The United Way of Northeastern New York submitted the following additional comments.

COMMENT: The United Way of Northeastern New York recommended that proposed rules become effective for the fall 2007 campaign and not the fall 2006 campaign.

RESPONSE: After review, the implementation dates have been amended.

COMMENT: The United Way of Northeastern New York recommended that the regulations require that disbursement be made quarterly or at least semi-annually in the year it is received from the Office of the State Comptroller or other authorized State payroll office.

RESPONSE: No change is made. Section 335.7(c)(4) requires the FCC budget to provide for distributions and the approximate time of distributions. Section 335.3(b) provides that the Local SEFA Committee approves or rejects the budget. Timing of distributions for campaigns that raise millions should not be the same as campaigns that raise thousands.

COMMENTS BY CSEA/AFSE LOCAL 1000, THE PUBLIC EMPLOYEES FEDERATION, UNITED UNIVERSITY PROFESSIONS, ORGANIZATION OF NYS MANAGEMENT/CONFIDENTIAL EMPLOYEES, COUNCIL 82, AND AFSCME.

COMMENT: The public employee unions recommended that the policies limiting the number of consecutive terms for committee members be removed.

RESPONSE: Section 335.3(a)(3) has been amended to remove the requirement that by-laws include a limitation on the number of terms members may serve.

COMMENT: The public employee unions recommended that at least two-thirds of the Statewide SEFA Council be comprised of bargaining unit members, similar to the provision for membership on the Local SEFA Committees. Additionally, they recommended there not be a limitation on the number of consecutive terms committee members may serve.

RESPONSE: No change is made regarding the structure of the Statewide SEFA Council; its structure should be sufficient to ensure equitable representation. Section 335.4(a)(2) has been amended to remove the requirement that by-laws include a limitation on the number of terms members may serve.

COMMENT: The public employee unions recommended that, as much as possible, decisions on eligibility be made on the local level where state employees are more familiar with community needs and the various non-profit organizations. Additionally, they recommended that the ultimate decision on appeals rest with the Statewide SEFA Council.

RESPONSE: The current regional eligibility process frustrates the local eligibility decisions of state employees. It is the frustration of dedicated state employees serving on the local committees that has led to the centralized review of applications detailed in the proposed rule. There are currently 23 regional SEFA campaigns. Under the current procedure, charities must submit one application to each of the regional SEFA committees, and state employees are required to potentially review the same application 23 separate times. Often, when a charity is accepted in one region and denied in another, OGS is burdened by an appeal process that is the product of an inconsistent regional application process. The Court in *ISA v. O'Shea* 104 Misc 2d 1071 supported a more consistent approval process by ruling that the issue of participation must be resolved through an articulated objective standard. Also, the Court in *EFNY v. OGS* held that it is logically impossible or, at very best, highly arbitrary that applications by the same organization could be found by some local committees to meet the requirements for participation and found by the other local committees not to meet the same requirements. A centralized system results in a more consistent approval process.

COMMENT: The public employee unions recommended that non-profit participants be required to follow all state and federal labor laws and regulations, including laws protecting the right to organize. They also recommended that all participants should agree they will not use funds received from the SEFA campaign to encourage or discourage union organization and agree to procedures that provide for labor peace, including majority verification and neutrality in union organizing campaigns similar to the provisions spelled out under state law for public sector and non-NLRB workplaces.

RESPONSE: The proposed rule allows state employees to designate their contributions to the charities they choose. Participating charities that fail to address the concerns of state employees will, as a result, fail to receive contributions and charities that fail to receive contributions for three years may be removed from that campaign. The comment is addressed by each state employee's ability to contribute to only those charities the employee chooses.

COMMENT: The public employee unions recommended that the regulations be amended to grant state employees paid time off and include travel expense reimbursement for SEFA activities.

RESPONSE: No change was made. Paid time off is not within the statutory grant of authority these rules may address. Section 335.4(b)(1) allows state employees serving on the Statewide SEFA Cabinet to authorize reimbursement to Council and Cabinet members for travel expenses.

Flexibility requires leaving the issue of reimbursement to the judgment of the state employees on the Council.

---



---

## Department of Health

---



---

### EMERGENCY RULE MAKING

#### NYS AP-DRG Patient Classification System

**I.D. No.** HLT-16-06-00001-E

**Filing No.** 397

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

**Action taken:** Amendment of sections 86-1.62 and 86-1.63 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(3)

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

**Specific reasons underlying the finding of necessity:** The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, "The Commissioner shall establish as a basis for case classification for case based rates of payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period." Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2006 hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

**Subject:** NYS AP-DRGs, service intensity weights and group average arithmetic inlier lengths of stay.

**Purpose:** To update the NYS AP-DRG patient classification system to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS); to modify existing; and add new DRGs to more accurately reflect pattern of health resource use.

**Substance of emergency rule:** 86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

#### 86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system.

The changes in the DRG classification system described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

**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 June 26, 2006.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2) and 2807(3) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c(3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

The SIWs and non-Medicare trimpoints are an integral part of the 2006 hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Additionally, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

Costs:

Costs to State Government:

The proposed regulations do not impact the cost base upon which payments are made. Therefore, costs to the State are not expected to markedly change as a result of these amendments.

Costs of Local Government:

No increase in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to new medical technologies. No other significant alternatives were considered.

Federal Standards:

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

Compliance Schedule:

The proposed rule establishes rates of payment as of January 1, 2006; there is no period of time necessary for regulated parties to achieve compliance.

Contact person:

William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsna@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

**Regulatory Flexibility Analysis**

Effect on Small Business and Local Governments

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of this rule.

Professional Services

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS), and add new, delete or redefine existing DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no anticipated increases or decreases in hospitals' revenues in the aggregate. Revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b(1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation

Local governments and small businesses were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

**Rural Area Flexibility Analysis**

Effect on Rural Areas

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

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

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. In the aggregate, as a result of these amendments, there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb(2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Opportunity for Rural Area Participation

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its November 17, 2005, meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rule making.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

#### **Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations update the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weights and length of stay standards for each DRG. This classification system, which has been in effect since 1988 in New York State, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. Since this is merely an update, the proposed regulations have no implications for job opportunities.

## **EMERGENCY RULE MAKING**

### **FQHC Psychotherapy and Offsite Services**

**I.D. No.** HLT-16-06-00002-E

**Filing No.** 398

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

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

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

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

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

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

**Subject:** Payment for FQHC psychotherapy and offsite services.

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

**Text of emergency rule:** Section 86-4.9 is amended to read as follows:

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

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

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in paragraph (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the

following services shall not constitute threshold visits: pharmacy, nutrition, medical social services *with the exception of clinical social services in FQHC clinics as defined in paragraph (g) of this section*, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

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

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

(g) For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.

(h) Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.

(i) Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.

(1) FQHC offsite services must:

(i) consist of services normally rendered at the FQHC site.

(ii) be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.

(iii) be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.

(iv) be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.

(v) not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.

(vi) not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.

(2) Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.

**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 June 26, 2006.

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

**Regulatory Impact Statement**

Statutory Authority:

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

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

- Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.
- Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.
- Payment will be made on the basis of a FQHC group rate.
- Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.
- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.
- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

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

Costs:

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

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services.

These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Cost Estimates			
	Downstate	Upstate	Statewide Average	
Offsite Visits Subsequent	\$62.73	\$55.19	\$58.96	Offsite Visits \$1,117,212
Hospital Care Psychotherapy Services				Group Therapy
Group Psychotherapy	\$34.86	\$30.81	\$32.84	\$6,222,733
2004 FQHC Visit Volume	1,894,864			
Volume Increase Assumptions				Total \$7,339,945
Group Therapy Increase = 10%				
Increase 2004 FQHC Volume.				
Off-site Visit Increase = 1% Increase				
Over 2004 FQHC Volume				

Cost to the Department of Health:

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternatives:

Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

Federal Standards:

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

Compliance Schedule:

The proposed amendment will become effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

Effect on Small Businesses and Local Governments:

No impact on small businesses or local governments is expected.

Compliance Requirements:

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

Professional Services:

No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department's (SED) new standards for social worker licensure.

Compliance Costs:

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

Economic and Technological Feasibility:

DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of

size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

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

Types and Estimated Number of Rural Areas:

This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

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

Compliance Costs:

There are no direct costs associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

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

#### **Job Impact Statement**

Nature of Impact:

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

Categories and Numbers Affected:

There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

Regions of Adverse Impact:

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

Minimizing Adverse Impact:

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

Self-Employment Opportunities:

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

**Text of proposed rule:** Part 15 and Appendix 1 of 14 NYCRR are repealed.

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

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

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

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

#### **Regulatory Impact Statement**

1. Statutory Authority:

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

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

c. Section 16.00 of the Mental Hygiene Law grants the commissioner the authority to adopt and promulgate any regulation reasonably necessary to implement and effectively exercise the powers and perform duties set forth in article 16 of the Mental Hygiene Law, which are necessary to maintain the consistent high quality of services provided within the State to its citizens with mental retardation or developmental disabilities.

2. Legislative Objectives: The proposed repeal of this section will further the legislative objectives embodied in Sections 13.07, 13.09(b), and 16.00 of the Mental Hygiene Law by the deletion of outdated, antiquated regulations.

3. Needs and Benefits:

a. The vast majority of the provisions of Part 15 are unnecessary because of the promulgation of similar or more stringent regulatory requirements by the Federal government, such as in regulations governing Intermediate Care Facilities, and regulations promulgated by OMRDD, the Office of Mental Health (OMH) or the Office of Alcoholism and Substance Abuse Services (OASAS) elsewhere in Title 14 of NYCRR. Other portions of Part 15 merely restate provisions of Article 15 of the Mental Hygiene Law.

For example 14 NYCRR subdivision 15.2(a) states, "Admission and treatment procedures must be designed to minimize the perception of being estranged from the rest of the community, to eliminate any depersonalizing or degrading procedures, and to maximize the patient's self-esteem. This would include, but not be limited to, patients maintaining possession of their own clothing and personal belongings unless contraindicated for health and safety purposes." This topic is addressed in Section 633.4 of the same Title by detailing the rights and responsibilities of persons receiving services. Federal government regulations governing Intermediate Care Facilities also address these patient protections in 42 CFR 483.420(a)(9) and 42 CFR 483.420(a)(12). Lastly Mental Hygiene Law addresses similar topics in Section 33.02 and Section 33.07.

The repeal of these provisions will simplify OMRDD's regulations to avoid inconsistencies and confusion due to the same or similar requirements appearing in multiple places. The remaining provisions reference the use of outdated or non-existent documents or are unnecessarily specific or cumbersome.

b. The forms in Appendix 1 are also outdated in their use of terminology and dates and may not reflect current service environments. With the repeal of the requirements, facilities may choose to continue to utilize the old forms or new forms may be developed to address current facility and consumer needs. Facilities may also explore alternative methods of documentation, including the use of electronic recordkeeping. The repeal of the mandate will allow for greater flexibility in the future as needs change; forms may be further modified without seeking a regulatory change and facility specific forms may be designed to best meet user needs.

If there is adequate demand, OMRDD will consider producing a revised set of forms which would be made available to facilities.

---



---

## Office of Mental Retardation and Developmental Disabilities

---



---

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

#### **Admission and Retention Standards**

**I.D. No.** MRD-16-06-00020-P

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

**Proposed action:** Repeal of Part 15 and Appendix 1 of Title 14 NYCRR.  
**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Repeal of the admission and retention standards governing residents of hospitals, schools and alcoholism facilities and the corresponding forms.

**Purpose:** To repeal outdated, antiquated regulations and forms concerning the admission and retention of individuals residing in hospitals (e.g., psychiatric centers), schools (e.g., developmental centers) and alcoholism facilities as defined in the Mental Hygiene Law.

- c. OMH and OASAS also support the repeal of Part 15 and Appendix 1.
- 4. Costs:
  - a. The repeal will have no fiscal effects on the agency, the state or local governments.
  - b. The repeal will have no fiscal effect on private regulated parties.
- 5. Local Government Mandates: There are no new requirements imposed by the repeal of the section or appendix on any county, city, town, village; or school, fire, or other special district.
- 6. Paperwork: The repeal of the forms in Appendix 1 may actually decrease paperwork, as facilities may be able to streamline or consolidate forms. If replacement forms are developed, the time to complete forms may be reduced as the forms would be less confusing and better reflect current terminology and consumer situations at particular facilities. Forms may also be adapted to solicit information necessary to satisfy other systemic needs.
- 7. Duplication: Subsequent to the original adoption of Part 15, both the Federal government and state government have promulgated similar or more stringent regulatory requirements. This repeal removes duplicate requirements.
- 8. Alternatives: OMRDD could leave the old, outdated regulation in effect. However, OMRDD considers its repeal to be a preferable option. As stated, the vast majority of the provisions of Part 15 are no longer necessary because of the promulgation of similar or more stringent regulatory requirements by the Federal government, OMH, OMRDD or OASAS. Other portions of Part 15 merely restate provisions of Article 15 of the Mental Hygiene Law. The remaining provisions reference the use of outdated documents or are unnecessarily specific. Consistent with the mission of the Governor's Office of Regulatory Reform, the repeal of Part 15 and Appendix 1 reduces unnecessary procedures and paperwork requirements.

OMRDD reviewed the forms in Appendix 1 and determined that they are outdated and no longer reflect current service environments. OMRDD considered revising the forms. However because there is no need for a universal format the preferred option is to give facilities the opportunity to continue to utilize the old forms or to develop new forms to better address facility or consumer needs.

9. Federal Standards: The repeal of Part 15 and Appendix 1 will not exceed any minimum standard set by the federal government.

10. Compliance Schedule: OMRDD expects to adopt the repeal as soon as possible within the time frames mandated by the State Administrative Procedure Act.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for the proposed repeal has not been submitted. OMRDD has determined that the repeal will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. The finding is based on the fact that the proposed repeal is the deletion of outdated, antiquated regulations and forms. The majority of the provisions of Part 15 are addressed elsewhere in Title 14 of NYCRR, Article 15 of the Mental Hygiene Law or in Federal regulations. Therefore the repeal of Part 15 will not adversely impact affected facilities. The remaining provisions are unnecessarily specific and as such the deletion will lessen the burden on facilities.

The repeal of Appendix 1 would eliminate the requirement that facilities use outdated forms which may or may not meet their current needs. Facilities would have the option of using current forms or using other documents which may better meet their needs.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis for the proposed repeal is not being submitted because the repeal will not impose any adverse economic impact on rural areas or on reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The finding is based on the fact that the proposed repeal is the deletion of outdated, antiquated regulations and forms. The majority of the provisions of Part 15 are addressed elsewhere in Title 14 of NYCRR, Article 15 of the Mental Hygiene Law or in Federal regulations. Therefore the repeal of Part 15 will not adversely impact affected facilities. The remaining provisions are unnecessarily specific and as such the deletion will lessen the burden on facilities.

The repeal of Appendix 1 would eliminate the requirement that facilities use outdated forms which may or may not meet their current needs. Facilities would have the option of using current forms or using other documents which may better meet their needs.

**Job Impact Statement**

A JIS for the proposed repeal was not submitted because it is apparent from the nature and purpose of the repeal that there will be no impact on

jobs and/or employment opportunities. The finding is based on the fact that the proposed repeal is the deletion of outdated, antiquated regulations and forms. The proposed repeal will not have any effect on jobs or employment opportunities in New York State.

---



---

## Power Authority of the State of New York

---



---

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**State Environmental Quality Review Act**

**I.D. No.** PAS-16-06-00008-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 461 of Title 21 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 8-0113; Public Authorities Law, section 1004

**Subject:** State Environmental Quality Review Act (SEQRA).

**Purpose:** To update and clarify the Power Authority's SEQRA rules.

**Public hearing(s) will be held at:** 10:30 a.m., June 6, 2006, at Power Authority's New York City Office, 501 Seventh Ave., 9th Fl., 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:** Section 461.2 is added to read as follows:

§ 461.2 Severability

*If any provision of this Part or its application to any person or circumstance is determined to be contrary to law by a court of competent jurisdiction, such determination shall not affect or impair the validity of the other provisions of this part or the application thereof to other persons or circumstances.*

Subdivision (g) of Section 461.3 is amended to read as follows:

(g) Director means the Power Authority's [Director of the Environmental Division, and is the individual responsible for the preparation and review of environmental determinations to assure compliance with this Part] *Vice President of Environmental Management or such other person succeeding to the powers and duties of such office under a different title and, in any case, the officer or employee validly exercising such powers and duties in an acting or permanent capacity.*

Subdivision (t) of Section 461.3 is amended to read as follows:

Type II action means an action or class of actions that is not a Type I action and is listed in sections 461.7 and 461.17 of this Part. *Notwithstanding the foregoing, no action having a significant impact on the environment, as determined pursuant to section 461.18 of this Part or defined as a "Type I Action" pursuant to regulations implementing SEQRA adopted by the New York State Department of Environmental Conservation shall constitute a Type II action hereunder.*

Subdivisions (a) and (b) of Section 461.4 are amended to read as follows:

(a) If the [activity] action is a Type I or unlisted action, the director shall determine if other agencies [are involved] *qualify as involved agencies.*

(b) Where it is determined that other agencies are involved [and the activity is a Type I action], the director shall mail the EAF, *with Part I thereof completed*, and a copy of an application, if applicable, to the involved agencies, notifying them that, within 30 calendar days of the date the EAF was mailed to them, a lead agency must be designated by agreement among them. If no lead agency is agreed upon within the 30-day period, the Power Authority, pursuant to [6 NYCRR 617.6(e)] *6 NYCRR 617.6(b)(5)(i)*, may request *by certified mail or other form of receipted delivery* the commissioner of the New York State Department of Environmental Conservation to designate a lead agency.

Paragraphs (5) and (8) of subdivision (b) of Section 461.6 are amended to read as follows:

(5) any nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to the Agriculture and Markets Law, article [25, section 303] 25-AA, sections 303 and 304) which exceeds 10 percent of any threshold established in this section;

(8) any action which exceeds the locally established thresholds or, if no such thresholds are established, any action which takes place wholly or partially within, or substantially contiguous to, any critical environmental area designated by a local agency pursuant to 6 NYCRR [617.4] 617.14.

Paragraph (9) of subdivision (d) of Section 461.9 is amended to read as follows:

(9) a discussion of the effects of the proposed action on the use and conservation of energy, where applicable and significant, *provided that in the case of an electric generating facility, the statement shall include a demonstration that the facility will satisfy electric generating capacity needs or other electric system needs in a manner reasonably consistent with the most recent state energy plan;*

New paragraphs (10) and (11) are added to subdivision (d) of Section 461.9 as follows:

(10) *a discussion of the effects of the proposed action on solid waste management where applicable and significant;*

(11) *a discussion of the effects of any proposed action on, and its consistency with, the comprehensive management plan of the special groundwater protection program, as implemented by the commissioner pursuant to article 55 of the Environmental Conservation Law;*

Paragraphs (10), (11), (12), and (13) of subdivision (d) of Section 461.9 are renumbered as follows:

[(10)] (12)

[(11)] (13)

[(12)] (14)

[(13)] (15)

Subparagraphs (i) and (vii) of paragraph (2) of subdivision (a) of Section 461.11 are amended to read as follows:

(i) [with the Commissioner of Environmental Conservation at 50 Wolf Road, Albany, NY 12233] *electronically at enb@gw.dec.state.ny.us and also with the Division of Environmental Permits, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-1011;*

(vii) at the Power Authority's headquarters office and at any local offices or projects in the area affected by the activity[.];

Subparagraph (viii) of paragraph (2) of subdivision (a) of Section 461.11 is added to read as follows:

(viii) *by delivery to any person who has requested a copy.*

Subparagraphs (ii), (iii), and (iv) of paragraph (2) of subdivision (b) of Section 461.11 are amended to read as follows:

(ii) [with the State Clearinghouse] *with the Department of Environmental Conservation, Division of Environmental Permits, 625 Broadway, Albany, NY 12233-1750; and*

(iii) [with the appropriate regional clearinghouse designated under the Federal Office of Management and Budget circular A-95; and] *for actions in the coastal zone, with the Secretary of State.*

[(iv) for actions in the coastal zone, with the Secretary of State.]

Subdivision (a) of Section 461.17 is amended to read as follows:

(a) Reconditioning, *rehabilitating or modernizing* of existing facilities and structures, including essentially maintenance-type work with improvements to correct substandard features *not involving large-scale new construction or expansion.*

Subdivisions (ab) and (aj) of Section 461.17 are amended to read as follows:

(ab) *Issuance or retirement* of indebtedness.

(aj) *Contracts for the purchase of power or supply arrangements that are financial in nature, including contracts for differences,* which do not commit the Power Authority to the construction of a large-scale energy facility.

Subdivision (ap) of Section 461.17 is amended to read as follows:

(ap) *Contracts or agreements contingent on the completion of the SEQRA process or the obtaining of a Certification of Environmental Compatibility and Public Need pursuant to the Public Service Law[, article VII or VIII, Certification of Environmental Compatibility and Public Need].*

Paragraph (5) of subdivision (ar) of Section 461.17 is amended to read as follows:

(5) seawalls, *bulkheads* and other shore-protection facilities and structures, fences, guardrails and barriers;

Subdivision (as) of Section 461.17 is amended to read as follows:

(as) The replacement, restoration, rehabilitation, reconstruction, renovation, demolition and removal of small existing *items of* equipment, structures or facilities, where the structure or facility to be modified or replaced will have substantially the same purpose and capacity as that replaced. Structures and facilities include, but are not limited to, those itemized under subdivision (ar) of this section. The activities described above in this category shall be limited to those having an estimated cost of \$500,000 or less, or which will have an interior area of not more than 10,000 square feet and not involve a total land area of more than two acres. Actions within this class are categorically exempt, as noted in subdivision (ar), except where substantially less harmful equipment having similar performance is available or where substantial noise, air, water or other pollution or the release of substantial waste products is likely to result from the reconstruction or replacement projects.

Paragraphs (4) and (8) of subdivision (au) of Section 461.17 are amended to read as follows:

(4) forest management practice, including construction, maintenance and repair of facilities or structures and silvicultural activities in compliance with [the Forest Road Construction Handbook (1973) and the Timber Harvesting Guidelines for New York (1975), or practice approved by the Public Service Commission] *applicable rules and guidelines;*

(8) ground application of registered pesticides, on an individual tree basis for the [suppression of forest] *control of* pests on Power Authority lands;

Paragraphs (10) and (11) of subdivision (ax) of Section 461.17 are amended to read as follows:

(10) dissemination of public information and public information activities; [and]

(11) the making of investments by or on behalf of the Power Authority[.]; *and*

A new paragraph (12) of subdivision (ax) of Section 461.17 is added to read as follows:

(12) *adoption of regulations, policies, procedures and legislative decisions in connection with any action on this list.*

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

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

**Public comment will be received until:** Five days after the last scheduled public hearing required by statute.

#### **Regulatory Impact Statement**

1. Statutory authority: Environmental Conservation Law Section 8-0113(3) and Public Authorities Law Section 1004 authorize the New York Power Authority ("Authority") to adopt, amend, and modify rules and regulations to implement the State Environmental Quality Review Act ("SEQRA"). The Authority initially adopted such SEQRA rules in 1985.

2. Legislative objectives: The Authority's proposed amendments to its SEQRA rules incorporate certain changes made to SEQRA since 1985 and to clarify and update the Authority's existing rules where appropriate.

3. Needs and benefits: It is appropriate for the Authority to periodically amend its SEQRA rules to reflect statutory changes and to clarify and update existing rules. Although the Authority's proposed amendments do not attempt to replicate the SEQRA regulations promulgated by the New York State Department of Environmental Conservation ("DEC") at 6 NYCRR Part 617, it may nevertheless be noted that most of the amendments will enhance the consistency of the two. Other changes are typically procedural, non-substantive, and/or minor in nature. Thus:

The addition of Section 461.2 conforms to the DEC regulations at Section 617.18 of Title 6 NYCRR.

The amendment of Section 461.3(g) is non-substantive and clarifies the existing definition of "Director" as meaning the Vice President of Environmental Management or such other person designated to act in that capacity.

The addition of subsection (t) to Section 461.3 conforms to the DEC regulations at Section 617.5(a) (i) of Title 6 NYCRR.

The amendments to subsections (a) and (b) of Section 461.4 are to conform to DEC regulations Section 617.2(s) and Section 617.6(b)(5)(i) of Title 6 NYCRR.

The amendments to paragraphs (5) and (8) of subsection (b) of Section 461.6 conform to DEC regulations at Section 617.14 of Title 6 NYCRR.

The addition and amendments to Section 461.9 capture and reflect statutory amendments made to Section 8-0109(2) of the Environmental Conservation Law.

The amendments to subparagraphs (i) and (vii) of paragraph (2) of subsection (a) of Section 461.11 conform to DEC regulations at Section

617.12(c) of Title 6 NYCRR. The addition of new subparagraph (viii) to paragraph (2) of subsection (a) of Section 461.11 conforms to DEC regulations at Section 617.12(b)(iv) of Title 6 NYCRR. The amendments to subparagraphs (ii), (iii), and (iv) of paragraph (2) of subsection (b) of Section 461.11 are non-substantive procedural mailing instructions.

The amendments to subsection (a) of Section 461.17 are to clarify the scope of reconditioning of existing facilities. The amendment of subdivision (ab) of subsection (z) of Section 461.17 is to clarify that retirement of indebtedness is to be treated the same as issuance for purposes of this provision. The amendment of subdivision (aj) of subsection (z) of Section 461.17 is to clarify that contracts for the purchase of power may also include contracts for differences and other types of financial supply arrangements. The amendment of sub-subdivision (5) of subdivision (ar) of subsection (z) of Section 461.17 is to clarify that bulkheads are included in shore-protection facilities. The amendment of Subsection (ap) of subsection (z) of Section 461.17 is non-substantive and is to repeal an obsolete reference and conforms to DEC regulations at Section 617.5(b)(35) of Title 6 NYCRR.

The amendment to subdivision (as) of subsection (z) of Section 461.17 is a non-substantive semantic clarification. The amendment to sub-subdivision (4) of subdivision (au) of subsection (z) of Section 461.17 is to repeal an obsolete reference and update the provision. The amendment of (8) of subdivision (au) of subsection (z) of Section 461.17 is to replace the word "suppression" with "control of". The amendments to sub-subdivisions (10) and (11) of subdivision (ax) of subsection (z) of Section 461.17 are non-substantive and for renumbering purposes. The addition of a new sub-subdivision (12) of subdivision (ax) of subsection (z) of Section 461.17 is to clarify that adoption of policies or procedures concerning any listed action also comprises a Type II action.

4. Costs: There will be no additional costs to regulated parties for implementation of and continued compliance with the Authority's modifications to its SEQRA rules. There are no anticipated additional expenses to the Authority or to state and local governments for implementation and continuation of the Authority's modifications to its SEQRA rules.

5. Local government mandates: The Authority's modifications to its SEQRA rules do not impose any additional programs, service, duty or responsibility on any county, town, village, school district, or other special district.

6. Paperwork: The Authority's modifications to its SEQRA rules do not impose any additional need for any reporting requirements, including forms and other paperwork.

7. Duplication: The modifications to the Authority's SEQRA rules do not duplicate, overlap, or conflict with any relevant rules of the state or federal governments. These modifications are generally consistent with DEC's SEQRA rules.

8. Alternatives: Before determining to amend its SEQRA rules as indicated, the Authority also considered leaving the existing 1985 version of the rules unchanged and also repealing these rules *in toto* with the exception of the "Type II" list appearing at 21 NYCRR § 461.17. The first alternative was rejected because Section 8-0107 of the ECL imposes an affirmative obligation on the Authority to review its regulations, policies, and procedures in order to determine whether they contain deficiencies that might inhibit implementation of SEQRA and to take steps to address any such deficiencies. The second alternative was rejected because the Authority believes that the complexity and scope of its statutory mandate make the maintenance of an independent, stand-alone platform for implementing SEQRA essential to the Authority's functioning.

9. Federal standards: The Authority's modifications to its SEQRA rules do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: It is anticipated that regulated persons will be immediately able to achieve compliance with the Authority's modifications to its SEQRA rules.

**Regulatory Flexibility Analysis**

1. Effect of rule: It is anticipated that small businesses and local governments will be unaffected by the Authority's modifications to its SEQRA regulations.

2. Compliance requirements: Small businesses and local governments will not have to undertake any additional reporting, recordkeeping, or other affirmative acts because of the Authority's modifications to its SEQRA regulations.

3. Professional services: Small businesses and local governments will not require any additional professional services to comply with the Authority's modifications to its SEQRA regulations.

4. Compliance: Regulated business, industry, or local government will not incur any additional initial capital costs or annual costs for continuing compliance because of the Authority's modifications to its SEQRA regulations.

5. Economic and technological feasibility: The Authority's modifications to its SEQRA regulations will not affect the economic and technological feasibility of compliance by small businesses and local governments.

6. Minimizing adverse impact: The Authority's modifications to its SEQRA regulations will not have any additional adverse impact on small businesses of local governments.

7. Small business and local government participation: Under State Administrative Procedure Act Section 202-b(6), the Authority will ensure that small businesses and local governments have an opportunity to participate in the rule making process by publishing the Notice of Proposed Rule Making in the State Register and conducting a public hearing.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: The Authority's modifications to its SEQRA regulations will not affect the number of rural areas to which these SEQRA regulations will apply. These modifications will not impose any additional requirements on rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The Authority's modifications to its SEQRA regulations will not require any additional reporting, recordkeeping, professional services, or other compliance requirements in rural areas.

3. Costs: It is estimated that there will be no additional initial capital costs or annual costs for any public and private entities in rural areas because of the Authority's modifications to its SEQRA regulations.

4. Minimizing adverse impact: The Authority's modifications to its SEQRA regulations will not cause any additional adverse impact to public and private sector interests in rural areas.

5. Rural area participation: The Authority will comply with State Administrative Procedure Act Section 202-bb(7) by publishing the Notice of Proposed Rule Making in the State Register and conducting a public hearing.

**Job Impact Statement**

1. Nature of impact: The Authority's modifications to its SEQRA regulations will have no impact on jobs and employment opportunities.

2. Categories and numbers affected: The Authority's modifications to its SEQRA regulations will not affect any categories of jobs or employment opportunities.

3. Regions of adverse impact: The Authority's modifications to its SEQRA regulations will not have a disproportionate adverse impact on jobs or employment in any region of the state.

4. Minimizing adverse impact: This item is not applicable to the Authority's modifications to its SEQRA regulations.

5. Self-employment opportunities: This item is not applicable.

---



---

## Public Service Commission

---



---

**NOTICE OF ADOPTION**

**Initial Tariff Schedule by Sterling Homes, LLC**

**I.D. No.** PSC-06-05-00025-A

**Filing date:** March 30, 2006

**Effective date:** March 30, 2006

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

**Action taken:** The commission, on March 15, 2006, adopted an order approving the request of Sterling Homes, LLC to make various changes in the rates, charges, rules and regulations contained in its schedule for water service—P.S.C. No. 1.

**Statutory authority:** Public Service Law, section 89-e(2)

**Subject:** Water rates and charges.

**Purpose:** To set forth the initial rates, charges, rules and regulations under which Sterling Homes, LLC will operate.

**Substance of final rule:** The Commission approved the initial tariff schedule of Sterling Homes, LLC setting forth the rates, charges, rules and regulations under which the company will operate to become effective

April 1, 2006, and directed the company to file the necessary tariff leaves, 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-0053SA1)

### NOTICE OF ADOPTION

#### Transfer of Water Plant Assets by the Hamlet of Groveland Station Water Corp. and the Livingston County Water and Sewer Authority

**I.D. No.** PSC-21-05-00013-A

**Filing date:** March 30, 2006

**Effective date:** March 30, 2006

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

**Action taken:** The commission, on March 15, 2006, adopted an order approving the request by the Hamlet of Groveland Station Water Corp. and the Livingston County Water and Sewer Authority for approval of the transfer of the Hamlet of Groveland Station Water Corp.'s Water System to the Livingston County Water and Sewer Authority.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Transfer of water plant assets.

**Purpose:** To approve the transfer of water plant assets of Hamlet of Groveland Station Water Corp. to the Livingston County Water and Sewer Authority.

**Substance of final rule:** The Commission approved the joint petition of the Hamlet of Groveland Station Water Corp. and the Livingston County Water and Sewer Authority to transfer the water plant assets of the Hamlet of Groveland Station Water Corp. to the Livingston County Water and Sewer Authority, 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-0531SA1)

### NOTICE OF ADOPTION

#### Water Rates and Charges by Antlers of Raquette Lake, Inc.

**I.D. No.** PSC-31-05-00014-A

**Filing date:** March 30, 2006

**Effective date:** March 30, 2006

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

**Action taken:** The commission, on March 15, 2006, adopted an order approving the request of Antlers of Raquette Lake, Inc. to increase its annual water revenues to establish a surcharge and escrow account to finance system improvements.

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

**Subject:** Water rates and charges.

**Purpose:** To increase Antlers of Raquette Lake, Inc.'s annual revenues.

**Substance of final rule:** The Commission approved the request of Antlers of Raquette Lake, Inc. to increase its annual water revenues by \$13,459 or 1,252% on a temporary basis, 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-0839SA1)

### NOTICE OF ADOPTION

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

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

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

**Action taken:** The commission, on March 15, 2006, adopted an order approving Arbor Hills Waterworks, Inc.'s request to impose a quarterly surcharge of \$296 per customer for a three-year period to establish an escrow account to fund capital improvements.

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

**Subject:** To fund an escrow account for capital improvements.

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

**Substance of final rule:** The Commission authorized Arbor Hills Waterworks, Inc. to impose a quarterly surcharge of \$296 per customer for a three year period to establish an escrow account to fund capital improvements and directed the company to file the necessary revisions to implement the surcharge, 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-1143SA1)

### NOTICE OF ADOPTION

#### Transfer of Water Plant Assets from Lettiere Water System to Southside Water Inc.

**I.D. No.** PSC-04-06-00028-A

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

**Action taken:** The commission, on March 15, 2006, adopted an order approving the request of James V. Lettiere, Jr. d/b/a Lettiere Water System (Lettiere) to transfer assets to Southside Water Inc. (Southside).

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Transfer of water plant assets.

**Purpose:** To approve the transfer of water plant assets from Lettiere Water System to Southside.

**Substance of final rule:** The Commissioner approved the request of James V. Lettiere, Jr. d/b/a Lettiere Water System to transfer its water plant assets to Southside Water Inc., subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-

1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-0001SA1)

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

**Transfer of Books and Records by Taconic Telephone Corp., et al.  
I.D. No. PSC-16-06-00009-P**

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

**Proposed action:** The commission is considering the petition of Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation to transfer their accounts, books and records from their principal offices in New York State to one central location in South Portland, ME.

**Statutory authority:** Public Service Law, section 94

**Subject:** Transfer of books and records.

**Purpose:** To determine whether to allow the transfer of the books and records of Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation from their principal offices in New York State to one central location in South Portland, ME.

**Substance of proposed rule:** The Commission is considering Taconic Telephone Corp., Berkshire Telephone Corporation and Chautauqua and Erie Telephone Corporation's request – pursuant to Title 16, Sections 642 and 661.2 of the New York Codes, Rules and Regulations (16 NYCRR Sec. 642 and 661.2) - to transfer the hard copies of their accounts, books and records from their principal offices in New York State to one central location in South Portland, Maine. The three telephone corporations are all subsidiaries of FairPoint Communications, Inc. When FairPoint acquired each of these companies an Order was issued requiring them to seek the Commission's permission before removing their books and records from New York State — For Chautauqua and Erie Telephone Corporation see Case 96-C-1069, Order Approving Financing and Acquisition Subject to Conditions (issued June 27, 1997); For Taconic Telephone Corporation see Case 97-C-1618, Order Approving Financing and Acquisition Subject to Conditions (issued February 25, 1998); For Berkshire Telephone Corporation see Case 03-C-0972, Order Approving Financing and Acquisition Subject to Conditions (issued March 18, 2005). Pursuant to Section 3.3 of the Commission's rules (16 NYCRR Sec. 3.3), the FairPoint Companies request a waiver of those order provisions.

**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. Brillig, 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.

(06-C-0341SA1)

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

**New Types of Electricity Meters, Transformers and Auxiliary Devices by Ritz Instrument Transformers Incorporated**

**I.D. No. PSC-16-06-00010-P**

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

**Proposed action:** The commission is considering whether to approve or reject, in whole or in part, a petition filed by Ritz Instrument Transformers Incorporated for the approval of three families of electrical capacitor voltage transformers.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Approval of new types of electricity meters, transformers, and auxiliary devices.

**Purpose:** To permit electric utilities in New York State to use the proposed Ritz Instrument Transformers capacitor voltage transformers.

**Substance of proposed rule:** The Commission will consider a request from Ritz Instrument Transformers Incorporated (Ritz) for the approval for use in New York of three families of capacitor voltage transformers (CVTs). According to Ritz, the proposed CVT line is capable of providing ANSI revenue metering class accuracy, and has been tested to exceed the compliance accuracy requirements as stated in ANSI C12.11 and IEEE C57.13 test specifications. In accordance with 16 NYCRR Part 93, National Grid of New York has submitted a letter of intent to use the Ritz Instrument CVT transformers line in its customer billing and metering applications, if approved.

**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. Brillig, 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.

(06-E-0358SA1)

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

**Submetering of Electricity by the City of Niagara Falls**

**I.D. No. PSC-16-06-00011-P**

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

**Proposed action:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by the City of Niagara Falls to submeter electricity at Rainbow Mall, One Falls St., Niagara Falls, NY.

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

**Subject:** Request for the submetering of electricity.

**Purpose:** To allow the City of Niagara Falls to submeter electricity at Rainbow Mall, One Falls St., Niagara Falls, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny, or modify, in whole or in part, the petition filed by the City of Niagara Falls to submeter electricity at Rainbow Mall, 1 Falls Street, Niagara Falls, New York.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brillig, 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.

(06-E-0384SA1)

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

**Electric Space Heating by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-16-06-00012-P

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

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

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

**Subject:** Electric space heating.

**Purpose:** To revise Service Classification Nos. 4 and 9 regarding customer's eligibility or continued eligibility for Special Provision D and to eliminate ambiguity concerning the determination of eligibility.

**Substance of proposed rule:** The Commission is considering Consolidated Edison Company of New York, Inc.'s (Con Edison's) request to revise Service Classification No. 4—Commercial and Industrial—Redistribution (S.C. No. 4) and Service Classification No. 9—General—Large (S.C. No. 9) regarding customers' eligibility or continued eligibility for Special Provision D and to eliminate ambiguity concerning the determination of eligibility. Special Provision D provides for a reduction in the kilowatts of demand billed during the winter billing period when the service supplied under Rate 1 of S.C. Nos. 4 and 9 is used by the customer for the operation of electric space heating equipment that is permanently installed and supplies the customer's entire space heating requirements. The Commission may approve, reject or modify, in whole or in part, Con Edison's request.

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

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

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

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

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

(06-E-0396SA1)

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

**Revision of Meter Maintenance Fee by National Fuel Gas Distribution Corporation**

**I.D. No.** PSC-16-06-00013-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by National Fuel Gas Distribution Corporation to make various changes in the rates, charges, rules and regulations contained in its schedule for gas service—P.S.C. No. 8.

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

**Subject:** Revise facility maintenance fee for production facilities.

**Purpose:** To revise the company's meter maintenance fee.

**Substance of proposed rule:** The Commission is considering National Fuel Gas Distribution Corporation's (the company's) request to revise the meter maintenance fee it charges producers to recover the company's cost of maintaining meters and appurtenant facilities required to enable and measure the flow of local production at interconnection points on the company's system.

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

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

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

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

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

(04-G-1047SA6)

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

**Initial Tariff Schedule by Brookside Meadows Water-Works Corp.**

**I.D. No.** PSC-16-06-00014-P

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

**Proposed action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, Brookside Meadows Water-Works Corp.'s initial tariff schedule, P.S.C. No. 1—Water, to become effective July 27, 2006.

**Statutory authority:** Public Service Law, section 89-e(2)

**Subject:** Initial tariff schedule—electronic filing.

**Purpose:** To approve a tariff schedule, P.S.C. No. 1—Water for Brookside Meadows Water-Works Corp. which sets forth the initial rates, charges, rules and regulations under which the company will operate.

**Substance of proposed rule:** On March 29, 2006, Brookside Meadows Water-Works Corp. (Brookside or the company) filed and electronic initial tariff schedule, P.S.C. No. 1—Water, which sets forth the rates, charges, rules and regulations under which the company will operate, to become effective July 27, 2006. Brookside will serve the Brookside Meadows multi-family housing development in the town of Pleasant Valley, Dutchess County. The proposed subdivision currently plans for a maximum of 302 units of multi-family housing including a maximum of 248 apartment and condominium units and 54 town-homes with Brookside serving approximately 284 customers. The proposed rates in the initial tariff are designed to generate, at full development, approximately \$139,000 in total revenues and pre-tax rate of return of approximately 10.75% on a rate base of \$345,300. The proposed service charge would be \$90 per quarter plus a rate per 1,000 gallons of \$4.40. The estimated annual bill for an average annual usage of 30,000 gallons would be \$492. Brookside's tariff is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Commission Documents. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(06-W-0391SA1)

## State University of New York

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

**Traffic and Parking Regulations**

**I.D. No.** SUN-16-06-00015-P

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

**Proposed action:** Amendment of sections 568.3 and 568.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Proposed amendments to the traffic and parking regulations of the State University of New York College at Purchase.

**Purpose:** To increase the allowable amount for parking fines and to bring the traffic and parking regulations into conformity with L. 2005, ch. 699, by authorizing the exemption of veterans attending the State University of New York College at Purchase from parking and registration fees.

**Text of proposed rule:** Section 568.3 is amended by adding a new subdivision (f) to read as follows:

(f) *Veterans. Any veteran, as defined in section 360 of the New York State Education Law, in attendance as a student at the College at Purchase shall be exempt from registration and parking fees upon submission by the veteran of a written request for exemption together with written certification by the veteran that such veteran was honorably discharged or released under honorable circumstances from such service.*

\* \* \*

Subdivision (a) of section 568.7 is amended to read as follows:

§ 568.7 Penalty

(a) Each violation of the campus parking regulations will carry a fine of [25] \$50 for the first violation and a fine of \$75 for second and subsequent violations, except that violations of handicapped and fire lane provisions shall carry a fine of [50] \$150 for each violation.

\* \* \*

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

**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: Education Law § 360(1) authorizes the State University Trustees to make rules and regulations relating to parking, vehicular and pedestrian traffic and safety on the State-operated campuses of the State University of New York.

2. Legislative objectives: The present measure will bring the parking and traffic regulations applicable to the State University of New York College at Purchase into compliance with Chapter 699 of the Laws of 2005 by authorizing SUNY/Purchase to exempt veterans attending the College from applicable parking and registration fees and also will increase allowable fines for violation of parking regulations.

3. Needs and benefits: New York State Education Law was amended to authorize exemption of veterans from State University parking and registration fees. This amendment is needed to conform the SUNY/Purchase parking and traffic regulations to the change in law. Additionally, parking fine thresholds applicable to violation of campus parking regulations have not been changed for a number of years. In the meantime, many municipalities have increased parking fines for violation of local parking ordinances, particularly for violation of handicapped parking rules. The increase proposed here will allow SUNY/Purchase to have their fines increased to levels comparable to local municipal rules, thus strengthening incentives to avoid violation of campus parking rules.

4. Costs: Veterans enrolled at State-operated campuses of the State University will have exemptions from parking and registration fees and thus incur savings. Parking violators will experience higher fines.

5. Local government mandates: None.

6. Paperwork: Veterans will have to submit a written request for exemption and certify that they were honorably discharged.

7. Duplication: None.

- 8. Alternatives: There are no viable alternatives.
- 9. Federal standards: There are no related Federal standards.
- 10. Compliance schedule: SUNY/Purchase will notify those affected as soon as the rule is effective. Compliance should be immediate.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Purchase.

**Rural Area Flexibility Analysis**

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Purchase.

**Job Impact Statement**

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses internal parking and traffic regulations on the campus of the State University of New York College at Purchase.

## Thruway Authority

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

**E-ZPass Discount Plan**

**I.D. No.** THR-16-06-00007-P

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

**Proposed action:** Amendment of section 101.2 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 354(5), (8), (15); Public Authorities Law, section 361(1)(a); Vehicle and Traffic Law, section 1630

**Subject:** Implementation of a special E-ZPass Discount Plan and minor technical corrections to section 101.2.

**Purpose:** To implement a special E-ZPass Discount Plan for pick-up truck vehicle combinations using a fifth wheel hitch and make two technical corrections to 21 NYCRR section 101.2.

**Text of proposed rule:** Amendment to Section 101.2 of 21 NYCRR.

Section 101.2 Toll schedules and fees.

The following toll schedules and fees shall apply for the use of the Thruway system:

(a) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule" and each of which is appended hereto in Appendix A-1, (see section 101.4 of this Part) and made a part hereof. Effective January 6, 2008 such cash tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule 2008" and each of which is appended hereto in Appendix A-2, (see section 101.4 of this Part) and made a part hereof.

(b) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule - E-ZPass" and each of which is appended hereto in Appendix

A-3, (see section 101.4 of this Part) and made a part hereof except that certain commercial vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special additional E-ZPass discount.

(c) For that portion of the controlled system extending from, and including, the toll barrier at Woodbury, to, and including, the toll barrier at Williamsville, including the Berkshire section, and extending from, and including, the toll barrier at Lackawanna, to and including, the toll barrier at Ripley, the E-ZPass tolls for motorcycles and for motorhomes each having an authorized E-ZPass tag shall be as set forth on the detailed toll schedules, each of which is designated "New York State Thruway Toll Schedule – Motorhome E-ZPass and Motorcycle E-ZPass" and each of which is appended hereto in Appendix A-4, (see section 101.4 of this Part) and made a part hereof.

(d) Annual permit plan.

(1) Class 2L vehicles with authorized E-ZPass tags are eligible for the annual permit plan on the controlled system only if such vehicles are held in the name of or leased to:

- (i) an individual or two individuals not constituting a business entity; or
- (ii) a nonprofit, religious, charitable or educational organization.

Class 2L vehicles owned by or leased to partnerships, corporations or other business entities (including rental companies) are not eligible for the annual permit plan. To receive the annual permit plan discount, customers must comply with all of the terms and conditions of their authorized E-ZPass License Agreement.

(2) All customers that apply and qualify for the annual permit plan shall, upon payment of \$80, be entitled to use one designated E-ZPass tag, which is transferable to vehicles listed in paragraph (1) of this subdivision that are on the customer's E-ZPass account, that will provide an unlimited number of trips of 30 miles or less on the controlled system without payment of additional tolls, except that a toll of [50] 45 cents shall be charged for all trips across the Castleton-on-Hudson Bridge, which will be charged to the annual permit plan customer's account at the time of exit from the controlled system. Under the annual permit plan, for each trip over 30 miles, the amount of the toll charged shall be discounted by the amount of the toll for the first 30 miles of that trip in accordance with the detailed toll schedule, which is designated "New York State Thruway Toll Schedule – Permits" which is appended hereto in Appendix A-5, (see section 101.4 of this Part) and made a part hereof. The annual permit plan shall become effective on the date of issuance of such permit and shall be valid for a term of one year. Customers may purchase the annual permit plan for each E-ZPass tag issued under their account for vehicles listed in paragraph (1) of this subdivision.

(e) Commercial charge accounts. Commercial charge account customers must have an authorized E-ZPass account. Commercial charge account customers with authorized E-ZPass tags shall be allowed a volume discount on such terms as may be set by the authority from time to time, provided that their operators or operating companies apply, qualify, establish and maintain a formal commercial charge account with the authority. Registered omnibuses that maintain a formal charge account with the authority shall be allowed a special discount, in addition to a volume discount, if any, provided that their operators or operating companies file with the authority's department of finance and accounts a formal certification that the operator or operating company operates buses on the Thruway system.

(f) Bridge and barrier stations. (1) The cash tolls for bridge and barrier stations are as follows:

	TAPPAN ZEE BRIDGE	NEW ROCHELLE	YONKERS	SPRING VALLEY	HARRIMAN	CITY LINE/ BLACK ROCK	GRAND ISLAND BRIDGES
2L	\$4.00	\$1.25	\$0.75	\$0.00	\$0.75	\$0.75	\$0.75
3L	\$9.50	\$2.00	\$1.00	\$2.50	\$1.00	\$1.00	\$1.00
4L	\$11.25	\$2.50	\$1.25	\$3.75	\$1.25	\$1.25	\$1.25
2H	\$12.25	\$2.75	\$1.50	\$4.25	\$1.50	\$1.50	\$1.50
3H	\$17.00	\$3.50	\$1.75	\$6.75	\$2.25	\$2.50	\$1.75
4H	\$20.25	\$4.25	\$2.25	\$6.75	\$2.50	\$2.75	\$2.25
5H	\$27.00	\$6.75	\$3.50	\$11.00	\$3.50	\$4.25	\$3.50
6H	\$33.75	\$7.50	\$3.75	\$12.25	\$4.25	\$4.75	\$3.75
7H	\$40.50	\$8.25	\$4.25	\$13.50	\$4.75	\$5.50	\$4.25

\* Toll collected one way only.

The E-ZPass tolls for bridge and barrier stations are as follows, except that certain commercial vehicles including but not limited to certain commercial vehicles in classes 2H, 3H, 4H, 5H, 6H and 7H, may be eligible for a special E-ZPass discount:

	TAPPAN ZEE BRIDGE	TAPPAN ZEE BRIDGE	NEW ROCHELLE	YONKERS	SPRING VALLEY	SPRING VALLEY	HARRIMAN	CITY LINE/ BLACK ROCK	GRAND ISLAND BRIDGES
	PEAK	OFF PEAK			PEAK	OFF PEAK			
Resident	\$0.50	\$0.50							\$0.09
Carpool	\$2.00	\$2.00	\$1.00	\$0.50			\$0.50	\$0.50	\$0.25
Commuter	\$3.60	\$3.60	\$1.13	\$0.68	\$0.00	\$0.00	\$0.68	\$0.68	\$0.68
2L	\$9.50	\$4.75	\$1.80	\$0.90	\$2.50	\$1.25	\$0.90	\$0.90	\$0.90
3L	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
4L	\$12.25	\$6.13	\$2.61	\$1.43	\$4.25	\$2.13	\$1.43	\$1.43	\$1.43
2H	\$17.00	\$8.50	\$3.33	\$1.66	\$6.75	\$3.38	\$2.14	\$2.38	\$1.66
3H	\$20.25	\$10.13	\$4.04	\$2.14	\$6.75	\$3.38	\$2.38	\$2.61	\$2.14
4H	\$27.00	\$13.50	\$6.41	\$3.33	\$11.00	\$5.50	\$3.33	\$4.04	\$3.33
5H	\$33.75	\$16.88	\$7.13	\$3.56	\$12.25	\$6.13	\$4.04	\$4.51	\$3.56
6H	\$40.50	\$20.25	\$7.84	\$4.04	\$13.50	\$6.75	\$4.51	\$5.23	\$4.04

\* Toll collected one way only.

\*\* Toll collected one way only and the toll indicated for classes 3L through 7H represent the maximum amounts to be charged. The tolls for classes 3L through 7H may be reduced, on a graduated scale or otherwise, during certain hours for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

The motor home and motorcycle Plan tolls for bridge and barrier stations are as follows:

	TAPPAN ZEE BRIDGE	TAPPAN ZEE BRIDGE	NEW ROCHELLE	YONKERS	SPRING VALLEY	SPRING VALLEY	HARRIMAN	CITY LINE/ BLACK ROCK	GRAND ISLAND BRIDGES
	PEAK	OFF PEAK			PEAK	OFF PEAK			
MTRHOME	\$3.60	\$3.60	\$1.13	\$0.68	\$0.00	\$0.00	\$0.68	\$0.68	\$0.68
2 AXLES	\$3.60	\$3.60	\$1.13	\$0.68	\$0.00	\$0.00	\$0.68	\$0.68	\$0.68
MTRHOME	\$9.50	\$4.75	\$1.80	\$0.90	\$2.50	\$1.25	\$0.90	\$0.90	\$0.90
3 AXLES	\$9.50	\$4.75	\$1.80	\$0.90	\$2.50	\$1.25	\$0.90	\$0.90	\$0.90
MTRHOME	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
4 AXLES	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
2/3 AXLES	\$11.25	\$5.63	\$2.25	\$1.13	\$3.75	\$1.88	\$1.13	\$1.13	\$1.13
MTRCYCL	\$2.00	\$2.00	\$0.63	\$0.38	\$0.00	\$0.00	\$0.38	\$0.38	\$0.38

\* Toll collected one way only.

\*\* Toll collected one way only and the toll indicated for motor homes (with [2] 3 or more axles) [or motorcycles] represents the maximum amounts to be charged. The tolls for motor homes (with [2] 3 or more axles) [or motorcycles] may be reduced, on a graduated scale or otherwise, during certain hours for E-ZPass holders within such classes and upon such terms and conditions as the authority may determine from time to time.

On January 6, 2008 the Cash tolls will increase for bridge and barrier stations as follows:

	TAPPAN ZEE BRIDGE	NEW ROCHELLE	YONKERS	SPRING VALLEY	HARRIMAN	CITY LINE/ BLACK ROCK	GRAND ISLAND BRIDGES
2L	\$4.50	\$1.50	\$1.00	\$0.00	\$1.00	\$1.00	\$1.00
3L	\$10.50	\$2.25	\$1.25	\$2.75	\$1.25	\$1.25	\$1.25
4L	\$12.50	\$2.75	\$1.50	\$4.25	\$1.50	\$1.50	\$1.50
2H	\$13.50	\$3.25	\$1.75	\$4.75	\$1.75	\$1.75	\$1.75
3H	\$18.75	\$4.00	\$2.00	\$7.50	\$2.50	\$2.75	\$2.00
4H	\$22.50	\$4.75	\$2.50	\$7.50	\$2.75	\$3.25	\$2.50
5H	\$29.75	\$7.50	\$4.00	\$12.25	\$4.00	\$4.75	\$4.00
6H	\$37.25	\$8.25	\$4.25	\$13.50	\$4.75	\$5.25	\$4.25
7H	\$44.75	\$9.25	\$4.75	\$15.00	\$5.25	\$6.25	\$4.75

\* Toll collected one way only.

**Text of proposed rule and any required statements and analyses may be obtained from:** Marcy Pavone, Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2867, e-mail: marcy\_pavone@thruway.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:

Subdivision 5 of section 354 of the Public Authorities Law authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." Subdivision 8, in pertinent part, authorizes the Authority "to fix fees for the use of the thruway system or any part thereof necessary to produce sufficient revenue to meet the expense of maintenance and operation" Subdivision 15 of the same section authorizes the Thruway Authority to "do all things necessary or convenient to carry out its purposes and exercise the powers expressly given." In addition, subdivision 1(a) of section 361 of the Public Authorities Law authorizes the Authority "to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preser-

vation of its property and for the collection of tolls.” Furthermore, section 1630 of the Vehicle and Traffic Law authorizes the Authority to set tolls on its facilities.

2. Legislative Objectives:

The amendment of Section 101.2 of Title 21 NYCRR is intended to implement a special E-ZPass Discount Plan for vehicle combinations of pick-up trucks towing a camper, boat or trailer using a fifth wheel hitch. In addition, the amendment will make two technical corrections to the language contained in 101.2. The language changes will reflect the rates which were effective May 15, 2005.

3. Needs and Benefits:

The Authority adjusted its toll schedules and simplified its classification schedule for vehicles to reduce the number of vehicle types requiring classification from 43 to 9 effective May 15, 2005. Included in this adjustment was a provision to provide a Special Additional E-ZPass discount for certain commercial vehicles on both the controlled and barrier systems. This Special Additional E-ZPass discount was primarily applicable to 48 foot non-tandem commercial vehicles that made up 85 percent of all commercial vehicles using E-ZPass. This amendment to section 101.2 of 21 NYCRR will provide a special E-ZPass Discount Plan to include certain 3H, 4H and 5H vehicle combinations for pick-up trucks towing a trailer, camper or boat using a fifth wheel hitch.

When the Thruway toll schedules were revised effective May 15, 2005, the narrative contained in section 101.2 (d)(2) stated, in part, that a toll of “50 cents shall be charged for all trips across the Castleton-on-Hudson Bridge, which will be charged to the annual permit plan customer’s account at the time of exit from the controlled system.” The annual permit toll schedules effective May 15, 2005 include a toll of 45 cents, not 50 cents, and this proposed rule making will make that correction. Also, a correction to the footnote below the motor home and motorcycle Plan tolls for bridge and barrier stations contained in section 101.2(f) is necessary to accurately reflect the information contained in the corresponding toll plans in effect on May 15, 2005.

4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

5. Local Government Mandates:

This rule imposes no program, service, duty or responsibility on local government.

6. Paperwork:

None.

7. Duplication:

None.

8. Alternatives:

None.

9. Federal Standards:

None.

10. Compliance Schedule:

Ongoing.

**Regulatory Flexibility Analysis**

This regulation will have no negative impact on small businesses beyond the effect that the current regulations already have on them.

**Rural Area Flexibility Analysis**

This regulation does not impose any adverse impact on rural areas whether through compliance, reporting or in any other way, and as such, a Rural Area Flexibility Analysis is not required.

**Job Impact Statement**

It is apparent from the nature and purpose of the proposed rule that it will have no impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.

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

**Proposed action:** Addition of Part 43 to Title 17 NYCRR.

**Statutory authority:** Transportation Law, section 21 as added by L. 1998, ch. 279 as amended by L. 1999, ch. 100

**Subject:** Implementation of a State Single Audit Program when one is being done on the Federal level.

**Purpose:** To identify requirements, criteria and information necessary to establish the program.

**Text of proposed rule:**

Part 43

Single Audit Pilot Program

(Statutory authority: Transportation Law, § 21)

Section 43.1 Applicability.<sup>1</sup> The single audit pilot program applies to municipalities and public authorities that:

(a) expend in excess of one hundred thousand dollars in any fiscal year from the combined funds provided through state transportation programs, projects, grants, contracts or agreements administered by the Department of Transportation; and

(b) are required to have a Federal Single Audit performed for that fiscal year under the Federal Single Audit Act of 1984, as amended.

Section 43.2 Schedule of State Transportation Assistance Expended. For its fiscal years commencing after December 31, 2000, the municipality or public authority shall prepare either

(a) a supplementary “Schedule of State Transportation Assistance Expended” which shall include the following:

(1) the name of the municipality or public authority;

(2) the period covered by the Schedule;

(3) the titles of the state transportation programs funded; and

(4) the amounts actually expended during the period identified under the state transportation program, or

(b) in lieu of the supplementary “Schedule of State Transportation Assistance Expended,” a combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended,” which includes the information set forth in paragraphs one through four of subdivision (a) of this section.

Section 43.3 Management Representations. (a) When preparing the “Schedule of State Transportation Assistance Expended,” or the combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended,” as required by § 43.2 of this Part, the auditor shall obtain representations from the appropriate management of the municipality or public authority stating the full names and addresses of the individuals responsible for the management of the project and acknowledging that said management:

(1) is responsible for compliance with the laws, regulations, and provisions of contracts and grant agreements applicable to the auditee for state transportation assistance programs;

(2) is responsible for establishing and maintaining effective internal control over financial reporting and reporting on state transportation assistance;

(3) has identified and disclosed to the auditor all laws, regulations, contracts, and grant agreements that could have any direct and material effect on the preparation of financial statements or the audits required under these regulations;

(4) has identified and disclosed to the auditor any and all known instances of material noncompliance, violations or possible violations of laws, regulations, and provisions of contracts and grant agreements whose effects should be considered for disclosure in the financial statements or the or the audit documents required under these regulations or as a basis for recording a loss contingency claim.

(b) The management representations described above may be obtained in the form of a separate letter signed by the same duly qualified official of the municipality or public authority who signs the management representation letter for the Federal Single Audit. In lieu of a separate letter, the required representations may be included in the management representation letter for the Federal Single Audit by including the items described in subdivision (a) of this section with appropriate specific reference to state transportation assistance programs.

Section 43.4 Audit in Conjunction with Federal Single Audit. For its fiscal years commencing after December 31, 2000, affected municipalities or public authorities shall arrange, through the independent auditor who performs the Federal Single Audit, to have the supplementary “Schedule of State Transportation Assistance Expended” (or the combined supplementary “Schedule of Expenditures of Federal Awards and State Transporta-

---



---

## Department of Transportation

---



---

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

State Single Audit Program

I.D. No. TRN-16-06-00003-P

tion Assistance Expended”) audited in conjunction with the Federal Single Audit.

Section 43.5 Auditor’s Report. The independent auditor shall include the following as part of the reporting package for the Federal Single Audit, or as a separate State reporting package:

a) Auditor’s Opinion on the supplementary “Schedule of State Transportation Assistance Expended.” The independent auditor shall include the following in the report on the municipality’s or public authority’s financial statements:

1) a description of the accompanying supplementary “Schedule of State Transportation Assistance Expended” (or a combined supplementary “Schedule of Expenditures of Federal awards and State Transportation Assistance Expended.”) This identification may be by descriptive title or by page number or reference to the schedule; and

2) a statement that the accompanying supplementary information, including the supplementary “Schedule of State Transportation Assistance Expended” (or a combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended”) is presented for purposes of additional analysis and is not a required part of the financial statements;

3) an opinion on whether the accompanying supplementary “Schedule of State Transportation Assistance Expended” (or a combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended”) is fairly stated, in all material respects, in relation to the financial statements taken as a whole; and

4) either the supplementary “Schedule of State Transportation Assistance Expended”, a combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended” incorporated in the report issued to meet the Federal Single Audit requirements, or a separate report on the supplementary “Schedule of State Transportation Assistance Expended” may be issued.

b) Auditor’s Report on Compliance with Requirements Applicable to State Transportation Assistance Programs. The auditor shall provide an opinion on the municipality’s or public authority’s compliance with applicable state laws, rules, regulations and contract provisions in the administration of programs, projects, contracts and grants funded in whole or in part with state transportation assistance funds.

c) Auditor’s Report on the Municipality’s or Public Authority’s Internal Controls Over Compliance. The auditor shall provide a report on internal controls over compliance with the requirements of laws, regulations, contracts and grants applicable to state transportation funded programs that could have a direct and material effect on a state transportation funded program. The auditor’s Report on Compliance with Requirements Applicable to State Transportation Assistance Programs as described in § 43.5(b) and the Auditor’s Report on Internal Controls Over Compliance may be combined.

d) A Schedule of Findings and Questioned Costs for State Transportation Assistance Programs. The schedule shall include:

1) a summary of audit results including, where applicable, a statement that reportable conditions in internal control were disclosed by the audit and whether such conditions are material to the supplementary “Schedule of State Transportation Assistance Expended” or the combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended”;

2) a statement on whether the audit disclosed any non-compliance with state transportation assistance programs that is material to the supplementary “Schedule of State Transportation Assistance Expended” or the combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended”;

3) the status of current and prior material findings, known questioned costs and recommendations that affect the current audit of the supplementary “Schedule of Transportation Assistance Expended” or the combined supplementary “Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended”;

4) the auditee’s corrective action plan for reportable conditions, material non-compliance and known questioned costs for state transportation assistance programs, including a summary of follow-up actions by the auditee and auditor for prior years’ findings;

5) known questioned costs that are greater than \$10,000 and known questioned costs when likely questioned costs are greater than \$10,000 for a type of compliance requirement;

6) known fraud affecting state transportation assistance expended, unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs. The auditor is not required to make an additional reporting when the auditor confirms that the fraud was reported

to the municipality’s or public authority’s management and the New York State Department of Transportation by other means of communication outside of the auditors’ reports.

7) Instances where the results of audit follow-up procedures disclosed that prior reporting on the status of current and material findings, as described above, materially misrepresents the status of any prior audit finding or corrective action.

Section 43.6 Filing of Audit Reports. Audit reports and schedules are required to be filed with the Department of Transportation (Attn: Contract Audit Bureau, New York State Department of Transportation, 1220 Washington Avenue, Albany, NY 12232) within the earlier of 30 days after receipt of the reports by the municipality or public authority or within nine months of the end of the municipality’s or public authority’s fiscal year being reported on.

Section 43.7 Subrecipients. Some municipalities and public authorities receive state transportation assistance funds through municipalities, public authorities or state agencies other than the New York State Department of Transportation. Such funds, unless disbursed by the New York State Thruway Authority on behalf of the New York State Department of Transportation, shall not be included in determining whether this Part applies to the municipality or public authority. Such funds shall be treated for the purposes of this Part as a procurement activity.

Section 43.8 Charging of Audit Costs. Any incremental audit costs incurred by a municipality or public authority in compliance with these regulations may be allocated as an indirect cost to the state transportation assistance programs audited in proportion to the total annual amounts expended by the municipality or public authority for state transportation assistance programs, if such programs allow for the reimbursement of indirect costs and funds are provided for such purposes. Funds assigned for administrative purposes in accordance with statute, rules or regulations, grants, contracts, agreements, or program guidelines may be used for such purposes if agreed to in writing in advance by the New York State Department of Transportation.

Section 43.9 Additional Department of Transportation Audit Requirements. The Department of Transportation shall not impose any additional audit requirements on municipalities or public authorities which have an audit performed under this regulation, except as additional audits are deemed necessary by the Commissioner for:

a) periods on project close-out audits not covered by this regulation;

b) resolution of material known questioned costs;

c) resolution of non-compliance which is deemed material to the schedule of expenditures of state transportation assistance;

d) unresolved reportable conditions which are also material weaknesses to the financial statements or the schedule of state transportation assistance;

e) indications of irregularities or fraud, waste or abuse; or

f) audits deemed necessary by the Commissioner in fulfillment of monitoring responsibilities under Federal programs, or to comply with Federal compliance requirements.

Section 43.10. Guidance. The Department of Transportation will issue guidance to facilitate compliance with the requirements of this Pilot Program. Such guidance may be obtained from the Department’s Contract Audit Bureau.

<sup>1</sup>The single audit program is defined in § 21 of the Transportation Law. Affected municipalities and public authorities are required to submit single state audits for fiscal years commencing after December thirty-first, Two Thousand.

**Text of proposed rule and any required statements and analyses may be obtained from:** Linda Zinzow, Department of Transportation, 50 Wolf Rd., First Fl., Albany, NY 12232, (518) 457-4700, e-mail: lzinzow@dot.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.**

#### Summary of Regulatory Impact Statement

1. Statutory Authority: Section 14.18 and Section 21 of the Transportation Law, as added by Chapter 279 of the Laws of 1998, as amended, provide the statutory authority.

2. Legislative Objectives: Municipalities and public authorities will submit audits to the State on a new form that complies in form and content with single federal audits that are already required. These State audits would be performed by an independent certified public accountant in a

form closely shadowing the form of audit the CPA is already preparing for the federal government. The funds to be audited are for state transportation programs, projects, grants, contracts or agreements administered by the Department of Transportation. The law applies only to municipalities and public authorities expending more than one hundred thousand dollars in State Transportation Assistance administered by NYS Department of Transportation in any fiscal year and only when said entity performs a single audit pursuant to the federal Single Audit Act of 1984, as amended.

3. Needs and Benefits: The Department of Transportation expends several hundred million dollars per year in local programs and has a growing federal-aid pass through program. Audit coverage of these programs is essential. The New York Single State Audit requirement will simplify and synchronize the audit requirements. The regulations piggy-back on the federal requirements and forms in such a way that audits of programs across the State will have similar layout and design and will be similar to the forms already required for the same programs and projects on the federal level. Where a recipient needs to do a federal single audit, the Department would not impose any additional audit requirements unless the audit does not cover all the years in which the funds were expended. Aid recipients will benefit by the reduction in the work of preparing for several different audits. As contemplated by the Federal government, the single audit process should be less time-consuming and onerous on the municipality or public authority. The regulations are compact and uncomplicated, being less than 2,000 words.

Quicker close-out of projects will result in a faster release of retainage, deposits, or unexpended funds. Another boon to the aid-recipient is that expenses related to audits performed under these regulations would be chargeable as an indirect cost to the specific transportation program, project grant, contract or agreement to the extent allowable under state programs and funding provided. This would be achieved simply by including the estimated cost of the audit when bidding or applying for project funding. The program recipient can completely avoid the cost of the single state audit by adding the audit cost to the amount requested from the State for funding of the program.

4. Costs: Because affected municipalities and public authorities are already required to cause an audit of federal funds to be prepared, the incremental cost of including an audit of the state transportation funds involved is expected to be minimal.

5. Local Government Mandates: When municipalities or public authorities prepare their financial statements they will need to prepare supplemental schedules of state transportation funds expended, either separately, or in combination with a schedule of federal awards. Later, when these agencies have an independent federal single audit performed, they will also need to include certain elements pertaining to state transportation programs. The Single State Audit Ad Hoc Working Group included representatives of the municipalities, public authorities, associations concerned with public policies, and auditor associations that will be affected by the new procedure. It also mailed information concerning the program and requesting input to a much larger number of entities.

Written comments were received from the NYS Association of Counties mainly depicting the new program as "another unfunded mandate". The association objected that the audit threshold should be the same as the federal so that the impact locally would be minimal, that clusters of programs be audited together and be based on risk, that the implementation date is too soon to be reflected in the next budget, and that single state audits will apply to more programs than are currently being audited. Two counties submitted resolutions objecting to the single state audits based on those objections.

The City of New York Office of Management and Budget submitted written comments pointing out that the legislation may not cover very many New York City programs. Only two DOT programs benefiting New York City are audited as part of the City's federal single audit. Issues important to the City are that the federal threshold be used to determine when a single audit is needed, that clustering of programs be allowed, and that high and low risk programs be distinguished. A delay in the implementation date of the legislation was requested and granted by Chapter 100 of the Laws of 1999.

The New York State Government Finance Officers' Association, Inc. brought up unique issues from the point of view of the auditors. It recommended that the aid recipient through its management give written assurances concerning compliance with the laws, regulations, contracts, and grants. The auditor then would verify management's assertions and issue an opinion on management's assertion regarding both compliance and effectiveness of internal control. The association recommended that DOT publish a comprehensive compliance supplement modeled after the Fed-

eral Single Audit Compliance Supplement guide published by the federal Office of Management and Budget.

Mitigation of local mandate concerns. Some objections have been raised by counties mainly concerning the very existence of the required audit. However, the statute mandating single state audits was passed by the legislature in 1998. NYSDOT is mandated by Section 21 to prepare these proposed rules and regulations and every effort has been made to decrease any negative aspects of the program. The issue of using the federal audit threshold was addressed in the statute by making the state program required only if a federal single audit is already being done. There is no evidence that the single state audits will apply to more programs than are currently required to be audited. The counties' impression that these audits are not being done is evidence of the need for this program to insure that all applicable state transportation funds are being audited.

The issues of clustering programs and using risk as criteria have been incorporated into the proposed regulations. The suggestion that management make assertions that are evaluated by the auditor has been incorporated into the regulations and make up the basis of the single state audit. The implementation date is set forth in the statute and requires single state audits for fiscal years beginning after December 31, 2000. NYSDOT is preparing guidance in line with the request of the New York State Government Finance Officers' Association, Inc.

6. Paperwork: The Department of Transportation will issue guidance including suggested forms to comply with the requirements of these regulations. Every effort has been made to make the New York program track the paperwork that is already being prepared for the federal government. The regulations allow an auditor to choose the form that is submitted from either a "Schedule of State Transportation Assistance Expended" or the combined supplementary "Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended." Clustering of programs within one report will be allowed.

7. Duplication: The intent of the state's Single Audit Program is to streamline audits of agencies that receive state transportation aid. Because the federal audit is already required, the new state program will dovetail with it. The state and federal audits review many of the same records so this program will avoid duplication of effort, will be cost efficient, and will uncover non-compliance issues sooner than the current audit procedures would.

8. Alternatives: Issuance of this regulation is mandated by law, so there are no alternatives to be considered. However, every effort was made to allow for alternative audit forms to be allowed and to streamline the program to shadow the already-required Federal program.

9. Federal Standards: The federal Single Audit Program requirements as last revised are set forth in Chapter 75 of Title 31 of the United States Code known as the "Single Audit Act Amendments of 1996". Circular No. A-133 (revised June 24, 1997) titled Audits of States, Local Governments, and Non-Profit Organizations, sets forth standards aimed at obtaining consistency and uniformity in federal audits. The state's Single Audit Program only applies to municipalities and public authorities already subject to these federal Single Audit Act.

10. Compliance Schedule: This regulation only applies to municipalities or public authorities for their fiscal years which begin after December 31, 2000. An audit would not be done until the end of their fiscal year after December 31, 2001. Section 21 sunsets on December 31, 2006.

#### **Regulatory Flexibility Analysis**

1. Effect of Rule: No small businesses are affected by the rule. It is estimated that 125 local governments and public authorities will be impacted annually.

2. Compliance Requirements: Affected municipalities or public authorities would need to prepare, as part of their annual financial statements, a supplementary "Schedule of State Transportation Assistance Expended" or the combined supplementary "Schedule of Expenditures of Federal Awards and State Transportation Assistance Expended". The affected agencies will arrange, through the independent auditor who already is required to perform the Federal Single Audit for the municipality or public authority, to have this supplementary schedule audited in conjunction with the federal single audit.

3. Professional Services: An independent auditor, normally the same auditor who performs the Federal Single Audit, would be hired to perform the State Single Audit.

4. Compliance Costs: There are no capital costs associated with this proposed regulation. The annual cost for continuing compliance will vary for local governments depending upon the amount of state funds expended. Typically the costs of an independent audit are .25% to 1.5% of total program costs. It is expected that the cost of the program will range from

approximately \$2,500.00 to \$50,000.00 depending on the size and complexity of the program. These costs are reimbursable to the extent permitted under the state transportation program.

5. Economic and Technological Feasibility: Because a federal Single Audit is already being performed, it is feasible to comply with these regulations and perform a state Single Audit. The requirements of the state program allow the auditor to submit the federal audit firm with a simple additional schedule to account for state monies. Several other states have enacted similar provisions such as Connecticut and Florida. Other states have similar administrative requirements.

6. Minimizing Adverse Impact: To minimize adverse impact, the requirement for a State Single Audit only applies when a federal Single Audit is already being done because the federal government requires it.

7. Small Business and Local Government Participation: The proposed guidelines will be circulated for comment to both accounting groups, government financial management groups, and municipal groups. The following is a list of intended contacts:

- accounting: NYS Society of Certified Public Accountants, NYS Government Finance Officers' Association, and the largest five auditing firms.

- municipal: all counties, cities, towns, villages and public authorities, including Port Authority, Metropolitan Transit Authority, Triborough Bridge and Tunnels, and the City of New York

-associations: Association of Towns, and Association of Counties, NYS Association of Town Superintendents of Highways, NYS Highway Superintendents' Association, Inc. NY Conference of Mayors and Municipal Officials, American Public Works Association New York Chapter, NY Association of Local Government Records Officers, NYS Airport Managers Association, NYS Town Clerks Association, Empire State Report, NYS Transit Operators Association, Southern Tier West Association, Tug Hill Commission, Merwin Rural Services Institute at SUNY Potsdam, Southern Tier Central Regional Planning & Development Board

-state: Office of State Comptroller, Municipal Affairs, all Department of Transportation offices.

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

The proposed regulation will not impose any adverse impact on rural areas nor will it add new reporting, recordkeeping and other compliance requirements. Rural municipalities and rural public authorities will be affected in the same way as more urban municipalities and authorities. However, it is expected that many rural programs may not meet the minimum Federal and State financial amounts to trigger the program.

#### **Job Impact Statement**

It is apparent from the nature and purpose of the rules that it will not have a substantial adverse impact on jobs and employment opportunities. As far as can be determined the rules would have a neutral impact on jobs and employment opportunities neither adding nor decreasing them. Private-sector auditing firms may experience a negligible increase in staff. No increase or decrease in state auditing staff is anticipated but the deployment of state auditors will be impacted by letting state auditors concentrate on smaller programs or state-funded projects not requiring a single audit.

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

**Subject:** Filing written reports of independent medical examinations (IMEs).

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 26, 2006.

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

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

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

##### 2. Legislative objectives:

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

##### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medi-

---



---

## Workers' Compensation Board

---



---

### EMERGENCY RULE MAKING

#### **Independent Medical Examinations**

**I.D. No.** WCB-16-06-00004-E

**Filing No.** 399

**Filing date:** March 29, 2006

**Effective date:** March 29, 2006

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

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

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

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

**Specific reasons underlying the finding of necessity:** Recent decisions issued by board panels have interpreted the current regulation as requiring

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

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

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

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

#### 4. Costs:

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

#### 7. Duplication:

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

#### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the

filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

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

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

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

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

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

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

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

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

#### 2. Compliance requirements:

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

#### 3. Professional services:

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

#### 4. Compliance costs:

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

#### 5. Economic and technological feasibility:

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

#### 6. Minimizing adverse impact:

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

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

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

**Rural Area Flexibility Analysis**

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

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

**2. Reporting, recordkeeping and other compliance requirements:**

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

**3. Costs:**

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

**4. Minimizing adverse impact:**

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

**5. Rural area participation:**

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

**Job Impact Statement**

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

## NOTICE OF ADOPTION

**Alternative Dispute Resolution Claims Board**

**I.D. No.** WCB-46-05-00004-A

**Filing No.** 400

**Filing date:** March 29, 2006

**Effective date:** April 19, 2006

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

**Action taken:** Amendment of section 314.2(d)(5) and addition of section 314.8 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 25(2-c), 117(1) and 141

**Subject:** Written reports of injury in Alternative Dispute Resolution ("ADR") claims and board resolution of certain issues arising in ADR claims but not subject to the ADR program.

**Purpose:** To amend the time for filing reports of injury in ADR claims and set forth a procedure for board resolution of certain issues arising in ADR claims which are not subject to the ADR Program.

**Text of final rule:** Paragraph (5) of subdivision (d) of Section 314.2 of Title 12 NYCRR is hereby amended to read as follows:

(5) a report of injury shall be submitted to the board on an ADR-1 form by the party designated in the agreement within [30] ten days after the accident occurs. The board shall assign a file number to the claim;

A new Section 314.8 of Title 12 NYCRR is hereby adopted to read as follows:

*Board Adjudication of Certain Issues*

(a) *Special Funds applications:* Any employer participating in an alternative dispute resolution program pursuant to Section 25(2-c) of the Workers' Compensation Law, or such employer's carrier or third party administrator, that seeks relief pursuant to Sections 14(6), 15(8) or 25-a of the Workers Compensation Law, shall, at the time its application is filed with the Special Funds Conservation Committee, also file a copy of the application with the board and all affected parties.

(b) *Other applications:* Any such employer, or its carrier or third party administrator, that submits an application for relief involving a claim that is not subject to the same Section 25(2-c) alternative dispute resolution program shall file a copy of its application with the board and all affected parties simultaneously. Such applications may include, but are not limited to, requests for approval of a settlement agreement pursuant to Workers' Compensation Law Section 32 and/or an apportionment of liability pursuant to the Workers' Compensation Law. This section does not apply to claims or issues which involve individuals who or entities that are all subject to the same Alternative Dispute Resolution program.

(c) *Negotiated resolution:* In the event the parties reach an agreement regarding an application for relief described in subdivision (a) or (b) of this section, a copy of the agreement, signed by an authorized individual for each party, shall be submitted to the board for review. The board shall issue a written decision approving the agreement unless it finds that the agreement is unfair, unconscionable, or improper as a matter of law. No agreement entered into under this subdivision shall become effective until approved by the board. Decisions approving an agreement described in this subdivision shall not be reviewable under Section 23 of the Workers' Compensation Law absent evidence that the agreement is the result of an intentional misrepresentation of a material fact by, or was induced by fraudulent behavior on the part of, a signatory to the agreement or their agent. If the board disapproves a submitted agreement, it shall issue a written decision stating the reasons for such disapproval. Decisions disapproving an agreement shall be reviewable under Section 23 of the Workers' Compensation Law.

(d) *Adjudication:* In the event the parties are unable to reach an agreement regarding an application for relief described in subdivision (a) or (b) of this section, the applicant may request that the board adjudicate the issue or issues raised in the application. Upon receipt of such request, the board shall schedule a hearing before a Workers' Compensation Law Judge or other board attorney for the purpose of resolving the disputed issue or issues. Decisions issued by a Workers' Compensation Law Judge or board attorney pursuant to this subdivision shall be reviewable under Section 23 of the Workers' Compensation Law.

(e) *Nothing herein shall in any way affect or be deemed to modify the statutory agreement approval provisions of Workers' Compensation Law Section 32.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 314.8(b).

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

**Revised Regulatory Impact Statement**

**1. Statutory Authority:**

The Workers' Compensation Board (Board) is authorized to amend 12 NYCRR Part 314. Workers' Compensation Law (WCL) § 117(1) authorizes the Chair of the Board to make reasonable regulations consistent with the provisions of the WCL and the Labor Law. WCL § 141 authorizes the Chair to make administrative regulations providing in part for the receipt, indexing and examining of all notices, claims and reports. WCL § 25(2-c)(a) provides that for the purposes of employments classified under Sections 220, 240, and 241 of the Labor Law, an employer and a recognized or certified exclusive bargaining representative of its employees may include within their collective bargaining agreement provisions to establish an alternative dispute resolution system to resolve any claims arising under this chapter.

**2. Legislative Objectives:**  
By Chapter 491 of the Laws of 1995 and extended until December 31, 2010 (Chap. 649 of the Laws of 2005) the legislature amended Workers' Compensation Law § 25 to permit, by negotiated labor agreement, a non-WCB arbitration and/or mediation claim process for employers and employees in the unionized construction industry. As a result, there are now four operating workers' compensation alternative dispute resolution ("ADR") programs in New York State. The proposed rule would amend one provision of the regulations adopted in 1996 to implement Chapter 491 regarding the time period for which a report of injury is submitted to the Board and would add a new section to the regulations dealing with Board approval or adjudication of certain issues not subject to WCL § 25(2-c).

**3. Needs and Benefits:**

Workers' Compensation Law § 110(2) requires a non-ADR employer to file an accident report with the Board within ten (10) days of the date of accident. Presently, 12 NYCRR § 314.2(d)(5) requires an ADR employer to file an injury report within thirty (30) days of an accident. The requested regulation modification will reduce the amount of time for an ADR employer to file an injury report from thirty (30) days to ten (10) days and will make the ADR employer's time to file an injury report the same as is statutorily required for non-ADR employers. This portion of the rule is consistent with the legislature's objective of promoting the prompt resolution of workers' compensation claims.

It is important for ADR-1s to be filed promptly and at the same time as C-2 accident reports so the Board can quickly identify and separate ADR cases from traditional WCB claim processes. The ADR-1 is the initial and primary indicator that a particular claim is an ADR claim and needs to be segregated from non-ADR workers' compensation claim processing. In the absence of an ADR-1, Board personnel might assume a case is a "regular" compensation case and process the case accordingly. This can result in an ADR case being adjudicated by the Board in the traditional fashion, which defeats the purpose of the alternative dispute resolution process and may cause additional, unnecessary work for corrective action.

A uniform accident report filing date will generate consistency in accident report filing requirements and will assist the Board in accurately and promptly identifying ADR cases for segregation from customary WCB adjudication processes. Additionally, a uniform rule will reduce potential confusion amongst employers as to when accident reports need to be filed with the Board.

WCL § 25(2-c) allows employers and employee representatives covered by the statute to establish an alternative dispute resolution system to resolve claims under the WCL. However, there are some issues that may arise within these claims that are outside the scope of WCL § 25(2-c). These issues can include Section 32 settlement agreements involving non-ADR employers, and situations where an ADR employer is seeking financial relief from the Second Injury Fund or Fund for Re-Opened Cases (Special Funds) represented by the Special Funds Conservation Committee (SFCC), a non-ADR employer or an employer from another ADR program. The Special Funds Conservation Committee, Special Funds it represents and employers not covered under a particular ADR program are not subject to the jurisdiction of the ADR program and are not signatories to the collective bargaining agreement containing the ADR program provisions. The Board is also not a signatory to such collective bargaining agreements. Currently ADR employers seeking Special Funds reimbursement or apportionment of liability from an employer not covered under its ADR agreement have no way to obtain binding determinations against these entities. However, the Board retains jurisdiction over all claims and can address issues in ADR claims where an entity involved is not governed under the ADR agreement. The proposed rule would recognize and clarify the Board's continuing jurisdiction and remedy this problem by requiring that these issues be resolved by either a Board approved negotiated settlement or adjudication by the Board through its traditional processes.

A new section 314.8 makes clear that any applications regarding an issue in a claim that are outside the WCL § 25(2-c) process are to be filed with the affected parties and the Board. Any negotiated settlement regarding these issues would go to the Board for approval, and if approved would not be reviewable under WCL § 23. If the parties cannot reach an agreement on an application, the applicant may request that the Board adjudicate the issue. Decisions by the Board would be reviewable under WCL § 23. Nothing in 314.8 is meant to affect or modify the legal requirements for agreements under WCL § 32.

This clearly delineated procedure contained in Part 314 will avoid delays and confusion in the alternative dispute resolution process. This portion of the rule is consistent with the Legislature's objectives as it removes a financial disincentive (the unavailability of Special Funds reimbursement, apportionment of liability, and/or the ability to make final settlement of claims) for eligible employers to participate in ADR programs. Without the rule, ADR employers could be denied access to financial relief that non-ADR employers routinely obtain. Such denial is not equitable or appropriate, especially with respect to Special Funds reimbursement, as all employers, including ADR participants, are statutorily required to pay the assessments that fund the Special Funds. Without this regulation change, employers who are ADR participants are paying assessments the same as all other employers, but unlike non-ADR participating employers, they cannot obtain reimbursements from the Special Funds. The changes in this rule eliminate this inequity.

#### 4. Costs:

No additional costs for the agency or its constituents are envisioned for the amendment to 314.2(d)(5). In fact, costs may be reduced as it is anticipated that the prompt filing of ADR-1s, concurrently with the present C-2 filing requirement, will reduce the need for post-report filing corrective action that is sometimes needed to remove an ADR case from traditional Workers' Compensation Board claim processes.

Additional costs for the addition of 314.8 will be minimal and should be limited to photocopying, mailing costs, and legal fees associated with applications for relief. The Board's costs will consist of those associated with reviewing and approving negotiated agreements and holding hearings in cases where parties are unable reach an agreement regarding an ADR employer's request for financial relief. As the ADR program is limited in scope and participants, costs are expected to be minor and will be outweighed by the benefits of receiving Special Funds reimbursement and/or apportionment with a non-ADR employer.

#### 5. Local Government Mandates:

There are no local governments who are participants in an ADR program. Therefore the change to 314.2 will have no effect on any local governments. The addition of 314.8 will affect local governments who may be responsible for a portion of a claim originally thought to be the sole responsibility of an ADR employer. Such local governments would be subject to the processes outlined in 314.8.

#### 6. Paperwork:

No additional paperwork will be required as a result of the amendment of 314.2(d)(5). In fact, a uniform rule will likely reduce paperwork needed to rectify potential improper initial processing of ADR cases.

Some additional paperwork will be required for 314.8 as the rule requires applications to the Board and other affected parties and requires applicants to either make a request to the Board for the approval of a negotiated settlement or make a request to the Board to adjudicate an issue. However, the filing of applications ensures access of ADR participants to benefits which may otherwise have been denied.

#### 7. Duplication:

There is no duplication as this is a unique program administered solely by the WCB.

#### 8. Alternatives:

There are no viable alternatives for 314.2(d)(5). A regulatory filing deadline of thirty (30) days presently exists. This proposal will reduce this deadline to ten (10) days for consistency with Workers' Compensation Law § 110(2). This will assist the Board to accurately and promptly process an ADR case.

There are no viable alternatives for the addition of 314.8. The issues addressed in 314.8 cannot be handled within the ADR process and are for the Board to resolve either through the approval of a negotiated settlement or by adjudication. This proposal ensures the Board can resolve these issues within its sole jurisdiction, but only at the request of the parties, so Board involvement in the ADR process is kept to a minimum.

Based upon comments received during the Public Comment period, a sentence has been added to clarify that the new procedures in Section 314.8(b) do not apply when all the parties involved are subject to the same ADR program. This is a non-substantial change.

#### 9. Federal Standards:

There are no federal standards applicable.

#### 10. Compliance Schedule:

Affected parties will be able to achieve compliance with the rule upon its adoption.

### **Revised Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

Approximately 500 businesses within 4 program groups participate in the ADR program. As a result of the amendment to 314.2 the small businesses within the ADR program will be required to file an ADR-1 within 10 days of an injury as opposed to within 30 days as was required by the previous rule. The change to 314.2 will not affect local governments because no local governments participate in the ADR program.

The new 314.8 requires small businesses (or their carriers or third party administrators) within the ADR program seeking relief involving a claim not subject to WCL § 25(2-c) to file an application with the Board and all affected parties. These issues will be resolved either by a negotiated settlement which must be approved by the Board or be resolved by the Board through its adjudication process. Non-ADR small businesses and local governments who may be responsible for a portion of a claim initially thought to be the sole responsibility of an ADR employer are also subject to the processes outlined in 314.8.

#### 2. Compliance Requirements:

The amendment to 314.2 requires that an ADR-1 be filed within 10 days of the injury instead of 30 days. The new requirement deals solely with the time period in which to file a report of injury and brings the ADR time period within which to report injuries into conformance with the time period to file a report of injury for a traditional compensation claim.

The new 314.8 requires small businesses within the ADR program to file an application for relief with the Board and all affected parties. The small businesses must also either request approval of a negotiated settlement or Board adjudication of the issue. It is anticipated that the Board will require the submission of a form or other paperwork seeking either approval of the settlement or adjudication of the issue.

### 3. Professional Services:

It is believed that no additional professional services will be needed to comply with the amendment to 314.2.

It is believed that no additional professional services will be needed to comply with the addition of 314.8. While small businesses and local governments may need legal services to prepare settlement agreements and adjudicate matters before the Board, it is expected that any legal expertise needed would be provided by attorneys who already handle compensation matters for the small businesses and local governments.

### 4. Compliance Costs:

The proposal to amend 314.2 will not impose any compliance costs on small businesses in the ADR program. They only requirement is that the small businesses file the required form earlier than previously required. The filing time period is the same as for regular compensation claims.

Compliance costs for the addition of 314.8 include mailing, photocopying and legal fees for small businesses and local governments are expected to be small and manageable. Annual costs and continuing costs will vary depending on how many applications for relief an ADR small business must file or how many non-ADR small businesses and local governments must address. However, a small outlay in expenditures for ADR small businesses has the potential to result in significant financial relief. Payments by non-ADR employers and local governments are no greater than their liability would normally be under the workers' compensation law.

### 5. Economic and Technological Feasibility:

The economic costs for the rule changes are negligible. There are no known technological costs and it is assumed that small businesses and local governments will be able to comply with the changes.

### 6. Minimizing Adverse Impact:

The amendment to 314.2 is designed to minimize impact to small businesses by having a time period in which to file reports of injury which is uniform. A uniform accident report filing date will generate consistency in accident report filing requirements and will assist the Board in accurately and promptly identifying ADR cases for segregation from customary WCB adjudication processes. Additionally, a uniform rule will reduce potential confusion amongst employers as to when accident reports need to be filed with the Board.

Adverse impact is limited on ADR small businesses because while there are some costs associated with the addition of 314.8, the rule change is necessary to ensure that ADR small businesses have access to financial relief non-ADR employers routinely obtain. Non-ADR small businesses and local governments subject to this rule are not any more adversely impacted than under the traditional workers' compensation system.

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

The Board is in regular contact with ADR program managers. Prior to proposing these rules, the Board met with some ADR programs and shared copies of the rules, inviting comments, questions, and concerns with the ADR program. The Board received no comments, and has been questioned by one ADR program as to when this rule will be in effect.

During the Public Comment period the Board received comments from on ADR program and two law firms that represent ADR programs. All of the comments received strongly support this rule making. Two of the comments requested clarifying language in subdivision b of Section 314.8, which the Board has done by making a non-substantial revision to the rule text. Specifically, the Board has added a sentence to clarify that the procedures in 314.8(b) do not apply when all of the parties are part of the same ADR program.

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

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

The changes in the rules apply to all ADR employers. ADR employers are currently located in the eastern part of the state from New York City to Albany. However, 314.8 applies to employers in all areas of the state who may potentially share in a portion of liability for claim with an ADR employer.

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

The amendment to 314.2 changes reporting requirements from 30 to 10 days for any ADR employer, no matter where it is located in the state. However all ADR employers are already required to file an ADR-1. The addition of 314.8 requires ADR employers to file applications with the Board and affected parties for the resolution of issues outside of WCL § 25(2-c). All employers wherever located in the state are potentially subject to 314.8 if an issue arises in a claim as to extent of liability between ADR and non-ADR employers. Additional professional legal services may be needed but should be easily absorbed by the attorneys who presently handle workers' compensation matters for the employers. For non-ADR employers the process is almost identical to existing Board procedure.

#### 3. Costs:

No imposition of additional costs is anticipated for the amendment of 314.2. The proposed regulation solely changes the time period in which to file a notice of injury in ADR cases so that it is the same as regular workers' compensation cases.

Additional costs for the addition of 314.8 will be minimal and should be limited to photocopying, mailing costs, and legal fees associated with applications for relief. The Board's costs will consist of those associated with reviewing and approving negotiated agreements and holding hearings in cases where parties are unable reach an agreement regarding an ADR employer's request for financial relief. As the ADR program is limited in scope and participants, costs are expected to be minor and will be outweighed by the benefits of receiving Special Funds reimbursement and/or apportionment with a non-ADR employer. There is no expectation that costs will vary in rural areas.

#### 4. Minimizing adverse impact:

The amendment of 314.2 is designed to minimize adverse impact by requiring a report of injury be filed within 10 days as is the requirement for all other claims under the workers' compensation law.

Adverse impact is limited on ADR employers because while there are some costs associated with the addition of 314.8, the rule change is necessary to ensure that ADR employers wherever located within the state have access to financial relief non-ADR employers routinely obtain. Non-ADR employers subject to this rule, wherever located, are not any more adversely impacted than under the traditional workers' compensation system.

#### 5. Rural area participation:

The Board is in regular contact with all ADR program managers. Prior to proposing these rules, the Board met with some ADR programs and shared copies of the rules, inviting comments, questions, and concerns with the ADR program. The Board received no comments and has been questioned by one ADR program as to when this rule will be in effect.

During the Public Comment period the Board received comments from on ADR program and two law firms that represent ADR programs. All of the comments received strongly support this rule making. Two of the comments requested clarifying language in subdivision b of Section 314.8, which the Board has done by making a non-substantial revision to the rule text. Specifically, the Board has added a sentence to clarify that the procedures in 314.8(b) do not apply when all of the parties are part of the same ADR program.

### **Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published Job Impact Statement.

### **Assessment of Public Comment**

#### Alternative Dispute Resolution

The Workers' Compensation Board received comments from a participant in the Alternative Dispute Resolution Program and from two law firms representing participants in the Alternative Dispute Resolution Program.

The 45-day public comment period with respect to Proposed Regulations 12 NYCRR 314.2(d)(5) and 12 NYCRR 314.8 commenced on November 16, 2005. The 45-day period of public comment for the proposed regulations expired on December 31, 2005. The Workers' Compensation Board received and accepted formal written public comments on proposed regulations 12 NYCRR 314.2(d)(5) and 12 NYCRR 314.8 until Tuesday January 3, 2006. No additional comments were received after this date.

All of the comments received were in favor of the proposed regulations. Two commentators suggested an alternative paragraph for 12 NYCRR 314.8(b) to clarify that the Board would only exercise jurisdiction in claims which involve parties who are not signatories to the collectively bargained ADR agreement.

Based upon public comments received, the final rule contains the non-substantial modification of a clarifying sentence at the end of new 12 NYCRR 314.8(b) as follows:

“This section does not apply to claims or issues which involve individuals who or entities that are all subject to the same Alternative Dispute Resolution program.”

This is a non-substantial modification because it is intended to clarify which claims the Board would exercise jurisdiction over.